[Cite as *State v. Wainwright*, 2023-Ohio-2292.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	No. 111725
v.	:	
MACKENZIE WAINWRIGHT,	:	
Defendant-Appellee.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED, VACATED, AND REMANDED
RELEASED AND JOURNALIZED: July 6, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-20-653709-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kerry A. Sowul, Assistant Prosecuting Attorney, *for appellee*.

Cullen Sweeney, Cuyahoga County Public Defender, and Erika B. Cunliffe, Assistant Public Defender, *for appellant*.

MARY EILEEN KILBANE, P.J.:

{¶ 1} Defendant-appellant Mackenzie Wainwright ("Wainwright") appeals from his conviction for a single count of gross sexual imposition, raising seven

assignments of error for our review. After careful review of the record and relevant case law, we reverse, vacate, and remand for a new trial.

Factual and Procedural History

{¶ 2} On November 30, 2020, a Cuyahoga County Grand Jury indicted Wainwright on two counts of rape in violation of R.C. 2907.02(A)(2) and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(1). Count 1 referred to rape in the form of digital penetration; Count 2 referred to rape in the form of fellatio; Count 3 referred to gross sexual imposition in the form of "touching of penis"; and Count 4 referred to gross sexual imposition in the form of kissing of breasts. Wainwright initially pleaded not guilty to the indictment.

{¶ 3} On May 9, 2022, the case proceeded to a jury trial.

{¶ 4} The state called R.D., the alleged victim, as its first witness. Before the state began its direct examination of R.D., defense counsel asked the court if it would permit R.D. to remove her mask in the following exchange:

> DEFENSE COUNSEL: Judge, would you permit the witness to remove her mask?
>
> THE COURT: It's up to her.
>
> DEFENSE COUNSEL The jury may want to evaluate demeanor, frankness.
>
> THE COURT: There is a pandemic, and people have different experiences as a result, and I don't know if she's been vaccinated or not. I don't know what her exposure would be.
>
> DEFENSE COUNSEL: I can't control your protocols. I know Mackenzie here is the only person with a constitutional right, no one else. That would be my request.

> THE COURT: His constitutional rights are not being denied. He's here. She's here. He has a right to hear what she says. If you want to ask her during your cross to remove it, that will be fine. Ask her and see what she says.
>
> DEFENSE COUNSEL: Okay.
>
> THE COURT: If she says she has a medical reason that she doesn't, we'll handle it at that time.

At the beginning of defense counsel's cross-examination of R.D., counsel asked her if she would mind removing her mask, and she stated that she was not comfortable doing so because she was recovering from a cold.

{¶ 5} R.D. testified that she was 19 years old at the time of trial and that, in the summer of 2020, between her junior and senior years of high school when she was 17 years old, she was living in Wickliffe, Ohio with her mother and her brothers. During her direct examination, in response to an inquiry from the assistant prosecuting attorney, R.D. testified that on July 1, 2020, she had a labiaplasty — a procedure in which excess skin from the labia is removed — at Hillcrest Hospital. The state asked R.D. why she had a labiaplasty, and she responded "I wanted it."

{¶ 6} R.D. testified that she had been using Instagram for about five years. R.D. testified that at some point, she accepted a request from Wainwright to follow her on Instagram. Subsequently, R.D. posted a photo of herself on her Instagram account and Wainwright sent her a direct message ("DM") in response to the photo. According to R.D., she did not know Wainwright at the time, they had no friends in common, and she could not remember when she accepted his follower request on Instagram, but she believed the first time he sent her a DM was in June 2020, telling

her that she was cute. R.D. testified that Wainwright sent a DM in response to a different post on August 23, 2020, again telling her she was cute, and she responded "Aww, thanks." According to R.D., this was the first time she had responded to Wainwright.

{¶ 7} R.D. testified that the conversation continued, with Wainwright asking her for her name and how old she was. At the time, R.D. was 17 years old and she responded as such to Wainwright. Wainwright had just recently turned 18. R.D. and Wainwright subsequently exchanged phone numbers and began communicating through text messages and FaceTime video chats over the next several days. The state introduced approximately 50 pages of text messages between R.D. and Wainwright over the course of several days, and R.D. testified that they "FaceTimed" regularly. R.D. and Wainwright repeatedly discussed meeting up in person.

{¶ 8} R.D. testified that on August 27, 2020, she and Wainwright agreed to meet at Legacy Village, a shopping center in Lyndhurst, Ohio. R.D. drove alone to Legacy Village in her car, a gray 2006 Honda Civic, shortly before 8 p.m. R.D. testified that Wainwright called her and told her that he was parked near Dick's Sporting Goods. R.D. parked near Wainwright's car, a black Alfa Romeo. Wainwright got into R.D.'s car, and they began chatting for several minutes. Wainwright received a phone call that his takeout food order was ready from a restaurant in another area of Legacy Village, so he got back into his car to drive to pick up his food. Several minutes later, Wainwright returned with his food to the

area where R.D. had parked and took a phone call from his father. R.D. testified that after ending the phone call, Wainwright got back into her car and asked her for a kiss. R.D. testified that she said no because she "was not interested in him like that." R.D. testified that Wainwright did not take no for an answer and choked her and leaned in for a kiss. R.D. testified that at first Wainwright had his hands around her neck in "just a slight little choke" but when she attempted to push him away, he got more aggressive and applied more pressure until they kissed again.

{¶ 9} R.D. testified that after the second kiss, Wainwright began to eat his food, while she played on her phone and the two engaged in small talk. R.D. testified that when Wainwright finished eating, he "leaned [her] back" by "lightly" pushing her back with his hand on her chest and "went in for another kiss"; when she again attempted to push him away, he began choking her. R.D. testified that Wainwright pulled up her shirt and started to suck and bite her chest. R.D. testified that she continued to try to push him off, but he continued, eventually digitally penetrating her. While R.D. did not specify which hand Wainwright used during her trial testimony, her statements throughout the investigation provided contradictory accounts. At one point, R.D. claimed that Wainwright penetrated her with one hand because his other hand was injured; at another point, she claimed that the penetration caused her pain because he had used his injured, stitched finger to penetrate her. R.D. testified that she began to scream in pain because she was still recovering from her labiaplasty surgery a month earlier. R.D. testified that Wainwright then grabbed her head with one hand and took his penis out of his pants

with his other hand, ultimately pushing her head into his groin and forcing her to perform fellatio until he ejaculated. R.D. testified that she spit into a tissue. R.D. also testified that at some point during her encounter with Wainwright, a Legacy Village security officer drove by her car but did not stop. R.D. initially told the police that the officer passed in front of her vehicle; at trial, she testified that the officer passed behind her car and she screamed for help out of her car's open window, but the officer did not stop.

{¶ 10} R.D. testified that she was in pain, holding back tears, and ready to go home at that point. According to R.D., Wainwright shook her hand and said that he would call her later, and got back into his car and drove away. R.D. testified that immediately after he left the parking lot, Wainwright blocked her on social media; she testified that she discovered this when she went to his Instagram profile immediately after the encounter. R.D. also testified that because her text messages to Wainwright were green instead of blue, she could tell that he had blocked her phone number. R.D. testified that after she realized Wainwright had blocked her, she drove away and immediately called her mother on the way home to tell her what had happened. When R.D. arrived home, she and her mother immediately went to the Lyndhurst police station to make a report about what had just happened.

{¶ 11} The state also called R.D.'s mother, L.D., to testify as a witness. L.D. testified that on the evening of August 27, 2020, R.D. called her hysterically screaming "he touched me." L.D. testified that she knew that R.D. had gone on a date with a young man at Legacy Village, so she assumed that was to whom R.D. was

referring. L.D. testified that when R.D. got home, her daughter was frantic, crying, and shaking and told her that Wainwright had forced her to touch his penis. L.D. testified that she took her daughter to the Lyndhurst police station to make a report.

{¶ 12} The state called Lyndhurst police officer Brian Brooks ("Brooks") as a witness. Brooks testified that R.D. and her mother came to the police station on August 27, 2020, to make a report. Brooks testified that R.D. appeared upset as she recounted the incident. He testified that he collected tissues from her vehicle as evidence, and he also testified that he photographed her neck. The photographs do not show any marks or bruising, and nothing in the record suggests that bruising appeared later following the incident. Brooks testified that after interviewing R.D., he escorted her and her mother to Hillcrest Hospital, where R.D. was seen by a sexual assault nurse examiner ("SANE nurse"). Brooks subsequently contacted Legacy Village security to obtain security footage from the parking lot.

{¶ 13} During the defense's initial cross-examination of Brooks, the following exchange took place:

> DEFENSE COUNSEL: Did you, in preparation for your testimony, review the report that you referred to today?
>
> BROOKS: Yes.
>
> DEFENSE COUNSEL: Did you watch your body worn camera that you utilized the night of August 27, 2020?
>
> BROOKS: I did not.
>
> * * *
>
> DEFENSE COUNSEL: You did not review a video camera? If I ask you some questions about the conversation you had with the accuser in this

matter, do you want to refresh your memory because you didn't review it in preparation for your testimony? I'm happy to have you do that if you let me know, it will help you refresh your memory. Fair?

BROOKS: Fair.

DEFENSE COUNSEL: If I ask you a question and you recall that conversation, or that part of the conversation, and you say no, I do recall that, then we won't have to do that; is that fair?

BROOKS: Fair.

* * *

DEFENSE COUNSEL: So the first thing I heard you say about that meeting was that she was upset. Where on that body-worn camera during the course of that conversation did you see her upset?

BROOKS: Just in her tone and demeanor.

DEFENSE COUNSEL: Her tone and demeanor. Would you like to review your body-worn camera to refresh your memory, Officer?

BROOKS: Sure.

The state objected to the use of the body-camera footage to refresh Brooks's recollection, and the court initially overruled the objection. When the assistant prosecuting attorney asked the court if the video would be played outside the presence of the jury, the court reversed its ruling and sustained the state's objection without explanation. The court went on to decline counsel's repeated requests to use Brooks's body-camera footage to refresh his recollection of the interview with R.D.

{¶ 14} The state also called Gabrielle Anderson ("Anderson"), a forensic nurse with the Cleveland Clinic. Anderson testified that she was working at Hillcrest

Hospital in the early morning hours of August 28, 2020, and completed a rape kit collection and sexual-assault examination of R.D. Anderson testified as to how R.D. presented, physically and emotionally, and the examination that was done.

{¶ 15} During Anderson's direct examination, the following exchange took place:

> ASSISTANT PROSECUTING ATTORNEY ("APA"): Head or scalp?
>
> ANDERSON: No injuries noted.
>
> APA: Neck, under — neck, slash under chin?
>
> ANDERSON: So like down here and things, I did not notice any injury.
>
> * * *
>
> APA: When you're marking like no injury noted —
>
> ANDERSON: Uh-huh.
>
> APA: — based upon what you're hearing, are you surprised?
>
> ANDERSON: No.
>
> APA: Why not?
>
> ANDERSON: Because the majority of patient[s] that we see, if they're strangled, don't necessarily have injury.

Defense counsel objected, and the trial court overruled the objection.

{¶ 16} Later on in direct examination, when Anderson was testifying as to where she collected DNA swabs during R.D.'s examination, the following exchange occurred:

> APA: And then you have the head and neck?
>
> ANDERSON: Yes. I said no visible injury noted, and I obtained two dried stain swabs from her neck where she states the assailant choked

her. She did disclose pain. She disclosed neck tenderness while I was examining her.

APA: And you noted no visible injury?

ANDERSON: Yes.

APA: Were you surprised?

ANDERSON: No.

APA: Why not?

ANDERSON: Because the majority of patient the [sic] that I have seen that have been strangled did not have injury.

APA: Are you familiar with bruising?

ANDERSON: Yes.

APA: Does bruising occur right away?

ANDERSON: Not necessarily.

APA: Could it take days for bruising to appear?

ANDERSON: Yes. We, in fact, tell our patients specifically that have gone through strangulation and or some sort of domestic violence with any physical blows that bruising may show up a few days later and to follow up with law enforcement agency.

The same point was reiterated a third time at the end of Anderson's direct examination:

APA: Okay. And then you ask — there's a notation on here if any photos were taken?

ANDERSON: Yes, I did not take any photos.

APA: And why did you not take any photos?

ANDERSON: Because I didn't see any visible injury.

APA: And was that odd to you?

ANDERSON: No.

APA: And why not?

ANDERSON: Because sexual assault, the majority of patients who are sexually assaulted do not have injuries, specifically if they're estrogenized females, and the majority of strangulation cases I have seen, the patient does not have injury.

{¶ 17} Anderson testified as to the version of events that R.D. relayed to her during the examination. Anderson testified that R.D. told her that Wainwright had ejaculated in her hand; R.D. did not mention Wainwright ejaculating in her mouth at any point.

{¶ 18} The state also called Hristina Lekova ("Lekova"), a forensic DNA analyst at the Cuyahoga County Medical Examiner's Office. Lekova testified that the tissue collected as part of R.D.'s rape kit contained seminal fluid from Wainwright. Lekova also testified that swabs taken from R.D.'s breasts and neck contained DNA from Wainwright. Lekova testified that no male DNA was detected in R.D.'s vaginal or anal swabs.

{¶ 19} The state called Kathryn Tomaro, a community relations liaison and school resources officer for the Lyndhurst Police Department. Tomaro testified that she has rape crisis training and works in the police department's victim assistance program in domestic violence, child abuse, and sexual assault cases. Tomaro testified that she got involved with R.D.'s case when Brooks reached out to her to assist, and they set up for Tomaro to speak with R.D. Tomaro testified that she spoke to R.D. and L.D. on September 1, 2020, with Detective Scott Gorski ("Gorski"). During this interview, R.D. prepared a written statement.

{¶ 20} In the middle of Tomaro's cross-examination, it was revealed that a significant portion of Tomaro's body-camera footage had not been turned over to defense counsel. This came up when defense counsel was cross-examining Tomaro, and she stated that there was additional newly found body-camera footage beyond what she had reviewed during her testimony. The assistant prosecuting attorney informed the court that they had not seen this footage before, and apparently the Lyndhurst Police Department failed to turn over the entirety of the body-camera footage to the Cuyahoga County Prosecutor's Office. Specifically, a 46-minute video of R.D.'s interview with Tomaro had not been turned over to defense counsel. The court recessed to allow defense counsel to view the body-camera footage. When the court reconvened, defense counsel addressed the court and, based on their brief initial review of the body-camera footage, pointed to numerous inconsistencies in R.D.'s statements in the footage compared to her previous trial testimony and other statements in the case. Defense counsel asked the court to declare a mistrial based on the discovery violation. The assistant prosecuting attorney replied that none of the things pointed out by defense counsel were material inconsistencies and that everything in the additional body-camera footage was already accurately summarized by Tomaro's written report of her interview with R.D. Additionally, the assistant prosecuting attorney asserted that allowing defense counsel time to review the video and to recall R.D. sufficiently cured the inadvertent discovery violation. Ultimately, the court denied Wainwright's motion for a mistrial and adjourned to

allow defense counsel additional time to review the video in advance of recalling R.D. as a witness the following day.

{¶ 21} The next day, defense counsel renewed its motion for mistrial. The court again denied this motion, and the following exchange was had with respect to how to proceed:

> THE COURT: Based upon this new interview, there were issues that [defense counsel] would have addressed differently, or he would have addressed. Now, he's telling me now that that's more than what he said yesterday.
>
> DEFENSE COUNSEL: There is, Judge. Frankly, we would have approached this case differently, in all fairness, to be direct about it. Mackenzie's the only person here with a constitutional right, and had we known that —
>
> THE COURT: No, everybody has a constitutional right to a fair trial.
>
> DEFENSE COUNSEL: As an individual.
>
> THE COURT: Everybody.
>
> DEFENSE COUNSEL: That's the individual. His constitutional. Theirs isn't.
>
> THE COURT: Everybody has a constitutional right to a fair trial.
>
> DEFENSE COUNSEL: That's not – that's not my point. I'll concede on that because it's not material to what I'm saying. Mackenzie Wainwright and his counsel would have approached our entire strategy differently. Our opening would have been different, our cross-examination –
>
> THE COURT: You want to make another opening statement?
>
> DEFENSE COUNSEL: I don't know how you would to that.
>
> THE COURT: I'll tell them that it's irregular, but in the interest of justice, you can do it.

DEFENSE COUNSEL: Well, Judge, that would be like putting toothpaste back in the tube.

THE COURT: You can't tell me that's what you want and when I give it to you, you say I don't want it.

DEFENSE COUNSEL: Well, the court's parsing, but I ultimately want to say, let me get right to it.

After we prepared this one night, after it's been available for 20 months, we learned that there's a paucity of information that we need to cross-examine this young woman with.

Had we known, we would have done it in an appropriate fashion, appropriate order. That's not our fault.

I'm not going to be shy about that. That's not our fault we didn't have the interview, so I don't know how much more we have to explain, or petition the Court for what he's entitled to by way of confrontation.

So I think — I think there were nine yesterday. Best we could do with the time that we had.

Now, we spent the evening, and I think we did a pretty good job here of dedicating ourselves over the evening to do something that we should have had the luxury of doing for 20 months* * *

THE COURT: Anything else? Are you guys going to tell me what your area of concern are now, or should I guess?

DEFENSE COUNSEL: There are one, two, three, four, * * * 37 areas of concern.

THE COURT: I see.

DEFENSE COUNSEL: And they're marked — they're time marked, as well.

THE COURT: Why don't you share them with me.

DEFENSE COUNSEL: Your Honor, I'd like to do that ex parte. I don't believe that's anything that is of the State's concern, frankly.

THE COURT: You want me to have an ex parte cross-examination with you?

DEFENSE COUNSEL: About my cross-examination, yes. They don't have access to my examination any other time.

THE COURT: You've indicated to the government that you — had you had this video, you would have — your entire approach would have been different, your questions would have been different, that your focus would have been different. And yet, now that we seek to remedy it, you want to make it impossible because you're looking for a mistrial, and so, therefore, you are making it impossible for us to remedy it.

DEFENSE COUNSEL: No, that's not my intention. We are working on the assumption that we're moving forward. We requested the mistrial. That was denied. Now that we're going forward —

THE COURT: Twice.

DEFENSE COUNSEL: Now that we're going forward, we're doing it in a way that guarantees his right of confrontation.

THE COURT: Okay. I don't have any problems with that, but I don't want to bring her back and make it a whole new — new trial solicitation.

DEFENSE COUNSEL: I can't help it.

THE COURT: And procedurally it's — she's the government's witness, so when she comes back, the government has the opportunity to direct her, and then you'll have the opportunity to cross her. Now, if there are areas of concern that you have, then if you share them with us, with — with everybody, then we can get to those areas without spending the day, you know, spinning our wheels.

DEFENSE COUNSEL: Well, I think she should be called as if on cross, frankly, because it's their doing.

THE COURT: They don't know that the tape existed, either.

DEFENSE COUNSEL: I can't help that. They're the State. I have nothing to do with that, Judge.

THE COURT: Okay.

DEFENSE COUNSEL: The bottom line is there's an obligation to have it for his constitutional right to a fair trial. He didn't get it. He didn't get a fair trial.

> THE COURT: I'm going to give him that. When she comes back, the government will lead her, and you'll have an opportunity to cross.
>
> DEFENSE COUNSEL: That's fine, that's fine.
>
> THE COURT: And since you won't share your list with me —
>
> DEFENSE COUNSEL: I'll do so ex parte.
>
> THE COURT: I'm not going to have an ex parte conversation with you about anything.
>
> DEFENSE COUNSEL: That's fair. I don't know what — what service I provide to my client in open court —
>
> THE COURT: Well, you know, you started out yesterday, and [your co-counsel] gave me a list. So now, in the middle of it, you stand up and you say, no, we're not going to give you a list.
>
> DEFENSE COUNSEL: Well, Judge, we were asked yesterday, and we were complying with the court under extraordinary circumstances, receiving something mid-trial. Now that we've had time to reflect and review, I don't think it's fair to hold our feet to the fire for something that existed for 20 months.

{¶ 22} Defense counsel subsequently resumed its cross-examination of Tomaro. Tomaro confirmed that R.D. had told her that prior to meeting Wainwright at Legacy Village, R.D. and Wainwright had conversations of a sexual nature. Tomaro also confirmed that this was not included in her report of her interview of R.D.

{¶ 23} Following Tomaro's testimony, R.D. was recalled as a witness. The court outlined the bounds of defense counsel's cross-examination of R.D. upon being recalled and stated that defense counsel would "probably" be limited to what the state covered on its direct examination during the recall and that, generally, defense counsel would be limited to discrepancies that had been revealed in the

body-camera footage that had not been turned over. When R.D. was recalled, the court contradicted its own guidance and appeared to confuse information that had been covered in R.D.'s initial testimony, her statements on the video, and her statements as summarized in Tomaro's report.

{¶ 24} The state conducted a brief direct examination of R.D., and defense counsel conducted a cross-examination. R.D. testified that at various points in their communications prior to meeting at Legacy Village, Wainwright had discussed things of a sexual nature with her, and R.D. would ignore him. R.D. maintained that she did not say anything sexual in nature to Wainwright, and she decided to meet up with him because she was bored. On cross-examination upon being recalled, much of R.D.'s testimony was that she did not remember her statements to Tomaro.

{¶ 25} Finally, the state called Lyndhurst police detective Scott Gorski as a witness. Gorski testified that he was assigned to this case several days after the August 27, 2020 incident. Gorski testified that as part of his investigation of the case, he conferred with the other people that were involved in the case, reviewed Brooks's report, and began gathering information. Gorski testified that he was present for part of Tomaro's interview with R.D. on September 1, 2020. Gorski testified that he reviewed the Legacy Village security footage obtained by Brooks; this footage was played in court and showed Wainwright's and R.D.'s respective vehicles arriving and leaving Legacy Village on August 27, 2020. The footage also showed Wainwright's vehicle drive from the location of R.D.'s parked car to the restaurant where he had ordered takeout food, and back to R.D.'s car. Gorski also

testified that he took buccal swabs from Wainwright as part of his investigation. Gorski testified that he asked R.D. to provide him with any communications she had had with Wainwright. He testified that R.D. provided him with copies of text messages between herself and Wainwright, and Gorski did not extract any data from R.D.'s phone or Wainwright's phone.

{¶ 26} At the close of the state's case, Wainwright made a Crim.R. 29 motion for acquittal. The court granted the motion with respect to Count 3, gross sexual imposition in the form of touching of penis, stating:

> I've listened carefully to the information that's been provided, and I have listened carefully to the testimony that's been offered.
>
> And I think that the rape and the fellatio and the gross sexual imposition in Count 3 are part of the same act.
>
> I'm going to grant the motion on the [sic] Count 3.

{¶ 27} Wainwright called George Shaw ("Shaw"), an emergency medicine physician, as a witness on his behalf.[1] After introductory testimony relating to Shaw's extensive credentials, the court, the assistant prosecuting attorney, and defense counsel engaged in an extensive conversation, outside of the presence of the jury, with respect to whether Shaw was qualified as an expert witness in the area of mechanism of injury. Ultimately, the court declined to recognize Shaw as an expert witness in the area of mechanism of injury, but recognized him as an expert witness in the area of emergency medicine.

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[1] Because Shaw traveled from Cincinnati to testify, the court permitted his testimony to occur out of order.

{¶ 28} Shaw testified that he reviewed R.D.'s medical records following the incident and determined that there were no physical findings consistent with her account of having been strangled numerous times by Wainwright.

{¶ 29} At the close of Wainwright's defense, having called only Shaw as a defense witness, defense counsel renewed its Crim.R. 29 motion. The court denied this motion. On May 18, 2022, the jury began deliberations.

{¶ 30} The following day, on May 19, 2022, the court received a note from the jury stating that it had reached an agreement with regard to two of the counts, but was unable to come to an agreement on the remaining count. The court instructed the jury to keep deliberating. Later that day, the jury returned a verdict of not guilty on both counts of rape and guilty on the remaining count of gross sexual imposition. The court referred Wainwright for a presentence investigation and report and remanded him to the county jail.

{¶ 31} At some point prior to Wainwright's sentencing hearing, the court received a victim impact statement from R.D. in which she requested that he be sentenced to three years of probation, receive counseling, and complete community service.

{¶ 32} On June 14, 2022, the court held a sentencing hearing. Wainwright, Wainwright's family pastor, defense counsel, the assistant prosecuting attorney, and R.D.'s victim advocate addressed the court. Defense counsel recommended that Wainwright be sentenced to probation. The victim requested that Wainwright be

sentenced to a term of imprisonment. The court inquired of R.D. what had prompted her to change her mind, and the following exchange occurred:

> THE COURT: Okay. Why did you change your mind?
>
> R.D.: It's been very hard for me, and he's been out just talking about me to mutual people I know. I'm just finding out through my cousin, and he was just telling her bad things about me. So being out is only going to make things worse for me because he's just telling people how bad of a person I am for coming to you about this case.
>
> THE COURT: I'm confused, because during the trial I was led to believe that you guys met over the Internet.
>
> R.D.: Yes. I'm just now finding out that he had a group chat with a whole bunch of girls, and they were talking about me and he told them about the case. I've seen my cousin —
>
> THE COURT: But he's been in jail.

The court expressed that it was "befuddled" because contrary to R.D.'s testimony at trial, she was now indicating at sentencing that they in fact knew the same people.

{¶ 33} The court sentenced Wainwright to 18 months of community control sanctions and classified Wainwright as a Tier I sexual offender. The court also imposed $500 in costs, ordered Wainwright to have no contact with R.D., and ordered Wainwright to participate in a mentorship program with his pastor.

{¶ 34} Wainwright appeals, presenting seven assignments of error for our review:

> I. Mackenzie Wainwright's GSI conviction is not supported by the weight of the evidence presented and [therefore violates] his right to due process as protected by the 14th Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution.
>
> II. The trial court committed reversible error when it denied Mackenzie Wainwright the ability to use body camera footage from

R.D.'s initial statement to Lyndhurst Officer Brooks initially reporting the alleged sexual assault, thereby violating the Ohio Rules of Evidence and his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution.

III. The trial court committed reversible error when it permitted a non-expert to testify that in "the majority of strangulation cases I have seen, the patient does not have any injury."

IV. The trial court committed reversible error when it refused to recognize Dr. George Shaw as an expert in the mechanism of injuries and precluded him from opining that, given his review of the allegations and the records, R.D. had not been strangled.

V. Mackenzie Wainwright's right to confront the witnesses against him was violated when the trial court permitted the complainant to testify wearing a mask that covered the lower half of her face even though the remaining witnesses all testified without masks.

VI. The trial court violated Mackenzie Wainwright's right to due process and a fair trial when it denied his request for a mistrial where, in the middle of trial, it became clear that the State had failed to turn over most of the complainant's recorded interview with the investigating detective and police advocate.

VII. Cumulatively the errors identified herein rendered Mackenzie Wainwright's trial unfair.

Legal Analysis

{¶ 35} Because it is dispositive, we will begin by addressing Wainwright's sixth assignment of error.

{¶ 36} In Wainwright's sixth assignment of error, he argues that his right to due process and a fair trial was denied when the trial court denied his request for a mistrial after learning that the state had failed to turn over most of R.D.'s recorded interview with Tomaro. Specifically, Wainwright argues that learning, in the middle

of trial, of a 46-minute video containing statements from R.D. that were not contained in any of her other statements or her trial testimony, warranted a mistrial.

{¶ 37} Trial courts enjoy broad discretion in ruling on motions for mistrial. *State v. Johnson*, 8th Dist. Cuyahoga No. 108621, 2020-Ohio-2940, ¶ 23. Absent an abuse of discretion, a reviewing court will not reverse a trial court's decision regarding a motion for a mistrial. *Id.*, citing *State v. Benson*, 8th Dist. Cuyahoga No. 87655, 2007-Ohio-830, ¶ 136. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983); *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463. "A mistrial should not be ordered in a criminal case 'merely because some error or irregularity has occurred, unless the substantial rights of the accused or the prosecution are adversely affected.'" *State v. Johnson* at ¶ 24, quoting *State v. Wilson*, 8th Dist. Cuyahoga No. 92148, 2010-Ohio-550, ¶ 13, citing *State v. Reynolds*, 49 Ohio App.3d 27, 33, 550 N.E.2d 490 (2d Dist. 1988). The essential inquiry on a motion for mistrial is whether the substantial rights of the accused are adversely or materially affected. *Id.*

{¶ 38} Here, defense counsel moved for a mistrial based upon the state's failure to disclose evidence in violation of the rules of discovery. Crim.R. 16 governs discovery and requires the prosecuting attorney to provide copies or photographs, or permit defense counsel to copy or photograph, certain items related to the case and that are material to the preparation of a defense or are intended for use by the

prosecuting attorney as evidence at the trial. Crim.R. 16(B). The purpose of the rule is "to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large." Crim.R. 16(A). The rule serves to ""prevent surprise and the secreting of evidence favorable to one party."" *State v. Johnson* at ¶ 26, quoting *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 19, quoting *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3, 511 N.E.2d 1138 (1987).

{¶ 39} "A mistrial is not mandated where a discovery violation occurs." *State v. Johnson* at ¶ 27, citing *State v. Muszynec*, 8th Dist. Cuyahoga No. 87447, 2006-Ohio-5444, ¶ 16. When imposing a sanction for a discovery violation, "'trial courts must conduct an inquiry into the surrounding circumstances and "impose the least severe sanction that is consistent with the purpose of the rules of discovery."" *Id.*, quoting *State v. Rucker*, 2018-Ohio-1832, 113 N.E.3d 81, ¶ 20 (8th Dist.), quoting *Papadelis* at paragraph two of the syllabus. The Ohio Supreme Court has held that this inquiry should include three considerations: "(1) whether the [prosecution's] failure to disclose was a willful violation of Crim.R. 16, (2) whether foreknowledge of the undisclosed material would have benefited the accused in the preparation of a defense, and (3) whether the accused was prejudiced." *Darmond* at ¶ 35, citing *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689, syllabus.

{¶ 40} We must first address whether the prosecution's failure to disclose the body-camera footage was a willful violation of Crim.R. 16. The state points to a

statement made by defense counsel the morning after learning of the discovery violation as a stipulation that the discovery violation was not willful. In addressing the court and renewing Wainwright's request for a mistrial, defense counsel stated:

> I'm not sitting up here, Judge, and saying for a second that I believe that the Prosecutors sat on that information and didn't turn it over to us, but they are, Judge, tasked with the responsibility of getting from the police at least major components of the evidence.

While our review of the record reflects that the violation was likely negligent rather than willful, we disagree that this statement is entirely dispositive of whether the violation was willful.

{¶ 41} When the court initially inquired of the state why the additional video was not turned over to defense counsel, the assistant prosecuting attorney responded: "I think it was inadvertent. The two disks were scanned into our system; the third video was not." The assistant prosecuting attorney also informed the court that they had not had an opportunity to review the video. This statement does not automatically absolve the state from culpability because the prosecutor is responsible for knowing what is in the police file. *State v. Shivers*, 2016-Ohio-1378, 63 N.E.3d 517, ¶ 15 (8th Dist.), citing *State v. Russell*, 8th Dist. Cuyahoga No. 94345, 2011-Ohio-592, ¶ 37. This is especially true in light of Gorski's subsequent testimony in which he stated that he had turned over all footage to the prosecutor's office. The court did not conduct any additional inquiry into how and why, exactly, the footage was not turned over. On this record, we cannot say that the state's failure to disclose the 46-minute video was a willful violation of Crim.R. 16.

{¶ 42} We turn now to the second *Parson* factor, whether foreknowledge of the undisclosed material would have benefited the accused in the preparation of a defense. *Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689, at syllabus. In conducting this inquiry in the instant case, we are mindful of the nature of the case, in which the question is whether the sexual encounter between Wainwright and R.D. was consensual; the state's case against Wainwright rested significantly on R.D.'s testimony and account of her encounter with Wainwright. Therefore, R.D.'s credibility was a critical and material issue in the case. The significance of R.D.'s credibility is highlighted both by defense counsel's theory of the case throughout Wainwright's trial and by the jury verdict finding Wainwright not guilty on either of the two counts of rape.

{¶ 43} Defense counsel undertook to repeatedly highlight the numerous inconsistencies in R.D.'s versions of her encounter with Wainwright. Defense counsel's cross-examination of each of the state's witnesses, including R.D. herself, was focused on these inconsistencies. Specifically, defense counsel emphasized that while R.D.'s trial testimony and statement to her SANE nurse was that Wainwright had forced her to perform fellatio, R.D. did not mention this to her mother in the phone call immediately after the encounter, nor did she mention it to Brooks shortly thereafter. Defense counsel also emphasized that R.D. provided shifting accounts of which breast Wainwright had touched, whether he had digitally penetrated her with his right hand or his left hand despite claiming at one point that she screamed in pain because he penetrated her with an injured finger that had stitches, where the

security officer was when they passed by her car, and whether she had tried to scream for help.

{¶ 44} The 46-minute video contained additional statements by R.D., some of which were contradicted by other statements and some of which provided additional information that had not been offered elsewhere. Furthermore, the video contained an additional explanation of the context of R.D.'s communications with Wainwright. Wainwright argues that going through almost his entire trial without the benefit of knowledge of this additional information from the state's key witness hindered his defense. We agree.

{¶ 45} At no point has Wainwright contested R.D.'s allegations that Wainwright and R.D. had a sexual encounter in August 2020. The issue to be determined at trial, then, was whether that encounter was consensual, or whether Wainwright's sexual contact with R.D. was compelled by force. R.D.'s shifting version of events likely cast doubt on her credibility during trial; we cannot say that, had defense counsel been able to meaningfully cross-examine her on the additional inconsistencies revealed in the undisclosed material, Wainwright's defense would not have benefited.

{¶ 46} The 46-minute video was not included in the record in this appeal; therefore, this court has not reviewed the undisclosed material at issue. Based on our review of the record, the trial court did not review the undisclosed material at any point in the proceedings below. As such, our consideration of the contents of the video is limited to references made by the parties on the record. After initially

viewing the video during a brief recess, defense counsel noted nine material inconsistencies between the video and R.D.'s other statements in the case. The next morning, after an additional review of the video, defense counsel pointed to 37 such issues. Specifically, R.D. stated that Wainwright had only used one hand to digitally penetrate her because his other hand was injured and had stitches; elsewhere she had stated that he penetrated her with his stitched finger. Additionally, R.D. made new or inconsistent statements with respect to her communications with Wainwright before the incident, claiming that Wainwright did not like to text so most of their communications took place over FaceTime, despite over 50 pages of text messages being introduced at trial, and stating that the first time they spoke to each other, Wainwright told her in detail how their sex was going to be. Likewise, R.D. made new or inconsistent statements on the video about her efforts to resist Wainwright; she stated both that she did not resist because her brother had told her she would go to jail if she did and that she had tried to remove Wainwright's hands from her pants.

{¶ 47} The state argues that because defense counsel had Tomaro's written report, Wainwright had a "near perfect rendition" of the information contained in the body-Fcamera footage. Regardless of the accuracy or thoroughness of Tomaro's report, the assertion that a several-page report is an adequate substitution for 46 minutes of video footage is a "hollow, insufficient excuse" for the state's discovery violation. *Shivers*, 2016-Ohio-1378, 63 N.E.3d 517, at ¶ 14. "We do not subscribe to the theory that the full breadth and context of a video recorded interview can fairly

be distilled into a [brief] written summary." *Id.* Further, while Tomaro undoubtedly attempted to craft an accurate summary of the interview, she did not do so from the perspective of defense counsel. It was not Tomaro's responsibility to view R.D.'s statement with an eye toward Wainwright's trial strategy; it was defense counsel's responsibility to do so, and they were deprived of the opportunity to do so because of the discovery violation. Where direct evidence of R.D.'s demeanor shortly after the incident was available, which goes to the critical issue in the case — R.D.'s credibility — a written summary was not an adequate replacement for such evidence.

{¶ 48} Because the undisclosed body-camera footage is not a part of the record in this case, this court is unable to review the footage and is instead limited to the parties' respective statements about the footage made on the record. Based on these statements, it appears that the undisclosed material contains numerous inconsistencies. While none of these inconsistencies unequivocally undermines R.D.'s credibility, we find that, taken together, Wainwright's defense would have benefited from having the entirety of his accuser's statements prior to trial. In addition, the record contains numerous exchanges about, and contradictory descriptions of, R.D.'s demeanor, both immediately following the incident when she reported the incident to Brooks, and several days later, when she was interviewed by Tomaro. For example, there were implications that R.D. was laughing and joking with Brooks when she was making the report, despite testimony that she was upset and uncomfortable at that time. Video evidence of R.D.'s demeanor immediately following the incident is significant evidence in a trial where R.D.'s credibility is

extremely significant. This is especially true when the trial took place almost two years after the incident.

{¶ 49} With respect to the third *Parson* factor, we consider whether Wainwright was prejudiced. *Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689, at syllabus. In analyzing whether Wainwright was prejudiced, we begin by reiterating the late timing of the discovery violation.[2] Five of the state's seven witnesses, and Wainwright's sole witness, had already testified; the entirety of Wainwright's defense, save for defense counsel's closing argument and cross-examination of Gorski, was conducted without the benefit of the undisclosed material. Wainwright argues that, at a minimum, his opening statements, his cross-examination of R.D., and his cross-examination of Tomaro would have been significantly different with the benefit of complete discovery that included all of his accuser's recorded statements.

{¶ 50} While the court attempted to cure the discovery violation by permitting Wainwright to recall R.D. as a witness, this was an insufficient remedy. Our review of the record shows that recalling R.D. as a witness did not afford Wainwright a meaningful opportunity to cross-examine her based on undisclosed

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[2] We note that because the undisclosed material happened to be discovered during trial, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), is not implicated. There is no *Brady* violation where evidence is disclosed or introduced during trial. *State v. Collins*, 8th Dist. Cuyahoga No. 108878, 2020-Ohio-4136, ¶ 14, citing *State v. Sheline*, 8th Dist. Cuyahoga No. 106649, 2019-Ohio-528, ¶ 164. However, had the undisclosed material not been discovered during Tomaro's cross-examination, the discovery violation would have been sufficient to amount to a denial of due process pursuant to *Brady*.

material. Instead, the effect was introducing minimal additional testimony, replete with statements from R.D. that she could not remember what she told Tomaro and repeated interjections by both counsel and the court with respect to whether the testimony in question related to R.D.'s initial testimony, her statements in direct examination upon being recalled, or her statements to Tomaro. This was not a case where defense counsel was able to review the undisclosed information prior to trial and adjust trial strategy accordingly. *State v. Swindler*, 2d Dist. Clark No. 2011CA0072, 2012-Ohio-3398, ¶ 37. Likewise, Wainwright was not even afforded the opportunity to review the undisclosed material prior to initially cross-examining R.D. *State v. Green*, 10th Dist. Franklin No. 14AP-745, 2015-Ohio-1513, ¶ 11. The failure to disclose all of the accuser's statements prior to trial was not adequately cured by recalling R.D. at the very end of trial.

{¶ 51} In considering whether a defendant was prejudiced, courts often consider the balance of the evidence, notwithstanding the claimed discovery violation. *State v. Lopez*, 6th Dist. Lucas No. L-06-1243, 2007-Ohio-5473, ¶ 24. A reviewing court may overlook an error where the admissible evidence comprises "overwhelming" proof of a defendant's guilt. *State v. Mills*, 8th Dist. Cuyahoga No. 90383, 2008-Ohio-3666, ¶ 20, citing *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983). This is not a case in which Wainwright's conviction was supported by overwhelming evidence. This is reflected in the jury's deliberations in which the jurors had quickly reached a consensus that Wainwright was not guilty of the two more serious charges but were initially unable to reach a consensus on the

remaining gross sexual imposition charge. This is further reflected in the nature of the case. While the state introduced DNA evidence, the question of whether sexual activity occurred was not an issue at trial; the issue at trial was whether it was consensual. In a case that ultimately hinges on the accuser's credibility, a video statement of the accuser describing the incident could very likely have changed the outcome of the case. This is not a case where the independent evidence established Wainwright's guilt. *See, e.g., Williams*. Therefore, we cannot say that, regardless of the discovery violation here, there was overwhelming evidence of Wainwright's guilt.

{¶ 52} For the foregoing reasons, we find it was unreasonable to deny Wainwright's request for a mistrial based on a discovery violation. Therefore, Wainwright's sixth assignment of error is sustained. Based on our disposition of Wainwright's sixth assignment of error, the remaining assignments of error are moot and we decline to consider them pursuant to App.R. 12(A)(1)(c).

{¶ 53} Judgment reversed, sentence vacated, and case remanded for a new trial.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and
MICHAEL JOHN RYAN, J., CONCUR