[Cite as *State v. Washington*, 2009-Ohio-2893.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 08-MA-5
	)	
EDWARD WASHINGTON,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio
Case No. 2007CR00031

JUDGMENT: Reversed and Remanded

APPEARANCES:

For Plaintiff-Appellee

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: June 12, 2009

[Cite as *State v. Washington*, 2009-Ohio-2893.]
DONOFRIO, J.

{¶1} Defendant-appellant, Edward Washington, appeals from a Mahoning County Common Pleas Court judgment convicting him of felonious assault, following a jury trial.

{¶2} On March 23, 2006, Barbara Walter left the Avalon Gardens bar on Belmont Avenue in Youngstown around 1:45 a.m. Walter was homeless and was walking down Belmont Avenue when she saw appellant approaching from the opposite direction. Appellant and Walter had met once before and appellant had offered Walter a place to stay.

{¶3} According to Walter, she and appellant entered an apartment near Wick Park. Upon entering the apartment, Walter claimed that appellant threw her to the floor, punched her, kicked her, and raped her. Walter stated that this went on for several hours. The next morning, Walter went to the police station and then to the hospital.

{¶4} A Mahoning County grand jury indicted appellant on two counts of rape, first-degree felonies in violation of R.C. 2907.02(A)(2)(B), one count of felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(1)(D), and one count of kidnapping, a first-degree felony in violation of R.C. 2905.01(A)(4)(C).

{¶5} The case proceeded to a jury trial. At trial, Walter admitted that she was on several medications for seizures and bipolar disorder and that she had a difficult time remembering things due to a previous head injury. For instance, when Walter first reported her attack to the police, she told them that she had been raped ten times. However, she testified that she had no recollection of this and denied making this statement to police.

{¶6} Appellant wanted to cross examine Walter using the defense that he had paid her for sex. However, the trial court would not permit him to do so. Instead, appellant was limited to testifying that the sex was consensual and that Walter was looking for a place to stay and a hit of crack cocaine. Appellant made a proffer for the record that if the court would have permitted him, he would have cross examined

Walter and offered testimony about an agreement between them to exchange money for sex.

{¶7} While cross examining appellant, plaintiff-appellee, the State of Ohio, brought out the fact that appellant had numerous prior allegations of sexual assault against him, which did not result in convictions, and prior convictions for various other crimes. Appellant objected to this impeachment evidence arguing that the state did not provide him notice of its intent to use this evidence and that it was prejudicial. The trial court, however, allowed the impeachment evidence. In doing so, it gave the jury a limiting instruction, but not the instruction requested by appellant.

{¶8} The jury returned a guilty verdict on the felonious assault count and not guilty verdicts on the rape and kidnapping counts. The trial court subsequently sentenced appellant to five years in prison to be served concurrently with his sentence in another case.

{¶9} Appellant filed a timely notice of appeal on January 4, 2008.

{¶10} Appellant raises four assignments of error, the first of which states:

{¶11} "THE TRIAL COURT ERRED IN ADMITTING 'OTHER ACTS' EVIDENCE AND PRIOR CONVICTIONS WHICH HAD NOT BEEN DISCLOSED TO THE DEFENSE PRIOR TO TRIAL WHICH DENIED APPELLANT A FAIR TRIAL, THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, UNDERMINED THE PRESUMPTION OF INNOCENCE AND DENIED DUE PROCESS IN VIOLATION OF U.S. CONST. AMEND. VI AND XIV AND THE LIBERTIES AND RIGHTS SECURED BY OHIO CONST. ART. I §§ 1, 2, 10, AND 16."

{¶12} On direct examination, appellant testified that when he is with a woman and she tells him to stop, he stops. (Tr. 634). Then during cross examination, appellant volunteered the statement, "I never been in trouble with the law." (Tr. 671). This precipitated a dispute between appellant's counsel and the prosecutor regarding whether the state could introduce evidence of appellant's nine prior convictions (theft, receiving stolen property, public indecency, open container, aggravated menacing, telecommunication harassment, possession of drugs, attempted burglary, possession

of drug paraphernalia) and four allegations made against him for sexual assault. (Tr. 674-90). The court permitted the state to cross examine appellant with these convictions and allegations "for purposes of the character of the accused." (Tr. 686-87).

{¶13} Appellant's counsel noted for the record that the state never provided him with copies of appellant's prior convictions. In fact, he made a point of noting that it was on a Thursday that the issue first came up. (Tr. 687-88). The trial did not commence until the following Monday. (Tr. 688). Appellant's counsel pointed out that the prosecutor could have contacted him sometime in that time period and told him about appellant's convictions instead of waiting until trial resumed on Monday. (Tr. 688).

{¶14} Appellant contends that the trial court erred by permitting the state to introduce evidence regarding his prior convictions and allegations of sexual assault. Appellant first argues that this evidence did not meet any of the exceptions set out in Evid.R. 404. He then argues that the state failed to timely disclose its intent to use this evidence against him in violation of Crim.R. 16 and Mahoning County Local Rule 9. Appellant points out that the prosecutor knew ahead of time about his prior convictions and allegations of sexual assault as is evidenced from her statement. The prosecutor told the court that the reason she had not disclosed these matters was because she had not intended to use them. She stated she changed her mind when appellant testified that he had no trouble with the law. Appellant argues that this reason for non-disclosure demonstrated that the state ignored the discovery rules. He contends that the state's failure to disclose had a direct, negative impact on his ability to prepare a defense.

{¶15} A trial court has broad discretion in determining whether to admit or exclude evidence and its decision will not be reversed absent an abuse of discretion. *State v. Mays* (1996), 108 Ohio App.3d 598, 617, 671 N.E.2d 553. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial

court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶16} This assignment of error raises two issues: (1) was the evidence proper to attack appellant's character or credibility; and (2) did the prosecutor's nondisclosure of the evidence render it inadmissible. We will address each issue separately.

{¶17} Evid.R. 404 deals with character evidence. It provides in pertinent part:

{¶18} "(A) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

{¶19} **"**(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

{¶20} "* * *

{¶21} **"**(B) Other crimes, wrongs or acts. 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."

{¶22} Additionally, Evid.R. 609 limits impeachment by using evidence of a prior crime to (1) crimes punishable by death or imprisonment for more than one year or (2) crimes involving dishonesty or false statements, regardless of the punishment.

{¶23} When determining whether a prior conviction should be admitted for impeachment or whether the probative value outweighs the danger of unfair prejudice, the trial court should consider: (1) the nature of the crime; (2) how recent the prior conviction was; (3) the similarity between the crime charged and the prior conviction; (4) the importance of the defendant's testimony; and (5) the centrality of

the credibility issue. *State v. Goney* (1993), 87 Ohio App.3d 497, 501, 622 N.E.2d 688.

{¶24} Here appellant takes issue with two different lines of questioning.

{¶25} First, appellant testified on direct examination that when a woman tells him to stop during a sexual encounter, he stops. (Tr. 634). By making this statement, appellant put on evidence that he listens to a woman's wishes and respects her decisions. In doing so, he opened the door for the prosecution to prove the opposite. It did so by questioning appellant if other women had made sexual assault allegations against him.

{¶26} Second, on cross examination, appellant testified that he was never in trouble with the law. (Tr. 671). In making this statement, appellant brought his criminal past into play by testifying that he was a law-abiding citizen. In doing so, he opened the door for the prosecution to impeach him by rebutting this evidence. It did so by introducing evidence that appellant had in fact been convicted of numerous crimes.

{¶27} In a somewhat similar situation, the defendant, who was on trial for attempted murder, testified that upon discovering his girlfriend in bed with another man he "exploded" and he had "never been that way before." *State v. Eldridge*, 10th Dist. No. CA2002-021, 2003-Ohio-7002, at ¶27. The prosecutor then cross examined the defendant by bringing up his three prior misdemeanor convictions for assault, a misdemeanor conviction for making terrorist threats, and a felony conviction for obstructing police. The defendant objected and later argued on appeal that the trial court should not have permitted the prosecutor to use his prior convictions to impeach him. The appellate court disagreed:

{¶28} "At the outset, we observe that the prosecution may not initiate questioning to establish a criminal defendant's propensity for violence in a trial for violent offenses such as attempted murder. Evid.R. 404(A). However, a defendant may introduce testimony, through himself or others, of a relevant character trait that would tend to prove he acted in conformity therewith on a particular occasion. Evid.R.

404(A)(1). In a trial involving a violent offense, that character trait is typically for peacefulness.

{¶29} "By introducing this evidence, the defendant 'opens the door' for the prosecution, which is then permitted to rebut or impeach this character evidence on cross-examination. Evid.R. 405(A). The cross-examination may include inquiry into relevant specific instances of conduct. *Id.*

{¶30} "Sometimes these specific instances of conduct can involve relevant prior criminal convictions. In this situation, the prosecution is not limited only to the type of convictions described in Evid.R. 609. This is because the evidence is not offered for the purposes described in that rule, namely, for attacking the general credibility of the witness. Rather, the evidence is to rebut the character evidence initially presented by the defense." Id. at ¶41-43.

{¶31} Similarly, in this case, appellant "opened the door" for the prosecution to rebut his evidence that he stopped when a woman told him to stop and that he had never been in trouble with the law. Like the prosecution in *Eldridge*, the prosecution here did not use the disputed evidence to attack appellant's general credibility. Instead, it sought to specifically refute appellant's testimony. Thus, this evidence was admissible.

{¶32} But another troubling issue remains regarding the prosecutor's nondisclosure of the disputed evidence.

{¶33} Crim.R. 16 deals with discovery. Upon written request, each party shall provide the other party with the materials set out in the Rule. Crim.R. 16(A). Specifically, the Rule provides: "Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state." Crim.R. 16(B)(1)(b). Under this Rule, the parties have a continuing duty to promptly disclose that continues throughout trial. Crim.R. 16(D). If a party fails to comply with the discovery Rule, "the court may order the party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the

material not disclosed, or it may make such other order as it deems just under the circumstances." Crim.R. 16(E)(3).

{¶34} Mahoning County Local Rule 9 likewise deals with discovery. Pursuant to Local Rule 9(A) and (B), upon defense counsel's demand, the prosecutor shall deliver an "information packet" to defense counsel. The information packet shall include, among other items, the defendant's criminal record. Local Rule 9(B)(6). All discovery is to be completed seven days before trial. Local Rule 9(E). "*Matters not provided by either side to the other in violation of this rule shall not be used at trial without leave of Court for good cause shown*." (Emphasis added.) Local Rule 9(E).

{¶35} Prior to trial, appellant filed a request and discovery demand requesting all information to which he was entitled under Crim.R. 16 and Local Rule 9. This request would have included a copy of appellant's criminal record. The prosecutor did not disclose appellant's record until midway through its cross examination of him. Consequently, pursuant to Local Rule 9, the state should not have been permitted to use this evidence without showing the court good cause for not disclosing it in accordance with the discovery rules. When questioned about why she had not previously disclosed appellant's record, the prosecutor responded:

{¶36} "[H]ad the defendant not made voluntary statements, this would not be an issue. I had no intention of using any of this evidence. I was done with my case in chief, and I never referred to anything, anything that had to do with what the issues are now. And these are being used for impeachment purposes, which is not something that I intended to use nor was required to provide to him. He opened the door." (Tr. 688).

{¶37} The state acted in clear violation of the Criminal and Local discovery rules in not disclosing appellant's criminal record prior to trial. Furthermore, the prosecutor did not have good cause for the nondisclosure. The prosecutor's statement indicates that she was in possession of this information prior to trial. She simply was not planning to use it. However, there is no exception in the discovery rules that the state need only disclose appellant's criminal record if it plans on using

the record at trial. The rules are plain on their face that if the defendant makes a request for such information, the state *shall* provide it. Here the state not only failed to provide appellant's counsel with his prior record, but it made a conscious, deliberate choice not to provide the requested discovery. Thus, the state had no good cause for the nondisclosure.

{¶38} While one could argue that appellant should have made his counsel aware of his criminal past, we know that this is not always the case. And because appellant's counsel was unaware of appellant's criminal past, he could not adequately prepare his defense.

{¶39} When determining how to present a defense, counsel needs to have all of the relevant facts before him, including the defendant's criminal history. A defendant's criminal history is an extremely important factor to consider when deciding whether to put the defendant on the stand in his own defense. Counsel must consider that if he puts his client on the stand, it is likely to come out that he has a criminal past. Counsel must weigh the harm that this information will have against the benefit of the defendant telling the jury his version of the events. Additionally, if counsel knows of the defendant's criminal past, he may wish to bring it out on direct examination so as to show the jury that the defendant is not hiding anything from them. Because the prosecutor in this case failed to disclose appellant's criminal past, appellant's counsel was deprived of the opportunity to make these strategic decisions about putting appellant on the witness stand.

{¶40} For these reasons, the trial court abused its discretion in permitting the state to use the non-disclosed evidence of appellant's criminal history. Accordingly, appellant's first assignment of error has merit.

{¶41} Appellant's second assignment of error states:

{¶42} "THE TRIAL COURT ERRED IN FAILING TO PROVIDE AN IMMEDIATE LIMITING INSTRUCTION REGARDING THE PURPOSE OF INTRODUCTION OF PRIOR BAD ACTS, THEREBY DEPRIVING APPELLANT OF

DUE PROCESS IN VIOLATION OF U.S. CONST. AMEND. V & XIV AND OHIO CONST. ART. I § 10, 16."

{¶43} When the state impeached appellant by questioning him regarding his convictions and allegations of sexual assault, appellant requested an immediate instruction to the jury as to the limited purpose for which they could consider this evidence. While the trial court did give an immediate limiting instruction, it did not give the instruction appellant requested. The trial court instructed the jury:

{¶44} "I am instructing you that what is happening now is that the defendant had called into his character and his reputation. Since the defendant has opened this issue of reputation up, the prosecutor may ask questions if the defendant has ever had various incidents in his life. I am saying to you that regardless of what his answer is to the following line of questions, you are not to assume that the allegations or convictions ever took place. All that is happening is that the reputation of the defendant is being tested." (Tr. 696).

{¶45} Appellant, however, requested that the court give the following instruction:

{¶46} "Evidence was received that the defendant was convicted of _____ (describe prior conviction). That evidence was received only for a limited purpose. It was not received, and you may not consider it, to prove the character of the defendant in order to show he acted in conformity with that character. If you find that the defendant was convicted of _____, you may consider that evidence only for the purpose of testing the defendant's credibility and the weight to be given the defendant's testimony. It cannot be considered for any other purpose."

{¶47} Appellant argues that the trial court erred in not giving the instruction he requested. Therefore, he contends that the jury was instructed that the evidence was solely to attack his character, which he asserts was improper.

{¶48} A determination as to which instructions to give to the jury is a matter within the trial court's sound discretion. *State v. Guster* (1981), 66 Ohio St.2d 266, 271, 421 N.E.2d 157. Thus, we must review this issue for abuse of discretion.

{¶49} When the court allows the state to use prior convictions to impeach a defendant, it should then give an immediate limiting instruction to the jury. *Goney*, 87 Ohio App.3d at 503.

{¶50} In this case, the court did give an immediate limiting instruction. The difference between the instruction given by the court and the instruction requested by appellant is that the court instructed the jury that they could consider the state's impeachment evidence to test appellant's reputation or character. Appellant's instruction would have told the jury that they could not consider the impeachment evidence to prove his character but only to test his credibility.

{¶51} Credibility and character are not the same thing. A person's credibility may be considered as part of his character. However, character is broader. Pursuant to Evid. R. 404(B), prior crimes cannot generally be used to show a person's bad character. They can only be used to demonstrate proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evid.R. 404(B). However, in this case, appellant presented character evidence on direct examination that he is a law-abiding citizen who respects women's wishes. Thus, he opened the door for the state to present evidence to refute these character traits. The allegations of sexual assault and prior convictions were used for that purpose. Thus, the court's instruction to the jury that it could consider the impeachment evidence as to appellant's character was not in error.

{¶52} Accordingly, appellant's second assignment of error is without merit.

{¶53} Appellant's third assignment of error states:

{¶54} "THE STATE IMPROPERLY AND IMPERMISSIBLE USED APPELLANT'S POST ARREST SILENCE TO IMPEACH HIM IN VIOLATION OF U.S. CONST. AMEND. V. & XIV AND OHIO CONST. ART. I § 10, 16."

{¶55} While cross examining appellant, the prosecutor brought out the fact that appellant did not tell the state his version of the events prior to trial. Appellant did not object to these questions during trial.

{¶56} Appellant argues that these questions emphasized his post-arrest silence. He contends that this violated his right to remain silent after being arrested and, consequently, his right to due process.

{¶57} As appellee points out, appellant failed to object to this issue in the trial court. Thus, he waived all but plain error. Plain error is one in which but for the error, the outcome of the trial would have been different. *State v. Long* (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804.

{¶58} Appellant relies on the United States Supreme Court case of *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.E.2d 91. There, the Court held that a prosecutor may not use a defendant's post-arrest, post-Miranda warning silence to impeach the defendant's exculpatory story told for the first time at trial. *Doyle v. Ohio* (1976), 426 U.S. 610, 619-20, 96 S.Ct. 2240, 49 L.E.2d 91. This is because:

{¶59} " '(W)hen a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from Miranda warnings that this would not be the case.' " Id. at 619, quoting Mr. Justice White, concurring in the judgment in *United States v. Hale* (1975), 422 U.S. 171, 182-183, 95 S.Ct. 2133, 45 L.E.2d 99.

{¶60} The line of questioning appellant takes issue with is as follows:

{¶61} "Q. How many times did you go over the testimony you just gave today with your attorney?

{¶62} "A. The only time I know anything about any pictures is when he brought my discovery packet before I came to court. And that was over at the jail. But back about three months ago whenever I was indicted - -

{¶63} "* * *

{¶64} "Q. My question is how many times did you go over the testimony that you just gave us here today with your attorney?

{¶65} "A. Only a couple times. Answer whatever you wanted me to answer, you know, to the best of my knowledge and the truth.

{¶66} "Q. And before today you've never said anything about what you testified to anyone other than your attorney; is that what you're saying?

{¶67} "A. That's right.

{¶68} "Q. So you're aware this is the first time I'm hearing any of this?

{¶69} "A. From me, getting answers from me, Ma'am.

{¶70} "Q. So then your answer is yes?

{¶71} "A. Yes." (Tr. 661-63).

{¶72} It seems here that the prosecutor could have been attempting to give the jury the impression that appellant's attorney coached him in what to say and how to keep his story straight. At no time did the prosecutor mention appellant's arrest, the police who arrested him, or why he did not tell the police his version of events at that time. Conversely in *Doyle*, supra, the prosecutor specifically and repeatedly questioned the defendants as to why they did not tell the officer on the scene their version of what had occurred when it happened. Thus, the case at bar is distinguishable from *Doyle*.

{¶73} But it also seems that the prosecutor could have been referring to appellant's post-arrest silence. The prosecutor made a point of emphasizing that appellant had never told *anyone* his version of the events. Anyone would include the police.

{¶74} The prosecutor's initial questions were fair and did not call into question appellant's post-arrest silence. However, the prosecutor crossed the line when she asked, "before today you've never said anything about what you testified to anyone other than your attorney[?]" In asking this question, the prosecutor improperly called appellant's post-arrest silence to the jury's attention.

{¶75} But since we have already determined that appellant's conviction must be reversed based on his first assignment of error, we need not determine whether this error constituted plain error.

{¶76} Accordingly, appellant's third assignment of error is moot.

{¶77} Appellant's fourth assignment of error states:

{¶78} "THE TRIAL COURT ERRED IN LIMTING THE SCOPE OF CROSS EXAMINATION THEREBY DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION AND CROSS EXAMINATION IN VIOLATION OF U.S. CONST. AMEND. V, VI, XIV AND OHIO CONST. ART. I § 10, 16."

{¶79} The trial court prohibited appellant from cross examining Walter about their alleged sex-for-money agreement. Appellant proffered for the record that he wished to question Walter regarding his defense that their encounter was a sex-for-drugs or sex-for-money arrangement, that it was a consensual matter, and that Walter desired to engage in prostitution with him. (Tr. 516). He further proffered that he would not bring up Walter's prior convictions for loitering or prostitution. (Tr. 516).

{¶80} Appellant argues that even though the jury acquitted him of the rape counts, there is no way to know how the jury would have viewed Walter's testimony regarding the felonious assault count if he would have been able to cross examine her regarding his claim of sex for hire. He argues that the court violated his right to confront the witness against him by not allowing him to fully cross examine Walter.

{¶81} The limitation of cross examination is within the trial court's sound discretion, viewed in relation to the particular facts of each individual case. *State v. Vinson* (1990), 70 Ohio App.3d 391, 397 591 N.E.2d 337; *State v. Acre* (1983), 6 Ohio St.3d 140, 451 N.E.2d 802. Thus, we will review this assignment of error for abuse of discretion.

{¶82} The trial court did not abuse its discretion in prohibiting appellant from cross examining Walter regarding his sex-for-money defense. Evidence of prostitution would have been highly prejudicial. It could have easily caused the jury to conclude that Walter "deserved" what she got. And appellant was able to testify

that the sex with Water was consensual and even hinted at the fact that it may have been in exchange for someplace to stay or a hit of crack. Furthermore, as appellee points out, the jury acquitted appellant of the rape charges.

{¶83} Accordingly, appellant's fourth assignment of error is without merit.

{¶84} For the reasons stated above, appellant's felonious assault conviction is hereby reversed and the matter is remanded for a new trial.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.