

[Cite as *State v. Cannon*, 2010-Ohio-6156.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94146

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEVONTE CANNON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526070

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 16, 2010

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Devonte Cannon, appeals his conviction of aggravated burglary, raising a single assignment of error:

{¶ 2} “R.C. 2945.59 and Rule 404(B) prohibits [sic] evidence of other crimes, wrongs or acts and the trial court erred to appellant’s prejudice by allowing the state to introduce such evidence.”

{¶ 3} Cannon argues that the trial court improperly admitted evidence regarding his conduct and a statement he made to the victim at his bind-over

hearing in juvenile court. Because we find that the trial court properly allowed the evidence as an admission by Cannon, we affirm.

Procedural History and Facts

{¶ 4} Cannon, who was a juvenile at the time the underlying offenses were committed, was bound over to Cuyahoga County Common Pleas Court to be tried as an adult. He was then indicted on two counts: (1) aggravated robbery, carrying one- and three-year firearm specifications; and (2) kidnapping. He pleaded not guilty to the charges, and the matter proceeded to a jury trial.

{¶ 5} The evidence at trial revealed that on April 23, 2009, around midnight, Scott Foust (“the victim”) was robbed at gunpoint by two males while he was walking home. Approximately fifteen minutes later, Cleveland police officer John Mullin, along with his partner, apprehended two males at a bus stop who matched the description of the perpetrators provided by the victim. Cannon was one of the individuals apprehended and arrested. The police recovered a .22 caliber rifle from Cannon and a BB-gun from the other individual. The victim also positively identified both Cannon and the other male during a cold stand identification conducted shortly after Cannon was apprehended. The victim further identified the guns that the police had recovered as being the weapons that were pointed in his face.

{¶ 6} The jury found Cannon guilty of all the charges in the indictment. The trial court subsequently merged the aggravated robbery and kidnapping

counts, and the state elected to go forward on the aggravated robbery count. The trial court sentenced Cannon to a total prison term of eight years.

{¶ 7} Cannon now appeals his conviction.

Evidentiary Ruling

{¶ 8} In his sole assignment of error, Cannon argues that the trial court abused its discretion when it allowed testimony that Cannon “lunged” and screamed a profanity at the victim after the bind-over hearing. He contends that the evidence was improperly admitted as evidence of other acts in violation of Evid.R. 404(B) and R.C. 2945.59. We disagree.

{¶ 9} Initially, we note that Cannon never objected below to the victim’s testimony that he now complains was improperly admitted. He therefore has waived all but plain error. See *State v. Bays*, 87 Ohio St.3d 15, 26-27, 1999-Ohio-216, 716 N.E.2d 1126. While defense counsel did object to Officer Mullin’s testifying as to Cannon’s screaming a profanity when he saw the victim at the bind-over hearing, he did not otherwise object to Officer Mullin’s testimony, including that Cannon “tried to jump” at the victim. But regardless, we find no error, plain or otherwise, in the trial court’s admission of this testimony.

{¶ 10} 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.”¹ Other acts of misconduct are admissible, however, “if it

¹ This rule is consistent with R.C. 2945.59, which states: “In any criminal case in

is relevant to an issue at trial and its probative value is not outweighed by its prejudicial effect.” *Cleveland v. Dillingham* (May 11, 1995), 8th Dist. No. 67693, citing *State v. Thompson* (1981), 66 Ohio St.2d 496, 422 N.E.2d 855.

{¶ 11} “In balancing the probative value against the danger of unfair prejudice, the trial court is vested with broad discretion, and an appellate court should not interfere absent a clear abuse of discretion.” *State v. Conner*, 5th Dist. No. 2007AP060035, 2008-Ohio-4042, ¶29, citing *State v. Harcourt* (1988), 46 Ohio App.3d 52, 546 N.E.2d 214.

{¶ 12} This court has repeatedly recognized that “evidence of threats or intimidation of witnesses reflects a consciousness of guilt and is admissible as admission by conduct.” *State v. Soke* (1995), 105 Ohio App.3d 226, 250, 663 N.E.2d 986, citing *State v. Richey* (1992), 64 Ohio St.3d 353, 357, 595 N.E.2d 915; *State v. Ingram*, 8th Dist. No. 92785, 2010-Ohio-772, ¶80-81; *State v. Williams*, 8th Dist. No. 89461, 2008-Ohio-1948, ¶24. Indeed, intimidation of a witness is not “wholly independent” of the charged offenses. *Soke* at 250. Consequently, the admission of such evidence does not violate Evid.R. 404(B) and is admissible at trial. *Id.*

which the defendant’s motive or intent, the absence of mistake or accident on his part, or the defendant’s scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant’s scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.”

{¶ 13} Under the facts of this case, we cannot say that the trial court abused its discretion in allowing evidence of Cannon’s intimidating behavior toward the victim at the bind-over hearing. We cannot say its probative value is outweighed by its prejudicial effect. This evidence was relevant as to Cannon’s guilty conscience regarding the charges. Further, this evidence constitutes “the admission by conduct” addressed in *Soke*. See, e.g., *Ingram*, 2010-Ohio-772 and *Williams*, 2008-Ohio-1948.

{¶ 14} The sole assignment of error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and

JAMES J. SWEENEY, J., CONCUR