[Cite as *State v. King*, 2010-Ohio-5701.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. CT2010-0010
STEPHANIE KING	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas Case No. CR2009-062
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	November 18, 2010

APPEARANCES:

For Plaintiff-Appellant:

D. MICHAEL HADDOX
Muskingum County Prosecutor
27 N. Fifth Street
Zanesville, Ohio 43701

RON WELCH 0069133
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellee:

ROBERT MCCLELLAND 0082365
P.O. Box 340
Zanesville, Ohio 43702

Delaney, J.

{¶1} The State of Ohio appeals the decision of the Muskingum County Court of Common Pleas, granting a mistrial due to a discovery violation and then dismissing the State's case with prejudice. Defendant-Appellee is Stephanie King.

{¶2} In August, 2009, Appellee was indicted on one count of theft, in violation of R.C. 2913.02, a felony of the fifth degree. Her case proceeded to trial on January 27, 2010.

{¶3} During opening statements, the prosecution made references to statements made by Appellee to a police investigator as well as to the State's witnesses. They also referenced the fact that Appellee was caught with the victim's wallet in her hand and that she handed $680.00, which was stolen from the victim, back to the victim when she was caught. The State additionally made reference to text messages sent by Appellee during opening statements. No objection was made by defense counsel.

{¶4} During voir dire and during defense counsel's opening statement, counsel repeatedly alluded to the fact that Appellee would take the stand in her own defense and would explain her side of the story. Defense counsel state that Appellee would say that she "found" the victim's money and her wallet. Counsel also stated that Appellee had a prior theft conviction.

{¶5} The State then called the victim, Morgan McKinnan, to testify as its first witness. Ms. McKinnan testified that her wallet was stolen as well as a camera and $680.00 from a room at the Genesis School, where she was employed. She testified that Appellee was discovered by another school employee with her wallet. She also

testified that Appellee handed her the $680 out of her purse when the other employee stepped out of the room.

{¶6} At that time, the prosecutor asked Ms. McKinnan if Appellee had texted her about the incident, to which Ms. McKinnan responded that she had. The prosecutor then asked if she remembered the content of those statements, to which Ms. McKinnan replied, “She apologized. She said she - - I don’t remember exactly word for word. Can I just - -“

{¶7} The prosecutor then handed Ms. McKinnan copies of several text messages that had been printed off. The prosecutor then again asked Ms. McKinnan about the content of the messages, and Ms. McKinnan read one of the messages, which stated, “I can’t even begin to apologize to you enough. I hope that someday you will find it in your heart to forgive me. No time soon, but I hope someday.”

{¶8} No timely objection was made to this testimony.

{¶9} After the prosecutor finished direct examination, defense counsel asked to approach the bench. Defense counsel notified the court that he had not been provided copies of these text messages in discovery. The prosecutor stated that it appeared that the text messages had been left out of discovery. Specifically, the prosecutor stated, “Your Honor, I’m looking right now through our discovery. There’s not a reason why other than an oversight in the discovery process, Your Honor. I do not see where they have been provided in discovery, Your Honor.”

{¶10} Defense counsel requested a mistrial, and the court granted the mistrial. The court then issued a journal entry, filed on February 4, 2010, wherein it gave a basic

summary of its reasons for granting the mistrial and then dismissed the State's case with prejudice, thereby barring the State from re-trying Appellee.

{¶11} The State requested that the court issue findings of fact and conclusions of law. On May 19, 2010, the trial court did so, and within its entry, stated "that the act of the State hints toward intentional overreaching to gain an unfair tactical advantage."

{¶12} The State now appeals and raises one Assignment of Error:

{¶13} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN DECLARING A MISTRIAL AND BY DISMISSING THE STATE'S CASE WITH PREJUDICE DUE TO AN INADVERTENT DISCOVERY VIOLATION."

I.

{¶14} In its sole assignment of error, the State of Ohio asserts that the trial court abused its discretion in declaring a mistrial and by dismissing the State's case with prejudice due to an inadvertent discovery violation.

{¶15} Trial courts have the discretion to impose various sanctions for discovery rule violations. See Crim. R. 16(L) (previously Crim. R. 16(E)(3)). Specifically, trial courts are permitted to do the following:

{¶16} "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." Crim. R. 16(L)(1).

{¶17} Former Crim. R. 16(E)(3), which was in place at the time this trial occurred, stated:

{¶18} "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} In examining a trial court's decision regarding sanctions for discovery rule violations, an abuse of discretion standard applies. *State v. Wiles* (1991), 59 Ohio St.3d 71, 78, 571 N.E.2d 97. A trial court is required to 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." *City of Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138, paragraph two of the syllabus.

{¶20} In *State v. Howard* (1978), 56 Ohio St.2d 328, 333, 10 O.O.3d 448, 451, 383 N.E.2d 912, 915, the Supreme Court stated, "[t]he philosophy of the Criminal Rules is to remove the element of gamesmanship from a trial." The purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one party. The overall purpose is to produce a fair trial. *Papadelis*, supra, at 3, citing *State v. Mitchell* (1975), 47 Ohio App.2d 61, 80, 1 O.O.3d 181, 192, 352 N.E.2d 636, 648.

{¶21} Crim. R. 16 provides a range of sanctions that the trial court may impose, given the severity of the violation. We note that in this case, the violation was that the

prosecution failed to turn over inculpatory text messages sent by the defendant to the victim in the case. The content of the message that was read into evidence at trial was a vague apology asking Ms. McKinnan to forgive Appellee. The message did not specifically state what she was asking Ms. McKinnan to forgive her for.

{¶22} In *Papadelis*, the Supreme Court stated, "we find that a trial court must inquire into the circumstances surrounding a violation of Crim.R. 16 prior to imposing sanctions pursuant to [then] Crim.R. 16(E)(3). Factors to be considered by the trial court include the extent to which the [party] 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." *Papadelis*, at 5.

{¶23} They went on to state, "If a short continuance is feasible and would allow the [party] sufficient opportunity to minimize any surprise or prejudice caused by the noncompliance with pretrial discovery, *such alternative sanction should be imposed*. Even citing *** 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." Id.

{¶24} In the present case, the trial court did not impose the least severe sanction that was consistent with the purpose of the rules of discovery. In fact, the trial court imposed the most severe sanction that it could. The court declared a mistrial and

then dismissed the State's case with prejudice, thereby precluding the State from being able to try Appellee on the charges again. Such a sanction is only appropriate where misbehavior by the offending party was intentionally calculated to cause or invite a mistrial. *State v. Serafini*, 5th Dist. No. 2005-CA-00135, 2006-Ohio-1187. In *Serafini*, this Court noted that "[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." Id., at ¶40, internal citations omitted.

{¶25} The prosecutor referred to the text messages in opening statement, and trial counsel did not object. Moreover, trial counsel did not object during direct examination when this text message was marked as evidence and given to the witness to refresh her recollection. Trial counsel waited until the prosecutor completed his direct examination before asking to approach and informing the trial court that counsel had not received a copy of the text messages in discovery.

{¶26} It is important to note that during defense counsel's opening statement and during voir dire, defense counsel stated that the defendant would be testifying at trial, and even went so far as to inform the jury that the defendant has a prior conviction for theft.

{¶27} From the opening statements of counsel and from the brief direct examination of Ms. McKinnan, the other evidence against Appellee appears to be substantial, in that Appellee was caught with Ms. McKinnan's wallet in her hand, she

took the $680.00 out of her purse and handed it back to Ms. McKinnan, and she told a law enforcement officer that she had taken the wallet.

{¶28} When defense counsel asked for a mistrial, the following exchange took place outside of the hearing of the jury:

{¶29} "Mr. McClelland: * * * I'm objecting to the – I know it's not been submitted as evidence but used to refresh the recollection, statements by my client apparently by text message. I want to look at these for authentication purposes, but I also want to bring to the attention that I did not - - was not afforded these in discovery.

{¶30} "The Court: Thank you. That's enough. Mr. Welch, why wouldn't they get that in discovery?

{¶31} "Mr. Welch: Your Honor, I'm looking right now through our discovery. There's not a reason why other than an oversight in the discovery process, Your Honor. I do not see where they have been provided in discovery, Your Honor.

{¶32} "The Court: Is there anything exculpatory in that?

{¶33} "Mr. Welch: No.

{¶34} "The Court: It was all inculpatory?

{¶35} "Mr. Welch: It is all inculpatory.

{¶36} * * *

{¶37} "The Court: I'd like to see them. Mr. Welch, the problem I have with this, you brought this up in your opening statement. You didn't just bring it up to refresh her recollection. And you never gave it to defense counsel.

{¶38} "Mr. Welch: I understand, Your Honor. Your Honor, we would offer at this point that the defendant has indicated that she will be testifying. The State would have

been able to present those to her for the purposes of cross-examination to inquire of her under oath as to whether or not she had made those statements. That option is still available to the defense counsel, if they choose to contradict the validity of those statements.

{¶39} "The Court: I understand that. Mr. Welch. It's not what I'm talking about. You offered that. You brought those up in your opening statement.

{¶40} "Mr. Welch: I understand.

{¶41} "The Court: And you didn't provide those to defense counsel.

{¶42} "Mr. Welch: I understand, Your Honor. That being said, I would like to remind the court that it was during voir dire that the issue of the defendant testifying was first made known to the jury, in addition to the fact that she did have a prior. So that - - those issues were ones that were covered prior to the State mentioning the evidence during opening.

{¶43} * * *

{¶44} "The Court: Mr. Welch, explain to me why this is not invited error on behalf of the prosecutor? Why shouldn't I declare a mistrial and dismiss these charges?

{¶45} "Mr. Welch: Your Honor, we believe that the oversight is on the fault of the State. That is - - that is not an issue. However - -

{¶46} "The Court: And it's an admission of the defendant.

{¶47} "Mr. Welch: It - - Your Honor, we would – we could claim that it is a statement by the defendant from the standpoint of our witness being able to validate that. Now we believe that the defense counsel can also contradict that and - - during the course of cross-examination by saying, you know, is this a statement, it is not.

{¶48} "The Court: But you didn't provide it.

{¶49} "Mr. Welch: And I agree that - - that the State has not provided that. However, I do - -

{¶50} "The Court: If you would have provided it, it wouldn't be an issue. Right?

{¶51} "Mr. Welch: Correct.

{¶52} "The Court: Okay.

{¶53} "Mr. Welch: Correct. I do believe, however, defense counsel has had an opportunity to review those, that the time that it took and the impact on this case is minimal, that the defense counsel has an opportunity to cross-examine the individual that has provided the text information to the State. He has had an opportunity to question his client in front of the jury, which he has already indicated she is going to testify.

{¶54} "So the items the Court would be worried about, unfairly prejudicing the jury, can be addressed so that they are not overwhelming against the defendant. Now, had this been a case where the defendant were not going to testify, there had not been that representation, or where this was, say, a signed statement or a videotaped statement, something of that nature, then we believe the Court would be within its discretion to consider much harsher sanctions as far as the resolution of this case. However - -.

{¶55} "The Court: But Mr. Welch, let me pause you. In voir dire, it may have been mentioned about the defendant testifying. However, in your opening statement before they're [sic] opening statement, you brought this up. You brought this text message up, which was a statement of the defendant. She may not testify. You don't

know that she's going to testify. They can always at the last minute choose not to testify based upon the case as it's presented up to that point.[1]

{¶56} "Mr. Welch: I agree. However - -

{¶57} "The Court: But you already have this admission of hers, statement of the defendant, that you've had in your possession. I looked at the date. It was dated seven days after the incident.

{¶58} "Mr. Welch: Correct.

{¶59} "The Court: I think it's a big problem.

{¶60} "Mr. Welch: Your Honor, I agree that it is an error on behalf of the State. However, I don't think it's one that should be fatal to this case. And the fact that - -

{¶61} "The Court: Mr. McClelland, what's your position?

{¶62} "Mr. McClelland: Your Honor, you know, I'm very concerned with the discovery issues. I mean, that, - - first and foremost, Brady violations[2], violation of Criminal Rule 16. You know, if these text messages were just discussed and not provided for her to - - as a document, as a physical, tangible document, I might not have such an issue with it. * * *

{¶63} "The Court: Are you moving for a mistrial?

{¶64} "Mr. McClelland: Yes, I am.

---

[1] While certainly the trial court is correct that a defendant can choose at the last minute not to testify, we find it unlikely in this case that the defendant would do so, as her counsel had already disclosed to the jury that she had a prior criminal conviction for theft and counsel repeatedly stated in voir dire and opening statement that the jury would hear from the defendant.

[2] A *Brady* violation occurs when the State fails to turn over exculpatory statements or evidence to a defendant prior to trial. See *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. There was no *Brady* issue in this case.

{¶65} "The Court: I'm granting it. I'm going to grant your motion for mistrial. I find that the State invited error in this matter. Jeopardy attached. The case is dismissed."

{¶66} Further, in the trial court's findings of fact and conclusions of law supporting its dismissal of the charges, it stated, "Because this mistrial occurred due to the failure of the State to allow discovery of its most crucial piece of evidence, which had extremely high probative value, this Court concluded that the act of the State hints toward intentional overreaching to gain an unfair tactical advantage." (Emphasis added by trial court). The only other sanction that the trial court mentioned in its entry was the possibility of a limiting instruction. The court did not address, at any place on the record or in its entry, the prosecutor's statement that the exclusion of the text messages from discovery was an oversight and that it was not intentional. Moreover, the trial court failed to consider, either on the record, or in its entry, a less restrictive sanction, such as a continuance or striking the testimony.

{¶67} In *State v. Montgomery* (1982), 3 Ohio App.3d 280, 445 N.E.2d 254, the Hamilton County Court of Appeals addressed the failure of the state to disclose the existence of a statement of a co-defendant prior to trial and held that a defendant can be retried consistently with the doctrine of double jeopardy when his first trial ended in a mistrial due to the prosecutor's violation of Crim.R. 16(B). In arriving at its conclusion, the court of appeals analyzed the issue in the following terms directly applicable to the case before us:

{¶68} " * * * In determining whose interest shall prevail, the public's or the defendants', the critical inquiry is whether the defendants' opportunity for acquittal has

been impaired by the mistrial; in the obverse, it is whether the prosecution has, as a result of the mistrial, gained an advantage in the subsequent trial.

{¶69} "The factors favoring a new trial in the instant case and affirmance of the judgment below are several. Although the mistrial was caused by the prosecutor's failure to disclose under circumstances that imply negligence (when most charitably viewed), the prosecutor obviously did not intend to cause a mistrial. If anything, he wished to proceed to judgment in the first trial, and the declaration of a mistrial was to his disadvantage. On the other hand, the defendants now have the advantage of having [the co-defendant's] testimony in the first trial as well as her written statement, and they have information superior to what they had at the first trial." Id. at 282, 445 N.E.2d 254. See also, *State v. Barham* (Dec. 7, 1989), 3rd Dist No. 4-*88*-4." *Serafini*, at ¶¶49-51.

{¶70} In *Oregon v. Kennedy (1982),* 456 U.S. 667, 679, 102 S.Ct. 2083, 72 L.Ed.2d 416, the Supreme Court held:

{¶71} " ' * * * [T]he circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial."

{¶72} *Oregon*, supra, makes clear that prosecutorial misconduct will bar a second trial only when such behavior was 'intentionally' calculated to cause or invite mistrial. *State v. Doherty* (1984), 20 Ohio App.3d 275, 276, 485 N.E.2d 783. (See also, in accord, *State v. Glover* (1988), 35 Ohio St.3d 18, 20, 517 N.E.2d 900.)

{¶73} Having carefully reviewed the record, we find that there is insufficient evidence to conclude that the State acted with intent to goad Appellee into asking for a

mistrial. In fact, when defense counsel approached, he did not ask for a mistrial. The trial court suggested it and spent several minutes scolding the prosecutor for the oversight. Only after it was clear that the trial court was inclined to grant a mistrial and dismiss the case did Appellee ask for a mistrial.

{¶74} There is no evidence in the record that the State's mistake "hints toward intentional overreaching to gain an unfair tactical advantage." The State admitted on the record that it inadvertently omitted to provide the text messages in discovery. We do not find any evidence in the record that the prosecutor intentionally withheld evidence from the defense, nor do we find evidence that the trial court found the prosecutor's admission of inadvertent nondisclosure to be without credibility.

{¶75} Because we do not perceive any substantial prejudice to Appellee's right to a fair trial, we conclude that the trial court abused its discretion in ordering a mistrial and dismissing the case with prejudice. Appellant's assignment of error is sustained.

{¶76} The judgment of the Muskingum County Court of Common Pleas is reversed and this matter is remanded for a new trial.

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

[Cite as *State v. King*, 2010-Ohio-5701.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
STEPHANIE KING	:	
	:	
Defendant-Appellee	:	Case No. CT2010-0010
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is reversed and remanded. Costs assessed to Appellee.

_____
HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. JOHN W. WISE