COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2016 CR 00397**
vs.	:	**Judge McBride**
JOHN R. WITZEL II	:	**DECISION/ENTRY**
Defendant	:	

Matt Wiseman, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Ronald A. Mason, assistant public defender and counsel for the defendant, John R. Witzel II, 302 East Main Street, Batavia, Ohio 45103

This cause is before the court for consideration of the motion for mistrial filed by the defendant John R. Witzel II on March 30, 2017.

The defendant was indicted in this case on one count of gross sexual imposition in violation of Section 2907.05(A)(4) of the Revised Code, a felony of the third degree.[1]

On March 17, 2017, following a four-day trial, a jury found the defendant guilty of one count of gross sexual imposition as charged in the indictment.

The case was scheduled for sentencing on April 6, 2017. However, on March 30, 2017, the defendant filed a motion for mistrial supported by a memorandum.

[1] Indictment filed on July 5, 2016.

The court continued the sentencing hearing, issued a briefing schedule as to the motion for mistrial, and scheduled oral argument on the motion for May 1, 2017. The state submitted a responsive memorandum, and the defendant did not file a reply memorandum but did file a request for an evidentiary hearing on April 25, 2017.

On May 1st, the court hearing oral argument on both the request for an evidentiary hearing and the motion for mistrial. The court overruled the request for an evidentiary hearing on the basis that the defendant, who did not submit any affidavits in support of his motion, never articulated a valid reason, either in writing or orally during the hearing, for the court holding an evidentiary hearing on his motion.

At the close of the oral argument, the court took the motion for mistrial under advisement. Upon consideration of the defendant's motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The conviction arose from an incident that occurred on December 25, 2015 in Clermont County, Ohio, involving sex abuse of a ten-year-old child.

The case was originally assigned to Judge Thomas Herman. However, Judge Herman retired at the end of 2016; Judge Anthony Brock, who replaced Judge Herman, recused himself because he had prosecuted the defendant previously relative to incidents which the state intended to introduce in the within case as "other acts;" and the case was assigned to the undersigned (Judge Jerry McBride).

While the case was still assigned to Judge Herman, a subpoena had been issued at the request of defense counsel for Clermont County Children Services ("Children

Services") to provide to Judge Herman for his review "all reports, records & documents pertaining to T.E., d.o.b. 10-17-05." On January 18, 2017, defense counsel advised that the records had never been delivered to the court. He acknowledged that he had received some copies of Children Services records that had been provided in discovery by the state.

The state represented that it had advised Children Services to provide the records regarding T.E. to the defendant. The state believed it had received copies of all of the records from Children Services and that it had in turn provided copies of all of those records to the defendant. The parties agreed that they would approach Children Services together to verify that they had the complete file.

At the final pretrial conference, on February 15, 2017, the parties represented to the court that they still intended to meet with Children Services together to ensure that the defendant had received all of the documents regarding T.E. in Children Services' possession related to this case.

Following the conference, the court received a sealed envelope marked "Confidential" and labeled "Children Services Records for Judge McBride."

In the court's formal pre-trial memorandum, issued on February 27th, the court indicated that it had received these records. The court further advised:

> "There has been no determination by the court that an in camera review of records is necessary or appropriate, and the court is not going to conduct a 'fishing expedition' through those records for either side. There was an indication that counsel were going to meet with Children Services to see if there were any records that are discoverable that had not been previously given to defense counsel, but there has been no information provided to the court by counsel as to the result of that meeting or that Children Services records were going to be delivered to the court or as to the reason therefor. As a result, the records will remain sealed and will not be reviewed for the court

> pending the filing of a motion requesting the review and a hearing on that motion."

Neither party filed a written motion for the court to perform an in camera review of the Children Services records following February 27th.

On the first day of trial, March 13th, the court again reminded the parties that it had received sealed records from Children Services, but that it had not received any motion requesting an in camera review and a hearing on that motion. Defense counsel advised that counsel for both sides had gone to Children Services and had learned that the entire file concerning T.E. had not been provided to either the state or the defendant. Assistant Prosecuting Attorney Matt Wiseman advised that it was his understanding from that meeting that the state had received all of the materials from Children's Services that were relevant to this case, and that the other records referred to "older case files" and matters unrelated to the facts of this case. Defense counsel agreed that his understanding was that the withheld files were older and unrelated to the case involving the defendant.

The court indicated that it was not going to review the files absent a motion for in camera review. Defense counsel requested that the court review the records in camera, but the court denied that request because the files are confidential. The court again reiterated that it was not going to review the files because the parties had not given the court a reason to review them. However, the court stated that if either side had a justification for the court to review the records, and if they submitted case law supporting the appropriateness of that review, the court would review and make a determination on that motion. Neither party filed such a motion.

As the trial proceeded, T.E. testified that on Christmas Day in 2015, the defendant was sitting in the backseat of a vehicle next to her, in the presence of five of

her family members. T.E. testified that the defendant reached over and touched her vagina, over her clothing, several times. T.E. told the defendant to stop touching her and repeatedly tried pushing his hand away. Eventually the defendant stopped. Before the December 25th incident, T.E. testified that the defendant had kissed her on the cheeks, and there was an occasion when the defendant watched T.E. shower at his trailer while he walked in and out of the bathroom.

The court had previously issued a decision on a motion in limine, on February 27, 2017, that allowed the state to present testimony from T.E. regarding the defendant's prior conduct with her, as well as the testimony of two women who averred that the defendant had touched their vaginas when they were children. The court permitted this evidence for the limited purpose of showing the defendant's motive, plan, and/or absence of mistake or accident.

In its decision on the motion in limine, the court prohibited the state from presenting evidence concerning the defendant's convictions in *State v. John R. Witzel, II*, 1996 CR 005209 and *State v. John R. Witzel, II*, 2005 CR 002085. The case of *State v. John Witzel, II*, 1996 CR 005209 involved the conviction of the defendant for importuning charges, to which the defendant had pled guilty. The charges arose after the defendant and another man picked up two teenaged girls and brought them to a hotel room. At the hotel room the defendant instructed the girls to get in the shower, and he then watched them shower. The case of *State v. John Witzel, II*, 2005 CR 02085 involved numerous convictions for the possession of child pornography.

The first of the women to testify about prior sexual abuse by the defendant was Jessica Emery, who testified on March 15th.[2] The second woman to testify to prior sexual abuse, Lindsay McCroy, testified on March 16th.[3]

On March 15th, testimony was presented from Lori Saylor, an investigator from the Clermont County Sheriff's Office who had previously interviewed the defendant concerning the possible sexual abuse of T.E. Investigator Saylor recounted the defendant's statements during the interview as follows: The incident occurred on Christmas in 2015 while he was traveling home from a party with T.E.'s family. The defendant and T.E. were in the back of the vehicle, with T.E. sitting on the left side of the vehicle. T.E. was being rambunctious and her grandfather, who was driving, said she needed to calm down. The defendant placed his hand on T.E.'s hand, which was on top of her leg, to calm her down. T.E., however, grabbed the defendant's hand and pulled it between her legs. She then crossed her legs and would not release his hand. The defendant eventually was able to pull his hand out, and as he did so, T.E. said, "you touched my coochie." According to the defendant, if he did touch T.E.'s vagina, he did not feel it.

On March 16th, following the testimony of Lindsay McCrory, testimony was elicited from Kim Beverly, an intake worker with Clermont County Children Services.

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[2] Following her testimony, the court provided the jury with the following instruction: "Ladies and gentlemen evidence was received from this last witness about the commission of wrongs or acts by the defendant other than the offense with which he is charged in this trial. This evidence was received only for a limited purpose. It was not received, and you may not consider it, to prove the character of the defendant in order to show that he acted in conformity with that character. If you find the evidence of the other acts or wrongs is true and that the defendant committed the other wrongs or acts, you may not consider it for the purpose of inferring that if the defendant committed those wrongs or acts he must have committed the wrong or act alleged in this case. That is a forbidden inference. However, if you find that the evidence of other wrongs or acts is true and that the defendant committed them, you may consider that evidence for the purpose of deciding whether it proves the absence of mistake, the defendant's motive and/or the defendant's plan with regard to the offense that is charged in this case."

[3] After her testimony, the court again issued a limited instruction to the jury that was substantially similar to the one quoted above.

During her questioning, the state asked if Ms. Beverly had an opportunity to speak to the defendant, to which she claimed that she did. As Ms. Beverly recounted her conversation with the defendant, she stated the following: "He said he was already aware of the allegations. That he knew that he's going to jail because of his past history. And I said well I just need to explain to you – "

At this point, the court interjected "You want to approach?" to counsel. When counsel approached the bench, the court acknowledged that Beverly's testimony about the defendant's "past history" was problematic. The state submitted that it did not know that Beverly was going to say anything about the defendant's "past history." The state stated that it did talk to its witnesses before testifying and advised them as to topics they could not discuss.

The defense then moved for a mistrial. The court denied the motion, but advised counsel that the court would issue a curative instruction. The trial resumed, and the court provided the following curative instruction to the jury:

> "The reference to a statement as to prior history was improper. It should not have been made. You may not consider it for any purpose. I stress to you that in the law of this state, and I think every other state, we don't decide cases based on what somebody may have done in the past or what they did in the past. We decide it based on what they did relevant to the charge that you're considering. So you may not consider – first of all – there has been no statement as to what that means, 'prior history,' or whether it even relates to this – but you can't speculate about that and you can't consider that for any purpose. The only past history of wrongs or acts that you may consider is the testimony by the two witnesses, and that is subject to the limiting instruction that I gave you after the conclusion of the testimony of each of those witnesses. So I'm directing you not to consider the statement that was just made for any purpose."

Beverly resumed her testimony and recounted the conversation she had with the defendant. According to Ms. Beverly, the defendant stated the following: He was on his

way back home with T.E.'s family from a Christmas party on Christmas day and was sitting in the back of an SUV with T.E. T.E.'s grandfather told the kids to calm down because they were "hyper." T.E. was flailing her arms around, so the defendant grabbed her arms and tried to hold her arms down. T.E. then put his hand between her legs and tried to squeeze his hand. The defendant removed his hand, and he might have touched T.E. around the vagina area. T.E. said "don't touch my coochie."

At the close of the trial, the defense again moved for a mistrial, based on Beverly's reference to the defendant's "past history." The court denied the motion, having found that its curative instruction to the jury was sufficient to remedy the impropriety of Beverly's statement.

On March 17, 2017, the jury found the defendant guilty of gross sexual imposition as charged in the indictment. Defense counsel filed a motion captioned as a "motion for mistrial" on March 30, 2017 prior to the scheduled sentencing hearing.

The defendant in his motion asks the court to declare a mistrial and cites two bases for the motion. First, the defendant maintains that the court's curative instruction to the jury to disregard Beverly's statement referencing the defendant's "past history" is insufficient to cure the prejudice to the defendant. Secondly, the defendant posits that the state violated Crim.R. 16 and committed a *Brady* violation by not providing notice of the pretrial statement the defendant made to Beverly. The defendant claims that his due process rights have been violated because he was unable to properly prepare for trial or to consider alternatives to trial without being provided the statement. .

Just prior to the oral argument on the motion for mistrial, both the state and the defendant received a copy of an activity report, made by Beverly, which summarized

her conversation that she had with the defendant.[4] Despite prior requests and efforts by both counsel for the state and the defense to obtain all records from Children Services related to T.E.'s case, neither counsel for the state nor the defense had previously seen this document. During trial, counsel for the state and the defendant only had an investigative summary from Ms. Beverly, which did not include a reference to or a summary of her conversation with the defendant.[5] The activity report relayed substantially the same information about Beverly's conversation with the defendant as she testified to in trial.[6]

During oral argument, defense counsel argued that the defendant was prejudiced by not knowing that Ms. Beverly had engaged in conversation with the defendant. Defense counsel argued that, had he known that Beverly had that conversation with the defendant, or had he received the activity report summarizing the defendant's statements, he may have approached the trial differently and called additional witnesses. However, when pressed by the court as to what the activity report revealed that was significant to the defendant's trial preparation, defense counsel could not articulate the significance.

LEGAL STANDARD

The defendant's present motion moves for a mistrial. A mistrial should be declared when "it appears that some error or irregularity has been injected into the proceeding that adversely affects the substantial rights of the accused, and as a result,

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[4] Joint Ex. 1.
[5] Defs. Ex. 1.
[6] The report also included a statement from the defendant that he had not tried to kiss T.E. before, and he had not seen her naked or undressing. The report included statement's from the defendant that the incident was an accident.

a fair trial is *no longer possible*."[7] In this instance, however, the trial has already concluded. Therefore, the court will construe the defendant's motion as a motion for a new trial, under Crim.R. 33.

Crim.R. 33(A) provides, in pertinent part, as follows:

> "(A) **Grounds.** A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
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> (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
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> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
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> (3) Accident or surprise which ordinary prudence could not have guarded against;
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> (4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;
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> (5) Error of law occurring at the trial;
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> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may

[7] (Emphasis added.) *State v. Crane*, 12th Dist. Brown No. CA2013-02-001, 2014-Ohio-3657, ¶ 31, quoting *State v. Thornton*, 12th Dist. Clermont No. CA2008-10-092, 2009-Ohio-3685, ¶ 11. *See State v. Griffin*, 12th Dist. Butler No. CA98-05-100, 1999 WL 270321, *4 (May 3, 1999), citing *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1992) (holding same).

> produce affidavits or other evidence to impeach the affidavits of such witnesses."[8]

Furthermore, when a defendant moves for a new trial on the bases articulated in either Crim.R. 33(A)(2) or (3), those causes "must be sustained by affidavit showing their truth * * *."[9] Crim.R. 33 restricts trial courts from granting a new trial or setting aside a judgment of conviction "* * * unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial."[10] Notably, motions for a new trial are not granted lightly.[11]

LEGAL ANALYSIS

In the present case, the defendant argues that he is entitled to a new trial for multiple reasons. First, he posits that the state's failure to notify him of his statements made to Ms. Beverly and its failure to produce the activity report summarizing those statements violates the *Brady* rule. Second, he maintains that this failure violates Crim.R. 16. Third, the defendant argues that he is entitled to a new trial due to Ms. Beverly's reference to his "past history." Finally, although the defendant did not directly argue that he is entitled to a new trial because the court did not perform an in camera review of Children Services records, the court will address whether the lack of review was improper and gives rise to the need for a new trial.

The state highlighted in its response that the proper vehicle to address these arguments is a motion for a new trial pursuant to Crim.R. 33(A). The defendant did not

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[8] Crim.R. 33(A).
[9] Crim.R. 33(C).
[10] Crim.R. 33(E)(5).
[11] *State v. Zielinski*, 12th Dist. Warren No. CA2014-05-069, 2014-Ohio-5318, ¶ 16, quoting *Thornton*, 2013-Ohio-2394 at ¶ 21.

file a reply indicating whether he agreed with the state's position, and if so, which bases under Crim.R. 33(A) he was relying on. As outlined above, there are several causes that can give rise to a new trial, enumerated in Crim.R. 33(A)(1) through (6). At the hearing on the motion, the court stated that the Crim.R. 33 standard should apply. However, the defendant still did not identify which subparts of Crim.R. 33(A) applied. Therefore, the court will examine all bases that could arguably apply.

To begin with, the court notes that most of the bases for a new trial under Crim.R. 33(A) are inapplicable to the defendant's argument that he should have been provided notice of the defendant's statements to Beverly, along with the activity report. Subsections (A)(2) and (A)(3) plausibly fit.[12] However, those two bases "must be sustained by affidavit showing their truth * * *,"[13] and the defendant included no affidavits with his motion.

Further, the defendant has not presented any argument related to (A)(4), which allows for a new trial where the verdict is not sustained by sufficient evidence or is contrary to law. Given that the defendant never objected to Beverly's testimony relating the defendant's statements to her, it seems that (A)(5), which applies for an "[e]rror of law occurring at trial," would not apply either.[14]

Therefore, the only two bases that remain are (A)(1) and (A)(6). The court will first examine the potential *Brady* violation and the potential Crim.R. 16 notice violation under (A)(1), which allows for a new trial where there is an "[i]rregularity in the proceedings * * * because of which the defendant was prevented from having a fair

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[12] Crim.R. 33(A)(2) allows for a new trial due to the "misconduct of the jury, prosecuting attorney, or the witnesses for the state," and (A)(3) allows for a new trial when there is an "(3) accident or surprise which ordinary prudence could not have guarded against * * *."

[13] Crim.R. 33(C).

[14] The defendant did object to Ms. Beverly's mention of the defendant's "past history," but he never objected to her testimony regarding the defendant's statements to her generally.

trial." Then the court will examine whether alternatively (A)(6) applies, which permits a new trial when new evidence material to the defense is discovered.

As to the alleged *Brady* violation, the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), held that due process requires that the prosecution provide defendants with any evidence that is favorable to them whenever the evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[15] The Twelfth District Court of Appeals has succinctly summarized what the defendant must show to demonstrate a *Brady* violation: "(1) the evidence at issue was favorable to [the defendant] because it was either exculpatory or impeaching; (2) the evidence was suppressed by the state, either willfully or inadvertently; and (3) prejudice ensued."[16] Notably, this test is "stringent."[17]

As mentioned, to find that there has been a *Brady* violation, the suppressed evidence must be material to the defense. However, when "determining whether the state improperly suppressed evidence favorable to the accused, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[18] A "reasonable probability" is "a probability sufficient to undermine the confidence in the outcome."[19]

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[15] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *See State v. Webb*, 12th Dist. Clermont No. CA2014-01-013, 2014-Ohio-2894,¶ 17, quoting *State v. Mills*, 12th Dist. Butler No. CA99-11-198, 2001 WL 237096, *4 (Mar. 12, 2001) (holding same).

[16] *State v. Smith*, 12th Dist. Fayette No. CA2015-12-024, 2016-Ohio-5668, ¶ 20, citing *State v. Widmer*, 12th Dist. Warren No. CA2012-02-008, 2013-Ohio-62, ¶ 91. *See State v. Gibson*, 12th Dist. Butler No. CA2007-08-187, 2008-Ohio-5932, ¶ 25, citing *Moore v. Illinois*, 408 U.S. 786, 794, 92 S.Ct. 2562 (1972) (promulgating the same test).

[17] *Smith*, 2016-Ohio-5668 at ¶ 20, citing *State v. Jackson*, 57 Ohio St.3d 29, 33 (1991).

[18] *Gibson*, 2008-Ohio-5932 at ¶ 26. *See State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 39, quoting *United Sates v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 Led.2d 481 (1985) (explaining that evidence is material "when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'").

[19] *Smith*, 2016-Ohio-5668 at ¶ 19, citing *State v. Johnston*, 39 Ohio St.3d 48 (1988), paragraph five of the syllabus.

Requiring evidence to be material is not tantamount to requiring that the evidence "would have resulted in the defendant's acquittal," had it been disclosed.[20] Thus, when determining whether evidence is material, "the relevant 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.'"[21] As such, the *Brady* rule is violated if the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict."[22]

The Ohio Supreme Court has observed that as "a rule, undisclosed evidence is not material simply because it may have helped the defendant to prepare for trial."[23] Moreover, the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[24]

Turning to the case at bar, the state had a "duty to learn of any favorable evidence known to *the others acting on the government's behalf in the case* * * *."[25] As such, the state's *Brady* obligation extends to information held by Children Services.[26] The issue then becomes whether the withheld evidence, the activity report, was material to the defense.

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[20] *Brown*, 2007-Ohio-4837 at ¶ 39, citing *United States v. Agurs*, 427 U.S. 97, 111, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).
[21] *Brown*, 2007-Ohio-4837 at ¶ 40, quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).
[22] *Brown*, 2007-Ohio-4837 at ¶ 40, quoting *Kyles*, 514 U.S. at 434.
[23] *Brown*, 2007-Ohio-4837 at ¶ 49. *See Webb*, 2014-Ohio-2894 at ¶ 17, quoting *Brown*, 2007-Ohio-4837 at ¶ 49 (holding same).
[24] *Smith*, 2016-Ohio-5668 at ¶ 20, citing *State v. Fulton*, 12th Dist. Clermont No. CA2002-10-085, 2003-Ohio-5432, ¶ 33.
[25] (Emphasis original.) *State v. Campbell*, 4th Dist. Adams No. 13CA969, 2014-Ohio-3860, quoting *State v. Sanders*, 92 Ohio St.3d 245, 261, 750 N.E.2d 90 (2001).
[26] *Campbell*, 2014-Ohio-3860 at ¶ 12,

The court finds that the undisclosed conversation with the defendant and the activity report memorializing the conversation are not material. The state violated the *Brady* rule if the undisclosed statements "could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict."[27] The defendant's statements to Beverly, however, do not undermine the confidence in the verdict. The defendant's statements that Beverly shared with the jury, and her summary contained in the undisclosed activity report, mirror the statements that Investigator Saylor had already testified to.

In particular, the defendant's statement to Beverly includes the same recitation of how the drive home on Christmas with T.E. unfolded: the defendant maintained T.E. was rambunctious, her grandfather wanted the kids to calm down, he tried to calm down T.E. by taking hold of her hands or arms, she placed his hand between her legs and held it there, he extricated his hand, T.E. said "you touched my coochie," and he may have touched T.E.'s vagina accidentally in the process of extricating his hand. There is no exculpatory information in the previously withheld statement.

The defendant could not identify how the defendant's statement to Beverly would have exculpated him. Defense counsel argued that he would have approached the case differently and possibly called additional witnesses. However, the defendant's statement is not material merely because "it may have helped the defendant to prepare for trial."[28] In in examining the statement itself, the court cannot discern how the defendant would have been better prepared if he had received the statement prior to trial. Contrary to his assertion, there is no information in the summary of his statements to Ms. Beverly that suggest other witnesses should be called.

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[27] *Brown*, 2007-Ohio-4837 at ¶ 40, quoting *Kyles*, 514 U.S. at 434.
[28] *Brown*, 2007-Ohio-4837 at ¶ 49. *See Webb*, 2014-Ohio-2894 at ¶ 17, quoting *Brown*, 2007-Ohio-4837 at ¶ 49 (holding same).

Moreover, based on the jury's finding of guilt, the jury had already rejected the defendant's explanation that, if he touched T.E.'s vagina, it was only an accident while trying to calm her down. Because the jury rejected the defendant's explanation, which he had provided to both Investigator Saylor and Ms. Beverly, and which they relayed to the jury, the court fails to see how the activity report summarizing Beverly's conversation with the defendant would have had any impact on the outcome of the trial had the evidence been disclosed prior to trial.[29]

As such, the court finds that the state's failure to provide statements from the defendant to Ms. Beverly did not violate the *Brady* rule. There is no violation because the statements were not material to the defendant's guilt or punishment and there is no reasonable probability that the outcome of the defendant's trial would have been different had the statements been provided to the defendant. Because the statement was immaterial, the court does not find that the defendant is entitled to a new trial under Crim.R. 33(A)(1), based on an irregularity that occurred during the trial that prevented him from having a fair trial.

The defendant also posits that the court should grant the defendant a new trial because the state violated Crim.R. 16 in failing to provide notice that Ms. Beverly had contact with the defendant and for failing to provide the activity report that summarized that contact. Crim.R. 16(B) provides:

> "(B) Discovery: Right to Copy or Photograph. Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the

[29] *See Webb*, 2014-Ohio-2894 at ¶¶ 20-21 (the appellate court rejected the argument that the prosecution's failure to disclose a police report would have had an impact on the outcome of a trial where the defendant argued that it would have bolstered his theory that someone else started the fire he was on trial for, because the defendant had already attempted to place blame on others for the fire during the trial and the jury had found him guilty).

> following items related to the particular case indictment, information, or complaint, *and which are material to the preparation of a defense*, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:
>
> (1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant; * * *
>
> (5) Any evidence favorable to the defendant and material to guilt or punishment * * *."[30]

The Twelfth District Court of Appeals has observed that, when the prosecution withholds evidence in contravention of Crim.R. 16, "the mere failure to disclose evidence does not by itself warrant a new trial; the contested evidence must also be found to be material to the outcome of the trial."[31] As discussed at length above, the withheld evidence, the activity report and notice that the defendant made a statement to Beverly, is not material evidence to the defense.

Further, this case is similar to *State v. Nicholas*, 12th Dist. Butler No. CA2006-10-260, 2008-Ohio-628, in which the defendant was also not entitled to a new trial for an alleged Crim.R. 16 violation. In *Nicholas*, the defendant appealed the trial court's decision denying his motion for a new trial on the basis that there was a violation of Crim.R. 16(B).[32] The defendant argued that the state violated Crim.R. 16(B) because during the trial a detective attributed a statement to the defendant for the first time and the prosecution had not previously disclosed the statement to the defense.[33] The court of appeals found that there was no need for a new trial because there was no willful

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[30] (Emphasis added.) Crim.R. 16(B).
[31] *State v. Self*, 112 Ohio App.3d 688, 692, 679 N.E.2d 1173 (12th Dist. 1996), citing *State v. Perry*, 80 Ohio App.3d 78, 85, 608 N.E.2d 846 (11th Dist. 1992).
[32] *State v. Nicholas*, 12th Dist. Butler No. CA2006-10-260, 2008-Ohio-628, ¶ 8.
[33] Id. at ¶¶ 5-6.

violation by the prosecution, the defendant did not object to the testimony during trial or ask for a continuance, and the same information came in from a different witness.[34]

A very similar situation is presented here. Although the defendant objected to Beverly's reference to the defendant's "past history," he did not generally object to her testifying about her conversation with the defendant and attributing statements to him. Additionally, the defense did not ask for a continuance during the trial due to the revelation that Beverly had spoken to the defendant. Moreover, in oral argument on this motion, the defense admitted that the defendant was not alleging that the state engaged in misconduct by purposefully withholding discoverable information from the defendant. Finally, the defendant's statements to Beverly, which she relayed to the jury and had memorialized in the activity report, are substantially the same statements that the defendant made to Investigator Saylor. The jury had already heard those statements during Investigator Saylor's testimony. Due to the similarity between this case and *Nicholas*, and the finding that the statement was not material, a new trial is not warranted because of an alleged Crim.R. 16(B) violation.

Next, the court considers whether the activity report is new evidence and a new trial should be granted on that basis. Under Crim.R. 33(A)(6), a new trial may be granted on the defendant's motion "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial."[35] To prevail on a motion based on new evidence, "the defendant must establish that the evidence: "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as

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[34] Id. at ¶ 12.

[35] Crim.R. 33(A)(6). Notably, Crim.R. 33(A)(6) also requires the defendant to "produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given * * *." The defendant did not do that here, and for that reason alone his motion could be denied under Crim.R. 33(A)(6).

could not in the exercise of due diligence have been discovered before trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict former evidence."[36] Trial courts subject motions for a new trial based on newly discovered evidence to "the closest scrutiny."[37]

Under Crim.R. 33(A)(6), a new trial is not warranted. As listed above, the new evidence must disclose a strong probability that it will change the result if a new trial is granted. In the instant case, the statement is not exculpatory and does not reveal any new exculpatory evidence. As discussed, it is unlikely that the trial would have reached a different outcome had the defendant had the activity report prior to trial. Next, the court has already determined that the activity report is not material to the defense.[38] Lastly, the new evidence must not be "merely cumulative" to warrant a new trial. However, Investigator Saylor testified to substantially the same statements from the defendant as the ones listed in the newly discovered activity report. Indeed, Beverly also directly testified to the statements that the defendant made in the activity report. As such, the activity report is cumulative evidence. For these reasons, the court finds that the activity report does not serve as new evidence under Crim.R. 33(A)(6), and therefore a new trial is unwarranted.

Finally, the court considers whether the defendant is entitled to a new trial due to Beverly's reference to his "past history," and the court's failure to declare a mistrial after she made that statement. This argument reasonably fits the bases for a new trial listed

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[36] *Zielinski*, 2014-Ohio-5318 at ¶ 15, citing *State v. Petro*, 148 Ohio St. 505 (1947), syllabus. *See State v. Carr*, 12th Dist. No. CA2004-01-006, 2005-Ohio-417, ¶ 6, citing *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993) (applying the same six-part test to a case involving an alleged *Brady* violation).

[37] *State v. Hatton*, 4th Dist. Pickaway No. 13CA26, 2014-Ohio-3601, ¶ 10.

[38] *See Carr*, 2005-Ohio-417, ¶ 10 (finding that a police summary was not material evidence that merits a new trial because the statements of a witness contained in the police report were testified to by the witness during trial).

in Crim.R. 33(A)(1) and (5), which respectively allow for a new trial when there was an irregularity in the proceedings that prevented the defendant from having a fair trial or when there is an error of law that occurred at trial.

The decision to grant or deny a mistrial is a decision left to the trial court's discretion.[39] "A trial court should not grant a mistrial unless it appears that some error or irregularity has been injected into the proceeding that adversely affects the substantial rights of the accused, and as a result, a fair trial is no longer possible."[40]

"Generally, the introduction of evidence that the defendant has committed a crime independent of the offense for which he is on trial is inadmissible."[41] However, a "curative instruction is an appropriate remedy, rather than a mistrial, for inadvertent answers given by a witness to an otherwise innocent question."[42] Courts presume that juries follow the trial court's instructions, "including instructions to disregard testimony."[43] As such, a trial court does not abuse its discretion in not granting a mistrial when the trial court sustains the objection to the answer, the statement was not inflammatory or intentional, and the questioning does not dwell on the subject.[44]

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[39] *State v. Raypole*, 12th Dist. Fayette No. CA2014-05-009, 2015-Ohio-827, ¶ 27, citing *State v. Gilbert*, 12th Dist. Butler CA2010-09-240, 2011-Ohio-4340, ¶ 83.

[40] *Crane*, , 2014-Ohio-3657 at ¶ 31, quoting *Thornton*,, 2009-Ohio-3685 at ¶ 11. *See Raypole*, 2015-Ohio-827 at ¶ 27, citing *Gilbert*, 2011-Ohio-4340 at ¶ 83 ("Mistrials should only be declared when the ends of justice so require and a fair trial is no longer possible."); *Griffin*, 1999 WL 270321 at *4 ("A mistrial should not be granted merely because some minor error or irregularity has arisen.").

[41] *State v. Hale*, 12th Dist. Butler No. CA2002-02-037, 2003-Ohio-4448, ¶ 20, citing *State v. Hector*, 19 Ohio St.2d 167, 175, 249 N.E.2d 912 (1969).

[42] *State v. Wagers*, 12th Dist. Preble No. CA2009-06-018, 2010-Ohio-2311, ¶ 67, citing *State v. Mobley*, 2d Dist. Montgomery No. 18878, 2002 WL 506626, *2 (July 5, 2012).

[43] *State v. Jones*, 90 Ohio St.3d 403, 414, 739 N.E.2d 300 (2000), citing *State v. Zuern*, 32 Ohio St.3d 56, 61, 512 N.E.2d 585, 590 (1987). *See Raypole*, 2015-Ohio-827 at ¶ 25, citing *State v. Smith*, 12th Dist. Fayette No. CA2006-06-030, 2009-Ohio-197, ¶ 59 ("We must presume that the jury followed the trial court's instructions" to disregard a statement.).

[44] *Hale*, 2003-Ohio-4448 at ¶ 20, citing *State v. Jones*, 83 Ohio App.3d 723, 737, 615 N.E.2d 713 (2d Dist. 1992).

For instance, in *State v. Raypole*, 12th Dist. Fayette No. CA2014-05-009, 2015-Ohio-827, a mistrial was not warranted after a witness testified that the defendant only knew a certain person because the defendant "lived in the apartments years ago before he got sent away the last time."[45] In *Raypole*, the appellate court found that the trial court's curative instruction prevented any prejudice to the defendant.[46] The trial court had instructed the jury to disregard the statement and not speculate or draw inferences regarding the statement, and that instruction prevented the need for a mistrial.[47]

In another example, *State v. Wagers*, 12th Dist. Preble No CA2009-06-018, 2010-Ohio-2311, two witnesses testified that the defendant was in jail and had engaged in illegal activity, other than that for which he was on trial.[48] On appeal, the defendant argued that it was error for the trial court not to have declared a mistrial. The court of appeals court noted that the defendant had not made any showing as to how he suffered material prejudice from the inadvertent testimony.[49] Although the statements violated the court's prior motion in limine ruling, which instructed witnesses not to reference that the defendant was in prison, the witnesses inadvertently "blurted out" the jail reference.[50] The trial court offered to issue a limiting instruction to cure the defect, which the defendant declined.[51] The court of appeals ruled that the trial court had not abused its discretion in choosing not to declare a mistrial.

Numerous appellate districts, the Twelfth District Court of Appeals included, have found that inadvertent statements about illegal activity, prior convictions, and other bad

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[45] *Raypole*, 2015-Ohio-827 ¶¶21, 27.
[46] Id. at ¶ 26.
[47] Id.
[48] *Wagers*, 2010-Ohio-2311 at ¶ 64.
[49] Id. at ¶ 66.
[50] Id.
[51] Id. at ¶ 67.

acts, such as those described above, are not cause for a mistrial when appropriately dealt with by the trial court.[52]

The court finds that Beverly's statement that the defendant knew he was going to jail because of his past history was properly remedied with a curative instruction, and thus a mistrial was not warranted. Beverly's statement about the defendant's past history was an inadvertent statement made when answering an innocent question. Specifically, the state had asked if Beverly had an opportunity to speak with the defendant.

Further, the reference to the defendant's "past history" was ambiguous and less potentially prejudicial than many of the inadvertent statements described above. Although the court ruled in its decision on a motion in limine that witnesses could not reference the defendant's past convictions, Beverly did not directly reference his convictions or that he may have spent time in jail or prison. The most reasonable inference that the jury would have made would be to believe that it referred to the sexual abuse that Ms. Emery and Ms. McCrory had testified to. The jury already knew,

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[52] *See Hale*, 2003-Ohio-4448, ¶ 21 (finding the trial court did not abuse its discretion in not declaring a mistrial after a victim stated that the defendant (on an occasion separate from the crime) "shot through the house," because the trial court immediately issued a curative instruction); *State v. Bigsby*, 7th Dist. Mahoning No. 12 MA 74, 2013-Ohio-5641, ¶ 60 (finding that a declaration of mistrial was not warranted after a witness mentioned that she had visited the defendant at a correctional facility because the defense immediately objected and the court issued a curative instruction to the jury to disregard the statement); *State v. Holmes*, 5th Dist. Stark No. 2004CA00118, 2005-Ohio-1481, ¶53 (finding that a mistrial was unnecessary after a detective mentioned domestic violence charges against the defendant during trial that had been excluded in a motion in limine; a mistrial was unnecessary because the mention was elicited by an innocent question, the court sustained the defense's objection, and the court gave a curative instruction); *State v. Rodgers*, 2d Dist. Montgomery No. 20576, 2005-Ohio-3181, ¶ 93 (finding that the court did not abuse its discretion in denying a motion for mistrial after a witness mentioned that the defendant stole cars because the event was isolated, it did not recur during the trial, and there was overwhelming evidence of the defendant's guilt); *State v. Morgan*, 84 Ohio App.3d 229, 234, 616 N.E.2d 941 (5th Dist. 1992) (finding that the trial court did not abuse its discretion in failing to declare a mistrial after a witness mentioned the defendant had been in prison because the comment was not clear, the comment was isolated, the court cautioned the witness, and the defense rejected the opportunity for a limiting instruction).

from the court's limiting instruction on how to use the two women's testimony, that it could not infer that the defendant was acting in conformity with his character with T.E. based on Ms. Emery and Ms. McCrory's testimony.

Significantly, the court immediately stopped Beverly's testimony, consulted counsel, and issued a thorough curative instruction to the jury. The court instructed as follows:

> "The reference to a statement as to prior history was improper. It should not have been made. You may not consider it for any purpose. I stress to you that in the law of this state, and I think every other state, we don't decide cases based on what somebody may have done in the past or what they did in the past. We decide it based on what they did relevant to the charge that you're considering. So you may not consider – first of all – there has been no statement as to what that means, 'prior history,' or whether it even relates to this – but you can't speculate about that and you can't consider that for any purpose. The only past history of wrongs or acts that you may consider is the testimony by the two witnesses, and that is subject to the limiting instruction that I gave you after the conclusion of the testimony of each of those witnesses. So I'm directing you not to consider the statement that was just made for any purpose."

The court clearly instructed the jury not to consider the statement for any purpose. It is presumed that the jury was able to follow the court's clear instruction.

Moreover, the reference to the defendant's "past history" was an isolated incident, and the state instructed Ms. Beverly again that she was not to reference it. For all of the aforementioned reasons, the court finds that the defendant was not prevented from having a fair trial due to Ms. Beverly's inadvertent comment, and the court did not err in failing to declare a mistrial. As such, a new trial should not be granted on that basis.

Lastly, the court will consider whether the defendant should be granted a new trial because the court did not conduct an in camera review of the Children Services

records filed under seal. The defendant did not directly argue this point in either his motion or during oral argument. However, the defendant implies that the court should have conducted a review of the Children Services records that were delivered to the court.

Generally, children services agency records are confidential under R.C. 5113.17.[53] Even so, in certain circumstances a defendant may be entitled to certain children services agency records, following an in camera review by the trial court, if those records contain *Brady* material.[54] An in camera review is a "trial judge's private consideration of evidence," without participation from the parties.[55]

However, a defendant "may not require the trial court to search through [a state agency's] file without first establishing a basis for his claim that it contains material evidence."[56] The United States Supreme Court has explained that the defendant "must at least make some plausible showing of how their testimony would have been both material and favorable to their defense."[57]

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[53] R.C. 5153.17 provides: "The public children services agency shall prepare and keep written records of investigations of families, children, and foster homes, and of the care, training, and treatment afforded children, and shall prepare and keep such other records as are required by the department of job and family services. Such records shall be confidential, but, except as provided by division (B) of section 3107.17 of the Revised Code, shall be open to inspection by the agency, the director of job and family services, and the director of the county department of job and family services, and by other persons upon the written permission of the executive director."

[54] *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). *See Grantz v. Discovery For Youth*, 12th Dist. Butler Nos. CA2004-09-216, CA2004-09-217, 2005-Ohio-680, ¶ 15 ("In the criminal context, the United States Supreme Court has acknowledged, that under certain circumstances, confidential records of a children's services agency must be made available to a trial court for an in camera inspection.").

[55] *In re J.W.*, 9th Dist. Lorain No. 10CA009939, 2011-Ohio-3744, ¶ 9, quoting Black's Law Dictionary 775 (8th Ed. 2004).

[56] *State v. Sanders*, 92 Ohio St.3d 245, 261, 750 N.E.2d 90 (2001), citing *Ritchie*, 480 U.S. at 58, fn. 15.

[57] *Ritchie*, 480 U.S. at 58, fn. 15, citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982).

Ohio courts have acknowledged that there "exists little Ohio case law which discusses the initial showing a defendant must make before he is entitled to an in camera review of confidential records by the trial court."[58] However, both the Fifth District Court of Appeals and the Sixth District Court of Appeals have concluded that before a defendant is entitled to have the trial court conduct an in camera inspection of confidential records, "he is required to demonstrate that there is a reasonable probability, grounded on some demonstrable fact, that the records contain material relevant to the defense."[59] When a defendant fails to make this showing, a trial court has no duty to conduct an in camera review of the records.[60]

Furthermore, the court does not have a duty to conduct an in camera review of confidential records when the prosecutor reviews the files and concludes that there are no further *Brady* materials to produce to the defendant.[61]

In turning to the present case, the defendant is not entitled to a new trial due to the fact that the court did not conduct an in camera inspection of the Children Services records. In January 2017, before the court received the records from Children Services under seal, the state represented that it had received all of the records from Children Services and that it had provided these records to the defendant in their entirety. When the court received the records under seal, there was no corresponding motion from either party moving the court to conduct an in camera review of the records, nor was there any correspondence indicating why the records had been delivered. The court

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[58] *State v. Brown*, 5th Dist. Delaware No. 2005CAA01002, 2005-Ohio-5639, ¶ 69, quoting *State v. Allan*, 6th Dist. Lucas No. L-94-272, 1996 WL 38784 (Feb. 2, 1996).
[59] *Brown*, 2005-Ohio-5639 at ¶ 72. *See Allan*, 1996 WL 38784, *2 ("This court holds that a defendant is entitled to the trial court's *in camera* inspection of children services agency records where the defendant shows that there is a reasonable probability, grounded on some demonstrable fact, that the records contain material relevant to the defense.").
[60] *Brown*, 2005-Ohio-5639 at ¶ 72.
[61] *State v. Lawson*, 12th Dist. Clermont No. CA88-05-044, 1990 WL 73845, *10 (June 4, 1990).

had received no indication from the parties that these records would have contained any additional material that the defendant had not already received via the state. The court notified the parties of this in its entry, issued on February 27th. The court advised the parties that "* * * the records will remain sealed and will not be reviewed for the court pending the filing of a motion requesting the review and a hearing on that motion." Neither party filed a motion for the court to perform an in camera review of the Children Services records in advance of the trial.

Thus, up until the time of trial, the court had no duty to review the Children Services records in camera because (1) neither party moved the court to review the records and (2) the prosecutor had previously represented that he had produced all Children Services records relevant to the case to the defendant. As mentioned, the court has no duty to review confidential records in camera if the prosecutor reviewed the files and concluded that there are no further *Brady* materials to produce to the defendant.[62] Here, prior to the trial, the prosecutor had averred that the state had all of the Children Service's records and that it had produced those to the defendant. As such, the court had no duty to review the Children Services records as the defendant would have already had access to all *Brady* materials in the records.

On March 13th, the day the trial began, the court reiterated that it had received sealed records from Children Services and that it had not received any motion for an in camera review. The parties revealed for the first time that, upon jointly visiting Children Services, they discovered that there were more Children Services records than the state had received, and consequently, more than the defendant had received from the state. Both parties informed the court that they believed the additional records were unrelated

[62] *Lawson*, 1990 WL 73845 at *10.

to this case because they were related to earlier Children Services involvement with T.E. regarding her parents' drug abuse issues.

The court indicated that it was not going to review the sealed Children Services records absent a motion for in camera review. Although defense counsel requested that he personally review the files, which the court denied, defense counsel did not file any motion or orally move for the court to review the sealed Children Services records.

Even if the defendant had moved the court to review the sealed records, a defendant "may not require the trial court to search through [a state agency's] file without first establishing a basis for his claim that it contains material evidence."[63] Here, both parties represented that the un-reviewed sealed records dealt with unrelated matters involving T.E.'s parents. Further, defense counsel stated that he did not know what might be in the records.

Moreover, the defendant likewise failed to show that there is a "reasonable probability, grounded on some demonstrable fact, that the records contain material relevant to the defense."[64] The representations to the court were that the records the defendant did not have were unrelated to this case. In fact, the defense stated that the new records had "nothing to do with Mr. Witzel." As such, the court had no duty to conduct an in camera inspection of the Children Services records. Accordingly, the court's decision not to review the Children Services records in camera is not a basis for the defendant to be granted a new trial.[65]

CONCLUSION

[63] *State v. Sanders*, 92 Ohio St.3d 245, 261, 750 N.E.2d 90 (2001), citing *Ritchie*, 480 U.S. at 58, fn. 15.
[64] *Brown*, 2005-Ohio-5639 at ¶ 72. *See Allan*, 1996 WL 38784 at *2.
[65] The court will provide the sealed confidential Children Services records to the appellate court, should the defendant appeal.

For the foregoing reasons, the court finds that the defendant's motion is not well-taken and hereby overrules it.

Counsel are directed to contact the Assignment Commissioner within five days of the date of this decision in order to schedule the sentencing hearing (which shall be held within two weeks of the date of the decision) in this case.

IT IS SO ORDERED.

DATED: 6-2-17

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 2nd day of June 2017 by e-mail to Matthew E. Wiseman, at mwiseman@clermontcountyohio.gov, and Katie Terpstra, at kterpstra@clermontcountyohio.gov, Assistant Prosecuting Attorneys for the State of Ohio, and to Ronald A. Mason, Attorney for the Defendant, at masonlaw@fuse.net.

Bailiff to Judge McBride