[Cite as *Sttae v. Boekhoff*, 2009-Ohio-5343.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE STATE OF OHIO

Plaintiff-Appellee

-vs-

SCOTT A. BOEKHOFF

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 09 CAA 02 0014

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 07CRI120693
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 5, 2009

APPEARANCES:

For Plaintiff-Appellant

DAVID A. YOST
Delaware County Prosecuting Attorney

By: BRENDA S. LEIKALA
Assistant Prosecuting Attorney
140 N. Sandusky Street
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For Defendant-Appellant

JOHN R. CORNELY
941 Chatham Lane, Ste. 201
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Hoffman, J.

{¶1} Defendant-appellant Scott A. Boekhoff appeals the January 27, 2009 Judgment Entry of the Delaware County Court of Common Pleas denying his petition for post-conviction relief. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 4, 2007, officers from the Delaware Police Department responded to a domestic relations incident at a campground located at 257 London Road, Delaware, Ohio around 10:00 p.m. Upon arriving at the empty campground lot, the officers discovered Kimberly Scaggs dazed, intoxicated and bleeding from her head. The officers learned Scaggs had been assaulted. Appellant, who was living with Scaggs at the campsite, was a suspect in the assault. Appellant was not found at the campsite, and the officers searched the grounds but were unable to find Appellant. As a result, a warrant was issued for Appellant's arrest.

{¶3} Officers found and confiscated Appellant’s cellular phone from the scene of the campsite.

{¶4} On September 4, 2007, the Delaware County Grand Jury indicted Appellant in case number 07 CRI 09 0503 on one count of felonious assault, in violation of R.C. 2903.11(A)(1), and one count of domestic violence, in violation of R.C. 2919.25(A).

{¶5} Following Scaggs release from the hospital, she contacted Appellant and they returned to Delaware. Corey Dean, Scaggs’ son, testified he heard Appellant make a threatening two way communication with Scaggs, “If you don't call off the dogs, then I'll make sure you don't breathe again.”

{¶6} From September 4, 2007 until September 30, 2007, Appellant contacted Scaggs on a cellular phone owned by Thomas Shopshire. The phone did not have two-way communication capabilities. Appellant also contacted Scaggs via the jail telephone, which calls were recorded.

{¶7} Appellant was arrested on September 30, 2007, and at the time of his arrest was in possession of his mother's cellular phone.

{¶8} Scaggs visited the jail on numerous occasions and contacted Appellant via telephone at the jail, during which they discussed her testimony.

{¶9} On December 7, 2007, the Delaware County Grand Jury indicted Appellant in case number 07 CRI 12 0693. Counts one and two of the indictment mirrored the charges in case number 07 CRI 09 0503, and added count three, intimidation of a witness in a criminal case, in violation of R.C. 2921.04(B), and count four, aggravated menacing, in violation of R.C. 2903.21(A). The state subsequently dismissed the charges in case number 07 CRI 09 0503.

{¶10} Appellant was arraigned in case number 07 CRI 12 0693 on December 12, 2007. On December 12, 2007, Appellant moved the trial court to continue the December 13, 2007 jury trial. The trial court granted the request, and rescheduled the jury trial for February 19, 2008.

{¶11} During pretrial preparation, defense counsel asked the State whether they knew the whereabouts of Appellant's cell phone. The State indicated they did not know of the location of the phone. However, during opening statements it was revealed to the prosecutor the phone was in an evidence locker at the police station. The prosecutor did not inform defense counsel of the phone's existence until the next day. The trial

court refused to admit the cellular phone into evidence due to the State's failure to disclose it earlier, believing it was inculpatory evidence as did defense counsel.

{¶12} Following the February 19, 2008 jury trial, Appellant was convicted on all counts, and sentenced to a total of five years in prison. Appellant timely appealed to this Court.

{¶13} On September 3, 2008, Appellant filed a petition for post-conviction relief. The trial court held a hearing on the petition on November 17, 2008.

{¶14} On December 16, 2008, this Court affirmed Appellant's conviction.

{¶15} Via Judgment Entry of January 27, 2009, the trial court denied Appellant's petition for post-conviction relief.

{¶16} Appellant now appeals assigning as error:

{¶17} "I. THE TRIAL COURT ERRED IN USING THE WRONG STANDARD IN FINDING THAT THE *BRADY* EVIDENCE WAS NOT MATERIAL AND THEREFORE IT ERRED IN DENYING APPELLANT'S PETITION FOR POST-CONVICTION RELIEF.

{¶18} "II. THE TRIAL COURT ERRED WHEN IT FOUND THE *BRADY* EVIDENCE WAS NOT MATERIAL SINCE THE ABSENCE OF THE EVIDENCE AT TRIAL UNDERMINED CONFIDENCE IN THE VERDICT.

{¶19} "III. THE MISCONDUCT OF THE ASSISTANT PROSECUTING ATTORNEY IN FAILING TO COMPLY WITH OHIO RULES OF CRIMINAL PROCEDURE RULE 16(D) VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL."

I, II

{¶20} Appellant's first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together. The errors

alleged are raised only with respect to Appellant's convictions for intimidation of a witness and aggravating menacing.

{¶21} Ohio Revised Code Section 2953.21 reads:

{¶22} "(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief."

{¶23} Appellant's petition for post-conviction relief asserts the State violated his rights to due process in not disclosing the recovery of his cellular phone at the site of the incident on September 4, 2007. The trial court found the evidence not material to

Appellant's conviction because the evidence against Appellant was "overwhelming" and knowledge of the existence of the cell phone "would [not] have affected the result of the trial". (See Jan. 27, 2009 Judgment Entry). Appellant maintains the correct standard to be applied in this situation is to determine "whether the verdict is one worthy of confidence". *State v. Brown* (2007), 115 Ohio St.3d 55. Appellant asserts the absence of the evidence at trial undermined confidence in the verdict. As did the trial court, we disagree.

{¶24} At the hearing on Appellant's petition for post-conviction relief, the trial court found the State failed to disclose the evidence, and the evidence was favorable to the defense.

{¶25} In Brady v. Maryland, (1963), 373 U.S. 83, the United States Supreme Court held, "...the suppression by the prosecution of evidence favorable to the accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Accordingly, the focus is on whether the failure to disclose the existence of the cell phone was material.

{¶26} In *State v. Brown* (2007), 115 Ohio St.3d 55, the Ohio Supreme Court held:

{¶27} "Due process requires that the prosecution provide defendants with any evidence that is favorable to them whenever that evidence is material either to their guilt or punishment. *Brady,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215. Evidence is considered material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United*

States v. Bagley (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481. This standard of materiality does not require that disclosure of the evidence would have resulted in the defendant's acquittal. *United States v. Agurs* (1976), 427 U.S. 97, 111, 96 S.Ct. 2392, 49 L.Ed.2d 342.

{¶28} "In determining materiality, the relevant question "is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley* (1995), 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490. Thus, the rule set forth in *Brady* is violated when the evidence that was not disclosed "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435, 115 S.Ct. 1555, 131 L.Ed.2d 490. In the end, this standard not only protects defendants; by ensuring a fair trial, it also protects the system of justice as a whole.

{¶29} "***

{¶30} "As a rule, undisclosed evidence is not material simply because it may have helped the defendant to prepare for trial. The United States Supreme Court has rejected a standard of materiality that focuses 'on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence.' *Agurs,* 427 U.S. at 112-113, 96 S.Ct. 2392, 49 L.Ed.2d 342, fn. 20. But that rule speaks to the question of materiality, not prejudice. See id."

{¶31} While the trial court found the evidence was favorable to the defendant, it went on to explain why the verdict was "worthy of confidence." The trial court found,

{¶32} "The recorded jail phone calls themselves provided ample evidence of the Defendant's attempts to coerce the victim to claim loss of memory, which she did at trial. The jail calls alone provided more than enough evidence to convict on Count Three and Four. Access and knowledge of the police possession of the Defendant's cell phone would have only confirmed that he did not make calls from his cell phone. The jail phone recordings were heard by the jury." (See, Jan. 27, 2009 Judgment Entry).

{¶33} We note, both the victim and her son testified at trial Appellant made threatening phone calls, but did not testify the calls were made from Appellant's cellular phone. Contrary to Appellant's assertion, we find the trial court correctly cited the correct standard in its judgment entry and did not error in finding the evidence not material.

{¶34} Accordingly, Appellant's first and second assignments of error are overruled.

III.

{¶35} Appellant's third assignment of error asserts misconduct of the prosecuting attorney in failing to comply with Criminal Rule 16(D), claiming the same violated his right to a fair trial and due process of law.

{¶36} For the reasons set forth in our discussion of Appellant's Assignments of Errors I and II, we find no prejudicial error resulted from Appellee's failure to disclose the existence of the cell phone before trial.

{¶37} Accordingly, the third assignment of error is overruled.

{¶38} The January 27, 2009 Judgment Entry of the Delaware County Court of Common Pleas is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
SCOTT A. BOEKHOFF	:	
	:	
Defendant-Appellant	:	Case No. 09 CAA 02 0014

For the reasons stated in our accompanying Memorandum-Opinion, the January 27, 2009 Judgment Entry of the Delaware County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ John W. Wise
HON. JOHN W. WISE