[Cite as *State v. Moss*, 2015-Ohio-3651.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA2
vs.	:	
JEFFREY A. MOSS, JR.,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy P. Gleeson, Gleeson Law Office, Logan, Ohio, for appellant.[1]

Adam R. Salisbury, Gallipolis City Solicitor, Gallipolis, Ohio, for appellee.

CRIMINAL APPEAL FROM MUNICIPAL COURT
DATE JOURNALIZED: 8-24-15
PER CURIAM.

{¶ 1} This is an appeal from a Gallipolis Municipal Court judgment of conviction and sentence. After a trial to the court, Jeffrey A. Moss Jr., defendant below and appellant herein, was found guilty of menacing in violation of R.C. 2903.22(A).

{¶ 2} Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT DEPRIVED MOSS OF HIS CONSTITUTIOANL [sic] RIGHT TO PRESENT WITNESSES IN HIS FAVOR WHEN IT DECLINED TO IMPOSE THE LEAST SEVERE SANCTION IN RESPONSE TO DEFENSE

[1]Different counsel represented appellant during the trial court proceedings.

COUNSEL'S DISCOVERY RULE VIOLATION."

SECOND ASSIGNMENT OF ERROR:

"MOSS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 3} On July 8, 2013, Keith William Jackson was visiting a park along with Cheyenne Bonecutter when a group of men approached. Appellant was a member of the group. These men allegedly referred to Jackson as the "N word," then called for a noose and a Confederate battle flag. The evidence adduced at trial also indicates that Bonecutter talked to the group while Jackson called the police.

{¶ 4} On July 10, 2013, a criminal complaint was filed that charged appellant with menacing. Appellant pled not guilty and the matter came on for a bench trial. At trial, Jackson testified to his version of events. Also, Gallipolis Police Department Officer Shallon Schuldt testified that appellant (1) admitted to her that he told someone to get a "rebel flag," and (2) stated that "a black man had no business with a white . . .," but stopped from saying anything more. Officer Schuldt further related that when she spoke to the victim, he "appeared shaken up." Appellant, however, denied that he threatened the victim.

{¶ 5} After hearing the evidence, the trial court found appellant guilty of menacing, sentenced him to serve three days in jail (with credit for time served) and pay a $25 fine and court costs. This appeal followed.

I

{¶ 6} In his first assignment of error, appellant asserts that the trial court erroneously prohibited him from introducing the testimony of several defense witnesses. Although appellant

concedes that he did not reveal the identity of those witnesses pursuant to a Crim.R. 16(D) discovery request, he nevertheless contends that the trial court's sanction was too severe. Appellant argues that the court should have imposed a less severe sanction and this decision, according to appellant, warrants a reversal of his conviction.

{¶ 7} The Ohio Supreme Court has stated that trial courts possess broad discretion to impose sanctions for discovery violations, and those rulings should not be reversed on appeal absent an abuse of that discretion. See *State v. Dillard*, 4th Dist. Meigs No. 13CA9,2014-Ohio-4974, at ¶13; *State v. Woods*, 4th Dist. Ross No. 13CA3396, 2014-Ohio-4429, at ¶15. It is important to note that generally an "abuse of discretion" implies that a court's attitude is unreasonable, arbitrary or unconscionable. *State v. Herring*, 94 Ohio St.3d 246, 255, 762 N.E.2d 940 (2002); *State v. Adams*, 60 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Furthermore, in reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732, 654 N.E.2d 1254 (1995); *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

{¶ 8} Crim.R. 16(L)(1) provides that, if, at any time during the course of proceedings, the trial court determines that a party has failed to comply with the discovery rules, the court may make any order it deems just including, inter alia, an order to prohibit the "party from introducing in evidence the material not disclosed . . ." We acknowledge that Ohio law is replete with cases in which trial courts have excluded witnesses that were not properly revealed to opposing counsel, and those orders were upheld on appeal. See *State v. Brooks*, 7th Dist. Jefferson No. 04JE10, 2004-Ohio-4546, at ¶19-28; *Mount Vernon v. Szerlip*, 5th Dist. Knox No. 98CA20, 1999

WL 436764 (Jun. 17, 1999); *State v. Johnson*, 5th Dist. Richland No. 98-CA-42, 1998 WL 818026 (Nov. 19, 1998). However, the failure to reveal the names of witnesses that could be called to testify in discovery under the Rules of Criminal Procedure deprives the opposing party the opportunity to adequately prepare for trial. Modern trials must not be conducted on the basis of ambush and surprise. Rather, the Rules of Criminal Procedure set forth the applicable procedure to be followed for pretrial discovery. The overall objective of the criminal rules of procedure is to remove the element of gamesmanship from such proceedings. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, at ¶19; also see *State v. Wilson*, 12th Dist. Butler No. CA2012–12–254, 2013-Ohio-3877, at ¶14. Again, trials should not be conducted on the basis of surprise or unfair advantage, but on the evidence that will facilitate a search for the truth. Additionally, courts should endeavor to impose the lease severe sanction for the failure to comply with the rules of discovery. See *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987).

{¶ 9} After our review in the case sub judice, and for the following reasons, we conclude the trial court's sanction was arbitrary, unreasonable and unconscionable. Our reasons are as follows. In *Papadelis*, supra, at 4-5, the Ohio Supreme Court quoted *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), in which the United States Supreme Court held the Sixth Amendment right to have compulsory process for obtaining witnesses is necessarily the right to present a defense:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the

> prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Id.* at 19, 87 S.Ct. at 1923.

The *Papadelis* court continued:

> "It is apparent that the sanction of exclusion may infringe on a criminal defendant's Sixth Amendment right to present a defense, particularly where, as in this case, all the defendant's witnesses are excluded. Note, The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense (1972), 81 Yale L.J. 1342. The courts of other states, when presented with the claim that exclusion of a criminal defendant's witnesses is too harsh a sanction, have held that the trial court must make an inquiry into the surrounding circumstances prior to excluding a party's witnesses. Before imposing the sanction of exclusion, the trial court must find that no lesser sanction would accomplish the purpose of the discovery rules and that the state would be prejudiced if the witnesses were permitted to testify. *State v. Mai* (1982), 294 Or. 269, 656 P.2d 315; *Richardson v. State* (Fla.1971), 246 So.2d 771; *People v. Williams* (1977), 55 Ill.App.3d 752, 13 Ill.Dec. 234, 370 N.E.2d 1261; *Borst v. State* (Ind.App.1984), 459 N.E.2d 751; *State v. Marchellino* (Iowa 1981), 304 N.W.2d 252; *State v. Smith* (1979), 123 Ariz. 243, 599 P.2d 199; *Fendler v. Goldsmith* (C.A.9, 1983), 728 F.2d 1181." Id. at 5.

{¶ 10} In *Papadelis*, the trial court precluded the defendant from calling any of his witnesses for his failure to comply with discovery rules, and the attorney for the defendant proffered the witnesses' testimony on the record. *Id*. at 2, 4. The Ohio Supreme Court found that Papadelis had been denied a fair trial. *Id*. at 4-6.

{¶ 11} In the case sub judice, the matter came on for trial on November 21, 2013. Moss' trial counsel failed to file reciprocal discovery after the prosecution had provided discovery to him. The prosecution then moved to exclude any witnesses that Moss would call on his behalf. However, counsel claimed that the witnesses were all present during the alleged incident and were accessible to the prosecution because as the police had talked to them during the

investigation. Also, the witnesses that Moss wanted to call were named in the police report and were disclosed to the defendant in the prosecution's discovery. The witnesses, however, were not listed in the prosecution's list of witnesses as the prosecution did not plan to call them in its case in chief. The witnesses were Austin White, Steven Bays, Tre Gillenwater, Trevor Gillenwater, and Dylan Herron. The trial court granted the state of Ohio's motion to exclude the witnesses and further addressed Moss' attorney:

> COURT: Mr. Conley, I'm going to go ahead and grant his motion because things have to be done right. You've, you've got to tell him, the rule is clear, you've [sic] to tell him who you're calling as witnesses. That's why we get here and we have off the cuff stuff sometimes. So I'm going to grant the motion.

Counsel then argued that the prosecution was not prejudiced by the failure of the defense to comply with the discovery rule. The following colloquy then took place:

> "COURT: So you're arguing he's not prejudiced by it by your not complying with the rule?
>
> MR. CONLEY: He absolutely is not. He, the police talked to all of those people. They were all there, the police talked to them, even got some evidence from them and everything, so why would he not know it?"

The trial court again granted the motion to exclude the witnesses. The trial court told the defense, "you've got to follow the rules."

{¶ 12} The trial proceeded with the prosecution calling the victim, Keith Jackson, on direct examination. After Jackson was questioned, Moss' attorney cross-examined him. During Jackson's cross-examination, the issue arose of whether a 911 tape existed in this case. The trial court then continued the bench trial and stated the following:

> "COURT: I'm going to give a continuance for you to try to find it. You still may not file a discovery or a witness list because I'm not going to let you benefit from

> this. So we're going to continue, the case is continued. Mr. Jackson, you may step down. * * *"

{¶ 13} Between November 21, 2013, the first date of trial, and before the next trial date of January 9, 2014, Moss filed a motion to be allowed to serve the state with discovery. The trial court denied Moss's motion on the day of trial, January 9, 2014, by stating the following:

> "COURT: All right. By ruling on uh, Mr. Conley's motion to be allowed to provide discovery is that I'm overruling that motion. Uh, the information was about these people who were there was provided in discovery. Um, initially uh, there were, as I understand it there are no written statements from those witnesses, so it would have been up to Mr. Conley uh, to talk to those people before uh, trial. And just because we went, we had begun the trial, um, does not mean that you, it doesn't change anything. So those witnesses will be excluded because the discovery process in the rules were not um, followed. * * *"

{¶ 14} The trial court then proceeded to read Crim.R. 16(B) into the record. After reading the rule, the following exchange took place that showed that the witnesses the defense wanted to call were actually listed in the state's discovery provided to the defendant.

> "COURT: I've read the rule. It's not his…Okay. I just read the rule to you Mr. Conley, where in there does it require Mr. Salisbury to list out the names on his response of all witnesses? They were in the police narrative and that's required.
> MR. CONLEY: Well…
> COURT: And that's he's given you.
> MR. CONLEY: I think what the complaint is saying is the only person who allegedly did this conduct was my client and there was a group as one that was there and the police talked to them. What information they got from them I don't know. When I was able to get all of them it was late in the case, I submitted the list…
> COURT: No, it was not late in the case. The names were given to you in discovery, which I don't know where that is.
> MR. CONLEY: Well…inaudible…there was some that they said they talked to, I still couldn't tell you who they were.
> COURT: On August 6th, you have had the officer's report since August 6th and all of those names, I'm assuming all of those names are listed there and they are. They are.* * *"

The defense then argued again that the state would not be prejudiced if the witnesses were permitted to testify.

> "MR. CONLEY: Well the last question, is how is the State, how is the State prejudiced even if the, the, a couple of those witnesses were available and he knows all about it and talked to the police who conducted the, the investigation. In the interest of justice why wouldn't these witnesses be allowed to come and testify?
>
> COURT: Mr. Salisbury, do you wish to respond to that?
>
> MR. SALISBURY: Uh, Judge I have no response other than that's the way that the rule is written uh, Criminal Rule 16B or 16D uh, requires disclosure of the witness list from the prosecution before the beginning of trial.
>
> COURT: And the only thing I can say to that Mr. Conley is that by the time that you um, we got to an actual trial on this you had had the information but for three months and there's an interest in the overall uh, protection of the system that we do not allow, at the last minute, witnesses to come in uh, and testify that have not been disclosed and that's my ruling. All right, where are we in trial?"

The Ohio Supreme Court found in *Papadelis*, supra, at 5:

> "[A] trial court must inquire into the circumstances surrounding a violation of Crim.R. 16 prior to imposing sanctions pursuant to Crim.R. 16(E)(3). Factors to be considered by the trial court include the extent to which the prosecution will be surprised or prejudiced by the witness' testimony, the impact of witness preclusion on the evidence at trial and the outcome of the case, whether violation of the discovery rules was willful or in bad faith, and the effectiveness of less severe sanctions.
>
> We recognize that a state's interest in pretrial discovery may be compelling. Notwithstanding that interest, any infringement on a defendant's constitutional rights caused by the sanction must be afforded great weight. Consequently, a trial court must impose the least drastic sanction possible that is consistent with the state's interest. If a short continuance is feasible and would allow the state sufficient opportunity to minimize any surprise or prejudice caused by the noncompliance with pretrial discovery, such alternative sanction should be imposed. Even citing defense counsel for contempt could be less severe than precluding all of the defendant's testimony. *United States, ex rel. Veal, v. Wolff* (N.D.Ill.1981), 529 F.Supp. 713, at 722. We hold that a trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding

> whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery."

{¶ 15} In light of the above Ohio Supreme Court precedent, we believe that the trial court abused its discretion by not applying the *Papadelis* analysis when it decided the sanction for the defense's failure to comply with the discovery rules. A trial court must consider not only the extent to which the prosecution will be surprised or prejudiced by the witnesses' testimony, but also the impact of witness preclusion on the evidence at trial and the outcome of the case, whether violation of the discovery rules was willful or in bad faith, and the effectiveness of less severe sanctions.

{¶ 16} As for the factor concerning the surprise or prejudice to the prosecution, the witnesses who Moss wanted to call to testify were witnesses who were disclosed to the defendant through the prosecution's discovery. The prosecution could not have been surprised or prejudiced by the testimony. The prosecution provided discovery to the defendant in August 2013 that disclosed the witnesses. The trial court even continued the case from November 21, 2013 to January 9, 2014 for purposes of finding a 911 tape. During this time period, the defense filed a motion to be allowed to serve the state with discovery. The trial court should have also considered the other factors prior to imposing the most severe sanction for Moss' lack of compliance with the discovery rules. While we do not condone Moss' actions, our highest court's precedent requires that "any infringement on a defendant's constitutional rights caused by the sanction must be afforded great weight." *Papadelis* at 5.

{¶ 17} We thus sustain Moss' first assignment of error, reverse the trial court's judgment and remand the case for further proceedings to apply the standard set forth by the Ohio Supreme

Court.

II

{¶ 18} In his second assignment of error, appellant argues that he received ineffective assistance from his trial counsel. In light of our ruling on his first assignment of error, this assignment of error is now moot and may be disregarded pursuant to App.R. 12(A)(1)().

{¶ 19} Having sustained the first assignment of error, the trial court's judgment is hereby reversed and this case is remanded for further proceedings consistent with this opinion.

JUDGMENT REVERSED
AND CASE REMANDED
FOR FURTHER
PROCEEDINGS
CONSISTENT WITH THIS
OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed, the case be remanded for further proceedings and appellant to recover of appellee the 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 Gallipolis Municipal Court to carry this judgment into execution.

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

Hoover, P.J. & Harsha, J.: Concur in Judgment & Opinion
Abele, J.: Dissents

For the Court

BY:_____
Marie Hoover
Presiding Judge

BY:_____
William H. Harsha, Judge

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.