[Cite as *State v. Kaplan*, 2010-Ohio-508.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91388

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HOWARD KAPLAN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-500227 and CR-507238

BEFORE: Sweeney, J., Gallagher, A.J., and Jones, J.

RELEASED: February 18, 2010

JOURNALIZED:

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Howard Kaplan ("defendant"), appeals from his convictions for one third degree felony count of importuning, eight second degree felony counts of importuning, and possession of criminal tools. Defendant challenges the admission of evidence and the exclusion of his defense witnesses, asserts prosecutorial misconduct, challenges errors in the jury instructions, and maintains the cumulative errors deprived him of a fair trial. For the reasons that follow, we reverse and remand for a new trial.

{¶ 2} Defendant was initially indicted in August 2007 under Case No. CR-500227. He was charged with nine counts of importuning and possession of criminal tools with a specification seeking the forfeiture of his home and office computers. The charges against defendant arose from conversations in an internet chat room, where a police detective was posing as a 12-year-old girl. The evidence included numerous documents purporting to be internet chat transcripts between the undercover detective and defendant, which included many lewd discussions. They also included remarks from defendant questioning the true age of the person to whom he was chatting. Defendant also asked whether this person enjoyed "rp," meaning role playing.

{¶ 3} On October 9, 2007, defense counsel filed a request for evidence, a motion for a bill of particulars, and a motion for discovery.

{¶ 4} On November 27, 2007, defense counsel filed a motion to compel discovery or to have the charges dismissed. On December 5, 2007, defendant

filed a motion to suppress evidence and statements. The State responded and the matter was set for hearing on January 14, 2008, which was later continued until January 17, 2008. However, the court never held an evidentiary hearing, denying the motions based solely on arguments.

{¶ 5} The State filed its bill of particulars on December 12, 2007, as well as its response to defendant's request for discovery. The State identified the following witnesses: Rick McGinnis; "Representative" of the Cuyahoga County Clerk of Courts, Criminal Division; "Representative" of the Cuyahoga County Sheriff's Department, I.D. Unit; "Representative" of the Cleveland Police Department; "Representative" of the Hudson Police Department; Detective Kaja Jeantet; and Jason Rice. On the same date, the State filed a demand for discovery.

{¶ 6} According to the record, the defense attorney had discussions about this case with another prosecutor whose name does not appear on the court filings by the State. On January 10, 2008, defense counsel sent that prosecutor a letter that identified defendant's potential witnesses, including Gary Kelley, Ph.D., Henry Fitzgerald, numerous other teachers, students, and co-workers at Western Reserve Academy ("WR"), previous employers to be named later, and Dean Borlan [sic].

{¶ 7} On February 13, 2008, the defense filed another motion to dismiss for alleged discovery violations.

{¶ 8} On March 18, 2009, Case No. CR-500227 was dismissed at the request of the State in order to re-indict defendant in Case No. CR-507238.

{¶ 9} On March 28, 2008, defendant filed a supplemental response to the State's demand for discovery. Therein, defendant identified additional potential witnesses as Pam Mackintosh, Sherry Chlysta (WR Academy), John Hale (WR Academy), Peggy DiPola, Martha Regula, and Gary Kelley, indicating a report would be available upon request.

{¶ 10} The matter proceeded to trial, where the State introduced the testimony of Richard Warner, Kaija Jeantet, Rick McGinnis, and Joey Barenabei.

{¶ 11} Warner, a Computer Forensic Examiner with the County Prosecutor's Office, testified about his involvement with the Internet Crimes Against Children Task Force. His testimony described the method in which the Task Force uses the Internet to ferret out illegal activity with minors. In this case, he aided McGinnis with an investigation of a screen name, "hakfisher," who had engaged in sexual conversation with a bogus account McGinnis had set up in a "Yahoo chat room," where he was posing as the 12-year-old girl. Warner reviewed the chats that had been "archived and saved" by McGinnis. Thereafter, Warner made telephone contact with the suspect using a voice transformer connected to an undercover phone line. The audiotapes of these conversations were played for the jury wherein the caller told the "12-year-old girl" to masturbate. Warner also maintained he was a 12-year-old girl when the caller said he sounded older.

{¶ 12} Warner conducted a forensic analysis on defendant's three computers and a digital camera. On these items, Warner found search hits for the screen name McGinnis used when impersonating the 12-year-old girl but nothing else nefarious.

{¶ 13} Warner testified that McGinnis generated the internet chat room transcripts.

{¶ 14} McGinnis was employed with the Internet Crimes Against Children Task Force through the County Prosecutor's Office. He explained how he set up a fictional profile of a 12-year-old girl in a Yahoo chat room on the internet.[1] He is trained not to approach anyone, not to initiate any sex discussions, and not to mention travel first. McGinnis explained, "[t]hat's one of the rules for the entrapment, is we do not approach them, they approach us." However, once a suspect mentions any of these topics, protocol allows the undercover officer to proceed with discussions on these subjects. Relative to this case, McGinnis said his fictional 12-year-old persona was approached in an Ohio chat room by somebody with the screen name "hakfisher." Hakfisher inquired about his age, to which he responded that he was a "12-year-old female" living in Cleveland, Ohio. McGinnis identified various exhibits as chat room transcripts between hakfisher and McGinnis's screen name "wannabe_hottmodel12." McGinnis indicated that he recognized these various exhibits as his chats with hakfisher.

[1]The screen name was wannabe_hottmodel12

{¶ 15} The bulk of McGinnis's testimony is comprised of his verbatim recitation from these chat room transcripts. The trial court allowed the evidence over defendant's continuing objection. McGinnis also testified about some electronic mail messages as well as an instant message. The State replayed the telephone conversations between Warner and hakfisher; McGinnis believed the voice on the phone call was defendant based on his interview with defendant.

{¶ 16} McGinnis testified that the transcripts were from "instant messenger archiving," which he described as a "program" and said he was "not certain how the program totally works." He indicated that "we automatically set it to archive. So it archives our log, which makes a chat log."

{¶ 17} McGinnis prepared a Grand Jury subpoena to Yahoo concerning the suspect's screen name, which appears in the record as State's Exhibit 127. Yahoo produced an IP address, which in turn lead to defendant at a campus housing. The record indicates that defendant was a teacher and coach.

{¶ 18} Defendant agreed to speak to the police and was later arrested. McGinnis stated that defendant was read his *Miranda* rights. During the interview, defendant was shown the chat transcripts and emails, some of which he initialed, as well as the disk containing the telephone conversations. Defendant did not actually listen to the disk. But, according to McGinnis, defendant "went ahead and * * * initialed * * * the disk, saying that it was his conversation." McGinnis agreed that defendant "all of a sudden stopped" initialing the documents.

{¶ 19} During cross-examination, McGinnis testified that he recalled the chats but did not have specific recollection of everything in the chat room transcripts. He confirmed that his trial testimony was "largely based on documents."

{¶ 20} McGinnis also confirmed that defendant at several places in the chats indicated he did not want to meet with wannabe_hottmodel12. He also confirmed that throughout the chats he would maintain that he was 12 and throughout the chats defendant would maintain wannabe_hottmodel12 was older.

{¶ 21} After the State rested, the defense sought to present witnesses. First, the State objected to the testimony of defendant's wife due to the fact that she was present during the trial despite their request for a separation of witnesses order. The court excluded this witness for that reason.[2]

{¶ 22} Then, a rather cluttered record was created to address whether the defense would be permitted to call any witnesses. On the one hand, the State's attorney made several statements displaying an awareness of the identities of certain defense witnesses at least a week and one-half prior. On the other hand, the State's attorney took issue with the fact that the defense had sent a witness list to a different assistant prosecutor several months previous.[3] The defense

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[2]The parties did not point to any separation order, nor can we find one, on the record.

[3]The defense subpoenaed this assistant county prosecutor to testify about the discovery in dispute and to confirm he told defense counsel to deal with him on this case. The State successfully moved to quash this subpoena claiming anything this assistant prosecutor would say would be irrelevant.

complained about various discovery matters and explained that they were told to deal with the assistant prosecutor to whom the witness list was sent. It is not disputed that defendant's supplemental discovery was filed with the clerk's office on March 28, 2008.[4]

{¶ 23} The State objected to Dr. Kelley's testimony on the grounds it had not received an expert report and Boland's testimony as being "absolutely improper" to the extent he was one of defendant's attorneys. The defense indicated that Boland's testimony was "completely unnecessary" and he would not be called as a witness. As for other witnesses, the defense indicated they were known to the State and available for questioning. The trial court denied the defense any witnesses, stating that the letter sent in January 2008 was not formally filed with the court. The court did not address the supplemental discovery that was filed with the court in March 2008 and which disclosed defense witnesses.

{¶ 24} The only witness the defense was permitted to call was defendant. Defendant is a husband, father, and grandfather. His teaching career spanned a 35-year period until 2007. Defendant indicated he had a "flawless" record, without any complaints made about him to his knowledge. He maintained he went into an Ohio adult chat room on the Internet. He stated Yahoo required him to check a box indicating he was over 18 years of age prior to entering the chat

[4]These proceedings took place on March 31, 2008.

room. Defendant stated his belief that wannabe_hottmodel12, aka "Brittany Young,"[5] was a housewife. He did not recall the chats word for word. According to him, Brittany Young initiated the contact. She did at some point indicate her age as 12 years. In response, he told her she was too young and to get out of the adult chat room. Defendant insisted that he never believed Brittany Young to be 12 years old. Based on his experience with teaching, he "felt in no way was this person that [he] was conversing with a teenager, much less being 12 years old," he had "no doubt in [his] mind that [he] was talking to somebody older." He cited Young's knowledge of fishing as one reason for his belief. Also, Young's understanding of terms such as "explicitly" lead him to that conclusion. He also said the telephone voice did not sound like a real voice to him but rather like someone older trying to disguise their voice. He believed it was part of a fantasy. He had no intention of meeting anyone he chatted with online.

{¶ 25} Defendant's wife called him home from a soccer practice, where he found police executing a search warrant. He agreed to accompany McGinnis to the police station. Defendant was told he was not under arrest but that the police had received complaints about him chatting with their daughter. McGinnis asked him to look at some chats. Although defendant could not confirm every word of them, he initialed some at McGinnis's request. When defendant's wife

[5] On defendant's computer screen, McGinnis's identity appeared as "Brittany Young" not wannabe_hottmodel12. State's witnesses confirmed this could have been

entered the room, he realized the police were going to arrest him. Defendant then stopped initialing the documents. However, at McGinnis's suggestion, defendant also wrote a letter of apology to Brittany Young. Defendant was then arrested.

{¶ 26} On cross-examination, defendant admitted he was hakfisher and had a Yahoo account. He acknowledged chatting with Brittany Young but could not verify every word of every chat. Defendant reviewed various portions of the chat transcripts and maintained his belief that Young was an adult engaged in a fantasy role play.

{¶ 27} According to defendant, he did not sign the waiver of his *Miranda* rights until after initialing the chat transcripts at the police department. The State's witnesses had testified that the waiver was executed upon arrival at the police department.

{¶ 28} Following defendant's testimony, the defense rested. The jury returned its verdict and defendant was sentenced as follows: one-year incarceration on Count 1, consecutive to a two-year term on Count 2; consecutive to a two-year term on Count 3; and concurrent to two-year terms on Counts 4 through 9; along with a concurrent six-month sentence on Count 10, for an aggregate prison sentence of five years. Additional terms were imposed, including postrelease control and the Tier I sex offender classification.

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the case.

{¶ 29} Defendant has assigned seven assignments of error for our review; however, our disposition of the fourth assignment of error warrants a new trial and thereby renders the remaining assignments of error moot. See App.R. 12(A)(1)(c).[6]

{¶ 30} "IV. The trial court improperly denied the appellant his right to compulsory process by failing to allow his witnesses to testify."

{¶ 31} The facts pertinent to this assigned error have been detailed above and will only be repeated here to the extent deemed necessary for ease of discussion.

{¶ 32} In this case, the trial court excluded all of defendant's witnesses for the reason that the witness list was not formally filed with the court. We presume the trial court was referring to the correspondence sent in January 2008, since the defendant's supplemental discovery, which disclosed witnesses, bears a time-stamp and was filed with the court. The State maintains the defense violated Crim.R. 16 and that the exclusion of the defendant's witnesses was an appropriate sanction.

{¶ 33} "A trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery." *City of Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511

[6]See Appendix.

N.E.2d 1138, paragraph two of the syllabus. The court is required to impose the least severe sanction where exclusion of witnesses would deny the defendant his or her constitutional right to present a defense. Id.; see, also, *State v. Jones*, Cuyahoga App. No. 91846, 2009-Ohio-2381, ¶10-12 (distinguishing exclusion of the witnesses where the State fails to provide discovery).

{¶ 34} In *Papadelis*, the Ohio Supreme Court instructed that "[f]actors to be considered by the trial court include the extent to which the prosecution will be surprised or prejudiced by the witness' testimony, the impact of witness preclusion on the evidence at trial and the outcome of the case, whether violation of the discovery rules was willful or in bad faith, and the effectiveness of less severe sanctions."

{¶ 35} Crim.R. 16(A), (C)(1)(c), and (E)(3) provide:

{¶ 36} "(A) Demand for discovery

{¶ 37} "Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

{¶ 38} "* * *

{¶ 39} "(C) Disclosure of evidence by the defendant

{¶ 40} "* * *

{¶ 41} "(c) Witness names and addresses. If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting

attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the defendant's case-in-chief in the event the witness has become unavailable through no fault of the defendant."

{¶ 42} "* * *

{¶ 43} "(3) Failure to comply. 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."

{¶ 44} At the outset, we note that defendant attempted to call his wife as one of his witnesses. Mrs. Kaplan was reportedly present throughout defendant's trial. Neither party has referenced a separation of witness order in the record, nor have we found one. Nonetheless, Mrs. Kaplan was not disclosed as a defense witness in either the January 2008 letter or the supplemental discovery. Additionally, defendant stated on the record that he had no intention of calling his attorney, whom he had also identified as an expert witness.

Assuming, without deciding, that the exclusion of these witnesses was a proper exercise of discretion, we still find that trial court erred when it excluded all of defendant's witnesses.

{¶ 45} Primarily, we are not convinced there was a discovery rule violation concerning the witnesses defendant identified in correspondence and the supplemental discovery that was filed with the court. The record clearly established that defense counsel sent a witness list to the prosecutor's office in January 2008, albeit to a different assistant prosecutor than those who were present at the trial. Defense counsel explained he was told to deal with that person to facilitate plea negotiations. Counsel's effort to substantiate this fact was pro-actively blocked by the State's effort to quash the subpoena that was served on the subject prosecutor. There was no effort by the court to inquire further into the facts surrounding this situation by, for example, examining this person on the record but outside the presence of the jury.[7]

{¶ 46} The intent of the discovery rules is to remove gamesmanship to the end of ultimately achieving a fair trial. The right of defendant to present his own witnesses to establish a defense is a "fundamental element of due process of law." *Papadelis*, 32 Ohio St.3d at 4-5. The defendant here faced serious charges that carried significant penalties. These charges required the State to prove that defendant was soliciting sexual activity from someone he believed was

[7]Incidentally, our review of the record found that the certificates of service on documents filed by the defense routinely indicated service on the State's attorney who

less than 13 or that he was reckless in that regard. The evidence adduced by the State was almost entirely comprised of McGinnis reading verbatim chat room transcripts to the jury. While defendant was able to testify on his own behalf, he was precluded from calling any witnesses, including character witnesses.

{¶ 47} There was no dispute that the defense made effort to disclose its witnesses to the State in January 2008. The only confusion was that it was sent to an assistant prosecutor, who was not present at defendant's trial. There was a plausible reason for this given by counsel and which is not contradicted by anything in the record, nor is there any suggestion that this was done for purposes of gamesmanship or to secrete this evidence. For example, there is no contention that defense counsel purposely sent the discovery disclosure to some assistant prosecutor that was wholly unrelated to this matter. At best, this scenario presents the occurrence of an honest mistake rather than a discovery rule violation.[8] One for which the total exclusion of the defendant's witnesses was wholly improper.

{¶ 48} Also perplexing is the court's decision to exclude witnesses disclosed in defendant's supplemental discovery on the grounds that it was not filed with the court. The supplemental discovery was filed on March 28, 2008 and indicates service on the State's attorney who tried this case.

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tried this case "and/or" the prosecutor to whom the January 2008 letter was sent.

[8]To that extent, the State's reliance upon *United States v. Valenzuela-Bernal* (1982), 458 U.S. 858, is misplaced.

{¶ 49} Even if the above circumstances could be construed as a discovery rule violation, it does not appear from this record that the trial court considered the *Papadelis* factors. Nor does it appear that the trial court ever considered imposing a lesser sanction, such as a brief continuance, to allow the State to interview the individuals thereby minimizing any unfair surprise or prejudice. Precedent required the trial court to impose "the least drastic sanction possible that is consistent with the State's interest." Just as in *Papadelis*, the trial court here "did not indicate that it balanced the State's interest against [defendant's] Sixth Amendment right to present a defense by considering any sanction other than excluding the testimony of his witnesses." Id. at 5. Considering the record as a whole and in conjunction with the applicable law, the trial court erred by its wholesale exclusion of the defendant's witnesses.

{¶ 50} Assignment of Error IV is sustained. Accordingly, the judgment is reversed and the cause is remanded for new trial.

Judgment reversed and remanded.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

LARRY A. JONES, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS
IN JUDGMENT ONLY

APPENDIX

"I. The trial court erred by admitting into evidence documents purporting to be accurate transcriptions of the appellant's chat room conversations.

"II. The trial court erred by improperly admitting into evidence testimony of irrelevant other acts evidence.

"III. The trial court erred by permitting the jury to consider prejudicially irrelevant testimony to be considered by the jury.

"V. The prosecutor committed acts of misconduct during the testimony and closing summation, which deprived the appellant of a fair trial.

"VI. The trial court erred by denying the appellant's requested jury instruction to define the element of 'belief' pursuant to R.C. 2907.02(C)(2), importuning.

"VII. The cumulative errors [that] occurred in the appellant's case deprived him of a fair trial."