[Cite as *State v. Gray*, 2023-Ohio-2951.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	No. 111263
GIANNI GRAY,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 21, 2023

Cuyahoga County Court of Common Pleas
Case No. CR-18-631500-A,
Application for Reopening
Motion No. 563930

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Jeffrey Schnatter, Assistant Prosecuting Attorney, *for appellee*.

Allison F. Hibbard, *for appellant*.

ANITA LASTER MAYS, A.J.:

{¶ 1} Applicant, Gianni Gray ("Gray"), claims that his appellate counsel was ineffective in his appeal, *State v. Gray*, 8th Dist. Cuyahoga No. 111263, 2023-Ohio-

215, 206 N.E.3d 842. Gray asserts that counsel was ineffective when counsel failed to argue that Gray was denied a fair trial when the trial judge would not allow him to play a videotaped police interview of a third party, failed to assign error to the introduction of evidence that was not provided to Gray until the middle of trial, failed to assert that appellant was denied a fair trial by his inability to properly review evidence, and failed to argue that Gray was deprived of a fair trial because he was not provided basic nutrition during trial. We deny the application for the reasons that follow.

I. Facts and Procedural History

{¶ 2} Gray was tried and convicted of crimes related to the shooting deaths of Malachai Stewart and Andre Williams, for which he received an aggregate prison sentence of 84 years to life. Gray appealed his convictions, and appellate counsel was appointed who assigned three errors for review. Counsel challenged the admission of hearsay testimony, the exclusion of testimony proffered by Gray because the trial court found that it constituted alibi evidence that was not properly disclosed, and challenged the state's use of a peremptory challenge on an African-American potential juror. On January 26, 2023, this court issued an opinion overruling these assigned errors and affirming Gray's convictions. *Gray* at ¶ 45.

{¶ 3} Gray timely filed an application for reopening on April 26, 2023. There, Gray argued that appellate counsel was ineffective for not presenting the following proposed assignments of error:

I. The trial court abused its discretion and denied Appellant due process and a fair trial when the trial court changed its mind and declined to permit Appellant to play video of an interview that the parties had previously stipulated would be played.

II. The trial court abused its discretion in permitting the introduction of evidence not provided to Appellant until the middle of trial.

III. Appellant's inability to sufficiently access and review evidence while incarcerated deprived Appellant of a fair trial.

IV. The lack of basic nutrition while incarcerated and proceeding pro se deprived Appellant of a fair trial.

The state timely opposed the application.

II. Standard for Reopening

{¶ 4} Just like trial counsel, appellate counsel must provide reasonably effective assistance. *State v. Simpson*, 164 Ohio St.3d 102, 2020-Ohio-6719, 172 N.E.3d 97, ¶ 11, citing *Coleman v. Thompson*, 501 U.S. 722, 755, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). App.R. 26(B) provides a means of asserting claims that appellate counsel failed to live up to this obligation. *Id.* at ¶ 12. On timely application, an appellate court must review the arguments presented and determine whether there is a "'genuine issue' as to whether appellant has a 'colorable claim' of ineffective assistance of counsel on appeal." *Id.* at ¶ 12, quoting *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998). If this showing is made, the application should be granted and the appellate court should proceed to the second step of the process where the appeal is treated as if it were an initial appeal. *Id.*

{¶ 5} The standard for ineffective assistance of appellate counsel is the same that applies to claims of ineffective assistance of counsel generally that was announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Simpson* at ¶ 14. "[I]n order to prevail on a claim that counsel was ineffective, a criminal defendant must show (1) that his counsel's performance was deficient and (2) that that performance prejudiced him." *Id.* at ¶ 18. In practice, this means that there is "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]'" *State v. Leyh*, 166 Ohio St.3d 365, 2022-Ohio-292, 185 N.E.3d 1075, ¶ 18, quoting *Strickland* at 694. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.*, quoting *Strickland* at 694. However, appellate counsel is not required to raise every possible issue on appeal and has discretion to winnow out those issues that have less chance of success on appeal. *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, 776 N.E.2d 79, ¶ 7.

III. Videotaped Interview of Damerisse Freeman

{¶ 6} In his first proposed assignment of error, Gray argues that appellate counsel was ineffective for not challenging the trial court's denial of Gray's attempts to play a police interview of a person who police suspected was the driver of the car from which Gray was alleged to have fired the shots that killed two people. Gray challenges the trial court's decision to allow the state to repudiate a stipulation regarding a videotaped interview of Damerisse Freeman ("Freeman") conducted by Detectives Christina Cottom ("Det. Cottom") and Morris Vowell ("Det. Vowell").

During the testimony of the detective, Gray informed the court that he wished to play a videotaped police interview of Freeman. (Tr. 1437.) Gray stated that the interview fell under the following exceptions to hearsay rules: "in the course of the investigation; state of mind of the declarant; effect on the listener and just for what it said, not for the truth of the matter asserted." (Tr. 1437.) The trial court questioned its use, and Gray elaborated, "[a]nd the last one is just what he said, not for the truth of nothing he's saying, just the fact that he said it. It's not being offered for the truth of the matter asserted. It's being offered to show his investigation, what he did throughout." (Tr. 1439.) The prosecutor did not offer arguments against its admission because he needed additional time to review the interview. The trial court delayed ruling on the issue so that the hour-and-a-half-long video could be reviewed by the judge and the prosecutor. (Tr. 1444-1445.)

{¶ 7} When discussions of the video resumed, there was apparently some type of stipulation reached between the parties, but the exact nature of the stipulation is unclear from a reading of the transcript:

> Court: So then we have what I call dead court time * * *. So you guys have stipulated you want the video played. My objection doesn't matter apparently. But it would be played in its entirety. Okay? So what the thinking was, was that you would just play it. You can still ask about it with Detective Cottom, but it's just something to get done. You understand?

(Tr. 1697.) Gray objected and wanted the video played during the cross-examination of the detective. But, apparently, that was contradictory to the trial judge's understanding of the stipulation:

> So because you're both agreeing to play it, I would play it before so that the State could ask questions of Detective Cottom as well. Do you see what I mean? You guys are agreeing to it. He's not objecting. So I know that you want to use it on cross-examination, but now that he's agreed to play it, he's going to be able to ask Detective Cottom about it, questions about it as well. Do you see what I'm saying?

(Tr. 1697-1698.) After further discussion, the trial court agreed to delay playing the video, but still instructed Gray that it would not be played according to the timing Gray had requested. (Tr. 1699.)

{¶ 8} Later, the nature of the stipulation is again discussed, with the trial judge stating,

> We finished [Det. Vowell's] direct by the State. It's the State's witness. They do not want to present the video. So they can choose who to call and who not to call. They don't have to call anybody for any particular piece of evidence.
>
> You wanted to present the video with Detective Vowell. They're saying that we'll stipulate to allowing you to play the video, but what they're saying is that they don't want to present it with Detective Vowell in their case in chief. They get to decide what they want to present in their case in chief.
>
> You will have your opportunity to call Detective Vowell and you can ask him questions in your case in chief, and they're agreeing, they're stipulating that you can play that video — which, you know, I have my opinions on that, but you guys can agree to anything you want — but the order of the witnesses and who they call for what purpose is the State's decision, inasmuch as it is also your decision in your case in chief.

(Tr. 1992-1993.) The court continued,

> So you can bring it in in your case in chief. Your cross-examination of him, I understand what you're saying, you're trying to use cross-examination for this video. They're saying: We are objecting. We're objecting to you using it on cross-examination.

> If you want to bring it in in your own case in chief, you may do so because you are presenting a case. You can call Detective Vowell and you can ask him all the questions that you want on direct examination. They're stipulating to that. You can do that.

(Tr. 1994-1995.) The state pointed out that when Det. Vowell was done testifying, the court gave Gray the option at that time to recall Det. Vowell and play the video but Gray did not. (Tr. 1995.)

{¶ 9} After much further discussion, the court stated, "I think I'm going to go with what I originally said, is that I agree that the video could be played before either detective [Cottom or Vowell] testified." (Tr. 2004.) However, the state offered an objection that Gray's purpose in using the video was "getting way past the, like, the effect on the listener, or the listener's state of mind." (Tr. 2005.) The state then explained what it understood about the stipulation and the purpose of the video:

> I did for those purposes, but that's not the purpose he's having the video played. I'm not going to agree that it can be played for the purposes he's describing now. He's essentially trying to get a video of Mr. Stewart to testify about — or Freeman.
>
> Court: About it being a truth or a lie, that he was lying.
>
> * * *
>
> State: — I'm not okay with it being played for that purpose. He came up with a different purpose.

(Tr. 2005-2006.)

{¶ 10} Eventually, the judge would not allow Gray to play the hour-and-a-half-long video of Freeman's interview. After the court questioned the use of the

video and held extensive discussions with Gray and counsel, the state asserted that Gray was really using the video for a purpose not discussed regarding the stipulation. After reviewing the video in camera, the trial court determined that much of the video was not relevant and what was potentially relevant was not being offered for Gray's stated purpose.

{¶ 11} Gray now claims appellate counsel was ineffective for not arguing this constituted a reversible error on appeal.

{¶ 12} A trial court has discretion to admit or exclude evidence at trial, and its decision will be examined for an abuse of that discretion. *Calderon v. Sharkey*, 70 Ohio St.2d 218, 222, 436 N.E.2d 1008 (1982). However, here Gray claims there was a stipulation that meant he should have absolutely been allowed to play the video for the jury.

{¶ 13} "A stipulation is 'a voluntary agreement between opposing parties concerning some relevant point * * *.'" *State v. Barstow*, 4th Dist. Hocking No. 02CA27, 2003-Ohio-7336, ¶ 37, quoting *Black's Law Dictionary* 1427 (7 Ed.Rev.1999). "Generally, a stipulation, once entered into, may not be unilaterally repudiated by a party." *Ashcraft v. Univ. of Cincinnati Hosp.*, 10th Dist. Franklin No. 02AP-1353, 2003-Ohio-6349, ¶ 16, citing *Whitehall, ex rel. Fennessy v. Bambi Motel, Inc.*, 131 Ohio App.3d 734, 723 N.E.2d 633 (10th Dist.1998); *Slaughter v. Scott*, 4th Dist. Scioto No. 98 CA 2591, 1999 Ohio App. LEXIS 1073 (Mar. 15, 1999). *But see State v. Bowler*, 6th Dist. Sandusky No. S-85-4, 1985 Ohio App. LEXIS 6831, 8 (July 26, 1985).

{¶ 14} Even where there is a stipulation regarding evidence, the trial court still maintains its gatekeeping role. R.C. 2945.03 "imposes a positive duty upon the trial court in a criminal case to control all proceedings therein and to limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue." *State v. Hill*, 40 Ohio App.2d 16, 317 N.E.2d 233, 237 (2d Dist.1963). Evid.R. 402 limits admissible evidence to that which is relevant. Evid.R. 403 further limits the admission of relevant evidence. For instance, "even where there are stipulations, Evid.R. 403 requires a balancing analysis to determine [the probative value of photographs of a decedent]." *State v. Tatum*, 10th Dist. Franklin No. 04AP-561, 2005-Ohio-1527, ¶ 11. Therefore, a stipulation does not abdicate a trial court's responsibility in all instances to fulfill its gatekeeping role.

{¶ 15} Here, while the stipulation remained amorphous during the extensive discussions that occurred regarding the interview, the record demonstrates that the stipulation was so that Gray could play the video for a certain stated purpose that was within a hearsay exception. The trial court did not allow Gray to play the interview to the jury because the court found that the purpose was not to show the course of the investigation. The trial court found that Gray was attempting to use it to impeach Mr. Freeman's character and not to explain the steps taken in an investigation. (Tr. 2133.) What became clear to the trial judge after numerous discussions of the video's use was that Gray's attempted use of the interview video was not to show the course of the investigation but to "essentially to try to show

Mr. Freeman is lying. And again, its beyond — you're try to — you're trying to [get] into character evidence of a nontestifying witness." (Tr. 2135.)

{¶ 16} Even with this finding, the court allowed Gray to recall Det. Vowell and inquire about the interview conducted with Freeman. The court allowed Gray significant latitude in the questioning, including about hearsay statements made by Freeman during the interview. (Tr. 2089-2140.) The court also allowed Gray to use portions of the interview to refresh Det. Vowell's recollection. (Tr. 2133.) Through this questioning, Gray established Freeman lied to detectives during the interview. (Tr. 2137.) The trial judge allowed Gray to elicit much of the same testimony from Det. Cottom. (Tr. 2244.)

{¶ 17} As a result, Gray has not shown that appellate counsel was ineffective for not raising this alleged error on appeal. Gray was able to elicit the gravamen of what he wanted from the video without playing the hour-and-a-half-long video for the jury. The trial court's decision to exclude the video does not undermine confidence in the verdicts rendered in this case and the proposed assignment of error does not present a colorable claim of ineffective assistance of appellate counsel.

IV. Mid-Trial Disclosure of Evidence

{¶ 18} Next, Gray argues that appellate counsel was ineffective for not challenging the timing of disclosure of certain evidence.

{¶ 19} In 2010, Ohio instituted a system of open discovery in criminal cases. *See* Staff Notes to Crim.R. 16. Crim.R. 16(A) states the purpose for the adoption of

this system: "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." Where either party falls short of this stated goal by failing to timely disclose information or evidence, "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).

{¶ 20} Where a discovery violation occurs, "[s]anctions for a Crim.R. 16 discovery violation are within the discretion of the trial court * * *." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 20. The three factors a judge should consider when crafting a discovery violation sanction include, "(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 ¶ 35, citing *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689 (1983), syllabus. "[T]he trial court must conduct an inquiry into the surrounding circumstances and impose 'the least severe sanction that is consistent with the purpose of the rules of discovery.'" *State v. Rucker*, 2018-Ohio-1832, 113 N.E.3d 81, ¶ 20 (8th Dist.), quoting *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), paragraph two of the syllabus.

A. The Disclosure of a Recording of an Anonymous Tip

{¶ 21} Within this proposed assignment of error, Gray first argues that the state failed to timely turn over a recording of an anonymous tip that indicated Gray was involved in the shooting.

{¶ 22} The admissibility of testimony regarding the anonymous tip was thoroughly briefed in the direct appeal, and this court has decided that issue in the state's favor. *Gray*, 8th Dist. Cuyahoga No. 111263, 2023-Ohio-215, at ¶ 18-26. In his application, Gray claims that appellate counsel was ineffective for not challenging the timing of the disclosure of a recording of the anonymous tip — not until the middle of trial. Gray claims that the anonymous tip was the only witness statement linking him to the crime and the production of the recording in the middle of trial prejudiced his defense.

{¶ 23} In support, Gray cites case law holding that witness statements to police are always material and must be disclosed. However, the contents of the recorded tip were disclosed to Gray prior to trial. A written report drafted by Sergeant Evelyn Montalvo ("Sgt. Montalvo") was disclosed to Gray prior to trial, which included the contents of the recording. After listening to the recording, the trial judge determined that the recording was consistent with Sgt. Montalvo's testimony and with the written report. (Tr. 1367.) The state also indicated that it did not intend to use the recording as evidence in the trial. (Tr. 1367.) The court gave Gray the opportunity to recall Sgt. Montalvo to question her regarding the recording. For the purposes of the application for reopening, we will assume

without deciding that the failure to turn over the recording constituted a discovery violation.

{¶ 24} Recently, in *State v. Wainwright*, 8th Dist. Cuyahoga No. 111725, 2023-Ohio-2292, this court reversed a conviction based on the trial court's denial of a mistrial for a discovery violation. There, during trial the state produced a recording of a police interview with the complaining witness involving sexual assault. Wainwright argued that the witness statement was inconsistent with her testimony and would have impacted how the defense handled her cross-examination and other aspects of trial. *Id.* at ¶ 21. When analyzing the second *Parson* factor, this court recognized that the pretrial disclosure of a recorded statement of the complaining witness was important to the defense and its ability to effectively challenge the credibility of the witness in a case that hinged on whether the witness and Wainwright had a consensual sexual encounter or whether the witness was assaulted. *Id.* at ¶ 42. The recorded statement also contained numerous inconsistencies and additional information that was not disclosed in any other report or summary turned over to Wainwright prior to trial.

{¶ 25} The circumstances in *Wainwright* are markedly different from the present case. First, Gray did not move for a mistrial based on the untimely disclosure of the recording.[1] While the recorded anonymous tip was important because it prompted the start of the investigation into Gray regarding the shooting

[1] Gray moved for mistrial for other alleged errors that occurred at trial. (Tr. 1236, 2704, 2707, and 2956.)

incident, the statement was consistent with pretrial disclosures of police reports and summaries. The trial court reviewed the recorded tip and found that it was consistent with reports that were disclosed prior to trial and consistent with Det. Montalvo's testimony about the tip. The trial court also granted a continuance and allowed Gray to recall witnesses and cross-examine them about the recorded tip if Gray so chose. This is consistent with the trial court's obligations under Crim.R. 16(L)(1).

{¶ 26} The *Parson* factors applied to the present case do not establish a colorable claim of ineffective assistance of appellate counsel. The recorded tip was not turned over because of the way they are labeled and the way Sgt. Montalvo requested records from the communications department of the police department. The state explained that because Sgt. Montalvo requested information regarding the case using a case number and the recording was not associated with this number, the recording was not obtained by Sgt. Montalvo prior to trial until Gray made a claim that it did not exist. It does not appear from the record in this case that the recording was deliberately withheld.

{¶ 27} After the trial judge listened to the tape outside of the presence of the jury, the judge found that it was consistent with Sgt. Montalvo's testimony and prior disclosures that contained all the information in the brief recording. Unlike *Wainwright*, 8th Dist. Cuyahoga No. 111725, 2023-Ohio-2292, police reports and other documents turned over to Gray prior to trial contained the information to which Sgt. Montalvo testified during the state's case-in-chief, which was used to

show how the course of the investigation began and how Gray became a suspect. There were no contradictions between the recording and pretrial disclosures. Gray was aware of the contents of the recording, and there is little chance that earlier disclosure of the recording itself would have benefitted Gray's defense.

{¶ 28} In an effort to demonstrate some prejudice, Gray theorizes that he could have attempted to investigate the recording and potentially the unidentified tipster and his opening statement would have been different. The first argument is entirely speculative. *See*, *e.g.*, *State v. Collins*, 8th Dist. Cuyahoga No. 108878, 2020-Ohio-4136; *State v. Pittman*, 1st Dist. Hamilton No. C-220460A, 2023-Ohio-1990. The second argument is not persuasive given that pretrial disclosures existed.

{¶ 29} Here, the *Parson* factors applied to the facts of this case do not indicate that the trial court abused its discretion when it crafted a remedy for the untimely disclosure of the recorded statement. The trial judge allowed time for Gray to listen to the recording and allowed Gray to recall Sgt. Montalvo for cross-examination about the recording. (Tr. 1369-1370.) The trial court exercised its discretion in crafting a remedy for the late disclosure of the recording when the contents of that recording were previously disclosed. Therefore, this issue does not present a colorable claim of ineffective assistance of appellate counsel.

B. Map of Cell Phone Location Data

{¶ 30} Gray further argues that he was denied a fair trial when a map generated using cell phone location data and a witness the state called to testify about the creation of the map was not disclosed prior to trial and was only disclosed

in the middle of trial. Gray also alleges that he had no way of viewing the map while in jail.

{¶ 31} The state requested that, rather than plotting the individual data points from cell phone location reports one at a time on the display screen in court, that a map be used to speed up the testimony of a witness that was properly disclosed prior to trial. The state offered to have the crime analyst that created the map, Gabby Zilich ("Zilich"), come in to testify about the creation of the map. (Tr. 2044-2045.) After the state's proposal, the trial judge gave Gray time to review the materials and then make any objection. (Tr. 2045.)

{¶ 32} Later, when asked for a response, Gray indicated that he wished for a location for a night club to be added to the map. He further stated, that his "only objection is, I would want to review the record and * * *." (Tr. 2154.) After the court stated that it would provide him with additional time, Gray continued, "And where it's pinned at, I just don't want you to pick the ones you want." (Tr. 2154.) The court then cleared the courtroom to give everyone an opportunity to review the maps and records and add the location pin or pins that Gray requested. (Tr. 2155.) Later, Gray did raise an objection to the timing:

> Yes, I understand what he saying. I just want to be able to locate the —
>
> State: We'll do both.
>
> Gray: — longitudes and latitudes and what he's using and what he's not using. That way when it come time to cross-examine the person — I'm saying, first of all, I object because I didn't receive it.

(Tr. 2160.)

{¶ 33} The trial court recognized that lots of evidence was coming in midtrial by both sides. Gray then elaborated on his objection: "Right. I understand that. I just wanted to compare so when it come time to cross-examine her, where is this location, if you going to use location, so I know around a relevant time of that day." (Tr. 2160.) The trial court then ordered the state to give Gray printouts and digital copies of all the files so that Gray could examine them, and the judge also stated that an order would be issued giving Gray computer time while in custody.

{¶ 34} Later, during a break in trial, Gray withdrew an objection to the use of a means to display the longitude and latitude of the location data extracted from cell phones because Gray wanted to do the same. (Tr. 2221.) However, issues persisted.

{¶ 35} The use of the map was again discussed. The state indicated that it wanted to use the map to do the same thing that Gray did while cross-examining the detective, but rather than inputting each longitude and latitude coordinates while on the stand, the state wished to use the map generated in the same way the information was used in court. (Tr. 2286-2287.) After hearing Gray's concerns about the map, the trial court finally stated,

> And essentially, if you would like to voir dire them beforehand about how they created the map, that's fine, but my understanding is essentially the map is created with the exact same thing that I did, [the trial judge entered the information into an interface to display the location on a map during Gray's cross-examination] only using software so it's not prone to human error like we had a couple hiccups where I accidentally touched the map and then it changed to the

> location to whatever I touched and then we had to redo it. That's my understanding of what this is.
>
> But I gave you a journal entry that orders the sheriff's deputies to allow you access to the computer [to examine the map and data] because you're representing yourself and you need access to prepare for tomorrow. Hopefully they will adhere to that. I'm going to see — John is not in here — if we can get you up earlier tomorrow and you can play with the Mondopad if they don't give you access. You can stay up here for a little bit longer and mess with it. But I am going to allow them to present essentially the same thing in a different format.

(Tr. 2294-2295.)

{¶ 36} There was then a voir dire of Zilich. She testified that she solely used the data contained within the cell phone extraction reports without any outside information to generate the map using a piece of software designed for that purpose. After her voir dire, questioning from Gray, and back-and-forth with the court, Gray indicated he would stipulate to the map. (Tr. 2327.) However, Gray still had issues regarding its use. Because of this, the state called Zilich to testify about the creation of the map as a summary of existing evidence. (Tr. 2349.) Gray also did not object to its admission as evidence at the conclusion of the state's case. (Tr. 2398.)

{¶ 37} Applying the *Parson* factors, we again find that this proposed assignment of error does not establish a colorable claim of ineffective assistance of appellate counsel. After it became clear that the way in which cell phone location data was being mapped in the courtroom was tedious and slow, the state created the map to speed up the process. This was not a willful violation because the map did not exist prior to trial, and the state disclosed the map soon after it was created. The map that was presented consisted of data disclosed prior to trial but presented in a

different form. The map constituted a visual aid used to give meaning to the data contained within cell phone location extraction reports of which Gray was previously aware. *See State v. Gragg*, 4th Dist. Highland No. 17CA2, 2017-Ohio-8703, ¶ 14. Gray had knowledge of the cell phone location data reports and the longitude and latitude of the points on the map. This constitutes foreknowledge of the map data, albeit, in a different form. *See State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 117.

{¶ 38} Here, the trial court crafted a remedy for the late disclosure of a visual aid used to clarify data of which Gray was aware. The court inquired about the creation of the map during a voir dire of the witness that created it, allowed Gray additional time to review the map, and ordered the state to include points on the map that Gray had requested. This proposed assignment of error does not present a colorable claim of ineffective assistance of appellate counsel.

V. Inability to Review Evidence

{¶ 39} Gray also argues that appellate counsel was ineffective because counsel did not raise an assignment of error alleging Gray was denied a fair trial because of issues he had during trial reviewing evidence. Gray represented himself during trial. He claims that his limited access to technology and evidence while in jail deprived him of a fair trial. He alleges that the jail lacked basic software that would allow him to review certain discovery materials. As examples, Gray cites his inability to access Sprint cell phone records and certain video evidence that were

stored in a format he could not view because the jail computers did not have an appropriate program.

{¶ 40} In each case where Gray brought it to the court's attention that he had an issue, the trial court provided alternatives. The trial court addressed the issues promptly by issuing orders for additional computer time, allowing him time to review evidence with standby counsel before, during, and after court proceedings, or by asking the state to reproduce the evidence in a form that Gray could more readily examine. When discussing his inability to access certain records that were in a format that Gray could not access on computers while in jail, the court had the state convert the document to a different format so that Gray could review it. The court also directed the state to print the records so that Gray could review them in jail. Gray worked closely with standby counsel to review the materials and the trial court provided time and space for that to occur.

{¶ 41} There is no indication from this assignment of error or the arguments raised that there is a colorable claim of ineffective assistance of appellate counsel for a failure to argue this issue. The only evidence in the record before this court is that any time Gray had a problem reviewing any materials, the trial court promptly addressed it to ensure that Gray and standby counsel could fully digest the materials exchanged in discovery.

VI. Proper Nutrition

{¶ 42} At one point during trial, Gray stated to the trial court that he had a problem with meals not being brought to him. The trial court inquired further and immediately addressed the situation.

> Gray: Okay. And just so the record reflect, this been my second day, and I got, like, a problem far as food and stuff. I ain't been given lunch two days in a row. This the second day. I ain't eat nothing since yesterday because I get up so early before breakfast come and they bring me here. And then —
>
> Court: They don't bring you anything up for lunch when you're up here?
>
> Gray: They supposed to, but it's the second day it happen in a row and I'm feeling kind of dizzy and I just wanted the record to reflect that.
>
> Court: I can't give you anything for obvious legal reasons.
>
> Gray: I know. The deputies usually go downstairs and get it from the guards, but I don't know if they forgetting about me, or whatever.
>
> Court: Can you call down to the jail? I'm having my bailiff call down to the jail. I can't — are you capable of continuing?
>
> Gray: Yeah, I can continue. I just want the record to be clear far as —
>
> Court: Sure. I will call the jail and see what's going on down there. Okay.

(Tr. 2473-2474.) As soon as the trial court was alerted to the issue, the court acted to remedy the situation and asked if Gray could continue. Gray stated that he could.

{¶ 43} Gray claims in his application for reopening that this lack of food is concerning. It is indeed concerning. The trial judge thought so too and immediately sought to rectify the situation as soon as it was brought to the judge's attention. There is little in the record and no case law is cited in support of this proposed assignment of error such that the claimed error would undermine the confidence in the outcome. Gray stated that he could continue, and the trial court immediately took steps to remedy the situation. The proposed assignment of error does not establish a colorable claim of ineffective assistance of appellate counsel.

{¶ 44} Application denied.

_____
ANITA LASTER MAYS, ADMINISTRATIVE JUDGE

MICHELLE J. SHEEHAN, J., and
MARY J. BOYLE, J., CONCUR