IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	**On Appeal from the**
Plaintiff-Appellee,	:	**Logan County Court of Appeals**
	:	**Third Appellate District**
v.	:	
	:	
ELI Y. CARTER,	:	**Supreme Court Case No.**
	:	**2023-0156**
Defendant-Appellant.	:	

MERIT BRIEF OF APPELLANT ELI Y. CARTER

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STATEMENT OF FACTS

Appellant is the adoptive father of [redacted], having previously been her foster father. The criminal case against Appellant arose out of [redacted] claim that Appellant had engaged in several instances of sexual contact and conduct with her beginning in 2007, on or around her seventeenth birthday. These acts were alleged to have occurred primarily at their shared residence at 417 Ludlow Road, Bellefontaine, Ohio 43311, but also in a dorm room at Urbana University, where [redacted] attended college after moving out of Appellant's house. The residence on Ludlow Road was also shared by Appellant's wife, [redacted] as well as multiple other children, both biological and fostered. The following facts and testimony were adduced at trial:

[redacted] testified that she was practically born into the foster system, having been placed in nearly 40 different homes before she came to reside with the [redacted]. Transcript of Proceedings, Volume I (hereinafter "Vol. I. Tr.") 29. Appellant and his wife officially adopted [redacted] on June 22, 2007. Vol. I. Tr. 36.

[redacted] testified that she was often abused both physically and sexually by Appellant while living in the residence and even after she left for college. *Id.* at 39-46. The alleged sexual abuse included groping and digital penetration, as well as oral and vaginal intercourse. *Id.* at 41. [redacted] first reported this alleged behavior to the Bellefontaine Police Department in June 2010, over three years after it purportedly began. *Id.* at 57. [redacted] testified that Appellant threatened to kick her out of the house should she expose their sexual relationship, and did not want to lose her family. *Id.* at 44. She stated that, after her initial contact with law enforcement in 2010, the investigation quickly stalled. *Id.* at 59. [redacted] heard nothing until 2017, when she once again

contacted law enforcement to inquire about the status of the investigation. *Id.* at 61. Once again, the case laid idle until 2020. Appellant was indicted in March of 2021.

On cross examination, [redacted] was questioned about an interview she provided for an article in the Columbus Dispatch, wherein she attributed her many foster placements to increasing behavioral problems as she grew up. *Id.* at 67. [redacted] admitted that, at the time of the alleged offenses, she was taking prescription antipsychotic drugs, including Risperdal, Cogentin, and Lithium. *Id.* at 73. [redacted] was also questioned as to the reason she delayed in reporting the alleged abuse. *Id.* at 84. Despite her alleged fear of becoming homeless, [redacted] had no explanation for why she delayed reporting even after leaving the house. *Id.* With regard to her potential motivations to bring false allegations, [redacted] admitted that she believed Appellant and his wife had withheld $7,000.00 in funds from Job and Family Services, which purportedly belonged to her. *Id.* at 92.

News of the allegations soon spread throughout the Bellefontaine community, including to Michael Mullins, the director of Adriel, Inc., Appellant's employer. At the time of Appellant's trial, Mullins resided in Minnesota. On February 7, 2022, two days prior to the beginning of trial, the State requested permission from the Court to allow Mr. Mullins to testify via live video, citing as justification "COVID spread and uncertain weather conditions." State's Motion for Witnesses to Testify Via Video, filed November 7, 2022, p. 1.

Appellant filed a motion opposing the State's request on the grounds that video testimony would run afoul of his confrontation rights and that any concerns over COVID spread or inclement weather were merely speculative and not supported by the actual circumstances surrounding Appellant's trial. Defendant's Memo Contra State's Motion for Witness to Testify Via Video, filed November 8, 2022, pp. 2-3. On February 8, 2022, the Court issued an Order allowing Mullins to

testify remotely over Appellant's objection. Appellant renewed his objection at trial, which was similarly overruled. Transcript of Proceedings, Volume II ("Vol. II Tr.") 194.

Ultimately, Mullins was permitted to testify at trial via videoconference. Vol. II Tr. 206. However, it is unclear from the record whether Mullins' testimony was obtained utilizing a one-way or two-way video communication method. While the transcript clearly reflects that Mullins' face was visible through his phone's camera, and that the trial court could "see and hear" Mr. Mullins clearly, it is silent as to whether the witness had a live video feed of the courtroom or solely audio. *Id.* at 201-202. In fact, the only item that Mullins described looking at were captions created by his voice-to-text application. *Id.* at 202. He was never asked to identify Appellant nor any other item, exhibit, or person in the courtroom. *Id.* at 194-233. Consequently, the record is devoid of any indication that Mullins' video feed of the courtroom, if any, visibly included Appellant. *Id.*

Immediately prior to testifying, Mullins disclosed that he wore a cochlear implant in one ear, a hearing aid in the other, and was using digital captioning software to aid in his understanding of the questions asked. *Id.* at 202. The Court instructed Mullins to rely "primarily as best you can on what you hear from the Court and the attorneys" and to ask that a question be repeated if necessary. *Id.* at 203. Counsel for Appellant immediately objected to the witnesses' use of captioning software and stressed the risk that Mullins would be reading rather than listening to the questions as they are presented to him. *Id.* at 204.

Counsel for Appellant specifically asked that the captioning be turned off to leave no question regarding "what is lost in translation and that upon which [Mullins is] relying." *Id.* Appellant argued that if Mullins heard well enough to offer his testimony via video, then he should have no trouble doing so without the aid of captioning software. *Id.* When asked if he was able to

turn his captioning off. Mullins said "I'm capable of turning it off if the Court requests that I do so, but I won't have as much confidence in what I'm hearing if I do that." *Id.* at 204-205.

The State argued that the Court's instruction to rely "primarily on what he hears verbally" and to request that a question be repeated if necessary was sufficient, and that the parties would be capable of determining whether he was answering the question which was asked. *Id.* at 205. Ultimately, the trial court stated it was "going to allow him to leave the caption on." *Id.* at 205. Appellant's Counsel renewed his objection, arguing that the software is "no different than [the Court] swearing in a court-appointed translator who has been sufficiently trained...what we're really doing is allowing for a computer to make that judgment." *Id.* In response, the Court simply stated "No, we're not." *Id.*

On direct examination, Mullins stated that Appellant came into his office in June 2010 to address the allegations made by [redacted] *Id.* at 213. According to Mullins, Appellant told him that he did indeed have a sexual relationship with [redacted] but that it was consensual and she was of age. *Id.* Mullins further testified that Appellant resigned from his position at Adriel and unceremoniously left his office. *Id.*

On cross examination, Mullins was confronted with his 2020 interview with police, which was remarkably different from his trial testimony. For example, Mullins initially told law enforcement that he could not recall whether Appellant resigned or was terminated. *Id.* at 225. Further, Mullins acknowledged telling detectives that he "[could not] remember what our conversation was" due to the passage of time between Appellant's alleged confession and the interview, which occurred ten years later. *Id.* at 231. Additionally, during his 2020 interview with detectives, Mullins stated that, "I just can't remember the detail of that conversation. I have a vague recollection." *Id.* at 226, 231.

Mullins' explanation for these substantial inconsistencies was less than credible. For example, he claimed that his memory of the 2010 conversion with Appellant was better in February 2023 than it had been during the 2020 meeting with law enforcement because he had been provided an opportunity to reflect on the conversation while preparing for his trial testimony, while the officers had "blindsided" him. *Id.* at 227-228. However, immediately after making this assertion, Mullins was forced to admit that he had been provided ample opportunity to reflect before his meeting with law enforcement, particularly as the interview had been scheduled in advance. *Id.* Similarly, Mullins had no reasonable explanation for either his silence or the absence of any notation in Appellant's personnel file following the 2010 conversation and purported admission of abuse, despite Mullins' legal responsibilities as a mandatory reporter. *Id.* at 218.

Finally, the State offered the testimony of Kurt Penhorwood, a former board member of Union Station, a community center with which the [redacted] were affiliated. Penhorwood testified that Appellant once asked rhetorically, "If it was consensual, why am I being charged with rape." Vol. I Tr. 158.

Appellant testified in his own defense, denying the existence of a sexual relationship between himself and [redacted] as well as ever having made any admission of the same to Michael Mullins. Vol II. Tr. 247, 254

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. 1

A CRIMINAL DEFENDANT'S RIGHTS TO CONFRONTATION, DUE PROCESS, AND A FAIR TRIAL ARE VIOLATED WHEN A WITNESS IS PERMITTED TO TESTIFY BY REMOTE MEANS UTILIZING A SPEECH-TO-TEXT CAPTIONING PROGRAM IN THE ABSENCE OF ANY IMPORTANT STATE INTEREST, PUBLIC POLICY, OR CASE NECESSITY.

The right of criminal defendants to confrontation is set forth in the Sixth Amendment to the United States Constitution, which is made applicable to the states through the Fourteenth

Amendment, *State v. Issa*, 93 Ohio St.3d 49, 59, 752 N.E.2d 904 (2001), as well as within the Ohio Constitution. While admission of testimony is generally reviewed for an abuse of discretion, the question of whether a criminal defendant's rights under the Confrontation Clause have been violated is reviewed *de novo*. *State v. Smith*, 8th Dist., 2005-Ohio-3579, ¶8, 162 Ohio App.3d 208, 832 N.E.2d 1286 (2005); citing *United States v. Robinson*, 389 F.3d 582, 592 (6th Cir. 2004).

The Sixth Amendment specifically provides that "[i]n all criminal prosecutions the accused shall enjoy the right to be confronted with witnesses against him," while Article I, Section 10 of the Ohio Constitution states that "[i]n any trial, in any court, the party accused shall be allowed to meet the witnesses face to face." This Court has previously held that these two provisions, while not identical, provide substantially the same right to confrontation. *State v. Arnold*, 2010-Ohio-2742, ¶12, 126 Ohio St.3d 290, 933 N.E.2d 775 (2010).

As recognized by the United States Supreme Court on several occasion, the right to confrontation "traces back to the beginnings of Western legal culture...with indications that a right of confrontation existed under Roman law." *Coy v. Iowa*, 487 U.S. 1012, 1015, 108 S.Ct. 2798 (1988); see also, *California v. Green*, 399 U.S. 149, 174, 90 S.Ct. 1930 (1970). Justice Scalia, in his majority opinion, took special care to observe that there is "something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Id.* at 1017, citing *Pointer v. Texas,* 380 U.S. 400,404, 85 S.Ct. 1065 (1965). For instance, a witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." *Id.* at 1019, citing Z. Chafee, The Blessings of Liberty, 35 (1956). Should the witness choose to avoid looking at the defendant, even that conduct may assist the trier of fact to draw appropriate conclusions about the veracity of his testimony. *Id.*

The United States Supreme Court has also recognized that face-to-face confrontation is not always an absolute, and that it "must *occasionally* give way to considerations of public policy and the necessities of the case." *Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). (Emphasis added, internal quotation omitted.) However, any exception permitting remote testimony must "(1) be justified, on a case-specific finding, based on important state interests, public policies, or *necessities* of the case, and (2) must satisfy the other three elements of confrontation – oath, cross-examination, and observation of the witness's demeanor." *State v. Oliver*, 8th Dist., 2018-Ohio-3667, ¶20, 112 N.E.3d 573 (2018), citing *Craig* at 849-851. (Emphasis added.)

In applying this standard, federal and state courts across the country have emphasized time and time again that this inquiry must be case-specific and, furthermore, that any deprivation of face-to-face confrontation must be a necessity rather than a mere convenience. See, e.g., *Craig*, supra, at 849; *Coy*, supra, at 1021; *United States v. Bordeaux*, 400 F.3d 548, 553 (8th Cir. 2005); *United States v. Pangelinan*, D.C. Kansas No. 19-10077, 2020 WL 5118550 (Aug. 31, 2020); *State v. Rogerson*, Sup. Ct. Iowa, 855 N.W.2d 495, 499 (2014); *State v. Stefanko*, 9th Dist., 2022-Ohio-2569, ¶¶19-24, 193 N.E.3d 632 (2022). Thus, while remote video testimony may sometimes be permissible, "[a] notable theme throughout these cases involve witnesses who had an *indefinite* inability to travel or were gravely ill." *Pangelinan*, supra, at *3. (Emphasis added.) Where the inability to travel is temporary in nature—even when it is of a significant duration, such as a woman in her seventh month of pregnancy—courts have found a continuance is the appropriate remedy to ensure the witness's appearance while protecting the defendant's constitutional rights. *United States v. Carter*, 907 F.3d 1199, 1203-1209 (9th Cir. 2018). Once more, at the risk of repetition, that determination must be made through a case-specific inquiry.

Given the Third District's reference to COVID prevention in its review of this matter, it must be noted that numerous state courts have concluded that this type of generalized concern related to the spread of COVID is not a case-specific inquiry and does not overcome a defendant's right to confrontation. See, e.g., *X.D.M. v. Juvenile Officer,* Mo.App. No. WD 84529, 2022 WL 2431680 (July 5, 2022); *State v. Tate*, 969 N.W.2d 378, 388-389 (Minn. App. 2022); *T.H. v. State*, 2nd Dist.Fla. No. 2D20-3217, 2022 WL 815047, 4-5 (Mar. 18, 2022); *C.A.R.A. v. Jackson Cty. Juvenile Office*, 637 S.W.3d 50, 65-66 (Mo. 2022); *Commonwealth v. Gardner*, Ky.App. No. 2020-CA-1383-MR, 2021 WL 3573304, *3-5 (Aug. 13, 2021).

Moreover, even where witnesses have raised individualized concerns related to COVID in a case-specific setting, courts have still been extremely reluctant to jeopardize a defendant's rights under the United States Constitution. For instance, in *United States v. Casher*, during the height of the initial COVID lockdown, the District Court of Montana considered whether it would permit out-of-state witnesses from Wisconsin and Colorado to testify via remote means. 2020 WL 3270541, (June 17, 2020). Both witnesses had concerns about traveling. One of them, Mr. Chrystal, was 63 years old, suffered from high blood pressure, hypothyroidism, an enlarged prostate, and an irregular heartbeat. *Id.*, at *1. His physician informed him that there were heightened concerns with air travel related to COVID and, due to his age and medical issues, that he was at a high risk of complications were he to become infected. *Id.*

In denying the government's request for remote testimony, the district court pointed out that "necessity" is a high bar, and that temporary medical and travel concerns do not meet that standard. *Id.* Moreover, the court observed that several alternatives to remote testimony, including a continuance, could have been considered and would have secured the defendant's constitutional rights. *Id.* In summary, both federal district and circuit courts have held that, where alternatives

are available, "the right of confrontation may not be dispensed with so lightly." *Id.*, citing *Carter* at 1203-1209, quoting *Barber v. Page*, 390 U.S. 719 (1968).

Finally, Appellant would point out that the holdings of the trial and appellate courts in this matter flew directly in the face of this Court's direction and leadership during the COVID crisis. Specifically, while this Court has treated the COVID pandemic with the utmost care and attention, it provided explicit guidance that COVID policies could not suspend any rights guaranteed by the Ohio and United States Constitutions. *See, e.g.*, *Stefanko*, supra, at ¶26, citing Ohio Supreme Court, *Speedy Trial Requirements* (Oct. 28, 2020) and *Covid-19 Guidance* (Oct. 28, 2020).

A. Remote Testimony Was Not Justified

The trial court's decision to allow Mullins' remote testimony lacked any case-specific factual or legal basis under *Coy, Craig,* or any state or federal case utilizing their application. Its concerns about weather conditions were purely speculative and objectively unreasonable given the specific information it had received through the weather forecast provided in Appellant's Memorandum. Similarly, the Third District's belief in a heightened risk of COVID transmission was also unsupported, if not entirely contradicted, by the record. Even to the extent that there had been a recent "spike" in COVID cases, the record is clear that there was no inquiry, at any level, as to the specific risks presented by Mullins' travel, or what alternatives could have been utilized other than a deprivation of face-to-face confrontation. Finally, even if a public policy concern about COVID had played some remote part in the trial court's decision, and even if no other alternatives were available, Mullins' use of unidentified voice-captioning software constituted a further violation of Appellant's constitutional rights under the Ohio and United States Constitutions.

In allowing Mullins to testify by remote means, the trial court observed that "live video testimony has become much more common than it was before the pandemic." See, Judgment Entry Granting State's Motion for Michal Mullins to Appear Via Live Video, filed February 8, 2022 (hereinafter "Judgment Entry"), 2. Referencing a single incident of flight cancellations faced by professional football fans, the trial court asserted that "the pandemic and labor shortages at airlines resulting from the pandemic and other causes and weather make travel by air uncertain on a daily basis." *Id.* Given the trial court's reliance on a single anecdote, it is notable that the data compiled by the United States Department of Transportation directly refutes its claim, showing that on average only about 1% of commercial flights were cancelled during the twenty-month period following the initial COVID shutdown and leading up to the trial court's decision in this matter. *See,* U.S. Dept. of Transportation, Air Travel Consumer Reports July 2020 through March 2022, https://www.transportation.gov/individuals/aviation-consumer-protection/air-travel-consumer-reports (accessed June 12, 2023).

Further undercutting its own rationale, the trial court also acknowledged that "[f]ans and media were forced to rent cars at the airport and drive to Cincinnati."[1] In other words, though the trial court was focused on the inconvenience caused by the cancellation of their flights, it recognized that the fans were still able to coordinate alternative means of transportation to ensure their attendance at the sporting event.

Finally, the trial court observed that "[i]t is currently winter in Ohio," and that the "[w]eather is unpredictable and *could delay or prohibit* [Mullins] from reaching Logan County to

[1] Appellant can only infer that the trial court meant that the fans drove to Kansas City, since that was the location of the game.

testify in person." *Id.* (Emphasis added.) Based exclusively on these limited findings, the trial court held that "Mullins [was] *unavailable* to testify in person." *Id.* (Emphasis added.)

Appellant respectfully submits that mere speculation does not constitute a justification, much less demonstrate a necessity, for remote testimony. Neither the State in its request, nor the trial court in its Judgment Entry, cited a single fact demonstrating that it was necessary for Mullins to testify via remote means due to indefinite unavailability. At most, the trial court referenced "uncertainty" and "unpredictability" in the weather that "*could* delay or prohibit" Mullins from testifying in person. Moreover, there was absolutely no examination of alternative means to allow Mullins to testify in person, such as a continuance, in lieu of violating Appellant's constitutional rights.

Had the record reflected *actual* adverse weather or travel conditions, or even the *likelihood* of such complications, the trial court's decision might have had some evidentiary support for a claim that Mullins was likely to be *temporarily* unavailable. However, the record directly contradicted any such concern. As set forth in Appellant's Memorandum Contra, neither the forecast for Minnesota nor that for Ohio reflected any imminent unfavorable weather conditions. There was no indication that the anticipated weather conditions had changed prior to the trial court issuing its decision. Given this information, which was made a part of the record, the trial court's unparticularized and generalized observation that "winter sometimes has bad weather" was utterly insufficient to demonstrate a *necessity* for Mullins to provide remote testimony due to indefinite unavailability.

In short, the trial court's generalized concern about winter weather was insufficient to demonstrate that Mullins was *unavailable* to testify in person or that his remote testimony was permissible under any recognizable legal standard. Neither the State nor the trial court articulated,

much less demonstrated, that Mullins would be prevented from appearing in person to testify. At most, the trial court noted that his in-person appearance might be "uncertain" – something that could be said about anyone travelling in from out-of-state to testify.

Conspicuously, the appellate court declined to address the trial court's weather and travel related justifications for Mullins' remote testimony. Instead, the Third District upheld the trial court's decision on an entirely novel rationale: that it was "justified on a case-specific finding based upon an important public policy involving the Covid pandemic." Opinion, ¶16. Specifically, the Third District found that Minnesota's seven-day average "was *more than* three times the Ohio Covid-case average." *Id.* Thus, the Third District concluded that "it is evident to us that the trial court considered the needs of the public and the trial court including all staff, the attorneys, and most importantly, members of the petit jury, from exposure to Covid."

Notably, the parties did not significantly brief the issue of COVID on initial appeal, as it was overwhelmingly clear from the trial court's Judgment Entry that it had no concerns regarding any heightened risk of infection. However, had this issue been brought up at any time by the Third District during oral argument, its misapprehension as to the facts could have been readily addressed.

As an initial observation, the Third District's unbriefed and unargued finding that Minnesota's seven-day average was "more than three times" that of Ohio is entirely unsupported by the record. To be clear, *neither the trial court nor the court of appeals was ever provided with Ohio's seven-day average*. That information has simply never been part of the record. Rather, Appellant's Memorandum Contra cited the 2,070 new Ohio cases reported on the day of February 6, 2022, but could only reference the *seven-day average* from Minnesota (7,056 cases), as it reported its numbers differently and daily figures were not available. Recognizing the difference between the number of new cases on a specific date and the seven-day average of new cases is of

vital importance in understanding the Third District's deficient analysis. Both states' infection rates had been dropping precipitously. Memorandum Contra, 2. As a result, Minnesota's seven-day average *was necessarily higher* than its daily number of new cases at the time that the seven-day average was calculated.[2]

Additionally, even if one were to assume that Minnesota's number of daily new cases was higher than Ohio's, the Third District did not consider their respective rate of infection *per capita*. Thus, there is no indication that the *rate* of infection was markedly different. Finally, even assuming that Minnesota's unknown daily rate of new cases had been made part of the record and had been higher than that of Ohio, the Third District's analysis still completely overlooked the single fact that *was* established by the record: that both states' respective infection numbers were down to pre-spike levels. *Id.*, 2. In other words, the Third District essentially held that normal COVID infection rates, as a matter of public policy, will always render out-of-state witnesses unavailable and will always constitute a legal justification for remote testimony.

In short, the trial court rationalized Mullins' remote testimony on speculative weather concerns that were both unsupported by the record and transitory in nature. The Third District justified the trial court's decision based on its misinterpretation of statistical information and its position that a generalized concern about COVID satisfied any constitutional concern. For the reasons set forth above, neither rationale constituted a sufficient justification to deprive Appellant of his right to face-to-face confrontation. *State v. Durst*, 6th Dist. Huron No. H-18-019, 2020-Ohio-607, ¶65, 2020 WL 865394 (2020), citing *Oliver*, *supra,* at ¶24. Accordingly, based on the

[2] An example to illustrate the faulty nature of the Third District's analysis: had Minnesota experienced approximately 14,000 cases on January 25, 2022, and then underwent a 2,300 decrease each day for the following seven days, it would have only had *200 new cases* on February 1, 2022, but its *seven-day average* would have been 7,100.

foregoing, Appellant respectfully submits that Mullins' remote testimony was unjustified and deprived Appellant of his confrontation rights as guaranteed by the United States and Ohio Constitutions.

B. Mullins' Remote Testimony Was Inadmissible

With respect to the remaining elements of confrontation, Appellant acknowledges that Mullins was placed under oath, subject to cross-examination, and that his face was visible on a screen during his trial testimony. Nevertheless, his reliance on an unseen and unverified speech-to-text captioning program rendered his testimony inadmissible and contrary to law.

R.C. 2311.14(A)(1) expressly provides that, "[w]henever because of a hearing, speech, or other impairment a party to or witness in a legal proceeding cannot readily understand or communicate, the court shall appoint a qualified interpreter to assist such person." Similarly, the Ohio Rules of Evidence disqualify witness testimony when the court determines that the person is, *inter alia*, "incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her." Ohio Evid. R. 601(B). Mullins' responses to the trial court's limited inquiry demonstrated that he had little confidence in his ability to understand what was being said, even when using his implant and hearing aid, without the assistance of a speech-to-text captioning program. Vol. II Tr. 204-205.

Specifically, at the start of his testimony, Mullins not only indicated that he was wearing a cochlear implant in one ear and a hearing aid in the other, but also that he was reading captions from his phone. In response, the trial court instructed him to "rely primarily as best as you can on what you hear from the Court and the attorneys…you must rely on the verbal communication that occurs during this hearing." When asked if the captioning could be disabled, Mullins indicated that

it could but further added, "*I won't have as much confidence in what I'm hearing if I do that.*" (Emphasis added.)

Rather than pursue the matter any further, the trial court agreed with the State that Mullins should "rely primarily on what he hears verbally and rely on [the captions] and if he has any questions to make sure he repeats the question." Counsel for Appellant remarked upon the appropriateness of a court-appointed translator under the circumstances and added that, by making this ruling, the trial court was essentially allowing a computer to tell Mullins what was being said. The trial court succinctly responded, "No, we're not."

Appellant submits that the trial court's ruling allowed Mullins to rely on an unsworn, unverified, and possibly incomplete version of the questions that were asked by the attorneys. Moreover, unlike every other form of sworn testimony adduced in Ohio courtrooms, there is simply no way to demonstrate that Mullins fully understood each question and that he answered it completely. Similarly, it is impossible to know whether Mullins followed the trial court's instructions about his translation software. Importantly, the Third District's opinion expressly avoided any meaningful analysis as to this last issue, under the rationale that it was "confined to a static transcript" and that there was no "evidence in the record that Mullins utilized the closed captioning on his cellphone while testifying." Opinion, ¶24.

If this case only required a determination of whether the witness engaged in misconduct or some other irregularity, the appellate court's limited analysis might be reasonably justified. However, that was not the sole issue presented on appeal. Rather, there is a more fundamental question which has yet to receive any meaningful appellate analysis: whether any witness misconduct by Mullins could have possibly been observed. Given the limitations created by the procedure utilized by the trial court to obtain Mullins' remote testimony, there was no way to

observe and ensure that he was not utilizing the software. There was no way to ensure that he was able to observe Appellant. In short, there was no way to prove that this means of remote testimony was "harmless beyond a reasonable doubt," as any assessment of these factual questions would involve pure speculation.

Accordingly, based on the foregoing, Appellant submits that the trial court's decision allowing Mullins to provide remote testimony not only deprived him of any meaningful opportunity to confront the witness as contemplated by the Ohio and United States Constitutions, but also violated his rights to due process and a fair trial by allowing an unreliable procedure which facilitates potential misconduct, prevents detection of the same, and ensures that any harmless-error analysis is entirely speculative.

C. Mullins' Remote Testimony Was Unfairly Prejudicial

Based on the verdicts reached in this matter,[3] the jury clearly placed great emphasis on Mullins' remote testimony. In addressing the prejudicial impact of that testimony, Appellant readily acknowledges that Mullins was subject to cross-examination concerning the numerous inconsistencies and fabrications which pervaded his ever-changing version of events. However, despite this limited concession to confrontation, every other meaningful provision of the United States Constitution, the Ohio Constitution, the Ohio Revised Code, and the Ohio Rules of Evidence designed to ensure and protect the reliability of cross-examination, face-to-face confrontation, and basic competency were all ignored in the name of expediency. Such a process is contrary to law and resulted in unfair prejudice to Appellant.

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[3] Appellant was convicted of alleged *in loco parentis* consensual sexual conduct which occurred after [redacted] turned eighteen, while he was acquitted on all other counts. This outcome was substantially consistent with Mr. Mullins' testimony, as opposed to that of Appellant, [redacted] or Penhorwood.

CONCLUSION

Neither the trial court nor appellate court articulated a sufficient, case specific necessity to deprive Appellant of face-to-face confrontation. Moreover, Mullins' testimony was obtained under circumstances which made it impossible to ascertain (1) whether the witness understood each question, (2) whether he was instead reliant upon voice-captioning technology, (3) whether that program was reliable, and (4) whether he was able to observe Appellant while testifying. Relatedly, neither Appellant nor the jury were provided an opportunity to observe Mullins' demeanor in person, despite the total absence of any legally sufficient justification for his absence. In light of the foregoing, Appellant respectfully requests that the Court reverse his convictions.

Respectfully submitted,

/s/ Samuel H. Shamansky
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was duly served upon Eric C. Stewart, Logan County Prosecuting Attorney, 117 East Columbus Avenue, Bellefontaine, Ohio 43311, on June 12, 2023, by electronic transmission.

/s/ Samuel H. Shamansky
SAMUEL H. SHAMANSKY

APPENDIX

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 8-22-12**

v.

ELI Y. CARTER, **JUDGMENT ENTRY**

DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court, the assignment of error is overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

JUDGE

JUDGE

JUDGE

DATED: DEC 19 2022

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 8-22-12**

v.

ELI Y. CARTER, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Logan County Common Pleas Court
Trial Court No. CR 21 03 0051

Judgment Affirmed

Date of Decision: December 19, 2022

APPEARANCES:

Samuel H. Shamansky **for Appellant**

Eric C. Stewart **for Appellee**

ZIMMERMAN, P.J.

{¶1} Defendant-appellant, Eli Y. Carter ("Carter"), appeals the February 8, 2022 judgment entry of the Logan County Court of Common Pleas, General Division, granting the State's request to have a witness testify via a two-way-live-video-conference call. For the reasons set forth below, we affirm.

{¶2} This case stems from Carter's sexual abuse of his adopted daughter, N.C., between the ages of 17-19 and her disclosure of that abuse.[1] On March 9, 2021, the Logan County Grand Jury indicted Carter on three counts of rape in violation of R.C. 2907.02(A)(1), all first-degree felonies and three counts of sexual battery in violation of R.C. 2907.03(A)(5), (B), all third-degree felonies. Carter appeared for arraignment on March 12, 2021 and entered not-guilty pleas.

{¶3} On February 7, 2022, the State filed a motion for witnesses to testify via video, which Carter opposed.[2] The trial court granted the State's motion.[3]

{¶4} On February 9, 2022, Carter's jury trial commenced wherein he was acquitted of the three rape charges (under Counts One, Three, and Five) and the sexual-battery charge (under Count Two). However, Carter was found guilty of the sexual-battery charges (under Counts Four and Six).

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[1] N.C. was 17 years old at the time of her adoption in 2007, 20 at the time of her disclosure in 2010, and 32 at the time of trial in 2022.

[2] Two witnesses who had previously resided in Logan and Champaign Counties had since relocated, and at the time of trial, both witnesses resided out-of-state.

[3] Even though the trial court granted the State's motion, the State only called one of the witnesses at trial.

{¶5} On March 18, 2022, the trial court held a sentencing hearing and ordered Carter to serve 30-month prison terms under Counts Four and Six, each, to be served concurrently to one another.

{¶6} Carter filed a timely notice of appeal and raises one assignment of error for our review.

Assignment of Error

> **The trial court erred by permitting Michael Mullins to testify by remote means utilizing a speech-to-text captioning program in violation of Appellant's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, comparable provisions of the Ohio Constitution, as well as Ohio law and the Ohio Rules of Evidence.**

{¶7} In his sole assignment of error, Carter asserts that he was denied the right to confront a witness against him in violation of the Sixth Amendment to the United States Constitution, Section 10, Article 1 of the Ohio Constitution, and the Rules of Evidence. Specifically, Carter argues that the State did not meet its burden by demonstrating that video conferencing was justified; that one of the witness's testimony was inadmissible because he used unverified software that aided his testimony; and that he was unfairly prejudiced by the admission of unreliable testimony.

Standard of Review

{¶8} Generally, a trial court has broad discretion with respect to the admission of evidence. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶

37. Accordingly, we will not disturb the trial court's evidentiary rulings absent an abuse of discretion that produces a material prejudice to the aggrieved party. *State v. Gipson*, 3d Dist. Allen No. 1-15-51, 2016-Ohio-994, ¶ 48, citing *State v. Roberts*, 9th Dist. Summit No. 21532, 2004-Ohio-962, ¶ 14. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in reaching its ruling. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶9} However, we review evidentiary rulings that implicate the Confrontation Clause under a de novo standard of review. *See State v. Armour*, 3d Dist. Allen Nos. 1-22-05 and 1-22-06, 2022-Ohio-2717, ¶ 37, citing *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, ¶ 97. "De novo review is independent, without deference to the lower court's decision." *State v. Hudson*, 3d Dist. Marion No. 9-12-38, 2013-Ohio-647, ¶ 27, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio*, 64 Ohio St.3d 145, 147 (1992).

Analysis

{¶10} Carter raises three arguments in support of his assignment of error the first of which implicates the Confrontation Clause.

Confrontation Clause

{¶11} "The Confrontation Clause to the Sixth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment,

provides that "'[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.'" *State v. Thomas*, 3d Dist. Marion No. 9-19-73, 2020-Ohio-5379, ¶ 17, quoting *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359 (2004), quoting the Confrontation Clause. Section 10, Article I of the Ohio Constitution provides in its pertinent parts:

> In any trial, in any court, the party accused shall be allowed * * * to meet the witnesses face to face[] * * *; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. * * *.

See also Crim.R. 15; R.C. 2945.481. The similar provisions of Section 10, Article I of the Ohio Constitution "provide[ ] no greater right of confrontation than the Sixth Amendment * * *." *State v. Self*, 56 Ohio St.3d 73, 79 (1990).

{¶12} Even though the United States Supreme Court has interpreted the Confrontation Clause as reflecting a preference for face-to-face confrontation, it has explained that the preference "'must occasionally give way to considerations of public policy and the necessities of the case.'" *State v. Marcinick*, 8th Dist. Cuyahoga No. 89736, 2008-Ohio-3553, ¶ 14, citing *Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157, 3165 (1990). Thus, the right to confrontation is not absolute, and the primary concern of the Confrontation Clause is "to ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous

testing in the context of an adversary proceeding before the trier of fact." *Maryland* at 845, 110 S.Ct. 3157. In holding that the right to confrontation is not absolute, the United States Supreme Court detailed the rationale for that right, including: 1) the giving of testimony under oath; 2) the opportunity for cross-examination; 3) the ability of the factfinder to observe demeanor evidence; and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant. *Id.* at 845-846, 110 S.C.t 3163-3164.

{¶13} Analogously, in interpreting Ohio's confrontation rights, the Supreme Court of Ohio has held that, "[e]ven in criminal law, the right to confrontation is not absolute." *Ohio Ass'n. of Pub. Sch. Employees v. Lakewood City Sch. Dist.*, 68 Ohio St.3d 175, 179 (1994). In *State v. Self*, the Supreme Court of Ohio determined that R.C. 2907.41, which permitted the use of a child sexual abuse victim's videotaped deposition at trial in place of live testimony, does not violate the Ohio or federal confrontation clauses.[4] 56 Ohio St.3d at 73, paragraph one of the syllabus. The court stated that a "literal face-to-face confrontation is not the *sine qua non* of the confrontation right." (Emphasis added.) *Id.* at 77. The court reasoned:

> [t]hough our Constitution uses the specific phrase 'face to face,' that phrase has not been judicially interpreted at its literal extreme. This is because the purpose of the 'face to face' clause of the Ohio Constitution (as well as the parallel provision of the Sixth Amendment) is to guarantee the opportunity to cross-examine and the right to observe the proceeding. Taking the phrase 'face to face' to its

[4] Although the General Assembly recodified R.C. 2907.41 as R.C. 2945.481 in 1997, for the issues in this appeal, it is substantially identical to its prior version.

> outer limits, one could argue that a witness who looks away from the defendant while testifying is not meeting the defendant 'face to face.' As we have indicated, a criminal defendant is ordinarily entitled to a physical confrontation with the accusing witnesses in the courtroom. Yet, the value which lies at the core of the Confrontation Clauses does not depend on an 'eyeball to eyeball' stare-down. Rather, the underlying value is grounded upon the opportunity to observe and to cross-examine. The physical distance between the witness and the accused, and the particular seating arrangement of the courtroom, are not at the heart of the confrontation right.

(Internal citation and footnote omitted.) *Id.* at 79. The Supreme Court of Ohio concluded that, "[w]hile closed-circuit television and videotape recording did not exist when the Ohio (or federal) Constitution was written and adopted, these new technologies, when employed in accord with R.C. 2907.41, provide a means for the defendant to exercise the right of cross-examination and to observe the proceedings against him with the same particularity as if he and the witness were in the same room." *Id.* Since *Self*, other Ohio courts have authorized the presentation of testimony via cloud-based-video-conferencing platforms, through Skype and Zoom, under limited circumstances. *See State v. Banks*, 1st Dist. Hamilton No. C-200395, 2021-Ohio-4330, ¶ 14-26; *State v. Castonguay*, 2nd Dist. Darke No. 2021-CA-2, 2021-Ohio-3116, ¶ 33-42.

{¶14} To determine whether an alternative to physical face-to-face confrontation is warranted, Ohio courts have employed a two-prong test set forth in *Self*. *Banks* at ¶ 22; *State v. Howard*, 2d Dist. 28314, 2020-Ohio-3819, ¶ 53; *Castonguay* at ¶ 35. When deciding whether an exception to the Confrontation

Clause is warranted, those appellate courts have concluded that a trial court must first consider whether the procedure is "justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and[,] * * * [second ensure whether the procedure] satisf[ies] the other three elements of confrontation[:] oath, cross-examination, and observation of the witness' demeanor." *Id.* at ¶ 22, quoting *Howard* at ¶ 53, citing *Marcinick*, 2008-Ohio-3553, at ¶ 14. Hence, we begin by addressing whether or not the "necessities of the case" justified an alternative to face-to-face confrontation.

{¶15} Prior to trial, the State requested the trial court to permit Mullins to testify remotely because he resided in Minnesota. Due to *spikes* in the number of reported Covid cases and the potential for bad weather (in Minnesota and Ohio) at the time of trial, the State argued for the witness to testify remotely. In rendering its decision on the State's motion, the trial court noted that live-video testimony was more commonplace than it was prior to the pandemic. The trial court further noted that, in addition to the Covid pandemic, airline-labor shortages (resulting from the pandemic) and other causes were creating unprecedented travel delays resulting in mass cancellations of airline flights.

{¶16} Here, even if we were to assume without deciding that the possibility of inclement weather was insufficient to warrant an exception for Mullins's video-conferenced testimony, we nevertheless conclude that the trial court's

determinations were justified on a case-specific finding based upon an important public policy involving the Covid pandemic. Indeed, Carter's memorandum contra to the State's motion detailed Kentucky's, Minnesota's, and Ohio's Covid-case data for a seven-day average. (*See* Doc. No. 75). That data reflected that Minnesota's seven-day average was *more than* three times the Ohio Covid-case average. (*Id.*). Thus, it is evident to us that the trial court considered the needs of the public and the trial court including all staff, the attorneys, and most importantly, members of petit jury, from exposure to Covid. *Banks* at ¶ 24 (holding that "[p]reventing the spread of C[ovid] is an important public policy that may warrant an exception to face-to-face confrontation under appropriate circumstances."), citing *United States v. Donziger*, S.D.N.Y. Nos. 19-CR-561 and 11-CV-691, 2020 WL 5152162, *2 (Aug. 31, 2020).

{¶17} In addition to the foregoing, we recognize this is not an issue of witness convenience, but rather, the trial court's duty to protect those who come and go from the courthouse and to maintain the orderly administration of trial proceedings. *See also State v. Owen*, 3d Dist. Union No. 14-92-34, 1993 WL 128177, *3 (Apr. 26, 1993), citing Crim.R. 1(B); *State v. Harding*, 3d Dist. Marion No. 9-93-8, 1993 WL 312905, *3 (Aug. 9, 1993).

{¶18} Since we reached the conclusion that the combination of the pandemic and resultant airline-labor shortages were sufficient bases to justify the trial court's

determination, we leave the question of whether the possibility of inclement weather is independently sufficient to warrant an exception to a criminal defendant's right to confrontation for another day.

{¶19} Accordingly, we conclude that under the specific facts and circumstances of this case, the use of two-way-live-video-conferencing allowing Mullins to testify from out-of-state, did not violate Carter's right to confrontation. Here, Mullins's two-way-live-video-conference call preserved the reliability elements of confrontation given that he testified under oath; he was subject to cross-examination; and, the jury and Carter could observe his demeanor while testifying. We find no error in admitting this testimony. Hence, there is no merit to the first portion of Carter's argument.

{¶20} Next, we turn the second portion of Carter's argument wherein he asserts that Mullins's remote testimony should have been inadmissible under the Rules of Evidence. Specifically, he argues that Mullins's use of closed-captioning software on his cellphone should have disqualified him as a witness under Evid.R. 601.[5] Further, Carter asserts that because the defense was unable to see or verify

[5] Mullins, a hearing-impaired witness, testified on behalf of the State in its case-in-chief. Mullins has a cochlear implant in one ear and wears a hearing aid in the other. "A cochlear implant is a small electronic device that is placed inside a [hearing-impaired person's] ear and provides him or her with a sense of sound." *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, ¶ 4, fn. 1. A "[h]earing aid", on the other hand, is defined in the Revised Code as "any wearable instrument or device designed or offered for the purpose of aiding or compensating for impaired human hearing, including all attachments, accessories, and parts thereof, except batteries and cords." R.C. 4747.01(A). Simply put, a hearing aid is a small electronic device (with a microphone, amplifier, and speaker) that can be worn in or behind the ear receiving sound, converting the sound waves to electrical signals and amplifying them sending them to the hearing-impaired person's ear through the speaker in the device.

the closed captioning on Mullins's cellphone screen that the admission of his testimony is contrary to law since the closed captioning involved the interpretation of the questions posed.

{¶21} We review Carter's assertions under an abuse of discretion standard of review since the decision to appoint or not to appoint an interpreter and evidentiary determinations are both within the sound discretion of the trial court. *See State v. Muhire*, 2d Dist. Montgomery No. 29164, 2022-Ohio-3078, ¶ 27; *State v. Flores*, 10th Dist. Franklin No. 19AP-405, 2020-Ohio-593, ¶ 11; *State v. Castro*, 2d Dist. Montgomery No. 14398, 1995 WL 558782, *4 (Sept. 20, 1995) citing *State v. Saah*, 67 Ohio App.3d 86, 95 (8th Dist.1990). *See also Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, at ¶ 62; *Gipson*, 2016-Ohio-994, at ¶ 48, citing *Roberts*, 2004-Ohio-962, at ¶ 14.

{¶22} We begin by addressing Carter's arguments regarding the Rules of Evidence. Evid.R. 601(A) provides that "[e]very person is competent to be a witness except as otherwise provided in these rules. Relevant to the facts presented, Evid.R. 601(B)(1) states "[a] person is disqualified to testify as a witness when the [trial] court determines" that he or she is "[i]ncapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her[.]" Despite Carter's assertions, Evid.R. 601(B)(1) has no application herein. That is, the facts do not support that

Mullins suffered from any speech-related issue as a result of his hearing impairment. Specifically, the record supports that he is hearing impaired, not speech impaired. Consequently, we find that there is no evidence in the record that Mullins was incapable of expressing himself in response to the questions asked.

{¶23} Next, we turn to Carter's argument related to the Revised Code that also implicate the Rules of Evidence and Rules of Superintendence. *See* Evid.R. 604; Sup. R. 88. R.C. 2311.14 provides in its pertinent parts

> (A)(1) Whenever because of a *hearing*, speech, or other *impairment* a party to or *witness in a legal proceeding cannot readily understand* or communicate, *the court shall appoint a qualified interpreter to assist such person.*
>
> (2) This section is not limited to a person who speaks a language other than English. It also applies to the language and descriptions of any person with a developmental disability who cannot be reasonably understood, or *who cannot understand questioning, without the aid of an interpreter*. The interpreter may aid the parties in formulating methods of questioning the person with a developmental disability and in interpreting the answers of the person.
>
> (B) Before entering upon official duties, the interpreter shall take an oath that the interpreter will make a true interpretation of the proceedings to the party or witness, and that the interpreter will truly repeat the statements made by such party or witness to the court, to the best of the interpreter's ability. If the interpreter is appointed to assist a person with a developmental disability as described in division (A)(2) of this section, the oath also shall include an oath that the interpreter will not prompt, lead, suggest, or otherwise improperly influence the testimony of the witness or party.
>
> * * *.

(Emphasis added.) R.C. 2311.14(A)(1)-(2), (B). *See also* Evid.R. 604; Sup. R. 88.

{¶24} Importantly, the record before us is not clear on this issue and since we cannot see Mullins while testifying at trial, we are confined to a static transcript. To us, Mullins's level of hearing impairment was not documented in the record nor is there evidence in the record that Mullins utilized the closed captioning on his cellphone while testifying. Moreover, even if we assume without deciding that he did use the closed-captioning feature, Carter suffered no prejudice because Mullins was instructed by the trial court that he *must* rely on the verbal questions posed and *not the closed captioning* when formulating his answers. (Feb. 10, 2022 Tr., Vol. II, at 201-206). The trial court further instructed Mullins that if he did not hear the question or did not understand the question that he was required to ask the trial court or the attorneys to repeat the question. *Id.*

{¶25} In our review, the record supports that Mullins was responsive during his testimony and never requested clarification of the questions he was asked. Moreover, the record is void of any objections from the defense asserting that Mullins was reading questions, rather than, listening to the questions posed. Hence, Carter cannot establish that Mullins could not readily understand the questions posed without the aid of an interpreter nor can he establish that Mullins used closed captioning while testifying.[6] Therefore, this portion of his argument is without merit.

[6] Nevertheless, even if we had reached different conclusions, Sup. R. 88 requires the trial court to give primary consideration to the method of interpretation chosen by a witness (in need of a sign language

{¶26} In his third argument, Carter synthesizes his prior two arguments and asserts that he is unfairly prejudiced by the admission of Mullins's testimony (under Evid.R. 403(A)) since the verdicts support that the jury relied heavily on this testimony to convict Carter of the two of the sexual-battery charges while acquitting him of the remaining sexual-battery charge and the rapes. We disagree.

{¶27} First, the State sought the amendment of the rape charges (under Counts One, Three, and Five) at trial from R.C. 2907.02(A)(1) to R.C. 2907.02(A)(2) deleting the relational element "who is not the spouse of the offender" and adding "purposely compels the other person to submit by force or threat of force". (Feb. 10, 2022 Tr., Vol. II, at 190-193). Notwithstanding Carter's testimony (at trial) that he did not sexually abuse N.C., the State also presented testimony from Kurt Penhorwood that Carter perceived his sexual relationship with N.C. as consensual. (*Id.* at 158, 213-214, 224-225, 251). Hence, the jury simply could have believed that N.C. and Carter were engaging in a consensual-sexual relationship. Indeed, sexual battery under R.C. 2907.03(A)(5) is designed to protect children from adults in positions of authority, and designed to protect the family unit and relationships by criminalizing incest. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 10 and ¶ 25 ("This reasoning applies not only to minor children, but to adult children as well. Moreover, parents do not cease being parents–whether

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interpreter) in accordance with 28 C.F.R. 35.160(b)(2), which includes "closed captioning, including real-time captioning". Sup. R. 88(B)(2); 28 CFR 35.104; 28 C.F.R. 35.160(b)(2).

natural parents, stepparents, or adoptive parents–when their minor child reaches the age of majority").

{¶28} Secondly, Carter's arguments are predicated on evidentiary weight and witness-credibility determinations, which are reserved for the trier of fact (i.e., the jury) and are misplaced under this assignment of error since Carter did not argue that his sexual-battery convictions were against the manifest weight of the evidence.

{¶29} Lastly, we note that all evidence presented by the State is prejudicial to a criminal defendant since it is offered to prove his or her guilt. *See State v. Skates*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 107. Because we determined that the State met its burden by demonstrating that Mullins's two-way-live-video-conferencing testimony was justified and that the record supports that Mullins relied upon the questions he heard and not the closed-captioning software, we will not say that the probative value of Mullins's testimony as to Carter's statement is substantially outweighed by the danger of unfair prejudice. Thus, this portion of Carter's argument is without merit.

{¶30} Accordingly, Carter's assignment of error is overruled.

{¶31} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

MILLER and SHAW, J.J., concur.

IN THE COMMON PLEAS COURT
OF LOGAN COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO, :

Plaintiff, :

-vs- : **CASE NO. CR 21 03 0051**

ELI Y CARTER : **JUDGMENT ENTRY/SENTENCING**
DOB: 06/05/1979 **PRISON**
:

Defendant.

On March 18, 2022, Defendant's sentencing hearing was held pursuant to R.C. 2929.19. The Defendant was present and represented by Attorney Samuel Shamansky, and was afforded all rights pursuant to Criminal Rule 32. Logan County Prosecutor Eric C. Stewart appeared on behalf of the State of Ohio.

The Court has considered the record, oral statements, any victim impact statement and pre-sentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11 and 2929.12. The Court has also considered the need for deterrence, incapacitation, rehabilitation and restitution. The Court has given no consideration to the Defendant's race, gender, ethnic origin or religious belief.

The Court **FINDS** that the **Defendant ELI Y CARTER** has been convicted of **COUNT FOUR, SEXUAL BATTERY,** in violation of R.C. 2907.03(A)(5), 2907.03(B), a felony of the third degree; and **COUNT SIX, SEXUAL BATTERY,** in violation of R.C. 2907.03(A)(5), 2907.03(B), a felony of the third degree.

The Court **FINDS** that a prison term is consistent with the purposes and principles of sentencing in R.C. 2929.11 and 2929.12. It is, therefore, **ORDERED, ADJUDGED and DECREED** by the Court that Defendant **ELI Y CARTER SHALL** serve

a stated **prison term of Thirty (30) months** under **COUNT FOUR, SEXUAL BATTERY,** in violation of R.C. 2907.03(A)(5), 2907.03(B), a felony of the third degree; and a stated **prison term of Thirty (30) months** under **COUNT SIX, SEXUAL BATTERY,** in violation of R.C. 2907.03(A)(5), 2907.03(B), a felony of the third degree. The sentences **SHALL** be served concurrently.

Defendant is **HEREBY CONVEYED** to the custody of the Ohio Department of Rehabilitation and Corrections. **Credit for Forty-four (44) days is GRANTED** as of this hearing date, along with future custody days while Defendant awaits transportation to the appropriate state institution.

The Defendant has been convicted of a sexually oriented offense. The Defendant received and executed the Explanation of Duties to Register as a Sex Offender (Ohio Attorney General's Form) in the presence of his Attorney in open Court. The Defendant is hereby classified as a Tier III sexual offender and is required to report his residential address every ninety (90) days for his lifetime. The Defendant **SHALL comply with the registration requirements under Ohio law.**

The Court Finds that the defendant has been convicted of an offense of violence and is not a felony sex offense, therefore, upon release from prison, the defendant will be subject to up to three years, but not less than one year of Post-Release Control. Said post-release control will be administered by the Adult Parole Authority pursuant to R.C. 2967.28. If post-release control is violated, the Adult Parole Authority or Parole Board can impose a more restrictive or longer control sanction or may return Defendant to prison for up to nine months for each violation, but not more than ½ of the stated prison term. If the Defendant is convicted of a felony committed while under post-release control, in addition to any prison term imposed for the new offense, the

Defendant may be returned to prison under this case for a term of twelve months or the time remaining on post-release control, whichever is greater. The additional periods of time imposed by another court because of a felony committed while under post-release control in this case or by the Parole Board for violations in this case while on post-release control are part of the sentence in this case.

In accordance with Ohio law, Defendant **SHALL SUPPLY A SAMPLE OF HIS DNA** to the Ohio Department of Rehabilitation & Corrections or the Adult Parole Authority.

Defendant shall pay all court costs, costs of prosecution, and fees permitted by 2929.18 for which judgment is hereby rendered against you. If there is insufficient money to pay the expenses out of your bail, then you will be responsible to pay these costs and expenses. You are notified as required by R.C. 2947.23 that:

- If you fail to pay the judgment or fail to timely make payments towards the judgment under a payment schedule toward that judgment approved by the court, the court may order you to perform community service until the judgment is paid or until the court is satisfied that you are in compliance with the approved payment schedule.

- If the court orders you to perform community service, you will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour performed will reduce the judgment by that amount.

The Court HEREBY notifies the Defendant of the right to appeal; that if the Defendant is unable to pay the cost of an appeal, the Defendant has the right to appeal without payment; that if the Defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost; that if Defendant is unable to pay the costs of documents necessary to an appeal, said documents will be provided without cost and that the Defendant has the right to have a notice of appeal timely filed.

Pursuant to R.C. 2937.40, any bond in effect in the above-captioned case is discharged and shall be released consistent with the provisions of R.C. 2937.40.

Judge Kevin P. Braig

ENDORSEMENT REGARDING NOTICE OF JUDGMENT

To the Clerk:

You are hereby directed to serve upon all parties Notice of Judgment and the date on which it was journalized pursuant to Civil Rule 58(B).

Judge Kevin P. Braig

XC: Prosecutor
Samuel Shamansky
Logan County Sheriff
Ohio Department of Rehabilitation and Corrections

LOGAN COUNTY
COMMON PLEAS COURT
FILED

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BARB McDONALD
CLERK

IN THE COMMON PLEAS COURT
OF LOGAN COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	
-vs-	:	**CASE NO: CR 21 03 0051**
ELI Y CARTER, **DOB: 06/05/1979**	:	**JUDGMENT ENTRY GRANTING STATE'S MOTION FOR MICHAEL MULLSINS TO APPEAR VIA LIVE VIDEO**
Defendant.	:	

On February 7, 2022, the State of Ohio (the State) moved the Court to permit witness Michael Mullins (Mullins) to testify via live video. In its motion, the State represented Mullins lives in Minnesota and that "COVID spread and uncertain weather conditions" justified permitting remote testimony.

Defendant Eli Y. Carter (Defendant) opposed the motion. During an off-the-record status conference with the Court, Defendant's counsel questioned whether the State's reasons were sufficient. Defendant's counsel did not identify any specific obstacle to Defendant confronting Mullins. Defendant's counsel generally noted that COVID infection rates are somewhat lower than they have been at other times in the past and that currently there is no adverse weather in the forecast.

To permit remote video testimony, the procedures must (1) be justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other three elements of confrontation – oath, cross-examination, and observation of the witness's demeanor. *State v. Oliver*, 8th Dist. No. 106305, 2018-Ohio-3667 ¶ *P20, 112 N.E.3d 573, 580.

In this case, Mullins lives in Minnesota. Due to the emergence of the COVID pandemic, live video testimony has become much more common than it was before the pandemic. Further, the pandemic and labor shortages at airlines resulting from the pandemic and other causes and weather make travel by air uncertain on a daily base. The Court notes the Cincinnati Bengals played in Kansas City in the AFC Championship Game on Sunday, January 30, 2022. A few days before the game, the airport in Covington, Kentucky suddenly canceled all flights to Kansas City. Fans and media were forced to rent cars at the airport and drive to Cincinnati. Air travel post-pandemic is not as reliable as it was post-pandemic. In addition, it is currently winter in Ohio. Weather is unpredictable and could delay or prohibit from reaching Logan County to testify in person.

The State has identified Mullins as an important witness in its case. According to the State's bill of particulars, "[o]n December 9, 2020, Detective Salyer spoke with Michael Mullins, who was the CEO of Adriel [School] at the time of the initial report. Michael stated that Becky [Fullmer] and her husband had come to him with the allegations that there was a sexual relationship between Eli and the Victim. Michael stated that he discussed it with some of his staff and reported it to children's services.

"Michael had Eli come in and they talked about the report. Eli admitted to an incident but did not go into detail. Michael said there was no question they were talking about a sexual matter. Eli told Michael that the relationship was consensual, and that the victim had been over the age of 18. Michael stated that he terminated Eli, but then stated that he could not remember if he was fired or allowed to resign."

Under the fact specific circumstances of this case, the Court finds Mullins unavailable to testify in person. Moreover, testimony from Mullins about what Defendant

told him is relevant and admissible as admissions of the Defendant. Finally, the Court's video conferencing system, which was funded by a grant from the Ohio Supreme Court is available and functional and capable of providing Defendant and his counsel the opportunity to confront Mullins and subject him to cross-examination. The Court will place Mullins under oath and the jury will be able to observe his demeanor.

For all these reasons, the Court find the State's motion well-taken and **GRANTS** the motion.

IT IS HEREBY SO ORDERED.

Judge Kevin P. Braig

cc: Prosecutor
SAMUEL H SHAMANSKY