[Cite as *State v. Arnold*, 2010-Ohio-6617.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23155
vs.	:	T.C. CASE NO. 06CR4928
CHINA ARNOLD	:	
Defendant-Appellant	:	

See original opinion, *State v. Arnold*, 189 Ohio App.3d 507, 2010-Ohio-5379.

. . . . . .

DECISION AND ENTRY

Rendered on the 30th day of December, 2010.

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PER CURIAM:

{¶ 1} This matter is before the court on an App.R. 26(A) application for reconsideration filed by the State of Ohio. The State has also filed a motion asking us to stay execution of our final judgment of November 5, 2010, *State v. Arnold*, 189 Ohio App.3d 507, 2010-Ohio-5379, until we rule on its application for reconsideration.

{¶ 2} "The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its

decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *City of Columbus v. Hodge* (1987), 37 Ohio App.3d 68, paragraph one of the syllabus; *Matthews v. Matthews* (1981), 5 Ohio App.3d 140; *State v. Black* (1991), 78 Ohio App.3d 130. "An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1996), 112 Ohio App.3d 334, 336.

{¶ 3} The State's application challenges two findings we made. First, that allowing the State to offer evidence of Linda Williams' video testimony at Defendant Arnold's second trial violated Defendant's constitutional right of confrontation, per *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 S.Ct. 177. Second, that the trial court abused its discretion when it granted the State's motion to exclude the testimony of a witness called by Defendant, Kyra Woods.

{¶ 4} The State has attached materials to its application for reconsideration filed on November 12, 2010 that are not a part of the record of the trial proceeding. Defendant has likewise attached similar materials to its Response filed on November 22, 2010. Other materials are also attached to the State's Reply filed on November 29, 2010. Pursuant to the authority conferred on us

by App.R. 9(E), we order the record supplemented with those materials.[1]

{¶ 5} Regarding Linda Williams, the State does not challenge our application of *Crawford* to the State's failure to provide discovery. Instead, the State contends that our finding that it failed to provide Defendant with Linda Williams' address is "flat wrong." The State cites Dkt. No. 153 and Vol.I, pp. 11-12, of the transcript of Defendant's first trial.

{¶ 6} Docket Number 153 is a written decision of the court filed on May 23, 2007 overruling Defendant's motions to avoid coercive practices during the mitigation phase of Defendant's trial and to require jurors to answer interrogatories regarding the manner in which they weigh aggravating circumstances and mitigating factors. It has no relation to the issues of discovery or the testimony of Linda Williams.

{¶ 7} Vol. I, pp. 11-12 is a transcription of a conference in chambers on Thursday, January 31, 2008, prior to the testimony of Linda Williams. Defendant's attorney stated his understanding that the State intended to produce only two of six witnesses named on its witness list, "The one we were able to make contact with

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[1] Attached to the State's November 29, 2010 Reply are "Excerpted Transcript of Proceedings" from three in-chamber conferences held on January 29th and 30th, 2010. Citations in this Decision and Entry to these excerpts will be as follows: "Excerpted Tr. ___."

both last night through an investigator and this morning at the Prosecutor's Office. The second one, though, lives in Texas and won't be here, I've been told, until Monday. I would ask for a phone number so that I could call her."

{¶ 8} It is undisputed that Defendant's attorneys interviewed Linda Williams in the Prosecutor's Office, for what the State later said was "several minutes," on the morning of the day Williams testified. The State contends that counsel's statement that his investigator had also interviewed Williams the night before demonstrates that we were "flat wrong" when we found that Defendant had no access to Williams until the interview on the morning of trial, and that the State's violation of its duty of discovery in that regard resulted in the later *Crawford* violation at the second trial.

{¶ 9} Even if the State is correct concerning the investigator's interview of Williams the evening before, the significance of that fact must be weighed in relation to the discovery failure that occurred, and the resulting prejudice suffered by Defendant.

{¶ 10} The State concedes that the prosecution team was aware as early as January 7, 2008, that Linda Williams' address was 76 Victor Avenue, in Dayton. (Transcript of November 5, 2008 Hearing on Defendant's Motion for New Trial, p. 560-61; State's Reply, p.

15.) On January 11, 2008, in response to Defendant's motion to compel, the court ordered the State to file "a true and accurate witness list with criminal records provided or the case shall be dismissed." (Dkt. 367). The State filed a memorandum on January 14, 2008, asking the court to withdraw its order, insisting that "[t]he State of Ohio has fully complied with its obligation of discovery" and agreed to provide witness addresses when the Defendant requested them. Nevertheless, on January 22, 2008, and again on January 25, 2008, as it had for many months before, the State responded to Defendant's repeated discovery requests and the court's orders compelling discovery with written statements that Linda Williams' address was "c/o Mike Galbraith, Dayton Police Department, 335 West Third Street, Dayton, OH 45402," which is the headquarters of the Dayton Police Department. (Dkt. 396, 440; Excerpted Tr. 8.)

{¶ 11} The trial was scheduled to commence on the morning of Monday, January 28, 2008. On the preceding Saturday, January 26, 2008, at about 3:15 p.m., the State sent a fax communication to the offices of Defendant's attorneys, stating that Linda Williams' address was 76 Victor Avenue. (Excerpted Transcript, 10-13.) Defendant's counsel stated that they did not discover that fax communication until they arrived at their office on the morning of Monday, January 28, 2008, the first day of trial. (Response

to Appellee's Application for Reconsideration and Stay, p. 7, citing Appellee's Amended Brief, p. 50.)

{¶ 12} Linda Williams was scheduled to testify, and did testify, on Thursday, January 31, 2008. Even if Defendant's counsel had Williams' address on the morning of Monday, January 28, 2008, their ability to make use of it was curtailed by events. Donald Otto, the prosecutor's investigator, had removed Williams from her home at 76 Victor Avenue on the evening of Sunday, January 27, 2008, and took Williams to a hospital for treatment of injuries her boyfriend had inflicted. After that treatment, Otto took Williams to a Doubletree Hotel for her own safety.

{¶ 13} Williams went to the Prosecutor's Office the following morning, Monday, January 28, 2008. Because Williams needed further medical attention, due to her advanced pregnancy, Otto returned Williams to the hospital that same day. Williams was admitted to the hospital and was discharged on Tuesday, January 29, 2008. In her subsequent testimony on Defendant's motion for a new trial, Williams testified that she was at the Prosecutor's Office for three days prior to her testimony on January 31, 2008. (Transcript from November 3, 2008 Hearing on Defendant's Motion for a New Trial, p. 70-71.) Defendant's counsel were not made aware of that fact.

{¶ 14} We do not question the propriety the State's conduct in

acting to protect Linda Williams' health and safety as it did. Nevertheless, during those times she was at a motel and in the hospital, and later while she was in the Prosecutor's Office waiting to testify, Williams was not at 76 Victor Avenue but was, effectively, in the State's care and custody. The State had a duty to make defense counsel aware of that fact, and it didn't.

{¶ 15} This sequence of events, and the interview of Williams that Defendant's counsel was permitted to perform on the morning of Thursday, January 31, 2008, is significant in relation to the trial court's orders in response to Defendant's objections to the State's discovery failure and the State's misrepresentations to the court.

{¶ 16} On Tuesday, January 29, 2008, at the end of the trial day, Defendant's counsel asked for a continuance of the trial in order to interview witnesses whose addresses he had only lately been provided. After hearing arguments from both sides, the court took that motion under advisement. (Excerpted Tr. 9.)

{¶ 17} The following morning, Wednesday, January 30, 2008, the court met with counsel to rule on Defendant's motion. In the course of that hearing, the court stated its understanding that the State's "position was that it had provided witness addresses to Defendant as soon as the (witnesses) addresses were known to them, they were supplied to the defense." (Excerpted Tr. 11, 18.)

Assistant County Prosecutor Brandt replied, "You are correct with regard to our response." (Excerpted Tr. 11-12.) The court repeated its "understanding" that the State had provided addresses as soon as it had them. Neither Brandt nor Assistant County Prosecutor Franceschelli, who was also present, made an effort to correct the court's second statement.

{¶ 18} As a result, and acting on its misunderstanding that the State had provided Linda Williams' address as soon as the State had that information, which was untrue, the court denied the continuance Defendant requested and ordered that, instead, the State must make Williams and other witnesses available for interview by defense counsel prior to their testimony. Defendant's counsel objected to that denial of his motion. (Excerpted Tr. 16-18.) The limited interview of Linda Williams on the morning of the following day, Thursday, January 31, 2008, was a product of the court's order of the preceding day.

{¶ 19} The State in its application puts great emphasis on the trial court's resolution of Defendant's discovery objection and related motion for a continuance. Yet, the record demonstrates that the court was operating under a misapprehension, created by the State, that the State had promptly provided Linda Williams' address as soon as it had that information. The record demonstrates that the State knew of Linda Williams' address as

early as January 7, 2008, but didn't provide it to Defendant until January 26, 2008, on a Saturday afternoon, by fax. After that, when its investigator removed Williams to a hospital and hotel on the evening of Sunday, January 27, 2008, the State failed to reveal Williams' whereabouts to Defendant. The fact that Defendant's investigator was finally able to locate Williams the evening before she testified is of only marginal significance in relation to Defendant's need and request for discovery and the State's failure to provide it.

{¶ 20} The State argues that, nevertheless, Defendant's counsel was satisfied with the court's resolution of the matter. That is belied by the record. Defendant's counsel, Attorney Rion, objected to it. (Excerpted Tr. 16-18.) Furthermore, his co-counsel, Attorney Lennen, argued that the State's conduct had prevented the defense from conducting interviews necessary to preparation of Defendant's case. (Excerpted Tr. 2.)

{¶ 21} The State also argues that the limitation Defendant suffered with respect to the testimony of Linda Williams was nevertheless harmless. The State points to the testimony of two other jail inmates concerning a conversation in which Defendant Arnold, when the matter of her baby's death was mentioned, stated: "I didn't mean to do it." (Tr. 990-1023). We agree that the statement implicates Defendant in her child's death. However, her

defense was negligence in not preventing someone else from killing her child. Linda Williams' testimony that Defendant admitted actually putting her infant in the microwave and turning it on directly contradicts her defense. It has a probative value different from the evidence of the other two witnesses mentioned.

{¶ 22} Finally, the State argues that it nevertheless complied with the court's "open discovery" rule, Mont.Loc.R. 3.03(D)(2)(d), when it provided a copy of a police report of an interview with Linda Williams, in which she related the facts implicating Defendant in her baby's death to which Williams later testified. The report does not reflect Linda Williams' address. The report was attached to a letter dated January 9, 2008, which was two days after the State learned of Linda Williams' address. Yet, the State again failed to reveal that address. (January 9, 2008 letter from David M. Franceschelli to Jon Paul Rion, Esq., attached as Appendix B to Application for Reconsideration and Motion for Stay.)

{¶ 23} Providing the police report of the interview of Linda Williams did not discharge the State's duty under Crim.R. 16 to provide Linda Williams' address, which is likewise a requirement of Mont.Loc.R. 3.03(D)(2)(d)(v.) Indeed, the State's attitude toward its duty of discovery is portrayed in its assertion that its compliance with the local rule is "voluntary." The local rule was adopted pursuant to Article IV, §5(B), of the Ohio

Constitution. Compliance by the State and defendants is mandatory, until the rule is judicially revoked or vacated, which has not happened. The State is not authorized to ignore the local rule, or Crim.R. 16, to suit its purposes.

{¶ 24} We are not persuaded that we were wrong in concluding that the State failed to comply with its duty of discovery when it withheld the address of Linda Williams. The fact that the State finally provided it by fax on the Saturday afternoon before trial was to begin on the following Monday portrays a purposeful effort to prevent Defendant's effective use of that information, even when it was provided. The State furthermore permitted the court to act on a misapprehension, one created by the State, that the information had instead been provided promptly, leading the court to deny Defendant's request for a continuance in order to interview Williams and other witnesses before their testimony. As we stated in our Opinion of November 5, 2010, that impaired the opportunity for cross-examination of Williams Defendant was afforded, resulting in a *Crawford* violation when Williams' recorded testimony was subsequently introduced in evidence at Defendant's second trial.

{¶ 25} We acknowledge that this was a high-profile trial that was hard fought by both sides. Our finding of misconduct on the part of the prosecutors should not be construed as approval of any

similar failures on the part of the defense team. Yet, different standards come into play. As Justice Frankfurter wrote, our system of criminal justice necessarily depends on "conscience and circumspection in prosecuting officers." *United States v. Dotterweich* (1943), 320 U.S. 277, 285, 64 S.Ct. 134, 88 L.Ed. 48. For that reason, while the prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States* (1935), 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314. The prosecutors violated that principle when they purposely withheld Linda Williams' address and whereabouts from defense counsel, and then misled the court concerning what they had done.

{¶ 26} Regarding Kyra Woods, the State argues that we failed to state that exclusion of her proffered testimony was prejudicial to Defendant, and, in any event, that Woods' testimony would merely be cumulative to that of another witness, as the trial court found.

{¶ 27} We found that the trial court abused its discretion when it excluded Kyra Woods' testimony, for reasons stated in our opinion. The issue, then, is not whether the error is prejudicial, but whether the error is harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. On this record, that standard is not satisfied. The State's contention that the court did not abuse its discretion is nothing more than a challenge to our logic in reaching the conclusion we

reached, which is not a basis for reconsideration pursuant to App.R. 26(A). *State v. Owens*.

{¶ 28} The State's application for reconsideration and motion for stay are Denied.

JAMES A. BROGAN, JUDGE

MIKE FAIN, JUDGE

THOMAS J. GRADY, JUDGE

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