

[Cite as *State v. A.P.*, 2018-Ohio-5040.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106890

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

A.P.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-622865-A

BEFORE: McCormack, P.J., Stewart, J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 13, 2018

ATTORNEY FOR APPELLANT

Mary Catherine Corrigan
50 Public Square, Suite 1900
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

By: Theodore Parran
Eben McNair
Brandon Piteo
Carson Strang
Assistant County Prosecutors
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

TIM McCORMACK, P.J.:

{¶1} Defendant-appellant A.P. appeals his conviction, arguing that the trial court abused its discretion in admitting evidence and his conviction was against the manifest weight of the evidence. For the reasons that follow, we affirm his conviction.

Procedural and Substantive History

{¶2} This case stems from events that took place on October 29, 2017. That day, A.E. (“Victim”) and her son with A.P., (“Child”), went to A.P.’s house to carve pumpkins. A.P. and Victim had previously been in a relationship. They were not in a romantic relationship in October 2017, but they were attempting to coparent.

{¶3} According to the Victim, she and Child arrived at A.P.'s house at around 2 p.m. For about an hour, they were carving pumpkins and everyone was getting along. At some point, Child made a comment about how Victim had said that A.P.'s current girlfriend was a bad person. According to Victim, this upset A.P., and he began insulting Victim. In response, Victim told Child that they were leaving, and Child became upset and ran into his bedroom. Victim followed Child into the bedroom. A.P., still upset, followed Victim into the bedroom and became physically violent, choking her and throwing her into a closet door.

{¶4} Victim left the room and called A.P.'s mother, who told her to leave the house. Victim went outside and sent A.P. a text message telling him to bring Child outside. A.P. came out of the house and again grabbed Victim and threw her, this time down onto the cement steps at the front of the house. Meanwhile, Child was crying and running around Victim's parked car in the driveway. A.P. began to chase Child. When Victim got between A.P. and Child, A.P. knocked her to the ground. Eventually, A.P. brought Victim's things out of the house. Victim told A.P. that she was calling the police, and A.P. went inside to get his coat and then left.

{¶5} Police arrived at A.P.'s house in response to Victim's 911 call. The officers told Victim that she should leave and that they would look for A.P. The next day, Victim went to the police department to pursue a criminal complaint. Officer Franklin Descenzo photographed Victim's injuries, including bruises and marks on her neck, back, and wrist.

{¶6} Several days later, Victim went to the hospital because she was still experiencing pain and was having trouble using her right arm. She was given prescriptions for muscle relaxers and pain medication.

{¶7} On November 9, 2017, A.P. was indicted on one count of domestic violence, in violation of R.C. 2919.25(A), and one count of endangering children, in violation of R.C.

2919.22(A). A.P. waived his right to a jury trial, and the matter proceeded to a bench trial on January 31, 2018.

{¶8} At trial, the state called two witnesses: Victim and Officer Descenzo. During the prosecutor's direct examination of Victim, she testified that she had received phone calls and text messages from A.P. after the incident apologizing. Following Victim's testimony, the court took a lunch recess, during which Victim provided the state with the messages she had referenced. The state then provided the messages to defense counsel. Subsequently, Victim was called back to testify about these messages.

{¶9} At the close of the state's case, defense counsel made an oral motion for acquittal pursuant to Crim.R. 29. The trial court denied this motion.

{¶10} A.P. then testified on his own behalf. A.P. testified that Child stated that Victim did not think A.P.'s girlfriend was a good person and he became upset in response to that comment. A.P. testified that Child became upset when Victim told him they were leaving, and A.P. attempted to comfort Child. At this point, according to A.P., Victim attacked him, scratching his face and screaming at him. A.P. also testified that at one point, he tried to remove Child from Victim's arms and, as a result, he fell down and Victim and Child fell down onto the cement steps. A.P. testified that he left the house when Victim called the police because he did not want the situation to escalate further.

{¶11} Defense counsel renewed the Crim.R. 29 motion. The trial court denied this motion and found A.P. guilty of domestic violence and child endangering and sentenced him to 24 months in prison.

{¶12} A.P. now appeals, presenting two assignments of error for our review.

Law and Analysis

{¶13} In his first assignment of error, A.P. argues that the trial court abused its discretion by improperly admitting evidence at trial that had not been disclosed to his counsel pursuant to Crim.R. 16(B)(1).

{¶14} In his second assignment of error, A.P. asserts that his conviction was against the manifest weight of the evidence.

Crim.R. 16(B)(1)

{¶15} A.P.’s first assignment of error asserts that the trial court abused its discretion when it admitted text messages and a voicemail into evidence in the middle of trial. Crim.R. 16(B)(1) governs the criminal discovery process, stating:

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 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.

When a party has violated this rule, Crim.R. 16(L)(1) gives a trial court broad discretion, stating that the court “may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.” The general purpose of the criminal rules “is to remove the element of gamesmanship from a trial.” *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3, 511 N.E.2d 1138 (1987), quoting *State v. Howard*, 56 Ohio St.2d 328, 333, 383 N.E.2d 912 (1978). In addressing a discovery violation committed by the state or the defendant, a

trial court is required to consider the circumstances of the violation and impose “the least severe sanction that is consistent with the purpose of the rules of discovery.” *Id.* at 5.

{¶16} “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). In analyzing whether a trial court abused its discretion in admitting the text messages and voicemail in this case, we consider three factors that govern the trial court’s exercise of discretion in imposing a sanction for a discovery violation committed by the state. We consider (1) whether the failure to disclose was a willful violation of Crim.R. 16; (2) whether foreknowledge of the undisclosed material would have benefitted the accused in the preparation of a defense; and (3) whether the accused was prejudiced. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 35, citing *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689 (1983).

{¶17} Here, the record makes clear, and A.P. concedes, that the failure to disclose evidence was not a willful discovery violation. With respect to the second factor, determining whether foreknowledge of the evidence would have benefitted A.P. in preparing his defense requires a consideration of the evidence itself. In the text message, A.P. said “I’m sorry things happened the way they did.” In the voicemail, A.P. says that he “just wanted to call and apologize for everything” and he was sorry for covering Victim’s mouth. A.P. asserts that both the text message and voicemail are confessional in nature and that they were treated as such by both the state and the trial court. Regardless of the extent to which the defendant’s statements can be characterized as confessional, we agree that foreknowledge of these statements would have benefitted A.P. In this case, a thorough review of the record makes clear that the trial

court also recognized the importance of allowing defense counsel time to consider these statements and how best to put forth a defense against them.

{¶18} After this evidence was first discussed during the state's direct examination of Victim, a lunch recess was taken, during which the state received a screen shot of the text messages and a copy of the voicemail from Victim and subsequently made that evidence available to defense counsel. The court reconvened briefly before taking a short recess to allow defense counsel the opportunity to listen to the voicemail. The court again reconvened, and defense counsel objected to the evidence, noting that the state had ample time prior to trial to discover the evidence. Another recess was taken, this time to allow defense counsel to speak with Victim regarding the evidence in question. When the court reconvened, defense counsel's objection was again noted for the record, and she confirmed that she did not need any additional time to speak with Victim. Victim was then called to the stand again, and the prosecution and defense were permitted to examine the witness with respect to the text messages and voicemail. The trial court provided defense counsel with ample time to review the evidence and even went so far as to allow defense counsel to discuss the evidence with the victim prior to cross-examination. While we agree with the general proposition that foreknowledge of a defendant's statements is essential to the preparation of an adequate defense, A.P. has not provided any explanation as to how the trial court's remedy of the discovery violation in this case was inadequate.

{¶19} The third factor we must consider is whether the discovery violation prejudiced A.P. He argues that he was prejudiced because the main evidence in the case was his own testimony and Victim's testimony, and therefore the confessional statements clearly played a role in his conviction. We are not persuaded by this argument.

{¶20} First, we note again that defense counsel was given ample time in which to prepare or adjust the defense in response to the new evidence. When explicitly asked by the trial court if more time was needed, defense counsel answered in the negative.

{¶21} Further, A.P.'s argument that his conviction was based largely on his confessional statements requires speculation as to how much weight the trial court gave to particular pieces of evidence. In the absence of any information in the record that supports A.P.'s assertion, we decline to engage in such speculation. To the extent that A.P.'s argument here involves the weight of the evidence against him, we will address this in our discussion of the second assignment of error.

{¶22} For the foregoing reasons, we find that the trial court did not abuse its discretion by considering the text message and voicemail evidence.

Manifest Weight

{¶23} A.P.'s second assignment of error argues that his conviction was against the manifest weight of the evidence. A manifest weight challenge attacks the quality of the evidence and questions whether the state met its burden of persuasion at trial. *State v. Hill*, 8th Dist. Cuyahoga No. 99819, 2014-Ohio-387, ¶ 25, citing *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. When reviewing a manifest weight challenge, a court reviews the entire record, weighing all evidence and reasonable inferences and considering the credibility of the witnesses, to determine whether the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *Thompkins* at 387.

{¶24} After a thorough review of the record, we conclude that this is not the exceptional case in which the trial court lost its way and created a manifest miscarriage of justice. A.P. argues that there was no evidence to corroborate Victim's story aside from her own testimony

and the evidence discussed in the first assignment of error. We disagree. The record contains significant evidence that corroborates Victim's testimony, including the testimony of Officer Descenzo, photographs of Victim's injuries, and Victim's medical records. In light of the significant evidence corroborating Victim's testimony, including to some extent A.P.'s own testimony, we have no reason to question Victim's credibility. Further, in light of the independent physical and testimonial evidence that weighs in favor of A.P.'s guilt, we find that A.P. was not prejudiced by the text message and voicemail evidence. Even if this evidence had not been introduced at trial, sufficient, persuasive, and credible evidence was presented to sustain A.P.'s convictions. Therefore, A.P.'s convictions were not against the manifest weight of the evidence.

{¶25} The judgment of the trial court is affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

TIM McCORMACK, PRESIDING JUDGE

MELODY J. STEWART, J., and
PATRICIA ANN BLACKMON, J., CONCUR