[Cite as *State v. Miller*, 2015-Ohio-519.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101225

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RONALD MILLER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED, CONVICTIONS VACATED, REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-573137-A

BEFORE: S. Gallagher, J., Celebrezze, A.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: February 12, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Appellant Ronald Miller appeals his convictions for attempted aggravated murder, attempted murder, and felonious assault. For the reasons stated herein, we reverse the judgment of the trial court, vacate the convictions and remand the case for a new trial.

{¶2} On April 10, 2013, appellant was indicted on charges of attempted aggravated murder, attempted murder, felonious assault, and violating a protection order. He ultimately entered a plea of no contest to the charge of violating a protection order, and his conviction for that offense has not been appealed. He entered a plea of not guilty to the remaining counts and was found guilty following a jury trial. The first three counts were merged for sentencing. The trial court sentenced appellant to a prison term of eight years on Count 1, attempted aggravated murder, and six months on Count 4, violating a protection order, to run concurrently. The court also imposed a mandatory five years of postrelease control and ordered appellant to pay a $10,000 fine and costs. Appellant has appealed his conviction on the first three charges.

{¶3} On February 8, 2013, appellant's wife (referred to herein as R.M.) was involved in a motor-vehicle accident. She was driving her 1994 Honda Civic while running errands. While driving through a shopping plaza, her vehicle began to accelerate despite her foot being on the brake. She drove into a brick pillar, and the vehicle was spun through the front window of a nail salon. R.M. called appellant, and the police were called to the scene. When a police officer started the vehicle in order to back it out, the engine began accelerating rapidly. A towing company then was called to remove the vehicle.

{¶4} After the vehicle was pulled away from the building, the hood was opened. A wood shim was observed in the throttle mechanism of the vehicle.

{¶5} R.M. refused treatment and returned home with appellant. Upon being questioned by police, R.M reported that her marriage to appellant had its "ups and downs." Appellant described their relationship as "love/hate." They both were doing well financially. R.M. described appellant as being a quiet person, normally showing little emotion. Appellant and R.M. had been married since 1999. The topic of divorce was discussed early on in the marriage, and appellant had expressed how expensive and unpleasant it is to divorce. Nevertheless, at the time of the crash, there were no plans by either party to divorce.

{¶6} The police recovered wood shims from the home; however, this was not unusual. R.M. indicated that appellant had used them in the home, although infrequently. The police also found small shards of wood in the garage where R.M. stored her vehicle. When asked whether he put the shim in the accelerator, appellant acknowledged that he was mechanically inclined, but he indicated he did not have the knowledge to do something like that to a vehicle. Despite appellant's claims to not having the knowledge to compromise a throttle mechanism, a voluminous mechanical owner's manual for appellant's Pontiac Fiero was located in the home. Appellant also had a large amount of automotive tools.

{¶7} Appellant did not report any recent work having been done on R.M.'s vehicle, nor did he mention anything about changing the wiper blades. When he was informed a wood shim had been found in the accelerator, appellant mentioned it was not uncommon to find things in a vehicle.

{¶8} At one point during the investigation, appellant made reference to a mistaken identity theory and the possibility that someone mistakenly tampered with R.M.'s vehicle, believing the car belonged to someone else. He also asked the police to check surveillance video. When the police followed up with the requests, nothing turned up.

{¶9} Shortly following the accident, appellant and R.M. went to Motorcars Honda in Cleveland Heights. Appellant appeared upset and was asking whether someone could have tampered with the vehicle under the hood if the vehicle were locked. On March 1, 2013, the police brought the vehicle to Motorcars Honda for an inspection. It was discovered that appellant and R.M. had been there previously inquiring about the vehicle. The inspection of the vehicle revealed no abnormalities.

{¶10} Meanwhile, the police had submitted the wood shim to the Bureau of Criminal Investigation for DNA testing. The testing determined that DNA found on the shim was consistent with appellant's DNA. Another unidentified person's DNA was also found on the shim.

{¶11} Thereafter, the police arrested appellant, and he was charged with the crimes herein. R.M. felt disbelief upon learning appellant was a suspect.

{¶12} At trial, appellant indicated he and R.M. basically had a good marriage, but at times they did not agree and it was more difficult. Appellant claimed R.M. had been complaining about her windshield wipers and she wanted him to fix the problem. He testified that several weeks before the accident, he decided to change the windshield wipers on her vehicle. He had difficulty detaching the wiper blades. He opened the hood and tried to unbolt the arm from the motor mechanism, but the bolt was too tight. He decided to use a wood shim, affixed with a rubber band, to elevate one of the blades off the windshield so he could hit it with a hammer. He claimed the rubber band flew off and the shim fell into the engine. He was not able to locate the shim. He denied ever placing the shim in the throttle mechanism of R.M.'s vehicle.

{¶13} R.M. did not recall ever discussing the need to change the windshield wipers with appellant and was not aware that he had changed them. Appellant drove her car very little.

{¶14} Both sides called an expert to testify at trial. The state's expert opined that the vehicle's throttle was held in an open condition by a wood shim that had been placed in the throttle mechanism. The expert indicated that "the throttle could be normally operated through small pedal inputs with the wood shim providing no interference or stuck-throttle conditions," but that "a larger throttle pedal input and subsequent pedal release" could cause the shim to become entrapped and thereby hold the throttle "open or in a stuck-throttle condition." The expert was able to replicate the scenario three times, but was not able to consistently repeat the scenario.

{¶15} The defense expert found it highly unlikely that the shim could have been placed in the throttle mechanism because, according to him, had that happened, the engine would have been running at a very high rate of speed throughout. He opined that the shim had been in the engine compartment for an extended period of time before it became entangled in the throttle mechanism.

{¶16} During the trial, the state called appellant's first wife to testify. She had been married to appellant from 1966 to 1984 and had two children with him. She testified over objection that when she approached appellant about getting divorced, he threatened that he would "do something to the brakes so you'll be driving and you won't have brakes." The threat was made in 1983; she testified no report was made to the police, and nothing ever happened to her brakes. She also testified over objection to threats appellant made against her father's business, although the trial court sustained an objection to this testimony and told the jury to disregard that

statement. During appellant's testimony, he denied ever threatening to cut the brakes on his first wife's vehicle.

{¶17} Also during trial, the mechanic who towed the vehicle out from the storefront was permitted to testify over objection that "[j]ust from my experience, it couldn't fall in [the throttle mechanism] and get placed the way it was. It had to be jammed in there somehow."

{¶18} On appeal, appellant raises four assignments of error for our review. Under his first assignment of error, appellant claims the trial court erred by allowing the introduction of improper other-acts evidence. Appellant argues that the testimony from his first wife regarding 30-year-old threats made by appellant upon the end of their marriage was not admissible under Evid.R. 404(B) or R.C. 2945.59.

{¶19} We begin our analysis by noting the excellent investigation conducted in this case by the Richmond Heights Police Department. Rarely do we review a case where police go to such lengths to investigate facts related to a possible crime. The police here did a comprehensive investigation, leaving no stone unturned.

{¶20} With the investigation complete and a crime charged, a trial court has broad discretion regarding the admissibility of other-acts evidence under Evid.R. 404(B), and its decision will not be interfered with absent an abuse of that discretion that created material prejudice. *See State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 81. Other-acts evidence "'is not generally admissible to demonstrate that the defendant has a propensity for crime or that his character is in conformity with the other acts.'" *State v. Morris*, Slip Opinion No. 2014-Ohio-5052, ¶ 26, quoting *State v. Mann*, 19 Ohio St.3d 34, 482 N.E.2d 592 (1985), paragraph one of the syllabus; *see also* Evid.R. 404(B). However, such evidence 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). Evid.R. 404(B) is in accord with R.C. 2945.59. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 16.

{¶21} The Ohio Supreme Court has set forth the following three-step analysis that should be used by trial courts when considering other-acts evidence:

> 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.

Williams at ¶ 20.

{¶22} There is little doubt that a threat made to an ex-wife to tamper with her vehicle has relevance to the question of whether a husband would tamper with his current wife's vehicle. Arguably, this evidence is relevant to making a fact determination in the action more or less probable than it would be without the evidence. Thus, the first prong of the *Williams* test is arguably satisfied.

{¶23} Next, the state argued that the other-acts evidence was admissible to prove identity or motive. However, this is not a case where the identity of the perpetrator is an issue. *See State v. Ogletree*, 8th Dist. Cuyahoga No. 95412, 2011-Ohio-819, ¶ 38. Further, the evidence did not establish a motive, such as killing a wife to avoid an expensive divorce. A verbal threat made 30 years ago in contemplation of divorce does not establish a motive for the alleged crimes occurring in another marriage that had no suggestion of being over. There was no evidence of a planned or pending divorce in the record. In light of this, the other-acts evidence arguably was

offered for nothing more than to prove the bad character of the accused — that he was a bad person for threatening to do this in the past and this time he acted in conformity with that character when he followed through.

{¶24} Nonetheless, we accept that it was plausible that the evidence was offered to show that appellant's common plan or scheme in a possibly troubled marriage was to tamper with his wife's vehicle in order to eliminate her and avoid an expensive divorce. Although the prosecution failed to offer this reasoning, if we accept this latter reasoning under Evid.R. 404(B), arguably the second prong for admission might be satisfied.

{¶25} In the last step, we must consider whether the probative value of the other-acts evidence is substantially outweighed by the danger of unfair prejudice under Evid.R. 403. In considering the prejudice step, we must first look at the evidence that was offered. Normally, "other-acts" evidence involves a physical act. Although we are cognizant that a verbal threat can certainly be considered as an act, it is important in this instance to recognize the distinction between the purported threat of tampering with someone's brakes and the actual physical act of tampering with the throttle mechanism.

{¶26} For example, in the *Williams* case, the other act was sexual contact with another minor several years earlier that resulted in Williams being convicted of a misdemeanor assault. *Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 7-8. In addition to the testimony of the victim and social worker in *Williams*, there was a clear record of a prior act in the form of a prior conviction. *Id.* It was not simply an undocumented verbal claim.

{¶27} Moreover, in *Williams*, there was parallel conduct against the witness, occurring 11 years prior, which tended "to show the motive Williams had and the preparation and plan he exhibited of targeting, mentoring, grooming, and abusing teenage boys." *Williams* at ¶ 5, 22.

The other-acts evidence indicated that the defendant had targeted young, fatherless males "to gain their trust and confidence and groom them for sexual activity with the intent of sexual gratification." *Id*. at ¶ 25. The court determined that the other-acts evidence could be admitted "to show the plan of the accused and the intent for sexual gratification" with regard to sexual crimes against the victim. *Id*.

{¶28} In *State v. Ceron*, 8th Dist. Cuyahoga No. 99388, 2013-Ohio-5241, the court distinguished *Williams* and rejected the use of other-acts evidence where there were fundamental differences with the nature of the conduct at issue. In *Ceron*, the court found that the trial court abused its discretion in introducing evidence that the defendant had pulled down the pants of an adult female family member as it did not make it more probable that he also pulled the pants down of a five-year-old and then went on to rape the five-year-old. *Id*. at ¶ 84, 96. The court indicated that "the conduct in both incidents hardly constituted a unique behavioral footprint" and that "there is a 'fundamental difference' between a man desiring to engage in sexual activity with an adult * * * and desiring sexual contact with a very young child." *Id*. at ¶ 89. The court in *Ceron* relied upon a similar case, in which the court found that evidence that a defendant grabbed his wife's adult daughter, pulled her toward him, and made a sexually charged comment to her was highly inflammatory and did not have any tendency to prove his motive or intent to rape his wife's little girl. *State v. Morris*, 9th Dist. Medina No. 09CA0022-M, 2012-Ohio-6151, 985 N.E.2d 274, *aff'd*, Slip Opinion No. 2014-Ohio-5052 (determining when a new trial is an appropriate remedy for the improper admission of other-acts evidence under Evid.R. 404(B)).

{¶29} Here, the other-acts evidence was an alleged 30-year-old verbal threat to tamper with an ex-wife's vehicle that was made during their incumbent divorce. The ex-wife testified she did not report the threat to police, and she could not even detail when the specific threat was

made. Further, there was no independent corroboration to test the validity of the claim in assessing its prejudicial effect on the proceedings.

{¶30} Although we are not suggesting such statements must be proven by independent facts, assessing the prejudicial effect on admitting such evidence inherently implies that it has been reviewed for validity. Here, there was no documentation of the original threat or any resulting legal proceedings or events related to the purported threat. In short, there was no evidence that the appellant ever actually tampered with his ex-wife's vehicle. There is a clear distinction in the nature of the conduct involved where one involves a threat and the other involves actual physical conduct.

{¶31} Additionally, the remoteness of the threat cannot be overlooked in this case. As the Ohio Supreme Court has stated:

> [A]lthough other acts evidence aimed at showing an idiosyncratic pattern of conduct should not be so remote from the offense charged as to render them non-probative, logic does not require that they necessarily be near the offense at issue in both place and time. * * * The key to the probative value of such conduct lies in its peculiar character rather than its proximity to the event at issue.

State v. Jones, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 191, quoting *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 46 (internal quotations omitted). Under the circumstances herein, the distinctions between the conduct, together with the remoteness, renders the other-acts evidence non-probative in this matter.

{¶32} We therefore find the unfair prejudice of the evidence substantially outweighed any probative value. Although the trial court gave a limiting instruction, there was simply no "sound reasoning" that could justify its admission. *See State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14. Therefore, the trial court abused its discretion in allowing the other-acts testimony.

{¶33} "[I]n determining whether to grant a new trial as a result of the erroneous admission of evidence under Evid.R. 404(B), an appellate court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record." *Morris,* Slip Opinion No. 2014-Ohio-5052, at ¶ 33. An improper admission affects a defendant's substantial rights so as to require a new trial as a remedy where there is prejudice to the defendant and the error was not harmless beyond a reasonable doubt. *Id.* at ¶ 26-29. In making these determinations, an appellate court "must excise the improper evidence from the record and then look to the remaining evidence" for either overwhelming evidence of guilt or some other indicia that the error did not contribute to the accused's conviction. *Id.* at ¶ 29.

{¶34} Here, after excising the other-acts evidence from the record, we find no overwhelming evidence of guilt, and we cannot say that the error did not contribute to the accused's convictions. The improper admission affected appellant's substantial rights because he did not receive a fair trial. Because there was prejudice to appellant and the error was not harmless beyond a reasonable doubt, we must vacate the convictions and remand for a new trial. Appellant's first assignment of error is sustained.

{¶35} Under his second assignment of error, appellant claims the trial court erred by allowing the introduction of improper opinion evidence from a lay witness. Specifically, appellant challenges the testimony of the mechanic who towed the vehicle from the storefront and opened the hood. The mechanic was permitted to testify that the shim could not have fallen into the throttle mechanism the way it was positioned and that it must have been placed or jammed in there.

{¶36} The mechanic was not proffered as an expert witness. His opinion testimony was admissible if it fell within the parameters of Evid.R. 701, which governs opinion testimony by lay witnesses. Evid.R. 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Trial courts have wide discretion in allowing lay witness opinion testimony under Evid.R. 701. *State v. Kehoe*, 133 Ohio App.3d 591, 607, 729 N.E.2d 431 (12th Dist.1999).

{¶37} Courts have permitted lay opinion testimony on a subject outside the realm of common knowledge and in areas in which it would ordinarily be expected that an expert must be qualified under Evid.R. 702, provided the testimony still falls within the ambit of Evid.R. 701's requirement that a lay witness's opinion be rationally based on firsthand observations and helpful in determining a fact in issue. *State v. McKee*, 91 Ohio St.3d 292, 296-297, 2001-Ohio-41, 744 N.E.2d 737; *Wittensoldner v. Ohio DOT*, 10th Dist. Franklin No. 13AP-475, 2013-Ohio-5303, ¶ 13-18. In these situations, the witness must have a reasonable basis — grounded either in sufficient experience or specialized knowledge — for arriving at the opinion expressed. *McKee* at 296. "These cases are not based on specialized knowledge within the scope of Evid.R. 702, but rather are based upon a layperson's personal knowledge and experience." *Id*. at 296-297.

{¶38} In this case, the mechanic's testimony went beyond that which was "rationally based on the perception of the witness." There is no doubt that the mechanic could testify to his firsthand observations regarding the shim being stuck in the throttle mechanism. Further, he may well have had personal knowledge of the workings of the throttle mechanism based upon his personal knowledge and many years of experience as a tow truck driver and a mechanic.

However, his testimony that the shim could not have fallen into the throttle mechanism and must have been "jammed in there somehow" was a conclusion as to how the shim ended up in the throttle mechanism. Because this conclusion could not be rationally based on firsthand observations, the trial court should not have allowed it in the form of lay-witness testimony. Appellant's second assignment of error is sustained.[1]

{¶39} Under his third assignment of error, appellant claims the trial court erred when it granted the prosecution's request for a continuance to obtain a supplemental report from the state's expert. Appellant argues that the trial court should have denied the request because the state had not complied with Crim.R. 16(K). However, even if a violation of Crim.R. 16(K) occurred, a trial court has discretion with regard to the admission or exclusion of evidence. *State v. Opp*, 3d Dist. Seneca No. 13-13-33, 2014-Ohio-1138, ¶ 16. The defense was aware that the state's expert would testify against appellant's assertion that the wood shim ended up in the throttle mechanism by accident and was not ambushed by the information. It was within the trial court's discretion to grant the requested continuance. Appellant's third assignment of error is overruled.

{¶40} Under his fourth assignment of error, appellant claims his conviction for attempted aggravated murder is against the weight of the evidence. When reviewing a claim challenging the manifest weight of the evidence, the court, reviewing the entire record, must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created

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[1] Because the issue is not before us, we do not address whether the mechanic could have qualified as an expert witness under Evid.R. 702. Also, because we have already determined the case must be remanded for a new trial, we need not consider harmless error.

such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶41} Applying the foregoing standard to this case, we are unable to conclude appellant's conviction was against the manifest weight of the evidence. The state presented sufficient admissible evidence to prove the offenses beyond a reasonable doubt and offered expert testimony to discredit the defense's theory. We are unable to find this is an exceptional case in which the evidence weighs heavily against the conviction. Appellant's fourth assignment of error is overruled.

{¶42} Judgment reversed; convictions vacated. This case is remanded for a new trial.

It is ordered that appellant recover of appellee 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.

SEAN C. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A.J., CONCURS;
EILEEN A. GALLAGHER, J., CONCURS IN JUDGMENT ONLY