[Cite as *State v. Bai*, 2011-Ohio-2206.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-05-116
	:	O P I N I O N
- vs -		5/9/2011
	:	
YUYANG DAVID BAI,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-11-1886

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POWELL, P.J.

{¶1} Yuyang David Bai seeks to overturn his convictions for gross sexual imposition (GSI) and assault by arguing on appeal that the Butler County Common Pleas Court, the prosecution, and his trial counsel committed prejudicial errors. Bai's assault conviction is affirmed, but we reverse his GSI conviction because the state's failure to disclose the victim's handwritten statement undermines our confidence in that verdict and

his trial counsel provided ineffective assistance with regard to requesting an in camera inspection of the statement.

{¶2} Bai, a student at Miami University, was charged with GSI, assault on a police officer, and aggravated robbery for events that occurred on the Miami University Oxford campus in the early morning hours of Nov. 1, 2009. A jury found Bai not guilty of the aggravated robbery charge (attempting to take a police officer's service weapon), but guilty of GSI and assault on a police officer, as charged. The trial court sentenced Bai to prison for one year on the GSI and one year for the assault, to be served consecutively. Bai files this appeal, raising 11 assignments of error.

{¶3} We will outline the evidence provided at trial before we discuss each of the assignments of error. We will attempt to follow the chronological order of events as presented by witnesses for the state and the defense, but will principally include the testimony of M.L., the alleged victim, at the conclusion of the summary.

{¶4} Miami University Police Officer Bryan Hyllengren was on duty around 1:45 a.m. when he saw a woman, later identified as M.L., stumbling, having difficulty walking and dropping items. The officer said M.L. quickened her pace when he attempted to get her attention. Once stopped, M.L. gave her name and handed the officer her credit card when he asked for her ID. M.L. told the jury she remembers drinking at least seven or eight drinks of beer and liquor that evening, Halloween night.

{¶5} Officer Hyllengren said he smelled a strong odor of alcohol on M.L. She also had bloodshot, watery eyes, slurred speech, and appeared disoriented. The officer asked her to submit to a portable breath test (PBT) and called the "life squad" to the scene. Officer Hyllengren found M.L. to be "highly intoxicated," based upon his training and experience. The officer said the life squad took M.L. to the hospital at 2:10 a.m.

{¶6} M.L. was released from the hospital after the officer served her a summons

for a charge of underage consumption. M.L. was transported back to campus by bus and dropped off at Minnich Hall at 2:49 a.m.

{¶7} Bai testified that he drank some alcohol on Halloween night. He bought food from the Shriver Center around 2:38 a.m., and was walking back to his dorm when he saw M.L. outside another dorm. She had items from her purse on the ground. She said she couldn't find her ID and couldn't get into her dorm. They went into Bai's dorm building to get warm.

{¶8} Bai asked M.L. if she wanted to get some food from Shriver Center. They walked to Shriver, where M.L. bought some ice cream at the market there. Cameras from Shriver and the market show Bai and M.L. walking from the refrigerator cases to the cashier, and down a hallway.

{¶9} Bai said they walked up to the first floor of the Shriver Center to eat the ice cream. Bai said he asked M.L. if she liked him and whether she thought he was cute, and she said "yes." He asked her if she wanted him to stay with her and she said she did. Bai said they began kissing after he asked her if he could kiss her. He said he put his hand on her leg and she "responded favorably." "She didn't say no. She kept on kissing me."

{¶10} At one point, Bai walked downstairs to buy some water and candy and returned to M.L. A Shriver camera shows Bai walking alone. His swipe card, which is a photo ID card that contains the student's name, meal plan, etc., indicates a food purchase at 3:26 a.m. at the market in the Shriver Center. Bai said they left Shriver about 3:30 a.m. Bai estimated they were in the center for 20 to 30 minutes.

{¶11} After leaving Shriver, M.L. said she was cold, so Bai asked her if she wanted to find a warm building. They entered Gaskill Hall through an unlocked door. Bai said M.L. called him "a saint" because it was warm in the building. Finding the first and second floor entrance doors locked, Bai and M.L. went upstairs to the third floor to find a restroom

so M.L. could wash her hands. Bai said the building was pretty dark inside; there were a few security lights on in the hallway.

{¶12} While M.L. was washing her hands in the restroom, Bai said he walked up behind her and put his arms around her waist. According to Bai, M.L. said, "No, I can't do this right now." Bai said he let go.

{¶13} Miami University Police Officer Jay Young testified that he saw Bai and M.L. before they entered Gaskill Hall. The officer said he was sitting in his police vehicle on campus when he observed a male later identified as Bai with M.L. The officer said Bai was walking backwards in front of M.L, holding both of her hands and looking around. Officer Young found the behavior suspicious, so he turned off his car headlights, swung his car around, and got out to investigate.

{¶14} After entering Gaskill Hall, Officer Young searched the basement first and eventually walked up to the third floor, as the first and second floor entrance doors were locked.

{¶15} Officer Young said he heard voices on the third floor. A female voice said, "No. Please stop. I don't want it to go there. You know, please stop." He heard a male voice saying, "Why not? Come on. Why?"

{¶16} Young walked toward an open room and saw Bai in the room "kind of on his knees with one hand out in front" and the other hand in the groin area of the female. Officer Young said M.L. was sitting on the floor with her legs spread out in front of her and her arms back, in what the officer called a "somewhat reclined position." He said it looked like Bai was rubbing M.L.'s "vagina area."

{¶17} As the officer stepped to the doorway, he said he simultaneously flipped on the light switch, and asked "What's going on?" He said Bai jumped up, turned around and faced the officer. Bai told the officer they were looking for a bathroom. Bai started

walking nervously around the room.

{¶18} Officer Young said he was dressed in his Miami University Police uniform, which on that night included a sweater and a jacket. The jacket was tucked into his gun belt. Young described the police patches on the jacket. Young admitted he does not remember identifying himself as a police officer.

{¶19} Officer Young told Bai to sit down and give him his identification. Bai said he had to leave. Bai tried to push past the officer standing in the threshold of the door. Young said he grabbed Bai and pushed him back into the room. Young said Bai charged at him, "coming with arms extended, kind of throwing a punch sort of thing. I stopped him. I'm trying to slap his punches to one side. I was caught in the left cheek with one. I returned one on him. I shoved him back."

{¶20} Young said Bai "came at me" additional times. At one point, Young was kicked and later "slammed" to the ground on his back. During this altercation, the men crashed into a firebox in the hallway, cracking the glass front. Officer Young said both men fell to the ground and he believed that Bai was reaching for his service weapon in its holster. Eventually, Young said Bai rolled off him and took off running down the stairs.

{¶21} Bai told the jury that he and M.L. walked from the restroom into an open room on the third floor of Gaskill Hall, and did not turn on the room lights. He said M.L. sat cross-legged on the floor and took out her cell phone. She talked about trying to find someone who could let her into a different dorm.

{¶22} He said he was standing when he heard someone say "what are you two doing in here?" or something to that effect. Bai said he saw a dark figure in the doorway. He thought the person was a custodian or maintenance person. Bai didn't want to get in trouble for being in the building. Bai said the man did not identify himself. Bai acknowledged that the man turned on the lights in the room at some point.

{¶23} Bai said he panicked, ran toward the door, and was pushed back by this person. When Bai ran toward the door again, the person tackled him. Bai said he pushed himself up and ran out the door and out of the building.

{¶24} Officer Young stayed with M.L. and called for assistance, telling dispatch that Bai was running. Officer Young said M.L. was "totally out of it;" * * * "highly Intoxicated in my opinion." Off-duty officers heard the calls for assistance and caught up to a winded Bai on the band field. He was taken into custody.

{¶25} The sexual assault nurse examiner (SANE) who examined M.L. around 5:10 a.m. said she smelled a strong odor of alcohol on M.L. She said M.L. was crying, incoherent, kept saying she was violated. She told the nurse that Bai was an acquaintance from school, that she went to her dorm and was lying on the ground, and "this guy I know started bothering me." She told the nurse that the man put his hands on the outside of her personal area. Later in the report, the nurse indicated that M.L. said the man put his hands inside her panties and was rubbing her.

{¶26} The nurse testified that she believed M.L. was substantially impaired. The nurse said, "My opinion was that she was, because the one thing that she did keep saying to me throughout the whole crying, and she continued to cry throughout the --- most the whole exam was, I wanted to keep this special for when I got married, and he violated me." [sic]

{¶27} The nurse acknowledged that she saw M.L. walking down the hallway at the hospital during M.L.'s first visit to the hospital and did not notice anything unusual about her conduct.

{¶28} M.L. testified that she does not remember being arrested earlier in the evening, and only remembers being asked some identification questions at the hospital on her first visit. She remembered trying to call friends to get back into her dorm because

she didn't have her "swipe" card. M.L. said she didn't remember meeting anyone or going to the Shriver Center on campus, although she said she was the individual in the still photograph from the Shriver Center cameras.

{¶29} M.L. remembered being in Gaskill Hall and "feeling uncomfortable" and "knowing that I was in the wrong place." She knew she was not in her dorm. M.L. said she remembered Bai touching her inside her underwear "on her vagina." She remembered saying "no," that she didn't want to do that and didn't want to go there, but it didn't stop. She said she was not able to identify the male she was with that night. M.L. said she did not remember the events because she was "extremely intoxicated." The prosecutor asked M.L., "Did you, to your knowledge, consent to anything?" She answered, "No."

{¶30} When Bai's trial counsel asked if she recalled going to the Shriver Center, buying ice cream, and kissing Bai, M.L. said she didn't recall those things.

{¶31} Trial counsel asked M.L. to read aloud for the jury an email she wrote to police on November 1. In the email addressed to Miami University Police Detective Schneider, M.L. said as follows:

{¶32} "As for recalling the situation as you wish me to do, the crime occurred like this. After leaving McCullough-Hyde Hospital around 2:30 p.m., (sic) I was walking back to my dorm, Minnich Hall. I was walking back on the slanted walk, and I walked farther down by Gaskill Hall. This is where a man confronted me and began walking with me while I was still walking to my dorm.

{¶33} "He then proceeded to take me into Gaskill Hall and make sexual advances towards me. This is when he began touching me and forcing himself upon me. I resisted and said no to him, but—but he still touched me in a way that made me realize that what he was doing was not okay, and I was not consenting in any way. He also touched me

under my dress with—grabbed my vagina in a way that I was also very uncomfortable with. He did not enter my vagina with his penis, but grabbed in those areas with his hands.

{¶34} "Then thankfully an officer who had seen the man approach me before, lead me into Gaskill Hall—into Gaskill, decided to investigate the incident and found me inside the building. (sic) He saved me and helped me after the man was found by other officers and taken into custody. The officer then brought me to the hospital, where I was given a sexual assault examination and was made sure that I was okay.

{¶35} "This is what I remember and what Officer Yates, who visited me at my dorm tonight, November 1st, 2009, helped me put together. I hope this suffices and makes the situation more clear."

{¶36} As previously noted, Bai raises 11 assignments of error in this appeal. We will address the assignments of error out of order for ease of discussion.

{¶37} Assignment of Error No. 4:

{¶38} "BAI'S CONVICTION FOR ASSAULT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶39} Bai argues that the state failed to prove that he knowingly caused or attempted to cause physical harm when he was only trying to run out of the room in Gaskill Hall, and failed to prove that the officer sustained physical harm.

{¶40} Bai was charged with assault under R.C. 2903.13(A), which states that he knowingly caused or attempted to cause physical harm to another. The assault offense is a fourth-degree felony when the alleged victim is a peace officer in the performance of his official duties. R.C. 2903.13(C)(3).

{¶41} Bai does not appear to dispute in this appeal that Officer Young was a

peace officer. See R.C. 2903.13; R.C. 2935.01 ("peace officer" includes state university law enforcement officer). "Physical harm" is defined by R.C. 2901.01(A)(3) as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶42} According to R.C. 2901.22(B), a "person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶43} We previously outlined the testimony from both Officer Young and Bai regarding the altercation between the two men in Gaskill Hall. Officer Young described an altercation in which Bai "came at" him multiple times and on one occasion slammed the officer to the floor. Bai said he was only attempting to get through the door in which an unidentified man was standing. The jury received testimony about how the officer was dressed in uniform that morning. Officer Young also testified to suffering strains, sprains, and bruising from the altercation and indicated he was prescribed a muscle relaxer.

{¶44} Construing the evidence most favorably for the state on the sufficiency of the evidence challenge, we find that any rational trier of fact could have found the essential elements of the crime of assault beyond a reasonable doubt. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶34. The state showed beyond a reasonable doubt that Bai knowingly caused or attempted to cause physical harm to a peace officer in the performance of his official duties.

{¶45} A court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *Hancock* at ¶39. The question is, whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. Id.

{¶46} While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence. *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26.

{¶47} After reviewing the entire record, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction for assault must be reversed. Bai's fourth assignment of error is overruled.

{¶48} Assignment of Error No. 3:

{¶49} "BAI'S CONVICTION FOR GROSS SEXUAL IMPOSITION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHERE THERE WAS NO EVIDENCE M.L. CONSUMED ANY ALCOHOL AFTER 1:45 A.M., BAI DID NOT SEE HER CONSUME ANY ALCOHOL, AND THERE WAS EVIDENCE THAT HER ABILITY TO RESIST OR CONSENT WAS NOT SUBSTANTIALLY IMPAIRED."

{¶50} In this assignment of error, Bai argues that his GSI conviction should be reversed because there was a lack of the requisite level of proof that M.L.'s ability to resist or consent was substantially impaired and that Bai knew or had reasonable cause to believe that M.L.'s ability to resist or consent was substantially impaired.

{¶51} Bai was charged under R.C. 2907.05 (A)(5). The statute states in pertinent part that no person shall have sexual contact with another, not the spouse of the offender; when * * * "[t]he ability of the other person to resist or consent * * * is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person * * * is substantially impaired because of a mental or physical condition

or because of advanced age."

{¶52} We previously defined "knowingly." R.C. 2907.01(B) defines "sexual contact" as any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

{¶53} The Ohio Supreme Court has held that "substantial impairment" must be established by demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct. See *State v. Zeh* (1987), 31 Ohio St.3d 99, 103-104; see *State v. Brown*, Marion App. No. 9-09-15, 2009-Ohio-5428, ¶22 (*Zeh* did not specifically deal with what evidence was necessary to find the victim was substantially impaired, thus, courts have made the "substantial impairment" determination on a case-by-case basis, providing great deference to the fact-finder).

{¶54} "Substantial impairment" may be proven by the testimony of persons who had some interaction with the victim and by permitting the trier of fact to obtain its own assessment of the victim's ability to either appraise or control her conduct. *State v. Brady*, Cuyahoga App. No. 87854, 2007-Ohio-1453, ¶78; *Brown* at ¶21.

{¶55} In a case alleging substantial impairment due to voluntary intoxication, "there can be a fine, fuzzy, and subjective line between intoxication and impairment." *State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, ¶23, quoting *State v. Doss*, Cuyahoga App. No. 88443, 2008-Ohio-449, ¶18. "Every alcohol consumption does not lead to a substantial impairment." *Doss*. "Additionally, the waters become even murkier when reviewing whether the defendant knew, or should have known, that someone was impaired rather than merely intoxicated." Id.

{¶56} Officer Hyllengren and another officer with Hyllengren earlier in the morning

testified that they believed M.L. was intoxicated, and Hyllengren called a medic unit to evaluate M.L. Officer Young said M.L. was very intoxicated and unable to assist him when he encountered her in Gaskill Hall. The SANE nurse also opined that M.L. was intoxicated. M.L. told the jury she was "extremely intoxicated" and remembered very little about the morning's events.

{¶57} On the witness stand, M.L. was unable to recall being arrested, walking to Shriver Center, and most of her interaction with Bai. However, the email M.L. forwarded to police contained more detail about the events of that morning, particularly regarding the sexual contact. Presumably, the jury could infer from the testimony of the other witnesses that M.L.'s ability to resist or consent was substantially impaired by her intoxication and Bai knew or had reasonable cause to know her ability to resist or consent was substantially impaired because of her intoxication.

{¶58} Construing the evidence most favorably for the state on the sufficiency challenge for this offense, we find that any rational trier of fact could have found the essential elements of the crime of GSI as charged beyond a reasonable doubt. *Hancock*, 2006-Ohio-160 at ¶34.

{¶59} Pertaining to the manifest weight of the evidence, we note that Bai said M.L. did not consume alcohol in his presence. He said she was able to talk and walk normally, voiced her opinion about getting ice cream, and paid for it with her own cash. In his opinion, M.L. was not intoxicated.

{¶60} Further, Bai denied leading M.L. into Gaskill Hall or having sexual contact with M.L. there. Bai said he stopped when M.L. told him she "can't do this right now" when he put his arms around her waist in the restroom. M.L. told police in her email that she resisted and said no to Bai during their encounter in Gaskill, but he still touched her.

{¶61} We presume the jury made a credibility determination adverse to Bai's

version of events for this offense. We cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *Hancock* at ¶39. Bai's third assignment of error is overruled.

{¶62} Assignment of Error No. 2:

{¶63} "FAILURE TO DISCLOSE M.L.'S HANDWRITTEN STATEMENT, WHICH CONTAINED RELEVANT, MATERIAL, AND EXCULPATORY EVIDENCE, IS PROSECUTORIAL MISCONDUCT AND A VIOLATION OF ESTABLISHED RULES OF CRIMINAL PROCEDURE REGARDING [SIC] REVERSAL."

{¶64} Bai argues that the state was in possession of a handwritten statement from M.L. that it failed to disclose in violation of the discovery rules and its obligation to inform him of potentially exculpatory evidence under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194.

{¶65} There are three components of a true *Brady* "violation:" (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene* (1999), 527 U.S. 263, 281-282, 119 S.Ct. 1936.

{¶66} When the state withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law. *Cone v. Bell* (2009), __U.S.__,129 S.Ct. 1769, 1782-1783. Evidence is "material" within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. Id.

{¶67} The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *State v. Goff* (March

5, 2001), Clinton App. No. CA2000-05-014, 2001 WL 208845 at *4, citing *Kyles v. Whitley* (1995), 514 U.S. 419, 434-435, 115 S.Ct. 1555 (one does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict).

{¶68} The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. See *Kyles* at 437-438. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable. Id.

{¶69} No constitutional violation occurs if the evidence that was allegedly withheld is merely cumulative to evidence presented at trial. *State v. Aldridge* (1997), 120 Ohio App.3d 122, 145.

{¶70} And finally, the version of Crim. R. 16(B)(1)(f) applicable to this case, stated in pertinent part that: "Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection."

{¶71} According to Bai, the undisclosed statement contradicts M.L.'s testimony as it reveals that M.L. remembered events of that morning and consented to some physical contact and kissing. Bai argues that the handwritten statement was "highly probative" of M.L.'s alleged substantial impairment and refuted the assertion of the state and M.L. that her lack of memory of events proves her impairment.

{¶72} The state argues that the statement is not exculpatory and is consistent with M.L.'s comments to the SANE nurse that morning and the contents of the email read into evidence. The state argues the statement reinforces the assertion that M.L. was substantially impaired and even if this statement had been disclosed, a different result at trial is unlikely.

{¶73} A copy of the handwritten statement was provided to this court attached to the presentence investigation (PSI) report. While it is not entirely clear from the record, the statement was apparently presented to the trial court at sentencing as a victim impact statement.

{¶74} The document at issue is a voluntary statement on a pre-printed form from the Miami University Police, provided on November 1, but purportedly signed by M.L. on November 2. The statement indicates that it was given to "Det. W. Schneider." A detective signed the bottom of each of the three pages. The form has a box checked, indicating "criminal complaint."

{¶75} In this statement, M.L. remembers that she and the male she met outside her dorm went into his dorm basement to get warm. She wrote that she felt that she was in the wrong place. She said she told Bai that she needed to get her swipe card from Shriver, so Bai took her there. She remembers buying and eating ice cream. She said she was under the influence from earlier in the evening and was extremely confused about how she was going to get back into her dorm. M.L. wrote that she thought it was okay to stay with Bai; she thought they were going back to her dorm.

{¶76} According to the statement: "At the state I was in, I followed him into what I thought was my hall but was actually Gaskill Hall. He kissed me and talked to me which made me feel comfortable but I still insisted on calling my friends. When he began kissing me and touching me again—I felt afraid. I was uncomfortable and something clicked in

my mind that I was not in the right place and that I was not supposed to be with the male. He touched me all over my body but when he began to touch under my dress, I felt violated.

{¶77} M.L. describes in detail Bai's conduct in touching her. This included a statement that Bai was "attempting to stick his hands inside me while trying to also get on top of me. I told him no and to stop but he continued. * * * He then proceed and was going to try to have sex with me, even though I said no, and that is when a police officer found me and the male on top of me. * * *"

{¶78} Bai argues that the failure to disclose the statement prejudiced him, because: 1) the prosecution tried to show the details contained in the email read into the record were not the result of M.L.'s memory, but a product of police assistance; and 2) the state presented testimony that contradicted the contents of the handwritten statement.

{¶79} As to the first argument, a review of the record indicates that Bai's trial counsel questioned M.L. about police assisting her in writing the email. The prosecutor asked M.L. to explain what police assistance she received. It does not appear the prosecutor emphasized the police assistance for the email any more than Bai's trial counsel.

{¶80} Turning to the second assertion, we agree with Bai's argument that the state presented testimony that contradicted the contents of the handwritten statement. Bai cited to the state's examination of M.L. in which the prosecutor asked her why she couldn't remember anything from that evening and she responded that it was because she was extremely intoxicated. When asked by the prosecutor did she, "to your knowledge," consent to anything?" M.L. said "no."

{¶81} According to the record, the prosecutor on cross-examination questioned Miami University Police Detective Schneider about the Shriver Center video that was

shown to the jury. Detective Schneider is the same detective to whom M.L. provided the handwritten statement. The prosecutor asked Det. Schneider the following question:

{¶82} "Q: Based on your observations of that video and based on your collection of evidence and a you're the detective in this case, do you have any evidence to either provide me, the defense or this jury that the defendant and the victim had any physical contact such as kissing or intercourse?

{¶83} "A: No evidence."

{¶84} At oral argument, Bai's counsel cited to a portion of the transcript of the prosecutor's rebuttal closing argument. According to the record, the prosecutor argued on rebuttal as follows: "And then he [Bai] talked about, he says there was kissing. First of all, it's irrelevant. You can kiss a girl and then still rape her. You can kiss a girl and still have unconsented sexual contact. I mean, it's irrelevant. But even that statement is self-serving with no offer of proof anywhere else. There is no evidence of that, not on video and no other evidence taken from anywhere else. The detective told you that."

{¶85} A prosecuting attorney's conduct during trial does not constitute grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 405. The touchstone of a due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940.

{¶86} The state possessed a statement from M.L. that revealed her most detailed memory of the events in question, and it was written soon after the events occurred. The statement indicated that M.L. participated in some activities with Bai that made her comfortable before activities that made her uncomfortable occurred, and to which she told Bai to stop.

{¶87} The state made the point of telling the jury through testimony and argument

that there was no evidence corroborating Bai's version of events as they pertained to Bai and M.L. kissing. However, M.L. provided that evidence in the statement not disclosed by the state.

{¶88} The state argues that the statement's contents, including those about kissing, are not material. We disagree.

{¶89} The state was required to show under this specific GSI charge that M.L.'s ability to resist or consent was substantially impaired because of a mental or physical condition of intoxication and Bai knew or had reasonable cause to believe her ability to resist or consent was substantially impaired.

{¶90} M.L. and two police officers who interacted with her that night said she was highly or extremely intoxicated. M.L. testified that she was confused and had a limited memory of the morning's events because she was intoxicated. The key to the state's case as charged was associating M.L.'s intoxication to substantial impairment. The jury was required to draw the inference that M.L.'s intoxication was such that it substantially impaired her ability to resist or consent and that Bai was aware of this condition or he had reasonable cause to believe her ability to resist or consent was substantially impaired.

{¶91} We find prejudicial error in the state's failure to provide this exculpatory handwritten statement. This statement presents a rather detailed recollection of the events that unfolded, particularly those events leading up to the alleged sexual contact. Since M.L. was able to recall few details at trial, the handwritten statement presents a more inclusive picture for the jury when it was considering whether M.L.'s ability to resist or consent was substantially impaired because of her condition and Bai's knowledge.

{¶92} This statement was not simply a duplication of the information contained in the SANE nurse's testimony or in the email read into the record. The statement was highly probative of M.L.'s substantial impairment and Bai's knowledge of the impaired

ability to resist or consent. Failure to disclose this handwritten statement undermines our confidence in the guilty verdict for the GSI offense, and constitutes prosecutorial misconduct. Bai's second assignment of error is sustained.

{¶93} Assignment of Error No. 1:

{¶94} "BAI'S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE HE WAS DENIED ACCESS TO ALL MATERIAL INFORMATION IN M.L.'S [VICTIM'S] HOSPITAL RECORDS EVEN THOUGH SHE TESTIFIED ABOUT HER PHYSICAL CONDITION AND THE STATE INTRODUCED MEDICAL EVIDENCE AND TESTIMONY REGARDING HER PHYSICAL CONDITION."

{¶95} Bai argues that all of M.L.'s medical records were material and relevant because the state was required to show that M.L.'s ability to resist or consent to the sexual contact was substantially impaired because of her mental or physical condition and police officers offered their opinions about M.L.'s intoxication before her first hospital visit and after the incident with Bai. See, generally, *Pennsylvania v. Ritchie* (1987), 480 U.S. 39, 107 S.Ct. 989.

{¶96} The record indicates that Bai's trial counsel issued a subpoena for M.L.'s medical records for the time period of October 31 and November 1, 2009. The hospital moved to quash the subpoena or moved for a protective order in the alternative. During a pretrial hearing, the trial court was told that M.L. would not consent to the release of her medical records.

{¶97} Bai's trial counsel indicated at the hearing that the medical records were subpoenaed so the trial court could inspect them in camera, because the defense wanted to establish the time M.L. arrived at the hospital the first time she was taken there and the time she was released. Defense counsel said, "If the State's not using them [medical records], we have no interest in using those items."

{¶98} The record indicates that the state and defense agreed the first sheet of the emergency department record for the first visit could be used with everything redacted but M.L.'s name and the times of that visit. Therefore, Bai received and used the information he was seeking from the medical records he subpoenaed. Finding no error, Bai's first assignment of error is overruled.

{¶99} Assignment of Error No. 7:

{¶100} "THE TRIAL COURT ERRED IN FAILING TO INQUIRE REGARDING DEFENSE COUNSEL'S CONFLICT OF INTEREST."

{¶101} Bai argues that the trial court was told that his trial counsel may have a conflict of interest because M.L. told her attorney that one of Bai's trial attorneys previously represented her and that representation involved underage intoxication.

{¶102} Trial counsel explained to the court that he had no recollection of representing M.L. and his office had been unable to locate any record that he had previously represented her. Bai's trial counsel indicated that he had no intent to cross-examine M.L. about any previous events or arrests.

{¶103} The trial court told trial counsel that the court didn't think it even had to address it [the alleged conflict of interest], but it had an obligation to report ethical violations and would do so if applicable.

{¶104} A lawyer represents conflicting interest when, on behalf of one client, it is his duty to contend for something that his duty to another client requires him to oppose. *State v. Manross* (1988), 40 Ohio St.3d 180, 182.

{¶105} Where a trial court knows or reasonably should know of an attorney's possible conflict of interest in the representation of a person charged with a crime, the trial court has an affirmative duty to inquire whether a conflict of interest actually exists. *State v. Gillard* (1992), 64 Ohio St.3d 304, syllabus, 312 (*Gillard II*).

{¶106} The duty to inquire arises not only from the general principles of fundamental fairness, but from the principle that where there is a right to counsel, there is a correlative right to representation free from conflicts of interest. Id. syllabus.

{¶107} In order to establish a Sixth Amendment violation due to a conflict of interest, a defendant who failed to object at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *State v. Gillard*, 78 Ohio St.3d 548, 552, 1997-Ohio-183 (*Gillard III*). In order to establish an actual conflict, the defendant must first show that some plausible alternative defense strategy or tactic might have been pursued but could not be pursued because of the conflict. Id. at 553; *State v. Peoples*, Franklin App. No. 02AP-945, 2003-Ohio-4680, ¶39.

{¶108} Bai argues that there was a potential conflict or actual conflict of interest, but has not offered how the alleged conflict affected his trial strategy or prejudiced him. See *Peoples* at ¶40-41. Accordingly, Bai's seventh assignment of error is overruled.

{¶109} Assignment of Error No. 8:

{¶110} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED TESTIMONY REFERENCING THE PBT TEST EVEN THOUGH IT HAD ALREADY EXCLUDED THE RESULTS OF THE PBT."

{¶111} Bai's trial counsel filed a motion in limine to exclude the portable breath test (PBT) administered to M.L. by Officer Hyllengren because of reliability issues. The trial court indicated at the pretrial hearing that it would exclude the results of the PBT, but permit the officer to testify that he "gave the test, and as a result of that, he made a referral to the hospital. " Bai's trial counsel continued to object to any mention of the test.

{¶112} At trial, however, Bai's trial counsel did not renew his objection. During Officer Hyllengren's direct testimony, the prosecutor asked him what he did after he placed M.L. in his cruiser and he said he offered her a portable breath test.

{¶113} "Q: And as a result of the portable breath test, what do you do then?

{¶114} "A: Due to the level of the breath test, I summoned the Oxford Life Squad to come evaluate her."

{¶115} A motion in limine is a tentative, interlocutory, precautionary ruling by the trial court and reflects its anticipatory treatment of the evidentiary issue. *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-203. A motion in limine is directed to the discretion of the trial judge regarding an evidentiary issue that is anticipated, but has not yet been presented in full context. Id.

{¶116} Any claimed error regarding a trial court's decision on a motion in limine must be preserved at trial by an objection, proffer, or ruling on the record. Id. Failing to object to the admissibility of the evidence at trial waives any error except plain error. *State v. Krull*, Butler App. Nos. CA2002-06-146, CA2002-06-153, 2003-Ohio-4611, ¶38; Crim.R. 52(B); see Evid.R. 103.

{¶117} An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. *State v. Baldev*, Butler App. No. CA2004-05-106, 2005-Ohio-2369, ¶12. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶118} While the trial court said it would not permit the results of the test to be introduced, we recognize that the answer given, "[d]ue to the level of the test, I summoned the Oxford Life Squad," was akin to providing the test results.

{¶119} However, we cannot say, but for this testimony, the outcome of the trial would have been different. The admission of the testimony did not amount to plain error. Bai's eighth assignment of error is overruled.

{¶120} Assignment of Error No. 6:

{¶121} "THE TRIAL COURT COMMITTED PLAIN ERROR WHEN PERMITTING THE SANE NURSE TO TESTIFY REGARDING IRRELEVANT AND PREJUDICIAL STATEMENTS MADE BY M.L. DURING HER SECOND HOSPITAL VISIT."

{¶122} Bai argues that the SANE nurse's testimony that M.L. said she "wanted to keep this special for when I got married, and he violated me," was irrelevant and highly prejudicial as it inflamed the emotions and sympathy of the jury. Acknowledging that trial counsel failed to object to the statements, Bai argues that the admission of the testimony was plain error. See Crim.R. 52(B).

{¶123} A trial court has broad discretion in determining whether to admit or exclude evidence, and the appellate court will not reverse the trial court's determination unless the trial court abused its discretion and the defendant suffered material prejudice. *State v. Long*, 53 Ohio St.2d at 98.

{¶124} After reviewing the record, we cannot say Bai suffered material prejudice by the admission of these statements through the SANE nurse. We do not find plain error. Bai's sixth assignment of error is overruled.

{¶125} Assignment of Error No. 9:

{¶126} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO SUBMIT A DISPATCH TAPE ON REBUTTAL THAT THE TRIAL COURT HAD ALREADY EXCLUDED."

{¶127} The trial court excluded the dispatch tape in a pretrial ruling because it was not timely disclosed by the state in discovery. Bai argues that the entire dispatch tape was played to the jury even though it was offered and admitted to rebut his testimony about how much time elapsed between when the officer confronted him on the third floor of Gaskill Hall and the end of the altercation.

{¶128} Rebuttal evidence is that which is given to explain, refute, or disprove new

facts introduced by the adverse party; it becomes relevant only to challenge the evidence offered by the opponent, and its scope is limited by such evidence. *State v. McNeill*, 83 Ohio St.3d 438, 446, 1998-Ohio-293.

{¶129} Admission of rebuttal testimony is a matter within the sound discretion of the trial court and an appellate court will not reverse the trial court's determination unless there is a clear and prejudicial abuse of discretion. Id.; see *Hancock*, 2006-Ohio-160 at ¶122.

{¶130} Bai has failed to show how he was materially prejudiced by the trial court's decision to permit the entire dispatch tape to be used in rebuttal. Bai's ninth assignment of error is overruled.

{¶131} Assignment of Error No. 5:

{¶132} "BAI WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶133} Bai argues with this assignment of error that his trial counsel made numerous prejudicial errors that denied him effective assistance of counsel.

{¶134} A defendant has the burden of proving that he had ineffective assistance of counsel. See *State v. Lott* (1990), 51 Ohio St.3d 160, 174. To meet his burden of proof, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052.

{¶135} The *Strickland* court strongly cautioned courts considering the issue of ineffective assistance of counsel that judicial scrutiny of counsel's performance must be highly deferential. *State v. Frazier* (1991), 61 Ohio St.3d 247, 253, citing *Strickland* at 689. It is all too tempting for a defendant to second-guess counsel's assistance after conviction, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was

unreasonable. *Frazier*.

{¶136} Strategic or tactical decisions, even debatable ones, will not form a basis for a claim of ineffective assistance of counsel. See *State v. Bradford*, Warren App. No. CA2010-04-032, 2010-Ohio-6429, ¶98.

{¶137} Turning to Bai's arguments, his claim that his trial counsel erred in not objecting to M.L.'s presence at trial is not well taken. A victim has a constitutional and statutory right to be present during the trial unless the court determines that exclusion of the victim is necessary to protect the defendant's right to a fair trial. Section 10(a), Article I, Ohio Constitution; R.C. 2930.09; Evid.R. 615. Bai fails to inform this court how he was denied a fair trial by M.L.'s presence, and therefore, no prejudice is found.

{¶138} Bai's claim that trial counsel was ineffective for violating the trial court's discovery deadlines, which resulted in the exclusion of a videotape showing the conditions of Gaskill Hall. This argument is not well taken. The only repercussion for the untimely disclosure appears to be the exclusion of the tape showing the conditions at Gaskill, and Bai fails to show on appeal how he was prejudiced.

{¶139} Bai claims his trial counsel was ineffective for failing to review Officer Young's medical records at trial when an element of the assault offense was physical harm. Young testified that he suffered soft tissue injury. As previously noted, R.C. 2901.01(A)(3) defines "physical harm" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2903.13(A) prohibits knowingly causing or *attempting to cause* physical harm. Bai has failed to show how a review of Officer Young's medical records prejudiced his case.

{¶140} Bai alleges that trial counsel erred in failing to move for a mistrial after the SANE nurse testified that M.L. said she was saving herself for marriage. As we previously noted, strategic or tactical decisions, even debatable ones, will not form a basis

for a claim of ineffective assistance of counsel and Bai fails to show that trial counsel's performance prejudiced the defense so as to deprive him of a fair trial.

{¶141} Bai claimed his trial counsel was ineffective for not objecting to the prosecutor's leading questions referencing the portable breath test and to the testimony from the officer about the PBT. The record indicates that trial counsel felt strongly that the PBT should not be mentioned at all, but the trial court disagreed. It is very unlikely that had trial counsel objected at trial, the court would have reversed its ruling. However, trial counsel did not give the trial court the opportunity by objecting. We cannot say that trial counsel's performance on this issue prejudiced the defense so as to deprive Bai of a fair trial.

{¶142} And finally, Bai contends that his trial counsel was ineffective for failing to request a complete copy of M.L.'s medical records for the first and second hospital visit when they were relevant to her physical condition. He also argues that trial counsel was ineffective for failing to object or move for a mistrial when the SANE nurse read from the medical records from M.L.'s second hospital visit, or for not requesting an in camera inspection of all of the medical records by the trial court.

{¶143} As we noted in a previous discussion, trial counsel subpoenaed all of the applicable medical records and the hospital responded with motions to quash or for a protective order. M.L. would not consent to release the records.

{¶144} According to the transcript, Bai's trial counsel was able to introduce the timeline for the first visit, cross-examine the SANE nurse about aspects of the second visit, and present the following argument in closing: "* * * they introduced no, no, no evidence of intoxication, no technical evidence of intoxication. [sic] * * *. They took her to the hospital and the hospital released her. The hospital releases people that are impaired and incapable of taking care of themselves? I don't believe so. * * * [Bai] did

not know that [M.L.] was substantially impaired, if in fact, [M.L.] was substantially impaired." * * * Those are the elements that the state must prove beyond a reasonable doubt."

{¶145} Bai's trial counsel employed a particular strategy in requesting the medical records and in not pursuing them further. We will not second guess trial counsel's trial strategy. As we previously noted, strategic or tactical decisions, even debatable ones, will not form a basis for an ineffective assistance of counsel claim. *Bradford*, 2010-Ohio-6429 at ¶98.

{¶146} One final argument not raised in Bai's brief, but discussed at oral argument was trial counsel's alleged ineffectiveness for failing to request M.L.'s statements upon completion of her direct testimony.

{¶147} According to the version of Crim.R. 16(B)(1)(g) applicable at the time, "[u]pon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement. If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the consistencies. * * *. Whenever the defense attorney is not given the entire statement [because the trial court determined no inconsistencies existed], it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal."

{¶148} Bai's counsel did not request in camera inspection of any statements from M.L. We have discussed at length in another assignment of error the impact of M.L.'s handwritten statement. Had trial counsel requested an in camera inspection of M.L.'s written or recorded statements, this handwritten statement would have or should have

been produced and considered for this case. As we have found that the absence of the statement was material and prejudicial to Bai, we must likewise find that trial counsel's failure to request this statement prejudiced Bai and constituted ineffective assistance of counsel.

{¶149} Bai's fifth assignment of error is sustained only as it pertains to trial counsel's failure to request an in camera inspection of M.L.'s statements at the conclusion of her direct testimony at trial.

{¶150} Assignment of Error No. 10:

{¶151} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED BAI TO TWO CONSECUTIVE, ONE-YEAR SENTENCES WITHOUT STATING ON THE RECORD THE BASIS FOR SUCH CONSECUTIVE SENTENCES."

{¶152} Based on our resolution of two other assignments of error, Bai's GSI conviction is reversed. Therefore, this assignment of error is overruled as moot.

{¶153} Assignment of Error No. 11:

{¶154} "BAI WAS DENIED A FAIR TRIAL AS A RESULT OF THE CUMULATIVE EFFECT OF ERRORS IN THE TRIAL COURT."

{¶155} Under the doctrine of cumulative error, a conviction will be reversed where the cumulative effect of the errors committed at trial deprives the accused of the constitutional right to a fair trial, even though each of the numerous instances of error does not individually require reversal. *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168.

{¶156} The doctrine of cumulative error is not applicable to cases where there has not been a finding of multiple instances of harmless error. *State v. Turner*, Franklin App. No. 09AP-1126, 2011-Ohio-1089, ¶51.

{¶157} We find no multiple instances of harmless error with regard to Bai's assault

conviction. With respect to the GSI conviction, we have determined that reversible error occurred. Therefore, this assignment of error is overruled.

{¶158} Judgment is affirmed as to the conviction for assault and reversed as to the gross sexual imposition offense. This matter is remanded for further proceedings.

BRESSLER and RINGLAND, JJ., concur.

[Cite as *State v. Bai*, 2011-Ohio-2206.]