[Cite as *State v. Dinardo*, 2015-Ohio-1061.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-L-108**
- vs -	:	
ARMAND R. DINARDO, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 12 CR 000837.

Judgment: Affirmed.

Stephanie G. Snevel, Special Prosecutor, P.O. Box 572, Wickliffe, OH 44092 (For Plaintiff-Appellee).

David M. Lynch, 333 Babbitt Road, Suite 333, Euclid, OH 44123 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Armand R. DiNardo, Jr., appeals his conviction, following a jury trial, in the Lake County Court of Common Pleas of illegal possession of a deadly weapon or dangerous ordnance in a school safety zone, obstructing official business, inducing panic, and failure to comply with an order or signal of a police officer. For the reasons that follow, we affirm.

{¶2} On April 15, 2013, appellant was indicted in a five-count indictment for two counts of illegal possession of a deadly weapon or dangerous ordnance in a school safety zone, felonies of the fifth degree, in violation of R.C. 2923.122(B), with a forfeiture specification involving a handgun (Counts One and Two); obstructing official business, a felony of the fifth degree, in violation of R.C. 2921.31 (Count Three); inducing panic, a misdemeanor of the first degree, in violation of R.C. 2917.31(A)(3) (Count Four); and failure to comply with an order or signal of a police officer, a misdemeanor of the first degree, in violation of R.C. 2921.331(A) (Count Five). Appellant pled not guilty.

{¶3} At trial, it was established that appellant and Sharon DiNardo were once married and had two children together. The couple later divorced and Sharon was awarded custody of both children. The oldest, M.D., is a teenager. On November 12, 2012, M.D. ran away from her mother's home following an argument. M.D. went to her father's house where she spent the night.

{¶4} The next morning, appellant dropped off M.D. at the Cardinal Autism Resource and Education School in Mentor, a school for autistic children, where Sharon is employed. M.D. exited appellant's van and went into the school. School employees later became concerned after observing appellant's van in the parking lot as they did not know why he was there. Sharon called 911. She reported there was an unwanted guest in the parking lot who will not leave. A recording of the call was made, but later purged at the Lake County Sheriff's Department. A written report of that call was also made, which memorialized Sharon's report. As a result of Sharon's call, officers from the Mentor Police Department were dispatched to the school.

{¶5} Officer Brian Vernick, the first officer to respond to the school, testified that when he arrived, he saw appellant's van parked in the parking lot. He approached the van and saw appellant sitting in the driver's seat. Appellant said he was waiting for his daughter, who was in the school. Appellant told the officer he had a concealed carry permit, and Officer Vernick saw a handgun lying on the center console in the van.

{¶6} Officer Vernick went inside the school and spoke with school officials. Patsy Hixson, a school secretary, testified there were about 12 staff members and 18 students in the building and school was in session at that time. She testified she and another school official asked Officer Vernick to tell appellant to leave the premises.

{¶7} Rick Lucas, the school custodian, testified that, due to appellant's presence in the school parking lot and his reported possession of a revolver, the building was put in a "Code Red" lockdown, as there was a perceived danger and a concern for the safety of the students and staff. He said that, since this was a Code Red lockdown, students and staff were secured in safe areas in the building and the doors to those areas were locked.

{¶8} After speaking with school officials, Officer Vernick went back outside; approached the driver's side of appellant's van; and told him to leave. Officer Vernick's back-up, Officer John Vecchione, arrived at the school at that time and approached the passenger side of appellant's van.

{¶9} Officer Vernick said that appellant refused to leave. The officer told appellant to leave about 10 more times, but he continued to refuse to go and became increasingly agitated. Officer Vernick and Officer Vecchione both testified that appellant

began moving his hands around inside the van and that his firearm was within his reach.

{¶10} Officer Vernick said he was concerned the handgun presented a threat. Officer Vecchione saw appellant's firearm move slightly at one point when appellant's hands passed over it and brushed it. Officer Vecchione tried to open the passenger door, but it was locked. He asked appellant to unlock it. Appellant refused to comply and became "very irate." Appellant told the officers to leave him alone or "he'd have to get crazy." Officer Vecchione radioed for additional back-up.

{¶11} Appellant then started the ignition and began backing up his van. The officers' cruisers were parked behind appellant's vehicle. Officer Vernick said the wheels on the van were turned toward the left while appellant was reversing. Officer Vernick was concerned that the van would strike either him or Officer Vecchione. Due to appellant's "aggressive action," Officer Vernick drew his weapon and ordered appellant to stop. Appellant stopped briefly, then drove his van and parked in a different spot in the school parking lot.

{¶12} Officer Vernick entered his cruiser and moved it to secure the entrance doors to prevent anyone from entering the school. Additional back-up officers from the Mentor Police Department arrived and helped to secure the entrance and exit. Appellant started his ignition again and began driving his van through the parking lot. Officer Vernick said the officers gave appellant multiple verbal commands to exit his van; however, appellant did not comply.

{¶13} Due to appellant's repeated disregard for the officers' commands, Officer Vecchione tried to break the driver's side window of appellant's van, but he was

unsuccessful. Following several verbal commands, appellant eventually unlocked his car door. Several officers removed him from his van and placed him in handcuffs. The entire incident lasted about 25 minutes.

{¶14} Appellant did not testify. Nor did he present any evidence disputing the officers' version of events. Thus, the state's evidence was undisputed.

{¶15} Following trial, the jury found appellant guilty on all counts except Count Two, one of the two counts of illegal possession of a deadly weapon or dangerous ordnance in a school safety zone.

{¶16} A sentencing hearing was held on October 4, 2013. The trial court sentenced appellant to two years of community control and imposed various sanctions and conditions, including 90 days in jail with work-release privileges and the forfeiture of appellant's handgun. Appellant filed a motion to stay execution of his sentence, but the trial court denied the motion. Appellant appealed and asserts three assignments of error. For his first assigned error, he contends:

{¶17} "The Court committed error in allowing trial to proceed in light of the destruction of crucial evidence by the State even absent defense counsel's failure to move for dismissal."

{¶18} First, appellant argues the destruction of the 911 recording violated his due process rights in light of the state's duty to preserve it. This court in *State v. Lothes*, 11th Dist. Portage No. 2006-P-0086, 2007-Ohio-4226, stated:

> **{¶19}** The State's failure to preserve materially exculpatory evidence is a violation of a defendant's due process rights under the Fourteenth Amendment of the United States Constitution. *See Arizona v.*

Youngblood, 488 U.S. 51, 55-58 (1988) * * *. The burden rests with the defendant to prove that the evidence in question was materially exculpatory. *State v. Jackson*, 57 Ohio St.3d 29, 33 (1991). Evidence is deemed materially exculpatory 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." *State v. Johnston*, 39 Ohio St.3d 48 (1988), paragraph five of the syllabus * * *. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*.; *accord Jackson*, [*supra*,] at 33. If the defendant meets his burden in demonstrating that the evidence destroyed was "materially exculpatory," he need not also demonstrate that he made a request for such evidence. *Johnston*, [*supra*,] at 61.

{¶20} However, evidence is not materially exculpatory if it is merely potentially useful to the defense. *State v. Lewis*, 70 Ohio App.3d 624, 634 (4th Dist.1990) * * *. * * * The failure to preserve evidence that is merely potentially useful violates a defendant's due process rights only if the police or prosecution acted in bad faith. *State v. Keith*, 79 Ohio St.3d 514, 523 (1997); *Lewis*, [*supra*,] at 634. "The term 'bad faith' generally implies something more than bad judgment or negligence. '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.'"

State v. Wolf, 154 Ohio App.3d 293, 2003-Ohio-4885, ¶14 (7th Dist.), quoting *Hoskins v. Aetna Life Ins. Co*., 6 Ohio St.3d 272, 276 (1983). *Lothes*, *supra*, at ¶17-18.

{¶21} Here, Nina Lombardo-Mylott, Mentor's safety forces communication supervisor, testified she supervises the communication center dispatch that sends out emergency services such as police, fire, and EMS. She said that dispatchers record reports phoned into the center's computer system. The policy and procedure of the dispatcher, when taking a 911 call, is to type verbatim as closely as possible what is being relayed over the phone from the caller. She said that audio recordings of 911 calls are kept for 90 days. After 90 days, they are purged at the Lake County Sheriff's Department unless a request is made to preserve the recording.

{¶22} With respect to this incident, Ms. Lombardo-Mylott testified regarding the dispatch center's computerized record of Sharon's call. The incident report, which memorialized what Sharon said to dispatch, was admitted in evidence. Ms. Lombardo-Mylott said Sharon reported an unwanted guest was in the school parking lot in a van dropping off a child of an employee and that he will not leave. In addition to being made into a written report, the 911 call was also recorded. However, she said that because no one asked that the 911 recording be preserved, pursuant to dispatcher policy, the recording was purged after 90 days.

{¶23} Appellant argues that Ms. Lombardo-Mylott's testimony that appellant never requested the 911 recording be preserved was false because appellant made a demand for discovery after the complaint was filed in the Mentor Municipal Court but before the case was bound over to the Lake County Court of Common Pleas.

Appellant's demand for discovery was general in nature, requesting the various items listed as discoverable in Crim.R. 16. However, a general demand for discovery is *not* a request to preserve a specific item of evidence. Appellant did not request that the 911 recording be preserved. From appellant's discovery request, the state could not possibly have guessed that appellant wanted to preserve the recording.

{¶24} The Seventh District in *State v. Tarleton*, 7th Dist. Harrison No. 02-HA-541, 2003-Ohio-3492, rejected the notion that a general request for discovery was tantamount to a specific request to preserve a video recording. *Id*. at ¶3, ¶26. The Seventh District held that because the defendant only made a general request for discovery and did not make a specific, immediate request to preserve the recording, the burden remained on the defendant to demonstrate that the recording was exculpatory. *Id*. at ¶26.

{¶25} Moreover, the record reveals that appellant had equal access to the 911 tape. The state of Ohio maintains open-file discovery. *See e.g. State v. Banks*, 11th Dist. Lake No. 2008-L-177, 2009-Ohio-6856, ¶9. In addition, "it is not the responsibility of the state to obtain evidence that the defendant can obtain on his own." *State v. Franklin*, 2d Dist. Montgomery No. 19041, 2002-Ohio-2370, ¶52, citing *Kettering v. Baker*, 42 Ohio St.2d 351, 354-55 (1972) (holding that the defendant had equal access to the 911 tape recording and that it was not the responsibility of the state to obtain evidence that the defendant could have obtained on his own.) Even if such a duty were to be imposed on the state, there is no evidence that the 911 recording was material. *See Franklin, supra,* at ¶52, fn.2.

{¶26} Appellant did not meet his burden to prove that the recording would have been "materially exculpatory" because he presented no evidence that, if the recording had been disclosed to him, there was a reasonable probability that it would have changed the outcome of the trial. This is because the substance of the 911 call was included in a written report that was admitted in evidence. Thus, the report could have been used to cross-examine the state's witnesses. As a result, the recording of the 911 call was only "potentially useful." However, there had been no request made to preserve the recording and it was destroyed pursuant to dispatcher policy. Thus, there was no evidence of bad faith in the destruction of the recording, and appellant's due process rights were not violated.

{¶27} Next, appellant argues his trial counsel was ineffective because he did not move to dismiss the indictment on the basis of the destruction of the 911 recording. In order to prevail on an ineffective-assistance claim, the defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *State v. Bradley*, 42 Ohio St.3d 136, 142 (1989).

{¶28} Under *Strickland,* reviewing courts must strongly presume that counsel's performance falls within a wide range of reasonable legal assistance. *State v. Carter*, 72 Ohio St.3d 545, 558 (1995).

{¶29} Further, strategic and tactical decisions do not support a claim of ineffective assistance of counsel. *State v. Henry,* 11th Dist. Lake No. 2007-L-142,

2009-Ohio-1138, ¶78. The failure to object at trial is strongly presumed to be a strategic and tactical decision, and the defendant has the burden to present evidence to overcome this presumption. *State v. Tipton*, 11th Dist. Portage No. 2012-P-0072, 2013-Ohio-3207, ¶28.

{¶30} Appellant argues his trial counsel should have moved to dismiss because the 911 recording could have been used to show that panic was induced by Sharon as she was untruthful in reporting that appellant would not leave the parking lot. However, the incident report, an essentially verbatim account of Sharon's 911 phone call, reveals nothing that shows Sharon's report was deceptive. Thus, there is nothing to suggest the recording would have provided any information that was not contained in the written report. Moreover, appellant's refusal to leave the parking lot was corroborated by the officers' testimony.

{¶31} Appellant thus failed to overcome the strong presumption that his counsel's decision not to move to dismiss on the basis of the 911 tape's destruction was strategic or tactical. As a result, appellant did not demonstrate his counsel's performance was deficient.

{¶32} Appellant's first assignment of error is overruled.

{¶33} For his second assignment of error, appellant contends:

{¶34} "The Court committed error in Jury Instructions that shifted burden of proof to Defendant improperly and in denying request for additional instruction."

{¶35} Appellant asked the court to charge the jury with respect to the two statutory defenses to illegal possession of a deadly weapon or dangerous ordnance in a school safety zone, which are set forth at R.C. 2923.122(D)(3) and (4). The court

granted the request and charged the jury as to (D)(4), but denied it as to (D)(3) after finding that an instruction on (D)(3) was not supported by the evidence.

{¶36} First, appellant argues that because the trial court failed to define the term "affirmative defense" in its charge, he could not have received a fair trial.

{¶37} "For purposes of appellate review, '[t]he decision to issue a particular jury instruction rests within the sound discretion of the trial court.'" *State v. Nichols*, 11th Dist. Lake No. 2005-L-017, 2006-Ohio-2934, ¶28, quoting *State v. Huckabee*, 11th Dist. Geauga No. 99-G-2252, 2001 Ohio App. LEXIS 1122, *18 (Mar. 9, 2001). "Absent an abuse of discretion this court will not reverse the trial court's decision to provide the jury with a specific instruction." *Id.*

{¶38} This court stated in *State v. Norwood*, 11th Dist. Lake No. 2000-L-146, 2002-Ohio-1359: "When reviewing a trial court's jury instructions, an appellate court must examine the entire jury charge. *State v. Porter*, 14 Ohio St.2d 10, 13 (1968). One sentence or one phrase should not be looked at in isolation. *Id*. * * * Further, generally, jury instructions are viewed in their entirety to determine if they contain prejudicial error. *State v. Fields*, 13 Ohio App.3d 433, 436 ([8th Dist.]1984)." *Norwood* at ¶29-35. Thus, even if a jury instruction is inappropriate, if it does not materially affect the outcome of the case, a reversal of the judgment is not justified. *Id.* at ¶35.

{¶39} "Jury instructions should contain plain, unambiguous statements of the law applicable to the case and evidence presented to the jury. *Marshall v. Gibson*, 19 Ohio St.3d 10, 12 (1985). The jury instructions provided by the trial court must be confined to the issues raised by the pleadings and the evidence." *State v. Kirin*, 11th Dist. Trumbull No. 99-T-0054, 2000 Ohio App. LEXIS 3661, *7-*8 (Aug. 11, 2000). Accordingly, the

trial court may not instruct a jury where there is no evidence to support a particular issue.

{¶40} Appellant fails to present any case law holding that the phrase "affirmative defense" must be defined in the court's charge. Significantly, this phrase is not defined in the Ohio Jury Instructions. In any event, the trial court instructed the jury that the state had the burden to prove every element of every offense charged beyond a reasonable doubt. The court also explained the material elements of the offense and defined the key terms.

{¶41} Further, the court instructed the jury that appellant was asserting an affirmative defense and explained its elements. The court defined the term "burden," and stated that "[t]he burden of going forward with the evidence and the burden of proving an affirmative defense are upon the defendant. He must establish such a defense by a preponderance of the evidence." The Ohio Jury Instructions provide the identical definition of "burden" under 2 OJI CR 417.27. The court also defined "preponderance of the evidence," stating that it "is the greater weight of the evidence, that is, evidence that you believe because it outweighs in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value." The Ohio Jury Instructions provide the same definition of "preponderance of the evidence" under 2 OJI CR 417.29.

{¶42} Thus, although the trial court did not define the phrase "affirmative defense" for the jury, appellant was not deprived of a fair trial.

{¶43} Further, appellant argues that R.C. 2923.122(D)(4) does not set forth an affirmative defense and that by designating R.C. 2923.122(D)(4) as such, the trial court

improperly placed the burden of proof to appellant because one of the elements of this statutory defense requires the defendant to show that he is not in violation of R.C. 2923.16, "improperly handling firearms in a motor vehicle." Appellant argues this violates the well-established rule that the state is required to prove every element of the crime charged beyond a reasonable doubt.

{¶44} As a preliminary matter, we note that appellant's trial counsel took the position at trial that R.C. 2923.122(D)(4) is an affirmative defense. Under the "invited error doctrine," "a party is not entitled to take advantage of an error that he himself invited or induced." *State v. Doss*, 8th Dist. Cuyahoga No. 84433, 2005-Ohio-775, ¶5, citing *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, ¶27. A criminal defendant cannot make a strategic decision at trial and then complain on appeal that the result of that decision constitutes reversible error. This is exactly the situation the invited error doctrine seeks to avert. *Doss* at ¶7. Because appellant took the position in the trial court that the defenses provided for at R.C. 2923.122(D)(3) and (4) were affirmative defenses, he cannot argue on appeal that by treating them as such, the trial court committed reversible error.

{¶45} In any event, based on our review of R.C. 2923.122(D)(4), this subsection clearly sets forth an affirmative defense. "An affirmative defense * * * is in the nature of a confession and avoidance, where the accused admits that he engaged in the conduct alleged [the confession], but claims that he was legally justified in doing so [the avoidance]." *State v. Turner*, 2d Dist. Montgomery No. 24322, 2011-Ohio-5417, ¶15, citing *State v. Rhodes*, 63 Ohio St.3d 613, 625 (1992) ("an affirmative defense is in the nature of a 'confession and avoidance,' in which the defendant admits the elements of

the crime, but seeks to prove some additional fact that absolves the defendant of guilt."). *Accord State v. Puma*, 11th Dist. Geauga No. 1215, 1985 Ohio App. LEXIS 8924, *5-*6 (Sep. 27, 1985). In contrast, the defendant does not assert an affirmative defense where he denies engaging in the conduct alleged upon which the criminal charge is based. *Turner, supra*.

{¶46} R.C. 2923.122(D)(4) provides that a defendant with a handgun in a school safety zone is not guilty of illegal possession of a deadly weapon in a school safety zone when (1) he is carrying a valid concealed carry permit; (2) he is the driver or passenger in a motor vehicle and is in the school safety zone while immediately in the process of picking up or dropping off a child; and (3) he is not in violation of the *separate* offense of "improper handling of firearms in a motor vehicle," in violation of R.C. 2923.16. R.C. 2923.122(D)(4) clearly sets forth an affirmative defense because, under it, the defendant admits that he possessed a handgun in a school safety zone ("the confession"), but alleges that he has a legal reason why he is not guilty of the offense ("the avoidance"). As such, appellant had the burden to prove this affirmative defense by a preponderance of the evidence and the trial court, by designating it as such, did not improperly place the burden of proof on him. Contrary to appellant's argument, the fact that appellant had to prove he was not in violation of R.C. 2923.16 to be entitled to this defense does not implicate due process because *he was not charged with that offense*.

{¶47} Next, appellant argues he did not receive a fair trial because the trial court failed to give the additional instruction regarding the defense set forth in R.C. 2923.122(D)(3). As noted above, appellant requested that the trial court instruct the jury

on the affirmative defenses contained in both R.C. 2923.122(D)(3) and (4). However, the court only gave an instruction relating to (D)(4). Appellant argues he was also entitled to an instruction under (D)(3) because it was possible the jury could have found he established the elements of this defense. However, one of the elements of this defense is that the defendant did not enter onto school premises. Because it was undisputed that appellant *was* on school premises during the incident, the court properly determined that the evidence did not support the defense under (D)(3). Thus, the trial court acted within its discretion in denying appellant's request to instruct the jury regarding the defense contained in (D)(3).

{¶48} Appellant's second assignment of error is overruled.

{¶49} For his third and final assignment of error, appellant alleges:

{¶50} "The failure to raise conflict of interest issues was ineffective assistance of counsel."

{¶51} Appellant argues his trial counsel was ineffective in not objecting to a conflict of interest in light of an alleged relationship between one of the assistant prosecutors and Sharon. Appellant suggests this conduct amounted to "prosecutorial misconduct."

{¶52} To make a finding of prosecutorial misconduct, a reviewing court must determine whether the prosecutor made statements during the trial that were improper, and if so, whether the remarks affected the defendant's substantial rights. *State v. Smith*, 87 Ohio St.3d 424, 442 (2000). A conviction will not be reversed because of prosecutorial misconduct unless it so taints the proceedings that a defendant is deprived of a fair trial. *Id*.; *State v. Haynes*, 11th Dist. Ashtabula No. 2012-A-0032,

2013-Ohio-2401, ¶76. However, appellant fails to reference the record for any alleged improper remarks made by the prosecutor.

{¶53} Instead, appellant argues that a personal relationship existed between an assistant prosecutor and Sharon. However, appellant does not reference any record evidence proving the existence of such relationship. In any event, a special prosecutor was appointed to handle this case three days after appellant was indicted and over three months before the jury trial. Thus, we do not discern any conflict of interest.

{¶54} In light of the foregoing, appellant fails to demonstrate any prosecutorial misconduct. As a result, his counsel was not deficient in not objecting to same.

{¶55} Appellant's third assignment of error is overruled.

{¶56} For the reasons set forth in this opinion, appellant's assignments of error are not well-taken and the same are overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶57} As I do not agree with the majority's analysis or holding, I respectfully dissent.

{¶58} A review of the record reveals that this entire case cascades from Sharon DiNardo's 9-1-1 call. For the reasons that follow, this writer feels that appellant's due process rights were violated and that he is entitled to a new trial.

{¶59} In his first assignment, appellant argues the trial court erred in allowing the trial to proceed in light of the destruction of crucial evidence by the state even absent defense counsel's failure to move for dismissal.

{¶60} In this case Ms. Lombardo-Mylott testified that audio recordings of 9-1-1 calls are only kept for 90 days unless a request is made to preserve a recording. However, the record supports appellant's contention that Lombardo-Mylott's testimony was false, in this respect, because he did in fact make a request and demand for discovery. The City of Mentor Schedule of Records Retention and Disposition Policy, Form RC-2, lists a 90 day retention period *if no action is pending.* Here, this matter was pending when the tape was purged. Clearly, the state breached its duty to preserve materially exculpatory evidence under Crim.R. 16. At a minimum, the failure to preserve the recording amounts to bad faith. *State v. Lothes*, 11th Dist. Portage No. 2006-P-0086, 2007-Ohio-4226, ¶18.

{¶61} Sharon DiNardo's 9-1-1 call led to appellant's inducing panic charge, which, in turn, led to the other charges that were brought against him. However, because the tape was purged prior to trial, it was never before the jury. The state points out that the 9-1-1 call was made into a written report which was admitted into evidence as Exhibit 3, containing a memorialization of what the caller stated to dispatch. However, this only left the jury with the substance of what someone was told. This clearly is not the same as having the exact, tangible thing, i.e., the tape recording itself.

It is troubling that in this digital age in which we live, important 9-1-1 tape recordings are destroyed after a mere 90 days due to some internal error, and in violation of the stated policy especially when, as in this case, the matter was still pending and the entire prosecution was based upon that evidence.

{¶62} Based on this unique fact pattern, how can one properly conclude that appellant was the person that induced panic, especially since there is no 9-1-1 recording? The restatement of the call supports that the panic at issue may have been actually induced by the caller herself who was less than accurate in her reporting to the 9-1-1 operator.

{¶63} As stated, this whole matter began when Sharon, the ex-wife of appellant, called 9-1-1 and reported that appellant, an "unwanted guest," was in the parking lot and "would not leave." Sharon's report, however, is not accurate. Rather, the record reveals that appellant merely took his daughter to school, as do so many parents. He waited in his lawfully parked van in the parking lot while his daughter went inside to get her cell phone from her mother. Appellant never caused any disturbance during that time period, nor at the point of the call, had he been asked to leave. Nevertheless, Sharon called 9-1-1, claiming that appellant was an "unwanted guest" and that he "would not leave."

{¶64} As a result, the school went into lockdown. Police arrived and spoke with appellant. They observed appellant's handgun, which was lawful under R.C. 2923.12, "Carrying concealed weapons," as he possessed a CCW permit, i.e., a license to carry a concealed weapon. Police *asked* him, but did not *order* him, to leave at that time. Appellant declined as his daughter was still inside.

{¶65} Consider being a parent, lawfully parked at your child's school parking lot waiting for your son or daughter who is picking up something at school and you are *asked* to leave. Do you have to? If *others* overreact, should *you* have to pay the consequences? It is difficult to fathom what, if anything, appellant could have done. As addressed, the matter only escalated. As a result, "inducing panic" led to other charges. Appellant was convicted, sentenced to jail, stripped of his permit to carry a concealed weapon, is prohibited from owning any firearms, and his weapon was forfeited.

{¶66} Based on the facts presented, it is clear that the omission of the 9-1-1 tape prejudiced appellant. At the very least, it prevented the jury from hearing and judging the credibility of the predicate act. There is evidence that appellant's due process rights were violated, entitling him to a new trial.

{¶67} Given that appellant's first assignment of error has merit, and that he should receive a new trial, I would find that the remaining assignments of error are moot.

{¶68} I therefore respectfully dissent.