[Cite as *State v. Buchanan*, 2009-Ohio-6042.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-04-001
	:	O P I N I O N
- vs -		11/16/2009
	:	
JACKIE BUCHANAN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2006-2332

Jessica Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Sarah M. Schregardus, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Jackie Buchanan, appeals a decision of the Brown County Court of Common Pleas convicting him of rape and gross sexual imposition. For the reasons outlined below, we reverse the decision of the trial court.

{¶2} The charges were prompted by an incident that allegedly occurred on April 23, 2006. Appellant was the stepfather of the victim, eight-year-old T.H. On the day in question, the family had a cookout at their home. Following the cookout, T.H. testified,

appellant called her into the house and removed her underwear. She stated that he then "touched her with his private" and "licked her in her private" and "touched her on her private." T.H. identified appellant in the court room as the perpetrator.

{¶3} T.H.'s mother testified that she witnessed the incident. After the cookout was over, T.H.'s mother gave the couples' son a bath. When she went to retrieve a towel from the dryer, she noticed that her office door was shut. Upon opening the door, she saw T.H. sitting on appellant's lap. According to T.H.'s mother, appellant had one arm around T.H. and his hand was up her dress. T.H. immediately jumped up, stood behind her mother, and started crying. T.H. told her mother that appellant was trying to "make babies" with her. Appellant denied any wrongdoing.

{¶4} Later that night, T.H.'s mother prepared to bathe her. She noticed that T.H.'s underwear, which she had been wearing earlier that day, was missing. She also observed that T.H.'s private parts were red and irritated. Approximately one week later, the mother informed the principal at T.H.'s school of the allegations. The principal notified the authorities. T.H. was examined by a physician at Cincinnati Children's Hospital, who found no physical signs of sexual abuse and concluded that the exam was normal.

{¶5} At trial, appellant maintained his innocence and testified he was not in Brown County at the time of the alleged incident. Employed as an over-the-road trucker, appellant contended that he delivered a load to Wilmington, Ohio on April 22, 2006, a Saturday. Because he did not have to reload until Monday morning, appellant maintains, he stayed at a truck stop in Wilmington in the interim. Appellant stated he did not return home that weekend because his boss did not permit him to drive the truck without a load.

{¶6} Appellant was indicted on one count of gross sexual imposition (GSI) in

violation of R.C. 2907.05(A)(4), a third-degree felony, and one count of forcible rape of a child under the age of ten in violation of R.C. 2907.02(A)(1)(b), a first-degree felony. Following a jury trial in January 2008, appellant was found guilty and convicted on both counts. The trial court imposed a life sentence on the rape count, of which 10 years was mandatory, and three years on the GSI count, to run consecutive to the life sentence. Appellant timely appeals, raising three assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE PROSECUTOR'S MISCONDUCT DENIED MR. BUCHANAN A FAIR TRIAL AND DUE PROCESS OF LAW, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶9} Assignment of Error No. 2:

{¶10} "THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO PRESENT IMPROPER EVIDENCE WITH NO LIMITING INSTRUCTION."

{¶11} Assignment of Error No. 3:

{¶12} "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF MR. BUCHANAN'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶13} For ease of analysis, we shall begin by addressing appellant's third assignment of error. Appellant argues that he suffered ineffective assistance of counsel due to a number of alleged deficiencies in defense counsel's performance. One of these deficiencies involves counsel's failure to object when the prosecution questioned appellant about a public indecency charge pending against him in the state of

Massachusetts.

{¶14} Appellant presented his alibi defense at trial, stating he was not in Brown County at the time of the alleged incident. He testified on direct examination that his job as a trucker mainly consisted of driving to the east coast. The following exchange took place during cross-examination, when appellant was being questioned by the prosecution:

{¶15} "Q. And after September of '05, you stopped driving to the east coast; is that correct?

{¶16} "A. Yeah, I was – September of '05, yeah, I went going west.

{¶17} "Q. And, in particular, you would no longer drive into the State of Massachusetts; isn't that right?

{¶18} "A. No, I don't drive in Massachusetts. I don't run up in there.

{¶19} "Q. Well, are you not a fugitive from the State of Massachusetts because you didn't appear on a criminal charge against you?

{¶20} "A. I – I talked to a lawyer on that, and he told me not to go up in there, because I was on a side rest area taken, you know, what a normal person, you know, was taking a pee in front of their tire on the truck on the side of the interstate. So that's not no reason why I would not come back up in there, because the cop said he was going to give me a citation or some kind of ticket over that deal, or something. I can't exactly remember all of it, but I just never talked to 'em no more.

{¶21} "Q. Is not there a charge in the Westborough District Court in Westborough Massachusetts against you for indecent exposure, and you're refusing to go back to that state, because it's a misdemeanor?

{¶22} "A. I've been up in that state after when that happened and stuff, too. I've got a log book –

{¶23} "Q. Did you appear in court?

{¶24} "A. No, I didn't appear in court, because I never got no court date on the deal at that time."

{¶25} Defense counsel did not lodge any objections during the above cross-examination. On re-direct examination, defense counsel attempted to rehabilitate appellant. Appellant testified he was not aware of an outstanding warrant or capias from the state of Massachusetts. He explained that he was standing on the passenger side of the truck urinating, on the opposite side of traffic, and was not trying to expose himself. Appellant acknowledged that he was cited by a police officer for urinating on the side of the interstate. He also stated that he spoke with an attorney, who advised him not to return to Massachusetts.

{¶26} The prosecution pursued the issue on re-cross examination:

{¶27} "Q. Now, Mr. – Mr. Buchanan, why do you need to use a plastic bottle to pee in if you're peeing on the side of the road?

{¶28} "A. I didn't use no plastic bottle.

{¶29} "Q. You didn't –

{¶30} "A. I did not tell –

{¶31} "Q. You didn't write a letter in which you described that what happened was that you were peeing in your truck because you couldn't stop, and a busload of girls came along, and they didn't see the bottle?

{¶32} "A. I didn't write a letter.

{¶33} "* * *

{¶34} "Q. Mr. Buchanan, is that not your handwriting?

{¶35} "A. No, not compared to what is on my log book and what's on there.

{¶36} "Q. Well, whose letter is that?

{¶37} "A. (Negative headshake; no verbal response.)

{¶38} "Q. Do you want to read it to yourself?

{¶39} "A. I did not write that letter. That's not my handwriting.

{¶40} "Q. Could you read it for yourself, please?

{¶41} "A. (Witness complying.) That's not my handwriting –

{¶42} "Q. Does that not describe the incident in Massachusetts?

{¶43} "A. What it don't describe, if that's not my handwriting, I did not write this.

{¶44} "Q. Did you tell somebody to write it for you?

{¶45} "A. No.

{¶46} "Q. Does it not describe the incident in Massachusetts?

{¶47} "A. That's what it said right there, but that's not what it says or what I was told for.

{¶48} "Q. I have no further questions, Your Honor."

{¶49} Again, defense counsel failed to object at any point during the above interchange.

{¶50} To determine whether counsel's performance constitutes ineffective assistance, we must apply the two-tier test of *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, appellant must show that his counsel's actions fell below an objective standard of reasonableness. Id. at 690. Second, appellant must demonstrate that he was prejudiced by counsel's actions. Id. at 693. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case. *Strickland* at 694.

{¶51} First, we find that defense counsel's failure to object to the evidence

pertaining to the pending Massachusetts charge was objectively unreasonable. This is due to the fact that the evidence would have been inadmissible under Evid.R. 404(B), 608(B), and 403(A).

{¶52} Generally, Evid.R. 404(B)[1] prohibits the admission of evidence of other crimes, wrongs, or acts as character evidence in order to show that the person acted in conformity therewith. *State v. Forbes*, Preble App. No. CA2007-01-001, 2007-Ohio-6412, ¶10. This rule is subject to certain exceptions. Specifically, Evid.R. 404(B) permits the admission of evidence of other crimes, wrongs, or acts to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶53} As indicated, appellant was convicted of GSI and forcible rape of a child victim. The pending Massachusetts charge and the charges for which appellant was on trial were similar in nature in that both involved young girls and alleged sexual conduct. The prosecution brought the pending Massachusetts charge and the facts underlying the charge to the jury's attention in a manner which suggested that appellant had a propensity for engaging in sexual conduct with young girls. There is nothing to demonstrate that the pending charge was introduced to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This "other acts" evidence was thus not admissible under Evid.R. 404(B).

{¶54} Evidence of the pending Massachusetts charge would also not have been admissible under Evid.R. 608(B).[2] That rule generally provides that specific instances of

1. Evid.R. 404(B) states: "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."

2. Evid.R. 608(B) states: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid. R.

conduct may not be proven by extrinsic evidence. However, the rule permits cross-examination on specific instances of conduct when clearly probative of the witness' character

for truthfulness or untruthfulness.

{¶55} As stated, appellant testified that his job as a truck driver previously consisted of travel to the east coast. The prosecution inquired on cross-examination whether it was true that appellant no longer drove to Massachusetts. Appellant responded that he did not "run up in" Massachusetts anymore. The prosecution then pursued the topic further, asking whether appellant was a fugitive from the state of Massachusetts because there was a pending charge against him for indecent exposure in that state. On re-cross, the prosecution questioned appellant about the allegations underlying the charge, namely, that appellant was urinating in his semi tractor-trailer and a "busload of girls came along" and saw him.

{¶56} The prosecution's persistent questioning on the pending Massachusetts charge was not permissible under Evid.R. 608(B). The prosecution's questioning regarding the details underlying the pending charge was not clearly probative of appellant's character for truthfulness or untruthfulness. Rather, it was designed to show that appellant had a propensity for engaging in sexual conduct with young girls. Such a method of questioning oversteps the bounds of Evid.R. 608(B). Once appellant unequivocally answered that his job as a truck driver no longer involved driving to Massachusetts, the prosecution was stuck with his answer and could not further pursue the topic under the guise of testing appellant's credibility. *State v. Carroll*, Warren App.

609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

No. CA84-08-056, at 10-11, 1985 WL 8687.

{¶57} Even if the evidence pertaining to the pending Massachusetts charge could have been deemed admissible under Evid.R. 404(B) or 608(B), exclusion would have been mandatory under Evid.R. 403(A).[3] This is because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. See, e.g., *State v. Meador*, Warren App. No. CA2008-03-042, 2009-Ohio-2195, ¶75. First, the probative value of evidence pertaining to something as tenuous as a pending charge was uncertain. The danger of unfair prejudice, on the other hand, was great. As stated, the evidence relating to the pending charge suggested that appellant had a propensity for engaging in sexual behavior with young girls. The present matter involved the serious charges of GSI and forcible rape of a victim under the age of ten. The danger of unfair prejudice under such circumstances is manifest. Therefore, the evidence would have necessitated exclusion under Evid.R. 403(A).

{¶58} Courts have repeatedly recognized that trial tactics, even debatable ones, do not constitute a denial of effective assistance of counsel. See, e.g., *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶146. However, in a case which basically boils down to "he said, she said," the credibility of the witnesses is particularly crucial. Without question, the prosecution's questions about the pending Massachusetts charge were highly damaging to appellant's credibility. It is curious that defense counsel would not interject with an objection while appellant's credibility was being so thoroughly degraded. Such an action cannot withstand scrutiny by resorting to the presumption that it was the product of trial strategy. See *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, citing *Strickland* at 689. In view of this and the aforementioned considerations, we

find that defense counsel's failure to object to the introduction of the highly inflammatory evidence regarding the pending Massachusetts charge fell below an objective standard of reasonableness.

{¶59} Next we determine whether appellant was prejudiced by defense counsel's deficient performance. That is, whether there is a reasonable probability that the result of the trial would have been different but for counsel's failure to object to the evidence concerning the pending charge. The evidence in this case was entirely circumstantial. T.H. and her mother testified in support of the allegations, and T.H.'s maternal grandparents testified that appellant was in town on the day in question. Appellant, as stated, denied committing the abuse and insisted that he was out of town on the day of the alleged incident. Furthermore, there was no physical evidence to support the allegations. The physician who examined T.H. three weeks after the alleged incident testified that there were no signs of sexual abuse. The physician also testified that the passage of time tends to decrease the likelihood of discovering any signs of sexual assault.

{¶60} Appellant presented further evidence that cast doubt upon the allegations. Appellant sought to discredit T.H.'s mother by depicting her as a vengeful ex-wife who threatened to "get even" with him after their failed marriage. In addition, there was testimony that T.H. had previously implicated her maternal uncle in allegations of sexual molestation as well, but T.H.'s mother did not believe the uncle had committed the act and did not pursue criminal charges against him.

{¶61} We have no doubt that the highly inflammatory questioning and testimony elicited from appellant relative to the pending Massachusetts charge contributed to his

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3. Evid.R. 403(A) states: "Although 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."

conviction. Due to the questionable evidence in this case and the particularly egregious impact of the evidence concerning the pending charge, we find that appellant was prejudiced by defense counsel's failure to object.

{¶62} We conclude that appellant suffered ineffective assistance of counsel and was denied a fair trial. Appellant's third assignment of error is sustained. Because this ruling is dispositive of the matter, we decline to address appellant's remaining assignments of error at this time. App.R. 12(A)(1)(c). See, e.g., *State v. McMullen*, Butler App. No. CA2006-04-086, 2007-Ohio-125.

{¶63} The judgment of the trial court is reversed and this matter is remanded for further proceedings according to law and consistent with this opinion.

{¶64} Reversed and remanded.

BRESSLER, P.J., and POWELL, J., concur.