

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 10CA009756

Appellee

v.

PHILLIP V. THOMAS, III

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CR076875

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 28, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Phillip Thomas does not handle rejection well. A week after Kim Montgomery broke up with him, he bashed open the front door of her house with a hatchet, pinned her down on her couch, and beat her up. A jury convicted him of aggravated burglary, abduction, and assault, and the trial court sentenced him to eight years in prison. Mr. Thomas has appealed, arguing that the trial court incorrectly allowed Ms. Montgomery and two of his past girlfriends to testify about other similar things he had done. We affirm because the trial court properly allowed the women to testify about Mr. Thomas's other violent acts.

FACTS

{¶2} Ms. Montgomery testified that she began dating Mr. Thomas in the summer of 2007. They dated on and off until September 2008, when Ms. Montgomery decided to end their relationship permanently because of Mr. Thomas's instability and his bouts of violence. She

testified that Mr. Thomas attacked her and beat her violently on September 11, 2008, and that she ended their relationship the next day.

{¶3} According to Ms. Montgomery, Mr. Thomas was not ready to end their relationship, and he began calling her at all hours of the day and night. About a week after she broke up with him, Ms. Montgomery received a telephone message from Mr. Thomas telling her that he was tired of her ignoring his telephone calls and that he would find her. The next morning, around 4:00 a.m., Ms. Montgomery woke to a loud banging at her front door. She went downstairs and saw Mr. Thomas's car through a window. As she attempted to leave through the back door, he broke into her home through the front door carrying a hatchet. He caught up to her, hit her, and knocked her to the floor. He dragged her to a couch where he hit her some more and threatened her with the hatchet. After that, he dragged her into the kitchen where he got a screwdriver. He dragged her back to the couch. Ms. Montgomery testified that he then threw her onto the couch and told her to stay there or he would kill her. He then attempted to fix the front door with the screwdriver. As he worked, he asked her why she did not love him anymore. He proceeded to alternate between questioning her and hitting her over the next couple of hours. According to Ms. Montgomery, he finally left around 7:00 a.m. because he was expecting a telephone call at his home.

{¶4} Ms. Montgomery testified that, before Mr. Thomas left, she promised to meet him for breakfast later that morning. After he was gone, however, she was so in shock that she could not leave her house. It was only after a family member called to check on her later in the day that she called police about what had happened. After speaking to a deputy at her house, she went to the hospital where she was treated for multiple contusions and a closed head injury. The

deputy testified that Ms. Montgomery's door had definitely been forced open, but there was no way to determine how.

{¶5} Susan Heister testified that she had dated Mr. Thomas for a couple of months in 2002. After she ended the relationship, he began leaving her numerous telephone messages, in which he insulted her and threatened to beat her. Because she was scared, she called Mr. Thomas's mother, who invited her to stay with her. According to Ms. Heister, when she later tried to call into her answering machine to let Mr. Thomas's sister listen to the messages Mr. Thomas had left, someone answered her phone. She called the police, who went to her apartment and discovered that it had been trashed, with holes punched in the walls and her belongings thrown everywhere. Ms. Heister testified that Mr. Thomas later pleaded guilty to burglary, telephone harassment, and menacing by stalking for his actions.

{¶6} Shelly Hildebrand testified that she dated Mr. Thomas in 2006. After she ended the relationship, she began receiving a number of phone calls from Mr. Thomas calling her names. Although she obtained a protection order against him, he came to her house one day and began yelling at her and throwing rocks, which broke some of the windows of her house and car. She called the police, who apprehended Mr. Thomas near her house. According to Ms. Hildebrand, Mr. Thomas was convicted of vandalism and menacing by stalking for his conduct.

OTHER ACTS EVIDENCE

{¶7} Mr. Thomas's assignment of error is that the trial court incorrectly allowed evidence of his other acts. He has argued that Ms. Montgomery should not have been allowed to testify about the other acts of violence he committed against her. He has also argued that Ms. Heister and Ms. Hildebrand should not have been allowed to testify about the criminal acts he

committed against them. He has argued that the testimony violated Section 2945.59 of the Ohio Revised Code and Rule 404(B) of the Ohio Rules of Evidence.

{¶8} Under Section 2945.59, “[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.” Under Evidence Rule 404(B), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. 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.”

{¶9} Section 2945.59 and Evidence Rule 404(B) “codify the common law with respect to evidence of other acts of wrongdoing” *State v. Lowe*, 69 Ohio St. 3d 527, 530 (1994). “Evidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* In addition, the alternative purpose for which the evidence is being offered must be a material issue in the case. *State v. Curry*, 43 Ohio St. 2d 66, 71 (1975); *State v. DePina*, 21 Ohio App. 3d 91, 92 (1984) (citing *State v. Burson*, 38 Ohio St. 2d 157, 158 (1974)).

{¶10} This Court has held that Section 2945.59 and Evidence Rule 404(B) “are to be strictly construed against the state and conservatively applied by the trial courts.” *State v.*

Bronner, 9th Dist. No. 20753, 2002-Ohio-4248, at ¶93; see also *State v. Broom*, 40 Ohio St. 3d 277, 282 (1988) (“the standard for determining admissibility of such evidence is strict.”). “Whether proffered other-act evidence has a tendency to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and whether any of those things is of consequence to the determination of the action in a given case are questions of law” that we review de novo. *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶13.

{¶11} Mr. Thomas has argued that, because he admitted in his opening statement that he assaulted Ms. Montgomery, the only issues for trial were whether he committed aggravated burglary and abduction. He has argued that the testimony of his prior girlfriends was not probative of his motive, intent, or his modus operandi. Regarding the exception for modus operandi, Mr. Thomas has argued that the facts of his other cases were not similar to this case. He has further argued that the modus operandi exception can only be used if identity is at issue, which it was not in this case. See *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994).

{¶12} We will focus on whether Ms. Heister’s and Ms. Hildebrand’s testimony tended to prove Mr. Thomas’s motive because the issue is dispositive. According to the State, its theory of the case was that Mr. Thomas broke into Ms. Montgomery’s house with the intention of harming her because he could not cope with her ending their relationship. The State has argued that Ms. Heister’s and Ms. Hildebrand’s testimony helped to establish that Mr. Thomas’s motive for his breaking into Ms. Montgomery’s home was that it was his response to being spurned by her.

{¶13} We agree that the prior girlfriends’ testimony tended to show that the reason Mr. Thomas broke into Ms. Montgomery’s home was because he could not handle rejection. The

trial court, therefore, correctly allowed Ms. Heister and Ms. Hildebrand to testify about what Mr. Thomas did after they ended their relationships with him. See *State v. Perez*, 124 Ohio St. 3d 122, 2009-Ohio-6179, at ¶97 (concluding that defendant’s prior bar robberies were relevant to his motive in committing the robbery for which he was on trial); *State v. Diar*, 120 Ohio St. 3d 460, 2008-Ohio-6266, at ¶77 (concluding testimony that defendant went to great lengths to obtain babysitters was admissible because it supported State’s theory that she killed her child because she was tired of being a mother).

{¶14} Mr. Thomas has also argued that the trial court should have excluded Ms. Heister’s and Ms. Hildebrand’s testimony because it was highly prejudicial. Under Rule 403(A) of the Ohio Rules of Evidence, “[a]lthough 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.”

{¶15} “Application of Rule 403(A) calls upon a trial court to, in its discretion, weigh the probative value of particular evidence against the danger that its admission will cause unfair prejudice.” *State v. Hoffmeyer*, 9th Dist. No. 23712, 2008-Ohio-2311, at ¶30. We will not reverse a trial court’s weighing under Rule 403(A) unless it abused its discretion. *Id.* Upon review of the record, we conclude that the trial court exercised proper discretion under Rule 403(A). Although the testimony of Ms. Heister and Ms. Hildebrand was prejudicial to Mr. Thomas’s case, the question under Rule 403(A) is whether the evidence was unfairly prejudicial, which it was not. Furthermore, in light of the limiting instruction given by the trial court, Mr. Thomas has failed to demonstrate that Ms. Heister’s and Ms. Hildebrand’s testimony confused or misled the jury.

{¶16} Regarding Ms. Montgomery’s testimony about Mr. Thomas’s other acts, she testified that he had been violent throughout their relationship, and that the event that caused her to break up with him for good was when he beat her on September 11, 2008. The State has argued that Ms. Montgomery’s testimony was admissible under the common plan or scheme exception to Section 2945.59 and Evidence Rule 404(B) because it “is part of the immediate background of the instant offenses.” See *State v. Curry*, 43 Ohio St. 2d 66, 73 (1975) (providing that the other acts must be “inextricably related” to the alleged criminal act).

{¶17} A jury is entitled to know the “setting” of a case, including evidence of other crimes that explains the circumstances or tends logically to prove any element of the offense charged. *State v. Wilkinson*, 64 Ohio St. 2d 308, 317 (1980) (quoting *United States v. Roberts*, 548 F.2d 665, 667 (6th Cir. 1977)); see *State v. Thompson*, 66 Ohio St. 2d 496, 498 (1981) (explaining that other acts testimony is admissible if “the challenged evidence plays an integral part in explaining the sequence of events and is necessary to give a complete picture of the alleged crime.”). Although Mr. Thomas admitted in his opening statement that he hit Ms. Montgomery, he denied breaking into her house or abducting her. Ms. Montgomery’s testimony that Mr. Thomas had a history of violence and that she broke up with him for good after he attacked her and beat her violently gave the jury a complete picture of the status of their relationship at the time of the offenses. The fact that Mr. Thomas had previously injured Ms. Montgomery and that that was her motivation for ending their relationship undermined Mr. Thomas’s suggestion that he had been allowed into Ms. Montgomery house. Rather, it supported the State’s theory that Mr. Thomas committed aggravated burglary by forcibly breaking into Ms. Montgomery’s house with the intent to harm her. See R.C. 2911.11(A) (providing that “[n]o person, by force, . . . shall trespass in an occupied structure . . . with purpose to commit in the

structure . . . any criminal offense . . .”). We, therefore, conclude that the trial court correctly allowed Ms. Montgomery to testify about Mr. Thomas’s prior violent behavior. Mr. Thomas’s assignment of error is overruled.

CONCLUSION

{¶18} The trial court correctly allowed the State’s witnesses to testify about Mr. Thomas’s other acts. The judgment of the Lorain County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

KENNETH N. ORTNER, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.