

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22846
v.	:	T.C. NO. 2008 CR 1435
	:	
JOSEPH D. MYRICKS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 2nd day of October, 2009.

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FROELICH, J.

{¶ 1} Defendant-appellant Joseph Myricks appeals from his conviction and sentence for Felonious Assault. Because the trial court did not abuse its discretion in refusing to allow defense counsel to cross-examine the complaining witness about her pending criminal indictment in order to attack her credibility pursuant to Evid.R. 608(B), the

judgment of the trial court will be affirmed.

I

{¶ 2} On the afternoon of April 8, 2008, M.M. and D.D. went to Myricks' apartment, where the three smoked crack cocaine. M.M and Myricks had been acquainted for approximately one month. D.D. left, but M.M. waited with Myricks for another friend to bring more crack cocaine. As they waited, Myricks suddenly attacked her, punching, slapping, and biting her. He dragged her to his bedroom, where he removed her clothes and took photographs of her. Myricks tried to have sexual intercourse with M.M., but he could not maintain an erection. At various times, Myricks poured beer, fruit juice, shaving cream, hand soap, and toothpaste on M.M.'s vagina, and he was eventually able to maintain an erection long enough to penetrate and to ejaculate.

{¶ 3} Before he allowed her to leave, Myricks threatened to kill M.M. if she told anyone what he had done. M.M. went to a nearby gas station where she called a friend, who picked her up and called the police. When Dayton Police Officer Imwalle responded, she found M.M. crying hysterically and bleeding from her mouth. Officer Imwalle spoke with M.M. and then sent her to the hospital. Officer Imwalle and three other officers went to Myricks' apartment. They arrested Myricks and obtained a search warrant for his apartment. Inside, the officers saw blood droplets on the kitchen floor, near a mop and bucket. They recovered a disposable camera, beer cans, shaving cream, toothpaste, hand soap, and a bottle of fruit punch. They also found a large knife on the air conditioning unit in the bedroom.

{¶ 4} Police later informed M.M. that Myricks is HIV positive, and she sought

medical testing and treatment. M.M. testified that Myricks never told her that he is infected. Myricks had known for eight years that he is HIV positive.

{¶ 5} When interviewed by Detective Olinger, Myricks admitted to having both oral and vaginal sex with M.M., but he insisted that the acts were consensual. Myricks admitted to the detective that he did not tell M.M. that he was HIV positive, explaining, “I didn’t tell her I was HIV positive. I tell nobody. It’s a secret.”

{¶ 6} Myricks was indicted on one count of felonious assault by way of engaging in sexual conduct, knowing that he carried HIV, but without disclosing that fact to the other person prior to engaging in the sexual conduct. Myricks testified at trial. He claimed that although he had engaged in oral sex with M.M., there was no vaginal penetration because he was unable to maintain an erection. However, he admitted on cross-examination that there had also been vaginal sex. Myricks insisted that the sexual acts were consensual and that he did tell M.M. that he was HIV positive prior to engaging in those acts. A jury found Myricks guilty as charged, and the trial court sentenced him to four years in prison. Myricks appeals.

II

{¶ 7} Myricks’ sole assignment of error:

{¶ 8} “THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THAT APPELLANT WAS NOT ALLOWED TO QUESTION THE STATE’S COMPLAINING WITNESS, [M.M.], ABOUT THE FACT THAT SHE WAS FACING A PENDING CRIMINAL CHARGE OF IMPERSONATING A POLICE OFFICER.”

{¶ 9} In his sole assignment of error, Myricks argues that the trial court erred in

refusing to allow him to cross-examine M.M. about the fact that at the time of trial she was under indictment for impersonating a police officer. The issue was addressed in the trial court as follows:

{¶ 10} “THE COURT: *** it’s my understanding that this witness, the victim in this case [M.M.], is in custody?”

{¶ 11} “MR. BREZINE: Yes, sir.

{¶ 12} “THE COURT: And, I want to know, Mr. Brezine, if there is any reason why I should allow any questioning about her being in custody or what she is in custody for?”

{¶ 13} “MR. BREZINE: *** I believe that the questions go very much to her credibility as a witness.

{¶ 14} “THE COURT: What is she in custody for and what do you intend to ask her about what she is in custody for?”

{¶ 15} “MR. BREZINE: Among other things, she’s in custody for impersonating a police officer, which is a dishonest thing to do.

{¶ 16} “MR. BARRENTINE: If she were convicted that would be true. She has not --

{¶ 17} “THE COURT: I guess that’s my concern. This is -- the State has not requested particularly a motion in limine, but I perceive that this might be a problem. So, how -- how is it not -- how is it admissible in the absence of a conviction?”

{¶ 18} “***”

{¶ 19} “[W]hether or not she had been arrested or she is in custody now for impersonating a police officer, unless and until you can show me specifically how it would

be relevant to this case without a conviction of that offense is something that you will not be able to get into.

{¶ 20} “***

{¶ 21} “And that includes the fact that she’s in custody if that’s what she’s in custody for because that doesn’t have any relevance to this case, unless you can tell me how it’s relevant to this case.”

{¶ 22} Myricks insists that this testimony was necessary to attack the complainant’s credibility, which was of paramount importance because the only contested issue was whether or not he told M.M. that he was HIV positive prior to engaging in sexual conduct with her. The trial court determined that the information would only have been admissible had she been convicted of the crime. However, the court did allow cross-examination about the witness’ prior conviction and on her use of illegal drugs.

{¶ 23} “The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.” *State v. Sage* (2009), 122 Ohio St.3d 297, ¶24. “The term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the trial court’s attitude was unreasonable, arbitrary, or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157, citations omitted.

{¶ 24} On appeal, Myricks presents a two-part argument in support of his assignment of error. First, he contends that the existence of M.M.’s pending charge for impersonating a police officer is admissible for impeachment under Evid.R. 608(B) because it goes “very much to her credibility as a witness,” and impersonating a police officer “is a dishonest thing to do.” He also insists, for the first time on appeal, that the evidence was

admissible to show that M.M.'s pending charge could have motivated her to testify with the expectation or hope of more lenient treatment in her own case.

{¶ 25} The Ohio Rules of Evidence clearly delineate the methods by which a party may impeach a witness' credibility. A witness' credibility may be attacked, under Evid.R. 609, by evidence that the witness has been convicted of a crime, or under Evid.R. 608, by evidence of the witness' character for untruthfulness. In effect, Myricks asks this court to hold that evidence of any pending indictment against a witness for a charge that could be relevant to her credibility, were she found guilty, should be admissible for impeachment under Evid.R. 608(B). We are unprepared to do so because "[t]he rights to confront witnesses and to defend are not absolute and may bow to accommodate other legitimate interests in the criminal process." *State v. Boggs* (1992), 63 Ohio St.3d 418, 422, citing *Chambers v. Mississippi* (1973), 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297.

{¶ 26} Evidence Rule 608(B) states in relevant part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness ***." In applying this rule, the Ohio Supreme Court has held that while the credibility of a witness may be attacked by proof of a conviction, it generally may not be attacked by proof of an indictment. *State v. Hector* (1969), 19 Ohio St.2d 167, paragraph 5 of the syllabus; *Keveney v. State* (1923), 109 Ohio St. 64, 66. This is because "Evid.R. 608(B) provides a

well-established rule of law that protects a legitimate state interest in preventing criminal trials from bogging down in matters collateral to the crime with which the defendant was charged.” *Boggs*, supra, at 422-23. Obviously, a merely indicted defendant is presumed not guilty, and should we accept Myricks’ position, trials could easily be sidetracked by the allegations against witnesses rather than focusing on the charges against the defendant. Moreover, there is absolutely nothing on the record as to the details of the charges against M.M., when they happened, or how this charge, per se, is “clearly probative of truthfulness or untruthfulness” or of the witness’s “character for untruthfulness.” Evid.R. 608(B).

{¶ 27} Myricks cites three cases in support of his claim that the indictment is relevant to M.M.’s truthfulness: *State v. Frederick*, Montgomery App. No. 18996, 2002-Ohio-1195; *State v. Carlson* (1986), 31 Ohio App.3d 72; and *State v. McKinney*, Wayne App. No. 01CA0038, 2002-Ohio-3194. However, none of those cases involves an indictment pending against a witness. In both *Frederick* and *Carlson*, the court was faced with witnesses who may have had a financial interest in the outcome of the criminal prosecution because they had filed, or were contemplating filing, a related civil suit. The *McKinney* court held that the witness’s previous false police report against the defendant was relevant to her credibility in the most recent case. However, in the case at bar, Myricks has pointed to no specific aspect of M.M.’s pending charge that would indicate a character for untruthfulness. The mere existence of an indictment, regardless of the charges contained therein, does not automatically equate with evidence of a witness’ character for untruthfulness. *State v. Davis* (Dec. 31, 1998), Lake App. No. 97-L-246.

{¶ 28} It is significant in this case that Myricks only sought to rely on the fact of the

indictment and the name of the charge in order to attack M.M.'s credibility. He did not ask the witness, for example, if she lied or whether she impersonated a police officer. Although the fact of the indictment was not admissible, Myricks may have been able to ask M.M. about these "specific instances of conduct" under Evid.R. 608(B). The indictment is not the crucial fact, the behavior is.

{¶ 29} Myricks also maintains that M.M.'s indictment was relevant to the possibility that she was motivated to testify with the expectation or hope of more lenient treatment in her own case. Although this argument could have been raised in the trial court, it was not; Myricks raises it for the first time on appeal. Having failed to raise this argument in the trial court, Myricks has waived all but plain error. Crim.R. 52(B). Plain error does not exist unless it can be said that but for the error, the outcome of the trial clearly would have been different. *State v. Long* (1978), 53 Ohio St.2d 91.

{¶ 30} "While ordinarily the credibility of a witness may be attacked by proof of a conviction of crime, but not by proof of indictment, this rule is subject to the exception that a witness in a criminal case may be asked if he is under indictment for a crime, if such fact would reasonably tend to show that his testimony might be influenced by interest, bias, or a motive to testify falsely" under Evid.R. 616(A). *State v. Hector* (1969), 19 Ohio St.2d 167, paragraph 5 of the syllabus. For example, the existence of an indictment may be relevant when the witness could expect or hope for leniency in the disposition of his own case. *Id.*, citations omitted. See, also, *State v. Drummond* (2006), 111 Ohio St.3d 14; *State v. Durant* (2004), 159 Ohio App.3d 208, 2004-Ohio-6224; *State v. Gavin* (1977), 51 Ohio App.2d 49. However, because Evid.R. 616(A) was not brought to the attention of the trial court, the

court was unable to consider whether cross-examination of M.M. about the indictment may have been proper under that rule. In this case, we cannot say with any certainty that the outcome of Myricks' trial would have been different if the defense had cross-examined M.M. about her pending indictment.

{¶ 31} We conclude that the trial court did not abuse its discretion in refusing to allow Myricks to cross-examine M.M. about her pending indictment pursuant to Evid.R. 608(B). Moreover, Myricks' failure to raise the possibility of M.M.'s bias, prejudice, or interest resulting from her pending indictment, as permitted by Evid.R. 616(A), did not amount to plain error. Accordingly, Myricks' sole assignment of error will be overruled.

III

{¶ 32} Having overruled Myricks' sole assignment of error, the judgment of the trial court will be Affirmed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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