

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-129
- vs -	:	<u>OPINION</u>
	:	6/21/2010
ROBERT ATKINSON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR25625

Rachel A. Hutzal, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

John C. Kaspar, J. William Duning, 130 East Mulberry, Lebanon, Ohio 45036, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Robert Atkinson, appeals his conviction in the Warren County Court of Common Pleas for one count of assault on a corrections officer. We affirm the lower court's decision.

{¶2} The record discloses that appellant was indicted for one count of assault on a corrections officer in violation of R.C. 2903.13(A), which is a fifth-degree felony pursuant to R.C. 2903.13(c)(2)(a). The charges were the result of an altercation that

occurred while appellant was incarcerated at the Warren Correctional Institution. Appellant was alleged to have assaulted Corrections Officer Paul Adkins with a crock pot on July 16, 2008.¹

{¶13} Following a jury trial, appellant was found guilty as charged and was sentenced to eleven months in prison. Appellant timely appeals, raising two assignments of error.

{¶14} Assignment of Error No. 1:

{¶15} "THE TRIAL COURT ABUSED ITS DISCRETION BY PRECLUDING TESTIMONY OF A THIRD-PARTY PSYCHOLOGIST FOR PURPOSES OF IMPEACHING THE CREDIBILITY OF THE VICTIM ON THE GROUND THAT THE TESTIMONY WOULD BE UNFAIRLY PREJUDICIAL TO THE STATE'S CASE."

{¶16} In his first assignment of error, appellant argues that the trial court erred in prohibiting him from introducing extrinsic evidence to impeach Officer Adkins. Appellant argues that he should have been permitted to introduce evidence to illustrate Officer Adkins' racial bias towards appellant, in addition to Adkins' untruthfulness, inconsistency of recollection, and desire for revenge against appellant. Specifically, appellant sought to introduce statements Adkins made to Dr. Donald S. Scott, Ph.D. during a post-incident psychological evaluation regarding a swastika tattoo on his right arm and a racial epithet he used toward appellant following the altercation.² In excluding Dr. Scott's testimony, the trial court held that the probative value of the evidence was outweighed by its prejudicial effect.

{¶17} The admissibility of relevant evidence rests within the sound discretion of the

1. At trial, Officer Adkins described an institutional crock pot as: "basically the same thing as a coffee pot only it's plastic with a steel plate in the bottom [that] plugs into the wall."

2. Dr. Scott's proffered report stated, in relevant part: "[Officer Adkins] stated that he 'blacked out' due to rage * * * [and he] states the administration claims he called the inmate who assaulted him 'a n*gger[.]'".

trial court. *State v. Ford*, Butler App. No. CA2009-01-039, 2009-Ohio-6046, ¶36. Absent an abuse of discretion, as well as a showing that appellant suffered material prejudice, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *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. *Id.* When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.*

{¶8} Under Evid.R. 616(A), any witness can be impeached by a showing of prejudice, bias, or interest through examination or by extrinsic evidence. The impeachment evidence must be relevant as required by Evid.R. 402. Nevertheless, relevant impeachment evidence may still be excluded under Evid.R. 403(A) if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury. *Ford*, 2009-Ohio-6046 at ¶37.

{¶9} After a thorough review of the record, we do not find that the trial court's decision to exclude Dr. Scott's testimony under Evid.R. 403(A) was an abuse of discretion under the circumstances. Evidence regarding Officer Adkins' alleged swastika tattoo or use of a racial epithet towards appellant is not probative of the material issues of whether a felonious assault occurred, or whether appellant had a valid defense thereto. Although appellant claimed self-defense, he presented no evidence at trial that racial bias instigated the physical altercation between the men. In fact, on cross-examination, appellant was permitted to ask Adkins whether he recalled saying "bring that n*gger back here, he hit me in the face," which clearly references a point in time *after* the physical altercation occurred. Thus, evidence of Adkins' alleged tattoo and use of a racial epithet is not probative of any material issue in this case. We find that the trial court's decision to exclude Dr. Scott's testimony was not arbitrary,

unreasonable or unconscionable.

{¶110} Appellant asserts numerous other arguments relating to the admissibility of Dr. Scott's testimony, including its use for impeachment under Evid.R. 613, Evid.R. 616(B), Evid.R. 801(D)(2)(a), and Evid.R. 803(4). However, because we hold that this evidence was properly excluded on other grounds, we decline to address whether it falls under any other evidentiary rules. See *State v. Farley* (Nov. 2, 1998), Clermont App. No. CA98-01-004, fn. 1.

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

{¶112} Assignment of Error No. 2:

{¶113} "APPELLANT'S RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE TRIAL COURT PROHIBITED APPELLANT FROM PRESENTING TESTIMONY OF A THIRD-PARTY PSYCHOLOGIST FOR PURPOSES OF IMPEACHING THE CREDIBILITY OF THE VICTIM ON THE GROUND THAT THE TESTIMONY WOULD BE UNFAIRLY PREJUDICIAL TO THE STATE'S CASE."

{¶114} In his second assignment of error, appellant argues that the trial court's failure to permit Dr. Scott's testimony violated his right to confrontation. Appellant argues that without Dr. Scott's testimony, he was unable to "properly demonstrate that [Officer] Adkins was biased, prejudiced and had a motive to misrepresent." However, appellant did not raise the alleged Confrontation Clause violation below. Further, Officer Adkins, the declarant, testified at trial and was subject to cross-examination. Accordingly, the Sixth Amendment right to confrontation was not implicated. See *State v. Smith*, Butler App. No. CA2009-02-038, 2010-Ohio-1721, fn. 8; *State v. Williams*, Butler App. No. CA2007-04-087, 2008-Ohio-3729, ¶31.

{¶115} Therefore, appellant's second assignment of error is overruled.

{¶116} Judgment affirmed.

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