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2016 IL App (3d) 150315-U

Order filed June 30, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellant,	)	
v.	)	Appeal No. 3-15-0315
	)	Circuit No. 02-CF-1057
ERIC K. GLOVER,	)	
Defendant-Appellee.	)	Honorable Carla Policandriotes, Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Justices Lytton and McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion by excluding comparative ballistics evidence as a sanction for a discovery violation by the State.

¶ 2 On June 17, 2002, Velma Franklin, defendant's girlfriend and mother of his child, was murdered in her home. She died as the result of a single gunshot wound to her head. In order to prove defendant was the gunman as part of a murder prosecution initiated in 2012, the State intended to offer other crimes evidence linking the bullet defendant admitted discharging into the

bedroom wall in 2002 to the same weapon allegedly used to murder his girlfriend just two months later.

¶ 3 During the court-ordered discovery process, the parties discovered the bullet removed from the wall in 2002 had been destroyed during a routine purge of the Joliet Police Department's evidence vault, making it unavailable for inspection in 2015. However, the State tendered ballistics reports prepared in 2002 to the defense. The ballistics reports concluded the bullet found in the wall and the bullet found in the victim's skull were fired from the same weapon. The State hoped to introduce the ballistics comparison as circumstantial evidence that defendant murdered the victim.

¶ 4 Since one of the bullets could not be produced by the State for purposes of discovery, the court imposed a discovery sanction. The court prohibited the State from presenting evidence identifying the destroyed projectile as being fired from the same weapon as the projectile recovered during the autopsy.

¶ 5 The State filed a timely appeal on May 6, 2015. We affirm.

¶ 6 **FACTS**

¶ 7 On July 3, 2002, a Will County grand jury returned an indictment against Eric Glover (defendant) for the first degree murder of Velma Franklin, his then live-in girlfriend and mother of his child, in violation of 720 ILCS 5/9-1(a)(1) (West 2002). On February 13 2003, the People of the State of Illinois (the State) moved to voluntarily dismiss the first degree murder charge without prejudice. Defendant was subsequently charged with unlawful use of weapons by a felon (UUW).

¶ 8 Following a stipulated bench trial, the court found defendant guilty of UUW. Defendant received a sentence of probation. However, defendant did not comply with the conditions of his

probation. In November of 2005, defendant was resentenced to serve five years in the Illinois Department of Corrections.

¶ 9 On May 31, 2012, more than nine years after defendant's first degree murder charges were initially dismissed, a grand jury returned a first superseding bill of indictment against defendant for the first degree murder of Velma Franklin in violation of 720 ILCS 5/9-1(a)(1) (West 2002). On June 1, 2012, the trial court ordered the process of routine discovery to begin. During this process, the State determined that a bullet retrieved from the bedroom wall in 2002 had been destroyed by an evidence custodian. Thereafter, defendant filed motions seeking to exclude evidence pertaining to the destroyed bullet and requested a dismissal of the 2012 murder indictment.

¶ 10 During the 2014 hearing on the pending defense motions, the court received testimony that established two bullets were recovered during the murder investigation in 2002. One bullet was removed from inside a wall in the victim's bedroom. The bullet recovered from the bedroom wall was assigned a case number corresponding with the UUW charge.

¶ 11 A second bullet was removed from the victim's head during her autopsy. The bullet recovered during the autopsy was assigned a case number corresponding with the first degree murder charge. Since each bullet was assigned a separate case number, the bullets were stored within different sections of the Joliet Police Department's (JPD) evidence vault. Further, the bullet found in the bedroom wall was thrown away pursuant to a routine evidence purge in September of 2012. The bullet stored in connection to the murder was not destroyed as the JPD never destroys evidence connected with homicide cases.

¶ 12 In June of 2002, the Illinois State Police (ISP) conducted comparative ballistics testing on both bullets. The ISP crime lab prepared a report concluding both bullets had been discharged from the same weapon.

¶ 13 At the 2014 motion hearing, defendant offered the testimony of one witness, David E. Balash. Balash was an independent firearms examiner, crime scene reconstructionist, and forensic science consultant. Balash testified he examined the lab reports and worksheets prepared by the ISP concerning the shared characteristics of the two bullets. Balash stated he could not possibly determine whether the 2002 ballistics reports contained accurate conclusions unless he could personally compare both bullets side by side under a microscope.

¶ 14 The State presented the testimony of multiple witnesses including Richard J. Trafton, a police officer and former evidence technician for the JPD. Trafton testified he was the case agent who was responsible for the crime scene in 2002. Trafton said he removed what appeared to be a bullet from a piece of wood inside of a wall in the victim's bedroom. He photographed and identified the object as bullet "4934." Trafton also testified that a second bullet was removed from the victim's skull during her autopsy. This second bullet was identified as bullet "4935." Trafton explained that bullet 4934 was placed in storage under a case number for the UUW charge against defendant and bullet 4935 was placed in storage under a separate investigation number for defendant's 2002 first degree murder charge.

¶ 15 Next, the State called Nicholas Amelio, a crime scene investigator and evidence technician for the JPD since 2006. Amelio explained that homicide evidence was kept in red envelopes, never to be destroyed, while all other envelopes were manila. Bullet 4934 would have been kept in a manila envelope because it was part of the UUW case.

¶ 16 Amelio detailed how evidence technicians routinely purge evidence when the evidence vault becomes too full. Because a five-year sentence was handed down to the defendant in 2005 for UUW, Amelio concluded defendant's sentence would have been completed in, what was then, 2012. Therefore, bullet 4934 was destroyed as Amelio was not aware of the connection between the UUW case and the unsolved homicide case. Amelio characterized the destruction of the bullet connected with the homicide as unintentional and a "horrible mistake."

¶ 17 Next, Walter I. Shreck testified on behalf of the State as a retired expert in firearms identification for the ISP. Shreck testified to completing the forensic comparison of bullets 4934 and 4935 and concluding both bullets had been fired from the same weapon. Shreck stated he was 100% sure the bullets were a match, but had no independent recollection of his examination barring the usage of his notes and reports from the time.

¶ 18 A second ISP forensic examiner, Robert J. Hunton, testified he verified Shreck's findings in 2002 that each bullet had been fired from the same weapon. Hunton further stated there were no comparison photographs (micrographs) taken of the two bullets as it was not standard practice in 2002 as it is now. In fact, Hunton stated, you would have needed a court order to take micrographs in 2002. Finally, Hunton testified he had no present recollection of the 2002 verification in question.

¶ 19 The State's last witness, Dan B. Gunnell, testified as the assistant laboratory director for the ISP Forensic Science Lab. Gunnell testified that he began working at his current position in 2003, and served as the supervisor for both Shreck and Hunton for many years. Gunnell explained to the court that neither he nor anyone else he knew had ever questioned the accuracy of the work of Hunton or Shreck.

¶ 20 Gunnell also described the laboratory’s quality control program that included: yearly proficiency tests for examiners, peer reviews, random selection of cases sent to the quality assurance coordinator, and an annual audit by the National Forensic Science Technology Center (NFSTC). Gunnell further commented on studies finding the error rate in firearms identifications to be less than 1%. Gunnell said he would be shocked if a third firearms examiner disagreed with the findings of Hunton and Shreck.

¶ 21 On April 20, 2015, the trial judge found no due process violation occurred based on the destruction of bullet 4934 because the bullet was not an essential piece of evidence relevant to guilt or innocence for the offense of murder. The court also found the discovery violation resulted from an inadvertent and unintentional destruction of evidence. Based on the testimony presented during the motion hearing, the court found:

“[T]he just remedy is an imposition of an Order prohibiting the prosecution from the presentation of evidence identifying the destroyed projectile as being fired from the same weapon as the projectile recovered during the autopsy.”

¶ 22 Pursuant to this ruling, the State filed a certificate of impairment pursuant to *People v. Young*, 82 Ill. 2d 234, 247 (1980), and filed a timely notice of appeal pursuant to Rule 606 on May 6, 2015. Ill. S. Ct. R. 606 (eff. Dec. 11, 2014).

¶ 23 ANALYSIS

¶ 24 On appeal, the State does not dispute that a discovery violation occurred, but takes issue with what they see as a harsh sanction imposed by the trial court. Defendant contends the discovery sanction designed by the court was a narrowly tailored sanction and did not constitute an abuse of discretion by the trial court.

¶ 25 Illinois Supreme Court Rule 412 governs the State’s responsibilities for disclosure of evidence to the accused. Ill. S. Ct. R. 412 (eff. Oct. 1, 1971). In addition, Illinois Supreme Court Rule 415 states that when “a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.” Ill. S. Ct. R. 415(g)(i) (eff. Oct. 1, 1971). “To allow a party to defy a discovery order without facing sanctions can be likened to a dog without teeth – all bark and no bite.” *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 37.

¶ 26 The proper sanction for a discovery violation is a decision best left to the discretion of the trial court, and the court’s judgment shall be given great weight. *People v. Koutsakis*, 255 Ill. App. 3d 306, 312 (1993). The trial court is best positioned to craft a discovery sanction based on how the discovery violation will affect the defendant. *People v. Kladis*, 2011 IL 110920, ¶ 42. When a trial court imposes a discovery sanction, the court’s ruling is reviewed for an abuse of discretion, which occurs “only where the decision of the trial court is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would take the view adopted by the trial court.” *Kladis*, 2011 IL 110920, ¶ 42.

¶ 27 Exclusion of evidence or dismissal may be proper even if the discovery violation was unintentional. *People v. Newberry*, 166 Ill. 2d 310, 317 (1995). The discovery sanction must be affirmed if it was narrowly tailored and did not prevent the State from prosecuting the defendant with “evidence apart from that which was barred under the sanction.” *Kladis*, 2011 IL 110920, ¶ 45. Narrowly tailored means using the least restrictive means possible to fulfill an intended goal. *People v. Cornelius*, 213 Ill. 2d 178, 204 (2004).

¶ 28 In this case, the State emphasizes that their expert opined there is a statistical 1% chance the comparative testing of both bullets produced an erroneous conclusion that each bullet was discharged from the same weapon. Further, the State emphasizes the court's finding that the destruction of bullet 4934 was inadvertent.

¶ 29 The State relies on the decision in *People v. Sykes* in support of their contention that a less onerous approach of providing a limiting instruction concerning the destroyed evidence was a more appropriate sanction. *People v. Sykes*, 341 Ill. App. 3d. 950, 969-71 (2003). However, the imposition of discovery sanctions must be addressed on a case by case basis. Even the *Sykes* court recognized the correct sanction for a discovery violation is a decision appropriately left to the discretion of the trial court. *Sykes*, 341 Ill. App. 3d at 972.

¶ 30 We agree the record demonstrates the destruction of evidence by the State was not intended to interfere with defendant's ability to prepare a defense in this case. However, inadvertent destruction is simply one of several factors considered by the trial court when designing a proper sanction for the destruction of evidence. Most troubling is the fact that without both bullets, the defense could not replicate comparative testing or determine the accuracy of the worksheet notes concerning the physical characteristics of each bullet.

¶ 31 Significantly, the court did not exclude all evidence pertaining to the missing evidence. For example, the court's ruling would allow the State to introduce evidence showing the discovery of bullet 4934 in the bedroom wall. Furthermore, the court's ruling will allow the prosecution to present defendant's admission that he personally, but accidentally, fired bullet 4934 into the bedroom wall. In fact, the only evidence excluded as a sanction upon the State was the expert's conclusion that both bullets 4934 and 4935 were fired from the same weapon. This



sanction appears to accomplish its goal of negating any injustice suffered by defendant while allowing the State to continue their prosecution of the case, and thus is narrowly tailored.

¶ 32

#### CONCLUSION

¶ 33

The trial court did not abuse its discretion by excluding comparative ballistics evidence as a sanction for a discovery violation by the State.

¶ 34

Affirmed.