

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

State of Ohio, : Case No. 09CA14
Plaintiff-Appellee, :
v. : DECISION AND JUDGMENT ENTRY
Jamie R. Boyd, :
Defendant-Appellant. : **Released 4/6/10**

APPEARANCES:

Richard H. Hedges, Athens, Ohio, for appellant.

C. David Warren, Athens County Prosecuting Attorney, Athens, Ohio, and George J. Reitmeier, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

Harsha, J.

{¶1} Jamie R. Boyd appeals his conviction for raping and kidnapping a young woman who responded to his ad in the local newspaper for part-time help. After the victim contacted him about the job, Boyd took her to his apartment. She alleged that Boyd raped her in his bedroom soon after they got there. Boyd admitted sexual contact with the victim, but claimed the sex was consensual.

{¶2} First, Boyd argues that the prosecutor committed prosecutorial misconduct during closing arguments, by linking the terms “killer” and “rapist.” However, the prosecutor did not directly compare Boyd to a “killer” and the court properly admonished the prosecutor before he went any further. Furthermore, given the relative weight of evidence, we cannot say the challenged comments affected the outcome of Boyd’s trial.

{¶3} Second, Boyd contends that the trial court erred by allowing four felons to testify at trial. Boyd argues that their testimony was objectionable under Evid.R. 403(A),

a rule that mandates exclusion of relevant evidence on the grounds of prejudice or confusion of the issues. However, Boyd failed to establish that the relevance of the felons' testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Thus, the trial court did not err in allowing them to testify.

I. Summary of Facts

{¶4} The victim contacted Boyd about an advertisement he placed in the Athens Messenger seeking part-time evening help. Boyd told her that the job consisted of assembling newspapers for delivery in the early morning hours. The victim was interested so Boyd arranged to show her the "job site." Boyd picked up the victim at approximately 9:30 PM and drove her to a storage shed in The Plains, Ohio, where Boyd assembled the newspapers. While en route, Boyd and the victim talked about the job and the victim's family. He asked the victim if she had a boyfriend. Boyd described the conversation as "flirtatious." The victim testified that she felt uncomfortable during the conversation and that she spoke infrequently.

{¶5} During the ride, Boyd may also have asked her if she was interested in being his roommate or cleaning his house. Boyd placed two other advertisements in the newspaper, one seeking a roommate, "female preferred," and one seeking help cleaning his apartment. The victim was unsure of when Boyd mentioned the apartment cleaning job or his desire for a roommate. After viewing the shed, the two drove to Boyd's apartment, apparently so that the victim could see what needed cleaning.

{¶6} Boyd gave the victim a tour of the apartment. The victim's mother became concerned about her welfare and at 10:01 PM called Boyd's cell phone. She asked to

speak to the victim. Boyd gave the phone to the victim who told her mother that she was “okay.” The victim returned the phone to Boyd who was reclining on his bed and watching television. The victim sat at the foot of the bed.

{¶7} Next, the victim alleged that Boyd grabbed her from behind, removed her clothing, and forcibly raped her. Boyd’s version was that he asked the victim if she wanted to “cuddle,” she said yes, he kissed her, and they had consensual sex. The victim said that after the rape, she asked Boyd to take her home and he agreed. Boyd said that he noticed the victim’s demeanor change after the sexual encounter. The victim asked to go home and this surprised him because he thought they were going to put newspapers together.

{¶8} The victim’s mother received a phone call from Boyd’s cell phone at 10:17 PM. The victim told her mother that she was coming home and to wait on the porch for her. The mother described the victim as “hysterical.” The victim claimed she did not mention the rape because Boyd was in an adjoining room. Boyd admitted that the victim was upset on the way home.

{¶9} At around 10:40 PM Boyd dropped the victim off at her home. After she ran to her mother and told her that she had been raped, the mother attempted to stop Boyd as he was leaving. Boyd testified he heard someone saying “stop him” but drove off because he was scared of the area and also because of the victim’s change in demeanor.

{¶10} Boyd was later indicted for rape and kidnapping. While awaiting trial in the Southeastern Ohio Regional Jail (SEORJ), Boyd allegedly made inculpatory statements about the rape and kidnapping in the presence of three inmates. These inmates

testified against Boyd at his trial. Phillip Radcliff, a felon on community control, also testified about an encounter with Boyd. Radcliff claimed Boyd refused to employ him to deliver papers, saying that he only wanted to hire females. Boyd was convicted of rape and kidnapping and sentenced to consecutive terms of ten years for the rape charge and five years for the kidnapping charge. He has filed a timely appeal.

II. Assignments of Error

{¶11} Boyd presents us with the following assignments of error:

{¶12} Assignment of Error I: The Prosecuting Attorney committed prosecutorial misconduct in his closing argument by using emotionally misleading statements. The Court overruled the objection and erroneously allowed the prejudicial statements to remain before the jury.

{¶13} Assignment of Error II: The Court erred in overruling the Defendant's repeated objections to the use of inmate testimony under Evidence Rule 403, that the testimony is more prejudicial than probative.

III. Prosecutorial Misconduct

{¶14} In his first assignment of error, Boyd argues he was denied his right to a fair trial because of prosecutorial misconduct. Specifically, Boyd argues that the prosecutor improperly inflamed the jury in closing arguments by invoking the concepts of "killer" and "rapist" and equating the two. The State argues that the prosecutor's remarks were responsive to Boyd's counsel's opening statements, which questioned whether a person guilty of rape would have allowed the victim to use his cell phone and drive her home. Moreover, the State argues that even if the comments were improper, they did not affect the fairness of Boyd's trial.

{¶15} The comments by the prosecutor that Boyd challenges are: “[s]he told him take me home. Was that probably the smartest thing? Well we can all sit there and think about it but what was his other option? His other option was to kill her. So because he’s not a killer, he’s not a rapists [sic]? That’s the only other option he had. He could take her home, kick her out the door or kill her. I mean the defense boils down to[:] [i]f he didn’t kill her so he’s not a rapists [sic].”

{¶16} Boyd’s counsel objected. The judge responded: “[i]t’s getting real close. I’ll let it in but let’s not stick, let’s pull away from the edge...” The prosecutor continued his closing arguments and received no further objections from Boyd’s counsel.

A. Standard of Review

{¶17} When reviewing a claim of prosecutorial misconduct we ask whether “the remarks were improper and if the remarks prejudicially affected an accused’s substantial rights.” *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, at ¶44, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record. *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293. “The touchstone of analysis ‘is the fairness of the trial, not the culpability of the prosecutor.’” *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶92, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940.

{¶18} Prosecutors and defense counsel are entitled to a wide degree of latitude during their summation. *Lott* at 165. “The prosecutor may draw reasonable inferences from the evidence presented at trial, and may comment on those inferences during

closing argument.” *State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4, 739 N.E.2d 749, citing *State v. Smith*, 80 Ohio St.3d 89, 111, 1997-Ohio-355, 684 N.E.2d 668. We must “view the state’s closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial.” *Treesh* at 466, citing *State v. Moritz* (1980), 63 Ohio St.2d 150, 157, 407 N.E.2d 1268.

B. Questionable Remarks but no Prejudice

{¶19} We examine four factors to determine whether remarks are “improper”: “(1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the defendant.” *State v. Nott* (Jul. 29, 1982), Athens App. No. 1070, 1982 WL 3488, at *2, quoting *State v. Hill* (1977), 52 Ohio App.2d 393, 396, 370 N.E.2d 775.

{¶20} The remarks were questionable but we do not feel that they were of such an outrageous nature as to inflame the jury against Boyd. The prosecutor did not directly compare Boyd to a murderer. In fact the prosecutor stated that Boyd was not a killer. Nonetheless, mentioning the word “killer” could be seen as inflammatory. But other cases suggest that a more direct comparison is required before such comments are improper. In *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, the prosecutor compared the defendant, convicted of killing his girlfriend and her father, to mass murderers and serial killers. During penalty-phase closing arguments the prosecutor stated: “[b]ut then let’s draw this out a little more. Let’s suppose he killed three people. Would that be significant? Would the mental problems be significant? Four, five, six people, when does it stop being significant? A whole stadium full of

people, a whole school full of people, when does this stop being significant? Or should we draw the line at any people and say, look, you know, if you have got a problem, we have got people who deal with your problem.” Id. at ¶84. Likewise in *State v. Chandler* (July 17, 1985), Hamilton App. Nos. C-840705, C-840706, TRIAL Nos. B-841073, B-841127, 1985 WL 8933, the trial court sustained objection to remarks by the prosecutor directly comparing the defendant to another highly publicized individual on trial for murder (Alton Coleman) and suggesting that if the jury did not convict the defendant, Alton Coleman could not be convicted as well. Id. at *1-2.

{¶21} There was no direct comparison in this case. The prosecutor did not say Boyd was a killer. In fact he said the opposite. At most the statement reflected an embellished interpretation of Boyd’s defense but we do not think it was of such significance to mislead jurors. When Boyd’s counsel objected to the statement the court allowed the remarks to stand but cautioned the prosecutor. We think this was the proper cure. It is unlikely that the jury was so inflamed or confused by the prosecutor’s remarks that they required any further admonitions from the court. And we observed nothing improper in the prosecutor’s closing or rebuttal thereafter.

{¶22} Even if we are to assume the remarks amounted to misconduct, the evidence against Boyd was substantial. The victim explained her version of events, which was bolstered by the testimony of her mother and the three inmates. Boyd offered his version of the facts but his story about consensual sex appeared unrealistic. He claimed to meet the victim for the first time, apparently to offer her a job, and then had consensual sex with her within an hour.

{¶23} Even if we assume that the statement goes beyond being “questionable” and into the realm of improper, we do not believe it impugned the substantial fairness of Boyd’s trial. This remark by the prosecutor was a singular incident in a trial that appears to have fairly safeguarded Boyd’s rights as a criminal defendant. The prosecutor’s statements were not outcome determinative as the evidence of Boyd’s guilt was overwhelming. Accordingly, we overrule this assignment of error.

IV. Evid.R. 403(A) Objections to Felons’ Testimony

{¶24} In his second assignment of error, Boyd argues that the trial court erred by overruling his objections to the testimony of four felons: Phillip Radcliff, who was on community control, and three inmates at SEORJ. He contends that their testimony was subject to mandatory exclusion under Evid.R. 403(A). As a preliminary matter, the State points out that Boyd objected to Radcliff’s testimony on the basis of Evid.R. 403(A) but did not object on any basis to the inmates’ testimony. The record confirms the lack of recorded objections to the inmates’ testimony.

A. Testimony of Phillip Radcliff

{¶25} Radcliff testified about a single encounter with Boyd. He said he was with two females when Boyd drove up in his car and asked if the girls would help him deliver newspapers. The girls were not interested. Radcliff offered to help him deliver the newspapers instead but Boyd declined Radcliff’s offer, saying he needed one of the girls. Radcliff found this strange.

{¶26} Boyd contends that Radcliff’s testimony was only marginally relevant to the case. At trial he argued that the State was using Radcliff’s testimony as a back door means of offering “similar acts” evidence. The State argues that Radcliff’s testimony

was relevant because it would help show his intent in placing the newspaper advertisement; i.e., that he was not looking for help delivering papers but instead was seeking a female companion.

1. Standard of Review

{¶27} “The admission or exclusion of relevant evidence rests within the sound discretion of the trial court” and we may not reverse unless there has been an abuse of that discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, at paragraph two of the syllabus. An abuse of discretion consists of more than an error of judgment; it connotes an attitude of the trial court that is unreasonable, unconscionable, or arbitrary. *State v. Lessin*, 67 Ohio St.3d 487, 494, 1993-Ohio-52, 620 N.E.2d 72. When applying the abuse of discretion standard, we are not free to merely substitute our judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161,169, 559 N.E.2d 1301.

2. Relevancy and Prejudice

{¶28} Evid.R. 403(A) states that: “[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid.R. 401. Unfairly prejudicial evidence “is that quality of evidence which might result in an improper basis for a jury decision. Consequently, if the evidence arouses the jury’s emotional sympathies, evokes a sense of horror, or appeals to an

instinct to punish, the evidence may be unfairly prejudicial. Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect." *Oberlin v. Akron Gen. Med Ctr.*, 91 Ohio St.3d 169, 172, 2001-Ohio-248, 743 N.E.2d 890, quoting Weissenberger's Ohio Evidence (2000) 85-87, Section 403.3. Where the danger of improper use substantially outweighs the probative value of the evidence, exclusion is mandatory. Evid.R. 403(A).

{¶29} We agree with Boyd that Radcliff's testimony was only marginally relevant to the case. Nonetheless, Boyd has not established that its probative value was substantially outweighed by the danger of unfair prejudice or confusion. Boyd does not explain how Radcliff's testimony aroused the jury's emotional sympathy for the victim, evoked a sense of horror, or appealed to the jury's sense to punish. If anything, Radcliff's testimony was bland, merely suggesting that Boyd acted a bit strange and may have been desperate for female companionship.

{¶30} Boyd seems to think that Radcliff's testimony was unfairly prejudicial because it was only slightly probative of any issues in the case. But just because some evidence casts the defendant in an unfavorable light does not mean that the evidence is subject to mandatory exclusion under Evid.R. 403(A). Generally speaking, all evidence presented by the prosecution is prejudicial to the criminal defendant. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, at ¶107. But only evidence that is demonstrated to be *unfairly prejudicial* is within the prohibition of the rule. *Id.* Accordingly, "[Evid.R. 403(A)] manifests a definite bias in favor of admissibility of relevant evidence." *Leslie v. Briceley* (Jan. 6, 1998), Washington App. No. 97CA10, 1998 WL 2374, at *2, citing *State v. Frazier*, 73 Ohio St.3d 323, 333, 1995-Ohio-235,

652 N.E.2d 1000. Boyd failed to offer any arguments to overcome the rule's preference for admissibility.

{¶31} Boyd also claimed at trial that the testimony was a back door method of introducing "similar act" evidence. Evidence of "other acts" is generally inadmissible to prove the character of the defendant to show that he acted in conformity when committing the crimes alleged. Evid.R. 404(B). Nonetheless, such evidence may still be admissible to show proof of intent, or motive. *Id.* And although Boyd's objection at trial to "similar act" evidence could be construed as an Evid.R.404(B) motion, he has not renewed that argument in his appellate brief and we do not address it. See App.R. 12(A)(b). Accordingly, we perceive no abuse of discretion by the trial court in admitting Radcliffe's testimony.

B. Testimony of the Inmates

{¶32} The first inmate, David Willis, stated that he bunked with Boyd in SEORJ for about a week. He suspected Boyd was in jail on rape charges and "encouraged" Boyd to talk about the crime. He told Boyd that his friend was getting out of jail soon and would look up his charges on the internet. Eventually, Boyd told him and other inmates the nature of his charges. Willis claimed that Boyd graphically told the inmates it was hard to perform oral sex on an unwilling victim. Willis also claimed that Boyd told him he did not use a condom during the rape and was concerned when the victim's mother called immediately after the rape.

{¶33} Willis admitted not liking Boyd, calling him a "scum bag." Willis also admitted knowing the victim's father. He said he was very angry when he discovered

who the victim was. Willis was charged with assaulting Boyd, by threatening to kill him, the day before Willis gave his testimony.

{¶34} The second inmate, Chad Williams, testified that he overheard the same conversation in which Boyd described having sex with the victim without a condom, and claimed performing oral sex on the victim. Williams added that Boyd said he made the victim scream. The third inmate, Adam Taulbee, confirmed Willis' and Williams' testimony. Taulbee indicated that he was given thirty days in the hole because Boyd reported him for "controlling the block" (controlling other inmates by intimidation).

{¶35} Boyd argues that these witnesses' testimony should have been subject to mandatory exclusion under Evid.R. 403(A) because their testimony was akin to watching "a reality show of jail culture" where the prisoners decide who is guilty and what punishment they should receive. Boyd further argues that the judge should have recognized that several of the inmates had grudges against him. The States argues that any biases these inmates may have had against Boyd go to their credibility, and not the admissibility of their testimony under Evid.R. 403(A).

1. Standard of Review

{¶36} Because Boyd failed to object to the testimony of these witnesses, he has waived all but plain error. Crim.R. 52(B); *State v. Slagle* (1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916. Plain error is an obvious error or defect in the trial proceedings affecting a substantial right of the accused. Crim.R. 52(B). Appellate courts exercise their powers to recognize plain error only under exceptional circumstances to avoid a miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus. Under this standard, we will reverse only if we decide

that the outcome of the trial would have been different without the error. *Id.* at paragraph two of the syllabus. Even then, we retain discretion in deciding whether to correct forfeited errors. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

2. Relevancy and Prejudice

{¶37} We perceive no error or defect affecting the outcome of the trial in the decision of the trial court to allow the inmates to testify. Evid.R. 403(A) prohibits the introduction of relevant evidence with a probative value that is “substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid.R. 401. The inmates testified that Boyd confessed in detail to raping the victim. Thus, their testimony was relevant in that it was probative of Boyd’s guilt. Furthermore, it seems clear that the probative value of this testimony was not substantially outweighed by the potential that the jury might hear their testimony and associate Boyd with jailhouse culture.

{¶38} But Willis’ testimony is troubling because he opined that Boyd was a “scum bag” and was guilty of rape. Evid.R. 701, requires opinion testimony by lay witnesses to be “(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” The “scum bag” comment is clearly inflammatory and the opinion on Boyd’s guilt was not helpful to the fact finder. Although Evid.R. 704 does not categorically prohibit opinion testimony embracing an ultimate issue, this opinion on guilt merely told the jury what result to reach. This is not the type of help that Evid.R. 701 envisions. See

Gianelli & Snyder, Ohio Evidence (2 Ed.) 675-677, Section 704.4. Accordingly, both comments were objectionable. Nonetheless, we hold that their admission was not plain error because they did not affect the substantial fairness of Boyd's trial. In other words, we cannot say they changed the outcome of Boyd's trial. As we already noted in Section III.B, the State's evidence against Boyd was compelling. Thus, we are confident that the jury would have reached the same verdict without Willis' improper opinion testimony.

{¶39} Boyd also seems to suggest that these witnesses' testimony was subject to exclusion because of their status as convicted felons or because they held grudges against Boyd. However, felons are qualified to testify in court. See Evid. R. 601. Their criminal backgrounds and personal grudges against Boyd are issues going to their credibility, not the admissibility of their testimony. And these potential biases were laid out before the jury by both the prosecutor and defense counsel. Thus, the jury was well aware that they were hearing the testimony of convicted felons whose credibility was suspect and two of whom had "axes to grind" with Boyd. Accordingly, we find no defects in the trial court's decision to allow the inmates to testify that would cause us to invoke the doctrine of plain error. Boyd's second assignment of error is meritless.

V. Conclusion

{¶40} We conclude that Boyd's assignments of error are meritless and affirm his convictions. The remarks by the prosecutor did not affect the substantial fairness of Boyd's trial. Furthermore, the trial court properly overruled Boyd's Evid.R. 403(A) objection to the testimony of Radcliff. Finally, we observe no plain error in the trial

court's decision to allow three inmates to testify about Boyd's alleged jailhouse confession.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.