[Cite as *State v. Messenger*, 2022-Ohio-3120.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOSEPH S. MESSENGER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 CO 0017

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2020 CR 354

BEFORE:
David A. D'Apolito, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Reversed, Vacated and Remanded.

Atty. Vito Abruzzino, Columbiana County Prosecutor and *Atty. Tammie M. Jones*, Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. Mary Catherine Corrigan, Friedman Gilbert Gerhardstein, 50 Public Square, Suite 1900, Cleveland, Ohio 44113, and *Atty. Allison F. Hibbard,* The Brownhoist Building, 4403 St. Clair Avenue, Cleveland, Ohio 44103, for Defendant-Appellant.

Dated: August 18, 2022

D'APOLITO, J.

{¶1} Appellant, Joseph S. Messenger, appeals his convictions for one count of endangering a child in violation of R.C. 2919.22(A), a felony of the third degree, and one count of assault in violation of R.C. 2903.13(B), a misdemeanor of the first degree, following a trial by jury in the Columbiana Court of Common Pleas. The trial court imposed a prison sentence of thirty months for the felony conviction, and a thirty-day jail sentence for the misdemeanor conviction, to be served concurrently, for an aggregate sentence of thirty months.

{¶2} Appellant advances four assignments of error. First, Appellant challenges the trial court's decision allowing the alleged victim, I.S., Appellant's then-eight-year-old daughter, to testify from a different courtroom by way of closed-circuit television. Next, Appellant asserts that the trial court abused its discretion when it prohibited the defense from offering testimony that I.S.'s mother had abused I.S. in the past. Third, Appellant contends that the trial court abused its discretion when it permitted repeated references to abuse during the trial, despite the fact that the indictment charged reckless, not intentional, conduct. Finally, Appellant argues that the trial court abused its discretion when it admitted expert testimony of a nurse practitioner, when a summary of her qualifications was not appended to her expert report.

{¶3} Having reviewed the record, we find that Appellant's first assignment of error has merit. Based upon the absence of a demonstration of good cause by the state for its failure to timely comply with R.C. 2945.481, and the prejudicial effect of the admission of I.S.'s testimony, Appellant's convictions are reversed and vacated, and this matter is remanded to the trial court for further proceedings.

LAW

{¶4} R.C. 2919.22, captioned "Endangering children," reads, in relevant part: "No person, who is the parent * * * of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." R.C. 2919.22(A). A violation of division (A) of this section that results in serious physical harm to the child constitutes a felony of the third degree. R.C.

2919.22(E)(2)(c). R.C. 2903.13, captioned "Assault," reads, in relevant part: "No person shall recklessly cause serious physical harm to another * * * *" R.C. 2903.13(B).

{¶5} R.C. 2901.22, captioned "Culpable mental states," provides in relevant part:

> A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

"Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist. R.C. 2901.01(A)(8).

FACTS

{¶6} Neither Appellant nor I.S.'s mother testified at trial. They were the only persons present and awake when I.S., their then-seven-year-old daughter (d.o.b. 6/13/12) suffered second-degree burns as a result of a scalding incident in the bathroom tub at their apartment located at 1133 Prospect Street, Salem, Ohio, on October 2, 2019. As a consequence, the accounts of the events leading to I.S.'s injuries at trial, other than her own account, were taken from Appellant's conflicting narratives of the evening as reported on two separate occasions to the investigating police detective and a medical professional at the hospital where I.S. was transferred for treatment.

{¶7} I.S. was first seen at her local emergency room in Salem, Ohio, but due to the severity of her injuries, she was transferred by ambulance and admitted to the main campus of the Akron Children's Hospital.

{¶8} Paul McPherson, M.D., a pediatrician specializing in the diagnosis of child abuse at Akron Children's Hospital in Akron, Ohio, assessed I.S's injuries. Dr. McPherson was qualified as an expert witness at the trial without objection from the defense. Dr. McPherson explained that he was tasked with an assessment of I.S.'s injuries for child

abuse and/or neglect because the medical professionals that provided I.S.'s treatment had concluded that "the history provided to medical providers did not seem to make sense in conjunction with the burn injuries, they were worried that something else might have happened." (Trial Tr., p. 529.)

{¶9} Appellant provided the following account of the events leading to I.S.'s injuries to Dr. McPherson. I.S. was prescribed a sleep aid, Trazadone, which was administered prior to her bedtime. At 10:00 p.m., I.S. awakened and Appellant and I.S.'s mother discovered that I.S. had urinated on the mattress on which she slept. The mattress is located in the closet of the master bedroom. Appellant sent I.S. to the bathroom to bathe, while he and her mother changed the sheets on the mattress.

{¶10} At some point, Appellant heard I.S. scream, then found her in the tub. Shortly after removing her from the tub, Appellant noticed that the skin on the top of I.S.'s feet was starting to blister. Appellant applied aloe to the top of I.S.'s feet and she was given a sponge bath to remove the odor of urine. Appellant and I.S. were driven to the emergency room by Appellant's grandparents, because neither of I.S.'s parents owned an automobile.

{¶11} Dr. McPherson's examination revealed second degree burns to the skin on the top, but not the bottom, of I.S.'s feet, burns to her right mid-back, the back of her right elbow, and to her left upper-buttocks. He posited that the bottom of I.S.'s feet were not burned because they were pressed against the basin of the tub, which would have been markedly cooler than the water in the basin, while the top of her feet were directly exposed to the scalding water.

{¶12} Dr. McPherson testified that the injuries, especially to the skin on the top of I.S.'s feet, were severe and required hospitalization and significant pain management. I.S. was prescribed a combination of fentanyl, morphine, and oxycodone "to deal with the pain of [the injuries] and the pain of dressing changes." (*Id.*, p. 542.) Appellant's grandmother testified that I.S. appeared to be in shock when she was being transported to the hospital.

{¶13} Detective Jordan Reynolds of the Perry Township Police Department conducted the police investigation. When he arrived at the Prospect Street apartment, Detective Reynolds activated the faucet in the tub without adjusting the water

temperature. After fifteen to twenty seconds, the water temperature registered 127 degrees. The faucet, which is depicted in State's Exhibit three, is a large crystal knob, which tilts up and down to turn the water on and off, and turns to the left or the right to adjust the temperature of the water.

{¶14} Detective Reynolds further testified that the hot water tank, located in the hallway of the apartment, had three temperature settings, "A, B, and C," (VERY HOT). The tank was set on the highest temperature. A warning on the knob of the tank reads, "CAUTION: RISK OF SCALDING INCREASES WITH HOTTER WATER."

{¶15} After Detective Reynolds discovered the setting on the hot water tank, he asked I.S.'s mother, who was present with her other children at the apartment, if she had set it. She responded that she did not set it, as she "was not allowed to touch it." (*Id.*, p. 262.) Detective Reynolds contacted the maintenance supervisor at the apartment complex, who stated that he was the only individual with authority to adjust the temperature settings on the hot water tanks, and that he set every tank in the complex to "B."

{¶16} According to Dr. McPherson, 127-degree water is "well above adult pain threshold levels." (*Id.*, p. 539.) Further, when asked the length of time that the "submersion or contact with a hot liquid would be required before second degree burns would be sustained," Dr. McPherson opined that one minute of exposure to 127-degree water would cause a third-degree burn. (*Id.*, p. 540.) While it is not clear whether Dr. McPherson meant one minute of submersion would result in second or third-degree burns, Dr. McPherson plainly stated that "the water would have been too hot for [I.S.] to want to stay in there at 127 degrees."

{¶17} More specifically, Dr. McPherson testified, "so if the water is coming out at 127 degrees or the water was 127 degrees in the bath, then [I.S.] has the developmental capabilities of removing herself from that before sustaining second degree burns." (*Id.*, p. 539.) He further explained that "if [I.S.] was exposed to water hot enough to cause second degree burns from a bath or shower that she drew herself, she would have likely moved out of that bath or that shower before the skin was exposed long enough to have second degree burns." (*Id.*)

{¶18} However, Dr. McPherson offered no testimony regarding the impact that the sleeping medication had on I.S.'s cognition or reaction time. He testified that sedatives affect children in differing degrees:

> Q: And if a child had been administered [T]razadone and then awakened during the night, would the child be groggy or sleepy?
>
> A: The child might be a little more groggy than normal.
>
> Q: Would you have any concerns, as a medical professional, about the child being trusted to draw her own bath?
>
> A: It would depend on how groggy or un-groggy that child is.
>
> You know, [T[razadone does not affect every child the same way. Some children might be more groggy that others after having [T]razadone.
>
> But a caregiver directing a seven-year-old to draw their own bath indicates to me that the level of grogginess would have been minimal.

(*Id.*, p. 543-544.) Although Dr. McPherson opined that an extremely groggy child performing a dangerous task would require supervision, I.S.'s cognitive state on October 2, 2019 was not established in the record.

{¶19} According to Dr. McPherson's testimony, his examination and assessment included consideration of alternative reasons for I.S.'s injuries, including accidental causes or an underlying skin condition. Nonetheless, following his examination, Dr. McPherson concluded that I.S.'s injuries were "highly concerning for inflicted trauma." (Trial Tr., p. 564.) He further concluded within a reasonable degree of medical certainty that I.S.'s injuries were consistent with a diagnosis of child physical abuse.

{¶20} That same evening, Appellant was interviewed by Detective Reynolds at Akron Children's Hospital. Appellant told Reynolds that he and I.S.'s mother administered Trazadone, the prescribed sleep-aid, to I.S. between 7:00 and 8:00 p.m. before her bedtime. Around 10:00 p.m., they woke I.S. in an attempt to avert a bedwetting accident

(a side effect of Trazadone), however, I.S. had already urinated. They sent I.S. to bathe, while they stripped the mattress of the wet sheets and replaced them.

{¶21} Appellant heard the water filling the tub for roughly sixty to ninety seconds, then he heard I.S.'s ankle strike the side of the tub as she attempted to enter. Approximately twenty to thirty seconds after Appellant heard I.S. enter the tub, he heard her scream. Appellant ran to the bathroom, which Detective Reynolds testified was roughly fifteen feet from the master bedroom closet. As Appellant ran to the bathroom, he heard a splash. As Appellant turned the corner into the bathroom, he saw I.S. "huddled toward the back of the tub." (*Id.*, p. 271.)

{¶22} Appellant removed I.S. from the tub and placed her on the toilet. I.S. told Appellant that her feet felt sunburned, which is when Appellant noticed that the skin on the top of her feet was beginning to blister. Appellant applied aloe to I.S.'s feet, dressed her, then began making phone calls to arrange transportation to the hospital.

{¶23} According to mobile telephone records, Appellant dialed his grandfather's mobile phone number once, and his grandmother's mobile phone number twice. Ultimately, Appellant's grandparents retrieved Appellant and I.S. from the apartment and drove them to the emergency room. They arrived a little after 1:00 a.m. The hospital was roughly two blocks from the apartment.

{¶24} Appellant informed Detective Reynolds that he was the last person to use the shower. Appellant explained that he set the water temperature to the highest setting in order to relieve his back pain. Appellant also informed Detective Reynolds that Appellant felt responsible for I.S.'s injuries because he had left the water temperature on the highest setting after completing his shower. Appellant told Detective Reynolds that Appellant had a higher-than-normal heat threshold due to his occupation as a welder.

{¶25} Appellant told Detective Reynolds that Appellant placed his hand in the water after he removed I.S. Appellant saw that his hand was red, which indicated to him that the water was too hot. He explained that he was incapable of gauging the water temperature by sensation due to nerve damage to his hand.

{¶26} Appellant provided a third and substantially different account of the events of October 2, 2019 during an interview with Detective Reynolds on November 7, 2019. According to Appellant, he and I.S.'s mother did not provide I.S. her prescribed dose of

sleeping medication on the evening in question because I.S. was "really tired." (Trial Tr., p. 286.) That evening, Appellant and I.S.'s mother took a shower together between 9:30 and 10:00 p.m., which is plainly at odds with Appellant's earlier statement that the water temperature was very hot due to his high tolerance for heat.

{¶27} Appellant told Detective Reynolds that he and I.S.'s mother watched a movie until 11:30 p.m. when they decided to wake I.S. to avert a bedwetting accident, although no Trazadone had been administered, and learned that she had already urinated. In this version of the story, Appellant told I.S. to go to the bathroom, but to wait until he and I.S.'s mother came to the bathroom to start the shower. Despite his instructions to I.S. to wait for adult supervision, Appellant did not react when he heard the water begin to run.

{¶28} Roughly one week later, I.S. was interviewed by Courtney Wilson, a social worker at the Child Advocacy Center on the Boardman campus of Akron Children's Hospital ("CAC"). I.S. was sheepish and fearful, as well as unable to maintain eye contact, and she declined to answer any questions regarding the events leading to her injuries. Wilson testified that she discontinued the interview because I.S.'s behavior was "flat, depressed, [and] child-like, younger than her age developmentally." (Trial Tr., 397.)

{¶29} Monique Malmer, a nurse practitioner at CAC, examined I.S.'s injuries that same day. She was qualified as an expert over the objection of Appellant.

{¶30} Malmer testified that I.S. had been prescribed medication for oppositional defiance disorder and attention deficit hyperactivity disorder, diagnoses which indicated that I.S. had difficulty focusing and did not follow directions. Malmer further testified that a seven-year-old, particularly one who had been prescribed a sedative, should have been supervised when awakened from a sound sleep in the middle of the night and sent to draw her own bath. Appellant's grandmother, who had custody of I.S. briefly after the accident, explained that she chose to discontinue I.S.'s sleeping medication because I.S. struggled to function after she awoke in the middle of the night to use the bathroom.

{¶31} Detective Reynolds conceded on cross-examination that he heard opposing stories regarding the events of October 2, 2019, first that I.S. "put herself into the bathtub" and also that Appellant "put her in the bathtub." However, according to Detective Reynolds' testimony, he was never told directly that Appellant placed I.S. in the tub.

{¶32} Detective Reynolds further conceded that criminal charges were not pursued due to the "uncertainty" surrounding the cause of I.S.'s injuries. (*Id.*, 314.) Likewise, Tina Deal-Hendon, a social worker at the Columbiana County Department of Job and Family Services ("CCDJFS") in the child services division, testified that the matter was considered "unsubstantiated" in November of 2019. (*Id.*, 367.)

{¶33} I.S. was removed from the custody of her mother as a result of her injuries. She lived for a short time with Appellant's grandparents, then for the remainder of the time prior to trial with her maternal grandmother. She thrived in both homes and was immediately weaned from all of her medication. Appellant's grandmother reported a single incident of bedwetting by I.S., which occurred after a supervised visit with I.S.'s parents.

{¶34} The investigation was reopened in April of 2020, after I.S. disclosed during a counseling session with Deal-Hendon that she was not responsible for the injuries she sustained on October 2, 2019. Unlike her demeanor at the October 14, 2019 interview, I.S. was happy and engaged during her second interview with Deal-Hendon on May 15, 2020. She twice recounted the events of October 2, 2019, at the beginning and the end of the interview. Without divulging the content of I.S.'s disclosure, Deal-Hendon testified that the narratives provided by I.S. during the interview were both internally consistent as well as consistent with her projected trial testimony. Both Wilson and Malmer explained during their testimony that delayed disclosure is common among child trauma survivors.

{¶35} I.S., who appeared at trial by closed-circuit television, testified that Appellant woke her on the evening in question, and placed her in the water in the tub. She exited the tub because the water was too hot. Despite the fact that I.S. informed Appellant that the water was too hot, Appellant placed her back in the tub and compelled her to sit in the water. She attempted to exit the tub a second time, but Appellant forced her to remain there until I.S's mother appeared and removed I.S. from the tub.

{¶36} I.S. testified that the foregoing account of the events leading to her injuries was the same account she provided to her counselor and maternal grandmother, and that the foregoing account was a truthful account of the evening's events.

{¶37} I.S.'s maternal grandmother purchased a laptop for I.S. in the spring of 2020. Defense counsel argued that I.S.'s maternal grandmother threatened to take the

laptop from I.S. should she return to Appellant's custody, in order to coerce her into providing testimony falsely accusing Appellant of causing her burns in October of 2019.

{¶38} Appellant was convicted on both charges. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN PERMITTING THE CHILD WITNESS TO TESTIFY VIA CLOSED-CIRCUIT.

{¶39} Ohio, like many states, has a statute that allows alleged child victims to testify outside the physical presence of the defendant upon motion by the prosecution if certain conditions are met. R.C. 2945.481. The trial court must find that the alleged child victim is unavailable to testify in the courtroom in the physical presence of the defendant due to one or more of the following: (1) the persistent refusal of the child victim to testify despite judicial requests to do so; (2) the inability of the child victim to communicate about the alleged violation or offense because of extreme fear, failure of memory, or another similar reason; or (3) the substantial likelihood that the child victim will suffer serious emotional trauma from so testifying. R.C. 2945.481(E). In the absence of a demonstration of good cause, the prosecution is required by statute to file the motion seven days prior to trial. R.C. 2945.481(C).

{¶40} On April 22, 2021, the Thursday prior to the commencement of trial on Monday, April 26, 2021, the state filed the R.C. 2945.481(C) motion, asserting that I.S.'s extreme fear would render her unable to testify, and that there was a substantial likelihood that I.S. would suffer serious emotional trauma if required to testify in the presence of her father. The following day, Friday, April 23, 2021, Appellant filed a response, in which he argued, among other things, that the motion was untimely.

{¶41} The motion was argued before the trial court on Monday, April 26, 2021, the first day of trial. Counsel for the state represented that I.S. informed her that she would not be able to speak in the presence of the defendant during a scheduled interview on Tuesday, April 20, 2021. Counsel for the state explained that she did not file the motion until Thursday because she was out of the office on Wednesday April 21, 2021. She

asserted that she notified defense counsel on Tuesday, April 20, 2021, as soon as she became aware of I.S.'s purported inability to testify.

{¶42} At the motion hearing, the trial court accepted the testimony of Tammy Rafferty, a state-licensed professional clinical counselor. Rafferty had counseled I.S. for almost two years when she testified at the hearing. According to Rafferty, I.S. had disclosed her father's role in the burns she sustained in October of 2019 during a counseling session, and I.S. had repeatedly expressed fear of her parents during various sessions. Rafferty further testified that I.S. had made progress in her treatment, based in large measure on the disclosure implicating her father. Rafferty concluded that I.S. would suffer "a big setback" should she be called to testify in the presence of her father. (Trial Tr., 37.) The trial court ultimately concluded that the state had met its burden of proof under both subsections of the statute cited in its motion.

{¶43} We have previously held that the decision to permit leave to file an untimely motion to suppress is within the trial court's sound discretion. *State v. Bryson*, 5th Dist. No. 16 CA 70, 2017-Ohio-830, ¶ 10. We apply the same standard to the timeliness of the pretrial motion at issue here. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶44} When a child victim testifies by closed-circuit television, the jury is likely to infer the defendant's guilt before the child offers a single word of testimony. As a consequence, the requirement that the state file a R.C. 2945.481 motion seven days prior to trial plays an essential role in the defense's ability to counteract the inference.

{¶45} The purpose of the rule is to provide sufficient time for defense counsel to prepare for the hearing. For instance, defense counsel may choose to retain a therapist to testify on behalf of the defense at the hearing on the motion. Similarly, if the motion is granted, defense counsel has the opportunity to alter the trial strategy. For instance, defense counsel may choose to fashion additional questions for voir dire or formulate and request a curative instruction regarding the manner of the child victim's testimony.

{¶46} Here, the prosecutor acted in direct contravention of the time requirement when she interviewed the child on the Tuesday before the trial, then filed the motion on the Thursday before trial. The state cites *State v. Remy*, 2018-Ohio-2857, 117 N.E.3d

916, for the proposition that a R.C. 2945.481 motion may be filed during the trial, therefore, the state's failure to comply with the seven-day requirement here is irrelevant to the good cause determination. However, in *Remy*, the state's untimely discovery of the child's reluctance to testify occurred, through no fault of the state, in the midst of trial. Here, the state's untimely discovery was the result of its failure to interview the child more than seven days before the trial. The trial court's decision sustaining the untimely motion renders the statute susceptible to abuse by the state, which may file a R.C. 2945.481 motion in the eleventh-hour to gain a tactical advantage over the defense.

{¶47} In this case, the R.C. 2945.481 motion was filed on the Thursday before the trial, and the opposition brief was filed the following day, Friday, so the hearing on the motion was conducted on the following Monday, that is, the first day of trial. As a consequence, the defense had inadequate time to prepare for the hearing or to formulate a strategy to overcome the inference created by the manner of the child victim's testimony. Accordingly, we conclude that the trial court abused its discretion when it found that the state established good cause for its failure to timely file to R.C. 2945.481.

{¶48} We further conclude that the admission of I.S.'s testimony does not constitute harmless error. Pursuant to Crim.R. 52(A), "any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." See also Evid.R. 103(A). "[E]vidence errors that are prejudicial because they improperly affect the verdict will be excised from the record with the remaining evidence weighed to see if there is evidence beyond a reasonable doubt of the appellant's guilt * * *." *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 33 (same harmless error test for constitutional and non-constitutional error). A reviewing court may overlook an error where the remaining admissible evidence, standing alone, constitutes "overwhelming" proof of a defendant's guilt. *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983).

{¶49} I.S's testimony alone identified the perpetrator and the circumstances giving rise to her injuries. Simply stated, the remainder of the trial testimony, which included conflicting testimony regarding the events leading to I.S.'s injuries, and speculation regarding her mental state, does not constitute overwhelming proof of Appellant' guilt.

{¶50} First, the state offered three different versions of the events of October 2, 2019, provided by Appellant to two different witnesses on two separate occasions. Depending upon the testimony, I.S. either was or was not administered Trazadone that evening, she either awakened on her own or was awakened by her parents, and was either sent to bathe or told to go to the bathroom and wait for an adult.

{¶51} The only uncontroverted testimony in the record establishes that Appellant deactivated the water in the shower that evening without adjusting the water temperature. While it is true that Appellant admitted a sense of guilt to Detective Reynolds regarding I.S.'s injuries, we find that Appellant's failure to adjust the water temperature does not constitute heedless indifference to a substantial and unjustifiable risk, or that his conduct was likely to result in I.S.'s injuries.

{¶52} Second, in the absence of I.S's testimony that Appellant compelled her to remain in the water against her will, the state relied on expert medical testimony to establish that I.S. was injured nonetheless due to Appellant's recklessness. Malmer opined that Appellant acted recklessly when he sent a sedated child, awakened from a sound sleep, to draw her own bath. Dr. McPherson, on the other hand, specifically declined to offer an opinion regarding the impact of Trazadone on I.S's cognition, opining instead that the effect of any medication varies with each child.

{¶53} Based on I.S.'s age and physical development, Dr. McPherson opined that I.S. had the motor skills to remove herself from the scalding water. However, due to the absence of any medical testimony establishing the effect of Trazadone on I.S., it is possible that I.S. fell into the tub and was unable to remove herself due to her sedation.

{¶54} Finally, in addition to our own analysis of the evidence, two of the state's witnesses conceded the dearth of evidence against Appellant prior to I.S.'s disclosure. Detective Reynolds conceded at trial that criminal charges were not pursued in 2019 due the "uncertainty" surrounding the cause of I.S.'s injuries. (Trial Tr., p. 314.) Likewise, Deal-Hendon, who was assigned to the case by CCDJFS after I.S.'s disclosure in April of 2020, acknowledged that the allegation that Appellant was responsible for I.S.'s injuries was considered to be "unsubstantiated" by the CCDJFS in November of 2019. (*Id*., 367.)

{¶55} Accordingly, we find that the trial court abused its discretion when it permitted I.S. to testify by closed-circuit television in the absence of a demonstration of

good cause for the state's failure to timely file the R.C. 2945.481 motion. We further find that Appellant suffered material prejudice as a result of the admission of I.S.'s testimony via closed-circuit television, insofar as the remainder of the admissible evidence in the record does not constitute evidence beyond a reasonable doubt of Appellant's guilt. Therefore, we find that Appellant's first assignment of error has merit.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT VIOLATED THE APPELLANT'S DUE PROCESS OF LAW IN PROHIBITING THE INTRODUCTION OF THE CO-DEFENDANT [MOTHER]'S, DOCUMENTED AND CONVICTED HISTORY OF CHILD ABUSE AGAINST THE ALLEGED VICTIM.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED IN PERMITTING THE STATE OF OHIO TO INTRODUCE ALLEGATIONS OF AND TESTIMONY ABOUT ABUSE, WHEN THE CONDUCT ALLEGED WAS RECKLESS.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE [THE CAC NURSE PRACTITIONER'S] EXPERT TESTIMONY DESPITE THE STATE'S FAILURE TO COMPLY [WITH] CRIM. R. 16(K).

{¶56} Because Appellant's first assignment of error requires a reversal of the jury's verdict and a vacation of Appellant's conviction, we find that his second through fourth assignments of error are moot.

CONCLUSION

{¶57} In summary, due to a lack of good cause for the state's failure to timely comply with R.C. 2945.481, we find that the trial court abused its discretion when it sustained the state's motion to permit I.S. to testify by closed-circuit television. Further,

based on the prejudicial effect of the admission of I.S.'s testimony, Appellant's convictions are reversed and vacated, and this matter is remanded to the trial court for further proceedings.

Donofrio, P.J., concurs.

Robb, J., dissents with attached dissenting opinion.

Robb, J., dissenting opinion.

{¶58} I hereby dissent to the decision to reverse Appellant's convictions based on the timing of the state's motion to permit the child victim to testify via "closed circuit equipment" under R.C. 2945.481. Upon certain criteria, this statute allows the testimony of a child victim who is under the age of thirteen to be presented by closed circuit equipment in a child endangering case. R.C. 2945.481(A)(2),(C), citing R.C. 2919.22. And, the statute gives the trial judge discretion to determine whether there was good cause for an untimely motion.

{¶59} Specifically, the judge may allow the child victim's testimony by closed circuit "upon the motion of the prosecution filed under this division, if the judge determines that the child victim is unavailable to testify in the room in which the proceeding is being conducted in the physical presence of the defendant, for one or more of the reasons set forth in division (E) of this section." R.C. 2945.481(C). Division (E) then provides:

> a judge may order the testimony of a child victim to be taken outside the room in which the proceeding is being conducted if the judge determines that the child victim is unavailable to testify in the room in the physical presence of the defendant due to one or more of the following:
>
> (1) The persistent refusal of the child victim to testify despite judicial requests to do so;
>
> (2) The inability of the child victim to communicate about the alleged violation or offense because of extreme fear, failure of memory, or another similar reason;
>
> (3) The substantial likelihood that the child victim will suffer serious emotional trauma from so testifying.

R.C. 2945.481(E). "Except for good cause shown, the prosecution shall file a motion under this division at least seven days before the date of the proceeding." R.C. 2945.481(C).

{¶60} Four days before the multi-day trial was scheduled to commence, the state filed a motion to permit the child to testify by closed circuit, alleging the child was unavailable to testify in Appellant's presence because her extreme fear would render her unable to communicate or because there was substantial likelihood the child would suffer serious emotional trauma from testifying in his presence. The defense filed a memorandum in opposition the next day contesting these allegations and stating the motion was untimely.

{¶61} At the hearing on the motion, the child's counselor said the child had been making progress working through the trauma of the burning incident; she was previously withdrawn and fearful but became more social and engaged. (Tr. 35-36). The child's disclosure about Appellant forcing her into hot bath water was part of that progress, as she previously refused to speak about it. (Tr. 36, 40). The child expressed fear of her parents on more than one occasion. (Tr. 36). The counselor opined that if the child were called to testify in Appellant's presence, it would impact her emotional well-being, would cause emotional trauma, and would constitute a "big set-back for her." (Tr. 37, 44).

{¶62} More specifically, the counselor opined the child would have extreme fear rendering her unable to talk if she had to testify in front of Appellant. (Tr. 44-45). This was consistent with the child's indications to the prosecutor that she could not speak in front of Appellant due to her fear. The counselor also opined there was a substantial likelihood the child would suffer serious emotional trauma if required to testify in his presence. (Tr. 45). The court granted the state's motion to allow the child to testify by closed circuit, making findings under both (E)(2) and (E)(3) of R.C. 2945.481. (Tr. 46).

{¶63} A decision on whether there was good cause for an untimely pretrial motion is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *See, e.g., State v. Hunt*, 12th Dist. Fayette No. CA2021-02-003, 2021-Ohio-3400, ¶ 25-26; *State v. Starkey*, 2012-Ohio-6219, 985 N.E.2d 295, ¶ 10-11 (11th Dist.). An abuse of discretion involves an unreasonable, arbitrary, or unconscionable decision. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Under such standard, we do not substitute our judgment for that of the trial court. *State v. Herring*, 94 Ohio St.3d 246, 255, 762 N.E.2d 940 (2002).

{¶64} At the hearing on the motion, the prosecutor explained she met with the child six days before trial was to commence. At the meeting, the prosecutor learned the child had such fear of Appellant that she would not be able to speak in his presence. (Tr. 23, 27). Defense counsel was immediately advised of the issue. The prosecutor made contact with the child's counselor to ask for her opinion, including on the alternative ground of whether the child would suffer serious emotional trauma from testifying in Appellant's presence. (Tr. 23). The prosecutor was out of the office the day after meeting with the child and filed the motion with the court two days after the meeting. (Tr. 23).

{¶65} Appellant suggests the prosecutor should have interviewed the child earlier rather than waiting until six days before the trial commencement date, which was after the seven-day statutory deadline for filing the motion. However, R.C. 2945.481(C) provides the timeline for *filing the motion* and speaks of good cause for the untimely filing of the motion. The statute does not provide a timeline for interviewing a child or for giving the child a tour around the courthouse during which indicators of the child's mental state may trigger the prosecutor's concerns.

{¶66} In fact, there are various reasons why a prosecutor may not meet with a witness *at all* before trial. For instance, a pre-trial meeting with a witness may be avoided in order to block a defense allegation of coaching by the prosecution. This was a strategy used by the defense here. Also, in cases involving child victims, the relevant professionals may strive to avoid multiple interviews in order to impart the least amount of stress on the child. For example, the CAC social worker in the case at bar conducted the first interview with the detective and the nurse practitioner watching from behind a mirror, and the Children Services investigator conducted the case-reopening interview with the detective watching from behind a mirror. *See, e.g., State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 33 ("Child-advocacy centers are unique. Multidisciplinary teams cooperate so that the child is interviewed only once and will not have to retell the story multiple times.").

{¶67} It would not be unreasonable for a prosecutor to initially refrain from scheduling an interview due to considerations such as these but then decide to meet with the child as the trial date nears due to custodial concerns over personal and locational familiarity. The fact the prosecutor met with the child six days before trial (at which time

the prosecutor learned a closed circuit motion was warranted) did not preclude a good cause finding where the prosecutor thereafter proceeded in a sufficiently timely manner.

{¶68} In the case cited by the state, the appellate court upheld the trial court's finding of good cause for the untimely motion for closed-circuit testimony even where it was filed days *after the trial started*. *State v. Remy*, 2018-Ohio-2857, 117 N.E.3d 916 (2d Dist.) (reviewing for plain error). The court concluded where the prosecutor learns of the issue after the deadline already passed and then files the motion a day after learning of the issue, there is "obviously" good cause for the untimely filing of the motion. *Id.* at ¶ 80.

{¶69} Here, the prosecutor did not learn the child would experience extreme issues from testifying in Appellant's presence *until after the deadline had passed*. The prosecutor informed the defense of the issue immediately upon learning of it from the child on Tuesday, April 20, 2019 (six days before the multi-day trial was scheduled to begin). We note the child did not testify until Wednesday, April 28, 2019 (the third day of trial).

{¶70} The prosecutor was out of the office the day after learning of the issue and filed the motion the second day after learning of the issue. Furthermore, based on the child's demeanor at the meeting, it was reasonable to contact the child's counselor to ascertain whether the concerns were valid and whether there may be an alternative ground for the motion as well. Although the motion was not filed until four days before trial was scheduled to commence, the defense had time to respond to the motion and did so in a written response and at a later hearing. The defense was warned about the issue more than seven days before the child testified and was not deprived of a trial strategy involving voir dire or jury instructions. It is also notable that the defense did not mention a desire to "retain a therapist" to testify in opposition to the child's counselor at the hearing on the state's motion or seek a continuance in order to do so.

{¶71} The policy concern cited by the majority (that a jury would infer guilt when a child victim testified by closed circuit) was a consideration for the legislature when deciding whether to enact the statute in the first place. The statute must be followed without adding requirements such as mandatory interviews before certain dates. Additionally, this court is prohibited from substituting our judgment for that of the trial court on the matter of good cause for an untimely filing. Under the totality of the facts and

circumstances existing herein, the trial court did not abuse its discretion in finding good cause for filing the motion for closed-circuit testimony four days before the first day of trial, which was two days after learning of and informing defense counsel about the issue.

{¶72} Upon such finding, I would then overrule the other argument under Appellant's first assignment of error and find there was competent, credible evidence to support the trial court's conclusion that the child was unavailable to testify in Appellant's physical presence due to an extreme fear rendering her unable to communicate or a substantial likelihood the child would suffer serious emotional trauma if required to so testify. R.C. 2945.481(E)(2) or (3); (Tr. 46). The trier of fact occupied the best position from which to weigh the evidence and judge the credibility of a witness. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). *See also State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, 860 N.E.2d 1002, ¶ 1. I would then proceed to address and overrule Appellant's remaining assignments of error, which the majority finds are moot due to the reversal of Appellant's convictions under his first argument.

{¶73} Accordingly, I would affirm the trial court's judgment and Appellant's convictions.

APPROVED:

For the reasons stated in the Opinion rendered herein, the assignments of error are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is reversed and vacated. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.