

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0884

State of Ohio,
Appellee,
vs.
Robert Burkholder,
Appellant.

Case No.:
On Appeal from the Lucas
County Court of Appeals,
Sixth Appellate District.
C.A. Case No. L-11-1216

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBERT BURKHOLDER

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Robert Burkholder's case is of great public and general interest because it concerns the rights to due process and a fair trial under the Fifth and Fourteenth Amendment to the United States Constitution and Section 16, Article 1 of the Ohio Constitution. Mr. Burkholder's case offers this Court an opportunity to demand that Ohio courts remain vigilant in protecting the rights of the people to due process and a fair trial by preventing juror bias, and admitting evidence of a defendant's prior convictions. Furthermore, Mr. Burkholder was deprived of the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. This Court should grant jurisdiction in this case to ensure that every criminal defendant and appellant is to be afforded due process, fair trial, and to receive effective assistance of trial counsel.

STATEMENT OF THE CASE

On November 10, 2010, Robert Burkholder was indicted by the Lucas County Grand Jury in a two count indictment on one count of Rape, a felony in the first degree and punishable pursuant to ORC§2907.02(B), and one count of Gross Sexual Imposition, a felony in the third degree. Arraignment was held on November 17, 2010 at which time Robert Burkholder was appointed counsel and entered pleas of not guilty to both offenses of the indictment.

Originally the indictment stated that the offenses occurred on July 1, 2010. The Defense filed a Notice of Alibi on February 3, 2011, with supporting documentation that Robert Burkholder was out of the state on July 1, 2010. Subsequently, the State amended the dates of

the indictment two times. First, the State moved to amend the indictment on March 14, 2011 to include the dates of July 1, 2010 through July 31, 2010. Second, the State moved to amend the indictment following their cases in chief at trial to include the dates of June 1, 2010 through August 6, 2010. Both of the State's motions were granted by the Court.

The Defense filed a Request for a Bill of Particulars on November 18, 2010. Although the State did respond their response did little to set forth the exact basis for each charge of the indictment. Instead, the State's response merely recited the indictment without specific details. However, at trial the State explained the acts giving rise to both charges filed against Robert Burkholder. With respect to the Rape offense the State indicated that it was alleged acts of vaginal penetration with his fingers (Tr. Trans. pg. 451). As to the Gross Sexual Imposition charges the allegation is that Robert Burkholder forced Marisa to touch his genital area (Tr. Trans. 453).

On January 14, 2011, the State of Ohio filed "State's Notice of Intent to Use Similar Acts Evidence Pursuant to Evid. R. 404(B) and R.C. §2945.59" in which it indicated its' intent to utilize Robert Burkholder's prior convictions of three charges of Gross Sexual Imposition offenses at trial in the case at bar. The Defense filed a Motion in Opposition and Motion in Limine on February 3, 2011. The trial court issued an "Opinion and Judgment Entry" on April 27, 2011 denying Defendant's Motion in Limine and allowing the State to present evidence pursuant to Evidence Rule 404(B) and R.C.2945.59. The Court's decision was made without conducting an evidentiary hearing on the "Notice" and Motion.

Robert Burkholder's trial commenced on August 8, 2011. Prior to the start of the trial the Defense renewed its' objection to the State's use of Defendant's prior criminal convictions under Evid Rule 404(B), which the Court denied. A jury was empaneled and testimony was presented.

At the conclusion of their case, which again was denied by the Court.

At the conclusion of the trial the jury found Robert Burkholder guilty on both counts of the indictment. The trial court sentence Robert Burkholder on August 12, 2011. On August 30, 2011, Robert Burkholder timely filed his Notice of Appeal, giving rise to an appeal to the Sixth Appellate District of Lucas County, Ohio.

STATEMENT OF THE FACTS

In the case at bar Robert Burkholder has continuously maintained his innocence. As a result, many of the facts presented at trial are in dispute. Nevertheless there are certain facts that were presented at trial that are relevant background information for this Court when considering the proposition of law presented by Appellant in this matter.

Robert Burkholder is the brother in law to Anthony Barrere, who is married to Andrea (Tr. Trans. pg. 195). Andrea and Anthony have two children together with the oldest of the two being Marisa (Tr. Trans. pg. 193). Marisa was nine years old at the time of the trial (Tr. Trans. pg. 194).

On August 6, 2010, while getting ready for a family vacation to Sandusky, Ohio, Andrea found Marisa masturbating (Tr, Trans. pg. 200). Andrea did not initially speak to her daughter about what she observed and decided to wait until later (Tr. Trans. pg. 200). Later that evening Andrea and her husband, Anthony, began to question Marisa what she was doing earlier and why (Tr. Trans. pg. 200).¹

¹ Throughout the trial several witnesses testified, over a hearsay objection by the Defense, what Marisa said in response to these questions. These witnesses also testified, over hearsay objections, what Marisa said occurred giving rise to the charges filed. However, as set forth below the Court's admission of this hearsay testimony was in error and therefore should not have been considered by the jury. Thus, the only admissible evidence describing what took place is the testimony of Marisa herself.

Marisa testified at trial that she was nine years old (Tr. Trans. pg. 322). She testified that she knew Robert Burkholder and referred to him as “uncle Bobby” (Tr. Trans. pg. 324). She spent the night at Robert's house two times (Tr. Trans. pg. 325). The last time she spent the night her two cousins, her sister Mia, Elizabeth, uncle Bobby and Aunt Angie were present (Tr. Trans. pg. 326). Marisa stated that as she was watching TV Robert came out of his bedroom indicating that he couldn't sleep and sat down with them (Tr. Trans. pg. 327). Marisa testified that Robert then asked if she wanted to sit on his lap and she did, because she has sat on his lap before (Tr. Trans. pg. 329). Marisa testified that as she was sitting in Robert's lap he *tried* to put his hand in her pants and he *tried* to put his finger in her “hole” (Tr. Trans. pg. 330). She also testified that as Robert rubbed “it”, meaning her private area (Tr. Trans. pg. 331). She also testified that he *tried* to put her hand on his private area (Tr. Trans. pg. 332). When she was asked to elaborate if it was where pee comes out Marisa testified “no” just his “skin” (Tr. Trans. pg. 332).

Elizabeth Meeks also testified at trial. Robert Burkholder is Elizabeth's uncle (Tr. Trans. pg. 331). Elizabeth is Marisa's cousin and stayed the night at Robert Burkholder's one time in the summer of 2010 (Tr. Trans. pg. 312). When she stayed there she slept in the living room with Marisa and Hannah, Robert's daughter (Tr. Trans. pg. 313). Elizabeth also testified that Marisa was on Robert's lap earlier in the evening not when they were going to sleep (Tr. Trans. pg. 320).

The State also called Dr. Randall Schlievert, who is the director of child abuse program and chief academic office for Mercy Health Partners (Tr. Trans. pg. 364). Dr. Schlievert testified that in such capacity he interviews and examines children suspected of being sexually abused (Tr. Trans. pg. 364). He testified that with respect to Marisa he conducted an exam and determined that it was “normal” (Tr. Trans. pg. 398). Meaning there were no physical signs of sexual abuse found during the exam (Tr. Trans. pg. 409).

At trial evidence of Robert Burkholder's prior convictions for Gross Sexual Imposition was also admitted (Tr. Trans. pg. 184). The State introduced this evidence through certified copies of Robert's prior convictions and through the testimony of Detective Dennis Huguelet. Detective Huguelet testified that he investigated the prior sexual abuse case involving Robert Burkholder and his daughter (Tr. Trans. pg. 176). Detective Huguelet testified that he responded to a report of sexual abuse and when he questioned Hannah Burkholder she reported that she was touched inappropriately (Tr. Trans. pg. 178). He also testified that Robert Burkholder admitted to touching his daughter inappropriately three times (Tr. Trans. pg. 182). Detective Huguelet also testified that he could not recall the specifics of how the offenses occurred or the circumstances surrounding them (Tr. Trans. pg. 189).

Proposition of Law I: The trial court erred in failing to remove juror #20 (Ms. Allman) for cause.

In the case at bar the trial court erred in failing to remove juror #20, Ms. Allman, for cause. When Ms. Allman was questioned in voir dire she specifically stated that she would hold the testimony of eight year old victim/witness automatically true and further would weigh the testimony higher than she would weigh everyone's else's (Tr. Trans. pg. 126-27). The purpose of voir dire is to ensure that a fair and impartial jury is selected for all parties in the case. Rule 24 of the Ohio Rules of Criminal Procedure address trial jurors and specifically sets forth provisions for removal of a juror for cause. Rule 24(C)(9) of the Ohio Rules of Criminal Procedure states in part that "A person called as juror may be challenged for the following causes:... (9) The the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the states..." Ms. Allman's responses to questions during vior dire provide a clear and unequivocal bias toward

the Defendant. During voir dire the following exchange occurred:

“Mr. Viren:.....Is there anybody here that's uncomfortable and feels that because an eight year old child makes these allegations against an adult that they are automatically true? Anybody? Okay.”

“Ms. Allman: I do.?”

“Mr. Viren: You do?”

“Mr. Allman: Yes I do.”

“Mr. Viren: So if an eight year old girl gets up and testifies you're going to automatically accept her testimony as being truthful?”

Ms. Allman: I find it hard to believe that an eight year old would lie about something like that.”

“Mr. Viren: Okay. So you can't – in your opinion, you can't be open minded?”

“Ms. Allman: No, I don't think I would be. When I do see an eight year old up here I would like to say I would be, but seeing an eight year old, I don't think I could.”

(Tr. Trans. pgs. 125-26).

The trial court then intervened and again inquired of Ms. Allman. Even with the court's inquiry she still indicated that she would weigh the testimony of an eight year old higher than anyone else's (Tr. Trans. pg. 127). At the end of the exchange with the Court the best response that Ms. Allman could give was that she would be fair and impartial depending on what the eight year old would say (Tr. Trans. pg. 129). Then upon further inquiry by defense counsel she stated “I'm going to weigh that higher than somebody else because she is eight...” (Tr. Trans. pg. 129).

When the Court was considering challenges for cause the Defendant requested that Ms. Allman be dismissed for cause as she indicated that she can not be impartial. In response the State said that Ms. Allman indicated she could be fair and impartial depending on what was said. However, the State's position is flawed. Ms. Allman clearly indicated that she would weigh the testimony of an eight year old's testimony as being true no matter what. Rather than remove Ms.

Allman the Court simply overruled the request.

The Court's refusal to remove juror Allman for cause was prejudicial to Robert Burkholder. This is especially true because this case rested solely and primarily on the testimony of a nine year old girl. Therefore, the fact that Ms. Allman clearly indicated that she would hold that particular witness to a different standard had a prejudicial affect to Robert Burkholder. Ms. Allman was one of the twelve jurors who ultimately decided the case. Because a unanimous verdict was required to convict Robert, her vote as to the outcome was vital. The fact that she indicated before even hearing any testimony that she would hold the testimony of one witness to a higher standard is more than sufficient evidence of the prejudicial affect her presence on the jury created.

The Court's failure to remove Ms. Allman (juror #20) for cause was in error because she clearly and unequivocally indicated that she could not be fair and impartial. Even after the Court attempted to clarify her statements Ms. Allman still maintained her position. The mere fact that Ms. Allman ultimately indicated that she would have to hear the testimony first she still stated that she would weigh it higher than somebody else (Tr. Trans. pg. 129). Because the Court erred in failing to remove Ms. Allman for cause and it was prejudicial Robert's convictions must be reversed.

Proposition of Law II: Appellant was denied effective assistance of counsel at trial.

Robert Burkholder's trial counsel was ineffective at trial for failing to remove a biased and partial juror. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proven to have fallen below an objective standard of reasonable

representation and, in addition, prejudice arose from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial would have been different. *Id.*, *State v. Bradley* (1989), 42 Ohio St.3d 136.

Even after the Court denied the request to remove juror #20, Ms. Allman, for cause counsel failed to use a peremptory challenge to remove this clearly biased and particular juror. As set forth above, Ms. Allman made it clear that she would hold the testimony of an eight year old witness to a higher standard than other witnesses. She also indicated that she would accept an eight year old witness's testimony as true automatically. These statements show that Ms. Allman could not be a fair and impartial juror in this case. Therefore, although the Court should have remove her for cause, when the Court failed to do so it was up to Robert's trial counsel to insure that she was not a member of the jury. The manner in which trial counsel has to do such is to utilize one of his peremptory challenges on this juror. In this case at bar, Defense counsel failed to do such. Moreover, Defense counsel waived his final challenge.

The fact that Robert's jury had a juror who clearly showed bias toward the testimony of a young victim/witness and the case involved a young victim was prejudicial. Juror Allman's presence on the jury alone had a prejudicial affect on Robert. As this Court is aware in a criminal trial a unanimous verdict is required for conviction. The fact that one of the jurors already was taking a State's witness's testimony as true would clearly affect the outcome of the trial in a prejudicial way. The fact that Ms. Allman had a vote in the outcome of the trial is per se prejudicial but it also doesn't address that fact that she could influence other juror's during deliberation.

While it is common knowledge that trial strategy is not considered ineffective assistance but in this case the failure to remove a clearly biased juror can not be considered trial strategy. Especially in light of the fact that counsel waived his final peremptory challenge. Therefore, because trial counsel failed to act to remove a biased juror, even though the Court should have removed said juror for cause, his performance fell below the objective standard of reasonableness, thereby rendering it ineffective.

Proposition of Law III: The trial court erred in its decision admitting evidence of Appellant's prior convictions.

The trial court's decision allowing the State to admit the evidence of Robert Burkholder's convictions for three prior offenses of Gross Sexual Imposition was error and contrary to Ohio and Federal law. The State erroneously contented that evidence of Robert Burkholder's prior convictions was admissible to prove motive, intent, opportunity, plan, knowledge, and absence of mistake. However, the State failed to produce any evidence prior to trial or at trial to support admission of the prior convictions for any of the reasons enumerated.

It is well settled law that generally the State can not present evidence of a different offense or bad act for the purpose of showing that the defendant committed the offense for which he is charged. *State v. Hector* (1969), 19 Ohio St.2d 167, 174-75. Evidence Rule 404(B) states in part "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The principle reason for prohibiting evidence of other bad acts is that it tends to draw the minds of the jurors from the crime which they are trying, to excite prejudice, and mislead jurors. *Knight v. State* (1896), 54 Ohio St. 365.

While there are limited exceptions to this rule, see ORC§2945.59 and Evid.R. 404(B),

admission must be strictly construed against the State. *State v. Broom* (1988), 40 Ohio St.3d 277, 281-282. The standard for determining admissibility of exceptions to the common law rule prohibiting evidence of other crimes, wrongs, and acts is strict. *Id.* Additionally, evidence of other crimes, wrongs, or bad acts is only admissible when it proves one of the exceptions enumerated in the rule, and when that exception is relevant to an issue in the case. *State v. Hector* (1969), 19 Ohio St.3d 167. Although other acts evidence may fall within one of the exceptions it must first be deemed relevant, that is tending to make the existence of any fact of consequences more probable than not in accordance with Evid.R.401.

Moreover, even if the evidence is deemed relevant it still must be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of issues, or misleading to the jury. Evid.R.403(A). Thus, the Court must conduct a weighing of the evidence to determine if it is not only relevant but also if relevant if its probative value is outweighed by the danger of unfair prejudice. In the case at bar, the Court failed to take either issue into consideration when it ruled that the evidence of Robert's prior convictions was admissible.

In *State v. Schaim* this Court addressed the concerns with admissibility of other acts evidence:

The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has the propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment.

State v. Schaim (1992), 65 Ohio St.3d 51, 59. The danger of a jury convicting the defendant because it believes the defendant has a propensity to commit crime is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature. *Id.* at 59. The case before this Court presents just such a danger. Robert Burkholder was charged with Rape

and Gross Sexual Imposition involving a minor child. The prior convictions sought to be admitted by the State were charges of Gross Sexual Imposition involving a minor child. Thus, the Court had to be cautious to insure that the dangers of the jury convicting Robert based on his propensity were averted, which the Court failed to do.

In this case at bar there is no correlation that would allow admission of Robert's prior convictions. In support of their "Notice of Intent to Use Similar Acts Evidence" the State argued that all of the exceptions delineated in both O.R.C. §2945.59 or Evid.R. 404(B) are applicable. However, the State failed to set forth any evidence or support in furtherance of these contentions. The only evidence regarding the prior convictions that the State did introduce was that they involved Robert's eight year old daughter and that he touched her inappropriately on three occasions over a three month year period. These facts alone do not support any of the exceptions. They fail to prove motive. Motive is not an element of a criminal offense, and thus not required to be proven by the State at trial. Motive is defined as the cause or reason that moves the will and induces action. Black's Law Dictionary. The prior convictions fail to prove motive because the mere fact that Robert previously committed Gross Sexual Imposition does not mean that he did so in this case. To make an argument that the prior acts give reason as to why Robert would commit the current offense would lead into the argument of propensity which is strictly prohibited by Evid.R.404(B).

There also is no evidence to support the contention that the prior conviction support opportunity. The facts of the prior offense compared to the allegations of the current charge are not similar so that there is no causal link to show that the fact that the prior offenses occurred that they gave rise to an opportunity to comment the current charge. This lack of any causal link or similarities between the prior convictions and the allegations in the case at bar also eliminate the

exceptions for intent and plan. The fact that Robert Burkholder was previously convicted of Gross Sexual Imposition involving a minor can not be used to show that he intended to commit the offense charge. Again, to argue that the exception for intent can be used in such a fashion would allow evidence of propensity, and therefore would allow the State to argue that because he committed a similar act previously he committed the offense charged. But this because he committed a similar act previously he committed the offense charged. But this position is strictly prohibited. The lack of any similarity also eliminates the ability of the State to rely on the exception for plan. The facts and circumstances between the prior offense and the current one are not similar to allow the argument that they fall within the same plan.

The State also argued that the prior convictions of Robert were admission to show identity. In the case at bar identity was not an issue for the State. The alleged victim clearly identified Robert Burkholder as the perpetrator of the crime charged. Thus, the issue of identity was not one that required use of prior acts to prove, even with Robert denying that the crimes occurred. In fact, the case law cited by the State to support their position are factually distinguishable from this case and they are not applicable. In those case the identity of the defendant was not clearly identifiable and therefore the other acts where needed to prove that the identity of the person in the current charge was the same as the prior.

In the Court's decision allowing the other acts evidence to be admissible it relied on the fact that both the prior convictions and current charges involved a minor victim to determine that there was a scheme or plan. However, the Court did not look at any other facts involved in the two cases to make this determination. The age of the victim is insufficient to make a determination that there is a common plan or scheme. The Court also determined that the prior convictions identified the defendant as the perpetrator in this case. Again, the Court misapplied

the purpose of the identity exception for prior acts. The Court stated that the prior acts show that defendant is the person who committed the current offense. This position is exactly what Evid.R.404(B) is designed to prevent, **propensity**. To take the position that the prior acts show that Robert was the person who committed the current charge is take the position that his prior actions show conformity which is strictly prohibited. Therefore, the Court's determination that the prior convictions are admissible was in error.

Furthermore, at no point did the trial court weigh the probative value of the prior convictions to dangers of unfair prejudice as required by Evid.R.403(A). In *United States v. Merriweather*, the Sixth Circuit addressed the admission of the other acts under Rule 404(b) and stated that the court must undertake a three step process. *United State v. Merriweather* (6th Cir. 1996), 78 F.3d 1070, 1074. In order to ensure Rule 404(b) is properly applied first the proponent of the evidence must identify the specific purpose for which the evidence is being offered. *Id.* at 1076. Second the court must determine if that the issue must be in dispute or a fact that the statutory elements of the crime require the government to prove. *Id.* at 1076-77. Finally the court must balance the probative value of the evidence against any fair prejudiced under Rule 403. *Id.* at 1077. At no point did the trial court weigh the probative value of the prior convictions to dangers of unfair prejudice as required by Evid.R.403(A) and *Merriweather*. Also, the Court made no mention of the inflammatory nature of the prior convictions and the risk associated with their admission in the current charge where the charges are similar. The Court also failed to address that the admission of the prior convictions could unfairly prejudice Robert Burkholder and result in the jury convicting him on his propensity rather than if he actually committed the crime alleged. In the case at bar these risks were even more present due to the nature of the prior offenses and the current charges. The age of the victims also made the offenses more

inflammatory calling for careful scrutiny of admission of the prior offenses to insure that their admission would not unfairly prejudice Robert. The Court failed to address these issues in its determination that the prior acts were admissibility of prior acts was applicable that the evidence was admissible. Again this determination by the Court was incomplete since it was required to determine that even if the prior acts were relevant that the weighing requirement set forth in Evid.R.403(A) must still be considered.

Additionally, the trial court failed to take into consideration the call for caution when admitting evidence or prior acts set forth in *State v. Schaim*. The Court also failed to strictly construe admission of the evidence against the State. The failure of the Court to address these issues in it's decision is tantamount to it not considering them. As a result, the Court failed to consider the danger that admission of Robert's prior convictions would present. Thus, the Court's admission of Robert's prior convictions would present. Thus, the Court's admission of Robert's prior convictions was in error.

Evidence that shows the Defendant is the **type** of person to commit the crime charged is inadmissible under Evid.R.404(B). However, that is exactly how the State presented the prior convictions of Robert Burkholder. They did not present them to prove one of the enumerated exceptions such as intent or motive, but rather that he was the type of person who would commit the offenses charged. This is evident by the manner in which the State presented the prior convictions to the jury. Specifically in their closing argument the State said that "and who just touched...The expert in touching eight-year old vaginas, that's who, Uncle Bobby." (Tr. Trans. pg. 500). The State also referred directly to his prior convictions in closing stating "His certified convictions tells you why he did it, that's his motive, because that's what he was." (Tr. Trans. pg. 507). The State also refers to Robert as a pedophile on multiple occasions and further stated

“pedophiles don't wake up one day, want to touch an eight year old vagina. It's a disease, it's like alcoholism, every day is a struggle.” (Tr. Trans. pg. 496). These statements unequivocally show that the State is not trying to prove that Robert's prior convictions fall within one of the exceptions set forth in O.R.C§2945.59 or Evid.R.404(B), but rather that Robert is the **type** of person to commit the crime charged. This use of Robert's prior convictions is in direct contradiction of Evid.R.404(B).

CONCLUSION

For the foregoing reasons, this Honorable Court should accept jurisdiction as this case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,



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On Behalf of the Appellant.

PROOF OF SERVICE

A true and accurate copy of the foregoing was delivered by regular U.S. Mail this 24th day

of May, 2013 to:

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On Behalf of the Appellant.

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No.:
Appellee,	:	On Appeal from the Lucas
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	:	Sixth Appellate District.
Robert Burkholder,	:	C.A. Case No. L-11-1216
Appellant.	:	

APPENDIX TO:

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBERT BURKHOLDER**

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-11-1216

Appellee

Trial Court No. CR0201003021

v.

Robert Burkholder

DECISION AND JUDGMENT

Appellant

Decided: APR 19 2013

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Joseph W. Westmeyer, III, for appellant.

SINGER, P.J.

{¶ 1} Appellant appeals his conviction for rape and gross sexual imposition following a jury trial in the Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

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{¶ 2} On August 6, 2010, as a Toledo couple prepared to take their family for the weekend to a Sandusky water park, they discovered their eight-year-old daughter, M.B., in her room masturbating. Concerned that sexual acting out for a child so young could be indicative of something greater, over the weekend the parents questioned her. M.B. told her parents that something had occurred approximately two months earlier during a sleepover at the home of M.B.'s uncle, appellant Robert Burkholder.

{¶ 3} According to M.B., "Uncle Bobby" and his wife had gone to bed leaving M.B., her sister and three cousins to watch television. At some point, M.B. said, appellant came into the room, saying that he could not sleep. He sat in a chair, watching television with the girls, and then asked M.B. if she would like to sit on his lap. M.B. sat on appellant's lap and appellant put a blanket over them. M.B. later testified that appellant put his hand down her pajama bottoms to her "private part area" and rubbed it, then "tried to put his finger in my hole." The girl reported "it hurted." M.B. testified that after she pulled appellant's hand from her pants, appellant put her hand on his "private part area." When the girl pulled away, appellant told her not to tell anyone.

{¶ 4} E.B.'s parents reported the incident to police who involved children's services. M.B. was examined by a physician specializing in child abuse who later testified that, although there were no physical findings, M.B.'s behavior was consistent with child abuse.

{¶ 5} On November 10, 2010, appellant was named in a two count indictment charging him with one count of rape of a child under age 13 and one count of gross

sexual imposition of a child under age 13. He pled not guilty and the matter proceeded to a trial before a jury.

{¶ 6} At trial, M.B. testified to the events at appellant's house. The physician and abuse nurse who examined M.B. also testified, as well as police and her parents. One of the cousins present in the room when the rape allegedly took place testified to being there and confirmed that appellant had come into the room and invited M.B. to his lap. The state also introduced certified copies of appellant's prior conviction for gross sexual imposition. Appellant rested without presenting any evidence.

{¶ 7} The jury returned a guilty verdict on both counts, as well as a specification that the victim was under age ten. The trial court entered judgment on the verdict and, following a presentence investigation, sentenced appellant to life imprisonment without the possibility of parole on the rape count and an additional consecutive five-year term of imprisonment for the gross sexual imposition. From this judgment, appellant brings this appeal. Appellant sets forth the following five assignments of error:

- I. The trial court erred in its decision admitting evidence of Robert Burkholder's prior convictions.
- II. The trial court erred in admitting multiple instances of hearsay.
- III. The jury verdict finding Robert Burkholder guilty of rape and gross sexual imposition is against the manifest weight of the evidence.
- IV. The trial court erred in failing to remove juror #20 for cause.

V. Robert Burkholder was denied effective assistance of counsel at trial.

I. Similar Acts

{¶ 8} Prior to trial, the state filed a notice of intent to present evidence of similar acts during trial; specifically, appellant's 2005 conviction on three counts of gross sexual imposition for touching the vagina of a nine-year-old female relative. Appellant filed a motion in limine, seeking to exclude this evidence. The trial court overruled appellant's motion. Appellant renewed the motion during trial and was again overruled. On appeal, appellant insists that this ruling was erroneous.

{¶ 9} Appellant notes the general rule that the state may not introduce evidence of an offense or bad act not charged in the instant proceeding merely to show a trait or disposition to commit the offense of which he or she is presently accused. *See State v. Hector*, 19 Ohio St.2d 167, 174-175, 249 N.E.2d 912 (1969). Appellant concedes exceptions to the general rule, but insists that, even if one of the exceptions is shown, the court must still balance the probative value of the evidence with its capacity to prejudice the defendant. According to appellant, evidence concerning his prior gross sexual imposition convictions only tends to suggest a character trait to show that he acted in conformity with that trait. Moreover, even if the convictions peripherally fall within one of the exceptions, there is nothing in the record to suggest that the court balanced their probative value with their capacity to unfairly prejudice the defendant.

{¶ 10} The state responds that Evid.R. 404(B), while prohibiting the introduction of evidence of a defendant's character to demonstrate that he acted in conformity with that character, allows "bad acts" evidence to establish motive, intent or plan. The state maintains, and the trial court found, that appellant's prior convictions tended to show a scheme or plan to commit sexual acts against minor female relatives.

{¶ 11} In material part, Evid.R. 404(B) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶ 12} R.C. 2945.59 permits the introduction of proof of the acts of a defendant which tend to show his or her motive, intent, scheme, plan or system in doing an act, if such proof is material, notwithstanding that such proof may show or tend to show commission of another crime.

Because R.C. 2945.59 and Evid.R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict. The rule and the statute contemplate acts which may or may not be similar to the crime at issue. If the other act does in fact "tend to show" by substantial proof any of those

things enumerated, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, then evidence of the other act may be admissible. (Citations omitted.) *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), paragraph one of the syllabus.

{¶ 13} “Evidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994).

{¶ 14} The admission or exclusion of evidence is within the trial court’s discretion and will not be reversed absent an abuse of discretion. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). The term abuse of discretion connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 15} The first witness at trial was the officer who investigated the allegations that led to appellant’s 2005 convictions. According to the officer, during that investigation appellant admitted to inappropriately touching a nine-year-old female relative at appellant’s home.

{¶ 16} Appellant’s admissions and the following convictions provide substantial proof that the other acts were committed by him. Moreover, the circumstances that led to the prior conviction tend to prove motive (sexual gratification) and a *modus operandi*

(targeting prepubescent female relatives in the home.) This is relevant evidence, admissible under Evid.R. 404(B). Any unfair prejudice implicated was negated by the court's limiting instruction that the jury could only use the convictions as proof of motive and intent.

{¶ 17} With respect to appellant's argument that, pursuant to Evid.R. 403, the trial court did not properly weigh the probative value of appellant's prior convictions against the capacity of this evidence to unfairly prejudice appellant, the court expressly found that the probative value of this evidence substantially outweighed the danger of any unfair prejudice. Such a finding is justified by the evidence. Accordingly, appellant's first assignment of error is not well-taken.

II. Multiple Hearsay

{¶ 18} In his second assignment of error, appellant complains that he was prejudiced during trial by the trial court's repeated erroneous admission of hearsay testimony. Appellant asserts that most of the witnesses against him reported statements from M.B. about an event nearly two months prior to the first disclosure. Admission of these statements over appellant's objection was error, appellant maintains. Moreover, the statements, as reported by others, were less equivocal than M.B.'s own testimony, operating to appellant's prejudice, he insists.

{¶ 19} "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). In general, hearsay is inadmissible in court, Evid.R. 802,

unless the testimony falls under one of the hearsay exceptions articulated in Evid.R. 803 and 804 or deemed “not hearsay” by Evid.R. 801(D).

{¶ 20} Appellant claims that the statements made by M.B. to her parents should not have been admitted because they were clearly hearsay. In the trial court, and here, the state concedes these statements were hearsay, but insists that they are admissible through the excited utterance exception provided for in Evid.R. 803(3). That provision permits the introduction of hearsay when such statements “relat[e] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

{¶ 21} Excited utterance statements may be admitted when the trial court reasonably finds:

- (a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective,
- (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual

impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration. *Potter v. Baker*, 162 Ohio St. 488, 124 N.E.2d 140 (1955), paragraph two of the syllabus.

{¶ 22} Appellant argues that, while the alleged touching may have been a startling event, possibly as much as two months elapsed between the time of that alleged event and M.B.'s disclosure. This, appellant insists, seems more than sufficient time for nervous excitement to have abated. Any excitement M.B. may have exhibited was as likely due to having been caught masturbating as to any event two months earlier, appellant suggests.

{¶ 23} The state responds that there is no per se amount of time after which a statement can no longer be considered an excited utterance. Citing *State v. Taylor*, 66 Ohio St.3d 295, 303-304, 612 N.E.2d 316 (1993), the state asserts that the exception is liberally construed when it relates to young children who have been the victims of sexual assault. The inability of children to fully reflect makes it likely that the statements are trustworthy. Ohio courts have held the excited utterance exception viable after as long as two months for a six year old, *State v. Ames*, 12th Dist. No. CA2000-02-024, 2001 WL 649734 (June 11, 2001), to approximately seven months for a 13 year old. *State v. List*, 9th Dist. No. 17295, 1996 WL 221899 (May 1, 1996).

{¶ 24} Given the liberal construction to the excited utterance exception we are directed to apply when considering children, *Taylor* at 304, we cannot say that the trial court's application of the excited utterance exception was unreasonable. Moreover, we note that M.B. herself testified and was subject to cross-examination at trial. If appellant sought to test the truth of the child's statements to her parents, he had every opportunity. Accordingly, we conclude that the trial court did not abuse its discretion in admitting M.B.'s hearsay statements. Appellant's second assignment of error is not well-taken.

III. Manifest Weight of the Evidence

{¶ 25} In his third assignment of error, appellant maintains that the jury's verdict was against the manifest weight of the evidence.

{¶ 26} A verdict may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id.* at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime

proven beyond a reasonable doubt. *Id.* at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 27} Both of appellant's arguments within this assignment of error go more to the sufficiency of the evidence than its weight. With respect to the rape count, appellant points out that R.C. 2907.02(A)(1)(b) prohibits sexual conduct with any non-spousal person under age 13. R.C. 2907.01(A) defines sexual conduct to include "the insertion, however slight, of any part of the body * * * into the vaginal or anal opening of another."

{¶ 28} Appellant maintains that the only testimony going to penetration was that of M.B., who testified that appellant "tried" to put his finger in her "hole." This testimony, appellant insists, proves only attempt, which was not charged. The state's physician sexual abuse expert's conclusion, that M.B.'s statement that "it hurtled" suggested penetration, was not specifically linked to M.B., according to appellant.

A jury is permitted to make reasonable inferences from the presentation of other facts. Further, a series of facts or circumstances may be used by a jury as a basis for ultimate findings or inferences. In reviewing a judgment of criminal conviction, the evidence must be viewed in a light most favorable to the state; all permissible inferences which can be drawn from the evidence may be used to determine the sufficiency of the

evidence. (Citations omitted.) *State v. Minniefield*, 6th Dist. No. S-88-44, 1989 WL 123324 (Oct. 20, 1989).

{¶ 29} The state's sex abuse expert testified that pain suggests that there was an incursion into the vagina, because the inside of the vagina in a young girl is very sensitive, while the area outside is substantially less sensitive. This testimony, coupled with M.B.'s report of pain and consideration of the language skills of a nine year old permit the jury to infer that there had been penetration. Consequently, there was sufficient evidence to support the jury's finding on the rape charge. Moreover there was nothing in the record to suggest that the jury lost its way in reaching this finding.

{¶ 30} Appellant makes the same sort of argument with respect to the gross sexual imposition count. M.B. testified that appellant "tried" to put her hand on his "private area." Again, appellant points out, no attempt was charged.

M.B. testified:

A. [H]e said, do you want to put my – your hand on my private part area.

Q. Did you answer him?

A. And I said no, but he said – and he put my hand there already.

Q. So he already had your hand on his private area?

A. And then I pulled away really fast.

Q. [D]o you have a name for that area?

A. No.

Q. Is it where he goes pee out of?

A. No, like, on his, like, skin, like, right, like – I don't know what it's called.

Q. Okay, between his legs?

A. Yeah, like, right here, like, I don't – like, on his skin and stuff.

[Points between her legs.]

Q. But you felt his skin?

A. Yeah.

Q. Between his legs?

A. Yeah.

{¶ 31} “Sexual contact” of the type required for gross sexual imposition pursuant to R.C. 2907.05(A)(4), “means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.” R.C. 2907.01(B).

{¶ 32} Again, the jury may take into consideration the language skills of a witness of tender years and make reasonable inferences from the testimony from such a witness. It is reasonable to infer that what M.B. described was the touching of a thigh or genitals for the purpose of appellant's sexual gratification. Accordingly, appellant's third assignment of error is not well-taken.

IV. Juror No. 20

{¶ 33} Appellant's remaining assignments of error relate to the selection of a juror. During voir dire, defense counsel asked the panel of prospective jurors if there was any among them who "feels that because an eight-year-old child makes an allegation against an adult that they [sic] are automatically true." Juror No. 20 responded, "I do."

{¶ 34} What followed was a long conversation between Juror No. 20, the defense and the court. Juror No. 20 explained that she would "find it hard to believe that an eight-year-old would lie about something like that." The court then asked the juror, if it was obvious the child was not telling the truth, "[W]ould you still weigh that testimony more heavily?" Juror No. 20 responded:

No, I think there's a point where you're telling the truth and not telling the truth, but just from the nature of the crime and everything I feel like if there was a slight chance that she seemed to be telling the truth that I would take her opinion more strongly.

{¶ 35} After some further discussion, Juror No. 20 agreed that she would follow the court's instructions when evaluating the testimony of the witnesses, including the weight of the child's testimony. Appellant's challenge for cause was overruled. At the conclusion of peremptory challenges, appellant's counsel had a remaining challenge, but elected not to exercise it with respect to Juror No. 20.

{¶ 36} In his fourth assignment of error, appellant asserts that the trial court erred when it denied his challenge for cause for Juror No. 20. In his fifth assignment of error,

appellant maintains that he was denied effective assistance of counsel, because trial counsel failed to use an available peremptory challenge on Juror No. 20.

{¶ 37} A defendant in a criminal case cannot complain of prejudicial error in overruling a challenge for cause if such ruling does not force the defendant to exhaust his or her peremptory challenges. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 87, citing *State v. Eaton*, 19 Ohio St.2d 145, 279 N.E.2d 897 (1969). Absent prejudice, an assignment of error may not be sustained. App.R. 12(B).

Accordingly, appellant's fourth assignment is not well-taken:

{¶ 38} In his remaining assignment of error, appellant asserts that his trial counsel was ineffective for failing to exercise his remaining peremptory challenge to remove Juror No. 20 from the jury.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d

674 (1984). *Accord State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶ 39} Scrutiny of counsel's performance must be deferential. *Strickland* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *Smith, supra*. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland* at 687. "Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance of counsel." *State v. Stevenson*, 5th Dist. No. 2005-CA-00011, 2005-Ohio-5216, ¶ 43. "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. *Id.* Appellant must show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. *Strickland* at 694. *See also State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990), for Ohio's adoption of the *Strickland* test.

{¶ 40} Appellant fails both prongs of the *Strickland* test. The selection of a jury is largely a matter of strategy and tactics. *State v. Keith*, 79 Ohio St.3d 514, 521, 684 N.E.2d 47 (1997). Trial counsel is in the best position to determine the relative merits of any specific prospective juror and weigh those merits against those of the panel member who might replace an excused juror. *Id.* Thus, we cannot say that trial counsel's decision to leave Juror No. 20 on the panel constituted deficient performance. Moreover, there is nothing in the record that would suggest that, had Juror No. 20 been excused, the

result of the proceeding would have been different. Accordingly, appellant's final assignment of error is not well-taken.

{¶ 41} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

Thomas J. Osowik, J.

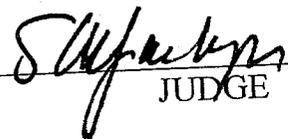
Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.