[Cite as *State v. Bozeman*, 2009-Ohio-3677.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, : CASE NO. CA2008-10-248

: OPINION
- vs - 7/27/2009

:

SHANE LEE BOZEMAN, SR. :

Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-10-1765

Robin Piper, Butler County Prosecuting Attorney, Government Services Center, Lina N. Alkamhawi, 315 High Street, Hamilton, Ohio 45012-0515, for plaintiff-appellee

Brian K. Harrison, P.O. Box 80, Monroe, Ohio 45050, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Shane Lee Bozeman, Sr., appeals a decision of the Butler County Court of Common Pleas convicting him of rape. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} On October 17, 2007, appellant was indicted on one count of rape in violation of R.C. 2907.02(A)(1)(b), a first-degree felony. The charge arose from allegations that appellant engaged in sexual acts with his son C.B. sometime in the fall of 1998. According to testimony in the record, appellant was home alone with four-year-

old C.B. when he summoned the child into the living room. Appellant inserted a video into the VCR which depicted naked people. In compliance with appellant's orders, C.B. undressed and lay down on the couch on his back. Appellant then placed his mouth on C.B.'s penis and placed his own penis in C.B.'s mouth. Appellant told C.B. to roll over onto his stomach, after which C.B. felt a sharp pain in his buttocks. Appellant ordered C.B. not to discuss the incident with anyone or appellant would "get him." That evening, C.B.'s mother observed bruising around his buttocks while she was bathing him. When she questioned appellant about the bruising, appellant said he paddled C.B. on the buttocks as a punishment for wetting the bed. C.B. corroborated the explanation because he was afraid of appellant.

{¶3} In November 2006, eight years after the incident, C.B. revealed the allegations of sexual abuse to his mother after having problems at school. A few months later, C.B. recounted the incident to a counselor, who reported the allegations to the police. Appellant was indicted, and the matter proceeded to a jury trial in September 2008. The jury returned a guilty verdict. Thereafter, the trial court sentenced appellant to a term of eight years in prison and classified him as a Tier III sex offender. Appellant timely appeals, raising two assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO CONTINUE HIS CRIMINAL TRIAL WHEN APPELLEE DISCLOSED ON THE EVE OF TRIAL A STATE AGENT WHO HAD GATHERED INFORMATION CONTAINING A STATEMENT OF APPELLANT AND OTHER POTENTIALLY EXCULPATORY OR OTHERWISE DISCOVERABLE INFORMATION."

{¶6} Appellant argues that the trial court abused its discretion in denying his request for a continuance on the morning of trial. On Friday, September 19, 2008, the

last business day before trial, the state filed an amended bill of particulars which alleged an additional act of sexual conduct perpetrated by appellant against C.B. That same day, appellant received supplemental discovery from the state. According appellant's brief,[1] this discovery indicated that C.B. was interviewed by a Butler County Children Services Board (CSB) worker in connection with an investigation into the allegations against appellant. At the hearing on a motion in limine filed by appellant, the assistant prosecutor stated that this interview between C.B. and the CSB worker took place around April 2007.

{¶7} Appellant orally moved for a continuance on Monday, September 22, the first morning of trial, so he could interview the CSB worker to discern whether she obtained any exculpatory or impeachment evidence in the course of her investigation. The assistant prosecutor assured the trial court that the victim's recitation of the facts in his interview with the CSB worker was consistent with his grand jury testimony and with statements made by C.B. at his most recent interview with the assistant prosecutor the week prior to trial. The assistant prosecutor informed the court that the CSB worker did not further investigate beyond her interview with C.B., and that the state had provided a summary of the interview to defense counsel. Upon consideration, the trial court denied appellant's motion for continuance.

{¶8} A trial court has broad discretion in determining whether to grant or deny a continuance. *State v. Unger* (1981), 67 Ohio St.2d 65, 67. An appellate court may not reverse the denial of a continuance absent an abuse of discretion. Id. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108

1. The supplemental discovery documents were not made part of the record and are therefore not available for our review.

Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶9} When a continuance is requested by a party, the competing interests to be considered are the court's right to control its own docket, the parties' and the public's interest in the prompt and efficient administration of justice, and the potential prejudice that could result to the moving party if the request is denied. *Unger* at 67. In balancing these interests, a court considers several factors, such as: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to the litigants, witnesses, opposing counsel, and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance that gave rise to the request; and any other relevant factors. Id. at 67-68.

{¶10} After reviewing the record, we do not find that the trial court abused its discretion in declining to grant appellant a continuance on the morning of trial. At the time appellant presented his oral motion, the trial court heard from both sides and concluded that a continuance would not be productive for appellant. The prosecution provided all of the information it had to appellant, including a summary of C.B.'s interview with the CSB worker. Notably, appellant used the interview summary during his cross-examination of both C.B. and C.B.'s mother.

{¶11} Appellant does not aver that the information provided by the prosecution in the interview summary was inaccurate or incomplete, nor does he point to anything in the summary that could substantiate the existence of any exculpatory information. The assistant prosecutor assured the trial court that C.B.'s testimony at trial would reflect the same set of facts which he related to the CSB worker. Therefore, an examination of the CSB worker would likely have yielded only cumulative information. Moreover, because the CSB worker did not pursue further investigation after interviewing C.B., it logically

follows that she did not possess any exculpatory information beyond anything contained in the interview summary.

{¶12} In addition to the above, as the trial court noted, trial had already been set for a significant period of time when appellant requested the continuance. Finally, taking into account the aforementioned factors, appellant has failed to demonstrate how he was prejudiced by the denial of the continuance. In light of these considerations, it appears that a continuance would have caused a fruitless and unnecessary delay. The court's denial of the continuance thus favored the prompt and efficient administration of justice.

{¶13} Appellant's first assignment of error is overruled.

{¶14} Assignment of Error No. 2:

{¶15} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REFUSED TO EXCLUDE UNFAIRLY PREJUDICIAL EVIDENCE OF PRIOR BAD ACTS OF THE DEFENDANT."

{¶16} Appellant contends that the trial court abused its discretion in permitting the state to present evidence of prior bad acts involving allegations of sexual misconduct perpetrated by him against A.B. and S.B., his two daughters. This evidence was excluded prior to trial at the hearing on appellant's motion in limine. In accordance with Evid.R. 404(B), the trial court determined that the evidence of these other acts was not admissible to prove appellant's character in order to show that he acted in conformity therewith. The court further held that, even if such evidence was admissible under Evid.R. 404(B), it must be excluded under Evid.R. 403(A) because the probative value was substantially outweighed by the danger of unfair prejudice.

{¶17} Although initially excluded, the evidence was later admitted at trial after the court ruled that appellant "opened the door" to the evidence in his testimony. Appellant

took the witness stand on his own behalf. On direct examination, he denied the allegations of sexual abuse against C.B. when questioned by defense counsel:

{¶18} "Q. * * * Do you recall an incident in which you went into [C.B.'s] room and told him to come outside and take his clothes off?

{¶19} "A. Absolutely not.

{¶20} "Q. Do you recall a point in time in which you told him to lay on the couch naked?

{¶21} "A. That never happened. That is not true.

{¶22} "Q. Do you recall a point in time in which you played any VHS video depicting images of naked people?

{¶23} "A. I would never ever, ever do that. That's –

{¶24} "* * *

{¶25} "Q. You heard [C.B.] say that he remembered that you put your penis in his mouth. Do you remember him saying that?

{¶26} "A. Yes, I remember him saying that.

{¶27} "Q. Do you recall a point in time in which that happened?

{¶28} "A. No, never.

{¶29} "Q. And you also recall [C.B.] stating that you put something into his buttocks?

{¶30} "A. I did hear him say that.

{¶31} "Q. Do you recall a point in time in which that happened?

{¶32} "A. No, that's very gross. *I would never do that to my own or any child.*" (Emphasis added.)

{¶33} Later, and while still under direct examination by defense counsel, appellant reiterated his innocence:

{¶34} "Q. * * * And again, you've heard this testimony regarding your son, what happened this – some date and time in 1998. As you sit here today, you have no recollection?

{¶35} "A. It makes me sick to even think about it. I never did anything like that. *I would never ever do that to any child ever.*" (Emphasis added.)

{¶36} At this time, a bench conference was held and the assistant prosecutor requested permission to cross-examine appellant about sexual misconduct perpetrated by appellant against his two daughters. After considering the matter, the trial court determined that the state could properly present appellant's daughters as rebuttal witnesses if appellant denied the allegations of sexual misconduct against them on cross-examination. The court concluded that it would be unfair to permit appellant to make a broad and unsolicited statement about his character without permitting the prosecution the opportunity to rebut the statement. Although the court believed that its previous ruling on appellant's motion in limine had been correct, it noted that the circumstances changed when appellant made the broad statement thereby opening the door and putting his own character in issue.

{¶37} The trial then resumed, and on cross-examination the assistant prosecutor asked appellant whether he engaged in certain sexual misconduct with his two daughters. Specifically, appellant was asked whether, in the year 2003, he offered his then 15-year-old daughter A.B. money in exchange for sex. Appellant denied the allegation. The assistant prosecutor then asked appellant whether, in the year 1998, he placed his hand down the pants of his then seven-year-old daughter S.B. and touched her vaginal area. Appellant denied that allegation as well. The state then presented both daughters, now 20 years old and 17 years old, respectively, as rebuttal witnesses. Both daughters testified that appellant had committed the respective sexual acts against

them. It is the admission of this testimony that appellant challenges on appeal, claiming that such evidence was inadmissible and prejudicial.

{¶38} We begin our analysis by noting that a trial court's decision to admit or exclude relevant evidence will not be reversed absent an abuse of discretion. *Hancock*, 2006-Ohio-160 at ¶122. Regarding the admission of character evidence, the general rule is that evidence of a person's character or character trait is not admissible to prove that the person acted in conformity therewith. Evid.R. 404(A). This limitation is commonly referred to as the "propensity rule."

{¶39} The propensity rule is subject to certain enumerated exceptions. For example, once an accused offers evidence that puts a pertinent character trait in issue, the state is permitted to offer rebuttal evidence on that trait. *State v. Jacobs*, Gallia App. No. 03CA24, 2004-Ohio-3393, ¶17. This rule is reflected in Evid.R. 404(A)(1), which provides that "[e]vidence 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."

{¶40} One commentary explains why an accused may choose to offer evidence of a pertinent character trait and the resulting consequences of this choice under Evid.R. 404(A)(1):

{¶41} "The basic rule is that the defendant may, at his option, offer evidence of his good character as proof that he did not commit the act charged because such conduct is not in accord with his character. This is often denominated the 'mercy defense'. If the accused offers evidence of his good character, then, and only then, can the prosecution offer evidence of the bad character of the accused." Giannelli Snyder, Rules of Evidence Handbook (2008), Staff Notes, 175-76.

{¶42} A slightly different, but equally helpful, analysis of Evid.R. 404(A)(1) is found in the following excerpt from Weissenberger's Ohio Evidence Courtroom Manual (2008) 73:

{¶43} "Rule 404(A) sets forth three exceptions *where the exclusionary rule will not apply* to character used to prove conforming conduct. First [in Evid.R. 404(A)(1)], the accused in a criminal case may seek to introduce pertinent evidence of his good character in order to raise the inference that on a particular occasion involving the crime for which he is charged, he acted in conformity with his good character and did not commit the operative facts of the crime." (Emphasis added.)

{¶44} This is precisely what occurred in the case at bar. Appellant offered evidence of his good character to raise the inference that he did not commit the crime charged because such conduct was not in accord with this character. "I would never have sex with my own or any child" undoubtedly qualifies as an assertion of good character. By making this assertion, appellant's proclivity towards sex with children (or, rather, the absence thereof) became part of his defense. Appellant raised the inference that he did not commit the alleged acts against C.B. because he would never engage in sex acts with his or any child. At that point, it would have been unfair to blindly accept appellant's assertion and prohibit the state from presenting rebuttal evidence on the issue. *State v. Fannin* (June 11, 1999), Ross App. No. 98CA2456, 1999 WL 402231 at *2.

{¶45} Although such a reading of Evid.R. 404 accords with the plain language of the rule, it seems that courts are loath to defy the propensity rule. But the precise wording of Evid.R. 404(A)(1) indicates that such evidence can in fact come in substantively. As stated, subsection (A) starts off by stating the general propensity rule, but then specifies that the propensity rule is "*subject to the following <u>exceptions</u>*." In

accordance with the clear wording of Evid.R. 404(A), then, evidence that falls within one of the exceptions is admissible to show action in conformity therewith. Subsection (1) states that one of those exceptions is where an accused offers evidence of a pertinent character trait.

{¶46} We observe that the present matter is similar to a case addressed by the Third Appellate District, *State v. Banks* (1991), 71 Ohio App.3d 214. The defendant in that case, John Banks, was charged with rape and gross sexual imposition based upon allegations of sexual conduct with his minor daughter. On appeal, Banks argued that he was prejudiced by the trial court's admission of testimony from two rebuttal witnesses regarding prior instances of alleged sexual activity between them and Banks. At trial, Banks professed his innocence multiple times while testifying on direct examination, stating that he had never had sex with his daughter or any minor child. Id. at 216. When questioned by the state on cross-examination, Banks denied engaging in sexual activity with the two rebuttal witnesses. The state then called the rebuttal witnesses, who testified about the sexual contact between them and Banks which occurred when they were four and five years old, respectively.

{¶47} Similar to the case at bar, Banks argued on appeal that this testimony was inadmissible to prove his character and also should have been excluded under R.C. 2907.02(D),[2] Ohio's Rape Shield Statute. The Third District found no error in the admission of the evidence because, the court reasoned, it was not introduced to establish Banks' character or to establish any of the factors set out in R.C. 2945.59, one

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2. In pertinent part, R.C. 2907.02(D) provides the following: "Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code * * *."

of the exceptions to the Rape Shield Statute.[3] Instead, the evidence was introduced after Banks himself called a pertinent character trait into question. The appellate court concluded:

{¶48} "In the case before us, the defendant, in his case-in-chief, interjected the issue of his prior sexual acts into the case. Consequently, as the defendant elected to rely upon the absence of prior acts of sexual misconduct or 'perversion' as a defense in his case-in-chief, the state was entitled to introduce testimony in rebuttal to meet the defense interposed by the defendant. '[T]he state is not to be deprived thereof simply because it might tend to further establish the elements of the crime charged.' Likewise, as to defendant's contention that the Rape Shield Statute was violated by the rebuttal testimony, we conclude that when the defendant 'opened the door' to the issue of his past sexual conduct, he effectively waived the statutory limitations regarding specific instances of sexual activity." Id. at 219-20. (Citation omitted.)

{¶49} The same reasoning applies to the case at bar. On direct examination, appellant twice testified that he "would never do that to *any* child" when questioned about the allegations. In making this sweeping statement during his case-in-chief, appellant himself interjected the issue of his character into the case. Consequently, appellant "opened the door" to rebuttal evidence on the issue, including evidence of previous sexual misconduct with other children. See, e.g., *State v. Hardie*, Montgomery App. No. 19954, 2004-Ohio-6783, ¶26; *Fannin*, 1999 WL 402231 at *4; *State v. Chojnacki* (Dec. 30, 1994), Medina App. No. 2326-M, 1994 WL 721918 at *7; *State v. Seymour* (Nov. 23, 1994), Montgomery App. No. 14324, 1994 WL 660763 at *4; and

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3. R.C. 2945.59 provides that: "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether

State v. Gauntt (Sept. 30, 1993), Cuyahoga App. No. 63792, 1993 WL 389470 at *4.

{¶50} As implicated by arguments in the *Banks* case, normally the rape shield law would prohibit the introduction of evidence such as that offered by the rebuttal witnesses in the present matter. See R.C. 2907.02(D) (rape) and R.C. 2907.05(D) (gross sexual imposition). The rape shield laws not only apply to past sexual activity of the victim, but to past sexual activity of the accused as well. The protection afforded to an accused by the rape shield law is noted in Evid.R. 404(A)(1). Even so, numerous Ohio courts have recognized that the protections of the statutes may be waived. See, e.g., *State v. Williams* (Jan. 2, 1986), 21 Ohio St.3d 33, 38 (Wright, J., concurring); *Fannin* at *4; *State v. Varner* (Sept. 25, 1998), Trumbull App. No. 96-T-5581, 1998 WL 683943 at *4, fn1; *Gauntt* at *4; *Banks* at 220.

{¶51} On another note, we observe that the trial court's cautionary and jury instructions indicated that the testimony given by appellant's daughters could not be considered for the purpose of establishing appellant's character or that he acted in conformity therewith, but only for credibility purposes. Because the rebuttal evidence was admissible substantively, however, it was not necessary for the trial court to issue this admonition. By asserting that he "would never do that to his or any child" and incorporating this character trait into his defense, appellant brought this character trait into question. The testimony of the daughters was introduced to rebut this facet of appellant's defense, not to attack his overall character for truthfulness. Cf. *Williams* at 36.

{¶52} Finally, we address appellant's argument that, even if he did open the door to such evidence, the testimony of A.B. and S.B. should have been excluded under

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they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

Evid.R. 403(A) because its probative value was substantially outweighed by its prejudicial effect. Evid.R. 403(A) requires that evidence be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Arguably, all evidence which tends to suggest a defendant's guilt is prejudicial. Evid.R. 403(A) expressly bars evidence that is *unfairly* prejudicial.

{¶53} As the Ohio Supreme Court observed in *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, ¶23:

{¶54} "[I]t is fair to say that all relevant evidence is prejudicial. That is, evidence that tends to disprove a party's rendition of the facts necessarily harms that party's case. Accordingly, the rules of evidence do not attempt to bar all prejudicial evidence – to do so would make reaching any result extremely difficult. Rather, only evidence that is *unfairly* prejudicial is excludable." (Emphasis sic.)

{¶55} See, also, Weissenberger's Ohio Evidence Treatise (2007 ed.) 107-08, Section 403.3 (stating: "If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under Rule 403. Emphasis must be placed on the word 'unfair'").

{¶56} Appellant was aware that the state had the rebuttal evidence in its arsenal when he took the witness stand. The evidence had previously been excluded at the hearing on his motion in limine. Nonetheless, appellant chose to make the sweeping assertion that he would never engage in sexual conduct with his own or any child. Appellant should not be permitted to make this sweeping and unsolicited statement and reap the benefits thereof while dodging the consequences that arose from his raising the issue. The admission of the rebuttal evidence was thus not *unfair*, even if it was prejudicial. In addition, the probative value of the rebuttal evidence shifted to high once

appellant interjected the issue into his defense. In light of these considerations, the admission of the rebuttal evidence did not violate Evid.R. 403(A).

{¶57} We conclude that the trial court did not abuse its discretion in permitting A.B. and S.B. to testify regarding appellant's prior acts of sexual misconduct with them. Appellant touted his supposed inability to ever engage in sexual conduct with children, thereby opening the door to the issue. The state was properly permitted to present rebuttal evidence on the same.

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

{¶59} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.