[Cite as *State v. Dille,* 2004-Ohio-6367.]

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO		:	JUDGES:
		:	W. Scott Gwin, P.J.
	Plaintiff-Appellee	:	John W. Wise, J.
		:	Julie A. Edwards, J.
-vs-		:	
		:	Case No. 03 CA 003
JEFFREY D. DILLE		:	
		:	
	Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Morgan County Court of Common Pleas Case CR-02-048
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	11/24/2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RICHARD D. WELCH Morgan County Prosecutor 109 E. Main Street McConnelsville, OH 43756	WILLIAM H. SAFRANEK POB 2606 Athens, OH 45701

Edwards, J.

{¶1} Defendant-appellant Jeffrey D. Dille, appeals from his sentence and conviction in the Morgan County Court of Common Pleas on one count of rape. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 3, 2002, defendant-appellant Jeffrey D. Dille [hereinafter appellant] was indicted on one count of rape, in violation of R.C. 2907.02. The matter proceeded to a jury trial which commenced on May 20, 2003. The prosecution presented four witnesses in its case in chief, including Lieutenant Brad Bond and Steve Shook. The prosecution concluded its case on the second day of trial and the defense presented four witnesses, including appellant. On rebuttal, the State recalled Lieutenant Brad Bond and played a recording of a statement given by Steve Shook to police. The tape was entered into evidence as State's Exhibit D.

{¶3} After deliberation, the jury sent a note to the trial court. The note, stated as follows: "Question: We are divided on vote – The point being O.J.I. 405.20: Credibility of Witness. Some believe the defendant, some believe the accuser. Please advise." In response, the trial court recharged the jury, giving them the same exact charge on credibility of witnesses and a charge concerning a deadlocked jury. Upon further deliberation, the jury returned a verdict of guilty.

{¶4} Sentencing and sexual offender classification hearings were held on July 17, 2003. Appellant was sentenced to a definite prison term of six years and ordered to pay restitution upon his release from prison. In addition, the trial court classified appellant as another sexual offender.

{¶5} It is from this conviction and sentence that appellant appeals, raising the following assignments of error:

{¶6} "I. THE TRIAL COURT ERRED IN ALLOWING STATE'S EXHIBIT D, AN AUDIO RECORDING OF AN INTERVIEW OF THE WITNESS STEVEN SHOOK, TO BE PLAYED BEFORE THE JURY AND ADMITTED INTO EVIDENCE FOR THE JURY'S REVIEW DURING DELIBERATIONS.

{¶7} "II. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTING ATTORNEY TO CONFRONT PROSECUTION WITNESS STEVE SHOOK WITH HIS PRIOR STATEMENTS AND BY ALLOWING THE PROSECUTING ATTORNEY AND THE WITNESS STEVE SHOOK TO READ PORTIONS OF PRIOR STATEMENTS OF THE WITNESS INTO THE RECORD."

I

{¶8} In the first assignment of error, appellant contends that the trial court erred when it allowed the State to play and introduce as evidence an audio recording of an interview the police conducted of witness Steve Shook, known as State's Exhibit D. Appellant argues that the statements on the tape were prohibited hearsay per Evid. R. 801(D)(1)(b). We disagree.

{¶9} Hearsay is not admissible. Evid. R. Rule 802. Evidence Rule 801(D)(1)(b) defines hearsay as follows: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Emphasis added.)

{¶10} In this case, the contents of the tape recording were not offered to prove the truth of the matter asserted. The tape recording was offered and played for the jury

in response to allegations by the appellant that the police coerced Shook, or otherwise acted in a heavy handed way towards Shook, in order to obtain a statement against appellant. As such, the trial court gave the jury a limiting instruction which informed the jury that "this tape is not being played for the purpose of you to decide the truth or falsity of what's on the tape. The tape is being played for you to determine whether during the interview there was any coercion by the police department. And that is the only thing that you are permitted to consider this tape for. . . ." Limiting instruction, in relevant part, Tr. Pg. 408.

{¶11} Since the tape recording was not offered to prove the truth of statements on the tape, the taped recording was not hearsay and thus, the trial court did not permit impermissible hearsay.

{¶12} Appellant presents a second issue in this assignment of error. Appellant argues that should this court find that the trial court did not error by admitting hearsay, this court should find that the trial court nevertheless abused its discretion under Evid. R. 403 because the recording had no probative value and was highly prejudicial, misleading and confusing. We disagree.

{¶13} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. Therefore, we will not disturb a trial court's evidentiary ruling unless we find said ruling to be an abuse of discretion; i.e. unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶14} Evidence Rule 403 states as follows, in relevant part: "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." Evid. R. Rule 403(A). Appellant contends that the tape recording had no probative value since the recording contained only a small amount of the discussions between Shook and police and that the coercion occurred before the tape recorder was turned on. In turn, appellant argues that the tape recording was very prejudicial.

{¶15} However, at trial, appellant's counsel conceded to the trial court that there was nothing in the taped recorded interview that had not been covered in the testimony at trial. Based upon this concession and a review of the transcript of the recording as provided in appellant's merit brief, this court finds that the recorded statement was cumulative to the testimony at trial. Admission of redundant and cumulative evidence is harmless when the evidence was properly admitted in another manner. See *State v. MacIver* (September 19, 1985), Cuyahoga App. No. 49412, 1985 WL 8621. Further, the trial court issued a limiting instruction and it is presumed that a jury will follow such an instruction. *State v. Jones* (2000), 90 Ohio St.3d 403, 414, 739 N.E.2d 300. As such, we find that the trial court did not abuse its discretion in permitting the tape recording to be played for the jury and admitting the tape into evidence.

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

II

{¶17} In the second assignment of error, appellant argues that the trial court erred when it allowed the appellee to confront its own witness, Steve Shook, with his prior statements and by allowing the prosecuting attorney and Shook to read portions of

those prior statements into the record. The State responds that Shook was not impeached with his own prior inconsistent statement but, rather, had his memory refreshed. In considering this issue, we find that even if appellant is correct that the exchange between the prosecuting attorney and Shook is best characterized as an impeachment, there was no reversible error.

{¶18} Evidence Rule 607 states that “[t]he credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage.” "Surprise is adequately demonstrated if the testimony is materially inconsistent with the prior statement, and counsel did not have reason to believe the witness would change his testimony." *State v. Blair (*July 7, 1986), 34 Ohio App.3d 6*,* 9, 516 N.E.2d 240, (citing *State v. Reed*, 65 Ohio St.2d 117, 125, 418 N.E.2d 1359). "Affirmative damage", as used in Evid.R. 607, " * * * occurs if the party's own witness testifies to facts that contradict, deny, or harm that party's trial position." *Blair* at 9 (citing *State v. Stearns* (1982), 7 Ohio App.3d 11, 15, 454 N.E.2d 139).

{¶19} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. Therefore, we will not disturb a trial court's evidentiary ruling unless we find a ruling to be an abuse of discretion; i.e. unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶20} In this case, we find that the record demonstrates surprise and affirmative damage. After the incident between appellant and the victim, Shook gave a statement

to police. In that statement, Shook stated that he heard the victim say "don't touch me; leave me alone" three times. Tr. pg. 217. In addition, Shook stated that the victim ran out of the residence and was crying uncontrollably. Tr. pg. 229-231. Shook told police that after the victim left, appellant claimed that he had just had sex with the victim and stated that he had "messed up." Tr. pg. 233-235. However, on the witness stand, when Shook was asked if he heard anything while the victim and appellant were alone in the kitchen, Shook replied "no." Tr. pg. 213. Thereafter, Shook continued to struggle against the prosecuting attorney's questions, at times making statements inconsistent with his prior statement and at times stating that he did not recall what happened nor what he told police happened. As a result, the prosecuting attorney was permitted by the trial court to use Shook's prior testimony in questioning Shook .[1]

{¶21} We find that there was a showing of surprise in that Shook had previously made a statement which was quite clear as to what happened that night and then attempted to testify totally different at trial. In addition, we find that Shook's attempt to testify differently constituted affirmative damage. The use of the prior inconsistent statement began when Shook said he did not hear the victim call out although he had previously stated that he heard the victim say "don't touch me; leave me alone" three times. In a case in which the issue is whether sex between the alleged victim and the defendant was consensual or not, such a change in the account is affirmative damage. Thus, pursuant to Evid. R. 607, the State could use Shook's prior statement for impeachment purposes. Further, it is apparent that Shook continued to be obstructive

[1] Ultimately, Shook acknowledged that the prior statement to police was the truth and that Shook was afraid to tell the truth due to a fear of being implicated and due to his friendship with appellant.

in an attempt to testify to a different set of circumstances than he stated to police in his prior statement. His trial testimony constituted surprise and affirmative damage to the State's case. Accordingly, we find no abuse of discretion.

{¶22} Accordingly, we overrule appellant's second assignment of error.

{¶23} The judgment of the Morgan County Court of Common Pleas is affirmed.

By: Edwards, J.

Gwin, P.J. and

Wise, J. concur

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JUDGES

JAE/0806

[Cite as *State v. Dille,* 2004-Ohio-6367.]

IN THE COURT OF APPEALS FOR MORGAN COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JEFFREY D. DILLIE	:	
Defendant-Appellant	:	CASE NO. 03 003

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Morgan County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES