

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

CITY OF CLEVELAND, :
 :
 Plaintiff-Appellee, :
 : No. 107985
 v. :
 :
 AHMAD ALREFAEI, :
 :
 Defendant-Appellant. :
 :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED
RELEASED AND JOURNALIZED: October 22, 2020

Criminal Appeal from the Cleveland Municipal Court
Case No. 2018 CRB 009929

Appearances:

Barbara A. Langhenry, Cleveland Director of Law, Karrie D. Howard, Chief Prosecutor, and Joan M. Bascone, Assistant Prosecutor; Ohio Crime Victim Justice Center and Diva Edel, *Amici, for appellee.*

William Norman; Mark A. Stanton, Cuyahoga County Public Defender, and John T. Martin, Assistant Public Defender, *Amici, for appellant.*

EILEEN T. GALLAGHER, A.J.:

{¶ 1} Defendant-appellant, Ahmad Alrefaei, appeals his convictions following a bench trial. He raises the following assignments of error for review:

1. The trial court erred when it refused to admit into evidence and consider a photograph offered by defendant which contained a date/time stamp showing that the complaining witnesses were not telling the truth about the time of the incident.

2. The trial court erred in finding Alrefaei guilty of child endangerment without sufficient evidence.

3. The trial court erred to the prejudice of Alrefaei and in violation of rights conferred by Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when it sustained the prosecution's objection excluding testimony relating to the intent and motives of the complaining witnesses.

4. The trial court erred and abused its discretion in denying Alrefaei's motion for separation of witnesses and ordering the complaining witnesses to remain in the courtroom while each other complaining witness was testifying.

{¶ 2} After careful review of the record and relevant case law, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Procedural and Factual History

{¶ 3} Alrefaei was charged in Cleveland M.C. No. 2018-CRB-009929, with two counts of domestic violence in violation of R.C. 2919.25, two counts of aggravated menacing in violation of Cleveland Codified Ordinances ("C.C.O.") 621.06, and two counts of endangering children in violation of C.C.O. 609.04. The indictment stemmed from a verbal and physical confrontation between Alrefaei and members of his family.

{¶ 4} The matter proceeded to a bench trial in October 2018, where the following evidence was presented.

{¶ 5} Alrefaei and his wife, M.Q., have four children together. Alrefaei immigrated to the United States without his family in 1996. In 2016, M.Q. and three of Alrefaei's children, R.A., A.A., and S.A., moved to the United States from Jordan to live with Alrefaei.

{¶ 6} R.A. testified that on June 8, 2018, she and Alrefaei got into an argument after she refused to contribute to the monthly payments for the family vehicle. R.A., who was 22 years old at the time of the incident, stated that Alrefaei became increasingly upset and asked her to leave the room where the argument was occurring. When R.A. refused to leave, Alrefaei suddenly "grabbed the knife from the table and tried to hit [R.A.] on [her] face." R.A. testified that she managed to avoid Alrefaei's attempt to strike her with the knife. However, Alrefaei successfully struck the back of R.A.'s head with his other hand. R.A. stated that she was terrified and that Alrefaei had threatened to kill her.

{¶ 7} R.A. testified that her mother, M.Q., and her two minor brothers, then 14-year old A.A., and then 11-year old S.A., ran into the room during the altercation. While M.Q. and A.A. attempted to restrain Alrefaei, R.A. took a photograph of the struggle with Alrefaei's cell phone. After the altercation, R.A. went to her bedroom and locked the door. R.A. then heard her mother and father "screaming" and "yelling" at each other. Later that evening, M.Q. warned R.A. to stay in her bedroom because Alrefaei was still upset and had hit M.Q. as well.

{¶ 8} During her cross-examination, defense counsel presented R.A. with a photograph marked defendant's exhibit No. 5. The photograph depicted the events

R.A. alleged to have captured with Alrefaei's cell phone while he was being restrained. R.A. confirmed that the timestamp on the photograph indicated that the photograph was taken on June 4, 2018, contrary to her testimony that the physical altercation occurred on June 8, 2018. When asked to explain the contradicting dates, the city raised an objection on the basis that R.A. could not authenticate the photograph. The trial court agreed that, without a proper foundation, R.A. could not authenticate the photograph. Thereafter, R.A. confirmed that she took a photograph with Alrefaei's phone, that she recognized defendant's exhibit No. 5 as the photograph she took during the altercation, and that the photograph contained a time and date stamp.

{¶ 9} A.A. testified that on June 8, 2018, he was doing homework in his bedroom, when he heard Alrefaei and R.A. arguing in the living room. A.A. stated that he and his mother both ran into the living room once R.A. began to scream. When A.A. entered the room, he observed Alrefaei "attacking" R.A. with a kitchen knife. A.A. testified that Alrefaei was holding the knife in one hand and his belt in his other hand. A.A. stated that Alrefaei "missed" striking R.A. with the knife, but managed to hit R.A. on the back of her head with the belt.

{¶ 10} A.A. testified that his mother took Alrefaei by his shoulders and pulled him away from R.A. At the same time, A.A. restrained Alrefaei's hand to prevent him from using the knife. When Alrefaei was directed onto a nearby couch, A.A. took the knife from Alrefaei's hand. A.A. testified that he was scared during the incident and believed Alrefaei "was capable of killing anyone in my family" with

the knife. After the incident, Alrefaei threatened to take revenge against M.Q. for keeping him away from R.A. Finally, A.A. confirmed that his younger brother, S.A., was in the room during the physical altercation.

{¶ 11} M.Q. testified that on June 8, 2018, she was in A.A.'s bedroom when she heard R.A. scream. When M.Q. ran to the living room with A.A. to see what was occurring, she observed Alrefaei "trying to kill" R.A. by attacking her with a knife. M.Q. testified that Alrefaei was threatening to "distort" R.A.'s face and expressed that he did not care if he went to jail. M.Q. stated that she managed to push Alrefaei to the couch as he attempted to hit R.A. Once subdued, A.A. took the knife from Alrefaei. M.Q. and A.A. then ran to A.A.'s bedroom and closed the door. M.Q. testified that Alrefaei was upset with her for intervening in his argument with R.A. Later that evening, M.Q. was in the kitchen when Alrefaei confronted her and hit her in the arm with a metal basket. M.Q. testified that she sustained a bruise on her arm. She eventually sought medical treatment for the ongoing pain she endured.

{¶ 12} Although M.Q. moved her three children out of Alrefaei's home the day after the altercation, she conceded that she did not immediately file a police report. M.Q. explained that she was scared of Alrefaei and believed he would interfere with her and her children's "immigration process." Ultimately, however, M.Q. filed a police report on June 19, 2018.

{¶ 13} During her cross-examination, M.Q. conceded that she did not observe Alrefaei strike R.A. with his hand. However, M.Q. indicated that R.A. had told her Alrefaei had hit her just before M.Q. and A.A. ran into the room.

{¶ 14} Dr. Xiaochou Tang testified that she is employed as a physician at MetroHealth Medical Center. Dr. Tang testified that on June 14, 2018, M.Q. came to the hospital complaining of left arm pain. Dr. Tang summarized the information she learned during her medical examination as follows:

[S]he said her husband hit her with a metal basket because there is something going on with the family. The patient tried to protect — protect her daughter from being stabbed by a knife. So we did [an] assessment with [her] arm, and I did an x-ray, and I called a social worker right away.

(Tr. 88.) Finally, Dr. Tang confirmed that M.Q. had a bruise on her upper left arm.

{¶ 15} At the conclusion of the city's case, defense counsel made a Crim.R. 29 motion for judgment of acquittal, which was denied.

{¶ 16} On behalf of the defense, Jennifer Taylor testified that she and Alrefaei have three children together. While Jennifer characterized Alrefaei as “a liar” for failing to disclose his marriage to M.Q., Jennifer stated that she has never observed Alrefaei act in a violent or threatening manner.

{¶ 17} Alrefaei and Jennifer's daughter, Shelia Taylor, also testified on behalf of the defense. Shelia described her father as a kind person, and stated that she has never seen Alrefaei act violently.

{¶ 18} Alrefaei testified on his own behalf and vehemently denied all allegations levied against him by M.Q. and his children. According to Alrefaei's

version of the events, he was sitting on his couch using a small screwdriver to open a watch while talking to M.Q. and R.A. about R.A. contributing to the payments for a family vehicle. Alrefaei conceded that an argument ensued after R.A. refused to make payments towards the vehicle. However, Alrefaei inferred that he was the victim of physical restraint, alleging that M.Q. and A.A. suddenly jumped on him as he was sitting on the couch. Alrefaei testified that he was scratched on his neck during the struggle. Alrefaei opined that M.Q., R.A., and A.A. may have fabricated the allegations against him because they were upset with Alrefaei for having another family and for not bringing them to the United States sooner.

{¶ 19} In an effort to impeach the credibility of the city's witnesses, Alrefaei attempted to demonstrate that the incident occurred on June 4, 2018, and not June 8, 2018, as M.Q., R.A., and A.A. each alleged. According to Alrefaei, the timeline of the events was significant because he recalled attempting to transfer the title to his home to A.A. on the morning of June 6, 2018, and hosting a family dinner later that evening. Alrefaei suggested that his family would not have remained in his home and participated in family activities had he acted in accordance with their allegations of violence on June 4, 2018. In support of his timeline, Alrefaei attempted to introduce the photograph R.A. took of the altercation with his phone, marked defendant's exhibit No. 5. The photograph contained a timestamp, reflecting that the photo was taken on June 4, 2018. After much debate, the trial court declined to admit the photograph into evidence because it was not properly authenticated.

{¶ 20} At the conclusion of trial, Alrefaei was found guilty of domestic violence, as charged in Counts 1 and 2, and endangering children, as charged in Counts 5 and 6. He was found not guilty of the aggravated menacing charges. In November 2018, the trial court imposed a \$1,000 fine, a 180-day suspended jail sentence, and a three-year period of active community control supervision.

{¶ 21} Alrefaei now brings this timely appeal.

II. Law and Analysis

A. Admission of Photograph

{¶ 22} In his first assignment of error, Alrefaei argues “the trial court abused its discretion in refusing to allow [him] to introduce a photograph which contained a date and time stamp, which supported [his] timeline and version of events, and directly contradicted the complaining witnesses’ testimony and version of the events.” Alrefaei contends the trial court’s evidentiary ruling denied him “the opportunity to present a defense by contradicting critical testimony in the case.”

{¶ 23} Defendant’s exhibit No. 5 consists of a photograph that was alleged to have been taken during the physical altercation between Alrefaei and his family members. The photograph depicts A.A. holding down Alrefaei’s left arm while Alrefaei is sitting on a couch. An object, believed to be a knife, is observable in Alrefaei’s left hand, while a belt is observable in his right hand. In addition, the photograph contains a timestamp, which indicates that the photograph was taken on “06/04/2018 - 10:58 PM.” With the exception of the timestamp, the

photograph is identical to the image relied on by the city during its presentation of evidence.

{¶ 24} In this case, defense counsel referred to the photograph during the cross-examination of R.A., in an attempt to impeach her testimony that the incident occurred on June 8, 2018. R.A. reiterated that she was sure the incident occurred on June 8, 2018, but conceded that she personally took the photograph while using Alrefaei's phone.

{¶ 25} The exhibit was further utilized by the defense during the direct examination of Alrefaei. Throughout his testimony, Alrefaei maintained that the argument with his daughter occurred on June 4, 2018. He explained that he was confident the incident occurred on that date because of the timestamped photograph. When presented with defendant's exhibit No. 5, Alrefaei testified that he recognized the photograph and that the photograph was taken with his cell phone. Alrefaei explained that the timestamp information was recovered from his cell phone by accessing a function of the cell phone that automatically records pertinent information, including the date, time, and location the photograph was taken. Alrefaei further testified that he was confident the argument occurred on June 4, 2018, because he remembered "landmark events" that occurred in the days following the dispute. Specifically, Alrefaei recalled attempting to transfer the title to his home to A.A. on the morning of June 6, 2018, and hosting a family dinner with his wife and children later that evening.

{¶ 26} Prior to closing arguments, the city objected to the admission of defendant's exhibit No. 5, on the basis that Alrefaei failed to properly authenticate the date and time information contained on the photograph. Following a brief discussion, the trial court granted the city's objection to the exhibit, stating, in relevant part:

I'm not gonna allow it. * * * I don't know that there's anything that authenticates that date is correct, especially since they're offering it for the truth of the fact that that's the actual date the picture was taken.

{¶ 27} A trial court is vested with broad discretion to determine the admissibility of evidence, as long as that discretion is exercised in accordance with the rules of procedure and evidence. *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). We, therefore, will not disturb the trial court's decision to admit or exclude evidence absent an abuse of discretion. An abuse of discretion connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 28} Evid.R. 901(A) states that "authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). "[T]he authentication requirement of Evid.R. 901(A) is a low threshold that does not require conclusive proof of authenticity, but only sufficient foundation evidence for the trier of fact to conclude that the evidence is what its proponent claims it to be." *State v. Toudle*, 8th Dist. Cuyahoga No. 98609, 2013-Ohio-1548,

¶ 21, citing *Yasinow v. Yasinow*, 8th Dist. Cuyahoga No. 86467, 2006-Ohio-1355,

¶ 81.

“The admissibility of photographic evidence is based on two different theories. One theory is the ‘pictorial testimony’ theory. Under this theory, the photographic evidence is merely illustrative of a witness’ testimony and it only becomes admissible when a sponsoring witness can testify that it is a fair and accurate representation of the subject matter, based on that witness’ personal observation. * * * A second theory under which photographic evidence may be admissible is the ‘silent witness’ theory. Under that theory, the photographic evidence is a ‘silent witness’ which speaks for itself, and is substantive evidence of what it portrays independent of a sponsoring witness.”

State v. Pickens, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 150, quoting *Midland Steel Prods. Co. v. Internatl. Union, United Auto., Aerospace & Agriculture Implement Workers, Local 486*, 61 Ohio St.3d 121, 129-130, 573 N.E.2d 98 (1991).

{¶ 29} After careful review, we find it is unnecessary to assess the application of Evid.R. 901 to the device-generated evidence contained on the photograph disputed in this case. Even if this court were to assume the trial court abused its discretion by excluding the timestamped photograph based on the concessions made by R.A., Alrefaei was not prejudiced by that error.

{¶ 30} Crim.R. 52(A) defines harmless error in the context of criminal cases and provides: “Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” Under the harmless-error standard of review, “the government bears the burden of demonstrating that the error did not affect the substantial rights of the defendant.” *State v. Perry*, 101 Ohio St.3d 118,

2004-Ohio-297, 802 N.E.2d 643, ¶ 15, citing *United States v. Olano*, 507 U.S. 725, 741, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In most cases, in order to be viewed as “affecting substantial rights,” “the error must have been prejudicial: It must have affected the outcome of the [trial] court proceedings.” *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 7, quoting *Olano* at 734. Accordingly, Crim.R. 52(A) asks whether the rights affected are “substantial” and, if so, whether a defendant has suffered any prejudice as a result. *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 24-25. If the government does not satisfy its burden, the appellate court has no discretion to disregard the error; rather, the court must reverse the conviction. *Perry* at ¶ 15.

{¶ 31} In this case, the disputed photograph does not directly contradict the city’s allegations against Alrefaei. In fact, the photograph corroborates the city’s allegations that Alrefaei had to be physically restrained by members of his family while in possession of a kitchen knife. Nevertheless, the photograph was exclusively relied on by Alrefaei in an effort to challenge the credibility of the city witnesses and the veracity of their accusations against him. As discussed, Alrefaei argued that the photograph demonstrated that the incident occurred on June 4, 2018, and not June 8, 2018, as alleged by R.A., A.A., and M.Q. However, evidence relating to the date of the incident was not limited to the timestamped photograph. Here, Alrefaei presented ample testimony concerning his belief that the argument occurred on June 4, 2018. He provided insight as to why he was certain his timeline was accurate, and described the “landmark events” he participated in with

his family after the incident in an attempt to discredit M.Q.'s testimony that she immediately left Alrefaei's home with her children. Thus, Alrefaei's attempt to impeach the victims' credibility was not limited to his reliance on the excluded exhibit. The trier of fact was presented with competing testimony regarding the circumstances of the altercation, including Alrefaei's timeline of events.

{¶ 32} Regarding witness credibility, we are mindful that “[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). Triers of fact “are free to believe some, all, or none of each witness’ testimony and they may separate the credible parts of the testimony from the incredible parts.” *State v. Malyshev*, 7th Dist. Jefferson No. 17 JE 0029, 2019-Ohio-1087, ¶ 83.

{¶ 33} Applying the foregoing to the circumstances of this case, we find evidence relating to the date of the altercation was not dispositive of the charged offenses. The trial court, as the trier of fact was free to give more weight to the victims’ testimony concerning their specific allegations of domestic abuse and child endangerment, even if the court were to have simultaneously found Alrefaei’s timeline to be credible. Accordingly, we are unable to conclude that the outcome of the trial would have been different had the photograph been admitted into evidence.

{¶ 34} Alrefaei’s first assignment of error is overruled.

B. Sufficiency of the Evidence

{¶ 35} In his second assignment of error, Alrefaei argues the city failed to present sufficient evidence to support his convictions for child endangering in violation of C.C.O. 609.04.

{¶ 36} A challenge to the sufficiency of the evidence supporting a conviction requires a determination of whether the city has met its burden of production at trial. *State v. Hunter*, 8th Dist. Cuyahoga No. 86048, 2006-Ohio-20, ¶ 41, citing *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). When reviewing the sufficiency of the evidence, an appellate court must determine “whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In a sufficiency inquiry, an appellate court does not assess whether the city’s evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction. *State v. Starks*, 8th Dist. Cuyahoga No. 91682, 2009-Ohio-3375, ¶ 25, citing *Thompkins* at 387; *Jenks* at paragraph two of the syllabus.

{¶ 37} C.C.O. 609.04 provides, in pertinent part:

(a) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen (18) years of age * * *, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection or support.
* * * .

(b) No person shall abuse a child under eighteen (18) years of age * * *.

{¶ 38} The language set forth under C.C.O. 609.04 mirrors the language provided in R.C. 2919.22. The statute provides, in relevant part:

(A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age * * *, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. * * *.

(B) No person shall do any of the following to a child under eighteen years of age * * *:

(1) Abuse the child * * *.

{¶ 39} R.C. 2919.22 focuses on “child neglect and abuse.” Subsection (A) defines the offense of neglect as the “violation of a duty of care, protection, or support which results in a substantial risk to his health or safety.” 1974 Committee Comment to R.C. 2919.22. Subsection (B) of R.C. 2919.22, on the other hand, “deals with actual physical abuse of a child, whether through physical cruelty or through improper discipline or restraint.” *Id.* In this case, there is no allegation that Alrefaei physically abused S.A. or A.A. Thus, our review is limited to the application of C.C.O. 609.04(a), and the corresponding language set forth under R.C. 2919.22(A).

{¶ 40} As it pertains to R.C. 2919.22(A), the term “substantial risk” is defined as “a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.” R.C. 2901.01(A)(8). In addition, this court has explained that under R.C. 2919.22(A), proof of recklessness is an essential element of the crime of

endangering children. *Cleveland Hts. v. Cohen*, 8th Dist. Cuyahoga No. 101349, 2015-Ohio-1636, ¶ 25, citing *State v. McGee*, 79 Ohio St.3d 193, 680 N.E.2d 975 (1997), syllabus. “A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person’s conduct is likely to cause a certain result or is likely to be of a certain nature.” R.C. 2901.22(C). Therefore, to support a conviction for child endangering under R.C. 2919.22(A), it must be established, beyond a reasonable doubt, that Alrefaei “(1) recklessly (2) created a substantial risk to the health or safety of one or more of his children (3) by violating a duty of care, protection or support.” *Cohen* at ¶ 25.

A child endangering conviction may be based upon isolated incidents or even “a single rash decision” in which a parent recklessly puts his or her child’s health or safety at risk. *State v. James*, 12th Dist. Brown No. CA2000-03-005, 2000 Ohio App. LEXIS 5905, *6-7. However, “[t]o prove the requisite “substantial risk” element, * * * there must be some evidence beyond mere speculation as to the risk of harm that could potentially occur due to a single imprudent act.” *State v. Hughes*, 3d Dist. Shelby No. 17-09-02, 2009-Ohio-4115, ¶ 21, quoting *Middletown v. McWhorter*, 12th Dist. Butler No. CA2006-03-068, 2006-Ohio-7030, ¶ 11.

Id. at ¶ 27.

{¶ 41} There is no dispute that Alrefaei is the father of A.A. and S.A. and owed them a duty of care as a parent. However, Alrefaei argues on appeal that S.A. and A.A.’s presence during the altercation between himself and R.A. was insufficient to support a finding of guilt as to child endangerment. We find some merit to Alrefaei’s position.

{¶ 42} In this case, the evidence adduced at trial established that Alrefaei brandished a knife during an argument with his daughter and that A.A. actively participated in the attempt to restrain Alrefaei on a nearby couch. The photograph captured during the altercation reveals that A.A. was forced to hold his father's wrist in an effort to prevent him from using the knife against someone in anger. A.A. testified that he restrained Alrefaei's hand because he was scared of his father. A.A. explained his state of mind during the altercation as follows:

I think [Alrefaei] was capable of killing anyone in my family. That's why I was afraid. Yeah. He had a knife, and I think he had the intention to kill, yeah. Or – yeah. He did.

(Tr. 25.)

{¶ 43} Collectively, the evidence presented at trial supports a conclusion that Alrefaei acted with a heedless indifference to the consequences of his conduct and acted in a manner that created a substantial risk to A.A.'s health or safety by violating a duty of care. In relevant part, A.A. provided extensive testimony establishing his direct involvement in the physical confrontation and the danger posed by his close proximity to the knife that was in Alrefaei's possession. A.A. described the severity of Alrefaei's anger and testified that he believed his father "had the intention to kill." Viewing the evidence in a light most favorable to the prosecution, we find a rational trier of fact could have found beyond a reasonable doubt that Alrefaei committed the offense of child endangerment.

{¶ 44} However, we find there is insufficient evidence to sustain the child endangering conviction corresponding to S.A. In this case, S.A. did not testify at

trial, and the record only contains vague references to his location during the incident. While A.A. testified that S.A. was in the room during the altercation, there is no direct evidence regarding his proximity to the physical struggle or the scope of his observations. Moreover, there has been no claim that S.A. actively participated in the altercation or otherwise attempted to restrain Alrefaei. *See State v. Kouame*, 8th Dist. Cuyahoga No. 108559, 2020-Ohio-3118, ¶ 23. Nor is there any testimony to suggest the injuries sustained by M.Q. and R.A. were “readily apparent” to S.A. *Id.* at ¶ 43. Although the verbal and physical dispute may have had a negative emotional impact on S.A., we find, on this record, that S.A.’s mere presence during the altercation did not create a risk of harm — much less a substantial risk of harm — to his mental or physical health or safety. *See Cohen*, 8th Dist. Cuyahoga No. 101349, 2015-Ohio-1636, at ¶ 30; *State v. Jackson*, 8th Dist. Cuyahoga Nos. 108516 and 108611, 2020-Ohio-1118, ¶ 35.

{¶ 45} Based on the foregoing, we affirm the child endangering conviction relating to A.A. However, we find the evidence was insufficient to support Alrefaei’s conviction on the child endangering offense involving S.H.

{¶ 46} Alrefaei’s second assignment of error is sustained in part, overruled in part.

C. Impeachment Evidence

{¶ 47} In his third assignment of error, Alrefaei argues the trial court erred by excluding testimony relating to the intent and motives of his wife. Alrefaei contends that the trier of fact should have been able to hear evidence of bias to

determine M.Q.'s veracity, "particularly in a case that relies so heavily on the credibility of the complaining witnesses due to the lack of hard evidence."

{¶ 48} During the cross-examination of M.Q., defense counsel attempted to question her about Alrefaei's relationship with Jennifer Taylor, in an effort to establish M.Q.'s "bias against Alrefaei based on previous events." The prosecutor objected to the line of questioning on grounds of relevancy. The trial court sustained the objection, stating that Alrefaei's past relationship with Jennifer was not relevant to the issues of credibility in this case unless defense counsel could establish a bias argument that is "couched in terms of credibility regarding the time of [M.Q.] making the report — or testifying now." The court explained:

I am not going to have a conversation about family history from the '90s or 2007, because that doesn't have any basis for the 2018 credibility allegation that is being put forth here today. So I'm gonna again indicate that if we're gonna utilize that information * * * I'm definitely not allowing it in the distance * * *, unless you're saying that [M.Q.] found out June the 10th, 12th, 13th, or 14th.

(Tr. 108.)

{¶ 49} The constitutional right of cross-examination includes the right to impeach a witness's credibility. *State v. Green*, 66 Ohio St.3d 141, 609 N.E.2d 1253 (1993); *State v. Brewer*, 2d Dist. Montgomery No. 13866, 1994 Ohio App. LEXIS 3724 (Aug. 24, 1994). Evid.R. 611(B) permits cross-examination on "all relevant matters and matters affecting credibility." In turn, Evid.R. 616(A) governs methods of impeachment and provides that "[b]ias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by

examination of the witness or by extrinsic evidence.” Evid.R. 616(A). The denial of full and effective cross-examination of any witness who identifies a defendant as the perpetrator of the offense is the denial of the fundamental constitutional right of confrontation essential to a fair trial. *State v. Hannah*, 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978).

{¶ 50} However,

trial courts have wide latitude in imposing reasonable limits on the scope of cross-examination based upon concerns about harassment, prejudice, confusion of the issues, the witness’s safety, or repetitive, marginally relevant interrogation. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). It is within the trial court’s broad discretion to determine whether testimony is relevant, and to balance its potential probative value against the danger of unfair prejudice. *In re Fugate*, 2d Dist. Darke App. No. 1512, 2000 Ohio App. LEXIS 4306 ([Sept. 22,] 2000). We will not interfere with the trial court’s decision in those matters absent an abuse of discretion. *Id.*

State v. Bolton, 8th Dist. Cuyahoga No. 96385, 2012-Ohio-169, ¶ 41, quoting *State v. Foust*, 2d Dist. Montgomery No. 20470, 2005-Ohio-440.

{¶ 51} “Evidence which is not relevant is not admissible.” Evid.R. 402. “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid.R. 401.

The mere fact that testimony is logically relevant does not in all cases make it admissible. It must also be legally relevant. A fact which in connection with other facts renders probable the existence of a fact in issue may still be rejected, if in the opinion of the judge and under the circumstances of the case it is considered essentially misleading or too remote.

State v. McDowell, 3d Dist. Hancock No. 5-17-01, 2017-Ohio-9249, ¶ 28, quoting *Whiteman v. State*, 119 Ohio St. 285, 289, 146 N.E. 51 (1928).

{¶ 52} In this case, we find the trial court did not err by imposing reasonable limits on the scope of defense counsel’s cross-examination of M.Q. about Alrefaei’s past romantic relationship. Defense counsel was permitted to introduce extensive testimony regarding Alrefaei’s family history, including his immigration to the United States and his relationship with Jennifer while M.Q. remained in Jordan. However, given the significant separation in time between Alrefaei’s past relationship with Jennifer and the date of the alleged offense in this case, we are unable to conclude that it was unreasonable for the court to limit defense counsel’s exploration of M.Q.’s potential bias to the relevant time frame. Beyond mere speculation, defense counsel failed to connect Alrefaei’s past relationship to circumstances that may have affected M.Q.’s motives or credibility near the time she filed the police report in 2018. Accordingly, we find the trial court reasonably determined that this evidence was too remote to be relevant. See *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 35, citing *Whiteman v. State*, 119 Ohio St. 285, 298, 164 N.E. 51 (1928) (holding “it is the trial court’s province to determine whether, under the circumstances, testimony is ‘essentially misleading or too remote’ to be deemed relevant.”). And, because the disputed evidence was not relevant, Alrefaei has not demonstrated that he was “prohibited from engaging in otherwise appropriate cross-examination.” *Van Arsdall* at 680.

{¶ 53} Alrefaei's third assignment of error is overruled.

D. Marsy's Law

{¶ 54} In his fourth assignment of error, Alrefaei argues the trial court erred by denying defense counsel's request to separate the witnesses during trial. Alrefaei submits that "newly enacted Article I, Section 10a of the Ohio Constitution ('Marsy's Law') did not provide the trial court discretion to deny [his] motion requesting a separation of witnesses in this case."

{¶ 55} In this case, defense counsel requested the trial court to separate the city witnesses during the trial so that each alleged victim could not tailor their testimony to corroborate the testimony of other city witnesses. Following a discussion on the record regarding the applicability and requirements of Marsy's Law, the trial court denied defense counsel's request, stating:

[Marsy's Law is] a constitutional amendment. If the Constitution's saying that they can be present during the entire process and they have a right to be present, that includes the trial — I mean, all the parts of the trial so that they cannot be separated or asked out.

* * *

I didn't make the law, but it's — and I believe since it's a constitutional, it's kind of like the right to counsel. So it's a paramount law. So, you know, if there's a — if there's a procedure issue, my understanding is that the Constitution would trump that. So — I mean, you know, it could be a credibility question that you ask when they are cross-examined by you as counsel, but I think the Constitution indicates that they can be present during the entire span of a trial. It means during the testimony.

(Tr. 6.)

{¶ 56} The constitutional amendment known as Marsy's Law became effective on February 5, 2018, and expands the rights afforded to victims of crimes.

Relevant to this appeal, the amendment provides as follows:

(A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:

(1) to be treated with fairness and respect for the victim's safety, dignity and privacy;

(2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, *and to be present at all such proceedings*[:.]

(Emphasis added.)

{¶ 57} While the Marsy's Law now incorporates a victim's right to be present at all public proceedings involving a criminal offense into the Ohio Constitution, the notion that a victim may remain present during the trial proceedings is not new. *See, e.g., State v. Marshall*, 12th Dist. Butler No. CA2008-03-093, 2009-Ohio-2197, ¶ 41; *Sheflyand v. Schepis*, 8th Dist. Cuyahoga Nos. 95665 and 95667, 2011-Ohio-2040, ¶ 29. In this regard, we find the Ohio Rules of Evidence and the Ohio Revised Code provide further guidance in reviewing the trial court's denial of Alrefaei's request to exclude the alleged victims from the courtroom during trial.

{¶ 58} Specifically, Evid.R. 615 governs the separation and exclusion of witnesses. The rule provides in pertinent part:

(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear

the testimony of other witnesses, and it may make the order of its own motion. An order directing the “exclusion” or “separation” of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

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

* * *

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

{¶ 59} In turn, R.C. 2930.09 also provides for the victim’s presence in the courtroom at any stage of the proceeding, stating:

A victim in a case may be present whenever the defendant * * * in the case is present during any stage of the case against the defendant * * * that is conducted on the record, other than a grand jury proceeding, unless the court determines that exclusion of the victim is necessary to protect the defendant’s * * * right to a fair trial[.].

{¶ 60} Generally, a decision to allow a victim to remain in the courtroom during a trial is left to the discretion of the trial court. *State v. Klusty*, 5th Dist. Delaware No. 14 CAA 07 0040, 2015-Ohio-2843, ¶ 32. The burden is on the defendant to show the presence of the alleged victim compromised the defendant’s right to a fair trial. *State v. Ricco*, 11th Dist. Lake No. 2008-L-169, 2009-Ohio-5894, ¶ 27.

{¶ 61} After careful review of the record in its entirety, we are unable to conclude that the trial court abused its discretion by denying defense counsel's request to separate the city witnesses during trial. As discussed, Evid.R. 615(B)(4) states that the exclusion of witnesses does not apply where the alleged victim's presence is authorized by statute enacted by the General Assembly or by the Ohio Constitution. As stated, Marsy's Law expressly provides that victims have the constitutional right to be present at all public proceedings involving the criminal offense alleged to have been committed against him or her. Thus, the presence of each victim is permitted by the Ohio Constitution and statute.

{¶ 62} With that said, however, we recognize that R.C. 2930.09 requires the trial court to carefully balance a defendant's right to a fair trial against the victim's constitutional and statutory right to be present during criminal proceedings. In this case, the trial court's statement on the record failed to fully appreciate Alrefaei's own, and equally relevant, due process rights. Thus, the court's characterization of Marsy's Law and its application to the circumstances presented in this case was incomplete.

{¶ 63} Nevertheless, upon review of the record in its entirety, we find Alrefaei failed to satisfy his burden of demonstrating that the presence of each victim compromised his right to a fair trial. In this case, defense counsel's request to separate the witnesses consisted of a generalized reference to the *possibility* that the testimony of one victim might influence the testimony of another victim. However, counsel's vague assertion was insufficient as it failed to identify

“particularized evidence that the victims['] testimony will be so affected by the victim['] presence during the testimony of other witnesses that her right to a fair trial would be violated.” See *State v. Montgomery*, 5th Dist. Stark No. 2019CA00012, 2019-Ohio-5178, ¶ 22, quoting *State v. Maley*, 1st Dist. Hamilton No. C-120599, 2013-Ohio-3452, ¶ 7 (“We hold that for a defendant to show that a victim’s presence would result in an unfair trial, she must present particularized evidence that the victim’s testimony will be so affected by the victim’s presence during the testimony of other witnesses that her right to a fair trial would be violated. General assertions that it is possible are insufficient.”).

{¶ 64} Moreover, a review of the record does not reveal unfairness. Beyond vague and general assertions on appeal, Alrefaei has not identified any testimony in the record to suggest a victim altered or modified his or her testimony to conform with the evidence presented during the trial. To the contrary, each victim offered testimony based on his or her own personal observations and experiences. And in fact, there were minor inconsistencies in each victim’s recollection of events, including the location of other family members during various stages of the altercation. See *State v. Pickett*, 4th Dist. Athens No. 15CA13, 2016-Ohio-4593, ¶ 19 (finding the victims’ “somewhat differing accounts” support the likelihood that each testified according to his own recollection, rather than according to what the other victim stated while testifying). These issues were thoroughly explored by defense counsel during the cross-examination of each victim, thereby providing Alrefaei the opportunity to test whether the each victim’s testimony was tailored

or truthful. *See State v. Marshall*, 12th Dist. Butler No. CA2008-03-093, 2009-Ohio-2197, ¶ 44. Under these circumstances, Alrefaei has not demonstrated that the exclusion of each victim was necessary to protect his right to a fair trial.

{¶ 65} Based on the foregoing, we find the trial court did not abuse its discretion by permitting each victim to be present throughout the court proceedings. Alrefaei's fourth assignment of error is overruled.

{¶ 66} Judgment affirmed in part, reversed in part. We remand the case to the trial court to vacate the child endangering conviction pertaining to S.H. due to lack of sufficient evidence.

It is ordered that appellant and appellee share the 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 municipal 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.

EILEEN T. GALLAGHER, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY WITH SEPARATE CONCURRING OPINION;

SEAN C. GALLAGHER, J., CONCURS WITH SEPARATE CONCURRING OPINION AND CONCURS WITH THE SEPARATE CONCURRING IN JUDGMENT ONLY OPINION

MARY J. BOYLE, J., CONCURRING IN JUDGMENT ONLY:

{¶ 67} I agree with the lead opinion’s first three assignments of error. I respectfully disagree, however, with the lead opinion’s analysis and reasoning in defendant’s fourth assignment of error. The lead opinion concludes that the trial court did not abuse its discretion in denying Alrefaei’s request to separate the witnesses during trial despite finding that the trial court’s decision was incomplete. As set forth below, it is my view that the trial court abused its discretion when it denied Alrefaei’s request. Because I nonetheless agree that the error was harmless, I concur in judgment only with the lead opinion.

{¶ 68} In his fourth assignment of error, defendant maintains that the trial court abused its discretion in denying his motion for a separation of witnesses. There were four alleged victims in this case (two domestic violence victims and two child endangering victims). For its case in chief, the city called three of the alleged victims to testify against Alrefaei; his 14-year-old son, his 21-year-old daughter, and his wife. At the beginning of trial, the city moved for a separation of witnesses. Before the trial court could rule on the city’s motion, Alrefaei also moved for a separation of witnesses. The trial court told the parties that under Marsy’s Law, the victims had a right to be present. The trial court then stated, “They need to come back in. I think that Marsy’s Law doesn’t allow us to prohibit them from being (inaudible) the proceeding[.]” The court then instructed the bailiff to “grab them.” Alrefaei objected for the record, requesting the court to weigh the victims’ constitutional right to be present at the trial against his due process rights.

{¶ 69} The city then called its first witness, Dr. Xiaochou Tang, who was Alrefaei's wife's treating physician. The trial court asked the city if it would instead call a witness who was "in the room as opposed to" the only witness who was not in the courtroom. The trial court stated that it was "making sure the objection [was] deminimized," and that it was trying to balance Alrefaei's "procedural rights." The trial court warned the city that if it did not call one of the alleged victims first, it would "have them removed" from the courtroom. The city then called witnesses in the following order: Alrefaei's son, his daughter, Dr. Tang, and Alrefaei's wife.

{¶ 70} In 1994, Ohio voters approved the Ohio Victims' Rights Amendment, which was contained within Article I of the Ohio Constitution, and specifically, Ohio's Bill of Rights. It stated:

Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the general assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process. This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding, does not abridge any other right guaranteed by the Constitution of the United States or this constitution, and does not create any cause of action for compensation or damages against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

Ohio Constitution Article I, Section 10a.

{¶ 71} The General Assembly also enacted R.C. Chapter 2930, Ohio's Victims' Rights Act, in 1994. It became effective on October 12, 1994, just before voters approved of the 1994 constitutional amendment. Some of the rights that victims

gained under Ohio's Victims' Rights Act include the right to receive information about their rights from the law enforcement agency investigating the crime (R.C. 2930.04), the right to authorize another person to act as their representative during the proceedings (R.C. 2930.02), the right to receive current information about the investigation (R.C. 2930.04), the right to be notified when the offender is arrested or released before trial (R.C. 2930.05), the right to reasonable return of property (R.C. 2930.11), the right to information from, and meaningful discussions with, the prosecutor (R.C. 2930.06), the right to be informed of, and object to, a motion, request, or agreement that will substantially delay the proceedings (R.C. 2930.08), the right to be present during trial (R.C. 2930.09), and the right to make a statement at sentencing (R.C. 2930.12), as well as several other rights.

{¶ 72} The rights afforded to victims were greatly expanded in Ohio in November 2017, when voters approved the constitutional amendment known as Marsy's Law. Marsy's Law is named after Marsy Nicholas, a University of California Santa Barbara student who was stalked and killed by her ex-boyfriend in 1983. California became the first state to adopt Marsy's Law as part of the California Victims' Bill of Rights Act in 2008. In addition to California and Ohio, voters in Florida, Georgia, Illinois, Kentucky, Nevada, North Carolina, North Dakota, Oklahoma, South Dakota, and Wisconsin have adopted Marsy's Law. *See* <https://www.marsyslaw.us/states> (accessed Aug. 28, 2020). Ohio's Marsy's Law became effective on February 5, 2018.

{¶ 73} Ohio Constitution Article I, Section 10a, now states in its entirety:

(A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:

(1) to be treated with fairness and respect for the victim's safety, dignity and privacy;

(2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings;

(3) to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right of the victim is implicated;

(4) to reasonable protection from the accused or any person acting on behalf of the accused;

(5) upon request, to reasonable notice of any release or escape of the accused;

(6) except as authorized by section 10 of Article I of this constitution, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused;

(7) to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim;

(8) to proceedings free from unreasonable delay and a prompt conclusion of the case;

(9) upon request, to confer with the attorney for the government; and

(10) to be informed, in writing, of all rights enumerated in this section.

(B) The victim, the attorney for the government upon request of the victim, or the victim's other lawful representative, in any proceeding involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated, may assert the rights enumerated in this section and any other right afforded to the victim by law. If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition.

(C) This section does not create any cause of action for damages or compensation against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(D) As used in this section, "victim" means a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act. The term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incapacitated victim.

(E) All provisions of this section shall be self-executing and severable, and shall supersede all conflicting state laws.

(F) This section shall take effect ninety days after the election at which it was approved.

{¶ 74} Although not all sections are relevant to this appeal, it is paramount to understand how Marsy's Law has expanded victims' rights in Ohio. Thus, I will highlight just a few provisions. One of the biggest changes under Marsy's Law is how a victim is defined. Under Marsy's Law, a "victim" is "a person against whom the criminal offense or delinquent act is committed or who is directly and

proximately harmed by the commission of the offense or act.” Ohio Constitution Article I, Section 10a, Subsection(D).

{¶ 75} R.C. 2930.01(H), however, defines a victim as:

(1) A person who is identified as the victim of a crime or specified delinquent act in a police report or in a complaint, indictment, or information that charges the commission of a crime and that provides the basis for the criminal prosecution or delinquency proceeding and subsequent proceedings to which this chapter makes reference.

(2) A person who receives injuries as a result of a vehicle, streetcar, trackless trolley, aquatic device, or aircraft accident that is proximately caused by a violation described in division (A)(3) of this section or a motor vehicle accident that is proximately caused by a violation described in division (A)(4) of this section and who receives medical treatment as described in division (A)(3) or (4) of this section, whichever is applicable.

{¶ 76} Marsy’s Law arguably expands who a victim may be in certain circumstances because the victim does not need to be named in the complaint or indictment, but rather just directly and proximately harmed by the act. The federal Crime Victims’ Rights Act defines a crime victim similar to Marsy’s Law; i.e., a person “directly and proximately harmed as a result of the commission of a Federal offense.” Regarding the federal definition of victim, one circuit court observed:

The CVRA * * * does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document. The statute, rather, instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties. Under the plain language of the statute, a party may qualify as a victim, even though it may not have been the target of the crime, as long as it suffers harm as a result of the crime’s commission.

In re Stewart, 552 F.3d 1285, 1289 (11th Cir.2008). As another federal circuit court explained:

“The requirement that the victim be [‘]directly and proximately harmed[’] encompasses the traditional ‘but for’ and proximate cause analyses.” *In re Rendon Galvis*, 564 F.3d 170, 175 (2d Cir.2009) (citing *In re Antrobus*, 519 F.3d 1123, 1126 (10th Cir.2008) (Tymkovich, J., concurring) (noting that “direct[.]” harm encompasses a “but-for” causation notion that is different from proximate harm)). “The necessary inquiry is [.] fact-specific[.]” *Id.* (citations omitted).

In re McNulty, 597 F.3d 344, 350 (6th Cir.2010).

{¶ 77} How a victim is defined is important because under Marsy’s Law, a court is required to order “full and timely restitution from the person who committed the criminal offense” to the victim. Ohio Constitution Article I, Section 10a, Subsection (A)(7). The Ohio restitution statute states only that courts *may* impose restitution to the victim based upon the victim’s economic loss. R.C. 2929.18(A)(1). Under the arguably broader definition of victim set forth in Marsy’s Law, third parties may be able to receive restitution if the offender’s conduct directly and proximately harmed them. Third parties could receive restitution in Ohio until 2004 when the General Assembly amended the statute to prohibit third parties from receiving restitution. *See State v. Didion*, 173 Ohio App.3d 130, 2007-Ohio-4494, 877 N.E.2d 725 (3d Dist.) (defendant lost control of his truck and crashed into a home, injuring two victims and killing a third; trial court ordered restitution to Blue Cross/Blue Shield and the Department of Jobs and Family Services for covering two of the victims’ medical expenses and to a bank for covering the funeral costs of the

third victim; Third District held that the trial court's order of restitution to Blue Cross/Blue Shield, Department of Jobs and Family Services, and First National Bank of Sycamore was invalid because restitution was not permitted for third parties under the restitution statute after 2004).

{¶ 78} Marsy's Law also expanded notice provisions. Under Marsy's Law, upon request of a victim or a victim's representative, prosecutors must give victims "reasonable and timely notice of all public proceedings involving the criminal offense" and reasonable notice of any release or escape of the accused. Ohio Constitution Article I, Section 10a, Subsection(A)(2) and (5).

{¶ 79} In contrast, R.C. 2930.05 states in part that the law enforcement agency investigating the crime shall give the victim notice of the arrest or detention of the defendant, the name of the defendant, and whether the defendant is eligible for pretrial release or for release from detention. R.C. 2930.06 also provides that prosecutors, "*to the extent practicable*, shall confer with the victim" before pretrial diversion is granted, amending or dismissing the indictment against a defendant, agreeing to a plea, or trial. (Emphasis added.) But under Marsy's Law, if the victim requests, prosecutors are required to confer with the victim and are no longer excused from doing so if conferring with the victim it is not practicable.

{¶ 80} Marsy's Law also provides that victims, upon request, have the right to be present at all public proceedings in any matter involving the criminal offense against the victim. Ohio Constitution Article I, Section 10a, Subsection (A)(2). This is the section that is relevant to this appeal. Even before Marsy's Law, however,

victims in Ohio already had the right to be present in the courtroom during any stage of the proceedings. R.C. 2930.09, which was first enacted in 1994, states:

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

{¶ 81} R.C. 2930.09 gives discretion to the trial court to exclude a victim from the proceedings if the court determines that it is necessary to protect the defendant's right to a fair trial. Marsy's Law does not include any language that indicates a court can exclude a victim after the victim requests to be present.

{¶ 82} Evid.R. 615 sets forth the rule for the separation and exclusion of witnesses. It provides in relevant part, "Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses[.]" Even before Marsy's Law, Evid.R. 615(B)(4) stated in relevant part that the rule "does not authorize exclusion of any of the following persons from the hearing: * * * in a criminal proceeding, a victim of the charged offense to the extent that the victim's presence is authorized by statute enacted by the General Assembly." In response to Marsy's Law, the Ohio Supreme Court amended Evid.R. 615 effective July 1, 2019. *See* Staff Notes ("The amendment

to Evid.R. 615 was made to comply with the 2017 amendment to Article I, Section 10a of the Ohio Constitution, also known as Marsy’s Law.”). Subsection (B)(4) now states that an alleged victim of the charged offense may not be excluded from a criminal proceeding “to the extent that the alleged victim’s presence is authorized by statute enacted by the General Assembly or by the Ohio Constitution.” Evid.R. 615(B)(4). Subsection (B)(4) further states that “‘victim’ has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes.”

{¶ 83} Before Marsy’s Law, courts generally held that a trial court’s decision to allow a victim to remain in the courtroom was left to the discretion of the trial court. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 96 (“Although R.C. 2930.09 provides that a defendant’s fair-trial rights are superior to a victim’s right to be present, the statute clearly gives the trial court discretion to make the determination whether the victim’s presence will prejudice the defendant.”); *see also State v. Montgomery*, 5th Dist. Stark No. 2019CA00012, 2019-Ohio-56178, ¶ 21, citing *State v. Klusty*, 5th Dist. Delaware No. 14CAA070040, 2015-Ohio-2843, ¶ 32 (“A decision to allow a victim to remain in the courtroom during a trial is left to the discretion of the trial court.”). Courts also placed the burden “on the defendant to show the presence of the alleged victim compromised the defendant’s right to a fair trial.” *Montgomery* at ¶ 21, citing *State v. Ricco*, 11th Dist. Lake No. 2008-L-169, 2009-Ohio-5894, ¶ 27; *see also State v. Pickett*, 4th Dist. Athens No. 15CA13, 2016-Ohio-4593, ¶ 18; *State v. Hines*, 3d Dist. Marion No. 9-05-13, 2005-Ohio-6696, ¶ 22.

{¶ 84} Marsy's Law appears to take away the trial court's discretion to exclude a victim from trial if the victim requests to be present. The Fifth and Fourteenth Amendments of the United States Constitution, however, protect a defendant's right to a fair trial through the Due Process Clause. The Due Process Clause under Fifth Amendment of the United States Constitution is applicable only to the federal government. But its protections are extended to the states via the Fourteenth Amendment, which provides that "[n]o [s]tate shall * * * deprive any person of life, liberty, or property, without due process of law." *State v. Williams*, 6 Ohio St.3d 281, 285, 452 N.E.2d 1323 (1983); *see also United States v. Agurs*, 427 U.S. 97, 111, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Such rights are "implicit in the concept of ordered liberty" and necessary to "maintain a fair and enlightened system of justice." *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937). Although states may afford individuals greater rights, states cannot deprive individuals of rights guaranteed by the federal constitution. *State v. Robinette*, 80 Ohio St.3d 234, 238, 685 N.E.2d 762 (1997). State constitutions and amendments to them are therefore subject to the applicable prohibitions and limitations of the federal constitution.

{¶ 85} In a criminal trial, a defendant's right "to due process is, in essence, the right to a fair opportunity to defend against the [s]tate's accusations." *State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837, 895 N.E.2d 821, ¶ 12, quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In this case, Alrefaei argues that the trial court deprived him of a fair trial because it

permitted all three alleged victims to be present in the courtroom while the other alleged victims were testifying.

{¶ 86} The purpose of a separation order is “so that [witnesses] cannot hear the testimony of other witnesses,’ Evid.R. 615, and tailor their own testimony accordingly.” *State v. Waddy*, 63 Ohio St.3d 424, 434, 588 N.E.2d 819 (1992). Evid.R. 615 “is predicated on the well-established and time-honored practice of separating witnesses in order to facilitate the exposure of inconsistencies in their testimony and to prevent the possibility of a witness shaping his or her testimony to conform with that of another.” *State v. Beavers*, 2d Dist. Montgomery No. 26036, 2015-Ohio-1161, ¶ 66, quoting *State v. Hartzell*, 2d Dist. Montgomery No. 17499, 1999 Ohio App. LEXIS 3812, 3 (Aug. 20, 1999). In cases where there is one victim, prosecutors can simply call the victim first and then the victim can remain during other witnesses’ testimony. But here, there were three alleged victims.

{¶ 87} It appears as if the trial court judge in this case ordered the victims into the courtroom based upon Marsy’s Law without knowing if the victims wanted to be in the courtroom. When the city and Alrefaei requested a separation of witnesses, the trial court denied their request, stated that “Marsy’s Law doesn’t allow us to prohibit them” from being in the courtroom, and instructed the bailiff to bring the witnesses back in the courtroom. The prosecutor is generally the one who communicates with the victim pursuant to R.C. 2930.19, which states, “In a manner consistent with the duty of a prosecutor to represent the interests of the public as a whole, a prosecutor shall seek compliance with this chapter on behalf of a victim, a

member of the victim's family, or the victim's representative." If the prosecutor was asking for a separation of witnesses, the victims may not have requested to be in the courtroom. There is certainly nothing in Marsy's Law that mandates a victim be in the courtroom during a trial. In fact, there may be many reasons that a victim does not want to sit through the entire proceedings or even any part of the proceedings — especially when family members and children are testifying. Here, Alrefaei's wife and two children were testifying against their husband and father. They may not have wanted to sit through everyone else's testimony. Moreover, Alrefaei's wife may not have wanted her children to hear her testimony. But after the trial court ordered all of them back in the courtroom, they likely felt they had no choice but to stay. Thus, it is my view that the trial court erred when it ordered the victims into the courtroom without knowing their wishes. It is also my view that the prosecutor should have placed the victims' wishes on the record. We see countless victims decline to appear at a sentencing hearing for whatever reason. It is not hard to imagine that for some victims, it is too painful to relive events that occurred or to even see the perpetrator.

{¶ 88} It is also my view that the trial court should have conducted a balancing test on the record, weighing the competing interests of Alrefaei's right to a fair trial (to have the witnesses excluded) versus the alleged victims' right to be in the courtroom. This balancing test existed before Marsy's Law under the 1994 constitutional amendment and R.C. 2930.09. *See State v. Maley*, 1st Dist. Hamilton No. C-120599, 2013-Ohio-3452, ¶ 8. R.C. 2930.09 specifically states that a victim

may be present during any stage of the case, but only if it does not infringe upon the defendant's right to a fair trial. While Marsy's Law appears to make a victim's presence in the courtroom mandatory if the victim so wishes, the trial court still must consider a defendant's right to a fair trial under the United States Constitution. Thus, R.C. 2930.09 and the Due Process Clause of the federal constitution still require the court to conduct a balancing test before denying a defendant's request for separation of witnesses.

{¶ 89} Here, Alrefaei objected to the witnesses being present and asked the court to weigh his rights against the victims' rights. The trial court declined to do so, stating that it had no choice but to allow them to be present under Marsy's Law, without ensuring that their presence would not infringe upon Alrefaei's right to a fair trial. The trial court did order the city to call one of the victims first to testify (instead of the doctor) because it said it was trying to balance Alrefaei's "procedural rights." But in this case, there were three alleged victims who the city intended to call as witnesses who were all present during the incident. This included the first two witnesses, the daughter and son, who would understandably be influenced by the presence of their mother, the third witness. Moreover, because it does not appear that the victims in this case requested to be in the courtroom, the answer to the balancing test should have been easy — the trial court should have excluded them at Alrefaei's request until they testified. Therefore, it is my view that the trial court abused its discretion when it denied Alrefaei's request for a separation of witnesses.

{¶ 90} Nonetheless, I disagree with Alrefaei that *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d (1967), applies here; that is, the error in this case was not a structural error. The United States Supreme Court has “repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal.” *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). To the contrary, most constitutional errors may be harmless. *Id.*, citing *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), and *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Structural errors are limited to those errors that “affec[t] the framework within which the trial proceeds,” and are not “simply an error in the trial process itself.” *Fulminante* at 309-310; *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 2564, 165 L.Ed.2d 409 (2006). Structural errors include such serious constitutional violations such as the total deprivation of the right to counsel at trial (*Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d (1963)), or a trial before an impartial judge (*Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)). The Sixth Circuit has applied the harmless error analysis after finding that a trial court failed to separate the witnesses during trial under Fed.R.Evid. 615. *United States v. Pulley*, 922 F.2d 1283 (6th Cir.1991).

{¶ 91} In this case, I agree with the lead opinion that the harmless error analysis applies. I also agree that Alrefaei was not prejudiced by such error. There is nothing in the record that indicates a concerning or unusual correlation between the testimonies of the three victims. I therefore concur in judgment only.

SEAN C. GALLAGHER, J., CONCURRING:

{¶ 92} I fully concur with the lead opinion, but I also agree with the discussion presented in the separate concurring opinion and believe that such analysis has its place in reviewing these issues moving forward. I simply would not go as far as to say that the trial court abused its discretion by permitting the alleged victims to remain in the courtroom based on how the facts played out in this particular case.

{¶ 93} The trial judge here had the foresight to recognize the new law was in place and did her best, without the benefit of prior reviews, to try to apply it. As both the lead and concurring opinions point out, it is going to take considerable thought going forward to balance the interests of both victims and defendants in the future.