[Cite as *State v. Winstead*, 2015-Ohio-1579.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MICHAEL A. WINSTEAD

Defendant-Appellant

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

Case No. 13 CA 87

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2013 CR 377
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 23, 2015

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1}. Appellant Michael A. Winstead appeals his conviction, in the Court of Common Pleas, Fairfield County, for aggravated burglary and felonious assault. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2}. In 2013, Carey Nichols was in a romantic relationship with appellant. Tr. at 62. On or about July 26, 2013, Nichols ended the relationship with appellant, and she requested that he leave her alone. *Id.*

{¶3}. Two days later, on the afternoon of July 28, 2013, appellant sent a text to Nichols asking to come to her house, located on Washington Avenue in Lancaster, Ohio. Tr. at 64. Nichols lived there with Gerald Brunton, the father of her three children. She was trying to "work things out" with Brunton, including possibly getting married. Tr. at 68, 212. Appellant eventually walked to Nichols' house, appearing intoxicated when he arrived. Nichols asked him to go home. Tr. at 64. Appellant left, but he continued to place unwanted texts and calls to Nichols. Tr. at 65-66.

{¶4}. Eventually, Ms. Nichols and Mr. Brunton went back inside their residence, and shortly thereafter, Robyn Saunders and Tonya Whipps arrived and hurriedly went into Nichols' house. Tr. at 76, 213. They informed Nichols and Brunton that appellant was heading back to their residence, and that he had a butcher's knife. *Id.* Shortly thereafter, Nichols saw appellant walking through the front yard with a butcher knife in one hand and a beer in the other. Tr. at 77-79.

{¶5}. Nichols rushed to the then-open front door to secure it. Tr. at 80. She placed her body weight against the door as appellant started kicking the door, trying to get in. *Id.* Appellant was yelling threats, mostly directed at Brunton. He claimed he

would stab or kill Brunton, and he continued to try to break through the door. Tr. at 214-215.

{¶6}. Appellant then went to the side door and forcibly opened it in order to get into the house. Tr. p. 85. Appellant came through the doorway, "swinging his knife" at Brunton. In response, Brunton used a broom to fend off appellant's "slashing" motions. Tr. at 219-220. Once inside, appellant continued waving his knife at Brunton, who maintained his defense with the broom. Tr. at 86-88. Nichols noticed a police officer arriving, and told appellant to get out. Tr. at 224. Appellant yelled: "I don't give a fuck about no cops." Tr. at 91-92. He then turned to walk out the door and stated that "it's time to die, he's going to shoot me." *Id.*

{¶7}. Officer Alex Sinewe of the Lancaster Police Department was on patrol on the afternoon of July 28, 2013. He obtained a call from a dispatcher, who had heard "a female screaming and *** the words 'Michael has a knife.' " Tr. at 247. Officer Sinewe responded to Nichols' residence, and was on the scene very briefly when he observed appellant step out on the porch with a knife in his hand. Tr. at 249. Sinewe immediately drew his firearm, pointed it at appellant, and started yelling verbal commands to drop the knife. *Id.* Appellant did not comply, but instead came off the porch and walked towards Sinewe. Tr. at 249-250. He did not stop until he was "within five to six feet" of the officer. *Id*. Sinewe recalled that appellant "kept screaming at me just kill me, just shoot me ***." Tr. at 250. During the standoff, appellant had one hand holding the butcher knife and the other holding a beer can, from which he continued to drink. Tr. at 253.

{¶8}. Within minutes, Officer Daniel Thomas (later promoted to detective) responded to the scene because he believed an officer might need assistance. Detective Thomas saw appellant five or six feet from Officer Sinewe, "shaking a knife" at him. He initially grabbed for his weapon, believing Sinewe's life was in danger. Thomas also told appellant to drop the knife, and when appellant did not do so, Thomas deployed his Taser device. After being tased, appellant still did not drop the knife. However, Officer Sinewe was then able to kick the knife out of appellant's hands. Appellant was handcuffed, and medics arrived to remove the taser probes. *See* Tr. at 293-300. Appellant was uncooperative with medics and called the officers "a bunch of pussies for not shooting him ***." Tr. at 302. Appellant was then transported in an ambulance. Tr. at 305.

{¶9}. On August 2, 2013, the Fairfield County Grand Jury indicted appellant on one count of aggravated burglary, a felony of the first degree, and one count of felonious assault, a felony of the second degree.

{¶10}. A jury trial was conducted on November 19-20, 2013. After hearing the evidence, which included the testimony of Ms. Nichols, Mr. Brunton, Ms. Whipps, Ms. Saunders, Officer Sinewe, and Detective Thomas, the jury found appellant guilty on both counts as set forth in the indictment.

{¶11}. Following a sentencing hearing on November 27, 2013, appellant was sentenced to six years on each count, to be served consecutively.

{¶12}. On December 13, 2013, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

{¶13}. "I. THE TRIAL COURT ERRED WHEN IT DID NOT SUPPRESS A RECORDING THAT THE STATE PROVIDED TO DEFENSE COUNSEL LESS THAN 24 HOURS PRIOR TO TRIAL.

{¶14}. "II. THE TRIAL COURT ERRED BY NOT ALLOWING DEFENSE COUNSEL TO IMPEACH THE WITNESS' TESTIMONY VIA A PRIOR CONVICTION PURSUANT TO OHIO RULES OF EVIDENCE RULE 609."

I.

{¶15}. In his First Assignment of Error, appellant contends the trial court erred in declining to suppress or exclude an audio recording of a telephone call made by appellant from the jail. We disagree.

{¶16}. Evid.R. 103(A) provides that error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected. Specifically, Crim.R. 16(L)(1) (formerly (E)(3)) vests in the trial court the discretion to determine the appropriate response or sanction for failure of a party to disclose material subject to a valid discovery request. *State v. Larkins*, 5th Dist. Richland Nos. 2007-CA-0092, 2007-CA-0093, 2008-Ohio-5982, ¶ 65. Furthermore, the United States Supreme Court has recognized that the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. *See United States v. Bagley* (1985), 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481.

{¶17}. In *State v. Parson* (1983), 6 Ohio St.3d 442, 445, 6 OBR 485, 487, 453 N.E.2d 689, the Ohio Supreme Court noted: "The court is not bound to exclude [nondisclosed discoverable] material at trial although it may do so at its option." In *Parson,* the Court established three factors that should govern a trial court's exercise of

discretion in imposing a sanction for a discovery violation committed by the prosecution. They are (1) whether the failure to disclose was a willful violation of Crim.R. 16, (2) whether foreknowledge of the undisclosed material would have benefited the accused in the preparation of a defense, and (3) whether the accused was prejudiced. *Id.* at the syllabus; *Darmond, infra*, ¶ 35.

{¶18}. In addition, "[p]aragraph two of the syllabus in *Lakewood v. Papadelis,* 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), provides that when deciding whether to impose a sanction, the court must impose the least severe sanction that is consistent with the purpose of the rules of discovery. 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, ¶ 14, citing *State v. Darmond,* 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, syllabus.

{¶19}. The evidentiary item at issue in the case sub judice is a CD recording of a telephone call made by appellant to Nichols while he was being held at the jail. Just before the commencement of proceedings on the day of trial, appellant had filed a motion in limine to preclude the State from using several recordings of such phone calls, which had been disclosed to appellant's defense counsel a few days before the trial. The trial court heard from the attorneys on the case on the morning of trial, outside the presence of the jury. *See* Tr. at 14-30. Appellant's defense counsel sought to exclude the State's use of the CD recordings as evidence, but we note he did not request a continuance of the trial as a sanction. *See* Tr. at 28. It appears undisputed that the CD in question was sent to appellant's trial counsel by regular mail, arriving the Monday

before the commencement of the Tuesday trial.[1] However, Assistant Prosecutor Meade had called defense counsel the Friday before the trial and read him a "brief transcript" of the recorded phone call in question. Tr. at 19.

{¶20}. The trial court made the following pre-trial ruling on the matter from the bench:

{¶21}. "The Court is required to attempt to serve the purposes of Criminal [Rule] 16 concerning the fair exchange of materials on both sides and the Court finds that providing -- allowing the defendant to have had these materials in his possession since the 18th and with the adopting the state's suggestion that the Court order the state to not present *** these materials to the jury again subject to any 403 rulings until the final part of its case tomorrow, the Court finds that that is sufficiently tailored to meet the purposes of discovery and would give Mr. Sarver ample opportunity to consider what he may need to do in terms of his trial strategy. So that will be the order of the Court."

{¶22}. Tr. at 28-29.

{¶23}. In regard to the three *Parson* factors, *supra*, we note Assistant Prosecutor Meade claimed that although the State was aware of the recordings and they were referenced in a prior hearing for purposes of setting bond, the "actual content" of the calls was not known until a staff investigator had listened to them on the Friday before trial as part of a group trial preparation in the office. *See* Tr. at 27. Meade also indicated that the State was "under the guns" upon realization that the trial commencement would have to be expedited due to looming speedy trial deadlines. *Id.*

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[1] Other telephone call recordings were sent to defense counsel by e-mail (rather than regular mail) on the Friday before trial; however, they were ultimately not used by the prosecutor at trial.

{¶24}. We find the credibility determination going to whether or not the State was "willful" in the aforementioned events was a matter better suited for the trial judge's firsthand review. Furthermore, it is undisputed that in the CD recording, appellant admits he was present at the scene with a knife, but he denied having an intent to harm anyone. Given that six eyewitnesses at trial (including the two police officers) placed appellant in or near the Nichols' residence carrying a knife and acting in a threatening manner, we are unpersuaded that the late disclosure of the recording constituted a significant detriment to the preparation of appellant's defense or that actual prejudice to appellant was established due to such delay.

{¶25}. Accordingly, we find no abuse of discretion under the circumstances in the trial court's remedy of directing the State to delay presentation of the phone call CD in question until the final phase of its case, in lieu of the more severe sanction of completely excluding the evidence. *See State v. Curry*, 5th Dist. Licking No. 99CA40, 1999 WL 770673 (stating "[w]hile we certainly do not encourage sluggish discovery tactics by any litigant, the trial court has discretion to determine what sanction is appropriate when the state fails to disclose discoverable material").

{¶26}. Appellant's First Assignment of Error is therefore overruled.

II.

{¶27}. In his Second Assignment of Error, appellant contends the trial court erred in preventing defense counsel from impeaching the victim/witness, Ms. Nichols, via questioning her about a prior drug-related crime. We disagree.

{¶28}. The admission or exclusion of relevant evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d

343. As a general rule, all relevant evidence is admissible. Evid.R. 402; cf. Evid.R. 802. Our task is to look at the totality of the circumstances in the case sub judice, and determine whether the trial court acted unreasonably, arbitrarily or unconscionably in allowing or excluding the disputed evidence. *State v. Oman* (Feb. 14, 2000), Stark App.No. 1999CA00027.

{¶29}. Appellant recites Evid.R. 609, which addresses "impeachment by evidence of conviction of crime." The rule states in pertinent part:

{¶30}. "(A) * * * For the purpose of attacking the credibility of a witness:

{¶31}. "(1) subject to Evid.R. 403, evidence that a witness other than the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted.

{¶32}. "(2) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

{¶33}. "(3) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance."

{¶34}. In the case sub judice, several weeks prior to trial, the State filed a motion in limine to exclude any evidence or argument relating to the granting of "intervention in lieu of conviction" ("ILC") to witness Carey Nichols in an unrelated criminal possession case. R.C. 2951.041(A)(1), addressing ILC procedures, states in part as follows: "If an offender is charged with a criminal offense, including but not limited to a violation of section 2913.02, 2913.03, 2913.11, 2913.21, 2913.31, or 2919.21 of the Revised Code, and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the criminal offense with which the offender is charged or that, at the time of committing that offense, the offender had a mental illness, was a person with intellectual disability, or was a victim of a violation of section 2905.32 of the Revised Code and that the mental illness, status as a person with intellectual disability, or fact that the offender was a victim of a violation of section 2905.32 of the Revised Code was a factor leading to the offender's criminal behavior, the court may accept, prior to the entry of a guilty plea, the offender's request for intervention in lieu of conviction. ***."

{¶35}. R.C. 2951.041 thus provides that, upon request, certain eligible offenders may be placed under the general control and supervision of the county probation department, or another comparable agency, and if the individual successfully completes an intervention plan, he will have the criminal proceedings against him dismissed. *State v. Ingram*, 8th Dist. Cuyahoga No. 84925, 2005-Ohio-1967, ¶ 9, citing *State v. Dempsey,* 8th Dist. Cuyahoga No. 82154, 2003-Ohio-2579. We have recognized that a "conviction" consists of a guilty verdict and the imposition of a sentence or penalty. *See State v. Rowser*, 5th Dist. Stark No. 2010CA00065, 2011-Ohio-575, ¶ 15, citing *State v. Whitfield,* 124 Ohio St.3d 319, 2010–Ohio–2, 922 N.E.2d 182, ¶ 12.

{¶36}. We therefore find no abuse of discretion in the trial court's disallowance of impeachment of Ms. Nichols by defense counsel, on the basis that at the time of trial, her ILC participation was not a "conviction" for drug possession for the purposes of Evid.R. 609.

{¶37}. Appellant's Second Assignment of Error is therefore overruled.

{¶38}. For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Fairfield County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, J., concurs.

Hoffman, P. J., concurs separately.

JWW/d 0323

Hoffman, P.J., concurring

{¶39} I concur in the majority's analysis and disposition of Appellant's first assignment of error.

{¶40} I further concur in the disposition of Appellant's second assignment of error. My only divergence from the majority's analysis is that I find the standard of review of the issue presented involves a legal question - not one involving discretion.

{¶41} That being said, I agree with the majority the trial court did not commit error in excluding the evidence.