[Cite as *State v. Phillips*, 2013-Ohio-4525.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-12-1111

Appellee — Trial Court No. CR0201102749

v.

Jermaine Phillips — **DECISION AND JUDGMENT**

Appellant — Decided: October 11, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Claudia A. Ford, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Jermaine Phillips, appeals the April 18, 2012 judgment of the Lucas County Court of Common Pleas which, following a jury trial convicting him of attempted rape, sentenced appellant to a seven-year term of imprisonment. For the reasons that follow, we affirm.

{¶ 2} The relevant facts of this case are as follows. On October 28, 2011, appellant was indicted on charges of felonious assault, R.C. 2903.11(A)(1) and attempted rape, R.C. 2923.02 and 2907.02(A)(2). The charges stemmed from an incident on March 7, 2010, involving appellant and the victim, who he knew. Appellant entered not guilty pleas to the charges and on November 16, 2011, the matter proceeded to trial. The jury found appellant not guilty of felonious assault but guilty of the lesser included charge of assault. The jury was hung as to the attempted rape charge and the court declared a mistrial.

{¶ 3} A retrial on the attempted rape charge commenced on March 20, 2012. The victim again testified as to the events of March 7, 2010. The victim testified that around 10:30 p.m., one of the victim's children let appellant into her apartment. He began punching her, removed her clothing and forced her into the shower. Appellant then forced her on the bed. When he left to make sure the children did not leave to get help, the victim called 9-1-1. Appellant returned to the room and saw the victim on her cell phone; he broke the phone in half and threw it across the room. The phone remained operable and an audiotape of the call was made and played for the jury. The victim testified that the tape recorded appellant asking her: "Are you going to f*ck or not?" The victim admitted that she told the responding officers and hospital staff that she was not sexually assaulted. The victim also admitted at the prior "hearing" she denied being sexually assaulted.

{¶ 4} Following lengthy discussions between the state, defense counsel and the court, discussed in detail below, the original tape of the 9-1-1 call placed by the victim and a version enhanced just before the retrial commenced, were admitted into evidence. Thomas Staff, an investigator with the Lucas County Prosecutor's Office, testified that the procedure he used in enhancing the tape was essentially boosting the weakest signal or lowest sound. The content remained unchanged. The enhanced tape was played for the jury.

{¶ 5} Toledo Police Officer Joseph Trudeau testified that on March 7, 2010, he and his partner, Officer Brian Smith, responded to the 9-1-1 call and upon entering the house he heard a woman screaming. Officer Trudeau stated that he saw appellant and the victim naked on the bed. Appellant had his hands on the victim's hips and Trudeau stated that he appeared to be thrusting back and forth; he had an erection.

{¶ 6} Officer Trudeau testified that his partner wrote up the report of the incident but that they collaborated to ensure its accuracy. He agreed that after reviewing the report there was no mention of appellant having an erection. During redirect examination, Officer Trudeau was questioned further about the report and whether the statement that "appellant was attempting to penetrate her vaginally with his penis" implied that his penis was erect. Trudeau answered affirmatively. Officer Brian Smith offered similar testimony regarding the incident.

{¶ 7} Toledo Police Detective Timothy Kaminski testified that he was the detective on duty and responded to the scene on Dorr Street. The victim told Detective

Kaminski that she was not sexually assaulted; he believed her. Kaminski clarified that he had not yet read the responding officer's report or listened to the 9-1-1 recording.

{¶ 8} Following deliberations, the jury found appellant guilty of attempted rape. On April 18, 2012 appellant was sentenced and this appeal followed. Appellant raises four assignments of error for our review:

> Assignment of Error no. 1: The court's failure to consider the three factors delineated in *State v. Heinish* (1990), 50 Ohio St.3d 231, 553 N.E.2d 1026, resulted in a deprivation of Mr. Phillips' right to due process and right to a fair trial as guaranteed by the United States Constitution.
>
> Assignment of Error no. 2: Trial counsel's failure to object to the admission of the enhanced audio recording or, in the alternative, request a continuance resulted in a deprivation of Mr. Phillips' right to the effective assistance of counsel as guaranteed by the United States Constitution.
>
> Assignment of Error no. 3: Admission of testimony that consisted of an officer reading a report authored by a different officer, resulted in a deprivation of Mr. Phillips' constitutional guarantee to confront the witnesses against him and a violation of Evid.R. 803(8)(b).
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> Assignment of Error no. 4: Trial counsel's failure to object to an officer reading a report authorized by a different officer resulted in a deprivation of Mr. Phillips' right to the effective assistance of counsel as guaranteed by the United States Constitution.

{¶ 9} Appellant's first assignment of error asserts that the trial court erred in not fully considering the appropriate test for determining whether the state's failure to timely provide defense with the enhanced 9-1-1 audiotape required its exclusion at trial. The decision of a trial court regarding a Crim.R. 16 discovery sanction is reviewed under an abuse of discretion standard. *State v. Naugle*, 6th Dist. Wood No. WD-02-042, 2003-Ohio-2529 ¶ 17. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blackemore v. Blackemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). In applying this standard, "a reviewing court may not simply substitute its judgment for that of the trial court." *Id*.

{¶ 10} Appellant asserts that Crim.R. 16 was violated because the state did not disclose the enhanced audio of the 9-1-1 tape until the day before trial. The record indicates that the state did not receive the tape until a day before trial but immediately contacted appellant's counsel and the parties had the opportunity to hear and review the enhanced recording. However, appellant contends that disclosure by the state so close to trial violates Crim.R. 16 which provides, in part:

> (A) Purpose, Scope and Reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All 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. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

{¶ 11} In regulating discovery and disclosure, Crim. R. 16(L) states:

> 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.

{¶ 12} Despite the fact that the "enhanced" or amplified audio 9-1-1 tape recording was not received by either side until just one day before trial, the non-amplified or original copy had been made available to appellant well in advance of his first trial. The state's witness, Thomas Staff, explained at trial how both exhibits (Exhibits 1 and 1A) are essentially duplicates or replicas of one another. The sole difference between the two was that Exhibit 1A is amplified so the weakest sounding voice (appellant's voice) could be heard more clearly and easily.

{¶ 13} As the court noted at trial, under Ohio Rules of Evidence 1001 and 1003, these exhibits would meet the definitions of duplicates or copies. Evid.R. 1001(4) defines a duplicate as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including

enlargements and miniatures, or by mechanical or electronic re-recording * * *." In the case in question, the amplified recording was a counterpart produced by mechanical or electronic re-recording. If, as the rule states, an enlargement of a photograph from the original suffices as a duplicate or copy, it seems consistent that an amplified version of a 9-1-1 recording would suffice as a duplicate or copy of the non-amplified version. A similar stance was taken in *State v. Burnett*, 3d Dist. Van Wert No. 15-86-20, 1987 WL 20300 (Nov. 24, 1987), where the court held precisely on the issue of duplicate tapes that:

> Furthermore, the trial court admitted the original *and* the duplicate into evidence, thereby eliminating any unfairness which may have resulted if only the duplicate tape had been admitted into evidence. The only difference between the two tapes is that the duplicate attempted to eliminate static and background noises so that the conversation could be more easily distinguished. Once it was established that Exhibit 7 was an accurate reproduction of Exhibit 3, it was not necessary for the individual who produced the duplicate to testify regarding the technology used to create the duplicate. Both tapes were made available to the jury during deliberations for their comparison. In any event, the original tape was in evidence and the jury could make its own determination as to accuracy. *Id.* at * 3.

{¶ 14} In the present case the state's witness, Thomas Staff, who produced the amplified version, testified regarding the technology used to

create the duplicate. Therefore, because the two exhibits are duplicates, and appellant received the original tape recording far before even his first trial, there was no failure to disclose evidence when the enhanced version was provided by the state, and thus no violation of Crim.R. 16.

{¶ 15} Alternatively even assuming that the state did, in fact, violate Crim.R. 16, reviewing the *Heinish* test, specifically in relation to prongs two and three, the trial court was correct in finding it admissible. *See State v. Heinish*, 50 Ohio St.3d 231, 553 N.E.2d 1026 (1990). In *Heinish*, the Ohio Supreme Court articulated that evidence disclosed outside of the rules governing discovery may be admitted where "the failure to provide discovery was not willful, foreknowledge of the statement would not have benefited the defendant in the preparation of the defense, and the defendant was not prejudiced by the admission of the evidence." (Citation omitted.) *Id.* at 236.

{¶ 16} As the appellant concedes, there is no argument that the state's failure to provide discovery was willful. In fact, the state gave the amplified copy of the 9-1-1 call to appellant as soon as it was received. Instead, appellant claims that he would have benefited from foreknowledge of the enhancement and that he was prejudiced by its admission into evidence. In support of this claim, appellant simply asserts that "a review of the recording indicates that the content of the enhanced 9-1-1 call was not commensurate with defendant's theory of the case."

{¶ 17} There is no evidence showing that the defense would have benefitted in any substantial way by having prior knowledge of the enhanced version. Further, the evidence was not prejudicial. To begin, it seems incongruous to suggest that the evidence was prejudicial when the enhanced recording was simply a louder and clearer version of the original recording, which both parties have had since the first trial. The parties had the enhanced version for the same length of time before trial, albeit a day, and the recording certainly could not have been a surprise to appellant as it was his voice featured on the recording. Further, simply because the enhanced version was not commensurate with appellant's theory of the case does not mean that appellant has shown how additional time would have benefited him and allowed him to change his defense theory. Such a benefit might arise, for example, when the authenticity of the recording could be questioned but that is not the case here. Finally, even without the enhanced 9-1-1 recording, there is other substantial evidence of the defendant's guilt. *See State v. Anderson*, 6th Dist. Lucas No. L-99-1419, 2001 WL 27540 (Jan. 12, 2001). The police discovered appellant on top/behind the victim naked and with an erection. Prior to police arrival, evidence at trial showed that appellant forced his way into the victim's apartment, beat her, forced her to remove her clothes, and made her get in both the shower and her bed all while she screamed no and tried to get him to stop. Because of the aforementioned reasons, all three prongs of the *Heinish* test would be satisfied. Appellant's first assignment of error is not well-taken.

{¶ 18} Appellant's second assignment of error contends that his counsel was ineffective in failing to object to the enhanced audio recording or in failing to request a continuance. Appellant concedes that prior to trial, appellant's counsel did object to the admission of the enhanced audio tape however, the objection was based on the issue of authentication of the recording. Based upon our finding that the enhanced audiotape was admissible as a duplicate or, alternatively, it was admissible under the *Heinish* factors, we find that appellant's second assignment of error is not well-taken.

{¶ 19} In appellant's third assignment of error, he argues that the testimony of Officer Trudeau reading from the police report authorized by his partner, Officer Brian Smith, violated his right to confront the witnesses against him. Conversely, the state asserts that the content of the report was put at issue during appellant's counsel's cross-examination of Officer Trudeau regarding whether appellant had an erection when he and his partner arrived at the scene.

{¶ 20} During cross-examination of Officer Trudeau, defense counsel had him review the report that he testified that he and Officer Smith had "collaborated" in writing to ensure its accuracy, but that Officer Smith actually wrote up. Officer Trudeau agreed that it did not specifically state that appellant had an erection. During redirect examination, the state had appellant read the following sentences from the report: "'Officers observed [the victim] naked on the bed on her hands and knees with suspect

Phillips completely naked as well behind her and trying to penetrate her vaginally with his penis. Officers ordered Phillips to get off the victim.'" No objection was made to this testimony.

{¶ 21} Evid.R. 803(8) provides the following exceptions to the hearsay exclusion:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

{¶ 22} In the present case, defense counsel repeatedly cross-examined Officer Trudeau about the contents of the report specifically, as referenced to above, the lack of a statement that appellant had an erection. Trudeau was also questioned about the fact that the report did not contain anything about appellant warning the victim to shut up. By highlighting the discrepancies between the report and the officer's testimony, counsel was attempting to impeach the officer's credibility.

{¶ 23} The Third Appellate District has observed, in regard to evidence derived from a police report:

> Although the statements contained within the police report are inadmissible hearsay, we find that the rule of invited error governs this

assignment of error. "The rule of 'invited error,' a corollary of the principle of equitable estoppel, prohibits a party who induces error in the trial court from taking advantage of such error on appeal." *State v. Woodruff* (1983), 10 Ohio App.3d 326, 327, 462 N.E.2d 457.

Invited error would preclude a defense counsel who induces hearsay evidence on cross-examination from precluding further hearsay testimony on redirect examination. *See State v. Miller* (1988), 56 Ohio App.3d 130, 565 N.E.2d 840. Therefore, any error with respect to Detective Brown's testimony, including any hearsay elicited by the State on redirect examination in response to appellant's cross-examination, was invited by the appellant. It is a general rule of law that a party who invites an error may not demand from the appellate court comfort from its consequences. *See State v. Chappell* (1994), 97 Ohio App.3d 515, 537, 646 N.E.2d 1191. *State v. Settles*, 3d Dist. Seneca No. 13-97-50, 1998 WL 667635, * 6 (Sept. 30, 1998).

{¶ 24} Based on the foregoing, we find that because appellant persisted in questioning Officer Trudeau about the contents of the report, he cannot now complain about the state's ability to conduct its redirect examination. We further find no plain error in the admission of the testimony. Appellant's third assignment of error is not well-taken.

{¶ 25} In appellant's fourth and final assignment of error he contends that trial counsel was ineffective by failing to object to Officer Trudeau's testimony during the state's redirect examination. We disagree. Counsel's questioning in an attempt to impeach Trudeau falls within the ambit of trial strategy and does not support an ineffective assistance of counsel claim. *See State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 101. Appellant's fourth assignment of error is not well-taken.

{¶ 26} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE