

[Cite as *State v. Heru*, 2010-Ohio-635.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No.     24756

Appellant

v.

KAATEM P. HERU

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 2009 01 0094

Appellee

DECISION AND JOURNAL ENTRY

Dated: February 24, 2010

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DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} While the jury was deliberating on whether Kaatem Heru had committed domestic violence, the prosecutor realized that he had not disclosed, as required by Rule 16(B)(1)(e) of the Ohio Rules of Criminal Procedure, that one of his witnesses had been convicted of a felony. The prosecutor told Mr. Heru’s lawyer and the trial court about his failure to disclose, and Mr. Heru moved for a mistrial and new trial. The court granted the motion for new trial because it concluded that the violation jeopardized his right to a fair trial. This Court affirms because the court exercised proper discretion when it granted the motion for new trial.

MOTION FOR NEW TRIAL

{¶2} The State’s assignment of error is that the trial court incorrectly granted Mr. Heru’s motion for new trial. The court granted the motion under Rule 33(A)(2) of the Ohio Rules of Criminal Procedure. Under that rule, the court may grant a new trial for “[m]isconduct

of the jury, prosecuting attorney, or the witnesses for the state” that materially affects a defendant’s substantial rights. Crim. R. 33(A)(2). This Court’s review of a case involving alleged misconduct under Rule 33(A)(2) “requires a two-step inquiry.” *State v. Herb*, 167 Ohio App. 3d 333, 2006-Ohio-2412, at ¶6 (analyzing rule in case involving juror misconduct). “First, it must be determined whether . . . misconduct actually occurred.” *Id.* “Second, if . . . misconduct occurred, it must be determined whether the misconduct materially prejudiced the defendant’s substantial rights.” *Id.* If there is evidence of those requirements, the question of whether a new trial should be granted is “addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion.” *State v. Schiebel*, 55 Ohio St. 3d 71, paragraph one of the syllabus (1990).

{¶3} Regarding the first step of the inquiry, the State has argued that the prosecutor’s failure to disclose the witness’s felony record was not prosecutorial misconduct under Rule 33(A)(2). According to it, there were only two ways that “the court could have found that there had been prosecutorial misconduct.” “First, the court could have found a violation under *Brady v. Maryland*, 373 U.S. 83 (1963).” Second, “was to find a violation of Crim.R. 16.” This Court will focus on Rule 16 of the Ohio Rules of Criminal Procedure.

{¶4} The State has conceded that the prosecutor inadvertently violated Rule 16(B)(1)(e). It has argued, however, that the violation was not prosecutorial misconduct because the prosecutor’s conduct was not willful. Under Rule 16(B)(1), the State must disclose certain evidence to defendants. “Upon motion of the defendant,” it must “furnish . . . a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney.” Crim. R. 16(B)(1)(e).

{¶5} The State has cited *State v. Parson*, 6 Ohio St. 3d 442 (1983), and *State v. Joseph*, 73 Ohio St. 3d 450 (1995), for the proposition that the trial court could not grant a new trial based on the Rule 16(B)(1)(e) violation unless the prosecutor’s failure to disclose was willful. In *Parson*, the Ohio Supreme Court considered whether it was reversible error under Rule 16(E)(3) for a trial court to admit evidence that had not been disclosed to the defendant under Rule 16(B)(1). The prosecutor had failed to disclose a statement that Mr. Parson’s co-defendant had made to a law enforcement officer. *Parson*, 6 Ohio St. 3d at 444. The trial court let the officer testify about the statement over Mr. Parson’s objection. *Id.*

{¶6} The Supreme Court agreed with Mr. Parson that the statement was discoverable under Rule 16(B)(1). *State v. Parson*, 6 Ohio St. 3d 442, 445 (1983). It noted, however, that, under Rule 16(E)(3), “the trial court is vested with a certain amount of discretion in determining the sanction to be imposed for a party’s nondisclosure of discoverable material.” *Id.* That rule provides that, “[i]f 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 . . . , 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(E)(3). The Supreme Court explained that, under that rule, “[t]he [trial] court is not bound to exclude such material at trial although it may do so at its option. Alternatively, the court may order the noncomplying party to disclose the material, grant a continuance in the case or make such other order as it deems just under the circumstances.” *Id.* It also explained that its review was “limited to a determination of whether the trial court’s action . . . constituted an abuse of discretion.” *Id.*

{¶7} The Supreme Court concluded that the trial court exercised proper discretion. *State v. Parson*, 6 Ohio St. 3d 442, 445 (1983). It determined that there was “nothing in the record . . . to indicate that the state’s failure to disclose was a willful violation of Crim.R. 16 or anything other than a negligent omission on its part.” *Id.* “Second, the appellant has not demonstrated, or even alleged, how foreknowledge of the nondisclosed statement would have benefited him in the preparation of his defense.” *Id.* “Also, the record is clear that by the time the disputed evidence was admitted . . . , appellant was well aware of its existence and if he were able, could have countered its effect.” *Id.* “Finally, although the police officer’s testimony may have harmed [the co-defendant], its prejudicial effect upon appellant was not demonstrated.” *Id.* The Court wrote in its syllabus that, “[if], in a criminal trial, the prosecution fails to comply with Crim.R. 16(B)(1)(a)(ii) by informing the accused of an oral statement made by a co-defendant to a law enforcement officer, and the record does not demonstrate (1) that the prosecution’s failure to disclose was a willful violation of Crim.R. 16, (2) that foreknowledge of the statement would have benefited the accused in the preparation of his defense, or (3) that the accused was prejudiced by admission of the statement, the trial court does not abuse its discretion under Crim.R. 16(E)(3) by permitting such evidence to be admitted.” *Id.* at syllabus.

{¶8} In *State v. Joseph*, 73 Ohio St. 3d 450, 457 (1995), the Supreme Court appeared to alter the standard of review for a trial court’s handling of a Criminal Rule 16 violation. The prosecution in that case had failed to disclose that one of its witnesses had been granted immunity. Mr. Joseph discovered that fact during trial and moved for a mistrial, arguing that he had been denied a fair trial. The trial court denied his motion. Citing *Parson*, the Supreme Court wrote that “[p]rosecutorial violations of Crim.R. 16 are reversible only when there is a showing that (1) the prosecution’s failure to disclose was a willful violation of the rule, (2)

foreknowledge of the information would have benefited the accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect.” *Id.* at 458 (citing *State v. Parson*, 6 Ohio St. 3d 442 (1983)); see also *State v. Jackson*, 107 Ohio St. 3d 53, 2005-Ohio-5981, at ¶131.

{¶9} The Ohio Supreme Court most recently examined Rules 16(B)(1) and (E)(3) and *Parson* in *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426. In that case, the Supreme Court appears to have returned to the abuse of discretion standard it adopted in *Parson*. The State failed to let Mr. Hale inspect written summaries of statements he had made to two law enforcement officers, as required by Rule 16(B)(1)(a)(ii). Despite that, the trial court allowed the officers to refer to the summaries at trial. Quoting *Parson*, the Supreme Court noted that it had “held that Crim.R. 16(E)(3) vests the trial court ‘with a certain amount of discretion in determining the sanction to be imposed for a party’s nondisclosure of discoverable material. The court is not bound to exclude such material at trial although it may do so at its option.’” *Hale*, 2008-Ohio-3426, at ¶114 (quoting *State v. Parson*, 6 Ohio St. 3d 442, 445 (1983)). It explained that “*Parson* established guidelines for evaluating the trial court’s exercise of discretion in this area . . . .” *Id.* at ¶115. Examining the factors listed in the syllabus in *Parson*, it rejected Mr. Hale’s argument that the statements should have been excluded.

{¶10} Although *Parson* and *Joseph* dealt with prosecutorial violations of Criminal Rule 16(B), they only addressed the remedies available to defendants under Rule 16(E)(3). The trial court in this case granted the motion for new trial under Rule 33(A)(2). Contrary to the State’s assertion, *Parson* and *Joseph* do not hold that a trial court may not grant a motion for new trial under Rule 33(A)(2) for a violation of Rule 16(B)(1)(e) unless the prosecutor’s failure to disclose was willful. Even if Rule 16(E)(3) provided the appropriate test in this case, the trial court had

broad discretion under that rule to fashion a just remedy. *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, at ¶114.

{¶11} Because the trial court cited only Criminal Rule 33(A)(2) in its decision, the question in this case is whether the prosecutor engaged in misconduct that materially affected Mr. Heru's substantial rights. Crim. R. 33(A)(2). The State conceded in its brief that "[t]he second way the court could have granted the motion for new trial was to find a violation of Crim.R. 16" and that the prosecutor violated Rule 16(B)(1)(e). This Court, therefore, will proceed to the second step of the Rule 33(A)(2) inquiry: whether the discovery violation materially affected Mr. Heru's substantial rights.

{¶12} The Grand Jury indicted Mr. Heru for domestic violence for allegedly causing physical harm to his younger sister. She testified that they were sitting at a table in a karaoke bar talking about some of their family problems when he got upset and started punching her. She said that, after some of the other patrons at the bar helped get him away from her, she went outside, but he followed her and started hitting her again. Mr. Heru, on the other hand, said that his sister started yelling at him inside the bar, so he suggested they go outside to continue their conversation. He said that, because he said some disrespectful things about her father, she started punching him. He tried to walk away, but she pursued him and he finally punched her twice to get her off him. One of Mr. Heru's friends corroborated his story.

{¶13} The only person who testified about what happened who was not a friend or family member of Mr. Heru or his sister was one of the bartenders. He corroborated the sister's story, explaining that he saw Mr. Heru and his sister fighting inside the bar and that Mr. Heru was the one who initiated it. It was his criminal record that the prosecutor failed to disclose under Rule 16(B)(1)(e). Mr. Heru, therefore, was unable to impeach him with that information.

{¶14} The trial court determined that “the nondisclosure of [the bartender’s] record may have been material to the finding of guilt in this case.” It also determined “that there is a reasonable likelihood that the undisclosed material could have affected the guilty verdict.” It noted that the bartender “was a key witness for the State” and that Mr. Heru’s “cross-examination . . . may have been more effective if he had been aware of [the] prior felony conviction.” It concluded that Mr. Heru’s “right to a fair trial was jeopardized by the State’s failure to disclose” the bartender’s record. It, therefore, granted the motion for new trial.

{¶15} Having reviewed the record, this Court concludes that there was evidence that the prosecutor’s failure to disclose the bartender’s criminal record materially affected Mr. Heru’s substantial rights. The prosecutor limited Mr. Heru’s ability to impeach the only impartial witness in a case that came down to whether the jury believed the brother or sister in a family argument. The State’s assignment of error is overruled.

#### CONCLUSION

{¶16} The trial court exercised proper discretion when it granted Mr. Heru’s motion for new trial. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

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CLAIR E. DICKINSON  
FOR THE COURT

WHITMORE, J.  
BELFANCE, J.  
CONCUR

APPEARANCES:

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellant.

DAVID M. WATSON, attorney at law, for appellee.