

[Cite as *State v. Cunningham*, 2009-Ohio-5352.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92062

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

STANTON CUNNINGHAM

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507510

BEFORE: Stewart, J., Blackmon, P.J., and Celebrezze, J.

RELEASED: October 8, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Elizabeth Kelley
Elizabeth Kelley, L.P.A., Inc.
13940 Cedar Road, Suite No. 285
Cleveland, OH 44118-3204

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Matthew T. Waters
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} A jury found defendant-appellant, Stanton Cunningham, guilty of rape, gross sexual imposition, and kidnapping of a ten-year-old child. In this appeal, he complains that the court impermissibly allowed the jury to hear evidence of his past drug use in violation of Evid.R. 404(B) and that the jury's verdict is supported by neither the sufficiency nor the weight of the evidence. We find that the court erred by admitting irrelevant, but highly prejudicial evidence of Cunningham's past drug use, so we reverse and remand for a new trial.

I

{¶ 2} Cunningham first complains that the court allowed the state to repeatedly characterize him as a crack addict and supplier for no other reason than to show that he was capable of committing the charged offenses. He maintains that had the state legitimately believed that his drug use was relevant, it should have filed a notice of its intent to use that evidence against him.

A

{¶ 3} Evid.R. 404(B) states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The rule prohibits the introduction of

other acts because there is the danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crimes charged in the indictment. *State v. Cotton* (1996), 113 Ohio App.3d 125, 131.

{¶ 4} Although other acts evidence is inadmissible to prove the character of a person in order to show that he acted in conformity therewith, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evid.R. 404(B). Even though other acts evidence might be admissible for these purposes, it must still be relevant under Evid.R. 402. Moreover, other acts evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury. See Evid.R. 403(A). As with all other evidentiary issues at trial, the admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Jacks* (1989), 63 Ohio App.3d 200, 207.

B

{¶ 5} The jury first heard about Cunningham's drug addiction during the state's opening statement. The state described the victim's mother as a "crack cocaine addict" and said that Cunningham was an "addict" who

befriended the victim's mother and "supplied the mother with drugs and in this way he gains access to [the victim]." In Cunningham's opening statement, defense counsel told the jury that "Stan hasn't been a [sic] angel in his life[.]" but that Stan "wasn't supplying drugs to [the victim's] mother" and that "[i]t is not that Stan never took drugs in his life, but he has been sober for a number of years before these incidents took place."

{¶ 6} During direct examination of the victim, she explained that she and her two brothers lived with their maternal grandmother because their mother "has a crack problem, cocaine problem[.]" The victim said that she waited six years to accuse Cunningham of these crimes because "he was out on crack like my mom. I didn't know what he was going to do." She went on to testify that her mother and Cunningham lived together despite her mother's crack addiction, and that when she visited them she once saw them smoking an unidentified "pipe." Finally, the victim testified that when the rape occurred she did not force Cunningham away because she was scared of what he might do to her since "I know he was on that whole situation my mom was on, and he was on that." When the state asked if she was referring to "drugs," the victim replied, "[y]es."

{¶ 7} Cunningham testified and admitted having a drug problem, but said that at the time of the alleged offenses he had been in a seven-year

period of sobriety that ended about five months after the date on which the victim claimed to have been raped.

C

{¶ 8} Cunningham did not object to the state's assertions in opening argument, so he has waived all but plain error. See *State v. Jalowiec*, 91 Ohio St.3d 220, 226, 2001-Ohio-26. No plain error is shown from the state's remarks about Cunningham's drug use because Cunningham arguably compounded the claimed error by responding to the state's assertions with his own characterization of his past drug use. Cunningham conceded that he used drugs at some point during his life, albeit not during the time in which the charged offenses occurred. His history of drug use was an open matter before the first witness testified.

{¶ 9} Notwithstanding opening arguments, testimony about Cunningham's drug use was a main component of the state's case-in-chief, and Cunningham repeatedly and timely objected to that testimony. Questions of relevancy remain – how was Cunningham's drug use relevant to the rape, gross sexual imposition, and kidnaping charges?

{¶ 10} "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Evid.R. 401. The elements of the charged sexually-oriented offenses do not

require any showing of impairment, so evidence of Cunningham's drug use had no relevance to proving the charged offenses. Cf. *State v. Boyd* (1985), 18 Ohio St.3d 30, 31 (evidence that defendant appeared intoxicated was irrelevant to prove charge of operating a motor vehicle while over the legal limit). In any event, the victim offered no testimony to show that Cunningham had been under the influence of any drugs at the time of the offense, or that his drug use somehow contributed to the offense. Evidence of drug use was not admissible as proof of the charged crimes.

{¶ 11} The state maintains that it used evidence of Cunningham's drug use under Evid.R. 404(B) "to show that he had opportunity, prepared, and had a plan in having access to [the victim] when he raped her." Appellee's Brief at 13. It is unclear how Cunningham's drug use created the opportunity for him to commit the crime. Cunningham lived with the victim's mother and the victim and her two brothers visited with the mother and Cunningham one weekend per month. Even if Cunningham had been using drugs at the time, the state offered no rational explanation as to how Cunningham's drug use created an opportunity for the victim to come visit. The victim and her brothers visited regularly and neither the victim nor her grandmother offered any testimony to show that the victim visited Cunningham because of his drug use. The court had no basis for admitting

testimony of Cunningham's drug use for the purpose of establishing opportunity under Evid.R. 404(B).

{¶ 12} The state also argues that Cunningham's drug use was relevant under Evid.R. 404(B) to show his plan to gain access to the victim – that by supplying the mother with drugs, Cunningham would have access to the victim.

{¶ 13} In *State v. Curry* (1975), 43 Ohio St.2d 66, 73, the supreme court addressed the “scheme, plan or system” aspect of Evid.R. 404(B) and explained that:

{¶ 14} “‘Scheme, plan or system’ evidence is relevant in two general factual situations. First, those situations in which the ‘other acts’ form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment. * * * To be admissible pursuant to this sub-category of ‘scheme, plan or system’ evidence, the ‘other acts’ testimony must concern events which are inextricably related to the alleged criminal act. * * *”

{¶ 15} There might be some merit to the state's argument if the state had offered proof that Cunningham's drug use gave him direct access to the victim on the day the offenses were committed. But testimony from the victim's grandmother showed that the victim and her siblings regularly visited with Cunningham and the victim's mother, and they did so without

any reference to Cunningham's alleged drug use. The state did not offer any proof that Cunningham had been under the influence of drugs at the time he committed the offenses, nor did it offer any proof to show that Cunningham's alleged drug use was "inextricably related" to the charged crimes.

{¶ 16} In the end, the state simply theorizes that Cunningham initiated a relationship with the victim's mother and supplied her with drugs for the sole purpose of gaining access to the child for the purpose of sexually abusing her. Apart from the lack of evidence to show that Cunningham had been under the influence of drugs at the time of the offense, this theory ignores evidence by the state's witnesses that Cunningham met the victim when she was five years of age and did not perpetrate the crime until she was ten years of age. During that time, Cunningham constantly interacted with all three children. They saw him nearly every day and even the victim described him as a family friend who then later became romantically involved with her mother. To accept the state's theory, one would have to believe that Cunningham spent five years cultivating a romantic relationship with the victim's mother, supplying her with drugs so that she would consent to have the victim and her two brothers spend one weekend a month with them, so that he could sexually abuse the victim. No rational person could find merit in this theory.

{¶ 17} The evidence of Cunningham’s alleged drug use permits just one conclusion – that the state impermissibly elicited evidence of Cunningham’s drug use for the sole purpose of proving that he acted in conformity therewith. The court erred by allowing this testimony into evidence.

{¶ 18} We next consider whether the error is prejudicial, and therefore reversible. In *State v. Perry*, 101 Ohio St. 3d 118, 2004-Ohio-297, the supreme court stated that when a defendant has objected to an error in the trial court, the appellate court must review the error under the harmless error standard. *Id.* at ¶15, citing Crim.R. 52 (“Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.”). A defendant’s “substantial rights” are affected when the error affects the outcome of trial. *Id.*; *State v. Shropshire*, Cuyahoga App. No. 85063, 2005-Ohio-3588, at ¶28.

{¶ 19} We determine whether the admission of other acts testimony was prejudicial by examining the quantity and quality of the evidence against Cunningham. The only evidence supporting the charges came from the victim herself. She testified that she had been sleeping on the couch at Cunningham’s house when he approached her and flicked her ear. She told him to stop and he left. He came back a few minutes later and unfastened her pants. He turned her by positioning her legs in front of him and then inserted two fingers inside her vagina. The victim said that Cunningham

stopped after hearing a neighbor calling for help because the victim's brother had been bit by a dog. The state offered medical records to substantiate the victim's assertion that her brother had been bitten by a dog.

{¶ 20} The victim did not notify anyone about what happened. She and her siblings continued to spend weekends at Cunningham's house, and he remained a family friend. Some six years later, the allegations surfaced during a meeting with the victim's grandmother and school principal. That meeting occurred because the victim had written the principal a letter which contained suicidal thoughts. The victim wrote that she "had been doing fine for some months or so" but "its coming back" and that she had been thinking of sleeping with a plastic bag over her head or jumping off a bridge. She wrote that "I am not feeling loved in this household, so maybe if I'm gone they won't have nothing to worry about accept [sic] the babysitting, the housework, etc. But for the most part they shouldn't care." She closed the letter by writing, "[h]opefully, this will go away. But first [sic] wanted to let you know that if you don't see me I'm gone."

{¶ 21} The principal called a meeting with the victim's grandmother and the school's speech therapist. The victim said that the grandmother "basically yelled at me," and "said I'm going to let them take you to the hospital and lock you up if this is what you are going to keep doing, because I told her I was taking some of her diabetic pills." After hearing the threat of

hospitalization, the victim said she cried for “a good three minutes” and “I just came out” – having their attention she told the others that Cunningham had raped her. She admitted making her accusation against Cunningham “[b]ecause I didn’t want to get locked up in the crazy house, and I wanted to let her know why I was thinking about killing myself.”

{¶ 22} The victim’s grandmother testified that she had been upset during the meeting with the victim and school principal, but flatly denied threatening to send the victim to the mental hospital. The principal gave conflicting testimony on whether the grandmother threatened to commit the victim for mental health treatment – she first stated that “I don’t remember any conversation about locking” the victim up for her own safety, but then said the grandmother “alluded to” comments about a psychiatric ward in order to pull information out of the victim. The principal said that prior to her meeting with the victim and the grandmother, the victim had alluded to sexual abuse, but offered no “clear cut details.” These allusions were not enough to make the principal intervene, and she testified that she “most definitely” would have taken steps to address any reports of sexual abuse had there been any previous accusation by the victim.

{¶ 23} Even after the victim made her accusation against Cunningham, the grandmother allowed Cunningham to take the victim’s two brothers to the movies. She said that she had not been aware of any inappropriate

conduct between Cunningham and the boys and “I didn’t even think about him bothering the boys.” She did admit that she used poor judgment in allowing the boys to go with Cunningham because she “needed a break.”

{¶ 24} The state’s evidence was not so compelling that the erroneous admission of other acts evidence could be harmless error. The state had no physical evidence of the rape. The victim waited six years to accuse Cunningham and did so only after her note alluding to suicide led her grandmother to threaten to send her to a mental hospital. Despite the allusions of possible sexual abuse to the principal, the principal did not report any abuse under her statutory duty to do so when having reasonable cause to suspect that abuse had occurred. See R.C. 2151.421(A)(1). And although admitting that she made a mistake by allowing the victim’s two brothers to spend time with Cunningham after hearing the victim’s accusations, the grandmother did state that she did not even think about Cunningham “bothering” the boys.

{¶ 25} By offering a theory that Cunningham was a crack addict who engaged in a long-term plan to gain access to the victim by supplying the mother with crack, the state in essence painted Cunningham as a sexually-depraved crack fiend. But Cunningham’s alleged drug use had no relevance to this case. Despite there being no evidence of any kind to show that he was under the influence of crack cocaine at the time of the offense, the

state continually asked witnesses about his alleged drug use. Those answers dovetailed into the state's theory that Cunningham plied the victim's mother with drugs to set up his opportunity to rape the victim. As previously noted, this theory is without merit.

{¶ 26} We conclude that the admission of other acts evidence relating to Cunningham's drug use affected the outcome of trial. We therefore sustain the first assignment of error and remand for a new trial. The second assignment of error is moot.

{¶ 27} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

PATRICIA ANN BLACKMON, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR