[Cite as *In re E.S.*, 2020-Ohio-3598.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE E.S.	:	
	:	No. 109129
A Minor Child	:	
	:	
	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 2, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL-17-109486

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda and Thomas Rivito, Assistant Prosecuting Attorneys, *for appellant*.

Mark A. Stanton, Cuyahoga County Public Defender, and Britta M. Barthol and John T. Martin, Assistant Public Defenders, *for appellee*.

EILEEN A. GALLAGHER, J.:

{¶ 1} The state of Ohio appeals from the decision of the Cuyahoga County Court of Common Pleas, Juvenile Division ("the juvenile court") dismissing the case with prejudice after it was discovered during the adjudicatory hearing that the state

had failed to produce a recording of a 911 call that contained material, exculpatory evidence. For the reasons that follow, we affirm.

Factual Background and Procedural History

{¶ 2} On October 11, 2017, the state filed a two-count delinquency complaint against E.S., alleging that E.S. was a delinquent child for committing acts that, if committed by an adult, would have constituted the offenses of felonious assault in violation of R.C. 2903.11(A)(1) and abduction in violation of R.C. 2905.02(A)(2). The charges related to a 2016 incident in which E.S. had allegedly punched then 13-year-old S.M. in the head while she was walking home from school. E.S. denied the charges.

{¶ 3} An adjudicatory hearing before a magistrate commenced on July 23, 2019. At the time of the hearing, E.S. was 16 years old. In its opening statement, the state claimed that the altercation occurred at the corner of East 40th Street and Community College Avenue after E.S. and two boys "approached" S.M. because they had been having ongoing problems with S.M.'s older brother. The state indicated that it would introduce evidence that E.S. had punched S.M. in the head, causing her to fall to the ground and lose consciousness, that when S.M. regained consciousness, she felt herself being dragged to a gate before losing consciousness a second time and that a neighbor ultimately intervened and took S.M. home. The state represented that the evidence would further show that when S.M. arrived home, her face was swollen, that S.M.'s stepmother called 911 and that S.M. thereafter spoke with the 911 operator and the police, reporting the incident. The state asserted that

the evidence would show that S.M. had suffered serious physical harm "at the hand of [E.S.]" and that he should be found to have committed the offenses at issue and adjudicated delinquent.

{¶ 4} In her opening statement, E.S.'s counsel argued that S.M. was not credible and should not be believed, that there was no follow-up police investigation to confirm S.M.'s version of the events and that there would be no other "credible evidence to show that this incident occurred." E.S.'s counsel further argued that the state could offer no evidence to support its theory regarding the alleged motive for the incident and highlighted the anticipated lack of medical or physical evidence showing that S.M. had been "knocked out" and "dragged" or that E.S. had caused serious physical harm to S.M.

{¶ 5} The state's first witness was S.M.'s stepmother, M.M. M.M. testified that a stranger had brought her stepdaughter home after school sometime in the "late fall" in "2015 or 2017 * * * when [S.M.] was 14" and that she called 911 because S.M. "looked a mess," i.e., her hair was "messed up," her pants were dirty and she had "a scratch on her knee, like she fall," she saw "fingerprints on [S.M.]" and S.M. was "swollen" and "shaking." M.M. testified that after she called 911, she handed the phone to S.M. to talk to the 911 operator.

{¶ 6} The state then sought to introduce a recording of the 911 call into evidence. E.S.'s counsel objected, stating the state had never produced the recording of the 911 call during discovery. There was no dispute that E.S.'s counsel had timely filed a written demand for discovery pursuant to which the recording of the 911 call

should have been produced. After reviewing the "discovery packages" that had been provided to E.S.'s counsel, the state acknowledged that it had not produced the recording of the 911 call to E.S.'s counsel. The court took a recess to give E.S.'s counsel and the court an opportunity to review the recording of the 911 call.

{¶ 7} The recording of the 911 call reveals that when S.M. was asked by the 911 operator whether she was hurt as a result of the incident and needed an ambulance, S.M. responded, "No," and stated that she only "need[ed] to make a report."

{¶ 8} With respect to the sanctions to be imposed for failing to produce the recording of the 911 call, the state argued that the "least restrictive measure" should be imposed and that the "least restrictive measure" and "best sanction" had already "been accomplished" by giving E.S.'s counsel a chance to hear the recording. The state asserted that the next least restrictive measure would be to preclude the use of the recording of the 911 call during the hearing.

{¶ 9} E.S.'s counsel argued that the 911 recording was relevant and material to E.S.'s guilt or innocence and was favorable to his defense because it included contemporaneous statements by S.M. that she had not been injured in the incident. E.S.'s counsel moved to dismiss the case pursuant to *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1983), arguing that the only adequate remedy for the state's failure to produce this "exculpatory piece of information" was dismissal.

{¶ 10} After hearing the parties' arguments and listening to the recording of the 911 call, the magistrate determined that the recording of the 911 call contained

exculpatory evidence material to the issue of E.S.'s guilt (particularly as to the element of serious physical harm on the felonious assault charge). The magistrate held that the state's failure to produce the recording in response to E.S.'s written discovery demand was a violation of both Juv.R. 24 and E.S.'s constitutional rights to due process under the Fourteenth Amendment and to competent counsel under the Sixth Amendment. On July 25, 2019, the magistrate issued a written decision recommending that the case be dismissed "pursuant to Juvenile Rule 29(F)(1) on the merits with prejudice."

{¶ 11} The state filed objections to the magistrate's decision. On September 30, 2019, the juvenile court issued a judgment entry overruling the state's objections and affirming, adopting and approving the magistrate's decision without substantial modification. The juvenile court explained its reasoning as follows:

> The Court finds, in pertinent part, that the alleged victim's statement on the 911 call * * * is material to the issue of the alleged delinquent's guilt as it speaks directly to the elements of Count 1 of the Complaint. The Court further finds that the State of Ohio has had approximately two (2) years to provide the call to the defense (first to the Public Defender, then to the child's assigned counsel). It is noted that as of the date of trial, the call had still not been provided to the defense. The Court further finds that in light of the State's actions, the defense was unable to properly prepare for trial; thereby, constituting a violation of the alleged delinquent's right to due process under the Fourth [sic] Amendment and to competent counsel under the Sixth Amendment to the United States Constitution * * *.
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> Where the 911 call * * * contains exculpatory evidence which was not provided to the defense in response to [E.S.'s discovery demand], the Court finds that the State of Ohio's failure in this regard, irrespective of whether done in good or bad faith, is a violation of the alleged delinquent's rights under the Due Process Clause of the Fourteenth Amendment. *See Brady v. Maryland*, *supra*. It is also a violation of

> Juv.R. 24. Consistent with these findings, [E.S. counsel's] Motion to Dismiss is well taken by the Court. The Motion is, therefore, granted.
> * * *
>
> Upon due consideration and over the objection of the Prosecuting Attorney, it is the order of the Court that the instant matter be and is hereby dismissed pursuant to Juv.R. 29(F)(1) on the merits with prejudice as jeopardy has attached in this matter.

{¶ 12} The state appealed pursuant to R.C. 2945.67(A), raising the following single assignment of error for review:

> The trial court erred in dismissing the charges against E.S.

{¶ 13} On December 13, 2019, E.S. filed a motion to dismiss the appeal for lack of jurisdiction, arguing that the juvenile court's order is a "final verdict" that cannot be appealed under R.C. 2945.67(A). The state opposed the motion. The motion was referred to the merit panel for decision.

Law and Analysis

Jurisdiction to Review the Juvenile Court's Order

{¶ 14} We first address E.S.'s motion to dismiss this appeal for lack of jurisdiction.

{¶ 15} R.C. 2945.67(A) provides, in relevant part:

> *A prosecuting attorney * * * may appeal as a matter of right* any decision of a trial court in a criminal case, or *any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information*, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and *may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict,* of the trial court in a criminal case or *of the juvenile court in a delinquency case*.
> * * *

(Emphasis added.)

{¶ 16} Citing *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985), *State ex rel. Yates v. Montgomery Cty. Court of Appeals*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987), and this court's decision in *State v. Roddy*, 8th Dist. Cuyahoga No. 88759, 2007-Ohio-4015, E.S. argues that because the juvenile court indicated that it was dismissing the complaint under Juv.R. 29(F)(1),[1] the dismissal constituted an "acquittal" for lack of evidence, which is a "verdict" under R.C. 2945.67(A), and, therefore, is not appealable by the state. Citing this court's decisions in *In re D.D.*, 8th Dist. Cuyahoga No. 105582, 2017-Ohio-9021, and *State v. Smith*, 8th Dist. Cuyahoga No. 70855, 1997 Ohio App. LEXIS 3760 (Aug. 21, 1997), the state responds that it is not barred from appealing the juvenile court's decision because the juvenile court "never addressed the sufficiency of the evidence, never granted a directed verdict, and limited its reasons for dismissal to the discovery violation" and, therefore, the juvenile court's dismissal was not a "final verdict."

{¶ 17} Although both parties' jurisdictional arguments center around whether the juvenile court's decision was a "final verdict," we note that in *State ex rel. Prade v. Ninth Dist. Court of Appeals*, 151 Ohio St.3d 252, 2017-Ohio-7651, 87

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[1] Juv.R. 29(F)(1) provides:

> Upon the determination of the issues, the court shall do one of the following: * * * If the allegations of the complaint, indictment, or information were not proven, dismiss the complaint[.]

N.E.3d 1239, the Ohio Supreme Court held that the "'except the final verdict' modifier" language in R.C. 2945.67(A) applies only to appeals "by leave of the court" and not to the four categories of "appeal[s] as a matter of right" specified in R.C. 2945.67(A) — which includes the state's right to appeal "any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information." The court explained:

> We begin by noting that "referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." *Carter v. Youngstown Div. of Water*, 146 Ohio St. 203, 209, 65 N.E.2d 63 (1946). Thus, on its face, the qualifying phrase "except the final verdict" applies only to the second part of R.C. 2945.67(A). It does not apply to the four situations listed in the "appeal as of right" portion of the statute. *Accord State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985), paragraph one of the syllabus.
>
> We have previously noted that the legislative intent behind R.C. 2945.67(A) was "apparent" and that the statute granted the state an appeal as of right from four distinct categories of trial-court decisions: "(1) a decision which grants a motion to dismiss all or any part of an indictment, complaint, or information; (2) a motion to suppress evidence; (3) a motion for return of seized property; and (4) a motion which grants post-conviction relief under R.C. 2953.21 to 2953.24." *State v. Fraternal Order of Eagles Aerie 0337 Buckeye*, 58 Ohio St.3d 166, 167, 569 N.E.2d 478 (1991) ("*F.O.E. Aerie 0337*"). We also noted that "the last portion of R.C. 2945.67(A) provides the state with a discretionary appeal 'by leave of the court' from any other decision of the trial court, except a final verdict." *Id.*
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> Our decision in *F.O.E. Aerie 0337* is consistent with our earlier decisions addressing the meaning of R.C. 2945.67(A). For instance, in 1985, we determined that a "directed verdict of acquittal [under Crim.R. 29(A)] by the trial judge in a criminal case is a 'final verdict' within the meaning of R.C. 2945.67(A) which is not appealable by the state as a matter of right or by leave." *Keeton* at paragraph two of the syllabus. We further held that "[i]n addition to those rulings in which the state is granted an appeal as of right pursuant to R.C. 2945.67(A) the state may, by leave of the appellate court, appeal any decision of a trial court in a criminal case which is adverse to the state except a final

> verdict." *Id.* at paragraph one of the syllabus. This means that the "except the final verdict" language applies only to appeals by leave, which are in addition to the four specific types of decisions from which the state has an appeal as of right. Two years later, we held that a judgment of acquittal based on Crim.R. 29(C) is a "final verdict" that "is not appealable by the state as a matter of right or by leave to appeal pursuant to [R.C. 2945.67(A)]." *State ex rel. Yates v. Montgomery Cty. Court of Appeals*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987), syllabus (following *Keeton*).
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> [Appellee] argues that this court's statement in *Yates* that "R.C. 2945.67(A) prevents an appeal of any final verdict," *id.* at 32, means that the statute's "except the final verdict" language applies to both as-of-right appeals and by-leave-of-court appeals. However, *Keeton* makes clear that the state's right to seek leave to appeal is in addition to its right to appeal the four types of trial-court decisions specifically enumerated. The express language of R.C. 2945.67(A) bars the state from seeking leave to appeal "any final verdict." It follows that the state also has no appeal as of right from a final verdict because a "final verdict" is not listed among the four distinct types of trial-court decisions from which the state may appeal as of right.
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> [Appellee] therefore is incorrect that *Yates* stands for the proposition that the "except the final verdict" language limits the types of decisions from which the state has a right to appeal under R.C. 2945.67(A).

Prade at ¶ 15-19.

{¶ 18} Accordingly, pursuant to R.C. 2945.67(A), the state has a right to appeal the juvenile court's order dismissing the case for failure to produce the recording of the 911 call. E.S.'s motion to dismiss the appeal for lack of jurisdiction is denied. We now address the merits of the state's appeal.

Dismissal for Failure to Produce Recording of 911 Call

{¶ 19} Juv.R. 24(A) provides in pertinent part:

> Upon written request, each party of whom discovery is requested shall, to the extent not privileged, produce promptly for inspection, copying,

> or photographing the following information, documents, and material in that party's custody, control, or possession: * * *
>
> > (3) Transcriptions, recordings, and summaries of any oral statements of any party or witness * * *;
> >
> > (6) * * * In delinquency and unruly child proceedings, the prosecuting attorney shall disclose to respondent's counsel all evidence, known or that may become known to the prosecuting attorney, favorable to the respondent and material either to guilt or punishment.

{¶ 20} Under Juv.R. 24(A)(6) and the Due Process Clauses of the Ohio Constitution and the United States Constitution, a juvenile respondent is entitled to discovery of evidence that is favorable to the respondent and material either to guilt or punishment. *See, e.g., In re C.A.*, 8th Dist. Cuyahoga No. 102675, 2015-Ohio-4768, ¶ 77; *In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404, ¶ 16 ("A prosecuting attorney is under a duty imposed by Juv.R. 24(A)(6) and the Due Process Clauses of the Ohio Constitution and the United States Constitution to disclose to a juvenile respondent all evidence in the state's possession that is favorable to the juvenile and material to either guilt, innocence, or punishment.").

{¶ 21} "We review a trial court's decision in a discovery matter for abuse of discretion." *In re C.A.* at ¶ 76, citing *In re D.M.* at ¶ 9; *see also In re P.K.*, 2019-Ohio-2310, 138 N.E.3d 544, ¶ 13 (5th Dist.), citing *In re Johnson*, 61 Ohio App.3d 544, 548, 573 N.E.2d 184 (8th Dist.1989); *see also State v. Keenan*, 143 Ohio St.3d 397, 2015-Ohio-2484, 38 N.E.3d 870, ¶ 7. A trial court abuses its discretion when its decision is unreasonable, unconscionable or arbitrary. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34; *Blakemore v. Blakemore*, 5 Ohio

St.3d 217, 450 N.E.2d 1140 (1983). "Abuse-of-discretion review * * * does not permit an appellate court to simply substitute its judgment for that of the trial court." *Darmond* at ¶ 34.

{¶ 22} The state first argues that the juvenile court abused its discretion in dismissing this case because "the Due Process Clause is not violated, as described in *Brady*, where material is provided to the defense during trial." The state maintains that because the recording of the 911 call was produced to E.S. during the adjudicatory hearing, there was "no *Brady* due process violation." *See, e.g.*, *State v. Sheline*, 8th Dist. Cuyahoga No. 106649, 2019-Ohio-528, ¶ 164 ("A *Brady* violation * * * occurs only where the suppressed exculpatory evidence is discovered after trial. * * * When the evidence is disclosed or introduced at trial, there is no *Brady* violation."). The state also argues that the juvenile court abused its discretion in dismissing the case because the court was required to impose the "least severe sanction" for the state's nonwillful discovery violation, and lesser sanctions, such as prohibiting the state from using the recording of the 911 call, granting an additional continuance to E.S. "to make any additional preparations that were necessary" or excluding evidence of the 911 call entirely, would have adequately remedied any harm to E.S. We disagree.

{¶ 23} We need not address the state's *Brady* argument. The Ohio Supreme Court has held that "irrespective of the mandate of the United States Constitution as explicated in *Brady* and its progeny," "Juv.R. 24(A)(6) imposes a duty" that, in juvenile delinquency proceedings, "'the prosecuting attorney shall disclose to

respondent's counsel all evidence, known or that may become known to the prosecuting attorney, favorable to the respondent and material either to guilt or punishment.'" *State v. Iacona*, 93 Ohio St.3d 83, 91, 100, 752 N.E.2d 937 (2001), quoting Juv.R. 24(A)(6).

{¶ 24} In this case, the state acknowledged that it failed to comply with Juv.R. 24(A). Juv.R. 24(C) provides:

> If at any time during the course of the proceedings it is brought to the attention of the court that a person has failed to comply with an order issued pursuant to this rule, the court may grant a continuance, prohibit the person from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

{¶ 25} The purpose of the discovery rules is to "prevent surprise and the secreting of evidence favorable to one party" in order to "produce a fair trial." *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3, 511 N.E.2d 1138 (1987).[2] When deciding whether to impose a sanction for a discovery violation, the trial court must "inquire into the circumstances surrounding" the violation and impose the "least severe sanction that is consistent with the purpose of the rules of discovery." *Id.* at paragraph two of the syllabus. This rule applies "equally" to discovery violations by criminal defendants and juvenile respondents and to discovery violations by the state. *Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, at ¶ 42. Factors to be considered when imposing a sanction for a discovery violation by the

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[2] Discovery violations in delinquency proceedings are analyzed consistent with Crim.R. 16.1. *See, e.g., In re Swift*, 8th Dist. Cuyahoga No. 79610, 2002 Ohio App. LEXIS 1271, 11 (Mar. 21, 2002).

state include: (1) whether the failure to disclose was a willful or bad faith violation of the discovery rules, (2) whether foreknowledge of the undisclosed material would have benefited the accused in the preparation of a defense, (3) whether the accused was prejudiced and (4) the effectiveness of less severe sanctions. *Id.* at ¶ 21-22, 35, 41.

{¶ 26} In this case, a serious discovery violation occurred. The state does not dispute that the recording of the 911 call contained material, exculpatory evidence and should have been promptly disclosed to E.S. in response to his written demand for discovery.

{¶ 27} The record reflects that the juvenile court gave careful consideration to the appropriate remedy for the state's discovery violation, including whether the imposition of other lesser sanctions would have reasonably remedied the harm caused by the state's failure to comply with the discovery rules. In a well-reasoned decision, the juvenile court concluded that the only fair and just response, considering all the circumstances, was to dismiss the complaint with prejudice.

{¶ 28} Although there was no indication that the state's failure to produce the recording of the 911 call was willful or in bad faith, the juvenile court noted that the case had been pending for over two years, that the recording of the 911 call should have been produced long before the hearing and that the material, exculpatory nature of the undisclosed evidence was clear. The juvenile court reasonably determined that going forward with the case and excluding the recording of the 911 call — a sanction proposed by the state below — was not an appropriate

sanction because the recording contained evidence favorable to E.S.'s defense, i.e., contemporaneous statements by the alleged victim that she had not been seriously harmed, which was an element of the felonious assault charge. The juvenile court likewise reasonably determined that a continuance would not have remedied the prejudice to E.S. The hearing had already begun; opening arguments had been presented; one witness had already been sworn and was testifying; and E.S. had already prepared for and set forth his defense theory, i.e., that S.M. had lied about the incident and was not to be believed — a theory that would have to be reformulated in light of this new evidence if the case were to proceed. As the magistrate explained, when announcing his decision at the hearing:

> [T]he Court will find that this is exculpatory, especially when talking about a [f]elonious [a]ssault charge. Because with a [f]elonious [a]ssault charge it is necessary [to prove the offender] did knowingly cause serious physical harm. And if there is no harm, then that is exculpatory with respect to the young man sitting in front of me.
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> The Court also finds that the State of Ohio had a duty. This case has been pending since at least 2017 and * * * the State of Ohio had a duty to turn this over awhile ago as a matter of fact. And unfortunately, that has not happened.
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> While the least restrictive method would be to go ahead and not allow the State to use it, we are in the middle of trial and because we are in the middle of trial, then [E.S.'s counsel] literally does not have enough time to be able to plan her cross-examination if the State were allowed to use this of the alleged victim or even of the stepmother for that fact who was the witness on the stand.
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> Because we have done opening statements, because one witness has been sworn and is in the process of being questioned on direct, the Court finds that the motion to dismiss because the 9-1-1 tape called State's Exhibit Number 1 was not produced prior to trial in sufficient enough time to allow the defense to be able to formulate its defense, * * * is well taken and is hereby granted.

{¶ 29} On the record before us, we cannot say that the juvenile court abused its discretion in dismissing the case with prejudice. There is nothing to suggest that the juvenile court's decision was arbitrary, unreasonable or unconscionable. Accordingly, the state's assignment of error is overruled.

{¶ 30} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the Cuyahoga County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

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

EILEEN A. GALLAGHER, JUDGE

ANITA LASTER MAYS, P.J., and
LARRY A. JONES, SR., J., CONCUR