

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2008-03-070
 :
 - vs - : OPINION
 : 6/15/2009
 :
 JULIUS CROSSTY, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR06-12-2311

Robin N. Piper, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Fred S. Miller, Baden & Jones Bldg., 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Julius Crossty, appeals his convictions for three counts of attempted murder and one count of felonious assault from the Butler County Court of Common Pleas.

{¶2} Appellant and his girlfriend, Carlana Reece, had a sporadic relationship over an approximately 15-year period, but never married. Appellant is the father of two boys, ages eight and nine at the time of the incident. Reece is the mother of appellant's older son. In

2003, appellant obtained legal custody of both boys and served as the primary caregiver and guardian for most of their lives. Appellant and Reece last separated in the spring of 2006, but would often see each other. In September, appellant lost his job. On November 27, 2006, Reece stayed overnight at appellant's home. That night, the pair had a conversation about Reece's prior relationships with other men. The following morning, appellant was scheduled to meet with officials at the Government Services Center in Hamilton to apply for unemployment assistance. Appellant and Reece left his home separately and went to the Government Services Center to help him complete paperwork.

{¶3} Before filling out the paperwork, appellant and Reece left the building. According to Reece, appellant told her that he believed his brother was in trouble and that he had to leave. According to appellant, the pair left because Reece propositioned him for sex. The pair returned to appellant's house in separate cars. Upon arrival, appellant carried Reece upstairs to the second-floor bedroom because she had a splint on her right leg. Reece contends that he carried her to the second floor to use the bathroom, while appellant testified that he laid her on the bed, intending to have sex. Appellant testified that he went downstairs to retrieve condoms and, when he returned, Reece was in the bathroom plucking her eyebrows. He then heard her cell phone, which was in her purse on the bed. Appellant then claimed he opened the purse and found letters postmarked from prison. He took the letters downstairs and read them. The letters were from appellant's friend, Donnie White, a prison inmate. The letters concerned Reece's prior sexual conduct with White and described White's plans to be with Reece upon his release. Appellant testified that White was "like a brother" to him and they had been friends since childhood. Appellant stated that this was the first time that he heard about Reece and White's relationship because Reece had not mentioned it the prior evening.

{¶4} Appellant testified that he returned upstairs and confronted Reece about the

letters. Reece told him the letters meant nothing. She then became angry and admitted having sex with White. Appellant claims that Reece lunged at him with tweezers and attempted to run from the bathroom. Appellant chased her and cut her with a box cutter.

{115} According to Reece, appellant's actions were unprovoked. She testified that, while she was in the bathroom, appellant "launched" at her, hit her from behind, kicked her into the bedroom and sliced her left leg in two places with a box cutter. She asked appellant to take her to the hospital, but he told her to shut up. According to Reece, appellant told her she would bleed to death and that they all were going to die together, including the boys. Appellant placed Reece on the mattress in the bedroom, wrapped a phone cord around her leg, wrapped her leg in a towel, applied an ace bandage and a heating pad, and covered her with blankets.

{116} The boys arrived home from school around 4:00 p.m. Appellant instructed them to go upstairs and say "hi" to Reece. According to the boys, Reece did not appear well. Then appellant gave the boys several small, white pills to swallow. Later, appellant called his brother to take Reece to the hospital. Before his brother arrived, appellant pulled the kitchen stove from the wall, turned the gas off, and disconnected the gas line, although he did not turn the gas back on. His brother arrived around 6:30 p.m. Appellant told his brother that he did not want to live and wished to kill himself. His brother called 9-1-1. Appellant left with the two boys before the police and paramedics arrived. Reece was taken to the hospital, where she had surgery to repair the wounds. One of the three arteries in her leg had been severed and could not be repaired. Her Achilles tendon was also lacerated.

{117} Appellant initially drove the boys to a field near their home. Appellant placed one end of a garden hose into the exhaust pipe and the other end inside the car. Appellant claimed that he did not start the car with the boys inside, but appellant's younger son testified that the car remained running and the car began to smell like smoke. The son further

claimed that he began to get a headache and the boys took a nap. In the morning, appellant transported the children by bicycle to an abandoned house two blocks away. The children testified that they napped, ate, and they cried with their father. Appellant testified that he returned to the car to retrieve their suitcases and decided to kill himself. He started the car, but nothing came through the hose, so he pushed a knit cap into the tailpipe, but still nothing came through. Appellant returned to the abandoned house. When the police discovered appellant's abandoned vehicle they noted that the hose was twisted and crinkled.

{¶8} At the house, appellant unsuccessfully tried to reach his brother to pick up the children, so he called their football coach. The boys sat on the back porch waiting, while appellant went inside the abandoned home and took the cap off the gas line in the house, once again, intending to commit suicide, but then returned to his boys. The football coach arrived and appellant lifted them over the fence. Appellant was apprehended by police shortly thereafter.

{¶9} Following a jury trial, appellant was convicted of three counts of attempted murder in violation of 2923.02(A) and one count of felonious assault in violation of R.C. 2903.11(A)(1) and sentenced to an aggregate term of 26 years in prison. Appellant timely appeals, raising three assignments of error. We will address appellant's assignments of error out-of-order in the interest of convenience.

{¶10} Assignment of Error No. 2:

{¶11} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT WOULD NOT PERMIT HIM TO TESTIFY REGARDING THE CONTENTS OF LETTERS WRITTEN BETWEEN CARLENA REECE AND DONALD WHITE."

{¶12} In his second assignment of error, appellant argues that his defense was based upon the theory that discovery of the sexual relationship between Reece and White,

combined with Reece's attack on him with the tweezers, provoked him into attacking Reece and cutting her with a box cutter; mitigating the charges to aggravated assault and attempted voluntary manslaughter. Appellant argues the trial court erred by excluding testimony relating to his personal recollection of the contents of the letters. Appellant states that the letters he wished to testify about no longer existed at the time of trial, so it was necessary for him to testify about the sexually explicit content.

{¶13} The admission of evidence lies within the broad discretion of the trial court and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶43. An abuse of discretion connotes more than an error of law or judgment, it implies a decision that is unreasonable, arbitrary or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶14} The trial court in this case excluded appellant's testimony, finding that the contents of the letters were hearsay and not properly authenticated. Appellant argues that the contents of the letters were not hearsay as they were not offered for the truth of the matter asserted. Rather, they were offered to understand appellant's subjective state of mind to establish provocation.

{¶15} Regardless of whether the evidence is hearsay, the contents of the letters are immaterial to appellant's defense since words alone are not sufficient to prove provocation. *State v. Shane* (1992), 63 Ohio St.3d 630, 637. In *Shane*, the Ohio Supreme Court examined the provocation requirement in the context of sexual infidelity which reduces a charge of murder to voluntary manslaughter. The *Shane* case involved a defendant who was allegedly provoked to act under the influence of sudden passion or in a sudden fit of rage by his fiancée's words informing him of her sexual infidelity. *Id.* at 636. The court noted that "assault and battery, mutual combat, illegal arrest or discovering a spouse in the act of adultery are classic voluntary manslaughter situations," but "words informing another of

infidelity should not be given special treatment by courts trying to determine what provocation is reasonably sufficient provocation. The killing of a spouse (usually a wife) by a spouse (usually a husband) who has just been made aware of the victim spouse's adultery simply is not an acceptable response to the confession of infidelity." *Id.* As a result, the court concluded "that words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations." Accordingly, we find no abuse of discretion by the trial court excluding appellant's testimony relating to the discovery of infidelity.

{¶16} Appellant's second assignment of error is overruled.

{¶17} Assignment of Error No. 1:

{¶18} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT IMPROPERLY CURTAILED CROSS-EXAMINATION OF THE STATE'S MAIN WITNESS AND WHEN IT MADE COMMENTS THAT ACTED TO LESSEN THE STATE'S BURDEN OF PROOF."

{¶19} During cross-examination, appellant's counsel questioned Reece about the contents of her correspondence with White and the nature of her relationship with White before he went to prison. Reece acknowledged that she engaged in sexual relations with White and wrote letters to him once he went to prison describing their past relations. Reece testified that she told White in the letters that she missed having sexual relations with him and that she wanted to have sex with him once he was released.

{¶20} Counsel then inquired, "And you told him you wanted to do it all day, every day?"

{¶21} Reese responded, "I don't believe I did but I mean there were a bunch of letters, and I don't remember what was in each one."

{¶22} Appellant's counsel then attempted to introduce five letters into evidence, but the trial court instructed, "I don't want to cut your cross-examination short, here, but you know

this lady is not on trial, and unless you are going to tie this up, to something that has to do with Mr. Crossty, I'm not going to let you continue to go after this lady."

{¶23} "Appellant's Counsel: That's not my purpose, Your Honor. My purpose is she has * * *.

{¶24} "The Court: Let's go.

{¶25} "Appellant's Counsel: She has lied about the situation.

{¶26} "The Court: Well give me some of that and I intend to let you proceed with cross-examination, but unless you are going to tie these letters up with – by this defendant, then I just don't think it is relevant.

{¶27} "Appellant's Counsel: I am, Your Honor."

{¶28} Appellant's counsel then proceeded to question Reece about whether appellant found the letters in her purse and if they prompted his attack.

{¶29} In his first assignment of error, appellant challenges the trial court's actions. Appellant argues that the trial court improperly terminated cross-examination of the victim and that he was prejudiced by the trial court's statement in the presence of the jury. Appellant argues that vigorous cross-examination of Reece was warranted in order to establish provocation to reduce his convictions to aggravated assault and attempted voluntary manslaughter, but the trial court bolstered the testimony of the victim by improperly "convey[ing] its impression to the jury that Reece was being unfairly attacked by counsel, that because she was the victim she should not be subjected to vigorous cross-examination, and that the jury should feel some sort of sympathy towards her precisely because she was not on trial."

{¶30} Trial judges shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant material matters with a view to expeditious and effective ascertainment of the truth regarding matters in issue. R.C.

2945.03; *State v. Smith*, Portage App. Nos. 2006-P-0101, -0102, 2008-Ohio-3251, ¶40. An appellate court reviewing the propriety of a judge's remarks before a jury must determine whether the comments were prejudicial to a defendant's right to a fair trial. *State v. Wade* (1978), 53 Ohio St.2d 182, 188.

{¶31} After review of the record, we find no prejudice in the trial court's statements in this case. As explained above, the contents of the letters and details of Reece's sexual conduct with White were irrelevant to appellant's trial. Further, the trial court's statement did not improperly bolster Reece's testimony or contribute to her credibility. The trial court was attempting to limit counsel's cross-examination to relevant matters since counsel began questioning Reece about her past sexual history with White and her feelings upon his future release from prison. Additionally, the trial court noted that counsel had not laid a foundation for the introduction of the letters since no connection was made between the letters and appellant.

{¶32} Accordingly, appellant's first assignment of error is overruled.

{¶33} Assignment of Error No. 3:

{¶34} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN OVERRULING DEFENDANT-APPELLANT'S MOTION FOR NEW TRIAL PURSUANT TO CRIM.R. 33."

{¶35} In his final assignment of error, appellant argues the trial court erred by failing to order a new trial based upon numerous instances of improper argument by the prosecution. Specifically, during cross-examination, the prosecution instructed the jury to "strongly consider" appellant's previous felony conviction. Appellant argues the trial court's failure to provide a limiting instruction upon request prejudiced appellant.

{¶36} Second, appellant argues the prosecution improperly injected personal opinions during closing argument. Specifically, appellant cites the prosecution's statement that if a

woman attacked him with tweezers, "I would laugh." Further, appellant mentions at least twenty-four instances of the prosecutor stating "I don't care" or that testimony or evidence "doesn't matter" during closing argument.

{¶37} Appellant also alleges that during closing argument the prosecutor misstated the law by shifting the burden of proof to appellant. Specifically, the prosecutor stated that appellant must "convince you that what he did that day was okay." Finally, appellant urges that the prosecution improperly commented upon the absence of witnesses during closing argument. Specifically, the prosecutor mentioned that appellant failed to call his brother as a witness.

{¶38} A new trial may be granted on motion of the defendant for irregularity of the proceedings, abuse of discretion by the court, and misconduct of the prosecuting attorney. Crim.R. 33(A). A trial court's ruling on a motion for a new trial will be reversed only for an abuse of discretion. *State v. Haddix* (1994), 93 Ohio App.3d 470, 480.

Previous Conviction

{¶39} Generally, for the purpose of attacking credibility, "evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 609(A)(2).

{¶40} Evid.R. 105 provides, "[w]hen evidence is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly."

{¶41} In this case, appellant's trial counsel objected to the prosecution's statement, asking the jury to consider appellant's previous felony conviction. Counsel also asked for the trial court to provide a limiting instruction in accordance with Evid.R. 105. The trial court overruled appellant's objection, informing counsel that he would provide the limiting instruction shortly thereafter during jury instructions.

{¶42} Even though an instruction was ultimately provided, appellant urges that the court erred by failing to give the instruction immediately upon request and the prosecution's statement remained inflammatory because he asked the jury to "strongly" consider the previous conviction, instead of being considered for a limited purpose.

{¶43} While we agree that the previous conviction may only be considered for a limited purpose, the trial court properly limited the evidence by issuing a curative instruction. Although the instruction was not provided directly after counsel's objection, the court specifically instructed the jury on the limited relevancy of prior convictions immediately following closing arguments in the jury instructions.

{¶44} Accordingly, we find no abuse of discretion by the trial court.

Personal Opinion, Misstatement of Law, Witness Absence

{¶45} A prosecutor's misconduct in closing argument is reversible error only if it deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 405; *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 643, 94 S.Ct. 1868. "A prosecutor may comment upon the testimony and suggest the conclusions to be drawn from it, but a prosecutor cannot express his personal belief or opinion as to credibility of a witness or as to the guilt of the accused, or go beyond the evidence which is before the jury." *State v. Stone*, Warren App. No. CA2007-11-132, 2008-Ohio-5671, ¶27. It is also improper for the prosecuting attorney to mislead the jury by either misstating the law or the facts in closing

argument. *State v. Depew* (1988), 38 Ohio St.3d 275, 288. Further, a prosecutor may not comment upon the failure of a witness to testify at trial whose name appears on a witness list provided in discovery proceedings. *State v. Hannah* (1978), 54 Ohio St.2d 84, 90; Crim.R. 16(B)(4).

{¶46} Appellant's counsel failed to object to the remaining complaints against the prosecutor; waiving any challenge except for plain error. *State v. Maurer* (1984), 15 Ohio St.3d 239, 259. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶50, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. Plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100.

{¶47} After review of the record, although the prosecution's remarks were improper, we cannot say that but for the comments the outcome of trial would have been different. In addition to the testimony of the various victims, appellant admitted committing the offending acts that led to his various charges, but urged that the charges should be reduced due to provocation and depression. However, overwhelming evidence was presented to support appellant's convictions.

{¶48} Appellant's third assignment of error is overruled.

{¶49} Judgment affirmed.

BRESSLER, P.J., and YOUNG, J., concur.

[Cite as *State v. Crossy*, 2009-Ohio-2800.]