[Cite as *State v. Snider*, 2023-Ohio-2639.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOSHUA SHANE SNIDER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 BE 0020

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 21 CR 226

BEFORE:
David A. D'Apolito, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Vacated and Remanded.

Atty. J. Kevin Flanagan, Belmont County Prosecutor, and *Atty. Jacob A. Manning,* Assistant Prosecuting Attorney, 52160 National Road, St. Clairsville, Ohio 43950, for Plaintiff-Appellee and

Joshua Shane Snider, *Pro Se,* Belmont Correctional Institution, P.O. Box 540, St. Clairsville, OH 43950, Appellant and *Atty. Sterling E. Gill, II,* 1544 East Broad Street, Suite 201, Columbus, Ohio 43203, for Defendant-Appellant (Brief Filed).

Dated: July 31, 2023

D'Apolito, P.J.

{¶1} Appellant, Joshua Shane Snider, appeals his convictions for one count of attempted murder in violation of R.C. 2923.02 and R.C. 2903.02(A),(D) (purposely cause the death of another), a felony of the first degree; one count of felonious assault in violation of R.C. 2903.11(A)(1),(D)(1)(a) (cause serious physical harm to another), a felony of the second degree; one count of failure to comply with the order or signal of a police officer in violation of R.C. 2921.331(B),(C)(5)(a)(ii) (cause a substantial risk of serious physical harm to persons or property), a felony of the third degree; and one count of vandalism in violation of R.C. 2909.05(C),(E) (serious physical harm to any gravestone), a felony of the fifth degree, following a trial by jury in the Belmont County Court of Common Pleas. Although Appellant purports to challenge all of his convictions, his brief focuses in its entirety on his convictions for attempted murder and felonious assault.

{¶2} During an altercation, Appellant stabbed the victim, Steven Chambers, in his chest with a knife, nicking Chambers' heart, puncturing his lung, and fracturing one of Chambers' ribs. Chambers suffered cardiac arrest in the ambulance en route to the hospital and had to be resuscitated by paramedics.

{¶3} Other than the combatants, Allison West was the sole eyewitness to the commencement of the altercation. She is the owner of 6 Patterson Road in Belmont, Ohio, the residence where the altercation occurred. An admitted friend of Appellant, West testified on behalf of the defense that Chambers initiated the physical confrontation by lunging at Appellant and punching him. Chambers, on the other hand, testified that Appellant attacked him without physical provocation. Chambers' fiancée, Barbara Burgess, testified on behalf of the state but conceded that she did not see the precipitating event that resulted in Chambers' near-fatal injuries.

{¶4} Five days after the altercation, while Appellant was still at large, he was identified driving a vehicle on the road by law enforcement. While being pursued by law enforcement, Appellant led officers on a high-speed chase that culminated in Appellant's loss of control of the automobile. As a consequence, the vehicle careened into the local cemetery and destroyed ten gravestones. A knife recovered from the vehicle was never submitted for scientific testing.

{¶5} During its case-in-chief, the state displayed the body camera footage of Bridgeport Police Department Sergeant Hunter Sylvis, who was the first officer on the scene following the altercation. While the victim was lying on the floor, Sergeant Sylvis removed items from the victim's pants pockets. The footage revealed that the victim had brass knuckles in his pants pocket during the altercation, a fact revealed for the first time at trial according to defense counsel. Defense counsel alleged that the body camera footage was never produced by the state during discovery.

{¶6} The trial court was aware of Appellant's intent to assert self-defense at trial. The testimony of Derek Vargo, who was a passenger in the automobile during the police chase and the only defense witness to testify during the defense's case-in-chief (West's testimony was offered on the first day of trial as she was not available on the second day), concluded at roughly 4:00 p.m. on the second day of trial. At that time, Appellant's counsel requested until the following morning to allow Appellant to consider whether to testify in his own defense.

{¶7} The trial court rejected Appellant's request, informing defense counsel that Appellant could either take the stand immediately, or defense counsel could represent on the record before the jury that Appellant would take the stand the following morning. Given those two options, Appellant hastily decided to testify then shortly thereafter opted to rest his case.

{¶8} The following day, that is, the beginning of the third day of trial, defense counsel informed the trial court of Appellant's desire to testify, but the trial court refused to consider Appellant's request in the absence of any "change in circumstances" from the previous day. The trial court also overruled defense counsel's unopposed request to place a proffer on the record, for the purpose of including Appellant's proposed testimony in the record for appeal. Appellant was convicted of all four counts in the indictment.

{¶9} Appellant advances two assignments of error. First, he argues that the trial court violated his right to due process by denying him a reasonable time to consider whether to testify on day two of the trial, and refusing to reopen his case on day three. Second, Appellant contends that the trial court committed a violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), when it permitted the state to

publish Sylvis' body camera footage to the jury despite the fact that defense counsel represented to the trial court the video was not provided to the defense during discovery.

{¶10} Because Appellant's first assignment of error has merit, his attempted murder and felonious assault convictions and sentence are vacated and this matter remanded to the trial court for further proceedings, with instructions that the administrative judge assign the case to a different judge.

FACTS AND PROCEDURAL HISTORY

{¶11} West, Chambers, and Burgess each offered their account of the events that lead to Chambers' injuries. Burgess conceded at trial that she did not witness the event that sparked the altercation. With respect to facts relevant to self-defense, the accounts of West and Chambers are directly at odds.

{¶12} West had previously invited Burgess, a recent acquaintance, to stay at 6 Patterson Road when West learned that Burgess was homeless. Burgess' homelessness was due to Chambers' incarceration following a domestic violence conviction, for which Burgess was the victim.

{¶13} 6 Patterson Road was at the time a makeshift drug den/way station for local addicts, which included the homeowners, West and her boyfriend, Donnie Henderson. Donnie Henderson was present when the altercation occurred but did not testify at trial.

{¶14} Appellant and Burgess met for the first time on Wednesday, July 21, 2021. West and Burgess met Appellant at a local restaurant, where Burgess told Appellant stories of Chambers' physical abuse.

{¶15} According to West, Burgess had no desire to leave Chambers, but seized the opportunity to capture Appellant's attention and evoke his sympathy. West had previously informed Burgess that Appellant had a history of rescuing women from similar circumstances.

{¶16} Two days later, on Friday, July 23, 2021, Chambers appeared at 6 Patterson Road. Later that day, Chambers, Burgess, West, and a woman identified in the record as "T.J." joined Appellant at a house party hosted by a friend of Appellant, who resided in Big Wheeling Creek, West Virginia. Appellant and Chambers met for the first time that day.

{¶17} The crystal-methamphetamine-fueled party continued into the early hours of Saturday morning, and as a consequence the group spent the morning and the early afternoon of the following day recuperating in Big Wheeling Creek. Despite Chambers' presence, or according to West because of it, Burgess flirted with Appellant at the party. West testified that Appellant "recognized the situation," and avoided being used as a pawn to evoke Chambers' jealousy. (Trial Tr., p. 275.)

{¶18} According to West, Chambers and Burgess took $100 from Appellant's wallet and his car keys, while he, West, and T.J. were sleeping on Saturday morning. They traveled to Cameron, West Virginia, where Chambers and Burgess had previously resided. However, when they returned to Big Wheeling Creek, Appellant was not cross with Chambers and Burgess and shortly thereafter the group commenced their trip back to 6 Patterson Road.

{¶19} Burgess and Chambers, who were seated in the back in Appellant's automobile, bickered throughout the automobile trip. According to West, at some point, Chambers called Appellant a "bitch," and began swinging his fists at Appellant, inadvertently striking the other passengers in the back seat. As a consequence, Appellant pulled the vehicle to the side of the road in Bridgeport, Ohio in order to engage in a physical confrontation with Chambers.

{¶20} West beseeched Appellant to postpone the fight and conduct it in the privacy of her backyard, as she feared law enforcement would be dispatched if a roadside brawl occurred on the highway. West informed Appellant that she already had legal problems in Bridgeport, which convinced Appellant to leave Chambers and Burgess on the side of the road to walk the roughly one mile back to 6 Patterson Road. When the couple returned to the residence, Appellant had already departed.

{¶21} The following day, Sunday, July 25, 2021, Chambers and Burgess were asleep in a second-floor bedroom when Appellant appeared at the front door. West described his mood as conciliatory. Appellant expressed his desire to apologize to Chambers and that he hoped for an apology in return.

{¶22} According to West, Appellant walked up the stairs to the second-floor bedroom, and a few seconds later, descended the stairs with Burgess. Appellant and

Burgess entered the first-floor bedroom, where West and Henderson were sitting, then Appellant closed the double doors to the first-floor bedroom behind him.

{¶23} Appellant asked Burgess why she was with a man who disrespected her and offered his assistance to help her escape from the abusive relationship. Appellant informed Burgess there was a young woman sitting in Appellant's vehicle, who Appellant had aided in escaping a violent romantic relationship.

{¶24} However, the conversation between Appellant and Burgess was interrupted when Chambers descended the stairs. According to West, Chambers was angry that Burgess was in the first-floor bedroom with Appellant. Chambers began to scream at Appellant, once again calling him a "bitch."

{¶25} West testified that Appellant walked from the first-floor bedroom to the landing of the steps, then Chambers, who was standing on the second or third step from the landing, lunged at Appellant and landed one or two punches. Appellant, in turn, landed what appeared to West to be a punch, which sent Chambers to the floor curled in the fetal position. When Burgess emerged from the first-floor bedroom screaming "[n]o, no, no," Appellant turned and left the residence. West accompanied Appellant as he departed from the residence in order to avoid any additional harm to Chambers.

{¶26} Unaware that he had been stabbed in the chest, Chambers walked back up the stairs to the bedroom. Although Chambers was bleeding, he mistakenly believed that he was bleeding from his injured hand. According to West, Chambers was angry with Burgess and "didn't want nothing to do with her." (Trial Tr., p. 285.) Roughly 30 to 35 minutes passed before West finally capitulated to Burgess' repeated requests to assess Chambers' injuries.

{¶27} When West entered the second-floor bedroom, Chambers admitted that he was feeling poorly, but he was still unaware that he had been stabbed. Because he was warm and nauseous, West encouraged him to sit in front of the air conditioning unit on the first floor. While sitting in a recliner in the living room, Appellant lifted his shirt due to chest pain and discovered the bleeding wound in his chest for the first time.

{¶28} Dizzied by his discovery, Chambers slid down the recliner into a state of unconsciousness. Burgess immediately called emergency services. When emergency

services personnel asked Burgess to describe the events leading to the telephone call, she responded that she was not aware of the events that had transpired.

{¶29} When emergency services arrived, Chambers was across the room from the recliner, as West and Henderson had unsuccessfully attempted to remove Chambers from the residence to avoid responsibility for his injuries. Chambers' blood contained methamphetamine, fentanyl, and alcohol, although he denied any fentanyl use.

{¶30} Prior to transporting Chambers to the hospital, Sergeant Sylvis emptied Chambers' pants pockets. Sylvis found illegal drugs, a drug scale, and brass knuckles.

{¶31} West initially denied knowledge of Appellant's identity. However, when Sergeant Sylvis returned to the scene of the crime with news that Chambers suffered a near-fatal injury, he reminded West and Henderson that they could be charged with the crime of obstructing justice should law enforcement later discover that they knew the man responsible for Chambers' injuries.

{¶32} West ultimately identified Appellant. She warranted that she did not see the knife in Appellant's hand when he struck the single blow to Chambers' chest. It was only later when she accompanied Appellant out of the residence that she saw his knife in his hand. She further stated that Appellant told her that he had inadvertently left the knife sheath somewhere in the residence.

{¶33} At trial, West denied seeing Appellant's knife in his hand at any point during or after the altercation, contrary to her statement to law enforcement immediately following the confrontation. However, she conceded that Appellant regularly carried a knife either in his waistband or sock. She further conceded that he kept the knife in a sheath. West struggled to reconcile her trial testimony with her statement to Sergeant Sylvis at the scene.

{¶34} According to Chambers' testimony[1], a disagreement occurred in Appellant's automobile on the way home to Bridgeport because "some things come up missing out of [Appellant's] vehicle that was mine." (*Id.*, p. 343.) Chambers continued, "[a]fter we got

[1]Chambers testified he was gainfully employed and affianced to Burgess on the day he testified. However, Burgess testified the couple had been engaged since December 24, 2019 after meeting in August of that same year.

out [of the automobile], I mean, that's when he got out a baseball bat and everybody yelled ["]stop[,"] and then he got in the vehicle and drove off [sic]." (*Id.*, p. 345.)

{¶35} Sunday morning, Burgess cooked a large breakfast, after which she and Chambers returned to her second-floor bedroom to sleep. Chambers was awakened by a yelp from Burgess' dog. As Chambers awoke, he saw Appellant and Burgess descending the stairs. After he regained full consciousness, he likewise descended the stairs and went room by room looking for Burgess. When he saw that the doors to the first-floor bedroom were closed, he assumed that Appellant and Burgess were there.

{¶36} Chambers testified that he heard Appellant yelling in the first-floor bedroom. Chambers conceded that he was "pretty upset" that Appellant and Burgess were in the bedroom, and he "yelled some stuff because [he] could hear [Appellant] yelling." (*Id.*, p. 350.) Chambers could not recall what he said.

{¶37} With that, Chambers (inexplicably) turned to go back up the stairs. While he moved from the landing to the second or third step, Appellant emerged from the first-floor bedroom "growling" and "looking all crazy." Appellant ran at Chambers, knocked him to the floor, then kicked him. Chambers testified, "[r]eally, I [do not] think there was any punches thrown at all, because he just come straight out and it was just like, you know, I felt my chest and I couldn't breathe and that's when I went down covered up [sic]." (*Id.*, p. 352.)

{¶38} According to Chambers, he was unaware that he had been stabbed until he was sitting in the living room and West observed, "[a]t least [Appellant did not] get you with his knife." As a consequence of West's observation, Chambers lifted his shirt for the first time and discovered the stab wound.

{¶39} According to Burgess' testimony, Chambers joined her at 6 Patterson Road in an effort to reconcile. Burgess conceded that the group attended a party in Big Wheeling Creek and that there was a "verbal altercation" in the automobile between Appellant and Chambers. Burgess testified that Appellant retrieved a hammer or tire iron from the vehicle, but West dissuaded him from brawling on the side of the road. Instead, Appellant asked Burgess to exit the automobile and left Chambers and Burgess on the side of the road.

{¶40} Burgess conceded that she and Chambers were engaged in a verbal altercation in the automobile. She further conceded that Chambers shouted the word "bitch" at some point, but she was not certain whether the pejorative was directed at her or Appellant.

{¶41} Burgess testified Appellant unexpectedly appeared in the doorway of her bedroom the following day. She denied having ever confided to Appellant any stories of Chambers' abusive behavior. Burgess testified that Appellant made a threatening gesture toward Chambers, who was sleeping beside her, but she convinced Appellant to forego any conflict.

{¶42} In response, Appellant said "come with me," so Burgess followed him. Burgess indicated that she was afraid of Appellant, and successfully avoided entering the other second-floor bedroom with him by telling him that the empty room was occupied. Next, Appellant "ordered [Burgess] down the steps." (*Id*., p. 507.) As they descended the stairs, Appellant inadvertently stepped on Burgess' pit bull, whose yelp woke Appellant.

{¶43} Appellant and Burgess entered the first-floor bedroom, where West and Henderson were sitting. Appellant shut the double doors behind them. Roughly thirty seconds to a minute later, Chambers descended the stairs. In the meantime, Appellant began yelling at Burgess. She could not recall the content of his harangue, but for the phrase "low life bottom feeders." Further, Burgess testified that Appellant gave her an "ultimatum," which she likewise could not recall. Burgess was "extremely nervous," so she put her hands over her ears.

{¶44} Next, Burgess heard Chambers begin to yell, but she was unable to understand what he was saying. Appellant opened one of the double doors and exited the bedroom. Burgess remained in the bedroom with her hands over her ears. She watched Appellant move toward the staircase, but she could not see Chambers from her vantage point through the single open door. Burgess heard an altercation, but she was crying and "shooken up [sic]." (*Id.* p. 514.)

{¶45} According to Burgess' testimony, West summoned her to the living room saying "Barb, he's down." Burgess "jumped up and out the left door" into the living room, where she witnessed Appellant kicking Chambers in the head, "three to four" times, while

Chambers was kneeling on all fours on the floor. (*Id.* p. 515-516.) Burgess did not see a knife in Appellant's hands. (*Id.* p. 517.)

{¶46} After Appellant left the scene, Burgess attempted to tend to Chambers' injuries but he angrily returned to the second-floor bedroom. She followed him to the second-floor bedroom, but he reproached her and told her that he was not interested in her company.

{¶47} Burgess denied having flirted with Appellant at the party, but claimed that Chambers "kind of thinks that sometimes, when [ ] he's under the influence of drugs." (*Id.* p. 519.) Burgess testified that it was West who flirted with Appellant at the restaurant on Wednesday, and Burgess had assumed that West was interested in a romantic relationship with Appellant.

{¶48} After Burgess convinced West to assess Chambers' condition, Chambers descended the stairs and sat in a recliner. It was there his injury was discovered.

{¶49} Sergeant Sylvis' body camera footage, which depicted the scene of the crime, was published by the state at trial. Prior to the arrival of emergency services, Sergeant Sylvis emptied Chambers' pants pockets, evidently looking for illegal drugs. Sergeant Sylvis explained to Chambers, as he was emptying Chambers' pockets, that it was essential for Chambers to confess any recent illegal drug use, as it would have a direct and potentially lethal impact on his medical treatment. In addition to yielding drugs and drug paraphernalia, Sergeant Sylvis' search of Chambers' pants pockets yielded brass knuckles.

{¶50} At the conclusion of the video, defense counsel objected to its introduction. Defense counsel stated, "I just want to enter an objection. We have not seen that. We requested that [in] discovery. It has not been provided to us. We have not seen it." (*Id.* at p. 396.)

{¶51} The state responded that the video was provided through the "matrix" as a part of the state's original discovery response. The state represented that defense counsel had experienced difficulty accessing the matrix through the pretrial period, but that the video was made available. The trial court overruled defense counsel's objection.

{¶52} At the conclusion of the state's case-in-chief in the afternoon of the second day of the trial, the trial court inquired about the number of potential defense witnesses:

THE COURT: All right. [Defense counsel], then, you're ready to call a witness?

DEFENSE COUNSEL: Derek Vargo.

THE COURT: Do you think there will be just one, or do you know? I am not going to hold you to it.

DEFENSE COUNSEL: Just one.

THE COURT: So then we would wrap up your case today? We could start closing and instructions tomorrow?

DEFENSE COUNSEL: Oh, can we let you know, Judge, after Mr. Vargo testifies?

THE COURT: That's fine. That's fine.

(Trial Tr., p. 611.)

{¶53} The following colloquy occurred after Vargo concluded his testimony:

THE COURT: Be seated, please. All right. [Defense counsel] before the jury is here, have you made a decision about any other witnesses?

DEFENSE COUNSEL: Judge, really would ask the Court to allow us to think about this and make that decision in the morning.

THE COURT: It's denied. Are you going to call any other witnesses?

DEFENSE COUNSEL: No.

THE COURT: It's four minutes after 4:00.

DEFENSE COUNSEL: No.

THE COURT: All right. So you're prepared to rest?

DEFENSE COUNSEL: No, I'm not prepared to rest. I believe we're being forced into making a decision. We've asked for some time to make it, and the Court has denied that.

THE COURT: That's correct. Are you resting your case?

DEFENSE COUNSEL: Then I have nothing further to say, Judge.

THE COURT: Are you resting your case?

DEFENSE COUNSEL: No.

THE COURT: All right. Well, the Court is going to find that you have rested your case unless you want me to call the jury in and ask you in front of them whether you're calling any other witnesses. It's up to you. I'll do it that way if you want.

DEFENSE COUNSEL: You can find that defense is resting its case if that's what you want to do, Judge.

THE COURT: Okay. You're not -- you don't want to renew your earlier motion, Rule 29?

DEFENSE COUNSEL: I'm sorry, Judge?

THE COURT: Did you want to renew your earlier Rule 29 motion?

DEFENSE COUNSEL: Just a minute, Judge.

(DEFENSE COUNSEL CONFERS WITH THE DEFENDANT OFF THE RECORD)

DEFENSE COUNSEL: I call Josh Snider to the stand, Judge.

THE COURT: Okay. Well, let's wait until we get the jury in. He does understand -- wait. He is raising his hand. Yes, sir?

THE DEFENDANT: Any way I can use the restroom first? I got -- I have diabetes. I'm not trying to take too much of the Court's time.

THE COURT: All the jurors in the room, Mr. Gossett?

MR. GOSSETT: They were, Judge. Let me make sure.

THE COURT: While we're on the record, [defense counsel], waiting, does your client understand he is subject to cross-examination if he testifies about anything the State wants to ask him about?

DEFENSE COUNSEL: He understands. He is unable to make a decision right now. We have asked the Court --

THE COURT: He just said he wants to testify. You've called him. I asked you a question. It was pretty simple.

DEFENSE COUNSEL: What I'd like to do is make the decision in the morning, Judge.

THE COURT: No. We are going to make the decision now. This case has been going on for a long time. We're in the second day of the trial.

DEFENSE COUNSEL: That is not my fault, Judge.

THE COURT: I didn't say -- well, it is partly, based on the examinations and such that you asked for, but that's not the point. The point is --

DEFENSE COUNSEL: -- Judge.

THE COURT: -- is he going to testify?

DEFENSE COUNSEL: I'd like to make that decision in the morning, Judge.

THE COURT: I've denied that request twice now. It's not going to change my mind. All the jurors out of the hallway?

MR. GOSSET: They are.

THE COURT: All right. You can escort him, deputies. Now, when he comes back, he can take the -- well, we'll call the jury in and then he can take the stand.

THE STATE: Judge, while we have a moment, does the Court have or anticipate having a draft of the jury instructions around? There were certain issues the Court wanted to address prior to that. Did you want us to address those prior to producing the draft or are we going to view that tomorrow morning?

THE COURT: There won't be a draft until tomorrow.

THE STATE: All right.

THE COURT: Has counsel thought about how long they want for closing arguments?

THE STATE: I'll take a half hour, Your Honor. Half hour.

THE COURT: Court thinks 20 minutes is proper, but you're asking for a half hour?

THE STATE: Yes, sir.

THE COURT: [Defense counsel]?

DEFENSE COUNSEL: The same.

THE COURT: I'm sorry?

DEFENSE COUNSEL: The same.

THE COURT: State want to split that time?

THE STATE: Yes, Your Honor 20 and 10.

THE COURT: Are we ready for you to call your next witness, [defense counsel]? And again, just so your client is aware, he is subject to cross-examination. You're giving up your right to remain silent. The State will be able to cross-examine you about anything that it believes relevant.

DEFENSE COUNSEL: We rest, Judge.

THE COURT: You didn't have any exhibits, did you?

DEFENSE COUNSEL: No.

THE COURT: All right. All right. Mr. Gossett, if you'd call the jurors in -- oh, wait. I'm sorry. My proposal would be that I'll have them come in tomorrow at -- let's make it 9:15. I'd like counsel, however, at 8:30. I will do the best I can to have a copy – a draft copy of the charge for you at that point in time. While we are talking about this, before we bring them in, again, I have a different reading of burden of proof on self-defense, [defense counsel], than what you had suggested. Under the newer Ohio law, I think the burden shifts over to the State. In other words, you don't have to prove affirmative defense. That is self-defense, I should say. By a preponderance, the State has to essentially disprove beyond a reasonable doubt the elements that the legislature has cited.

THE STATE: Your Honor, I agree with that to the extent that the Court is going to give the self-defense instruction in the first place. I think the Court has to make that determination as to whether or not sufficient evidence has been presented and, if the Court does find that, then I agree with you, it's up to the State to rebut that.

THE COURT: All right. Okay. Well, let's talk about the self-defense defense. The Court has tried to hash this out as I've listened to the testimony, and if the jury would believe Ms. West's testimony, it would appear to the Court, then, that the actual physical confrontation may have been initiated by Mr.

> Chambers striking Mr. Snider. Which I think, then, at least gets us to the threshold that it could possibly be a self-defense case.
>
> THE STATE: Understood.
>
> THE COURT: Or that that would be an available defense. I don't believe -- and you guys can think about this overnight and argue it in the morning if you wish; I don't think there's been any evidence whatsoever about the defense of necessity, so that's my initial thinking on those two points. But let's call the jury in. I will tell them where we are, excuse them, and then tell them what we are going to do tomorrow.
>
> (WHEREUPON, THE JURY WAS BROUGHT INTO OPEN COURT AND THE PROCEEDINGS CONTINUED AS FOLLOWS:)
>
> THE COURT: Be seated, please. Okay. I'll update you again, ladies and gentlemen. The defense has decided to rest its case. There were no exhibits offered by the defense. What that all means -- and [the state] is not going to present any rebuttal testimony to the testimony by the only defense witness, Mr. Vargo. So what that all means is the evidence is now closed.

(Trial Tr., p. 630-638.)

{¶54} The following day, defense counsel informed the trial court of Appellant's desire to testify. The trial court responded, "No basis as to why he changed his mind? Overruled." (*Id.*, p. 563.)

{¶55} Defense counsel explained that Appellant had left several messages for defense counsel at or around 9:00 p.m. the previous evening, but defense counsel was asleep. Defense counsel spoke with Appellant at 6:00 a.m. the following morning and Appellant expressed his desire to testify. Defense counsel explained:

> I discussed the situation with him after we both had some rest and could look at the implications, discuss the law, discuss where we are in the case.

> And it's my belief, based on the conversation I had with him, that he wants to take the stand in his own defense.

{¶56} However, the trial court responded, "he waived those rights yesterday. You have offered nothing to indicate today any change in circumstances that would justify – any sufficient change in circumstances that would justify this Court's changing its decision." (*Id.*, p. 654.) The trial court opined that reopening the case would be prejudicial to the state. The trial court observed, "Well, you rested, sir; you waived his right. You said that yesterday." Defense counsel responded, "You found that we rested. Judge." The trial court replied, "[w]e're done." (*Id.*, p. 655.)

{¶57} Further, defense counsel asked the trial court for the opportunity to proffer Appellant's proposed testimony, and the state did not object, but the trial court overruled defense counsel's request:

> DEFENSE COUNSEL: Your Honor I, would like to proffer what I believe the testimony of [Appellant] would be if allowed to testify, for the record.
>
> THE COURT: [Counsel for the state]?
>
> THE STATE: No objection, Your Honor.
>
> THE COURT: All right. The request is overruled.
>
> DEFENSE COUNSEL: Thank you, Judge.
>
> THE COURT: You're welcome.

(*Id.*)

{¶58} Relevant to this appeal, the relationship between the trial court and defense counsel had a rocky start and degenerated over the course of the two-day trial. Defense counsel, who lives in Columbus, Ohio, was an hour and ten minutes late on the first day of trial. No explanation was given on the record. The trial court forewarned defense counsel at the end of the first day that he would spend one day in jail for each minute he was late on the following day.

{¶59} Throughout the trial, the trial court frequently admonished defense counsel for various perceived errors, for instance, giving his opinion of the facts. During re-direct examination, defense counsel engaged in an ill-advised effort to characterize West's concession at the scene that she saw Appellant holding his knife as sarcasm. The trial court granted the state's objection, finding that defense counsel was leading the witness. On another occasion, the trial court both suggested then granted a motion to strike a portion of West's testimony that the trial court deemed non-responsive.

{¶60} Most notably, at the conclusion of West's testimony, which was taken out of order due to her unavailability on the second day of trial, the trial court cautioned defense counsel:

> You will not vouch for the credibility of your witnesses. I've already told the jury they can believe or disbelieve whatever they hear on the stand. Secondly, you came very close to crossing the line, if you did not do so in your opening statement, that [Appellant is] going to testify. Because you said that he would say this or he would do that. You came very close to, again, indicating that he would testify. I just want you to be aware of that's what my notes from the record say.

(Trial Tr., p. 337.)

{¶61} To the contrary, defense counsel did not imply that Appellant was going to testify in his opening statement or in his direct examination of West. In his opening statement, defense counsel did forecast the testimony of West, Chambers, and Burgess, however he never mentioned Appellant's intention to testify or divulged the substance of Appellant's potential testimony.

{¶62} Following the trial but prior to sentencing, defense counsel filed an affidavit of disqualification with the Ohio Supreme Court, alleging trial court bias, citing the day-of-jail-per-minute admonishment on April 12, 2022 as antagonistic and racially-motivated. However, the affidavit was dismissed by the Ohio Supreme Court as untimely.

{¶63} At the sentencing hearing conducted on May 2, 2022, the trial court merged Appellant's attempted murder and felonious assault convictions and sentenced Appellant

to a minimum term of eleven years and a maximum term of sixteen-and-a-half years on the attempted murder conviction. The trial court imposed a 36-month sentence on the failure to comply conviction and a twelve-month sentence on the vandalism conviction. All sentences were imposed to be served consecutively for an aggregate minimum term of fifteen years and an aggregate maximum term of twenty-and-a-half years. Restitution in the amount of $750 was ordered.

{¶64} This timely appeal followed.

ANALYSIS

ASSIGNMENT OF ERROR NO. 1

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ALLOW THE DEFENDANT TO TESTIFY, AND IN FURTHER DEROGATION OF HIS CONSTITUTIONAL RIGHTS, DID NOT ALLOW COUNSEL AND DEFENDANT SUFFICIENT TIME TO EVALUATE THE EVIDENCE, INCORRECTLY RULED THAT DEFENDANT HAD WAIVED HIS RIGHT TO TESTIFY, AND REFUSED TO EVEN LISTEN TO DEFENDANT'S OFFER OF PROOF.

{¶65} A defendant in a criminal case has the due process right to take the witness stand and to testify in his or her own defense. *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). The right to testify and to present a complete defense may also implicate the Confrontation Clause of the Sixth Amendment. See *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636, 645 (1986). The United States Supreme Court has recognized the defendant's right to testify as an important tactical decision protected by the Constitution. *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972).

{¶66} However, a defendant's right to testify is not without limitation and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. One such interest is the trial court's authority to exercise reasonable control over the mode and order of presenting evidence in order to ensure that the proceedings are

effective for the ascertainment of the truth. See Ohio Evid.R. 611(A)(1).[2] Thus, a trial court has discretion in ruling on a party's motion to reopen their case.

{¶67} The Eighth Circuit in *United States v. Jones*, 880 F.2d 55, 59-60 (8th Cir.1989) opined:

> The rule generally limiting testimony to the evidence-taking stage of trial does not unconstitutionally infringe upon a defendant's right to testify. While placing only a minor limitation on the right, the rule promotes both fairness and order in trials, interests which, of course, are crucial to the legitimacy of the trial process. In the interests of fairness and order, it simply imposes a commonsense requirement that the right to testify be exercised in a timely fashion. And consonant with the Supreme Court's admonition in *Rock*, the rule is not "arbitrary or disproportionate to the purposes [it is] designed to serve." *Rock*, 483 U.S. at 57, 107 S.Ct. at 2712.

{¶68} An abuse of discretion connotes more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). When applying this standard, an appellate court may not substitute its own discretion for that of the trial court. *Id.*

{¶69} With respect to the trial court's refusal to allow Appellant additional time to consider testifying on his own behalf at the conclusion of the second day of trial, the state argues that defendants who choose to testify as a matter of course are required to testify immediately following the previous defense witness. Therefore, the state reasons that the trial court did not abuse its discretion in declining to allow Appellant additional time to consider testifying on his own behalf. However, we find that the trial court's conduct on

[2] Ohio Evid.R. 611(A)(1) reads, in its entirety:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

the second day of trial must be considered in conjunction with its conduct on the third day of trial, as its conduct on day two had a direct impact on the trial court's refusal to reopen Appellant's case on day three.

{¶70} At the conclusion of the second day of trial, the trial court gave Appellant two options, to take the stand immediately or to put on the record his intention to testify the following day. The trial court provided no explanation for the ultimatum regarding Appellant's testimony, other than the fact that the trial had "been going on for a long time." The trial court also blamed defense counsel for the length of the trial, at least partly, "based on the examinations and such [for which defense counsel] asked."

{¶71} During voir dire, the trial court asked prospective jurors if "two days of service [would] make [their] service impossible." (Trial Tr., p. 15.) However, Appellant requested additional time to consider testifying on his own behalf at 4:00 p.m., therefore Appellant's request would not have required a recess or any use of the jury's time, and the trial would have continued for a third day regardless of Appellant's request.

{¶72} Based on the trial court's ultimatum, Appellant expressed his desire to testify, then just as hastily changed his mind and rested his case. Appellant's knee-jerk decision to rest appears to have been motivated by the trial court's admonition that Appellant's previous conviction for a drug offense would be admitted into evidence should he testify. Given the opportunity to confer with counsel, Appellant would have realized that all three of the witnesses who were present when the altercation occurred conceded they were abusing illicit drugs on the weekend in question.

{¶73} At the beginning of day three, defense counsel explained Appellant had decided he wanted to testify. The trial court overruled Appellant's motion because there had been no change of circumstances. However, there is no law in Ohio requiring a change of circumstances where Appellant first chooses to remain silent, then decides to exercise his right to testify on his own behalf. Finally, the trial court refused to accept an unopposed proffer of Appellant's proposed testimony.

{¶74} Having reviewed the record, we find that the trial court acted unreasonably and arbitrarily, first in refusing to allow a reasonable opportunity for Appellant to consider testifying on his own behalf, and second in denying his motion to reopen his case without citing any other legitimate interest that superseded Appellant's right to testify. First, the

trial court, without good cause, presented Appellant with a Hobson's choice, that is, no choice at all, regarding his prospective testimony. The following morning, the trial court refused to permit Appellant to testify in the absence of a change in circumstances. Finally, the trial court impeded Appellant's ability to challenge its decisions on appeal by prohibiting Appellant from proffering his testimony. The trial court's conduct is particularly concerning based on the evidence offered at trial, as there is no clear narrative of the events preceding Chambers' injuries and conflicting evidence regarding self-defense. Further, we disagree with the state's argument that Appellant suffered no prejudice as his version of the events was entered into evidence by proxy through West.

{¶75} For the foregoing reasons, we find the trial court abused its discretion when it refused to reopen Appellant's case on the third day of trial. Accordingly, Appellant's first assignment of error is meritorious.

ASSIGNMENT OF ERROR NO. 2

THE COURT COMMITTED REVERSIBLE ERROR BY NOT SANCTIONING THE PROSECUTION AND ORDERING RESPONSIVE PENALTIES, SUCH AS EXCLUDING THE USE OF CERTAIN VIDEO RECORDINGS NOT PROVIDED TO THE DEFENDANT IN ADVANCE OF TRIAL, WHICH VIOLATED THE DICTATES OF AN ORDER TO COMPEL THE EVIDENCE AND VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS AS PER *BRADY V. MARYLAND* AND ALSO DEPRIVED THE DEFENDANT OF THE USE OF THIS VITAL EVIDENCE BEFORE TRIAL FOR EXAMINATION OF QUALITY, ACCURACY, TRIAL PREPARATION AND OTHER ALLOWABLE PURPOSES TO ENSURE A FAIR TRIAL.

{¶76} Because we have sustained Appellant's first assignment of error, his second assignment of error is moot.

CONCLUSION

{¶77} For the foregoing reasons, Appellant's attempted murder and felonious assault convictions and corresponding sentence are vacated and this matter is remanded

to the trial court for further proceedings, with instructions that the administrative judge assign the case to a different judge.

Robb, J., concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, we hereby vacate Appellant's attempted murder and felonious assault convictions and sentence and remand this matter to the Court of Common Pleas of Belmont County, Ohio for further proceedings with the instruction that the administrative judge assign this case to a different judge. 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.