IN THE
SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

THEODIS MONTGOMERY,

Defendant-Appellant.

CASE NO. 2020-0312

On appeal from the Stark County Court of Appeals, Fifth Appellate District Case No. 2019CA00012

MERIT BRIEF OF APPELLEE STATE OF OHIO

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INTRODUCTION

There is no question that in matters involving constitutional rights, the criminal defendant's constitutional right to a fair trial trumps the rights of an accuser. However, when a practice or protocol does not abridge the right to a fair trial , "justice though due to the accused, is due to the accuser also." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed. 2d 720, citing *Snyder v. Massachusetts,* 291 U.S. 97, 54 S.Ct. 330,78 L.Ed. 674(1934*) overruled on other grounds, Duncan v. Louisianna,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491(1968). The purpose of the victim's rights laws are to extend the protection of fundamental rights beyond those accused of committing the crime to those who are the victims of the crime. It is the role of the trial judge, within the bounds of the applicable laws, to maintain this balance.

A non-witness victim and/ or a victim's representative have always had the constitutional right to be present in a public courtroom. For example, a grieving parent can be present during all stages of a murder trial wherein their child is the murder victim. However, there have been few laws passed that protect a victim's right to be present.

Prior to Marsy's law, the victim, the only person, other than the defendant, with a legitimate interest in justice, was easily excluded from the criminal proceedings pursuant to an Evid.R.615(A) request for the separation of witnesses. Even if the victim was not a State's witness, the defense could issue a subpoena to the victim and/or the victim's representative and legally prevent their presence in the courtroom. The defense strategy was to keep the victims out of the view of the jury, to avoid the influence of emotion and distraction.

Since a victim is not considered a party, the only exception to Evid.R. (A) was if the victim fell within two of the excluded witnesses. For example a law enforcement officer who was also the victim of the offense could be permitted to be present and sit at counsel table pursuant to Evid.R. 615(B)(2) or a victim whose presence was deemed necessary for the presentation of the State's case pursuant to Evid.R. 615(B)(3). Even though these victims fell within these exceptions the defense still cried foul arguing that the mere presence of a victim denied the defendant's right

to a fair trial. Court's have both granted and denied exclusions based on this broad, unsubstantiated assertion.

In November of 2017, over 1.9 million voters, representing almost 83 percent of the votes cast, passed Article I, Section 10(a) a.k.a Marsy's Law. This constitutional amendment is substantially similar to the Federal Constitutional amendment for victim's rights, and gives Ohio victims and/or their representatives, the constitutional right to due process by allowing a victim to be present during all stages of the criminal proceedings. Marsy's Law, and its progenies have a common pursuit- justice and a fair proceeding, for both the victim and the defendant.

Article IV, Section 5(B) of the Ohio Constitution, gives this Court the authority to promulgate Rules of Procedure. In acknowledging that a victim's due process rights should not be secondary to the due process rights of the defendant, this Court amended Evid.R. 615(B) to include a fourth division thereby excluding the victim-witness from the separation of witnesses. This amendment gives victims the right to be present and hear the testimony of other witnesses provided the victim's presence does not infringe on the defendant's right to due process. This modification does not abridge any substantial right of the accused.

Montgomery, argued on direct appeal and before this Court that there is no state legal authority for a trial court to allow a victim to be present at counsel table during a criminal proceeding. In seeking jurisdiction before this Court Montgomery argued, for the first time, that the physical arrangement of permitting the alleged victim-witness to sit at counsel table, and the identification of the alleged victim-witness as the State's representative, implicitly vouches for the victim-witnesses credibility and is per se unconstitutional. The Amicus argues for the first time that this physical arrangement is structural error in the criminal proceedings. In either case they argee that the practice is so inherently prejudicial that no showing of actual prejudice is required.

These arguments were not presented, heard, or considered, by either the trial court or by the Fifth District Court of Appeals. Therefore, they have not been preserved for review before this

Court. Likewise, the jurisdiction to consider theses new arguments has been improvidently granted. [1]

If this Court hears these new arguments, and finds that the victim-witness's presence at counsel table is inherently prejudicial, without a showing of actual prejudice, then this Court would effectively abolish Evid.R.615(B). And, the presence of any witness at counsel table pursuant to the exclusions in Evid.R.615(B)(1)-(4), would amount to a per se violation of due process.

Assuming this Court does not find the practice to be inherently prejudicial, then Evid.R. 615(B)(4), gives the trial judge the authority to permit the victim-witness, who has been specifically excluded form the separation of witnesses, the right to be present, hear the testimony of other witnesses and sit at counsel table. Traditionally, in Ohio, witnesses who are either persons or entities that are excluded from separation pursuant to Evid.R. 615(B)(1) through (3) have been permitted, at the discretion of the trial judge, to sit at counsel table. It logically follows, that the trial court has the discretion to permit a victim-witness to sit at counsel table with the State.

Finally, Evid.R.615(B) does not advise the court how to introduce a non-party witness to the jury. The law leaves this decision to the sound discretion of the trial court. Jurors know that a victim is a State's witness with a personal interest, in the outcome of the proceedings. Jurors are advised that it is their role to judge the witness's veracity and motivation in bringing these allegations against the defendant. The victim's presence does not amount to an unmistakable mark of guilt on the defendant similar to appearing in shackles. Further, there is nothing to suggest that sitting at counsel table and being identified as the State's representative misleads a jury into believing that the State is vouching for their credibility any more than a victim- witness's appearance as a State's witness would implicitly vouch for their credibility. More importantly,

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[1] In *State v. Hooks*, 92 Ohio St.3d 83, 2001–Ohio–150, 748 N.E.2d 528(2001), this Court noted, "a reviewing court cannot add matter to the record before it that was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter. See, *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500(1978)."

when the victim-witness testifies and is subject to cross-examination, the jury has the opportunity to use their experience and common sense to view the victims demeanor and judge the witness's cedibility.

Furthermore, if the trial court abused its discretion in allowing the victim-witness to be present at counsel table and/or in identifying the victim-witness as the State's representative then the courts have held that it is the defendant's responsibility, to establish actual prejudice. Nothing in the record in this case, establishes that the victim was present during all stages of the proceedings, and the record does establish that Montgomery suffered actual prejudice. The record does not reflect any request by the defense to have the victim removed because of emotional outbursts or distracting behavior. Whether a trial court has abused its discretion is determined on a case by case basis and is not a constitutional issue or a matter of great public interest. The record does not support Montgomery's argument. The record does not demonstrate that the State vouched for the victim's credibility. Therefore jurisdiction to review this claim as it pertains to Montgomery's case has been improvidently granted.

Under this standard of review, the Fifth District Court of Appeals was correct in finding that the trial court had the discretion to allow the victim to be present at counsel table as the State's representative, and, finding that Montgomery's vague argument that the trial court's decision denied him a fair trial, was insufficient to show that Montgomery had suffered actual prejudice to warrant the reversal of his conviction for kidnapping and rape.

STATEMENT OF THE CASE AND FACTS

Defendant-appellant, Theodis Montgomery (hereinafter, " Montgomery") was indicted by the Stark County Grand Jury for one count of kidnapping with a sexual motivation specification and one count of rape. Both counts included a repeat violent offender specification.

The Preliminary Proceedings At Trial

Prior to the commencement of the trial, the State moved to permit the victim-witness to sit at counsel table throughout the proceedings. At the time of the request, the State did not know whether Montgomery would be testifying on his own behalf, but was aware, that Montgomery had subpoenaed A.B.'s closest family members to testify on his behalf. The State argued that Article I, Section 10(a) of the Ohio Constitution (a.k.a Marsy's law), R.C. 2930.09 and Evid.R. 615(B)(3) and (B)(4), gave the trial court the authority to allow the victim to be present and sit at counsel table during all stages of the criminal proceedings. The State further requested that the victim-witness be identified as the State's representative.

Counsel for Montgomery objected arguing that Ohio law does not permit a victim to sit at counsel table and made an unsubstantiated claim the victim's presence at counsel table would deny his client a fair trial. Finding no actual showing of prejudice by the defense, the trial court granted the State's request relying on Evid.R. 615(B)(3) and (B)(4). The trial court also opined that the decision was consistent with the recent movement to recognize a victim's due process rights.

During voir dire, the trial court introduced everyone seated in front of the bar to the jury. The trial court briefly introduced A.B. as the State's representative. T.I. 47. Prior to the State's voir dire, the prosecutor identified himself as a Stark County Assistant Prosecutor with no mention of the State's relationship with A.B. T.I. 200. Prior to opening statements, the trial court instructed the juror as follows:

> "As jurors, you have the sole and exclusive duty to decide the credibility of the witnesses who will testify in this case, which simply means that it is you who must decide whether to believe or disbelieve a particular witness, and how much weight, if any, to give to the testimony of each witness.
>
> "In determining these questions, you will apply the tests of truthfulness which apply in your daily lives. These tests include the appearance of each witness upon the stand; his or her manner of testifying; the reasonableness of the testimony; the

opportunity he or she had to see, hear and know the things concerning which he or she testified; his or her accuracy of memory; frankness or lack of it; intelligence, interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper."
T.I. 293-294.

During opening arguments, the State told the jurors:

"At the end of this trial, you all are going to have a hard decision. You're going to decide whether you believe this young woman [A.B.] who you will meet for a few hours tomorrow. Now there will be physical evidence which will corroborate her story. But this case won't be decided on the physical evidence, it will be decided by 12 of you who go back in that jury room and make what, for some of you, may be one of the hardest and most important decisions you've ever had to make. It will be an important decision for [A.B.], it will be an important decision for the defendant, and it will be an important decision for the community.
"At the end of this trial, if you believe what [A.B.] tells you happened to her on March 16, you will have sufficient evidence to find the defendant guilty of rape and kidnapping.

***

"She's [A.B.'s] going to take the stand and she's going to testify. She' going to open herself up to scrutiny and your judgment. Everything she did and everything she didn't do on March 16, 2019 will be scrutinized as we try to assist you in determining whether she's telling the truth. She will sit in that chair [the witness stand] while she's called a liar, while the sincerity of her pain and her humiliation and her fear are questioned. She will do this because she has accused the Defendant of raping and kidnapping her."

T.I.300-302.

The State's Case

The case proceeded to the presentation of evidence. The State argued that Montgomery had kidnapped and raped A.B. Montgomery argued that A.B. consented. Like most sexual assault cases, the only witnesses to the alleged offense, were the victim,(A.B.), and Montgomery.

A.B. was called as the State's first witness. A.B. testified that she met Montgomery when she was living with her father. T.II. 338, 344. The families blended when Montgomery's sister married A.B.'s father. T.II. 343, 354. At the time of the assault, A.B. was engaged to a prison inmate who was scheduled to be released in approximately two months.

A.B. testified that prior to the assault, in December of 2019, Montgomery had made numerous attempts to date A.B. A.B. told Montgomery that she was engaged and was only interested in being friends. Angry about being rebuffed, Montgomery created a fake Facebook page wherein he published that he was in a sexual relationship with A.B. and, accused A.B. of sleeping with numerous men. A.B. became enraged and confronted Montgomery. Therafter A.B. had no relationship with Montgomery.

On March 15, 2019, at around 11:00 p.m.. A.B.'s father called and asked her to bring him some marijuana. Her father and his family were leaving the next day for a three day vacation in Florida T.II. 355-356. A.B. arrived at her father's house around 11:30 p.m.. She and her father smoked marijuana. A.B. decided to stay at her father's house that night. T.II.359, 361. At around 4:00 a.m. her father told her they were getting ready to leave. T.II. 362. Montgomery, who was living in the basement of the residence, stayed behind. T.II. 364.

A.B. testified that she was startled awake when Montgomery barged into her room and yelled, "What the F are you here for, why are you here?" and punched her in the face. T.II. 365. A.B. testified that Montgomery then grabbed her hands and sat her on a couch. A.B. had a bloody nose and face, and asked to use the bathroom. Montgomery walked her to the bathroom and continued to keep watch over her through an open bathroom door. T.II. 366-369. A.B. testified that she wiped her bleeding nose with a tissue and threw it in the waste basket. Meanwhile,

Montgomery took A.B.'s cell phone and put it in his pocket so she couldn't make or receive calls. T.II. 367. A.B. testified she was scared to death and crying. T.II. 368. Montgomery then forced her to walk down into the basement where he lived, put a pack of zip ties on a nearby table and asked her to pick a punishment, apparently for refusing his advances. T.II. 368-376. Ultimately, as "punishment," Montgomery humiliated A.B. by making her clean a large, dirty, dog kennel. T.II. 377. Montgomery then said he was going to tie A.B. up because he didn't want her to leave. T.II. 378. A.B. testified that she told him she didn't want to be in the basement. T.II. 378. Montgomery then grabbed A.B. by the wrists, walked her upstairs, took her into the bathroom and sat her on the toilet seat, telling her he was going to take a shower. T.II. 378. Montgomery then ordered A.B. to get into the shower. T.II. 379. At first A.B. refused. To avoid any further physical abuse, she took off her soiled clothes and got into the shower. T.II. 380. Two seconds later, Montgomery got into the shower, stood behind her, and forced A.B. to engage in vaginal intercourse. T.II. 380. A.B. testified, "I knew what I had to do. I gave up on fighting". T.II. 381. Montgomery then carried A.B. into the room where she had been sleeping earlier, put her on the couch and forced A.B. to engage in vaginal intercourse a second time. T.II. 382, 474. A.B. testified she was crying and asking him to stop. Eventually, he stopped. T.II. 382.

A.B. testified that after Montgomery stopped assaulting her, he started acting nice. He gave her a towel and told her he was sorry. T.II. 384. Montgomery cooked some food and washed her dirty clothes, leaving her dressed in a towel. T.II. 385. A.B. refused any food and watched Montgomery eat. T.II. 387. Apparently concerned that A.B might report the assault, Montgomery told A.B. that he was going to make her stay. A.B. testified, that she told Montgomery that if he let her go, she wouldn't say anything. T.II. 387. Montgomery agreed to let her go, gave A.B. her cell phone, let her get her children's birthday gifts from the basement, and walked her to the car. T.II 388. A.B. testified that as they walked to her car, she acted like nothing was wrong. She did this so Montgomery wouldn't change his mind about letting her leave.

After driving away, A.B. called her sister. A.B. also called her fiancé at the prison. The recorded call between A.B. and her fiancé was played for the jury and established that A.B. was upset and crying during the call. A.B's sister encouraged her to call 911 and report the rapes. T.II. 397. The 911 dispatcher advised A.B. to go to the hospital. At Mercy Medical Center, A.B. was given a sexual assault examination by S.A.N.E. nurse, Loralie Budlingmaier, and was interviewed by Detective Mongold from the Canton Police Department.

Lorallie Budlingmaier, the S.A.N.E. nurse, testified that she performed A.B.'s physical exam. During the exam. Budlingermaier observed that A.B. had a red spot on her neck, pain in the right side of her face, a ruptured blood vessel in the white part of her eye, pain across her nose, a laceration on her lips and a painful tooth. T.II 530-531. Budlingmaier testified that the physical injuries were consistent with A.B.'s verbal history of the assault. T.II.532. The photos taken at the hospital reflected that A.B. had physical injuries to her nose and lips and a red mark on her neck. T.II. 402.

Detective Mongold spoke with A.B. and testified that A.B. had injuries to her face, and was upset and crying. T.II.583. A.B. advised Detective Mongold that she had thrown a bloody tissue into the bathroom waste basket. T.II. 588. Detective Mongold contacted A.B.'s father by cell phone and asked for consent to search the home. A.B.'s father reluctantly gave the detective consent to search portions of his house. During the consent search, Detective Mongold recovered a bloody tissue from the bathroom waste basket, which Mongold testified, was consistent with the victim's history of the assault. T.II. 589. Detective Mongold also collected an oral swab from Montgomery, and A.B.'s sexual assault kit, Both were sent to BCI for DNA analysis. T.II. 590, 612.

Samuel Troyer a forensic analyst at BCI performed the DNA testing. Troyer testified that the A.B.'s vaginal swabs tested positive for semen and that the DNA in the semen was consistent with Montgomery's DNA by 1 in one trillion. One trillion being larger than the population on earth. T.II.633.

The Defense Case

Montgomery did not testify on his own behalf. As trial strategy, Montgomery's case relied heavily on the cross-examination of A.B. and the the testimony of A.B.'s close family members. These witnesses included A.B.'s sister, A.B.'s father, A.B.'s grandmother, A.B.'s grandfather. These witnesses testified to A.B.'s relationship with Montgomery, A.B.'s reputation, and A.B.'s veracity.

Montgomery used A.B.'s cross-examination to present his defense. Mongomery argues by way of A.B.'s testimony that A.B. was making the false accusations of kidnapping and rape to seek revenge and protect her relationship with her fiancé. To refute A.B.'s claim that her relationship was platonic, on cross-examination, A.B. admitted that prior to March 16, 2019, she would send Montgomery emails, Facebook messages and text messages. T.II.407- 416. The defense, asked A.B to identify an exhibit which depicted that A.B. had a thread of 53 messages with Montgomery during a two day period in November of 2019, including texts that occurred during early morning hours. T.II.412. To support Montgomery's claim that A.B. was seeking revenge the defense asked A.B. to identify her Facebook posts, about the fake page, establishing that she was mad at Montgomery about the false Facebook posts, and angry that Montgomery threatened to tell her incarcerated fiancé that she and Montgomery were having sex together, and that she was entertaining other gentlemen. T.II.418, 421. The defense characterized as threatening and revengeful, A.B.'s admission that in December of 2109 she told Montgomery, to go ahead and post the information and then see what would happen to him next. T.II. 422 A.B. further admitted, on cross, that she was also angered when Montgomery intercepted a communication between herself and her fiancé and shared the information with her father. T.II.423. A.B. admitted that on the night of the incident she was driving back and forth without a license. T.II. 426. A.B. admitted that she told the investigating officers that during the incident she had to play "a role"- the defense insinuating that A.B. was good at playing roles. T.II. 475. A.B. admitted that she

believed she left Montgomery's house at around 6:00 p.m. and arrived at her sister's house around 6:30 alluding that she had time to collude with her fiancé and/or conjure up a lie. T.II.496.

A.B.'s sister, Nicole Johnson, testified that A.B. called her around 6 p.m. crying and sobbing and arrived at her house around 6:30 p.m. T.III.643-645 Johnson testified that initially A.B. refused to call the police and that she, Johnson, actually made the 911 call. T.III.649. Johnson further testified that she met their grandmother and grandfather at Montgomery's residence that evening and that everything seemed normal in the house. T.III.652. Johnson said that a couple days later she was at her father/Montgomery's home and they were trying to figure this out, as a family. T.III.658. She testified that after being confronted about the allegations, A.B. became angry and kicked over the grill. Johnson testified that A.B. acted this way, because no one in the family believed her. T.III.661.

A.B.'s father, Adrian Burt testified that on March 15, 2019, A.B. stayed for the night. T.III.670. He testified that when he left A.B. was sleeping on the couch. T.III.673. (A.B. testified that she had been sleeping on a blanket on the floor). Although there was an objection, Burt stated, twice, in front of the jury, that Montgomery and A.B. were "creeping around, messing around", "seeing each other here and there." T.III.676-677. Burt testified that he wasn't concerned about leaving his daughter alone in the house with Montgomery, because he knew they were messing around. T.III.681. Burt further testified, that Montgomery told him that he didn't do anything. T.III.687. Burt testified that in a second conversation with A.B. she told him, that "after Montgomery punched her, they had sex". T.III.693. He testified that he was upset because, initially, A.B. had only told him, that Montgomery pulled her covers off and punched her. T.III.694. Burt stated he saw A.B. a few days later, and A.B. was mad because nobody believed her. After that, Burt had little or no contact with A.B. T.III.705. On cross-examination, Burt admitted that he had and continued to have a close relationship with Montgomery after A.B. made told her family that she had been raped by Montgomery.

Deborah Burt, A.B.'s grandmother, testified that she spoke with A.B. around 6 p.m. on March 16, 2019. She testified that A.B. wasn't frantic, or yelling and screaming like she would have expected. Afer talking with A.B.'s sister, Deborah, and her husband, (A.B.'s grandfather, Paul Burt), agreed to meet Johnson at Montgomery's house. Deborah testified that she didn't see anything unusual at the home. T.III.750. She stated she saw a bloody tissue in the bathroom, but did not see blood anywhere else in the house. T.III.753. She testified that when the family met a few days later A.B. appeared to be nervous. And, when her husband questioned A.B. about why her lip didn't look busted. A.B. responded by getting mad, kicking over the grill, and leaving. T.III.755.

A.B.'s grandfather, Paul Burt testified that when he went over to the house he didn't see anything unusual. T.III.771. He testified that during the family meeting a few days later, he confronted A.B. and asked her why he couldn't see have any marks on her face. He stated A.B. got mad and knocked over the grill. T.III.782. Neither Paul Burt or Deborah Burt saw A.B. much after that incident.

Closing Arguments

During closing arguments, the State again reminded the jury that they had a difficult job, they had to decide what facts to believe and weigh the evidence presented.T.I.871. The prosecutor stated, "As I said, you all will have to decide whether you find her [A.B.'s] testimony credible, wether you find it believable, and –but if you do, as I will show you in a few moments, that testimony establishes each and every one of the elements we're required to establish." T.III.872-873. *** "Now, as I told you in the beginning, this case will come down to whether you believe the testimony of [A.B.], because her testimony establishes each and every one of those elements." T.III.881***So if you find her testimony to be credible, if you find her testimony to be believable, her testimony satisfies each and every one of the elements that the State of Ohio is required to prove. Now I told you that would be tough. I told you I was going to ask you to rely on the word of a stranger. It's not an easy thing to do. But I'm asking you to go back there, to look at the

physical evidence, to think about what you heard. T.III.882.***Ladies and gentlemen, I can't make the decision as to whether you find her credible, defense counsel can't make the decision, you have to make it for yourselves. T.III.884.

The defense characterized A.B. testimony as being uncorroborated falsehoods and lies. T.III.886. The defense characterized the relationship between A.B. and Montgomery as being more than platonic as evidenced by the 53 emails identified during A.B.'s cross-examination. T.III.887. The defense reminded the jury that during A.B.'s cross-examination they discovered that A.B. was angry at Montgomery for several reasons- the fake Facebook page, Montgomery's threats to tell A.B.'s fiancé that she was having a sexual relationships with him and other men, and the intercepted communication that Montgomery gave to A.B.'s father. T.III.888. The defense characterized A.B. as calculated and revengeful through her cross-examination testimony that she dared Montgomery to follow through with his plan and then he would see what would happen next. T.III.889. The defense used A.B.'s cross-examination to try and establish that her testimony about the position of her body when she was punched, was inconsistent with the physical evidence. T.III.891. The defense used her family members to refute the A.B.'s testimony that she had a bloody nose and her credibility because they saw nothing unusual at the house and A.B. was messing around with Montgomery. T.III.892. The defense characterized her comments to the jury as not being the comments of a "legitimate rape victim". T.III.899. The defense further argued that A.B. acknowledged she could play a role- and that when she left that day she was still playing a role T.III. 900. 905. The defense finally argued that English common law and American common law came to adopt that phrase, falsus in uno, falsus in omnibus. And it's a Latin phrase meaning false in one thing, false in everything. T.III.907. "Who among you would allow yourself to be placed as an employment reference for [A.B.]? '[T]o testify to an employer as to her honesty and credibility? And if you wouldn't do that in your own affairs, you can't do it for Theodis Montgomery in his affairs." T.III. 907-908.

The Verdict

After two days of trial, on Novermber 15, 2019, at 4:15 p.m. the jury began deliberations. They reached a verdict at 8:35 p.m. After deliberating, the jury reached a split decision finding Montgomery guilty of kidnapping and rape and acquitting Montgomery on the accompanying sexual motivation specification.

In accordance with law, the repeat violent offender specification (RVO) was tried to the court. The testimony established that Montgomery had prior convictions for kidnapping, domestic violence and the violation of a protection order in Stark County Court of Common Pleas No. 2010CR0295. After the presentation of evidence, the trial court found Montgomery guilty of the RVO Specification.

Montgomery was sentenced to serve 10 years on each count and zero years for the RVO specification. The trial court further ordered the counts to be served concurrently for an aggregate sentence of 10 years.

The Direct Appeal

Montgomery filed a timely appeal from his conviction and sentence in the Fifth District Court of Appeals. Pertinent to this appeal, in the first assignment of error Montgomery argued that Article I, Section 10 of the Ohio Constitution guarantees a defendant a right to a fair trial and that right had been violated when the trial court allowed the victim to be present in the courtroom throughout the proceedings and be designated as the State's representative. In support, Montgomery argued that "the plain language of Marsy's law does not state that alleged victim's are to be designated as State's representatives. Thus, [A.B.] was not permitted to sit at counsel table with the State of Ohio." Appellant's Merit Brief, Page 11, Fifth Appellate District, Stark County, Case No.2019CA00012, 2019-Ohio-5178. The Fifth District characterized Montgomery's claim as follows: "Appellant argues that his right to a fair trial was denied because the victim was permitted to be in the courtroom as the State's designated representative throughout the trial." *State v. Montgomery*, 5th Dist. Stark No. 2019CA00012, 2019-Ohio-5178, ¶ 17.

In affirming the conviction and sentence, the Fifth District held that the decision to allow a victim to remain in the courtroom during a trial is left to the discretion of the trial court. The defendant has the burden to show that the presence of the alleged victim would compromise the defendant's right to a fair trial. A vague assertion of prejudice by the defendant, (as in this case) that the victim's presence was prejudicial, is insufficient to require the reversal of a conviction. *State v. Montgomery*, 5th Dist. No. 2019CA00012, 2019-Ohio-5178, ¶¶ 21-22.

APPELLEE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW

I. *THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY PERMITTING THE VICTIM-WITNESS TO BE PRESENT AT COUNSEL TABLE DURING ALL STAGES OF THE PROCEEDINGS AND BEING IDENTIFIED AS THE STATE'S REPRESENTATIVE.*

A. The defendant's constitutional right to a fair trial

"The right to a fair trial is a fundamental liberty." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976). It is inferred from the Sixth Amendment to the United States Constitution which provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This amendment is binding upon the States through the due process clause of the Fourteenth Amendment. See *Duncan v. Louisiana*, 391 U.S. 145, 158-59, 88 S.Ct. 1444, 1452-53, 20 L.Ed.2d 491 (1968).

B. The victim's constitutional right to be present

The Ohio Constitution, Article I, Section 10(a), a.k.a. Marsy's Law, as amended in 1994 and more recently in 2018 explicitly provides victims of crimes with the right to justice and due process in criminal proceedings The relevant sections effective February 5, 2018, read as follows:

> (A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:
>
> (1) to be treated with fairness and respect for the victim's safety, dignity and privacy;
>
> (2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings;
>
> (3) to be heard in any public proceeding involving release, plea, sentencing, and disposition;***
>
> (9) upon request, to confer with the attorney for the government;***.

As part of the legislation designed to carry out the mandate, the General Assembly enacted R.C. 2930.09, which provides:

> A victim in a case may be present whenever the defendant or alleged juvenile offender in the case is present during any stage of the case against the defendant or alleged juvenile offender that is conducted on the record, other than a grand jury proceeding, unless the court determines that exclusion of the victim is necessary to protect the defendant's or alleged juvenile offender's right to a fair trial or to a fair delinquency proceeding. At any stage of the case at which the victim is present, the court, at the victim's request, shall permit the victim to be accompanied by an individual to provide support to the victim unless the court determines that exclusion of the individual is necessary to protect the defendant's or alleged juvenile offender's right to a fair trial or to a fair delinquency proceeding.

Pursuant to these laws, the victim, like the defendant has the right to be present during all stages of the criminal proceedings, unless the trial court determines that the exclusion of the victim is necessary to protect the defendant's right to a fair trial.

C. The trial judge has the discretion to permit a victim-witness to be present and sit at counsel table during all stages of the criminal trial and to identify the victim as the State's representative.

Nothing in the U.S. Constitution, Ohio laws or the Ohio Constitution prohibit a victim from being present during a criminal proceeding. The First Amendment of the United States Constitution guarantees the public the right to access to court proceedings. The public can not be excluded unless it can be demonstrated that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984).

Ohio Rules of Evidence, Evid.R. 615(A), functions to limit public access, for potential witnesses, in a manner, that is tailored to ensure a fair trial. The purpose of the sequestration rule is to preventing witnesses from shaping their testimony to match that of another, and to discourage fabrication and collusion. *Geders v. United States*, 425 U.S. 80, 87, 96 S.Ct. 1330, 1334-35, 47 L.Ed.2d 592 (1976) "The sequestration process involves three parts: preventing prospective witnesses from consulting with each other; preventing witnesses from hearing other witnesses testify; and preventing prospective witnesses from consulting witnesses who have already testified." *Bradshaw v. Perdue*, 319 F.Supp. 3d 286 (2018), citing, *United States v. Sepulveda*, 15 F.3d 1161 (1st Cir.1993).

This rule was never meant to exclude victim-witnesses from public proceedings. In fact, as citizens, victim's have a constitutional right to be present and a legitimate interest in the outcome. Even so, separation has been used as a tool to prevent victims and/or victim's representatives from being present at criminal proceedings. For example, it is not uncommon for the defense to subpoena victims and/or victim's representatives to prevent them from being present in the courtroom during the trial.

Ohio case law has evolved to prevent these practices, by allowing the trial court to permit the victim to be present, and, by requiring the defense to establish that the victim's presence compromises the defendant's right to a fair trial. *State v. Ricco*, 11th Dist. Lake No. 2008-L-169, 2009-oHIO-5894. Additionally, the lower courts have held that vague arguments of possible prejudice are insufficient to prevent a victim from attending court proceedings, reasoning that this practice would render a victims's rights meaningless. *State v. Maley*, 1st Dist Hamilton No. C-120599, 2013-Ohio-3452, (Holding that for a defendant to show that a victim's presence would result in an unfair trial, she must present particularized evidence that the victim's testimony will be so affected by the victim's presence during the testimony of other witnesses that her right to a fair trial would be violated. General assertions that it is possible are insufficient) ; See also, *State v. Klusty*, 5th Dist. Delaware No. 15 CAA 070040, 2015-Ohio-2843, *dismissing Habeas Corpus*, *Klusty v. Warden, London Correctional Institution*, 2019 WL 2233357, *affirmed Klust v. Noble,* 2019 WL 1980972 (S.D.Ohio, May 3, 2019) (Holding that the Appellant failed to demonstrate that the victim's testimony was influenced or affected by her presence in the courtroom during trial. We find the trial court did not abuse its discretion in allowing the victim to remain in the courtroom as authorized by statute and Ohio rules of court throughout trial.); *State v. Pickett*, 4th Dist. Athens No. 15 CA 13, 2016-Ohio-4593 (holding that The defendant bears the burden of establishing that the victim's presence compromises the defendant's right to a fair trial.) *State v. Ricco*, 11th Dist. Lake No.2008–L–169, 2009–Ohio–5894, ¶ 27. ("[F]or a defendant to show that a victim's presence would result in an unfair trial, she must present particularized evidence that the victim's testimony will be so affected by the victim's presence during the testimony of other witnesses that her right to a fair trial would be violated. General assertions that it is possible are insufficient." *citing* State v. Maley, 1st Dist. Hamilton No. C–120599, 2013–Ohio–3452, ¶ 7.)

Evid.R.615 (B)(4) further protects victim's rights. Evid.R. 615(B) allows the court to exclude four distinct categories of witnesses from a party's request for separation and provides as follows:

(B) This rule does not authorize exclusion of any of the following persons from the hearing:

(1) a party who is a natural person;

(2) an officer or employee of a party that is not a natural person designated as its representative by its attorney;

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause;

(4) in a criminal proceeding, an alleged victim of the charged offense to the extent that the alleged victim's presence is authorized by statute enacted by the General Assembly or by the Ohio Constitution. As used in this rule, "victim" has the same meaning as in the provision of the Ohio Constitution providing rights for victim's of crimes.

The Appellant argues and the State concedes that the victim-witness, who is a natural person, can not be excluded from separation pursuant to Evid.R. 615(B)(2). However, Evid.R.615(B)(3) permits the trial court may grant exclusion if the victim-witness is necessary for the presentation of the State's case, and Evid.R.615(B)(4) permits the victim-witness is be excluded without any special showing of necessity.

While there is no specific Ohio law permitting the victim-witness to sit at counsel table[2] there is likewise no specific law preventing it. Notably, there is no Ohio or Constitutional law that specifically permits the defendant to sit at counsel table.[3] However, in this case, the trial courts decision to permit the victim-witness to sit at counsel table is historically, within traditional courtroom protocol and practices for all Evid.R. 615(B) witnesses.

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[2] Only Alabama law specifically gives the victims the right to sit at counsel table. Ala. Code Section 15-14-53(2000). Conversely only Louisiana court rule specifically prohibits the victim from sitting at counsel table La. Code Evid. Ann. Art.615 (West 2000)

[3] An accused has a fundamental right to be present at all stages of his criminal trial. Section 10, Article I, Ohio Constitution; Crim.R. 43(A). An accused's absence, however, does not necessarily result in prejudicial or constitutional error. "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts*, 291 U.S. 97, 107–108, 54 S.Ct. 330, 78 L.Ed. 674 (1934), overruled on other grounds, *Duncan v. Louisiana*, 391 U.S. 145, 154, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and *Malloy v. Hogan*, 378 U.S. 1, 2, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), fn. 1. See *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 50.

Take for example, the following scenarios. Evid.R.615(B)(2) allows the court to permit a non-party investigator to sit at counsel table even though no rule of law specifically permits this practice, so to, pursuant to Evid.R.615(B)(3), a caseworker case can be present, at counsel table, to assist the State, in the presentation of a child rape case. See *State v. Collins*, 4th Dist. Lawrence No. 1763 (5/28/1986). Likewise, pursuant to Evid.R.615(B)(1) the defendant is a party to the action, and, as a practical matter, is permitted, to sit at counsel table so that he or she can confer with counsel and participate in their own defense- the presence of the defendant is presumed to be essential to the presentation of the case.

It logically follows, that the intent of the Supreme Court, in promulgating Evid.R. 615(B)(4), is to allow the trial court to permit the victim to sit at counsel table without any further showing of necessity. Pursuant to Marsy's law, the victim, like the defendant, has the right to confer with counsel. And, like the defendant, the victim is presumably in the best position to assist the prosecutor with the case and to evaluate the veracity of the defense witnesses. Like the defendant, the victim, has a legitimate interest in receiving due process. According to Marsy's law the victim's right to due process must be preserved in a manner "no less vigorous than the rights afforded to the accused."

The federal courts have addressed the issue based on federal law, allowing the victim-witness to sit at counsel table and have made similar findings. The Federal Rule of Evidence, Rule 615, is substantially similar to the Ohio Rule and provides that at a party's request, the court must order a separation of witnesses . Like Ohio, the Federal rule does not authorize the exclusion of: (1) a party who is a natural person; (2) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; (3) a person whose presence a party shows to be essential to presenting the party's claim or defense; (4) a person authorized by statute to be present. The Justice for All Act of 2004/Crime Victim's Act, 18 U.S.C., Section 3771, authorizes the victim to be present at all stages of the proceedings.

In *United States. v. Valencia-Riasco*, 696 F.3d 938 (9th Cir. 2018), the defendant was charged with assaulting a federal officer by physical contact. The ICE agent was both the victim and the State's only witness to the actual physical contact. The other four witnesses only observed the events. The defendant argued that because the ICE Agent was the victim he should not be permitted to sit at counsel table because his presence would be prejudicial. The trial court overruled the objection, the defendant was convicted and appealed arguing inter alia that the trial court erred in allowing the ICE agent to sit at counsel table.

On appeal the Ninth Circuit held that the Justice for All Act provided an alternative ground for refusing to exclude the ICE Agent because he was not only the investigating officer but also the victim of the crime and was, by law, permitted to sit at counsel table. See also, *U.S. v. Charles*, 456 F.3d 249 (1st Cir.2006) *cert denied* 549 U.S. 1214, 127 S.Ct. 1260, 167 L.Ed. 2d 89 (2007), (holding that officer was also a victim was not required to be sequestered and the officer's presence at counsel table did not violate defendant's due process rights).

In Ohio, R.C. 2945.03 gives trial court judges the authority to control their proceedings. Evid.R. 615(B)(4) gives the trial court the authority to exclude a victim-witness from the separation of witnesses unless there is an actual showing of prejudice. Traditionally, the common practice in Ohio courts, is to permit the witnesses identified in Evid.R. 615(B) to sit at counsel table. Therefore, a trial court does not err, as a matter of law, in permitting the victim-witness to sit at counsel table.

D. Appellant has failed to establish prejudice.

1. The victim-witness's presence at counsel table did not violate the spirit of Evid.R. 615.

For the purposes of Evid.R.615 there is no difference between being present in the courtroom and sitting at counsel table. It is well settled that permission to sit at counsel table pursuant to Evid.R. 615(B) does not constitute error unless obvious advantage accrues to the prosecution contrary to the spirit involved in the separation of witnesses. *State v. Browning*, 5th Dist. Muskingum No. CA-77-18, (12/28/1977). Here there was no advantage to the State. The

victim-witness testified as the State's first witness and did not have the opportunity to tailor her testimony to match other witnesses. In addition, even if the victim-witness had not been permitted to sit at counsel table she would have still been permitted to sit in the courtroom and would have been able to observe and hear the trial proceedings and the testimony of the other witnesses.

2. The Court was correct in finding that the victim-witness's presence was necessary to the presentation of the State's case.

Evid.R.615(B)(3) excludes a victim-witness from the separation of witnesses and permits the witness to sit at counsel table if their presence is necessary for the presentation of the State's case. At the beginning of the case the State could not predict whether the defendant would testify, but knew that the defendant had subpoenaed four of A.B.'s closest family members to appear on behalf of the defense. A.B.'s sister, her father, her grandmother and her grandfather.

In this case especially, the victim was the only one involved in the case, other than the defendant, who knew more about the crime, Montgomery, her family and her family's relationship with Montgomery. For example, A.B.'s input was likely helpful on cross-examination of her father to show that he had and continued to maintain a close relationship with Montgomery even after he was aware of his daughter's allegations. The victim was therefore necessary to help the prosecutor, in ways that can't be anticipated, to craft appropriate direct and cross-examination questions for each of the potential defense witnesses. A.B. was in the best position to alert the prosecutor about bias or misrepresentation in the testimony of these witnesses. Her input was therefore important to presenting the truth to the jury.

3. The credibility of the victim-witness was not bolstered by the State

It is improper for the prosecution to vouch for the credibility of a government witness. Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. *United States v. Lawn*, 355 U.S. 339, 359-60 n. 15, 78 S.Ct. 311, 323, 2 L.Ed.2d 321 (1958); *United States v. Lamerson*, 457 F.2d 371 (5th Cir. 1972).

The first type of vouching involves personal assurances of a witness's veracity. The second type of vouching involves prosecutorial remarks that bolster a witness's credibility by reference to matters outside the record. See *United States v. Garza*, 608 F.2d 659, 664 (5th Cir. 1979). It may occur more subtly than personal vouching, and is also more susceptible to abuse. Such prosecutorial remarks may be fatal if, " the remarks, fairly construed, were based on the District Attorney's personal knowledge apart from the evidence in the case and that the jury might have so understood them."*Orebo v. United States*, 293 F.2d 747, 749 (9th Cir. 1961).

In this case, the State never made any remarks that bolstered the victim's credibility. During voir dire, the trial court introduced everyone in the room to the jury. The trial court introduced the prosecutor as being the representative of the State of Ohio and identified A.B. briefly as the State's representative. T.I. 47. Prior to the State's voir dire, the prosecutor identified himself as working for the Stark County Prosecutor, no mention was made of the State's relationship to A.B. T.I. 200. After voir dire, the trial court, during its instructions, advised the jurors that it was their responsibility to judge the credibility of the witnesses. Prior to opening statements, the State told the jury that they had the sole responsibility of judging the credibility of the victim-witness in reaching their verdict. During closing arguments, the State again reminded the jury that they had a difficult job, they had to decide whether to believe the victim, and weigh the evidence presented, to reach a verdict. The court and the State's comments dispelled any possibility of implicit vouching. *United States v. Valencia-Riasco*, 696 F.3d 938 (9th Cir.2018), (holding the presence of law enforcement officer, who was the prosecution's main witness and the alleged victim, at the prosecution's table did not violate defendant's due process rights in prosecution for assault on a federal officer by physical contact, despite defendant's arguments that the officer's presence at the prosecution table lent him an "aura" of credibility, and that the officer might have been able to change his testimony because he could listen to defendant's opening statement and the testimony of other prosecution witnesses; prosecution did nothing more than allow the officer to sit at the table, as the prosecution offered no explicit or implicit commentary on any testimony, and the

prosecution's questioning during voir dire effectively dispelled any possibility of implicit vouching. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 111; Fed.Rules Evid.Rule 615, 28 U.S.C.A.)

Like , *Valencia-Riasco*, under the circumstances in this case, the trial court did nothing more than allow A.B. to sit at counsel table. The prosecutor offered no explicit or implicit commentary on any testimony. And, the State's comments during voir dire, opening and closing statements and the trial court's instructions dispelled any possibility of implicit vouching.

4. A.B.'s credibility was important to both the State and the Montgomery.

Both the State and the defense relied on the victim's credibility. The State for a conviction and the defense for an acquittal. Montgomery did not testify. Rather, Montgomery's trial strategy was to use A.B.'s testimony on cross-examination to bolster his claim that A.B. made up the story to get revenge or to protect her relationship with her fiancé. On cross-examination A.B. testified about her frequent contact with Montgomery; gathering up gifts for her children and walking to her car as if nothing had happened at the house; her anger toward Montgomery and her warning to Montgomery about what would happen if he told her fiancé they engaged in sex; her admission that Montgomery stopped assaulting her when she asked him to stop; and her description of Montgomery as acting nice after the assault. Since Montgomery did not testify, it was necessary for the jury to believe A.B.'s testimony on cross-examination to support Montgomery's defense.

The jury had the opportunity to hear A.B.'s testimony, observe her demeanor, and use their reason and common sense to judge her credibility. They heard Montgomery's defense through her voice and her voice only. They were advised that they could believe or disbelieve any or all of her testimony. Based on the evidence presented, the jury could also reasonably conclude that A.B. was truthful about being kidnapped and raped by Montgomery. The physical evidence of the injuries to her face and neck, and the bloody tissue collected from Montgomery's bathroom trash can, further substantiated her claim that the intercourse was not consensual.

5. Nothing on the record suggests that the victim-witness's presence was prejudicial

Finally, the Amicus falsely argues that a the record of proceedings can not be used to establish prejudice by the presence of the victim-witness at counsel table. As an example the Amicus argues that continued conversations between the State and the victim-witness may be viewed by the jury but are not reflected in the record of proceedings.

This is hardly the case, a record can reflect courtroom procedures and protocols. The defense can make an objection or proffer the nature of unusual disruptive or distracting behavior in the courtroom. On appeal, pursuant to Rules App.Proc., Rule 9, the defendant can seek to preserve any unrecorded issues.

In this case, the record does not reflect that the presence of the victim-witness at counsel table was prejudicial to the defense. There is no evidence that the victim behaved improperly in front of the jury. The record does not reflect that the victim and the State constantly colluded as the Amicus suggest in its brief. There is no objection or proffer by the defense of improper or prejudicial behavior at State's counsel table . There is nothing to suggest that the victim was overly emotional or disruptive in any manner during the trial. Finally, there is no record of the defense moving the court to remove the victim from the proceedings for being disruptive and engaging in otherwise prejudicial behavior.

II. THE DEFENDANT'S RIGHT TO A FAIR TRIAL WAS NOT VIOLATED BY A VICTIM'S PRESENCE AT COUNSEL TABLE DURING ALL STAGES OF THE CRIMINAL TRIAL.

Because Montgomery can not establish actual prejudice, he is forced to argue that permitting a victim-witness to be present at counsel table is inherently prejudicial. Montgomery argues that this practice implicitly bolsters the credibility of the witness. The Amicus argues that permitting the victim to be present at counsel table is structural error. In either case, they both argue that in this instance no showing, of actual prejudice is necessary. However, merely permitting the victim-witness to be present at counsel table does not amount to the State giving the

jury a personal assurance that the witness is credible and does not brand the defendant with an unmistakable mark of guilt.

A. Vouching in a criminal proceeding .

Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. *United States v. Lawn*, 355 U.S. 339, 359 n. 15, 78 S.Ct. 311, 323 n. 15, 2 L.Ed.2d 321 (1958). See also *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir.1993). A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. *United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038, 1048, 84 L.Ed.2d 1 (1985); *United States v. Molina-Guevara*, 96 F.3d 698, 704 (3d Cir.1996).

The impact of improper vouching requires a harmless error analysis.

B. Structural error in a criminal proceeding.

In *Weaver v. Massachusetts,* __ U.S. __, 137 S.Ct.1899, 198 L.Ed.2d 420 (2017), the Court considered a structural error claim in the context of the right to a public trial. The Supreme Court adopted at least three broad rationales for identifying errors as structural. “One is when the right at issue does not protect the defendant from erroneous conviction but instead protects some other interest—like the defendant's right to conduct his own defense—where harm is irrelevant to the basis underlying the right. See *United States v. Gonzalez–Lopez*, 548 U.S. 140, 149, n. 4, 126 S.Ct. 2557, 165 L.Ed.2d 409. Another is when the error's effects are simply too hard to measure—e.g., when a defendant is denied the right to select his or her own attorney—making it almost impossible for the government to show that the error was “harmless beyond a reasonable doubt,”

Chapman, supra, at 24, 87 S.Ct. 824. Finally, some errors always result in fundamental unfairness, e.g., when an indigent defendant is denied an attorney, see *Gideon v. Wainwright*, 372 U.S. 335, 343–345, 83 S.Ct. 792, 9 L.Ed.2d 799.

The United States Supreme Court has found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) *(*defective reasonable-doubt instruction)) See also,.*Deck v. Missouri*, 544 U.S. at 624, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005)(the due process guarantees embodied in the Fifth and Fourteenth Amendments to the United States Constitution forbid the use of visible shackles during trial unless their use is justified by an essential state interest, such as where there is danger of violence or escape).

Structural errors are constitutional defects that " 'defy analysis by "harmless error" standards' because they 'affect[ ] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.' "*Arizona v. Fulminante*, 499 U.S. 279, 309 and 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Such errors permeate "[t]he entire conduct of the trial from beginning to end" so that the trial cannot " 'reliably serve its function as a vehicle for determination of guilt or innocence.' " *Arizona v. Fulminante*, 499 U.S. at 309 and 310, 111 S.Ct. 1246, 113 L.Ed.2d 302, quoting, *Rose v. Clark* , 478 U.S. 570, 577–578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).[4]

[4] See also *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 79, noting that the presence of restraints tends to erode the presumption of innocence that the justice system attaches to every defendant.

C. The presence of the victim-witness at counsel table does not implicitly vouch for the witness's credibility or amount to structural error.

The claims that a victim-witness's presence at counsel table implicitly vouches for the witness's credibility and the idea that this practice amounts to structural error have been considered and rejected, most notably in cases wherein the government representative is also the victim. In *United States v. Charles,*456 F.3d 249 (1st Cir. 2006) *cert denied* 549 U.S. 1214, 127 S.Ct. 1260, 167 L.Ed. 2d 89 (2007) he First Circuit of the Federal Appeals Courts addressed this issue. In *Charles,* the appellant argued that the district court failed to recognize the "prejudice inherent when a victim sits at counsel table" claiming that the victim's presence at counsel table improperly bolstered the victim's credibility. Appellant argued that this practice is so inherently prejudicial that the defendant need not demonstrate actual prejudice in order to make a due process violation. The defendant's argument relied in large part on *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed 2d 953 (2005). In *Deck* the Supreme Court held that the due process guarantees embodied in the Fifth and Fourteenth Amendments to the United States Constitution forbid the use of visible shackles during trial unless their use is justified by an essential state interest, such as where there is danger of violence or escape. *Deck v. Missouri*, 544 U.S. at 624, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005).The First Circuit rejected the defendants argument stating, " neither the Supreme Court nor inferior appellate tribunals, to our knowledge, have held that the presence of a victim at counsel table is inherently prejudicial in the same way found by the Supreme Court in *Deck* nor can we see any prejudice of that magnitude. The Court further held that the defendant failed to provide any convincing reasons to establish that he suffered any prejudice by the victim sitting at counsel table. Therefore absent a specific showing of prejudice there was no abuse of discretion in allowing the victim to sit at counsel table nor did it amount to a due process violation. *United States v. Charles*, 456 F.3d 249, 260 (1st Cir.2006); See, *United States v. Adams*, 8882 F.2d 1218 (7th Cir. 1989) (holding that allowing a DEA Agent, a witness for the State, to sit at counsel table did not amount to a "tacit endorsement" of the Agent by the State or a violation of due process); See also*, United States v. Valencia-Riascos*, 696 F.3d 938 (9th Cir. 2012)(holding "no

general constitutional principle ... render[s] it impermissible for a case agent who was also the victim in the case" to sit at the prosecution's table so as to "prevent the district court from exercising its discretion in favor of allowing the case agent to sit there." Citing *United States v. Charles*, 456 F.3d 249, 260 (1st Cir.2006)).These cases required the jury to make a determination of credibility between two witnesses.

Nothing about the circumstances in this case, distinguish it from the cases where these claims have been rejected. The victim-witness's presence at counsel table did not amount to structural error. Furthermore, the witness's presence at counsel table did not amount to implicit vouching. Montgomery's right to a fair trial was not violated by the victim's presence at counsel table.

D. Any constitutional error in this case requires a harmless error analysis.

If this Court determines that allowing the victim-witness to sit at counsel table implicitly vouches for the witness's credibility and denies the defendant's right to a fair trial, then the harmless-error analysis applies.

The United States Supreme Court as recognized that "most constitutional errors can be harmless."*Arizona v. Fulminante*, 499 U.S. at 306, 111 S.Ct. 1246. For example "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *State v. Hill,* 92 Ohio St.3d 191, 197, 749 N.E.2d 274 (2001), quoting, *Rose v Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). Thus, harmless error is appropriate where there is "overwhelming evidence or guilt" or "some other indicia that the error did not contribute to the conviction." *State v. Ferguson*, 5 Ohio St.3d 160, 166, 450 N.E.2d 265 (1983). If a court determines that the error did not affect the defendant's substantial rights, then the error is harmless and " 'shall be discarded.' " *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 7, quoting Crim.R. 52(A).

In this case, if there was error, the error was harmless. This was not a he said/she said case. The victim was the only person that testified to what happened. She took the stand and testified to being held against her will by Montgomery and being forced to engage in sexual intercourse two times. The victim's history of the events was consistent with the testimony of her sister, Nichole Johnson, the S.A.N.E. nurse and Detective Mongold. The physical injuries that were observed and photographed support her claim that the intercourse was not consensual. The bloody tissue in the waste basket observed by her grandmother and recovered by the detective support her history of being punched in the nose and bleeding. The jury took more than four hours to deliberate and reached a split decision finding Montgomery guilty of rape and kidnapping but not guilty of the sexual motive specification. A jury, whose ability to independently judge credibility simply by the presence of the victim-witness at counsel table would have simply concluded that the defendant was guilty as charged. For these reasons any error in the proceedings was harmless and the decision of the Fifth District Court of Appeals should be affirmed.

CONCLUSION

Montgomery argues that the laws in the State of Ohio do not specifically give the trial court the authority to allow a victim-witness to be present at counsel table therefore the trial court never has the discretion to permit this practice. Montgomery argues that allowing the victim-witness to sit at counsel table is so inherently prejudicial, that the showing of actual prejudice is not necessary. Their premise appears to be that if it can't be dis-proven then it must be proven. It's like boxing with a shadow. These types of nebulous arguments are the reason why victim advocates have fought long and hard to un do the progressive alienation of the victim from the courtroom.

A criminal defendant has the right to due process- a fair trial and an impartial jury. Any practice that unmistakably puts the mark of guilt on the defendant should be severely scrutinized. Victim's rights laws provide due process for a victim. Likewise any practice that limits access, or fair participation in the process and does not require some substantial showing of prejudice should

also be severely scrutinized. In balancing these interests, the State is seeking truth. The victim and the defendant are seeking justice. And the court is providing a fair process.

Jurors are presumed to follow a trial court's instructions. Jurors understand and presume that the State will, during the presentation of the case, present the testimony of a victim whose testimony will be subject to scrutiny through cross-examination. Generally, the trial court advises jurors that it is their job to judge the credibility of witnesses for both the prosecution and the defense. In any case, the jurors' role is as important to the State, as it is to the defense. We don't presume that in civil trials, where there are two parties to the case, that by sitting at counsel table the jurors will find one, or the other more credible. Why should we jump to such a conclusion when a victim, usually the only other party to the crime, with a legitimate interest in the outcome, would be anymore likely to be believed by a jury simply because of the courtroom arrangement.

It is not surprising that the defense would argue for the victim-witness's exclusion from counsel table. The victim's presence in any capacity is historically alarming to the defense. When the victim is present, the Juror's don't just hear a story. The story has a face and a family and in some cases a life altering experience. This is not lost on a jury. Nor is putting a face to the victim so inherently prejudicial that jurors automatically disregard the same face and family of an innocent defendant. The humanity of a victim, does not, without more, act like shackles on a defendant during a criminal trial.

The laws of the State of Ohio do by language and practice, provide the trial court with the discretion to allow a victim-witness to be present at counsel table. If the trial court abused its discretion, then the defendant must establish actual prejudice. In this case, Montgomery can not establish that the protocol amounted to actual prejudice and/or contributed to his conviction. His actions on March 16, 2019, caused his conviction.

The Court has discretion to determine which criminal cases to review with few exceptions. After reviewing the entire record here, this Court should find that Montgomery failed to properly represent the record below. There was no argument below that allowing the victim-witness to sit at

counsel table implicitly vouches for the witness's credibility. There was no argument below that allowing the victim-witness to sit at counsel table amounted to structural error. The constitutional arguments presented before this Court, were not raised before the lower courts and therefore jurisdiction has been improvidently granted.

For these reasons the State moves this Court to find that the jurisdiction to review the Appellant and Amicus's constitutional claims were improvidently granted. The constitutional claims were not made below and the record does not support the arguments.

The State moves this Court to hold that the trial court has the discretion to allow a victim-witness to be present at counsel table unless the defendant can show actual prejudice. And, that Montgomery's right to a fair trial was not violated by the presence of the victim-witnes at counsel table. Thereby affirming the decision of the Fifth District Court of Appeals.

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PROOF OF SERVICE

A copy of the foregoing MERIT BRIEF was sent by ordinary U.S. mail, postage prepaid, , to ADDISON M. SPRIGGS, counsel for defendant-appellant, at The Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, and to RUSSEL S. BENSING, the attorney for the Amicus Curiae, The Ohio Association of Criminal Defense Lawyer, at 1360 East Ninth Street, Suite 600, Cleveland, Ohio 44114, this 1st day of September, 2020.

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