[Cite as *State v. Miller*, 2015-Ohio-2714.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 26371
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2013-CR-785/2
v.	:	
	:	(Criminal Appeal from
MELVIN MILLER	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 2nd day of July, 2015.

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FAIN, J.

{¶ 1} Melvin Miller appeals from his conviction for Grand Theft, a felony of the

Fourth Degree, in violation of R.C. 2913.02(A)(1). Miller contends that the trial court erred in admitting hearsay evidence and irrelevant evidence and that he was denied his constitutional right to the effective assistance of counsel when his counsel failed to object to the admission of this evidence.

{¶ 2} We conclude that the admission of evidence under Evid.R. 404(B) was both erroneous and materially prejudicial to Miller's right to a fair trial, requiring reversal of the conviction. Therefore, the alleged error regarding the admission of the hearsay evidence is moot.

I. The Theft

{¶ 3} In February 2013, a surveillance video was recorded of the interior of the Toys R Us store in Miamisburg depicting three individuals entering the store together, who were later identified as Melvin, Dale and Tina Miller. The video depicts Dale pulling open the side of an electronic display case, and removing items from the case with Tina assisting him. The video depicts Melvin walking up and down the aisles near and around the electronics department. The store's loss prevention officer testified that three days after the incident, he discovered the electronic display case was empty and had been tampered with, so he obtained the surveillance video and gave it to the police. Based on his training and experience, it was his opinion that Melvin was acting as the "lookout" to assist Tina and Dale with the theft. The store manager testified that no one had consent to take the Nintendo items without payment, and that their inventory records verified a loss of 43 Nintendo units, valued at over $8000. The Nintendo units were not recovered.

{¶ 4} Detective Threlkeld testified, explaining how a photo array was created and

utilized for the identification of Miller, as part of his investigation. Still photos of the three suspects were obtained from the surveillance video, and matched to their identities through computer software. A different photo array was created for each of the three suspects, and presented to the loss prevention officer at Toys R Us by another police officer, not previously involved in the investigation. Miller was positively identified by the loss prevention officer from the photo array, and in the courtroom.

II. The Course of Proceedings

{¶ 5} Miller was charged with Grand Theft, in violation of R.C. 2913.02(A)(1). At trial, to show identification, motive, knowledge and absence of mistake, the trial court allowed the State to call a police officer from Green Township in Hamilton County, who testified that he responded to a call from Toys R Us on Glenway Avenue in his district about a possible theft in progress, approximately three weeks prior to the incident in Miamisburg. As part of the investigation, the officer interviewed Miller, who was in a car with two other suspects in the parking lot of the Toys R Us store. During the officer's testimony, no identification was made of the other two suspects. The suspects consented to a search of their car, and the officer found a Toys R Us store bag with six Nintendo units, but the suspects could not produce a receipt to prove ownership. The property was confiscated, and the suspects were told that they could retrieve the items with proof of ownership. The officer did not know if the items were still in police custody. No details of the investigation were discussed by the officer's testimony, but he verified that no charges were brought as a result of the investigation. Based on defense counsel's objection, the trial court gave this limiting instruction to the jury:

> Members of the jury, for purpose of that particular evidence was not to prove that, in any way, this defendant, to prove his character or to show conformity therein. However, it may have been used for another purpose. How much weight you attach to that particular evidence is left up to you.

Transcript pg. 221.

{¶ 6} The jury returned a guilty verdict, and the trial court ordered a pre-sentence investigation. Miller was sentenced to a series of community control sanctions, for a period of up to five years. From this judgment, Miller appeals.

III. Reversible Error Occurred When Prejudicial Testimony Was Admitted Under Evid.R. 404(B)

{¶ 7} Miller's Second Assignment of Error states as follows:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE JURY TO HEAR IRRELEVANT 404(B) EVIDENCE THAT ULTIMATELY PREJUDICED THE APPELLANT.

{¶ 8} Miller claims that the trial court erred by allowing the jury to consider the testimony of the police officer from Green Township, who testified regarding his investigation of Miller for a possible theft offense at a Toys R Us in the Cincinnati area, near the same time as the incident in Miamisburg. Defense counsel for Miller did object to the testimony on the basis of relevancy. His objection was overruled in a sidebar conference on the basis of Evid.R. 404(B).

{¶ 9} Evid.R. 404(B) provides:

> (B) 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. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

{¶ 10} At the sidebar conference, during which the court decided to allow the 404(B) testimony, the trial court did not discuss whether the probative value of the evidence was outweighed by its prejudicial effect. Evid.R. 403(A) provides:

> Exclusion mandatory. 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.

{¶ 11} We have followed established precedent holding that Evid.R. 404(B) must be strictly construed against the admissibility of other-bad-act evidence. *State v. Shaw*, 2d Dist. Montgomery No. 21880, 2008-Ohio-1317, citing *State v. Broom*, 40 Ohio St. 3d 277, 533 N.E. 2d 682 (1988). “The courts in Ohio have also long recognized that evidence of other crimes, wrongs or bad acts carries the potential for the most virulent kind of prejudice for the accused.” *Id.* at ¶ 13. The Supreme Court of Ohio has established the following three-part test for the admission of 404(B) testimony:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R 403.

State v. Williams, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶ 12} The admission of other-bad-acts evidence under Evid.R. 404(B) "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 that has created *material prejudice*." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 96, citing *State v. Diar,* 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66 (emphasis added). "Prejudice occurs if there is a reasonable possibility that the error might have contributed to the conviction." *State v. Cowans* 10 Ohio St.2d 96, 104-105, 227 N.E.2d 201 (1967).

{¶ 13} We discussed whether the admission of otherwise inadmissible evidence constitutes material prejudice in *State v. Bankston*:

> We must next decide whether the admission of the otherwise

inadmissible evidence constituted material prejudice to Bankston. In *State v. Harding,* Montgomery App. No. 20801, 2006-Ohio-481, at ¶ 24, this court stated: "Both Evid.R. 103(A) and Crim. R. 52(A) provide that error is harmless unless the substantial rights of a defendant have been affected." The test for harmless non-constitutional error is whether "there is substantial evidence to support the guilty verdict even after the tainted evidence is cast aside * * *." *State v. Cowans,* 10 Ohio St. 2d 96, 104 (1967). The test for harmless constitutional error is whether " 'beyond a reasonable doubt' * * * the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt." *State v. Williams* (1983), 6 Ohio St.3d 281, 290, certiorari denied (1983), 464 U.S. 1020, quoting *Harrington v. California* (1969), 395 U.S. 250, 254. However, a non-constitutional error may rise to the level of constitutional error if such error amounts to "a violation of the appellant's right to a fair trial as that term is understood under the due process clause of the Fourteenth Amendment." *State v. Davis* (1975), 44 Ohio App.2d 335, 348. Some courts have questioned the application of a more relaxed standard for evaluation of prejudice when non-constitutional errors are involved. See, e.g., *State v. Morris,* Medina App. No. 09CA0022–M, 2010-Ohio-4282. Nevertheless, in this case, the higher standard should be applicable because we perceive the introduction of over twenty minutes of inadmissible prejudicial phone conversations to be a violation of the appellant's right to a fair trial. Thus, we must examine if there is "overwhelming evidence of guilt" in the absence of the inadmissible

evidence.

State v. Bankston, 2d Dist. Montgomery No. 24192, 2011-Ohio-6486, ¶ 19.

{¶ 14} In the case before us, we do not conclude that there is "overwhelming evidence of guilt" in the absence of the 404(B) testimony. Other than the 404 (B) evidence placing Miller in a parked car with two other suspects, in possession of other Nintendo units, at another Toys R Us store, the State's case rested entirely on the surveillance video. The surveillance video does not show Miller engaging in the act of removing the Nintendo units from the cabinet, or having them in his possession, or having contact or communication with the other two suspects. Miller was charged as an "aider and abettor," and the loss prevention officer opined that Miller's actions on the video appeared to be acting as the "lookout" for the other two suspects. To establish the elements of an "aider and abettor," the State was required to prove that Miller was a person who purposely "supported, assisted, encouraged, cooperated with, advised or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson,* 93 Ohio St. 3d 240, 754 N.E. 2d 796 (2001).

{¶ 15} It has further been held that "the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor." *State v. Dodson*, 12th Dist. Butler No. CA2010-08-191, 2011-Ohio-6222, ¶ 11, citing *State v. Widner*, 69 Ohio St.2d 267, 269, 431 N.E.2d 1025 (1982). "Instead, 'there must be some level of active participation by way of providing assistance or encouragement.'" *Id.* citing *State v. Nievas*, 121 Ohio App.3d 451, 456, 700 N.E.2d 339 (8th Dist. 1997); *State v. Rader,* 12th Dist. Butler No. CA2010–11–310, 2011-Ohio-5084, ¶ 34. In the case before us, admitting the testimony of Miller's previous association with

two other unidentified persons who were suspects, but never charged, without more facts connecting Miller's role to a similar theft in Cincinnati, was not relevant to the issue of whether Miller acted as an aider and abettor to the offense which occurred in Miamisburg.

{¶ 16} Applying the three-part test established in *Williams, supra*, we do not conclude that the other-acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence, as required by Evid.R. 401. Without providing an identification of the two suspects in the alleged theft in Cincinnati, it cannot be concluded that Miller was cooperating or assisting the same principals in the Miamisburg theft. Without identifying Miller's role in the alleged theft in Cincinnati, it cannot be concluded that the prior event provided proof of plan or preparation to act with the principals in a similar action in Miamisburg. The officer's testimony, placing Miller at the scene of a suspected theft in Cincinnati, with two other unidentified suspects did not constitute proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident with regard to the events in Miamisburg. Therefore, we conclude that the other-acts evidence was not offered for any of the legitimate purposes identified in Evid.R. 404(B). Finally, we conclude that the probative value of the other-acts evidence was substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of misleading the jury, and was thus not admissible pursuant to Evid.R. 403(A). Therefore, the trial court's admission of this other-acts evidence was contrary to Evid.R. 404, an abuse of discretion, and did materially prejudice Miller's right to a fair trial.

{¶ 17} Miller's Second Assignment of Error is sustained.

IV. The Alleged Error Regarding the Admission of Hearsay Testimony Is Moot

{¶ 18} Miller's First Assignment of Error states as follows:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CONVICTING APPELLANT BECAUSE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO HEARSAY TESTIMONY.

{¶ 19} Miller argues that his defense counsel was ineffective when he failed to object to the hearsay evidence that was admitted during the testimony of Officer McCarthy and Detective Threlkeld. In light of our disposition of Miller's Second Assignment of Error, Miller's First Assignment of Error is moot.

{¶ 20} Accordingly, Miller's First Assignment of Error is overruled as moot.

V. Conclusion

{¶ 21} Miller's First Assignment of Error having been overruled as moot, and his Second Assignment of Error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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FROELICH, P.J., and DONOVAN, J., concur.

Copies mailed to:

Mathias H. Heck

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Hon. Richard Skelton
(successor to Judge Frances E. McGee)