IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-180267 TRIAL NO. B-1704861
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
GERALD FORNSHELL,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 31, 2019

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan,* Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy McKenna, for Defendant-Appellant.

BERGERON, Judge.

{¶1} Defendant-appellant Gerald Fornshell's conviction for felony public indecency hinged on the determination that minors were "likely to view" his conduct because all other facts besides that were largely stipulated. Presenting an array of assignments of error, Mr. Fornshell essentially challenges the fairness of his trial. Although we have some doubt about one particular piece of evidence presented to the jury, any defects were not sufficiently prejudicial to warrant reversal. We therefore affirm.

I.

{¶2} On the same day, Mr. Fornshell visited two different Half Price Books stores and masturbated in an aisle at both locations. Mercedes Velez visited those same stores contemporaneously with Mr. Fornshell. She first encountered him at the Mason Half Price Books and noticed him staring at her. She left, ran some errands, and then went to the Madeira Half Price Books store at approximately 8:00 p.m., where she encountered Mr. Fornshell again. This time, he approached her and asked to video her. She understandably declined and, shortly thereafter, turned to witness him masturbating in the aisle.

{¶3} Mr. Fornshell was indicted on two counts of public indecency under R.C. 2907.09(B)(1) and (A)(2). Mr. Fornshell did not dispute the indictment except to the extent that "any person who was likely to view and be affronted by [Mr. Fornshell's] conduct was a minor," which would elevate his offense to a felony of the fifth degree. R.C. 2907.09(C)(3). A jury found him guilty of count two, as elevated to a felony, and the trial court sentenced him to 12 months in prison with credit for 244 days served. He received an additional 12-month term in connection with violating

the terms of postrelease control on a prior conviction. Mr. Fornshell now appeals this felony conviction.

II.

{¶4} Mr. Fornshell's first three assignments of error relate to the evidence used to convict him. He argues that the state destroyed exculpatory evidence, that the trial court improperly admitted unfairly prejudicial video evidence depicting incriminating conduct at another time and location, and that his trial counsel was ineffective for stipulating to the introduction of that video. His remaining assignments of error concern the weight and sufficiency of the evidence and the propriety of his sentence. We first consider the alleged evidentiary errors.

A.

{¶5} Mr. Fornshell moved (unsuccessfully) to dismiss the charges below on the basis that the state failed to preserve materially exculpatory evidence—namely, the entire security video footage from the Madeira Half Price Books from the evening of the incident, framing this as a violation of his Fourteenth Amendment due-process rights. But this begs two questions—the materiality of the evidence and state action.

{¶6} "Evidence is constitutionally material when it possesses 'an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' " *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 74, quoting *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). If the evidence in question is only potentially useful, however, a defendant cannot show a due-process violation without first demonstrating bad faith on the state's behalf. *State v. Rice*, 1st Dist. Hamilton Nos. C-160668, C-160669 and C-160670, 2017-Ohio-9114, ¶ 13. The defendant bears the

burden to show the exculpatory nature of the evidence. *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, ¶ 11 (1st Dist.).

{¶7} With this standard in mind, Mr. Fornshell cannot satisfy his burden of demonstrating that the full video footage from the Madeira Half Price Books was materially exculpatory. The parties do not dispute that the incident occurred in the self-help section of the store, and that no video camera captured that portion of the store. Several witnesses, however, vouched for the likelihood of children in the store at the time of the incident. One Half Price Books employee testified that children were in the store. The victim, Ms. Velez, echoed the point, confirming that there were "absolutely" people under the age of 18 in the store at the time of the incident, and that she "probably" encountered children between the incident and her walk to report it. The store manager testified that it is possible to see through the shelves in the self-help area from other sections of the store, including the children's section, to which it is adjacent. She also testified that the incident occurred on one of their biggest sale days of the year, and that they sell "lots" of toys (attracting children and their parents alike). The manager personally viewed all of the surveillance video between 7:00 p.m. and 8:00 p.m. the evening of the incident and identified several distinct, potential minors in the store at or just before the time Mr. Fornshell entered the store.

{¶8} Mr. Fornshell nevertheless posits that the full store footage could have isolated minors entering and exiting while he was in the store. But in view of the litany of evidence above (and in light of our statutory analysis below), we do not believe that this would exculpate Mr. Fornshell. The jury was shown footage of likely minors entering the Madeira store before Mr. Fornshell arrived—consistent with the store manager's testimony. This evidence undercuts his contention that the full

video footage would have been exculpatory. Admittedly, it can often be difficult to establish that evidence that no longer exists is exculpatory, but based on the other available evidence in the record here, we cannot conclude that Mr. Fornshell can make such a showing.

{¶9} With the evidence only potentially useful, this obligates Mr. Fornshell to establish bad faith on the state's part to succeed with a due-process claim. But this case involves a third-party (not acting on behalf of the state) disposing of evidence, rendering it more difficult for Mr. Fornshell to connect the destruction of evidence to bad faith on the part of the state.

{¶10} Ohio law generally recognizes that the state need not gather evidence on the defendant's behalf (but when it does, that is a different story):

> Although we agree that is not proper for a law enforcement agency to suppress evidence, we also conclude that it is not the agency's obligation to engage in affirmation action in gathering evidence which an accused might feel necessary to his defense. The accused must protect his own interests. It is only when overzealous officials deny that opportunity can it be said that he is deprived of due process by state action.

City of Kettering v. Baker, 42 Ohio St.2d 351, 354-355, 328 N.E.2d 805 (1975).[1] " '[I]t is not the responsibility of the state to obtain evidence that the defendant can obtain on his own.' " *State v. Dinardo*, 11th Dist. Lake No. 2013-L-108, 2015-Ohio-

[1] The parties debate the significance of two judgment entries that we previously issued, *State v. Kimble*, 1st Dist. Hamilton No. C-150655 (June 9, 2017), and *State v. Barker*, 1st Dist. Hamilton No. C-130694 (July 10, 2014), but these are not precedential opinions from this court. We acknowledge the difficulties counsel face when judgment entries address matters on which this court has not previously opined, but in this case, sufficient caselaw existed from other Ohio courts to guide our analysis.

1061, ¶ 25, quoting *State v. Franklin*, 2d Dist. Montgomery No. 19041, 2002-Ohio-2370, ¶ 52 (discussing the state's burden to obtain 911 tapes).

{¶11} Mr. Fornshell made a demand upon the prosecuting attorney for videos at the scene and around the time of the arrest, but we cannot construe such a request to encompass evidence beyond the state's control. Mr. Fornshell did not subpoena the Madeira Half Price Books, nor has he pointed to any authority for the proposition that the *Brady* doctrine would require the state to secure evidence not in its possession from third parties. Without state action, the panoply of constitutional protections generally does not apply. *Bouquett v. St. Elizabeth Corp.*, 43 Ohio St.3d 50, 53, 538 N.E.2d 113 (1989) (appellee required to show state action to "warrant the constitutional protection of due process").

{¶12} While we can imagine finding bad faith in a scenario where the state prevented a defendant from securing evidence from a third-party, that is not the case here, and Mr. Fornshell has failed to offer proof otherwise of bad faith. Detective Vogel testified that he promptly asked Half Price books for all pertinent footage; that he requested "the entire video," but was told this was nearly impossible. Because the clips that he received substantiated the victim's claims, he did not persist for the entire video footage. Mr. Fornshell argues that this nonchalance rises to the level of bad faith. But "[b]ad faith implies something more than bad judgment or negligence," and we do not see anything more serious on the record before us. *See State v. Acosta*, 1st Dist. Hamilton Nos. C-020767, C-020768, C-020769, C-020770 and C-020771, 2003-Ohio-6503, ¶ 9.

{¶13} Without a showing that the evidence at issue was materially exculpatory or that the state acted in bad faith, (let alone a showing of state action), we overrule Mr. Fornshell's first assignment of error.

B.

{¶14} Mr. Fornshell's more compelling argument relates not to the video evidence left out, but to the video evidence allowed in. He insists that the trial court committed reversible error by admitting video footage from his visit to the Mason Half Price Books (which was not part of the indictment here). Although the trial court conceded error on this point, Mr. Fornshell failed to object below.

{¶15} "[T]he trial court enjoys broad discretion in admitting or excluding evidence. An appellate court will not disturb the exercise of that discretion absent a showing that the accused has suffered material prejudice." (Citations omitted.) *State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987). Evidence of "other acts" is inadmissible to show a defendant's "character * * * to show conformity therewith." Evid.R. 404(B). The Supreme Court of Ohio has set out a three-part test for admission of "other acts" evidence: it must be (1) "relevant to making any fact that is of consequence more or less probable than without the evidence," (2) presented for a legitimate purpose under Evid.R. 404(B), and (3) admissible under Evid.R. 403. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20. Under Evid.R. 403(A), "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶16} Here, the jury viewed footage of Mr. Fornshell at the Mason Half Price Books from earlier in the same evening of the Madeira incident. The video, while not explicit, is highly suggestive of his conduct in the Madeira store and, critically, also shows children present during the suggestive conduct. During the jury's viewing, Detective Vogel provided additional color by describing the conduct in a way that

suggests Mr. Fornshell was committing the same offense for which he was indicted in the Madeira store.

{¶17} Although the trial court judge instructed the jury to consider the Mason video only for the purposes of corroboration and the credibility of Ms. Velez's testimony, after the viewing, the court had second thoughts. Upon reflection, the trial court judge determined (rightly so) that the video was highly prejudicial and should never have been shown to the jury. At that point, however, the only curative step he could take was to forbid the evidence from being reviewed by the jury in its deliberations (defense counsel did not move for a mistrial). Mr. Fornshell argues that the evidence was unfairly prejudicial and that his trial counsel was ineffective for failing to object to it.

{¶18} Notwithstanding the limiting instruction given by the trial court, we find that the admission of the Mason video fails an Evid.R. 403(A) analysis in that—to the extent that it had any probative value (and we are skeptical of that)—that value was substantially outweighed by the dangers flagged in the rule. Since the entire issue before the jury was whether minors were "likely to view" Mr. Fornshell's conduct—a video from the same day, in a bookstore, showing him engaged in likely inappropriate activity with children in sight poses a substantial "danger of unfair prejudice."

{¶19} The problem for Mr. Fornshell, however, is that the video in question was stipulated to by the parties, which limits Mr. Fornshell's challenge to plain error. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 49 ("In fact, on one of the transcript pages Gross cites, his counsel stipulates to the admission of the nine photographs in question. Consequently, Gross has forfeited all but plain

error."), *modified on other grounds, State v. Downour*, 126 Ohio St.3d 508, 2010-Ohio-4503, 935 N.E.2d 828, ¶ 49.

{¶20} Under Crim.R. 52(B): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002) ("[Defendant] failed to object * * * at trial and thereby forfeited all but plain error."). To demonstrate plain error, he must show that (1) there was an error, i.e., the court broke a legal rule, (2) the error was plain, i.e., obvious in the course of the proceedings, and (3) the error affected substantial rights, i.e., it clearly determined the trial's outcome. *Id.* at 27. *See State v. Sanders*, 92 Ohio St.3d 245, 263, 750 N.E.2d 90 (2001) ("Plain error exists only when it is clear that the verdict would have been otherwise but for the error."); *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978) ("Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."); *State v. Webster*, 1st Dist. Hamilton No. C-120452, 2013-Ohio-4142, ¶ 41 (quoting *Long*).

{¶21} The first two prongs of this test are easily met by our preceding Evid.R. 403 analysis and the trial court's own belated recognition of its mistake. Where Mr. Fornshell comes up short, however, is the extent to which the video determined his conviction. His trial counsel admitted Mr. Fornshell's guilt of the misdemeanor offense of public indecency described in R.C. 2907.09(A)(2)—the trial strategy sought to avoid conviction for a felony by challenging the "likely to view" requirement. We must ask whether, without the Mason video, the jury still would have found that a minor was likely to view and be affronted by the conduct.

{¶22} As should be apparent from our discussion of the Madeira video footage and evidence, ample evidence supported Mr. Fornshell's conviction.

Multiple witnesses testified to the presence of children in the store, and to the proximity of the children's book section to where Mr. Fornshell lingered too long in the self-help section. Against the backdrop of this evidence, Mr. Fornshell cannot show that the admission of the Mason video tipped the balance at trial. Because Mr. Fornshell cannot show that admission of the Mason video impacted the outcome of the trial, he cannot succeed on a plain-error challenge. *See, e.g., State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 196-197, quoting *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69 ("[A]ny minimal probative value that [the evidence] may have had was outweighed by the danger of unfair prejudice. Nevertheless, given the overwhelming evidence of [the defendant's] guilt, we are unpersuaded that but for these photos, 'the outcome of the trial clearly would have been otherwise.' "). We accordingly find no plain error here and overrule the second assignment of error.

{¶23} In tandem with the above, Mr. Fornshell utilizes the failure to object to this video as a springboard for questioning his counsel's effectiveness. To demonstrate ineffective assistance of counsel, Mr. Fornshell must demonstrate (1) that his counsel's ineffectiveness was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that his counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶24} In this case, we conclude that the second prong of this analysis is the functional equivalent to the third prong of the plain-error analysis. Short of affecting the outcome of his trial, which—due to the wealth of photographic, video, and testimonial evidence discussed above, it did not—Mr. Fornshell's trial counsel's

errors did not operate to deprive Mr. Fornshell of a fair trial. We accordingly overrule his third assignment of error.

C.

{¶25} Mr. Fornshell's fourth and fifth assignments of error target the weight and sufficiency of the evidence to convict him of the felony charge, i.e., that "any person who was likely to view and be affronted by [his] conduct was a minor." R.C. 2907.09(C)(3). Reviewing these arguments, we are mindful that "[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of facts." (Citation omitted.) *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). "[S]ufficiency is a test of adequacy" used to determine " 'whether the evidence is legally sufficient to support the jury verdict as a matter of law.' " *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), quoting *Black's Law Dictionary* 1433 (6th Ed.1990). Weight, on the other hand, "concerns 'the inclination of the *greater amount of credible evidence* * * * to support one side of the issue rather than the other.' " *Id.* at 387, quoting *Black's* at 1594.

{¶26} Mr. Fornshell's argument dwells on the fact that the witnesses, including the victim, did not testify as to seeing a particular child in the vicinity during the occurrence of the incident. But this sets too high a standard for the "likely to view" requirement. A conviction for public indecency does not necessitate a showing that an actual person witnessed the event. *See State v. Ramey*, 10th Dist. Franklin No. 11AP-485, 2012-Ohio-1015, ¶ 16 ("It matters not whether others actually viewed the conduct but rather whether such conduct would likely have been viewed by others."); *State v. Henry*, 151 Ohio App.3d 128, 2002-Ohio-7180, 783 N.E.2d 609, ¶ 70 (7th Dist.) ("[T]he state was not required to prove that anyone was

actually offended by [defendant's] conduct. The state was simply required to prove that [defendant's] conduct was *likely* to be viewed by and affront others."); *City of Cleveland v. Carson*, 8th Dist. Cuyahoga Nos. 66084, 68193 and 68194, 1995 WL 396346, *4 (July 6, 1995) ("We find [likely to be viewed by and affront others] to mean that the possibility of being discovered by others exists, not that others actually witnessed the exposure.").

{¶27} Mr. Fornshell also analogizes to a recent case from this court on the "likely to be present" standard in the burglary context, *State v. Braden*, 2018-Ohio-563, 106 N.E.3d 827 (1st Dist.). Therein, we held that "likely to be present" means " 'greater than 50% likelihood.' " *Id.* at ¶ 8, quoting *In re Meatchem*, 1st Dist. Hamilton No. C-050291, 2006-Ohio-4128, ¶ 17. We found that the standard was not met in that particular case, where this court had only the victim's testimony and his testimony did not show beyond 50 percent certainty that someone was likely to be present in his home at the time of the burglary. To the extent that our reasoning in a burglary case assumes relevance in this context, the evidence adduced in this case presents sufficient "likelihood" that minors would witness the act. Witness testimony, photographic evidence (showing the proximity from the self-help section to the children's section), and video evidence all confirmed that chances were better than 50 percent that a minor was likely to have been present for Mr. Fornshell's conduct if the child had strayed a little from the children's section. One can certainly imagine difficult line-drawing situations under the indency statute, but this does not strike us as one of them.

{¶28} In light of our conclusion on the meaning of the statute, the evidence we surveyed above readily satisfies the sufficiency and manifest-weight standards. Mr. Fornshell's fourth and fifth assignments of error are accordingly overruled.

D.

{¶29} For his final assignment of error, Mr. Fornshell asserts that the record does not support the prison sentence imposed. We may reduce or otherwise modify this sentence only if we find, clearly and convincingly, that his sentence is not supported by the record or is contrary to law. R.C. 2953.08(G)(2).

{¶30} Initially, the state contends that this aspect of the appeal is moot because Mr. Fornshell has completed his sentence. The fact that a sentence has run its course does not necessarily moot the appeal of a felony conviction. *State v. Golston*, 71 Ohio St.3d 224, 227, 643 N.E.2d 109 (1994) ("[A]n appeal challenging a felony conviction is not moot even if the entire sentence has been satisfied before the matter is heard on appeal."). However, the principle from the *Golston* case—that the collateral consequences of a felony conviction give rise to the right to challenge it—"is not served, and thus an appeal is moot, when, as here, the appellant challenges only his sentence, and his completion of his sentence leaves him without a remedy affecting his conviction." (Citations omitted.) *State v. Ysrael*, 1st Dist. Hamilton No. C-140148, 2015-Ohio-332, ¶ 13. Here, Mr. Fornshell does not challenge any of the collateral effects of his sentence, but only the fact of the prison sentence itself. Although this may well be moot, we have no substantiation in the record to establish that Mr. Fornshell has completed his sentence, and thus we turn to the merits of his sentencing challenge.

{¶31} Mr. Fornshell points to the failure of the trial court to order a court clinic evaluation or to impose community control as the basis for overturning his sentence. Yet he identifies no authority obligating a trial court to allow the court clinic evaluation to go forward. Relatedly, while he cites R.C. 2929.13(B)(1)(a), which compels courts to use a community-control sanction or a combination of

community-control sanctions in certain instances of fourth- and fifth-degree felonies, he overlooks the exception in (B)(1)(b): "The court has discretion to impose a prison term upon an offender who is convicted of * * * a felony of the * * * fifth degree that is not an offense of violence or that is a qualifying assault offense if any of the following apply: * * * (v) The offense is a sex offense that is a * * * fifth degree felony violation of any provision of Chapter 2907 of the Revised Code." That exception applies here. Nevertheless, the trial court did consider a particular community-control sanction, but Mr. Fornshell had already completed it. It did not consider lesser sanctions in light of his past history of similar offenses in Ohio, Kentucky, and California.

{¶32} Mr. Fornshell also challenges the trial court's alleged failure to consider the purposes and principles of sentencing in R.C. 2929.11 and 2929.12. But our review of the transcript shows to the contrary. The trial court considered his evidence of mitigation at sentencing, during which he discussed his bipolar disorder, total disability, and nervous breakdowns. The judge evaluated this and described the sentencing purposes and principles, and Mr. Fornshell has not adequately demonstrated any potential flaws in the court's analysis. We accordingly overrule his sixth assignment of error.

III.

{¶33} Mr. Fornshell's assignments of error, considered in the context of the record as a whole, do not present cause for reversal. We believe Mr. Fornshell was afforded due process, evidentiary and trial counsel's errors did not determine the outcome, the weight and sufficiency of the evidence supported the conviction, and his sentence is well-grounded in the record and in the law. Therefore, all assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

MOCK, P. J., concurs.
ZAYAS, J., concurs separately.

ZAYAS, J., concurring separately.

{¶34} While I concur in the judgment, I write separately.

{¶35} Fornshell is precluded from challenging the admissibility of the video on appeal. Fornshell filed a written stipulation that the video was authentic and admissible. During the trial, Fornshell confirmed to the trial court that he deemed the video both authentic and admissible. Because of this stipulation, Fornshell has waived any argument that the video was inadmissible. *See State v. Smith*, 2017-Ohio-8558, 99 N.E. 3d 1230, ¶ 36 (1st Dist.), citing *In re J.B.*, 10th Dist. Franklin No. 11AP-63, 2011-Ohio-3658, ¶ 9 (explaining "it is well-established that a stipulation to the admissibility of evidence precludes any subsequent challenge or claim of error relating to the stipulated evidence"); *State v. Keck*, 127 Ohio St.3d 550, 2013-Ohio-5160, 1 N.E.2d 403, ¶ 17 (holding that defense counsel's stipulation to the admissibility of a scientific report waived any argument on appeal that the report was inadmissible).

{¶36} I also do not join the majority opinion because it announces a proposition of law that is broader than necessary to decide this case and unsupported by any legal authority. The majority implies that *Brady* does not require the state to secure evidence in the hands of a third party. That is simply not true. For example, prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, "the prosecution has a constitutional duty to turn over exculpatory evidence that would

raise a reasonable doubt about the defendant's guilt." *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), citing *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

{¶37} The *Brady* obligation applies to materially exculpatory evidence even if "known only to police investigators, and not to the prosecutor," whether the accused asked for it or not. *See Strickler v. Greene*, 527 U.S. 263, 280-281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), quoting *Kyles* at 438; *State v. Mills*, 12th Dist. Butler No. CA99-11-198, 2001 WL 237096, *4-5 (March 12, 2001) (explaining that the detective's knowledge of the existence of a videotape of the defendant in the bar on the night of the incident must be imputed to the state). Materially exculpatory evidence is limited to evidence that possesses "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta* at 489.

{¶38} But the issue before us is not whether the state violated its *Brady* obligations. Rather, we are asked to determine whether a due-process violation occurred based on lost or destroyed evidence. *See State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶ 7. Although Fornshell filed a motion to preserve the video, by the time he was indicted and filed the request, the video had been deleted per store policy. Thus, the majority's contention that Fornshell could have secured the full video footage himself is not supported by the record, and the cases cited by the majority that the state need not obtain evidence that is available to the defendant are inapplicable.

{¶39} When, as here, the defendant moved to have the evidence preserved, ordinarily, the state has the burden to prove that the evidence was not exculpatory.

See State v. Benton, 136 Ohio App.3d 801, 805, 737 N.E.2d 1046 (6th Dist.2000). However, when the request occurred after the video was destroyed, the defendant has the burden to prove the missing evidence is materially exculpatory. *See State v. Gatliff*, 12th Dist. Clermont No. CA2012-06-045, 2013-Ohio-2862, ¶ 42. The missing evidence in this case is the full video footage of the Madeira store on the day of the offense. It is undisputed that Half Price Books did not have a camera that would have recorded the actual offense. Therefore, the full video footage could not be materially exculpatory because it could not be used to establish that Fornshell was innocent or guilty of public indecency. *See Geeslin* at ¶ 12; *Gatliff* at ¶ 42 (concluding that the state's failure to preserve the surveillance video of the inside of the bar would not provide materially exculpatory evidence of the fight that occurred outside of the bar); *State v. C.J.*, 2018-Ohio-1258, 110 N.E.3d 50, ¶ 17 (12th Dist.) (finding no due-process violation for the state's failure to preserve the community center video because the video did not depict the altercation); *Cleveland v. Townsend*, 8th Dist. Cuyahoga No. 99256, 2013-Ohio-5421, ¶ 25 (concluding that the surveillance video outside the Cleveland Hopkins Airport was not exculpatory because the camera may not have recorded the incident).

{¶40} Additionally, Fornshell wanted to use the full video footage to determine whether minors were present at the time of the offense. However, the full video footage would not provide exculpatory evidence on this point because several eyewitnesses testified that children were present in the store during that time. *See Gatliff* at ¶ 42. At best, the full video footage was potentially useful evidence. *See id.*

{¶41} In the absence of bad faith on the part of the police, the "failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281

(1988). "Bad faith" implies something more than bad judgment or negligence. *State v. Brown*, 1st Dist. Hamilton Nos. C-180236, C-180237, C-180261 and C-180262, 2019-Ohio-1615, ¶ 15. "It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Id.*

{¶42} Fornshell failed to present any evidence that the full video footage had been destroyed in bad faith. Detective Vogel had requested the full video footage via email on July 18, 2017, two days after the incident had occurred. Within a week, Vogel received limited video footage that contained all of the video that showed Fornshell and the victim in the store. Half Price Books was technologically unable to provide the full video footage. This record does not demonstrate any bad faith by the police or the prosecution. To the contrary, the record shows that the state had secured all of the relevant video depicting Fornshell and the victim. *See Gatliff* at ¶ 43 (finding that because the state preserved the video that contained images of the fight outside of the bar, any assertions of bad faith were "solely speculative").

{¶43} Finally, I must point out that there is no evidence in the record that Fornshell masturbated at the Half Price Books in Mason. Although Vogel testified that, in his opinion, the video from the Mason store suggested that Fornshell had touched his groin area, a review of the video does not confirm Vogel's suspicions. The video shows Fornshell walking, sitting, standing, and kneeling while looking at books, with one to three persons shopping next to him. His groin area was rarely visible, but when it was, no touching was apparent. I note that the video was played to the jury at four times its actual speed, without objection, during the time Fornshell

allegedly touched his groin area, resulting in a distorted and misleading depiction of the actual events.

{¶44} Nevertheless, had the video actually showed Fornshell masturbating in the presence of children, as the majority contends, I would find that counsel was ineffective for stipulating to the video, and the inflammatory nature of the video so blatantly prejudicial, that a new trial would be warranted. *See State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 32 (explaining that "blatant prejudice may override even a strong case and require a new trial").

{¶45} However, based on the actual facts of this case, I concur in the judgment.

Please note:

The court has recorded its own entry this date.