[Cite as *State v. Huff*, 2015-Ohio-5589.]

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

STATE OF OHIO,	:	
	:	Case No. 14CA3596
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
ANTHONY R. HUFF,	:	
	:	
Defendant-Appellant.	:	**Released: 12/28/15**

APPEARANCES:

Timothy P. Young, Ohio State Public Defender, and Stephen P. Hardwick, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Shane Tieman, Assistant Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

McFarland, A.J.

{¶1} Anthony Huff appeals his convictions in the Scioto County Court of Common Pleas. Appellant was indicted on 24 counts. A jury found him guilty as to the following counts:

> Counts 16-19, burglaries, in violation of R.C. 2911.12(A)(2)(C), and second degree felonies;
>
> Counts 20-23, thefts of credit cards, in violation of R.C. 2913.02(A)(1)(B)(1)&(2) and R.C.2913.71(A), and fifth degree felonies; and,

> Count 24, attempted burglary, in violation of R.C. 2911.12(A)(2)(C) and R.C. 2923.02(A), and third degree felonies.

{¶2} On appeal, Appellant asserts the trial court erred by: (1) failing to exclude testimony from a critical witness that the State failed to disclose until three days prior to trial; and (2) permitting the State to ask a leading question on an issue critical to the State's case. Upon review, we find no merit to his arguments. The trial court did not err. Accordingly, we overrule both assignments of error and affirm the judgment of the trial court.

FACTS

{¶3} On September 11, 2013, Appellant was indicted on 24 counts which included theft, theft of credit cards, breaking and entering, and burglary. The indictments stemmed from events which occurred at various locations in Scioto County. Appellant was subsequently arraigned and pled not guilty. The parties exchanged discovery and the matter eventually proceeded to trial on December 9, 2013.

{¶4} Prior to Appellant's trial, the State elected to proceed only on charges that occurred on July 16, 2013, at Tipton Lane. Tipton Lane is a T-shaped road, running through grassy fields and bordering the Ohio River in western Scioto County. It is a quiet neighborhood not generally known to have any criminal activity.

{¶5} On December 9, 2013, a mistrial was declared when, due to inclement weather, there was an insufficient number of jurors reporting. The matter was rescheduled for jury trial on December 16, 2013. On December 11, 2013, the State filed a supplemental response to defendant's request for discovery, #6, which disclosed the name and written statement of an additional witness, Christopher Murphy. Murphy is a bailiff at Portsmouth Municipal Court where Appellant was arraigned and where his preliminary hearing took place.

{¶6} On December 16, 2013, Appellant filed a motion to exclude Murphy's testimony. The trial court overruled Appellant's motion. The matter proceeded to jury trial. The jury heard testimony from a neighbor, Marc Nolan, Christopher Murphy, victims of the alleged crimes, the chief detective on the case and other law enforcement officials, and various associates of Appellant. The jury also viewed the State's exhibits which included surveillance video, a stolen vehicle report, a letter Appellant wrote to his cousin, a letter written to co-defendant Hank Jones, a photograph of the allegedly stolen vehicle, a photograph of items stolen, a photograph of items found in the allegedly stolen vehicle, a videotaped interview of Appellant, and Appellant's jail phone calls to his mother.

{¶7} The State of Ohio sought to prove Appellant acted either as principal or an accomplice when five garages attached to homes were entered, vehicles rummaged, and items stolen. The State's theory was that Appellant accompanied Hank Jones to Tipton Lane to steal money and other items and that he actively participated by entering the garages, rummaging and stealing, and/or acting as a lookout.

{¶8} At the close of the State's case, all exhibits were admitted, along with one defense exhibit. Defense counsel then made a verbal motion for acquittal pursuant to Crim.R. 29. Counsel argued there was no physical evidence or eyewitness testimony to support burglary convictions. In response, the prosecutor argued there was ample direct and circumstantial evidence and that Appellant could be convicted as a principal or an accomplice. The trial court overruled Appellant's motion.

{¶9} The sole witness for the defense was Hank Jones, Appellant's 18-year old co-defendant. Jones essentially testified that he asked Appellant to accompany him to Tipton Lane, but he did not tell Appellant the purpose for their trip. Once there, the two separated, Jones going to the right and Appellant to the left. Jones eventually testified to entering all five garages and rummaging the vehicles. He testified Appellant joined him only briefly, when Jones became "spooked" at the second house. After walking together

long enough to be caught on the surveillance video, Jones testified they again separated and Appellant went to wait for Jones at the car. Appellant never helped him carry items or acted as a lookout.

{¶10} The jury returned a verdict of guilty as to Counts 16-24, set forth above. Some of the counts were merged for sentencing, but Appellant received a total aggregate sentence of 17 ½ years.

{¶11} This timely appeal followed. Where relevant, a summary of additional facts and testimony will be set forth below.

ASSIGNMENTS OF ERROR

> "I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO EXCLUDE TESTIMONY FROM A CRITICAL WITNESS THAT THE STATE FAILED TO DISCLOSE UNTIL THREE DAYS BEFORE TRIAL.
>
> II. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO ASK A LEADING QUESTION ON AN ISSUE CRITICAL TO THE STATE'S CASE."

A. STANDARD OF REVIEW

{¶12} The admission of evidence is within the sound discretion of the trial court. *State v. Jackson,* 4th Dist. Washington No. 12CA16, 2013-Ohio-2628, ¶ 16; *State v. Dixon,* 4th Dist. Scioto No. 09CA3312, 2010-Ohio-5032, ¶ 33, citing *State v. Sage,* 31 Ohio St.3d 173, 510 N.E.2d 343, (1987), at paragraph two of the syllabus. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is

unreasonable, unconscionable, or arbitrary. *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.*, 63 Ohio St.3d 498, 506, 589 N.E.2d 24 (1992); *Wilmington Steel Products, Inc. V. Cleveland Elec. Illuminating Co.*, 60 Ohio St.3d 120, 122, 573 N.E .2d 622 (1991). When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe 1*, 57 Ohio St.3d 135, 138, 566 N.E.2d 1181 (1991), citing *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶13} Furthermore, the control of discovery and sanctions for violations of that process are generally left to the discretion of the trial court. *State v. Bennington*, 4th Dist. Adams No. 12CA956, 2013-Ohio-3772, ¶ 28, citing S*tate v, Craig*, 4th Dist. No. 01CA8, 2002 WL 1666225 (Mar. 26, 2002), ¶ 33; see, also, *State v. Otte*, 74 Ohio St.3d 555, 563, 660 N.E.2d 711, 719-720 (1996). Therefore, the "abuse of discretion" standard governs both alleged errors complained of by Appellant.

B. LEGAL ANALYSIS AS TO ASSIGNMENT OF ERROR ONE

{¶14} Appellant contends the trial court erroneously permitted the State to introduce evidence of a statement that he allegedly made during a break in the preliminary hearing in his case. The statement was given during the trial testimony of Christopher Murphy, a bailiff at the Portsmouth

Municipal Court where the preliminary hearing was held. Appellant filed a written motion to exclude Murphy as a witness as he was not disclosed to the defense until three days prior to trial. The trial court denied the motion.

{¶15} Appellee State of Ohio acknowledges the disclosure was late. However, the State points out this is not a case where the witness was disclosed in the midst of trial. The State received the evidence and disclosed it on the Wednesday prior to the commencement of the new trial date. The State submits the prosecutors were not aware of a written statement until they actually interviewed Murphy the day following declaration of a mistrial. The State also contends it arguably complied with CrimR. 16 by providing supplemental discovery which listed the witness the State intended to call and which also provided summaries of statements of Appellant.

{¶16} In the alternative, the State argues if it has violated the spirit of discovery, Crim.R. 16 provides for sanctions. One of the possible sanctions is a continuance. Appellant was offered a continuance and declined. Although Appellant argues it would not have been a sanction upon the State, the State points out it would have had to again notify and contact witnesses, serve subpoenas, and perform the usual trial preparation.

{¶17} The purpose of the discovery rules is to prevent surprise and the secreting of evidence favorable to the other party. *State v. Lawhun*, 4th

Dist. Ross No. 11CA3223, 2012-Ohio-253, ¶ 7; *City of Lakewood v. Papadelis,* 32 Ohio St.3d 1, 3, 511 N .E.2d 1138 (1987); see also, *State v. Warren,* 8th Dist. Cuyahoga App. No. 83823, 2004-Ohio-5599 at ¶ 51. The current version of Crim.R. 16, as amended on July 1, 2010, and which governs discovery, provides in section (A) that "[a]ll duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal." *Lawhun, supra.*

{¶18} Crim.R. 16 provides in section (I) that "[e]ach party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surebuttal." *Lawhun, supra,* at ¶ 8. Further, Crim.R. 16(L), which governs regulation of discovery, provides as follows:

> "The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, 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."

{¶19} "The imposition of sanctions for a discovery violation is generally within the sound discretion of the trial court." *Lawhun, supra,* at

¶ 9, quoting *State v. Sinkfield,* 2nd Dist. Montgomery No. 18663, 2001-Ohio-1835; citing *State v. Parson* (1983), 6 Ohio St.3d 442, 445, 453 N.E.2d 689. However, prior to imposing one of the allowed orders provided in Crim.R. 16(L), the trial court must inquire into the circumstances surrounding the violation and should impose the least severe sanction. *City of Lakewood v. Papadelis*, *supra,* at paragraph two of the syllabus. The factors to be considered when making this inquiry are: 1) the extent of surprise or prejudice to the State; 2) the impact exclusion of the witness would have on the evidence and the outcome; 3) whether the violation was in bad faith; and 4) the effectiveness of less severe sanctions. *Id.* at 5; *State v. Sinkfield*, *supra.* The rule applies equally to discovery violations committed by the State or by a criminal defendant. *State v. Dillard,* 4th Dist. Meigs No. 13CA9, 2014 -Ohio-4974, ¶ 15; *Darmond* at the syllabus; see also *In re D.M.,* 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404, ¶ 15.

{¶20} Appellee State of Ohio directs us to our decision in *State v. Jackson*, 4th Dist. Washington No. 12CA16, 2013-Ohio-2628. Jackson was convicted of involuntary manslaughter, felony child endangering, and misdemeanor child endangering. On appeal, Jackson argued the trial court committed error when it overruled his motion to prohibit the State from calling an undisclosed rebuttal witness. The witness, Dave Ferguson, was

the city service director for the city of Belpre, Ohio. Appellant argued Ferguson was never disclosed and he could have been called in the State's case-in-chief, along with the other witnesses who testified to Appellant's lack of supervision of the children. Appellant contended he was surprised by the witness and had no time to prepare for cross-examination of Ferguson. He further argued because the witness was a Belpre city official, his testimony likely carried more weight with the jurors and significantly prejudiced Appellant. The State countered that although Ferguson was not disclosed, his testimony became relevant after Appellant presented his defense and elicited testimony indicating that Appellant was supervising his children. Appellee further noted after initially objecting, Appellant's counsel utilized the twenty minutes given to prepare for cross-examination, but did not renew the objection or request sanctions.

{¶21} In our decision, we referenced Crim.R. 16(B) which imposes on the prosecutor a duty to disclose certain information upon a proper discovery request made by the defendant and this includes discovery of witness names, addresses, and records of felony convictions. *Id.* Crim.R. 16(B)(1)(e). We also pointed out the duty to disclose information pursuant to a proper discovery request is continuous. *Id.* Crim.R. 16(D), as well as the sanctions provided for by Crim.R. 16(E). We observed: “It is well

within the trial court's discretion to decide what sanction to impose." *Jackson, supra*, at ¶ 25; *Finnerty, supra*, citing *State v. Apanovitch*, 33 Ohio St.3d 19, 26, 514 N.E.2d, 394, 402; *Parson, supra*, 6 Ohio St.3d at 445, 453 N.E.2d 691; *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051, 1059-1060 (1976). However, "[f]ailure to comply with a discovery request for the names of witnesses does not automatically result in exclusion of their testimony." *Id.* at ¶ 25.

{¶22} "[W]hen imposing a sanction for a discovery-rules violation, a trial court 'must impose the least severe sanction that is consistent with the purpose of the rules of discovery.' " *City of Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), paragraph two of the syllabus; *State v. Stonerock*, 4th Dist. Lawrence No. 11CA15, 2012-Ohio-2290, ¶ 28. Furthermore, "[p]rosecutorial violations of Crim.R. 16 are reversible only when there is a showing that (1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefited the accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect." *Stonerock, supra*, quoting *State v. Joseph*, 73 Ohio St.3d 450, 458, 653 N.E.2d 285 (1995).

{¶23} In *Jackson*, we concluded Appellant had not shown the failure to disclose Ferguson's name was a willful violation of the discovery rules.

The relevance of Ferguson's testimony had not been known until the testimony of a defense witness raised the significance of the presence of Appellant's pickup truck. We further observed Appellant's counsel requested twenty minutes to talk with Ferguson, but failed to request a continuance of trial or any other sanction.[1] *Id*. at ¶ 29. We held the trial court did not abuse its discretion because:

> "Appellant has not shown Appellee's failure to disclose was a willful violation of the discovery rules. Appellant has not shown how prior knowledge of Ferguson as a potential witness affected his ability to prepare the defense except for a vague reference in his brief that prior knowledge might have allowed him to call yet another witness in surrebuttal. And, Appellant has not shown that he was materially prejudiced by Ferguson's testimony, except for his argument that Ferguson's testimony may have carried more weight because he is a Belpre city official. This is a speculative assertion and, without more, we do not find evidence that Appellant was materially prejudiced by the court's failure to prohibit Ferguson's testimony. Furthermore, we note while Appellant initially objected, he did not move for a continuance of trial, or any other sanction." *Id.* at ¶ 30.

{¶24} More recently in *State v. Dillard, supra*, Dillard asserted on appeal that the trial court erred when it allowed an officer to testify regarding pseudoephedrine logs because the state failed to timely notify her before trial that a certain officer, Sgt. Gilkey, would testify. Dillard was convicted of illegal manufacturing of drugs and other charges. Here, the

[1] In *Jackson*, when Ferguson was called to the stand, defense counsel did not renew his objection.

State admitted at trial that it had violated Crim.R. 16(I) by failing to disclose Sgt. Gilkey's name as a witness until the evening before trial.

{¶25} Dillard's trial counsel requested the trial court to exclude Sgt. Gilkey's testimony. The State offered to allow Dillard's counsel time to interview Sgt. Gilkey and another witness. However, Dillard's counsel again requested that the witnesses not be allowed to testify, "or in the alternative, time be granted to the Defense to * * * understand this information better." The trial court denied the motion to exclude Gilkey's testimony. Dillard's counsel then stated he was ready to proceed and did not request a continuance. Dillard claimed on appeal that the trial court should have granted the motion to exclude the officer's testimony.

{¶26} In the *Dillard* decision, we again pointed out the dictates of Crim.R. 16(L)(1), the abuse of discretion standard, and the law in *Lakewood v. Papadelis, supra.* There, we concluded that the trial court did not abuse its discretion in refusing to exclude Sgt. Gilkey's testimony. We noted first that the State did not willfully fail to provide Sgt. Gilkey's name in discovery. *Id*. at ¶ 16. We also pointed out that advance knowledge of Sgt. Gilkey's testimony would not have benefited Dillard in the preparation of

her defense.[2] Further, although Dillard claimed unfair surprise by Sgt. Gilkey's testimony, Dillard ignored the fact that it was her trial counsel's own cross-examination which elicited the surprise testimony. Dillard's trial counsel's vigorous cross-examination got Sgt. Gilkey to admit that there are legitimate reasons to purchase medications containing pseudoephedrine, including treating the symptoms of colds and sinus infections. We concluded Dillard had failed to show that she was unfairly surprised.

{¶27} Finally, we pointed out the trial court followed the mandate in *Lakewood* when it imposed sanction. Dillard sought the harshest sanction available - the exclusion of Sgt. Gilkey's testimony - as a remedy for the State's discovery violation. We held:

> "Adopting Dillard's argument would contravene well-established precedent that requires the imposition of the least restrictive sanction consistent with the purpose of the rules of discovery." *Id.* at ¶19; *Darmond,* 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, syllabus; *Lakewood,* 32 Ohio St.3d 1, 511 N.E.2d 1138, at paragraph two of the syllabus.

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[2] In pretrial discovery, the State disclosed to Dillard the National Precursor Log Exchange ("NPLEx") report that Sgt. Gilkey testified about and authenticated. "The National Precursor Log Exchange (NPLEx) was a real-time electronic logging system used by pharmacies and law enforcement to track sales of over-the-counter (OTC) cold and allergy medications containing precursors to the illegal drug, methamphetamine." http://www.nplexservice.com. Dillard's trial counsel knew that the State's case would include testimony concerning the NPLEx report of her purchases of pseudoephedrine, a precursor to methamphetamine. We stated: "Common sense would have indicated to Dillard's trial counsel that the State would attempt to link her purchases to the crimes charged. Under comparable circumstances the Supreme Court of Ohio held that foreknowledge of expert testimony concerning DNA frequency evidence would not have benefited a capital defendant where the State's DNA report had been disclosed to the defendant in discovery. *Scudder*, 71 Ohio St.3d at 269; see also *State v. Horton*, 8th Dist. Cuyahoga No. 86821, 2006-Ohio-3736, ¶ 24." *Id.*

> "Exclusion of the evidence * * * is a remedy of last resort." Katz, Martin, Lipton, Giannelli, and Crocker, Baldwin's Ohio Practice Criminal Law, Section 47:23 (3d Ed. 2013).

{¶28} We reasoned that Dillard could have avoided any potential prejudice by accepting the State's offer to interview Sgt. Gilkey before he testified, seeking continuance, or if her trial counsel had not asked him damaging questions on cross-examination. *Id.* at ¶ 19. We also observed:

> "[A]lthough Dillard's trial counsel initially requested time to review the new evidence as an alternative to the request to suppress it, her counsel ultimately did not ask for a continuance to prepare. Nor does Dillard suggest on appeal that any remedy other than exclusion of the evidence was appropriate."

{¶29} We held that the trial court did not abuse its broad discretion by denying Dillard's request to exclude Sgt. Gilkey's testimony.

{¶30} Here, the record shows on December 11, 2013, the State filed a supplemental response to Appellant's request for discovery, disclosing Murphy as a witness, a written summary prepared by Murphy of Appellant's alleged oral statements, including "I didn't get into the houses but I was in the garages." On December 13, 2013, Appellant filed a motion to exclude Murphy as a witness. Appellant argued he was prejudiced by the delay in disclosure as he did not have the practical means of countering the accusations by interviewing the large number of people present at the time the statements were allegedly made.

{¶31} On December 16, 2013, the trial court inquired into the circumstances surrounding the violation. Appellant's trial counsel had the opportunity to argue his motion in chambers prior to the start of trial. Defense counsel argued that Murphy was not disclosed prior to trial, but was named after trial had commenced. Counsel indicated they were not contending undue delay or delay for the purpose of ambush, but that it would be difficult to interview other persons, and perhaps a co-defendant that would counter Murphy's testimony. Counsel stated: "I mean it's hard to go back and track something down from July 16th, who all was down there, we just haven't been able to do that so."

{¶32} At this point, the trial court asked Appellant's counsel if the defense was asking for a continuance to prepare. The following exchange occurred:

> Mr. Loesch: No, my client, we've already been here once I mean we're wanting to get, we want to put this matter behind us. My client has been in jail. He still sits in jail and we've already been through one mistrial. We're eager to put this matter behind us so therefore we're asking that we be allowed to proceed, but again that he may not be allowed to testify.
>
> The Court: Well would a continuance and giving you time to prepare alleviate any prejudice that you're now claiming?
>
> Mr. Loesch: It certainly could. It would allow more time for tracking down and interviewing potential witnesses but the question becomes do I really think that, you know, I don't know

> that it necessarily would give us things that are going to help us. It may, it may not.
>
> The Court: So, and I do not want to put words in your mouth, you're asking that he either be excluded or go ahead and proceed?
>
> Mr. Loesch: Correct.

{¶33} After arguments were heard, the trial court took the matter under advisement. Ultimately, the court overruled the motion to exclude. When the State called Murphy, Appellant renewed his objection which was noted on the record.

{¶34} Upon our review of the record, we find the trial court did not abuse its discretion by overruling Appellant's motion to exclude Murphy's testimony. First of all, the record does not demonstrate this was a willful violation. The record indicates the State used due diligence in disclosing Murphy's identity and statements. Trial commenced on December 9, 2013 and then a mistrial occurred. The next day, in preparation for the new trial date, the State discovered Murphy's statement, having only then been turned over to them from the Sheriff's office, and immediately disclosed the evidence to the defense.[3] In his brief, Appellant concedes the late disclosure was not done in bad faith.

[3] The disclosure was file-stamped December 11, 2013.

{¶35} Second, the disclosure was made three days prior to trial. While there was some element of surprise, this is not the case where disclosure occurred on the eve of trial, as in *Dillard*, or during the midst of trial, as in *Jackson.* Given that the late disclosure was not done in bad faith and was done three days prior to trial, we do not find the surprise was unfair or prejudicial.

{¶36} Second, the trial court offered Appellant a continuance which was refused. During the argument on the motion, defense counsel admitted a continuance could have alleviated prejudice. However, he also admitted he did not know if tracking and interviewing potential witnesses "would necessarily give us things to help." Appellant received Murphy's name and statements three days prior to the start of the second trial. It appears that counsel did not make an attempt to begin tracking and interviewing during that three day period, nor did Appellant avail himself of the offer of a continuance in order to search for witnesses or evidence to counter Murphy's testimony.

{¶37} Finally, a continuance is the least severe sanction. Appellant requested the most severe sanction, total exclusion, which as earlier discussed is a remedy of last resort. The trial court was not required to

utilize exclusion in the absence of a willful violation of the rules, as here, or when no unfair prejudice has been found.

{¶38} For the foregoing reasons, we find the trial court did not err and abuse its discretion by overruling Appellant's motion to exclude Murphy's testimony. As such, we overrule the first assignment of error and affirm the judgment of the trial court.

C. LEGAL ANALYSIS AS TO ASSIGNMENT OF ERROR TWO

{¶39} Under this assignment of error, Appellant again directs us to Christopher Murphy's testimony. Appellant argues the trial court's permitting the State to use a leading question regarding a main contested issue was a prejudicial error. Appellant objected to the question and was overruled. Appellant concludes that the prosecutor relied on Murphy's testimony in closing. Appellee responds that the question posed was not, per se, leading, and even if so, the error is a harmless one.

{¶40} Trial court judges enjoy broad discretion in the manner by which they conduct proceedings in their courtrooms. *State v. Leffingwell,* 4th Dist. Lawrence No. 12CA1, 2013-Ohio-1421, ¶ 17; *State v. Malloy,* 2nd Dist. Clark No. 11CA21, 2012-Ohio-2664, at ¶ 23; *State v. Messer,* 12th Dist. Clermont No. CA2004-03-020, 2005-Ohio-2501, at ¶ 14. Similarly, trial courts have discretion in the manner by which they allow the

questioning of witnesses. See generally *In re Kister*, 194 OhioApp.3d 270, 2011-Ohio-2678, 955 N.E.2d 1029, at ¶¶ 48-49; *State v. Schandel,* 7th Dist. Carroll No. 07-CA-848, 2008- Ohio-6359, at ¶ 71. Thus, a court's decision on such matters will not be reversed absent an abuse of that discretion.

{¶41} A leading question is "one that suggests to the witness the answer desired by the examiner." *State v. Diar*, 120 Ohio St.3d 460, 900 N.E.2d 565, 2008-Ohio-6266, ¶ 149, quoting 1 McCormick, Evidence (5th Ed. 1999) 19, Section 6. Under Evid.R. 611(C), "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." *Id. Leffingwell, supra*; *State v. Goff*, 4th Dist. Lawrence No. 2009-Ohio-4914, ¶ 85. However, the trial court has discretion to allow leading questions on direct examination. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 138; *State v. D'Ambrosio*, 67 Ohio St.3d 185, 190, 616 N.E.2d 909 (1993).

{¶42} Appellant cites the transcript of Murphy's testimony as follows:

> A: To paraphrase Mr. Huff made the statement that he did break into cars there, the place where he was accused of. He stated that he helped construct those houses down in that area. He made the statement that people living down there are government employees and that if you're a government employee you might as well lock your doors cause you're my target, or you are a target.

Q: Something similar to that nature?

A: That's correct.

Q: Okay. Did he mention anything about houses or garages?

A: He said- -

Mr. Loesch: Objection.

The Court: Overruled.

A: He said that he didn't do, he said, we advised him at that time that you know, you need to be quiet, that anything you say can be used against you still. And he said that he didn't care. As far as the houses go and the garages, he said that, I believe he said yes, he did the houses or was in a garage.

Q: Are you sure on that?

A: I'm almost positive about the garages, not the houses, but he said garages.

Q: You're not positive about the house- -

A: But the garages.

Q: Are you sure he said anything about the garages?

A: Yes, I am.

{¶43} In *State v. Diar*, *supra*, Diar was convicted of the aggravated murder of her minor child. She appealed various issues, including the use of leading questions throughout trial. Diar contended that the prosecutor used leading questions throughout one of the officers' testimony, Detective

Garcia. In particular, the prosecutor used leading questions asking Garcia about (1) Diar's clean appearance after exiting her house, (2) Diar's missing house keys, (3) whether gasoline from Diar's car provided a possible source of fuel to start the fire, (4) whether any evidence supported a break-in theory, and (5) whether the police checked all gas stations to determine whether Diar had purchased gasoline. The Supreme Court of Ohio held that these improper leading questions did not result in plain error because the questions elicited information *already* presented during the trial. *Id.* at ¶ 180.

{¶44} In *Leffingwell, supra,* Appellant was convicted of burglary. His on again/off again girlfriend was the State's chief witness against him. On appeal, he raised the issue of the State's repeated use of leading questions when his girlfriend testified. In our decision, we found no harmless error given that the *remainder* of the girlfriend's testimony incriminated Leffingwell and provided details of events.

{¶45} Here, we likewise find no prejudicial error occurred. Although summarizing much of the testimony, we have reviewed the entire record. Appellant was convicted of burglary, theft, and attempted burglary, a lesser included offense. The trial court instructed the jury on the definitions of "direct evidence" and "circumstantial evidence." The jury was further instructed that Appellant could be convicted as the principal offender of the

offense or if he aided, abetted or conspired with others to commit the offenses. While the State's direct question to Murphy about "houses or garages" was leading, the trial transcript was replete with incriminating circumstantial evidence that Appellant committed the offenses alleged, or that he aided, abetted, or conspired with Hank Jones to do so. The remainder of the evidence demonstrated Appellant's guilt as follows:

> 1. Marc Nolan's surveillance footage which showed two individuals getting into Nolan's family's trucks, rummaging, and then getting out and walking to Nolan's house. Both looked inside Nolan's houses and one of the individuals covered his face. Hank Jones identified Appellant on the video. Jones also identified a camera taken from the second house in his hand.
>
> 2. The three victims' testimony that they had attached garages, vehicles rummaged inside their garages, and change and other items stolen. In particular, victim Evan Maxson testified that his wife's phone and camera were stolen, which had been in the kitchen area accessed by his garage.
>
> 3. Melissa Keating, Appellant's girlfriend's testimony that Appellant was self-employed as a tattoo artist, did not have a regular income, and often stole from cars with Hank Jones, splitting their findings. She testified Appellant often wore dark clothes and jeans when he went out late at night to steal. Appellant often brought home appliances at 5:00 or 6:00a.m. in the mornings. Keating further testified on the morning of July 16, 2013, Appellant told her to report her red car as stolen.
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> 4. Shelly Stidham, Appellant's cousin's testimony that on the morning of July 16, 2013, Appellant and Jones called her to pick them up on the west side of the county where she found them on the side of the road. Stidham further testified she was directed to drive them down a road so they could pick up a

> drawstring bag that was passed back and forth between Appellant and Jones.
>
> 5. Deputy Jason Diddle's testimony identifying photographs of Melissa Keating's red car recovered on Tipton Lane, items stolen from one of the homes, and items recovered from the red car.
>
> 6. Captain Dave Hall's testimony that the Scioto County Jail has an internet based phone system which monitors and records phone calls made by the inmates.
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> 7. Detective Jodi Conkel's testimony that she investigated the residence Appellant shared with Melissa Keating and found multiple stolen items; that she interviewed Appellant on July 16, 2013; that she later interviewed Hank Jones; that she listened to Appellant's jail phone calls; and that Shelly Stidham turned over to her a letter Appellant wrote Stidham.
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> 8. The videotaped interview of Appellant by Detective Conkel in which Appellant first admitted there were 2 persons involved getting into 3 cars; his statement that "I go out one time in 9 months and I get caught"; and his later admission that he broke into 4-5 cars.
>
> 9. The jail phone call in which Appellant told his mother: "This Jodi Conkel bitch, she unloaded massive shit…she was dead on…."
>
> 10. The letter Appellant wrote to Shelly Stidham which stated in part: "When they picked me up I did not say shit…She showed me a film of me and Hank in a driveway but didn't show us go in. So stick with that…."

{¶46} It is true the State's case was mostly circumstantial. However, whether the evidence supporting a defendant's conviction is direct or circumstantial does not bear on our determination. *State v. McClain,* 4th

Dist. Pickaway No. 2014-Ohio-4192, ¶ 48. "Circumstantial evidence and direct evidence inherently possess the same probative value * * *." *McClain, supra*, quoting *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph one of the syllabus (overruled on other grounds.)

{¶47} It is also true the State's case had weaknesses. There was no fingerprint evidence and no eyewitness testimony. Melissa Keating, Shelly Stidham, and Hank Jones gave contradictory testimony at times, and all were facing various criminal charges. Detective Conkel questioned Appellant and Jones about crime sprees in other neighborhoods in Scioto County, although she testified she focused on the Tipton Lane events. Hank Jones attempted to discredit Detective Conkel's testimony by telling the jury she "prepped" him for the initial interview implicating Appellant, outside in the hallway while they were alone. During his videotaped interview, Appellant repeatedly denied entering anyone's residence.

{¶48} However, the jury was in the best position to view the witnesses and assess their credibility. A jury sitting as the trier of fact is free to believe all, part or none of the testimony of any witness who appears before it. *State v. Grube*, 4th Dist. Gallia No. 12CA7, 2013-Ohio- 692, ¶ 31. A jury is in the best position to view the witnesses and to observe witness demeanor, gestures and voice inflections, and to use those observations to

weigh credibility. *Grube, supra*; *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Appellate courts should not generally second guess juries on matters of weight and credibility. *Grube, supra*; See *State v. Vance*, 4th Dist. Ross No. 03CA27, 2004-Ohio-5370, at ¶ 10. In light of the overwhelming circumstantial evidence of Appellant's guilt, we do not find the trial court's allowance of one leading question caused prejudicial error. For the foregoing reasons, we overrule Appellant's second assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

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

For the Court,

BY: _____
Matthew W. McFarland,
Administrative 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.