IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-180091 TRIAL NO. B-1704388
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
TERRY L. JONES,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 27, 2019

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp,* Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, and *Joshua A. Thompson* and *Sarah E. Nelson*, Assistant Public Defenders, for Defendant-Appellant.

CROUSE, Judge.

{¶1} In this murder case, the victim was brutally stabbed in his neck. The knife hit an artery, causing him to bleed to death. Defendant-appellant Terry Jones's girlfriend, Alisha Hawkins, testified on his behalf at trial and claimed that she was the one who stabbed the victim, not Jones. Nevertheless, the jury found Jones guilty, and he was sentenced to 15 years to life in prison. The key witness against Jones was Hawkins's 13-year-old son, T.D. T.D. testified at trial that it was Jones, and not his mother, who stabbed the victim.

{¶2} The main issues in this appeal revolve around Jones's argument that the state withheld material impeachment evidence, including promises allegedly made to T.D. in order to get him to testify against Jones. In four assignments of error Jones argues that: (1) his right to due process and a fair trial were violated when the state failed to disclose and investigate material impeachment evidence, when the state engaged in misconduct, and when the trial court failed to declare a mistrial when it learned the state failed to disclose and investigate material impeachment evidence; (2) he was denied the effective assistance of trial counsel when counsel learned of impeachment evidence, but failed to request a continuance to investigate; (3) his murder conviction under R.C. 2903.02(B) was against the manifest weight of the evidence because the evidence presented at trial overwhelmingly demonstrated that Hawkins killed the victim; and (4) the trial court committed plain error in failing to sua sponte instruct the jury on voluntary manslaughter under R.C. 2903.03.

{¶3} For the following reasons, we find no prejudicial errors and affirm the trial court's judgment.

Factual Background

{¶4} On July 24, 2017, Michael Brooks was stabbed to death in the lobby of the apartment building where he lived. A knife was plunged into the left side of his neck, causing an "arterial spurt" which caused him to bleed to death. The only question at trial was whether Jones stabbed Brooks, as the state argued and the jury ultimately found, or Alisha Hawkins stabbed Brooks, as she told police at the scene and testified to at trial.

Jones's Testimony

{¶5} Jones lived with his girlfriend Alisha Hawkins and her son, T.D., at her apartment. They lived down the hall from Brooks. Jones testified that the morning of July 24, 2017, he left the apartment and went to the grocery store. When he came back, Hawkins was in the lobby of the apartment building. She was upset and told him that while he was gone Brooks had attacked her because he thought she had set him up to be robbed. Jones knocked on Brooks's door, but there was no response, so he went to put his groceries away in the apartment. T.D. was in the apartment and asked what was going on; Jones told him that Brooks had hit his mother. Jones then heard Brooks yelling at Hawkins, so he went back into the hallway. As he opened the door, he saw Brooks lunging at Hawkins, so he ran up and grabbed him from behind. He jumped on Brooks's back, and they tussled and moved around the lobby, eventually making their way outside. At first, Jones testified that he did not notice all of the blood until they were outside and he felt Brooks getting weak. Later, he

stated that when he was on Brooks's back and they were struggling, he noticed the blood spurting onto the door as they were going through the breezeway.

{¶6} Leaving Brooks bleeding on the ground outside, Jones came back inside, picked up the knife that was lying in the middle of the lobby floor, and went to Hawkins's apartment. Jones testified that he did not know when Brooks was stabbed, or how the knife ended up in the middle of the floor. He left the knife in the apartment and went back outside, taking off his t-shirt and using it to try to stop Brooks's bleeding. Then, Jones came back inside because, "[Brooks] was bleeding so hard, it's just like, I couldn't look at him no more." He testified that when he got back to the apartment, he was "pretty much panicking," so he took off his clothes and put them and the knife in a pillow case, and then put the pillow case by the garbage can. He took a shower and put on new clothes. When he came back out, he saw T.D. in the hallway with Police Officer Toni Savard. Savard told Jones to go upstairs to a neighbor's apartment, apartment 47, and wait for the police to come talk to him.

{¶7} Jones testified that he went outside the building through a side exit to stand with some other tenants from the building. He testified that somebody had called his mother (who used to live in the building) and handed him a phone with her on the line. He stayed outside with everybody for about 45 minutes before his sister pulled up and drove him to his brother's house in Dayton, Kentucky. He was outside the house in Dayton when the fugitive task force arrested him hours later.

Hawkins's Testimony

{¶8} Hawkins has multiple sclerosis. She walks with a limp and her right hand is permanently "balled up," such that she cannot use it except to grasp items with her "pinky finger." She testified that she went outside to wait for Jones to get

back from the grocery store. While she was sitting outside, Brooks walked up to her and started to hit her "like she was a man." She said she was hit a couple times in the face, and then on the top of her head and forehead. Brooks accused her of setting him up to be robbed a few days previously. Brooks went inside to his apartment. A few moments later Hawkins went to her neighbor Ronald Hon's apartment, told him what happened, and then went to her own apartment. She told T.D. that she had been attacked and to stay in the apartment. She testified that she grabbed a knife, put it down the back of her pants, and then went back out into the hallway because she did not want to upset T.D.

{¶9} Hawkins testified that she went down the hallway and stood by Hon's apartment. When Jones came back from the grocery store, she told him that Brooks had beaten her up. Jones knocked on Brooks's door, did not get an answer, and then went into Hawkins's apartment to put the grocery bags down. Hawkins stayed in the hallway near the lobby. She stated that Brooks opened his door just as Jones was coming back out of the apartment. She testified that Brooks threatened her and came towards her. She stated that she pulled the knife out of the back of her pants with her left hand and stabbed Brooks in the neck as Jones ran down the hallway and grabbed him from behind.

{¶10} Hawkins testified that once Jones had a hold of Brooks, she let go of the knife, leaving it in Brooks's neck, and backed up as Jones and Brooks tussled around the lobby and eventually ended up outside. She stated that during all of this she did not know where T.D. was. When she noticed that Brooks was bleeding, she turned her phone on and called 911.

Hawkins's 911 Call

{¶11} In her 911 call, Hawkins immediately told the operator that she was attacked and had to defend herself. The operator asked how the victim was injured, Hawkins said "a knife, I had a knife." The operator asked if she stabbed the victim, and Hawkins said, "I guess so, he was punching me in my face and I was just trying to get him off of me." The operator asked Hawkins where Brooks was cut, and she said, "I don't know, I think it's on the side. I can't tell he was punching me so hard." Hawkins said the neighbors in the building were trying to help her by getting him off of her.

Hawkins's Interview

{¶12} Hawkins was interviewed by police the same day as the stabbing. She was steadfast in her assertion that she had stabbed Brooks, but her story differed in many other respects. She said that when Brooks attacked her, she was sitting outside on the steps cutting up fruit with a knife, which she claimed that somebody had just walked up and given to her. She said she stabbed him with the knife, but he didn't start bleeding until he got inside. As she told detectives that she stabbed him, she swung her right arm. Later, Detective Hilbert asked what hand she stabbed him with, and she indicated her left hand. She stated that she had told T.D. to go upstairs to a neighbor's apartment before the stabbing occurred, and had then actually watched him go upstairs. She told the detectives that she tried to call 911, but her phone didn't have minutes, so she kept asking people for a phone until someone gave her one, and then she called 911.

Forensic Evidence

{¶13} When police searched Hawkins's apartment, they found a pillow case with bloody clothes, shoes, and a knife in a garbage bag on the floor next to the garbage can. The knife's handle was bent.

{¶14} At the police station, a photo was taken of Hawkins which showed a bump on her lip and a couple of very small cuts on her wrist, but otherwise there were no visible injuries which could be attributed to sustaining a beating by Brooks.

{¶15} Dr. Schott performed the autopsy on Brooks. She testified that the stab wound was on the **left** side of Brooks's neck, and was angled left to right in a downward motion. She stated that the stab wound resulted in "arterial spurt," which led to a large loss of blood under pressure.

The Security Camera

{¶16} At the time of the stabbing, the apartment building had a security camera in the lobby which took still photographs whenever the motion-activated sensor detected movement. The camera in the lobby did not capture all of the events, but it does provide a partial account. The clock on the camera was inaccurate, so in reality the events took place about 30 minutes later than what the time stamps on the photos indicate. Hawkins is seen walking outside at 10:54, a few minutes after Jones left to go to the grocery store.

{¶17} The next thing the photos show is that Brooks came inside, stopped, and looked back towards the breezeway, possibly talking to Hawkins for a few seconds, before walking toward his apartment. Hawkins walked inside a few seconds after Brooks and went to Hon's apartment.

{¶18} At 10:59:19, Jones returned from the grocery store and walked into the lobby of the apartment builiding. There are several photos which show him outside of Hon's apartment talking to Hawkins. At 10:59:59, a photo shows Jones on Brooks's back in the lobby of the building. One second later, another photo shows the knife lying in the middle of the lobby floor, several feet away from Jones and Brooks. Hon and Hawkins are in the 11:00:04 picture watching the two men fight. As Jones and Brooks moved across the lobby, blood was visible on the white wall near where they were fighting, and on the floor. By 11:00:17, the fight had moved outside, out of the view of the camera. During the entire fight, Jones was on Brooks's back. Hawkins and Hon were in the lobby watching the men fight, and it appears as though Hawkins was holding her phone and attempting to dial.

{¶19} At 11:01:04, Hawkins went outside. At 11:01:20, T.D. entered the frame for the first time. He walked through the lobby into the breezeway, and stood there for roughly the next five minutes. At 11:03:00, Jones walked back inside, blood visible on his shirt and pants. He picked up the knife and walked towards Hawkins's apartment. At 11:04:06, Jones went back outside with a t-shirt in his hand. At 11:05:02, Jones walked back inside towards Hawkins's apartment.

Body Cameras

{¶20} Officer Ward testified at trial that he arrived on scene two to three minutes after the 911 call. His body cam was played in court. He asked Hawkins who had stabbed Brooks, and she said she had because he hit her and she had been scared. Ward then placed Hawkins under arrest. Hawkins did not appear to have any blood on her. The body camera showed that a medic checked Hawkins for injuries, but did not render any medical aid.

{¶21} Officer Toni Savard testified at trial and her body camera footage was played in court. Savard asked the crowd gathered around the crime scene if anyone had seen what had happened, and T.D. raised his hand. She pulled T.D. aside, along with a neighbor who was comforting T.D. She testified in court that she wanted to isolate T.D. because Jones and women at the scene were "mouthing" something to T.D.

{¶22} On the body camera footage, T.D. told Savard that Brooks attacked his mother because he thought she had set him up to be robbed. He then admitted that he didn't actually see Brooks attack her, but that that's what his mother had told him. T.D. told Savard, "I came outside because I heard her yelling. Then she went in the house to get a knife, and she cut him." Savard asked T.D. if Jones was involved, and he said "no, he was at the store."

T.D.'s Interview

{¶23} T.D. was interviewed by detectives the same day as the stabbing. The first interview with T.D. was accidentally not recorded, but the state turned over the detectives' notes from the unrecorded interview to the defense.

{¶24} During the second, video-recorded, interview, which was played in court, T.D. told Detectives Taylor and Hilbert that his mother did not do the stabbing. T.D. reenacted the stabbing with Hilbert—during which he showed Jones standing in front of Brooks and stabbing him with the knife in his right hand.

T.D.'s Trial Testimony

{¶25} At trial, T.D. testified that he was in the apartment when he heard his mother yelling, so he went out in the hallway. He heard Hawkins tell Jones what happened with Brooks after Jones returned from the store. Jones went into

Hawkins's apartment. T.D. was standing in the hallway when he saw Brooks come back out of his apartment, and Brooks and Hawkins started arguing in the hallway. T.D. heard footsteps, and then saw Jones run up and stab Brooks from behind. After Jones stabbed Brooks, they wrestled their way outside.

{¶26} T.D. testified that he went through the lobby into the breezeway and stood there while his mother called 911. Hawkins and Hon told T.D. to get out of there, so he walked back down the hallway and went upstairs to apartment 47. T.D. came back down with the residents of apartment 47 and was in the lobby when Officer Savard came in and asked if anyone knew what had happened. T.D. testified that he initially lied and said his mother stabbed Brooks because he had heard his mother say to the 911 operator that she had done the stabbing. He thought that was what she would want him to say.

The Motion-to-Strike Hearing

{¶27} On the morning of January 23, 2018, midway through trial, and after T.D. had already testified, defense counsel notified the court that Jones told him that he had run into T.D.'s father, T.D., Sr., who was also being detained at the jail for unrelated charges. Jones reported that T.D., Sr., told him that if T.D. testified, T.D., Sr., believed that he would receive a favorable sentence on the charges pending against him. The court, concerned about this allegation, called a recess until the next day so the parties could investigate.

{¶28} The parties obtained a recording of a jail call from January 12, 2018, involving T.D., T.D., Sr., and Rose, T.D.'s grandmother and caretaker. In the recording, T.D., Sr., told T.D. not to testify, to tell the police that he wanted his father, and to "plead the Fifth." T.D. told T.D., Sr., that a woman promised to pay his

library fines and get him an Xbox after it was all over.[1] Rose told T.D., Sr., that she will be held in contempt of court if T.D. did not testify.

{¶29} On January 24, the court held a hearing, at which the following people testified: T.D., Sr., Detective Hilbert, and Jason Arenstein, T.D., Sr.'s, attorney. T.D., Sr., testified that the day before, January 23, while held at the jail for drug-possession and trafficking charges, he had run into Jones. T.D., Sr., told Jones that two detectives on Jones's case had come to see him because his son had asked the detectives if they could get T.D., Sr., to Jones's trial to support T.D. while he testified.

{¶30} Detective Hilbert testified that on January 12, 2018, there was a pretrial meeting at the prosecutor's office—the prosecutors, Hilbert, T.D., Rose, and Karen Rumsey, a victim's advocate, were all present. Initially, Rose did not want T.D. to testify, so Hilbert pulled Rose out of the room to talk to her.

{¶31} He told her that they did not want T.D. to have to testify, but they needed him to because Hawkins was claiming that she killed Brooks. He told Rose that there was a subpoena, and that T.D. had to be there. He said that T.D. would not get in trouble if he did not show up, but that Rose was the "responsible adult," and that she might get in trouble if she did not bring T.D. to testify. Hilbert admitted on cross-examination that he may have told Rose that she would be held in contempt of court if she did not bring T.D. to testify.

{¶32} When Hilbert and Rose came back in the room, T.D. had talked to Rumsey and seemed "okay" with testifying. T.D. requested that his father be there. Hilbert told him he could not make any promises and did not know if anything could

[1] It is unclear if T.D. thought that this was in exchange for his testimony.

be done since T.D., Sr., was in jail, but said that he would go talk to him. Detectives Hilbert and Taylor went to see T.D., Sr., on January 14.

{¶33} Hilbert testified that he told T.D., Sr., that he would try to get him out on electronic monitoring. Hilbert explained that Rose was overwhelmed, and T.D. had missed some school, so he thought that maybe he could get T.D., Sr., on electronic monitoring so that he could help Rose out. Hilbert stated that although they talked about T.D., Sr.'s, case briefly and in a limited way, he was not there to question T.D., Sr., about his crimes, so he did not think he needed to talk to T.D., Sr.'s, attorney first. Hilbert stated that the point of talking to T.D., Sr., was not to make sure T.D. came to court, but because T.D. had asked them to, and they were fulfilling his request.

{¶34} Hilbert testified that Karen Rumsey told him that T.D. had a $40 library fine for leaving a book in the apartment, which was locked up because it was a crime scene. She told Hilbert that she would see what she could do about it. Detectives Hilbert and Taylor did not document their visit with T.D., Sr., in any police reports. The state then played a recording of a second jail call in which T.D., Sr., reiterated to Rose that the police did not promise him anything, and that they only wanted him in the courtroom to make T.D. feel more comfortable.

{¶35} T.D., Sr., testified that the detectives met him at the jail and talked to him for roughly 15 minutes. The two detectives were not involved in the charges against T.D., Sr. They told T.D., Sr., that they wanted his son to testify, and that T.D. was asking that T.D., Sr., be there for comfort. The detectives told T.D., Sr., that they were going to do their best to get him to the trial, and that they would talk to the prosecutor about getting him on electronic monitoring in lieu of prison. T.D., Sr.'s,

lawyer, Jason Arensetin, was not present while the detectives talked to T.D., Sr. T.D., Sr., testified that he was not promised anything and did not promise to do anything for the police.

{¶36} T.D., Sr., testified that the detectives did not ask him to talk to his son about testifying, they just wanted him to be at the trial to support T.D. He testified that Rose told him that the person who made the promises to T.D. was "the social worker." He testified that he believed the payment of fines and the Xbox were in exchange for T.D. testifying.

{¶37} Arenstein testified that nobody had told him about the meeting with detectives—not T.D., Sr., the detectives, or the prosecutor. T.D., Sr., agreed to a plea deal on January 2, 2018. Arenstein described it as a "good" deal, but said that it still came with a presumption of prison time.

{¶38} Jones's counsel moved to strike the testimony of T.D. on the basis that Jones's attorneys were not made aware of the promises made to T.D. or T.D., Sr., which could have been used to cross-examine T.D., who had already testified. T.D. did not testify at the hearing about whether he was promised anything in exchange for his testimony or, if so, who made the promise.

{¶39} The trial court said that it was not clear from the evidence who offered to pay T.D.'s library fines and provide him an Xbox, and that it could have been a social worker. The court stated "we don't even know, in my mind, that it's Rumsey at all." The court continued, "the only evidence that we have in the case is that T.D. Sr. instructed T.D. Jr. to completely fabricate something, cry, do anything he had to do not to testify, which is exactly the opposite of what T.D. Jr. actually did, which was that he came in here, he testified, he was subject to cross-examination."

{¶40} The court overruled the motion to strike, stating that there was no evidence that "whatever anybody did, whether it was appropriate or not, had any influence" on T.D.'s testimony. Although the court said the detectives' actions in talking to T.D., Sr., without going through his counsel were inappropriate, he also concluded that the detectives did not talk to T.D., Sr., in a "surreptitious manner." The court stated that the defense would be permitted to recall T.D. and cross-examine him based on the information learned during the motion-to-strike hearing. However, Jones's counsel did not recall T.D. to the witness stand or request that he be permitted to voir dire T.D., Karen Rumsey, or any other witness outside of the presence of the jury.

{¶41} Jones was ultimately found guilty and sentenced. He has appealed, raising four assignments of error for our review. For the sake of clarity, we will discuss Jones's assignments of error out of order.

Third Assignment of Error

{¶42} In his third assignment of error, Jones argues that his murder conviction under R.C. 2903.02(B) was against the manifest weight of the evidence because the evidence presented at trial overwhelmingly demonstrated that Hawkins killed Brooks.

{¶43} When reviewing a conviction under a manifest-weight standard, an appellate court

> weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.

State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Reversal and the grant of a new trial should only be done in "exceptional cases in which the evidence weighs heavily against the conviction." *Id.*

{¶44} Jones argues that the jury lost its way because the evidence at trial "clearly showed" that Hawkins stabbed Brooks. While Hawkins was steadfast in her assertion that it was she who stabbed Brooks, not Jones, her testimony presented a myriad of problems. Hawkins's versions of the events have changed dramatically over time, and for the most part, she has not been able to articulate logical reasons behind the changes.

{¶45} First, it is important to note that Hawkins pled guilty to obstruction of justice, basically admitting that she lied to police about stabbing Brooks. At her plea hearing, she admitted to attempting to "hinder the discovery, apprehension, prosecution, conviction or punishment of Terry Jones for murder. Specifically, [Hawkins] called 911, maintained that she was the person who actually stabbed [Brooks], causing him to die. She made repeated statements back at the police district regarding the same information, that she was the one responsible for the death of [Brooks]."

{¶46} Second, in her interview with detectives, Hawkins told detectives that "If I say he do it, I get to go home, still going to die, because they think I'm a snitch." She continued, "either way, the only way I'm not going to die is if I – hey, I did it, self-defense."

{¶47} In addition, while she was sitting in the interview room with only T.D. present, but the video recorder still on, she whispered to him, "I'm not telling on nobody." She also said, "I'm not going to tell them that he did that. I'm going to say

that I did it and it was an accident. I'm not going to put somebody in jail that tried to save my life."

{¶48} Comparing Hawkins's testimony, her interviews, her initial statements to police, and her 911 call highlights multiple contradictions and factual inaccuracies. In her interview with detectives, she initially denied that Jones even lived with her, before admitting that he did live there, but that he was not present when the stabbing occurred. At trial, she testified that Jones was not only present, but jumped on Brooks's back as she stabbed him. At trial, she testified that she went inside her apartment to get a knife, but in her interview with detectives she said that she was outside with a piece of fruit and that somebody just walking by gave her a knife to cut it up with. At trial, she testified that she stabbed Brooks inside the building, but she told detectives in her interview that she stabbed Brooks outside, and he only started bleeding when he got inside. At trial, Hawkins said nothing about her neighbors pulling Brooks off of her, but during the 911 call, Hawkins told the operator that after Brooks attacked her, her neighbors attempted to help her by getting Brooks off of her.

{¶49} Additionally, Dr. Schott's testimony established that the stab wound resulted in "arterial spurt," which led to a large loss of blood under pressure. Despite this, Hawkins only had a spot of blood on the back of her shirt, and blood on her shoes.

{¶50} Hawkins's trial testimony is also not backed up by the physical evidence. The testimony at trial was that the stab wound was on the left side of Brooks's neck and in a downward motion from left to right. Brooks was five inches taller than Hawkins. Hawkins testified that she quickly grabbed the knife from the

back of her pants and stabbed Brooks with her left hand while he was coming at her. While quickly stabbing Brooks in a downward motion on the left side of his neck with her left hand while Brooks was facing her may have been possible, given her physical limitations, it seems highly unlikely.

{¶51} On the other hand, Jones testified that while he is mostly right-handed, he used his left hand to write notes during trial. The trial testimony and the security camera evidence established that Jones came up behind Brooks and jumped on his back. In light of the fact that the stab wound was on the left side of Brook's neck in a downward motion from left to right, the fact that Jones was behind Brooks, and the fact that Jones admitted to being able to write with his left hand, we cannot say that the jury clearly lost its way in believing that Jones and not Hawkins stabbed Brooks.

{¶52} We also consider Jones's actions after the stabbing. He picked up the knife, took it back to Hawkins's apartment, and then placed it inside of a pillow case and a garbage bag along with his bloody clothes. While Brooks was outside bleeding to death, Jones showered, changed clothes, and then left the scene. He went to his brother's house in Kentucky, where police tried to reach him for hours to no avail because neither he nor his family members were answering their phones.

{¶53} We agree that there were some inconsistencies in T.D.'s testimony. He initially told Officer Savard that Hawkins stabbed Brooks. He later told detectives that Jones stabbed Brooks from the front. Finally, at trial, he testified that Jones stabbed Brooks from behind.

{¶54} Nevertheless, the jury could have found T.D.'s testimony more credible for several reasons. His explanations for why his story changed, if not entirely

satisfactory, are at least logical. He testified that he heard Hawkins tell the 911 operator that she stabbed Brooks, and so he initially told Officer Savard the same thing because that's what his mother would have wanted him to do. At trial, when asked to explain why he initially demonstrated Jones stabbing Brooks from the front, he said that as Brooks was being stabbed he started to turn. Throughout all of the surveillance photos depicting the fight, Jones was behind Brooks, but the photos do not capture the very beginning of the fight, when Jones jumped on Brooks's back. So, it is possible that Brooks could have turned as he was being stabbed.

{¶55} We cannot say that the jury clearly lost its way in believing T.D.'s testimony over Hawkins's and Jones's testimony. The conviction was not against the manifest weight of the evidence and the third assignment of error is overruled.

First Assignment of Error

{¶56} In his first assignment of error, Jones claims that his right to due process and a fair trial were violated when the state failed to disclose and investigate material impeachment evidence, when the state engaged in misconduct, and when the trial court failed to declare a mistrial after it learned that the state had failed to disclose and investigate material impeachment evidence.

{¶57} Jones's first argument is that the state violated his right to a fair trial when it withheld and failed to disclose promises made to T.D. to pay his library fines, get him an Xbox, and get T.D., Sr., out of jail. Because the state did not disclose this evidence, Jones argues that a new trial is warranted.

{¶58} The "suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *State v.*

Johnston, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988), paragraph four of the syllabus, citing *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

{¶59} "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility" falls within the *Brady* rule. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), quoting *Napue v. People of State of Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

{¶60} However, in *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Supreme Court clarified that the *Brady* rule only applies in situations involving the discovery of exculpatory information *after* trial. (Emphasis added.) The Ohio Supreme Court followed suit in *State v. Wickline*, 50 Ohio St.3d 114, 116, 552 N.E.2d 913 (1990), holding that there was no *Brady* violation where the state produced the exculpatory information during trial. As the court in *State v. Aldridge,* 120 Ohio App.3d 122, 146, 697 N.E.2d 228 (2d Dist.1997), explained, a defendant is not prejudiced where the exculpatory material is discovered before or during trial and there are other remedies available which allow the exculpatory material to be entered into evidence.

{¶61} Here, even if promises were made to T.D. or T.D., Sr., and not disclosed prior to trial, the rule in *Giglio* does not apply because the promises allegedly made were discovered during trial and Jones had the ability to recall T.D., or call Rumsey or another witness, and get the impeachment material into evidence.

Prosecutorial Misconduct

{¶62} Next, Jones argues that the state committed prosecutorial misconduct when it failed to disclose and investigate the alleged promises made to T.D.

{¶63} The key determination in cases of prosecutorial misconduct is whether the misconduct deprived the defendant of a fair trial. *State v. Evans*, 63 Ohio St.3d 231, 240, 586 N.E.2d 1042 (1992). The prejudicial effect of the misconduct must be considered in the context of the entire trial, and not just the immediate context in which the misconduct occurred. *State v. Davenport,* 1st Dist. Hamilton No. C-130307, 2014-Ohio-2800, ¶ 45.

{¶64} Crim.R. 16(B)(5) codifies the prosecution's duty to disclose "any evidence favorable to the defendant and material to guilt or punishment," i.e., *Brady* material. In its discovery response, the state indicated that it was unaware of any evidence favorable to the defense under Crim.R. 16(B)(5), but stated that it would supplement discovery if it became aware of any such evidence. The state never informed Jones about the alleged impeachment evidence, and Jones did not learn of the evidence until T.D., Sr., told him about it when the two ran into each other at the jail.

{¶65} At the motion-to-strike hearing, the prosecutor told the court that the prosecution did not learn of the alleged promises about the Xbox and library fines until the day before the motion-to-strike hearing. However, the prosecution knew that Detectives Hilbert and Taylor were planning to visit T.D., Sr., prior to trial, because it had been discussed during a pretrial meeting at the prosecutor's office on January 12. There is no indication that the prosecution followed up with Detectives Hilbert or Taylor to determine what was discussed during their visit with T.D., Sr.

{¶66} It is well established that the police are part of the state and its "prosecutorial machinery," and police knowledge of exculpatory information is imputed to the prosecution for purposes of discovery. *State v. Johnson,* 134 Ohio

App.3d 586, 592, 731 N.E.2d 1149 (1st Dist.1999). The prosecution not only has a duty to disclose any promises made to witnesses, but to find out if any promises were made. *State v. Holt*, 132 Ohio App.3d 601, 609, 725 N.E.2d 1155 (1st Dist.1997).

{¶67} Nevertheless, the state's failure to provide discovery is not reversible error unless the "prosecution's failure to disclose was a willful violation of Crim.R. 16, that foreknowledge of the [evidence] would have benefited the accused in the preparation of his defense, or that the accused was prejudiced." *Johnson* at 592.

{¶68} For purposes of determining if the prosecution committed a Crim.R. 16 violation, we impute the knowledge held by Detective Hilbert and the rest of the police/prosecution team onto the prosecution. This would include any promises to help with the library fines, provide an Xbox, to make T.D., Sr., available for trial, or to get T.D., Sr., a more lenient sentence. Once prosecutors knew of the detectives' plans to visit T.D., Sr., they had a duty to follow-up after the visit and find out if any promises were made and disclose those promises. There is no indication that they did so.

{¶69} Upon a finding of a discovery violation under Crim.R. 16, the court is required to impose the "least severe sanction that is consistent with the purpose of the rules of discovery." *State v. Parker*, 53 Ohio St.3d 82, 86, 558 N.E.2d 1164 (1990).

{¶70} Once again, *Wickline* is instructive. During trial, Wickline became aware of police records that were not turned over by the prosecution in discovery regarding a police-officer-witness who had already testified. *Wickline*, 50 Ohio St.3d at 116, 552 N.E.2d 913. On appeal, Wickline claimed a discovery violation under Crim.R. 16(E). *Id.* at 117. But, Wickline had the option during trial to recall the

officer-witness and cross-examine him on the records, but declined to do so. *Id.* The Ohio Supreme Court determined that since there were means available to Wickline which were less drastic than ordering a new trial, and he decided to forego those means, he was not entitled to a new trial even if there had been a Crim.R. 16 violation. *Id.*

{¶71} Similarly, Jones had remedies at his disposal less drastic than a new trial. The court offered to allow Jones's counsel to recall T.D., and counsel could have requested to voir dire T.D., Rumsey, or any other witness who may have possessed exculpatory information, but he declined to do so. Jones forewent these remedies, and has not shown prejudice as a result of the prosecution's failure to further investigate any alleged promises made to T.D. Jones has failed to show that he was denied a fair trial.

Mistrial

{¶72} Jones next argues that the trial court erred in failing to declare a mistrial when the state failed to disclose the promises allegedly made to T.D. and T.D., Sr. Jones also argues that the court abused its discretion by not requiring the state to further investigate the alleged promises and any other impeachment evidence.

{¶73} We note that after learning at the motion-to-strike hearing of the alleged promises made to T.D. and T.D., Sr., Jones did not actually move for a mistrial; he only moved to strike T.D.'s testimony. Regardless, at the end of the hearing, the court, believing that Jones had moved for a mistrial, stated, "Your motion for a mistrial or to strike the testimony, based on the record that exists right now, is simply overruled."

{¶74} The decision to grant or deny a mistrial is in the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. *State v. Treesh,* 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001). A mistrial will not be granted simply because of some error or irregularity in the proceeding, rather it will only be granted when a fair trial is no longer possible. *Id.*

{¶75} A new trial would normally be proper where material impeachment evidence was not given to the defense, regardless of whether the prosecution knew of the evidence. *See Giglio,* 405 U.S. at 154-155, 92 S.Ct. 763, 31 L.Ed.2d 104. However, as discussed above, *Giglio* does not apply to Jones's case because the impeachment evidence was disclosed during trial and he had remedies available to him other than a mistrial.

{¶76} It was not error for the trial court to decline to grant a mistrial. Jones was not denied a fair trial by any failure of the prosecution to disclose the impeachment evidence because he was given the opportunity to put the impeachment evidence before the jury, but he declined.

{¶77} Jones's argument that the court should have ordered the state to investigate is also without merit. Pursuant to Crim.R. 16(B)(5), the state was already under a duty to investigate material impeachment evidence. By holding the hearing to determine if there was any merit to Jones's claim that the state withheld evidence, and then providing Jones with appropriate remedial measures, the court fulfilled its obligations. The court even made it clear to Jones and his attorney that the resources of the court were at his disposal to ensure the necessary witnesses would be brought to court and made available for questioning. The court was under no further obligation to order an investigation by the state.

{¶78} The first assignment of error is overruled.

Second Assignment of Error

{¶79} In his second assignment of error, Jones argues that he was denied the effective assistance of counsel when his attorney learned of impeachment evidence and failed to request a continuance to investigate.

{¶80} To establish an ineffective-assistance-of-counsel claim, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense, thereby depriving him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶81} As for the second prong, prejudice requires there to be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). "A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other." *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶82} There is no evidence in the record as to how T.D. or Rumsey would have testified regarding any alleged promises. Without any evidence of prejudice, we cannot find that Jones was denied the effective assistance of counsel. The second assignment of error is overruled.

Fourth Assignment of Error

{¶83} In his fourth assignment of error, Jones argues that the trial court committed plain error by failing to sua sponte instruct the jury on voluntary manslaughter.

{¶84} Jones did not request a voluntary-manslaughter instruction at trial. Therefore, he waived all but plain-error review. *State v. Hilliard*, 1st Dist. Hamilton No. C-160263, 2017-Ohio-2952, ¶ 10. To constitute plain error, an error must be "obvious," and "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 177.

{¶85} Jones's defense at trial was one of complete innocence, and therefore, conflicts with an offense that requires one to "knowingly cause the death of another." *See* R.C. 2903.03(A) (detailing the elements of voluntary manslaughter). Courts have noted that an instruction for voluntary or involuntary manslaughter can conflict with a defendant's chosen defense at trial, and that a trial court is under no duty to provide the instruction where the defendant has foregone it in favor of seeking a complete acquittal.

{¶86} It is within the realm of trial strategy to not request a voluntary-manslaughter instruction in favor of trying for a complete acquittal, and a trial court does not commit plain error in failing to provide the instruction. *State v. Harris*, 129 Ohio App.3d 527, 533-534, 718 N.E.2d 488 (10th Dist.1998); *see State v. Delawder*, 4th Dist. Scioto No. 10CA3344, 2012-Ohio-1923, ¶ 3 (holding that not requesting an involuntary-manslaughter instruction in the hopes of obtaining a complete acquittal is a strategic decision, and the trial court did not commit plain error in failing to sua sponte provide the instruction).

{¶87} The conflict between voluntary manslaughter and a defense of complete innocence means that instruction on the former could be destructive to the

latter. The court's decision to not provide the instruction was not plain error. The fourth assignment of error is overruled.

Conclusion

{¶88} For the foregoing reasons, Jones's assignments of error are overruled, and his conviction is affirmed.

Judgment affirmed.

ZAYAS, P.J., and **WINKLER, J.,** concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.