[Cite as *State v. Ogletree*, 2011-Ohio-819.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94512

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

STEPHEN OGLETREE

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528694

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

RELEASED AND JOURNALIZED: February 24, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Stephen Ogletree, appeals his convictions, rendered after a jury trial, for kidnapping and gross sexual imposition. We reverse and remand.

I. Procedural History

{¶ 2} Ogletree was charged in a nine-count indictment as follows: Count 1, kidnapping; Count 2, rape; Count 3, gross sexual imposition; Count 4, kidnapping; Count 5, rape; Count 6, gross sexual imposition; Count 7, kidnapping; Count 8, attempted rape;

and Count 9, gross sexual imposition. Each count contained either a sexual motivation specification or a sexually violent predator specification. The indictment charged that the offenses occurred "on or about" the time period from "October 1, 2003 through November 18, 2003," when the victim was "under the age of thirteen."

{¶ 3} The state filed a pretrial motion to use other acts evidence. The defense opposed the motion, but after a hearing, the trial court granted the motion. The case proceeded to a jury trial.[1] At the conclusion of the state's case, the defense made a Crim.R. 29 motion for acquittal. The court granted the motion as to Count 7, kidnapping, and Count 8, attempted rape, but denied it as to the remaining counts. The defense rested without presenting any witnesses.

{¶ 4} The jury found Ogletree guilty of Count 1, kidnapping, Count 3, gross sexual imposition, Count 4, kidnapping, Count 6, gross sexual imposition, and Count 9, gross sexual imposition, with the attendant sexual motivation specifications (Counts 1 and 4), but not guilty of the remaining counts (rape). The court found him not guilty of the attendant sexually violent predator specifications (Counts 3, 6, and 9). The trial court sentenced Ogletree to a five-year prison term.

II. Facts

{¶ 5} The following facts were elicited at trial. The alleged incidents occurred in 2003. At that time, the victim was 12- and 13-years old and resided with her mother and two younger sisters in a house owned by Ogletree in Maple Heights.

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[1]The sexually violent predator specifications were bifurcated and tried to the court.

{¶ 6} The mother worked as a nursing assistant at a nursing home from 7:00 a.m. to 3:30 p.m. Thus, the mother left the house before her girls would leave for school and would not be home when they returned after school. The victim was responsible for her two younger sisters in their mother's absence. The victim went to a different school from her sisters — she was in junior high school and her sisters were in elementary school. The victim's school day ended at 2:00 p.m., while her sisters' school day ended at 3:00 p.m. It was the victim's responsibility to go home after school and be there when her sisters returned from school.

{¶ 7} The victim testified that Ogletree often came to the house when just she and her sisters were home after school. She stated that he came to get his mail and do "handy work" inside and outside of the house. Both the victim and her mother testified that Ogletree had a key to the house and used it. The mother knew, from both her daughters and neighbors, that Ogletree was coming to the house when she was not there, found it "kind of strange," but never further inquired about it. The mother also testified that Ogletree would sometimes "pop over," when she was home because he was "just in the neighborhood" or to collect the rent.

{¶ 8} According to the victim, she initially thought Ogletree was "cool, kind, and helpful," and she took advantage of his offer to help her with her homework.[2] The victim testified that she and Ogletree would be in her bedroom when he would help her. After

[2]The victim was in special education classes because of a "cognitive disability," that according to her teacher, resulted in her not always "being able to make good decisions."

the first time Ogletree helped her with her spelling words, she did well on her spelling test, and accepted his offer to help again.

{¶ 9} The victim testified to four instances of inappropriate interactions with Ogletree, three of which she stated occurred in November, weeks before her 13th birthday, and one which occurred in December, after she had turned 13.

{¶ 10} According to the victim, the first incident occurred in November when Ogletree was helping her with her homework in her bedroom. The victim testified that after they had finished with her homework, Ogletree put his hands down her pants and up her shirt. She moved his hand and told him to "stop." The victim testified that after that incident, she declined Ogletree's offers to help with her homework.

{¶ 11} The second incident occurred again in November in the victim's bedroom. According to the victim, when she arrived home from school, Ogletree was at the house cutting the grass. She went inside, went to her bedroom, and pushed books up against the door.[3] Ogletree came in the house and knocked on her bedroom door. The victim ignored the knocking, but Ogletree came in her room anyway. The victim asked him to leave, but he did not. The victim stated that Ogletree pushed her on her bed, causing her to hit her head on the wall behind the bed, forced her pants off, and raped her. She testified that Ogletree was holding her wrists, "real tight, so [she] couldn't move [her] hands."

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[3]The victim testified that she routinely "barricaded" her room to keep "everybody," including her sisters, out.

{¶ 12} The victim testified that the third incident also occurred in November when she was in her bedroom after school. She again had books pushed up against the door and Ogletree opened the door, knocking down the books. He ignored her requests to leave and tried to make conversation with her. Eventually, he pushed her on the bed and raped her. The victim testified that she was "crying, screaming. [She] was telling him, stop. Stop. Stop. Get off me."

{¶ 13} The victim testified that she was able to recall that the first three incidents happened in November because they occurred weeks prior to her thirteenth birthday on November 19, 2003.

{¶ 14} The last incident occurred in December when the victim was home with and her sisters and mother. The victim testified that her sisters were in their bedroom playing and her mother was "blacked out" because of drug use.[4] The victim stated that Ogletree came into her bedroom, grabbed her by the hand, led her into the basement, and raped her. The victim testified that she tried to call out to her mom as she passed her on the way to the basement, but her mom was unresponsive. The victim testified that she was able to recall that the final incident occurred in December 2003 because that was the month her uncle died.

[4]The record demonstrates that during the relevant time period the mother was drug dependent.

{¶ 15} The victim stated that Ogletree told her not to tell anyone of the encounters because no one would believe her. She further testified that Ogletree would give her money after the incidents.

{¶ 16} The family eventually moved from the Maple Heights house because it was in foreclosure. They relocated several times, resulting in the victim going to four different high schools. In 2009, the victim's senior year at Shaw High School, she was assigned to complete a "reflection letter," reflecting on how she had achieved her goal of graduation. The allegations came to light when she wrote about her encounters with Ogletree in the letter. In the letter, the victim stated that she was raped by Ogletree three times when she was twelve years old, weeks prior to her thirteenth birthday.

{¶ 17} The state presented "other acts" testimony through a witness whose family was a tenant of Ogletree's when she was 16-years old. According to the witness, Ogletree would often come to their house to do "handy work." On one occasion, the witness and her 17-year old sister were home alone with Ogletree and were cleaning up the yard. Ogletree asked the witness to go inside with him to "check on a light bulb" and she complied. Once inside they went to the basement, where Ogletree asked to pick her up so she could see a light fixture. The witness again complied, and when Ogletree picked her up he touched her buttocks and vagina.

{¶ 18} The witness testified that after that incident she told her sister and mother; her mother, however, did not initially believe her. The witness testified that Ogletree continued to come to her house, but she would not comply with any of his further requests

of her, which resulted in him calling her "lazy." Ogletree was prosecuted for his alleged conduct with the witness, but found not guilty.

{¶ 19} The investigating officer testified that the victim in this case never told him about the first November incident or the December rape.

{¶ 20} Ogletree has assigned the following three errors for our review:

{¶ 21} "Assignment of Error I: The State failed to present sufficient evidence to sustain a conviction against Appellant.

{¶ 22} "Assignment of Error II: Appellant's convictions are against the manifest weight of the evidence.

{¶ 23} "Assignment of Error III: The trial court erred when it admitted other acts testimony in violation of R.C. 2945.59, Evid.R. 404(B) and Appellant's rights under Article I, Section 10 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution."

III. Analysis

A. Sufficiency of the Evidence

{¶ 24} For his first assigned error, Ogletree contends that the evidence was insufficient to sustain his convictions. Specifically, Ogletree argues that "there is no credible evidence that [he] committed any crimes[,]" and that "[e]ssentially, the whole story doesn't make sense." Ogletree's arguments relate to credibility and weight, which we do not consider in a sufficiency exercise. Rather, "[i]n determining whether the evidence is legally sufficient to support the jury verdict as a matter of law, '[t]he relevant

inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, 919 N.E.2d 190, ¶34, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 25} R.C. 2905.01(A)(4), governing kidnapping, provides that "[n]o person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]"

{¶ 26} R.C. 2907.05(A)(4), governing gross sexual imposition, provides that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when * * * [t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶ 27} The victim testified about four incidents[5] where Ogletree had sexual contact with her against her will.[6] She further testified that Ogletree used force to

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[5]The last incident, which allegedly occurred in December, is troubling to us and will be addressed in more detail below.

[6]"'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

restrain her liberty in all but the first incident. Accordingly, on this record, there was sufficient evidence to support the kidnapping and gross sexual imposition convictions and the first assignment of error is overruled.

B. "Other Acts" Evidence

{¶ 28} In his third assignment of error, Ogletree challenges the trial court's admission of "other acts" testimony.

{¶ 29} We review the admission of evidence under an abuse of discretion standard. *State v. Mauer* (1984), 15 Ohio St.3d 239, 264, 473 N.E.2d 768. "Abuse of discretion" connotes more than error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 30} The trial court allowed the "other acts" evidence, finding that the "characteristics [under which] the State would be permitted to use this evidence are pretty persuasive." We disagree.

{¶ 31} Under Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove" a defendant's character as to criminal propensity. "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."

{¶ 32} Further, R.C. 2945.59 provides that "[i]n any criminal case in 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."

{¶ 33} Evidence of other acts by a defendant is admissible only when it tends to show one of the matters enumerated in the statute and rule and only when the evidence offered is relevant to prove that the defendant is guilty of the offense in question. *State v. Burson* (1974), 38 Ohio St.2d 157, 158, 311 N.E.2d 526. The state contends that the "other acts" evidence was admissible under the scheme, plan, or system exception. In *State v. Curry* (1975), 43 Ohio St.2d 66, 330 N.E.2d 720, the Ohio Supreme Court explained when "other acts" evidence is admissible under the scheme, plan, or system exception:

{¶ 34} "'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. * * *

{¶ 35} "Identity of the perpetrator of a crime is the second factual situation in which 'scheme, plan or system' evidence is admissible. One recognized method of establishing that the accused committed the offense set forth in the indictment is to show that he has committed similar crimes within a period of time reasonably near to the offense on trial, and that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes." (Citations omitted.) Id. at 73.

{¶ 36} For "scheme, plan, or system" evidence to be admissible as tending to prove identity, identity must be a material issue in the trial. Id. at 72. "Identity is in issue when the fact of the crime is open and evident but the perpetrator is unknown and the accused denies that he committed the crime." *State v. Smith* (1992), 84 Ohio App.3d 647, 666, 617 N.E.2d 1160. Thus, some courts have held that modus operandi evidence is admissible in stranger rape cases, but inadmissible in acquaintance rape cases. See *State v. Wright*, Washington App. No. 00CA39, 2001-Ohio-2473.

{¶ 37} The first factual situation under which "scheme, plan, or system" evidence is admissible is not applicable here — the "other act" was not "inextricably related" and did not "form part of the immediate background" to the alleged crimes here.

{¶ 38} The second factual situation under which such evidence is admissible is likewise not applicable here. There was never any question as to the identity of the alleged perpetrator. The testimony demonstrated that Ogletree was the landlord of the house where the victim and her family resided, had a key to the house, and regularly came

to the house. The victim readily identified Ogletree as the perpetrator from the beginning of and throughout the case. Simply put, identity was not an issue here.

{¶ 39} The Ohio Supreme Court discussed the rationale for the limited admissibility of other acts evidence as follows: "The admissibility of other acts evidence is carefully limited because of the substantial 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 crime charged in the indictment. This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature * * *. The legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses, and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible." *State v. Schaim* (1992), 65 Ohio St.3d 51, 59, 600 N.E.2d 661.

{¶ 40} The exception offered by the state for admission of the other acts evidence is inapplicable and no other exception applies. Accordingly, the trial court abused its discretion in allowing the "other acts" testimony. We therefore sustain the third assignment of error and reverse and remand for a new trial.

C. Testimony about Alleged Uncharged Incident

{¶ 41} Although not raised on appeal, we address another issue, which is relevant in light of the fact that we are reversing this matter. The indictment charged that the offenses occurred "on or about" the time period from "October 1, 2003 through

November 18, 2003." All counts alleged that the victim was "under the age of thirteen," and set forth her date of birth as November 19, 1990. Thus, on November 19, 2003, the victim was no longer "under the age of thirteen." Extensive testimony was elicited, however, on the alleged final incident, the rape in the basement, which the victim testified occurred in mid-December 2003. The indictment was never amended to charge any alleged incident occurring after the victim turned thirteen and the jury was instructed as to all counts that the state charged that the victim was under thirteen.[7] We are mindful that the law has tolerance for the difficulty in these types of cases — those alleging multiple incidents and involving children who are often unable to recall exact dates and times — but, here, because the victim's age was an element of the charges, an alleged count that occurred after age 13 made time relevant to the indictment.[8]

{¶ 42} Accordingly, on remand, testimony about the alleged December 2004 incident would not be proper on this indictment.

IV. Conclusion

{¶ 43} Given our disposition, the second assignment of error, challenging the weight of the evidence, is moot and we do not consider it. See App.R. 12(A)(1)(c).

Reversed and remanded.

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

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[7]The state provided a bill of particulars, which also alleged that the incidents occurred "on or about October 1, 2003 to November 18, 2003," when the victim was "under the age of thirteen."

[8]Trial counsel raised, but did not pursue the issue, stating "[i]n the actual testimony, [the victim] complained of a rape that he is not even indicted for which was the December incident."

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. Judgment reversed and case remanded to the trial court for further proceedings consistent with this opinion.

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

LARRY A. JONES, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
MELODY J. STEWART, P.J., CONCURS WITH
SEPARATE OPINION

MELODY J. STEWART, P.J., CONCURRING:

I concur with the finding that the state's other acts testimony did not constitute substantial proof of Ogletree's scheme or plan to sexually assault the victim. The other acts witness testified that Ogletree allegedly assaulted her after he asked her to help him change a light bulb; the victim testified that Ogletree assaulted her while helping her with her homework. There was no factual nexus between these incidents, nor could one reasonably be implied. The state's argument in support of admitting the other acts testimony was based on nothing more than the allegation that Ogletree had twice assaulted young women who lived in his rental property. This improperly conflated opportunity with scheme or plan. As the majority opinion notes, Ogletree's opportunity to be present on the premises was obvious because he was the landlord, did repairs in the

home, and still had his mail delivered to the premises. Barring any other similarity in how the separate alleged instances of sexual assault occurred, there was no basis for the court to find that Ogletree acted according to some scheme or plan.

I also reject the state's argument that any error in the admission of other acts testimony was cured by the court's curative instruction in its general charge to the jury. While the general rule is that the jury is presumed to follow the court's cautionary instructions, the instruction given in this case was too vague to permit the presumption. The court instructed the jury that "[y]ou also heard evidence * * * about the commission of other wrongs other than the offense charged here which the Defendant was charged with. Again, that evidence was received only for a limited purpose. It was not received, and you may not consider it, to prove the character of the Defendant in order to show that he acted in conformity with or in accordance with that character." This instruction begs the questions: How should the evidence be considered? What was the "limited purpose" for which it was received?

Additionally, the court did not specifically reference the "other wrongs" to which it referred. How could members of the jury (without the benefit of any legal training) know what the court meant by that phrase or the rest of the cautionary instruction? Although there is no requirement that the cautionary instruction be made contemporaneously with the applicable evidence, a cautionary instruction like the one given in this case was so lacking in context that it was rendered meaningless. I would

therefore find that the cautionary instruction issued in this case failed to cure the court's error in admitting the other acts testimony.