[Cite as *State v. Treharn*, 2009-Ohio-2638.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 112
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
JAMES TREHARN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from County Court No. 5, Case No. 07CRB283.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: June 3, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant James Treharn appeals from his conviction of domestic violence entered after a jury trial in Mahoning County Court No. 5. The main issue on appeal is whether the court abused its discretion in failing to exclude a photograph that was not disclosed until the day of trial and in refusing to grant a mistrial based upon the failure to disclose the alleged victim's written statement until mid-trial. These were discovery violations. However, counsel did not object to the photograph until after the state rested, and counsel did not demonstrate how the late disclosure of the alleged victim's written statement affected the fairness of the trial since he had received the officer's recap of her statement and he was provided a recess after which he did not voice further objection. As such, the trial court did not abuse its discretion, and the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} On February 19, 2008, appellant was tried for domestic violence in violation of R.C. 2919.25(A), a first degree misdemeanor, which entails knowingly causing or attempting to cause physical harm to a family or household member. Jillian Treharn testified that on July 31, 2007, she and appellant had a very long argument about her consulting a divorce attorney and other marital issues. Appellant was feeding their nine-month-old daughter. When the baby started crying, Jillian wanted to hold the baby. Appellant yelled that she could have the divorce but not the baby. (Tr. 18).

¶{3} After more arguing, he gave Jillian the crying child. Jillian testified that as she walked away holding the child in her right arm, appellant grabbed her left upper arm. (Tr. 19). She said that he tried to turn her around but she escaped his grasp; she then told him she was calling the police but actually tried to call her parents. She testified that he took the telephone off her at which point she ran upstairs to the bedroom with him chasing and yelling at her. (Tr. 20-23). When she tried to close the door, he pushed it open and then slammed his forearm into her right arm as he pushed her against the wall. (Tr. 27).

¶{4} He then left the house. She put the child to sleep and called her father and her brother-in-law. Appellant called her ten to fifteen minutes after he left and

said: "it is over; you win. I'll give you the divorce. I'll give you whatever you want." (Tr. 30). At that point, Jillian called the Beaver Township Police to file a domestic violence charge.

¶{5} Appellant testified that Jillian tried to rip the baby out of his arms. (Tr. 128). She then slapped at him, which he blocked with his right arm. When he turned around to avoid her slapping, she pushed him. (Tr. 130-131). He then gave her the child. (Tr. 131). When she ran upstairs saying that she was going to call the police, he ran after her and stuck his foot in the door. He denied grabbing her left arm downstairs or hitting her arm upstairs while she was holding the baby. (Tr. 141-142). He confirmed that he called her and said she could have the divorce. He testified that he also told her that he could have reported her conduct to the police. He opined that this statement caused her to hang up and call the police. (Tr. 195).

¶{6} The jury found appellant guilty of domestic violence rather than the lesser included offense of disorderly conduct. He was thereafter sentenced to 180 days in jail with 170 days suspended leaving 10 days to serve. He was given one year of reporting probation with forty hours of community service and anger management counseling, and he was fined $250. Appellant filed timely notice of appeal.

ASSIGNMENTS OF ERROR

¶{7} Appellant's first and second assignments of error provide:

¶{8} "THE TRIAL COURT ERRED BY ADMITTING THE PHOTOGRAPHS AND STATEMENT NOT PROVIDED TO APPELLANT'S COUNSEL."

¶{9} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL."

¶{10} We begin by reviewing the additional facts that are more directly related to these assignments. At the end of her direct examination, Jillian stated that the responding lieutenant took pictures of her bruise evidencing appellant's act of grabbing her arm, and she identified State's Exhibit A as a photograph depicting that bruise. (Tr. 32). During Jillian's cross-examination, she noted that she gave a handwritten statement to the police. (Tr. 59). Defense counsel advised the court that they needed to speak to the lieutenant about the lack of this statement in the file. (Tr. 60).

¶{11} Thereafter, the lieutenant testified that he spoke to Jillian for five minutes before having her write her statement, which he noted had the same content as the narrative report he typed up about his interview with her. (Tr. 81-82). When asked why Jillian's written statement was not provided to the prosecutor or defense counsel, he answered that it should have been in the file and he disclosed that he had a copy of her statement with him. (Tr. 82-83). The information packet that was provided to defense counsel was labeled Defense Exhibit 1, and the lieutenant noted that the photographs he took of the bruise of the back of Jillian's arm had not been provided either. (Tr. 90).

¶{12} The state rested and asked to have the photograph of the bruise admitted. Defense counsel objected and asked that it be stricken, saying that he viewed it for the first time on the day of trial. (Tr. 106-107). The prosecutor, who apparently was just assigned to the case and who had reviewed the file for the first time that morning, stated that when he saw black and white photographs in the file, he told the police department that they needed to provide color photographs or he would not use the pictures. (Tr. 107, 110). One hour later, the police department provided color photographs, which the state immediately showed to the defense. (Tr. 107). Defense counsel stated that his approach to trying the case was affected by the fact that he had not seen any photographs until the morning of trial and he did not find out about Jillian's written statement until during trial. (Tr. 108).

¶{13} The court noted that the photograph had already been circulated to the jury. (Tr. 110). The court then admitted the photograph rather than excluding it and issuing a curative instruction as requested. (Tr. 110-111).

¶{14} As to the written statement, defense counsel moved for a mistrial, claiming that the statement was not even mentioned in the officer's report. (Tr. 113-114). The court instead provided time to review the statement. After a recess, the court stated on the record that the statement was not inconsistent with Jillian's testimony. (Tr. 116).

¶{15} Appellant now contends that the trial court abused its discretion in admitting the photograph and the statement and in refusing to grant a mistrial based

upon the failure to provide the photograph and the statement in discovery. However, the following law combined with the procedural history of this case work against him.

¶{16} If a discovery violation is brought to the court's attention, the court may order discovery, grant a continuance, prohibit the party from introducing the undisclosed evidence or make some other order it deems just under the circumstances. Crim.R. 16(E)(3). Under a local rule, discovery violations, including a failure to provide supplemental discovery seven days before trial, will result in undisclosed material being excluded from trial unless the court grants leave for good cause shown. Mah.Cty.Loc.Crim.R. 9(E).

¶{17} The trial court's decision on these matters, including the decision to deny a mistrial as a remedy for the discovery violation, will not be reversed absent an abuse of discretion. See, e.g., *State v. Garner* (1995), 74 Ohio St.3d 49, 59 (mistrial in general); *Pang v. Minch* (1990), 53 Ohio St.3d 186, 194 (local discovery rule violation); *State v. Parson* (1983), 6 Ohio St.3d 442, 445 (Crim.R. 16 violation). In exercising its general discretion, the court is to inquire into the circumstances of the discovery violation and impose the least severe sanction consistent with the purpose of the discovery rules, which is to prevent surprise and the secreting of evidence favorable to the other party. *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3.

¶{18} In *Parson*, the Court found that the trial court did not abuse its discretion in refusing to exclude undisclosed evidence where: (1) nothing in record showed the lack of disclosure was willful; (2) nothing showed how foreknowledge of the undisclosed statement would have benefited the defense; and (3) the statement's prejudicial effect was not demonstrated where counsel had time to counteract it. *Parson*, 6 Ohio St.3d at 445.

¶{19} Here, there was no indication that the discovery violations were willful. The prosecutor made various statements concerning his lack of knowledge of the missing items. In fact, appellant concedes that there was no willfulness on the prosecutor's part. As to the police department, the lieutenant was thoroughly questioned on the matter of the incomplete discovery file, and the court could use its discretion to find his testimony credible and his willfulness lacking. In addition, the

inquiry into the circumstances surrounding the lack of a statement and the lack of photographs was sufficient for the court to exercise its discretion.

¶{20} Next, we point out that contrary to appellant's suggestion, the court did not admit Jillian's written statement. It was not read to the jury, and it was specifically protected from the jury review of exhibits. (Tr. 112-113, 117). Thus, the second portion of appellant's first assignment of error, urging that the trial court should have excluded Jillian's written statement, is factually incorrect and will not be addressed further.

¶{21} Under the remainder of assignment of error number one, this leaves the question of whether the court should have excluded the photograph of Jillian's arm, which showed the bruise said to be caused when appellant grabbed her. As aforementioned, counsel did not seek exclusion of the picture or a curative instruction until after it was viewed by the jury and the state had rested. When the court pointed out the fact the photograph had already been viewed by the jury, the state noted that it would be difficult to "unring the bell." (Tr. 106-107, 110-111). The court agreed and allowed admission of the photograph.

¶{22} It is noteworthy that counsel did not seek a continuance or a mistrial based upon the photograph. Nor did counsel mention any lost potential to have an expert view the photograph to dispute that the depicted bruise could have been caused by the grabbing described by Jillian. Yet, appellant's argument on appeal regarding the photograph concerns the lost opportunity to consult an expert. We also point out that appellant knew about the bruise and its location as he testified that his sister viewed it and told him about it on the night of the incident. Additionally, in his statement to police the next day, he tried to explain why Jillian should not have a bruise on the back of her arm if her story was true. In fact, his testimony seemed to imply that he saw a digital photograph of the bruise at the police station. (Tr. 184, 193, 202).

¶{23} In any event, the failure to object to the photograph when the state introduced it during Jillian's testimony or when it was circulated to the jury essentially invited or waived any error. (Tr. 32). It is well-established that the failure to object at a time when the problem could have been avoided waives all but plain error. *State v.*

Williams (1977), 51 Ohio St.2d 112, 117. See, also, Evid.R. 103(A)(1), (D); Crim.R. 52(B). More specifically, the failure to object to the publication of a photograph to the jury until after the state rested constitutes waiver for purposes of appeal. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶92.

¶{24} An exception to the waiver doctrine, is the plain error doctrine. Here, however, the circulation of the photograph to the jury at the time of Jillian's testimony could not be considered the trial court's plain error as the trial court was unaware of the issue at the time of the photograph's introduction and circulation. See *State v. Barnes* (2002), 94 Ohio St.3d 21, 27 (party claiming plain error must show that an obvious error occurred which affected the outcome of the trial).

¶{25} Although the trial court could have excluded the photograph from evidence after the state rested and could have issued a curative instruction telling the jury to disremember what they saw, the refusal to do so was not an abuse of discretion that affected substantial rights under Crim.R. 16(E)(3). Considering the state's lack of willfulness, the jury's prior view of the picture and the defendant's lack of objection when the issue could have been avoided, the trial court could rationally use its discretion to find good cause to admit the photograph into evidence under Mah.Cty.Loc.Crim.R. 9(E). In accordance, appellant's first assignment of error is overruled.

¶{26} Regarding appellant's request for a mistrial, his appellate arguments revolve around his claim that his trial strategy would have been different if he knew there were pictures of the injury and that he may have been able to secure an expert to testify that the bruise would not have been located where it was if Jillian's story about his grabbing her was true. However, as the state points out, defense counsel did not seek a mistrial on the grounds of the photograph. The request to exclude the photograph had already been disposed of by the time counsel sought a mistrial. (Tr. 111, 113).

¶{27} After the court ruled on the photograph's admission, counsel specified that he had something else to discuss. He then began speaking of Jillian's statement and explained: "And, I guess, I'll move for a mistrial at this point on the basis of the fact that the primary complaining witness's handwritten statement was never provided

during discovery and only provided in the middle of the jury trial." (Tr. 113). Counsel continued to complain that the police report had no reference to the taking of a written statement and concluded, "So, I'm going to move for a mistrial on that basis." (Tr. 113-114). As such, the photograph was clearly not the basis for the mistrial motion and our review of assignment of error number two thus only relates to the written statement.

¶{28} Appellant's brief acknowledges that Jillian's written statement was not likely to have helped his defense. Moreover, the court stated on the record that the statement was consistent with her testimony. Additionally, the officer testified that his narrative was consistent with her written statement. This narrative was timely provided to appellant in discovery. As such, the benefit to the defense and the prejudice elements of *Parson* are not satisfied.

¶{29} As aforestated, it was conceded that the prosecutor did not willfully suppress Jillian's statement, and the trial court could rationally find that the late disclosure was not willful on the part of the police either. To reiterate, the lieutenant acknowledged that the statement should have been in the file, stated that he did not intend to secret the statement and then provided his copy to counsel.

¶{30} In addition, contrary to appellant's arguments, *the police report did in fact reveal that Jillian provided a written statement*. (See page 1, which describes property related to event as: "Written statement from Jillian Treharn"). This not only tends to negate willfulness on the part of the police department, but it also counters appellant's argument that he had no reason to know from the discovery provided that a written statement was given.

¶{31} Finally, we emphasize that after counsel moved for a mistrial on the basis of the state's failure to provide Jillian's written statement in discovery, the court instead chose the remedy of calling for a recess to allow counsel to review the statement, which he had not yet viewed more than cursorily. After the recess, counsel made no further mention of the issue. In other words, counsel did not inform the court that he needed a continuance to change his trial strategy as a result of the statement. Rather, his silence after being provided with a recess implied that he was satisfied that he could proceed because, for instance, her statement coincided with the narrative

report of the officer. Hence, the trial court did not abuse its discretion in failing to grant a mistrial based upon the written statement.

¶{32} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, J., concurs.
DeGenaro, J., concurs.