[Cite as *State v. Nettles*, 2024-Ohio-4910.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 113683
v.	:	
CALVIN D. NETTLES,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 10, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-22-674076-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kristin Karkutt, Assistant Prosecuting Attorney, *for appellee*.

P. Andrew Baker, *for appellant*.

MICHAEL JOHN RYAN, J.:

{¶ 1} Defendant-appellant, Calvin Nettles ("Nettles"), appeals his conviction for two counts of murder and two counts of felonious assault. After a thorough review of the law and the facts, we affirm.

{¶ 2} In 2022, Nettles was charged in a five-count indictment with aggravated murder, an unclassified felony, in violation of R.C. 2903.01; murder, an unclassified felony, in violation of R.C. 2903.02(A); murder, an unclassified felony, in violation of R.C. 2903.02(B); felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(1); and felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2).

{¶ 3} These charges stemmed from an incident that occurred on September 6, 2022, and resulted in the death of Carley Capek. Nettles was arraigned on the above charges and assigned two attorneys to represent him. The court eventually set trial for February 6, 2023. On that day, Nettles moved to continue trial, and it was continued until June 20, 2023. On March 30, 2023, Nettles retained new counsel. On May 19, 2023, counsel for appellant filed a motion for an expert at the State's expense, which the trial court granted. On May 30, 2023, Nettles requested to continue the trial, and the court rescheduled the trial to October 16, 2023. On June 13, 2023, Nettles waived his right to speedy trial.

{¶ 4} On October 16, 2023, the court granted Nettles's third request for continuance of trial and rescheduled the trial to January 22, 2024. On December 4, 2023, the trial court held a final pretrial hearing. During the hearing, defense

counsel informed the court that Nettles intended to find a new attorney. Nettles confirmed that he wanted new counsel. The court addressed Nettles, noting that this was his second set of attorneys and that although Nettles had the right to hire his choice of counsel, the court would not continue the January trial date.

{¶ 5} On Wednesday January 17, 2024, defense counsel filed a motion to withdraw. On Thursday January 18, 2024, the court held a hearing on the motion during which defense counsel stated that there was a disagreement regarding the evaluation of the evidence in the case, which had led to distrust and affected their ability to communicate with Nettles. The court noted that the case had been pending for 489 days, that there had been 17 pretrial hearings, including 11 with current trial counsel, the case had been set for trial three separate times and continued at Nettles's request, and the State had offered multiple plea deals.

{¶ 6} Nettles complained to the court that discovery was never provided to him and that he never discussed trial strategy with his counsel. Counsel stated that they had met with Nettles more than 20 times throughout the pendency of the case and provided him with full discovery.

{¶ 7} The court summarized the motions counsel had filed on Nettles's behalf, including requesting an expert at the State's expense despite having retained counsel. The court determined that, based on the timing of the motion to withdraw, Nettles was engaging in delay tactics. The court opined that there was a difference between a refusal to communicate and a defendant who does not like what the evidence shows and what his counsel has advised. The court reminded Nettles that

he had been given the option to retain his choice of counsel on December 4, 2023, and had chosen not to retain anyone else.

{¶ 8} Upon the court's denial of defense counsel's motion to withdraw, Nettles asked to represent himself pro se, arguing that his counsel had not been truthful with him. Upon this request, the trial court engaged in a colloquy with Nettles to determine whether he was knowingly, intelligently, and voluntarily waiving his right to counsel, provided him with a warning of the dangers of self-representation, and emphasized that he would be held to the same standard as any attorney if he proceeded pro se.

{¶ 9} Initially, Nettles appeared to follow along with the colloquy, but then became obstinate and repeatedly answered "no," that he did not understand the court's questions. He also stated several times that "[i]t's a set up." Based on these answers, the court determined that Nettles could not knowingly, voluntarily, and intelligently waive his right to counsel and denied his motion to proceed pro se.

{¶ 10} Also pertinent to this appeal, prior to trial the State filed a motion to have one of the witnesses testify via live video feed. The court granted the motion, over the objection of defense counsel.

{¶ 11} Trial commenced on Monday, January 22, 2024. Nettles agreed to allow a law student from the defense firm participate in his trial as a legal intern and signed a form allowing same.

{¶ 12} The following pertinent facts were presented at trial.

{¶ 13} On September 6, 2022, the Cleveland Division of Police received a call regarding a felonious assault in progress. Cleveland police officers Colin Gill ("Officer Gill") and Ryan Saunders ("Officer Saunders") were the first to arrive on scene where they encountered Nettles, who was sitting on a couch in the victim's residence "in a daze." After locating the nonresponsive victim, the officers detained Nettles and placed him in their patrol car for transport to a hospital. Other than Nettles and the victim, the officers did not observe any other individuals in the house.

{¶ 14} Cleveland Police Detective Daniel Nagy ("Detective Nagy") arrived soon after. Detective Nagy observed the victim on the ground in a pool of blood. At the time of his arrival, Cleveland Emergency Medical Services ("EMS") were on scene rendering aid to the victim, to no avail. The victim was declared dead by EMS.

{¶ 15} Detective Nagy's body camera captured the scene, as well as Nettles telling the officers "he lit the mess out of that girl." On the way to the hospital, Nettles stated that he and the victim were smoking PCP, and he "snapped."

{¶ 16} Detective Michael Hale ("Detective Hale") of the Cleveland Police Crime Scene Unit testified that he processed and documented the scene. He identified several photographs of the scene, including photos of the deceased victim, which were entered into evidence. During his testimony, Detective Hale testified to photographs he had taken depicting suspected blood on Nettles's feet, body, and hands, and a small cut on his arm. Detective Hale further testified about shards of

glass covered in suspected blood and hair that were collected from the scene and entered into evidence.

{¶ 17} Dr. Elizabeth Mooney ("Dr. Mooney"), a deputy medical examiner and forensic pathologist with the Cuyahoga County Medical Examiner's office, described the victim's injuries as a mixture of both blunt and sharp force injuries, including 42 stab wounds. Dr. Mooney documented eight wounds to the victim's scalp including one wound that passed through the victim's ear canal, caused a hemorrhage around the brain, and fractured the victim's orbital and maxillary bones. Dr. Mooney also documented a large stab wound to the victim's neck that passed through the jugular vein and struck the spinal column, which, according to Dr. Mooney, typically causes fatal cardiac arrest. Dr. Mooney also described the victim's defensive injuries, which consisted of 22 wounds mostly to the victim's left forearm and hand. Dr. Mooney opined to a reasonable degree of medical certainty that the victim's cause of death was blunt and sharp force injuries, and the manner of death was homicide.

{¶ 18} On January 26, 2024, the jury returned its verdict acquitting Nettles of aggravated murder and convicting him of the remaining charges. The trial court sentenced Nettles to an aggregate sentence of 15 years to life in prison.

{¶ 19} Nettles appeals and raises the following assignments of error for our review.

> I. Defendant-appellant's conviction must be reversed because the trial court erred in refusing to allow withdrawal of counsel.

II. The trial court erred in denying defendant-appellant's request to represent himself.

III. The conviction must be overturned due to a violation of defendant-appellant's right to confrontation.

The Trial Court Did Not Abuse its Discretion in Denying Defense Counsel's Motion to Withdraw

{¶ 20} In the first assignment of error, Nettles argues that his conviction must be reversed because the trial court abused its discretion in denying defense counsel's motion to withdraw.

{¶ 21} A criminal defendant has a right to counsel pursuant to the Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution. *State v. Milligan*, 40 Ohio St.3d 341 (1988), paragraph one of the syllabus. "[T]he right to choose one's counsel is not absolute, and 'the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he [or she] prefers.'" *State v. Keenan*, 2008-Ohio-807, ¶ 30 (8th Dist.), quoting *Wheat v. United States,* 486 U.S. 153, 159 (1988). The right to counsel "is circumscribed in several important respects." *Wheat* at *id*. The United States Supreme Court has "recognized a trial court's wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar." *United States v. Gonzalez—Lopez*, 548 U.S. 140, 152 (2006). The trial court's difficult responsibility of assembling witnesses, lawyers, and jurors for trial "counsels against continuances except for compelling reasons." *Morris v. Slappy*, 461 U.S. 1, 11 (1983).

{¶ 22} This court reviews a trial court's decision on a motion to withdraw as counsel for an abuse of discretion. *State v. Stewart*, 2018-Ohio-684, ¶ 14, citing *State v. Williams*, 2003-Ohio-4396, ¶ 135. An abuse of discretion occurs if the court's attitude in reaching its decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). An abuse of discretion also occurs if a court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35.

{¶ 23} In this case, Nettles was first assigned counsel. Unsatisfied with his assigned attorneys, Nettles retained different counsel. Nettles made at least three motions to continue the trial dates, which had originally been set for February 6, 2023, October 16, 2023, and January 22, 2024. During that time, the parties exchanged discovery, numerous motions were filed on Nettles's behalf, an expert was retained for Nettles at the State's expense, the court held several pretrial hearings, and the parties attempted to negotiate a plea agreement. On December 4, 2023, defense counsel informed the trial court of Nettles's intention to terminate their representation. Nettles addressed the court and said he wanted new counsel. The court indicated that Nettles was already on his second set of attorneys, and that while he could retain new counsel prior to the January 2024 trial date, the court would not continue trial a fourth time.

{¶ 24} Nettles did not retain new counsel. Instead, on January 17, 2024, just five days prior to trial, defense counsel filed a motion to withdraw. The trial court

held a hearing on the motion the next day. At the hearing, defense counsel stated that there was a disagreement between counsel and Nettles regarding the evaluation of the evidence in the case and that disagreement led to distrust and affected their ability to communicate with their client.

{¶ 25} The court emphasized that the case had been pending for almost 500 days, that there had been 17 pretrial hearings in the case, including 11 with his current attorneys, and that the trial had already been continued three times at the defendant's request. The court indicated its belief that Nettles was only trying to further delay trial.

{¶ 26} Nettles claimed that neither his first set of appointed attorneys nor his retained counsel ever went through discovery with him; defense counsel refuted that claim. The court told Nettles that that there was a difference between a refusal to communicate and a defendant who does not like what the evidence shows and what his counsel has advised and reiterated its opinion that Nettles's complaints were only being made for the purpose of delaying trial. The court reminded Nettles that the court had given him the option at the last pretrial hearing to find new counsel and Nettles had chosen not to secure new counsel.

{¶ 27} The trial court denied defense counsel's motion to withdraw, citing the foregoing reasons.

{¶ 28} After reviewing the record, we find no basis to conclude that the trial court abused its discretion in denying counsel's motion to withdraw. Counsel's motion was filed on a Wednesday and the trial court held a hearing the next day.

Trial was set for the following Monday. Nettles has provided no authority holding that a trial court's discretionary denial of a request for new counsel so close to trial violates his constitutional right to counsel of his choice. *See Carrier v. Burton*, 2021 U.S. Dist. LEXIS 162622, *43, fn. 4 (W.D. Mich. Jul. 27, 2021) (noting that the Sixth Circuit Court of Appeals has routinely held that denial of such a motion on the day of trial is appropriate.).

{¶ 29} Nettles was free to retain counsel of his choosing after declaring that was his intention at the December 2023 pretrial hearing, but he did not do so. The case had been pending for close to 500 days, numerous pretrial discovery and plea negotiations had taken place, and counsel had met with Nettles over 20 times and filed numerous motions on his behalf. Although Nettles and his counsel both stated their communication had broken down, we note, as the trial court did, that there is a difference between an irreconcilable conflict and disagreements over strategy. Disagreements over strategy do not suffice to establish good cause to allow counsel to withdraw, especially here where the case has been pending for over a year and the motion was filed just days before trial. *See Carrier* at *44.

{¶ 30} Considering the above, the trial court did not abuse its discretion in denying counsel's motion to withdraw. The first assignment of error is overruled.

The Trial Court Did Not Err in Denying Nettles's Request to Proceed Pro Se

{¶ 31} In the second assignment of error, Nettles argues that the trial court erred in denying his request to proceed to trial pro se.

{¶ 32} After the court, on the record, denied defense counsel's motion to withdraw, Nettles stated that he wanted to represent himself "because my attorneys didn't — they wasn't truthful with me."

{¶ 33} The court questioned Nettles about representing himself, asking Nettles if he understood he would be held to the same rules of evidence as an attorney and representing himself may impart to the jury a "negative feeling." The court inquired whether Nettles had an educational background in law, if he was familiar with criminal procedure and the rules of evidence, and if he understood that he would be held to the same standard as an attorney. After Nettles admitted he was not familiar with criminal procedure or the rules of evidence, the court stated that it "would strongly suggest that you rely on the expertise of your lawyers and not proceed by yourself." Nettles answered that he "refused."

{¶ 34} The court proceeded to ask additional questions, and Nettles began to answer "no" to every question, claiming the case against him was a "set-up." Nettles denied that he understood the indictment, claimed he did not understand the crimes he was being charged with, stated he did not remember his arraignment or the State's plea offers, claimed he did not understand the potential sentence the court could give him if convicted, and stated that he did not understand the meaning of consecutive sentences. Finally, exasperated, the court inquired whether Nettles understood what "one after the other" or "one before the other" meant. Nettles stated, "No, sir."

{¶ 35} The court inquired further, and Nettles continued to answer that he did not understand or stated "no" to every question. The court noted that it believed Nettles was "feigning" but would proceed with questioning him. The following colloquy occurred:

> THE COURT: Do you understand that if you represent yourself, you're on your own. I cannot tell you or advise you as to how you should try your particular case. Do you understand that?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: And do you understand you would be treated no differently than if you had a lawyer representing you?
>
> THE DEFENDANT: No, sir. . . .
>
> THE COURT: Do you know the difference — do you know what defenses there might be to the charges you face?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you understand there may be certain affirmative defenses or mitigating evidence and that the lack of knowledge of their existence or your lack of knowledge of the appropriate procedure for introducing evidence on these issues will not be grounds for an appeal if you do not address the appropriate issues?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: And do you understand that an attorney may be aware of ways of defending these particular charges that may not occur to you since you're not a lawyer?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Again, do you understand that I cannot give you advice about these matters?
>
> THE DEFENDANT: No, sir.

THE COURT: And do you understand that you must proceed by asking questions of the witness that will appear before the court? You cannot make statements that are not questions and you will not be permitted to simply argue with witnesses. Unless you decide to testify on your own behalf, you will not be permitted to tell the jury matters that you wish them to consider as evidence other than through the making of an opening statement and a closing argument. Do you understand that?

THE DEFENDANT: No, sir.

THE COURT: And do you understand that you may not make any statements to the witnesses, but may only ask questions of the witnesses concerning the facts in the case?

THE DEFENDANT: No, sir.

THE COURT: And do you understand that if you simply wish to make a statement as to your side of the story that you may be hampered in doing this unless you decide to testify?

THE DEFENDANT: No, sir.

THE COURT: If you decide to testify, you will be giving up your right to remain silent and you would be giving up your right to not incriminate yourself. If you decide to testify on your own behalf, you would be subject to cross-examination by the prosecutor. Do you understand those facts?

THE DEFENDANT: No, I do not.

THE COURT: And do you understand your right to not incriminate yourself and your right to remain silent?

THE DEFENDANT: No, I do not.

THE COURT: And do you understand that it may be much easier for an attorney to contact potential witnesses on your behalf and to question witnesses on your behalf than it may be for you?

THE DEFENDANT: No, sir.

THE COURT: And do you understand that it may be much easier for an attorney to provide legal research on legal questions that may come before the court than for you to do so on your own?

THE DEFENDANT: No, I do not.

THE COURT: And do you understand you would be required to conduct yourself in a professional and a respectful manner to the court and to all the witnesses involved in the case at all times?

THE DEFENDANT: No, I do not. I don't understand that.

THE COURT: Okay. And in discussing this matter with you, I must advise you that in almost every case, it would be my opinion that a trained lawyer would defend you far better than you can defend yourself. It is almost always unwise of a defendant on trial to try and represent themselves . . . since you are not familiar with the law. You are not familiar with handling a trial. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself. Do you understand my position on this issue?

THE DEFENDANT: No, sir.

THE COURT: You understand that I have again suggested to you that you consider permitting counsel to represent you?

THE DEFENDANT: I don't understand that sir.

THE COURT: Do you have any questions or want me to clarify regarding any of the things that we talked about here regarding your motion to represent yourself?

THE DEFENDANT: No, sir.

{¶ 36} Criminal defendants enjoy the constitutional right to self-representation at trial provided that the right to counsel is knowingly, voluntarily, and intelligently waived after sufficient inquiry by the trial court. *State v. Ellis*, 2020-Ohio-1115, ¶ 54 (8th Dist.), citing *State v. Johnson*, 2006-Ohio-6404. This

right, however, is not absolute. First, a criminal defendant must "unequivocally and explicitly" invoke his or her right to self-representation. *Ellis* at *id.*, citing *State v. Cassano*, 2002-Ohio-3751. The request must also be timely. *Ellis* at *id.*, citing *Cassano*. A trial court may deny a defendant's request to proceed pro se when the defendant makes his or her request near the trial date or under circumstances indicating that the request is made for purposes of delay or manipulation. *Ellis* at *id.*, citing *State v. Armstrong*, 2016-Ohio-2627 (8th Dist.).

{¶ 37} In *Ellis*, a case upon which Nettles relies, a panel of this court found that the trial court erred when it denied the defendant's motion to proceed pro se; the defendant's motion was made the day of trial. This court found that the trial court had improperly determined that the defendant's motion was untimely based on a disagreement the court had with the defendant regarding the defendant's view of the criminal justice system. This court also determined that the trial court had pressured the defendant to take a plea, and the defendant's request was not made for the purposes of delay. This court reasoned that "[i]f Ellis had caused ongoing delays of the trial through frequent requests for continuances, changes in counsel, or frivolous motions, there would be a basis for concluding his request for self-representation was merely another delay tactic." *Id.* at ¶ 58.

{¶ 38} The circumstances in this case differ from *Ellis*. Nettles initially told the court at his December 2023 pretrial hearing that he wanted to obtain new counsel, but the record does not show that he made any effort to do so. It was not until four days — two business days — before trial was set to commence that Nettles

made an oral motion to proceed pro se. At that point, the case had been pending for almost 500 days, and trial had already been continued three times. In light of these facts, the trial court did not err in finding that Nettles's request was untimely and made for the purposes of delay.

{¶ 39} Moreover, even if we were to consider Nettles's request timely made and not for the purposes of delay, Nettles was unable to show that he knowingly, voluntarily, and intelligently waived his right to counsel as evidenced by his answers to the trial court questions. Although the trial court understandably believed that Nettles was playing games by continually answering "no" to the court's questions, the fact remains that Nettles's chosen responses were that he did not understand the criminal trial process and did not understand the most basic of his constitutional rights as a criminal defendant — his right to remain silent and not incriminate himself. Thus, the trial court had no choice but to deny his request to proceed pro se.

{¶ 40} Based on the above, the second assignment of error is overruled.

The Trial Court Erred in Allowing an Absent Witness to Testify via Live Video Feed

{¶ 41} In the third assignment of error, Nettles argues that he was denied the right to confront a witness who testified via live video feed.

{¶ 42} While admission of testimony is generally reviewed for an abuse of discretion, the question of whether a criminal defendant's rights under the Confrontation Clause have been violated is reviewed de novo. *State v. Smith*, 2005-

Ohio-3579, ¶ 8 (8th Dist.), citing *United States v. Robinson*, 389 F.3d 582, 592 (6th Cir. 2004).

{¶ 43} Under both the federal and Ohio constitutions, a criminal defendant has a right to confront witnesses. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him [or her]." Article I, Section 10 of the Ohio Constitution states that "[i]n any trial, in any court, the party accused shall be allowed . . . to meet the witnesses face to face . . . ." While these constitutional provisions are not identical, the Ohio Constitution provides no greater right of confrontation than the Sixth Amendment. *In re H.P.P.*, 2020-Ohio-3974, ¶ 20 (8th Dist.), citing *State v. Arnold*, 2010-Ohio-2742.

{¶ 44} In *Maryland v. Craig*, 497 U.S. 836 (1990), the United States Supreme Court explained that although a preference for face-to-face confrontation at trial is reflected in the Confrontation Clause, the preference "'must occasionally give way to considerations of public policy and the necessities of the case.'" *Id.* at 849, quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895). The right to confrontation is not absolute, rather, "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Craig* at 845.

{¶ 45} Pursuant to *Craig*, this court has held that to qualify as an exception to the face-to-face confrontation requirement, "'the procedure must (1) be justified,

on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other three elements of confrontation — oath, cross-examination, and observation of the witness's demeanor.'" *State v. Marcinick*, 2008-Ohio-3553, ¶ 18 (8th Dist,), quoting *Harrell v. State*, 709 So.2d 1364, 1369 (Fla. 1998).

{¶ 46} As the State points out, this court has previously found that admission of live video testimony does not violate a defendant's right to confrontation. In *State v. Eads*, 2007-Ohio-539, ¶ 34-35 (8th Dist.), this court found that live video testimony was permissible when the absent witness was a recent amputee and hospitalized. In *State v. Marcinick*, 2008-Ohio-3553, ¶ 22 (8th Dist.), this court allowed live video testimony from a witness who lived in Belgium. A panel of this court found that live audio-video testimony preserved all the characteristics of in-court testimony and the reliability elements of confrontation because the witness testified under oath; was subject to full examination and cross-examination; and the trial court, jurors, and parties could observe the witness's demeanor and evaluate his or her credibility during the testimony. *Id.* at ¶ 22. We note, however, that this court limited its finding to the "narrow and specific facts of this case." *Id.* at ¶ 22.[1]

{¶ 47} Nettles relies on a recent case from the Ohio Supreme Court to support his claim that live video testimony violated his right to confrontation. In *State v.*

---

[1] In *Marcinick*, this court relied on three cases in deciding that remote testimony did not violate the appellant's right to confrontation: *Craig*, 497 U.S. 836, and *State v. Self*, 56 Ohio St.3d 73 (1990), both of which dealt with the sensitivity of child sex-abuse victims, and *Harrell*, 709 So.2d 1364, a nonbinding case from Florida.

Carter, 2024-Ohio-1247, which dealt with a witness based in Minnesota, the Court emphasized that live video testimony "'requires a case-specific finding based on evidence presented by the parties that an exception to face-to-face confrontation is "necessary to further an important state interest" or "public policy" interest.'" *Id.* at ¶ 36. The trial court found that the Minnesota-based witness was "unavailable" to testify in person due to "unpredictable" winter weather and "uncertain" airline schedules that "could delay or prohibit" travel from Minnesota to Ohio. *Id.* at ¶ 37. The Third District Court of Appeals agreed, albeit on different grounds, finding that the trial court's decision was justified on a case-specific finding based upon an important public policy involving the COVID-19 pandemic. *Id.* at ¶ 25.

{¶ 48} Upon review, the *Carter* Court found that "the trial court's simple observation that winter weather is 'unpredictable' was not a 'case-specific finding of necessity' and did not qualify as an exception to the face-to-face confrontation requirement." *Id.* at ¶ 37. Likewise, the Court dismissed the appellate court's reasoning and found that a recent surge in COVID-19 cases, after vaccines had been introduced and without more supporting evidence, was too general a reason to support a case-specific finding. *Id.* at ¶ 41. The Court concluded that the lower court's generalized concerns about COVID-19 risks and travel delays did not constitute a "case-specific finding of necessity" sufficient to abridge the defendant's right to face-to-face confrontation. *Id.* at ¶ 45.[2]

[2] We are not convinced that *Marcinick* would survive post-*Carter* scrutiny.

{¶ 49} In this case, the State argues that *Carter* is not apposite because Officer Gill's unavailability for trial was not speculative like it was in *Carter* — Officer Gill had a preplanned trip out of state and was not available to testify in person. The State also noted that the courtroom was equipped with a smartboard and a network connection that allowed for live testimony so that when Officer Gill testified remotely, the entire courtroom and all participants could see the officer's mannerisms and demeanor as he answered questions during his direct and cross-examination.

{¶ 50} While we agree that the facts in this case differ from those presented in *Carter*, we do not find that a pre-planned vacation automatically resolves the duty of a witness to appear in person to testify in a criminal case. Officer Gill was still employed by the Cleveland Division of Police, and there is nothing in the record to suggest that he would be unavailable for a long period of time.

{¶ 51} As noted in *Carter*, the U.S. Supreme Court requires a "case-specific finding" based on evidence presented by the parties that an exception to face-to-face confrontation is "necessary to further an important state interest" or "public policy" objective. *Carter* at ¶ 36, citing *Craig*, 497 U.S. 836, at 852. In *Craig*, the important State interest was protecting a "vulnerable" child sex abuse victim-witness from severe emotional trauma. *Id.* at 852-853. In this case, however, the State has failed to identify, let alone argue, that there was an important State interest or public policy objective to warrant an exception to in-person testimony. We

remind the parties that it is not this court's duty to root out arguments supporting a party's position on appeal.

{¶ 52} Thus, under the facts of this case, we do not find that the witness's vacation plans meet the standard as set forth in *Craig* and *Carter*. We conclude that the trial court erred in allowing a vacationing police officer to testify remotely.

The Trial Court's Error was Harmless

{¶ 53} Our analysis does not end here, however. We next consider whether allowing the video testimony was a harmless error beyond a reasonable doubt. In *Carter*, the Court noted that it had previously "'deemed Confrontation Clause violations harmless when 'the remaining evidence, standing alone, constitutes overwhelming proof of the defendant's guilt.'" *Id.* at ¶ 47, quoting *State v. Hood*, 2012-Ohio-6208. "Overwhelming proof becomes readily apparent when 'the allegedly inadmissible statements . . . at most tend[] to corroborate certain details' of the state's case-in-chief." *Carter* at *id.*, quoting *Schneble v. Florida*, 405 U.S. 427, 431 (1972). "Accordingly, the admission of purely cumulative evidence in violation of the Sixth Amendment amounts to harmless error." *Carter* at *id.*

{¶ 54} In *Carter*, the Court noted that other witnesses corroborated the victim's account of the events, independent of the absent witness's in-person testimony. *Id.* at ¶ 49. The Court held that given the evidence at trial, "there is no reasonable possibility that [the absent witness's] testimony contributed anything to the jury's findings of guilt that it could not have gleaned from other witnesses." *Id.* at ¶ 52.

{¶ 55} Here, Officer Gill was on a pre-planned vacation and testified via live video feed. He testified that on the date in question, he was with his partner, Officer Saunders. Officer Gill testified that when he and his partner arrived on scene, they encountered Nettles, who was sitting on a couch, staring at the wall "in a daze." Once Officer Saunders located the victim, Nettles was taken into custody. Officer Gill testified that he saw the deceased victim and described several photographs of the scene that were entered into evidence. Officer Gill testified that no one else was in the home other than Nettles and the victim. EMS was contacted, arrived on scene, and declared the victim deceased.

{¶ 56} Detective Nagy also testified for the State and his testimony was essentially the same as Officer Gill's testimony, except for the initial encounter with Nettles. Detective Nagy testified that he arrived on scene shortly after Officers Gill and Saunders; Nettles had already been detained. EMS was rendering aid to the victim, who they declared deceased. Detective Nagy testified that he was the only officer with a body camera, and he used the camera to record the scene, at times passing the camera to other officers for them to record their observations. Detective Nagy testified he recorded the interaction Nettles had with officers, during which Nettles stated that "he didn't know what happened. He just lit the mess out of that girl essentially." Detective Nagy transported Nettles to the hospital. During the ride, Detective Nagy heard Nettles state that he and the victim were "smoking PCP and he just snapped." The body camera recording was played for the jury and entered into evidence.

{¶ 57} Detective Hale from the crime scene unit testified that he documented the scene noting blood on Nettles's feet, body, and hands, and a small cut on his arm. The detective testified to the numerous crime scene photos that he had taken, including those testified to by Officer Gill.

{¶ 58} The coroner, Dr. Mooney, testified that the victim sustained 42 stab wounds, including eight stab wounds to her head and a large stab wound to her neck. Dr. Mooney also cataloged the victim's 22 defensive wounds, mostly to the left forearm and hand.

{¶ 59} Absent Officer Gill's testimony, there was abundant evidence that supported Nettles's convictions for murder and felonious assault. We conclude that there is no reasonable possibility that Officer Gill's testimony contributed anything to the jury's findings of guilt that it could not have gleaned from other witnesses. *See Carter*, 2024-Ohio-1247, ¶ 52. Therefore, the trial court's decision to allow Officer Gill to testify via video amounted to harmless error.

{¶ 60} Nettles's third assignment of error is overruled.

{¶ 61} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

_____
MICHAEL JOHN RYAN, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
ANITA LASTER MAYS, J., CONCUR