[Cite as *State v. Clay*, 2010-Ohio-5748.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

JAMES C. CLAY

Defendant-Appellant

Appellate Case No. 2009-CA-40

Trial Court Case No. 09-CR-122

(Criminal Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 24th day of November, 2010.

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BROGAN, J.

{¶ 1} James Clay appeals from his conviction of aggravated arson after a jury trial in Miami County Common Pleas Court. The facts underlying Clay's conviction are as follows:

{¶ 2} At approximately nine o'clock on the evening of December 21, 2007, Casstown, Fletcher, and Troy Fire Departments were dispatched on the report of a house fire at Clay's home on Troy-Sidney Road. Deputy Richard Manns of the Miami County Sheriff's Office was dispatched to the fire scene and found Clay in his front yard in a highly emotional state. Clay shouted "look at my car. All I do is try to help people. I live in Miami County. I'm guilty until I'm proven innocent." (State's Ex. 75.) Clay told Manns that two men entered his home and set the house on fire and ran out the back door. Manns searched the backyard area and could find no one suspicious. Manns did observe Clay's white four-door vehicle in Clay's driveway which had been spray painted with "guilty," "leave," and "nigger" on the vehicle. Clay told Manns that he and his two children were watching a movie in the rear bedroom of the home when the two men entered. Clay told Manns he grabbed a samurai sword to encounter the men, but they fled from the house. Clay gave Manns a written statement that evening. (State's Ex. 6.) It read as follows:

{¶ 3} "The kids and I were watching [a] movie. I was doing laundry. Most lights on front of house were off. Laundry room light [was] on. Stove light [was] on. We smelled something in [the] kitchen area. So I got up, opened the door and saw to [sic] people in [the] kitchen area. I closed the door quietly and put James and Faith in [the] bathroom and told him [sic] to lock [the] door. I grabbed [the] sword to approach [the] intruders. I open[ed] my bedroom door. There were 2 ppl. [people].

One was short [and] stalky (5'7" 180-200 lbs). [The] other [was] 5'10" to 6', thin. When I came at them the short one had a ball of flame towel maybe. [He] threw it at the floor and the whole hallway went up in flames. I step[ped] back in my bedroom. Got my kids out of the bathroom and ran out my office door, went to the north of [the] house and across [the] front yard to [the] neighbors. I ran back to my house around the back to my office and grabbed [my] cell phone and keys and started grabbing clothes and whatever I could. I threw it out the back door. I ran to the front and moved my cars away and saw nigger and guilty and leave sprayed on my car. The neighbors called 911 for me. The short guy was definitely white. The ball of flame lite [sic] of [sic] the eye holes of [the] sky mask and his wrist. They had on all black, ski mask and gloves. The[y] must have came through [the] garage."

{¶ 4} Gerald Pierce, a neighbor of Clay, arrived at the fire shortly after it started and encountered Clay who was standing outside his home. Because the night air was cold and Clay was only wearing a sleeveless t-shirt, Pierce offered his coat to Clay to keep him warm. Pierce thought Clay appeared in shock because of the fire.

{¶ 5} The fire virtually destroyed the Clay residence. Fire investigators quickly determined the fire was the result of arson and located its origin at the center of the home. Investigators located a new gasoline can at the fire's origin and they determined the fire was started by using gasoline as the accelerant. The gas can was unique because it had been recalled for safety purposes by the manufacturer. Fire investigators interviewed Clay at length and determined that Clay's version of how the fire was started was not consistent with their observations of the fire scene

and their opinion as to the fire's origin. (Tr. 650-658) (Tr. 416-441).

{¶ 6} Troy Assistant Fire Chief, Matthew Simmons, discovered that a gasoline can of the same make and model as was discovered embedded in the house floor was sold at a Shell gas station in the area three days before the fire. Simmons recovered a surveillance video from that station which depicts an African-American resembling Clay buying the gas can.

{¶ 7} Devin Melton, who worked at the Shell gas station on West Market in Troy, remembered selling the gas can to the person depicted in the surveillance video, but he could not identify Clay from a photographic lineup shown him. (Tr. 545.) He did remember the gas can was unique because it had a sticker with a lightning bolt on it. The can found embedded in the floor of Clay's home also had a sticker with a lightning bolt on the side of the can.

{¶ 8} The fleece coat, which Gerald Pierce had given Clay the night of the fire to keep him warm, had been left in Simmons' vehicle by Clay that evening. It was later analyzed at the state laboratory and found to have gasoline on it. Pierce was unable to provide investigators with any reason for the presence of gasoline on his jacket. Samantha Pierce said her husband's jacket had been hanging near the front door of their residence for a couple of days prior to the fire and she had not smelled gasoline on it.

{¶ 9} Scott Bennett, a fire investigator with Fire Investigation Services, testified he interviewed Clay at the request of Allstate Insurance company. He testified he asked Clay if he had any idea who the two persons were who set fire to his house. Bennett testified Clay told them the shorter of the two men was the

step-father of someone related to another case. (Tr. 607.) On cross-examination, Bennett was shown a copy of the transcribed interview he had with Clay, and he admitted that while Clay believed the fire was set because of his pending criminal case, Clay made no mention of the person being the father in the other case. (Tr. 634.) On re-direct examination, Bennett was asked to again refer to the transcript of his interview with Clay. Bennett noted that Clay told him he thought the fire was set by "the girl's family or someone in the county." Clay also said the girl's father who was making the accusations against him is five-feet seven or eight and is short and stocky. (Tr. 646.)

{¶ 10} Prior to trial, the State filed a motion to have the trial court determine the admissibility of evidence that Clay had been indicted for sexual battery fifteen days prior to the fire which gave rise to the aggravated arson charge against Clay. The State contended this evidence was relevant to prove Clay's motive for setting the fire; i.e., to gain sympathy in the Miami County community as a victim of racial discrimination. The record fails to portray whether Clay opposed the State's motion. No memorandum in opposition was filed. The trial court granted the State's motion noting that Clay had told investigators that the burning of his house was done by two men in retaliation for the charges arising from his sexual battery indictment. The court noted that Clay's statements to investigators made motive for the arson an issue for both sides. The trial court found that evidence of Clay's prior indictment was admissible under Evid.R. 404(B) to prove his motive in setting the fire and the prejudicial effect of such evidence did not substantially outweigh the probative value of such evidence. The court noted that the probative value of the sexual battery

indictment was clear "when one considers it was the defendant who first claimed the fire was set because of the indictment against him."

{¶ 11} During opening statement the prosecuting attorney informed the jury that they would hear that Clay had been indicted on a sexual battery offense a couple of weeks before his house burned down. The prosecutor stated it was the State's theory that Clay set the fire to his home to gain sympathy for him in facing this indictment. The defense lodged no objection to the prosecutor's opening remarks.

{¶ 12} Defense counsel noted in his opening statement that the arson was a hate crime. Counsel noted that the fire occurred eight days after his client had been arraigned in the sexual battery charge and that the sexual battery charge had caused "a lot of public outrage." (Tr. 137.) Counsel argued that the arsonists who set fire to his client's house did so to put Clay in fear. Counsel argued that his client was being "retaliated against for something that he was charged with just a week before this happened." (Tr. 144.)

{¶ 13} At the conclusion of the opening statements, the trial court instructed the jury that evidence of Clay's pending charge for sexual battery would be received in evidence for a limited purpose. The court instructed the jury that they were not to consider that evidence to prove the character of Clay and that he acted in accordance with that character. The jury was instructed the evidence was to be considered only on the issue of motive for the crime charged as argued by the State and the defendant. (Tr. 151.)

{¶ 14} During final argument, Clay's counsel argued the evidence

demonstrated the fire was set as a hate crime and that Clay told the police and investigator it could have been anybody. The prosecutor made no mention of motive in his final argument. The court instructed the jury again concerning the limited purpose of the "other acts" testimony.

{¶ 15} In appellant's first assignment of error, Clay contends the trial court erred in finding that a juror was eligible to serve on the jury when the juror stated she had already formed "opinions" about the case. During voir dire, a prospective juror informed the prosecutor that she had read about the case against Clay in the paper and had seen news accounts on television as well. She admitted she probably had already formed opinions about the case. She stated she could set aside those opinions. (Tr. 109.) She stated she would follow the court's instructions and she considered Clay not guilty before evidence was presented. (Tr. 110.) Both Clay and the State passed for cause and neither side exercised a peremptory challenge to excuse the juror from service on the jury. The court was not asked to rule on the eligibility of the juror to serve. The appellant's first assignment of error is Overruled.

{¶ 16} In appellant's second assignment, he contends the trial court erred in denying his pre-trial motion to change the venue of his trial. Specifically, he notes that a number of the prospective jurors indicated that they had heard or read about the case before they were selected as prospective jurors. Also, Clay argues that at least one juror stated she had already formed an opinion about the case. Clay also argues that the court should have granted a change of venue since one of the State's witnesses, Steve Baker, was a well known television reporter in Miami County. He also notes he was a coach of a local girls basketball team who had been indicted for

sexual battery of a girl on that team.

{¶ 17} The State argues that the trial court did not err in refusing to grant Clay's motion for change of venue because the court conducted a careful and searching voir dire of the jury along with counsel, and the jurors seated displayed no evidence of pre-trial bias or prejudice. The State also notes that the juror testified she could set aside any prior opinions she may have formed concerning the case against Clay and determine his guilt from the evidence presented at trial. Lastly, the State notes that Steve Baker was called by the State merely to authenticate the video footage he took the night of the fire.

{¶ 18} Extensive pre-trial publicity may not require a venue change. *State v. Treesh*, 90 Ohio St.2d 460, 2001-Ohio-4. The best test of the prejudicial effect of pre-trial publicity is the court's ability to impanel an impartial jury. *State v. Bayless*, 48 Ohio St.2d 73. In this case, the trial judge deferred ruling on Clay's motion until he was satisfied an impartial venire had been impaneled. A defendant claiming that pre-trial publicity has denied him a fair trial must show that one or more jurors were actually biased. *State v. Treesh*, supra.

{¶ 19} We have examined the voir dire and we are satisfied that the record does not disclose any evidence that the jurors were biased or prejudiced because of any pre-trial publicity. Any decision on a change of venue rests in the sound discretion of the trial court. *State v. Landrum*, 53 Ohio St.3d 107. There is no evidence the trial court abused its discretion in denying Clay's motion. The appellant's second assignment of error is Overruled.

{¶ 20} In his third assignment, Clay argues that the trial court erred in

permitting evidence concerning Clay's pending indictment for sexual battery. Clay argues that the admission of this testimony suggests that he had a propensity to commit criminal acts, and it serves no other purpose but to malign his character. Clay argues that if the prosecution was truly using this "other acts" evidence to establish the motive for the fire, the identity of the crime, to-wit, sexual battery, need not have been revealed to the jury.

{¶ 21} The State argues that it is important to note that both the State and the defendant used the issue of the pending sexual battery indictment. The State notes that Clay argued that two strangers burned down his house and painted racial slurs on his car as part of a hate crime in retaliation for his committing the sexual battery. The State instead argued that Clay set the fire for the purpose of generating sympathy for hm as a victim of a hate crime. Evid.R. 404(B) states: "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." (Emphasis added.)

{¶ 22} The record demonstrates that Clay from the outset told police that two strangers (one a white man) entered his home and set it afire. When asked why anyone would do such a thing, Clay suggested it must have been in retaliation for his pending indictment involving a young student. The State for its part suggested Clay was attempting to gain sympathy from the community by suggesting he and his family were the victims of a retaliatory hate crime as a result of the pending criminal

charge.

{¶ 23} We believe the trial court did not abuse its discretion in admitting the evidence of the pending indictment. The indictment involved a crime different than the one Clay was facing at trial. The evidence admitted related directly to the defense offered by the defendant during the investigation of the arson. The trial court instructed the jury concerning the limited purpose the jury could consider the evidence. Additionally, a ruling made by the trial court on a liminal motion is considered a tentative ruling. Counsel must renew an objection to the admission of the evidence once trial begins and the evidence is offered. *State v. Diar*, 120 Ohio St.3d 460, 469, 2008-Ohio-6266. The admission of this "other acts" testimony was also not plain error. The appellant's third assignment is Overruled.

{¶ 24} Appellant contends in his final assignment of error that his conviction is against the manifest weight of the evidence. Clay argues that this is so because Shell station clerk Devin Melton was unable to identify Clay as being the person who purchased the gas can as portrayed in the store's video.

{¶ 25} The State for its part argues that State Fire Marshall Steve Southard testified that Clay was the man at the Shell station buying the gas can three days before the fire. In fact, Southard did not so testify. The record reads as follows at page 673:

{¶ 26} "Now, um, Detective Moore and Assistant Chief Matt Simmons found a gas can purchase in Troy, Ohio and I was not involved in that but I did participate in looking at the video of the purchase. And in the video, um, has a shot at the register of a stocky, um, tall black man in the description of the Defendant. Had a goatee on

his face and, um, it looks like –

{¶ 27} "THE COURT: Hold on a second. Mr. Bennett, how is this proper testimony? He –

{¶ 28} "MR. BENNETT: Well let's move on.

{¶ 29} "THE COURT: Yeah. Let's move on."

{¶ 30} At best, Southard testified the man in the video resembled Clay's description. The trial court appropriately did not permit Southard to offer his opinion that the man in the video was Clay.

{¶ 31} The most compelling evidence was the fire investigator's testimony that Clay's explanation for the fire did not comport with the forensic evidence found at the scene. The jury was also able to observe the video and conclude for itself whether the person depicted was Clay. The person in the video did generally resemble Clay. The fact that Devin Melton could not positively identify Clay as the man he sold the gas can is not dispositive. There is no evidence the jury clearly lost its way and created a manifest miscarriage of justice. *State v. Thompkins* (1997), 78 Ohio St.3d 380. The fourth assignment is Overruled.

{¶ 32} The judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Robert J. Lindeman