

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. 2009 AP 03 0015
	:	
	:	
STEVEN S. KIENZLE	:	<u>OPINION</u>
	:	
Defendant-Appellant		

CHARACTER OF PROCEEDING: Criminal Appeal from Tuscarawas County Court of Common Pleas Case No. 2008 CR 0239

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 5, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, P.J.

{¶1} Appellant, Steven S. Keinzle, appeals a judgment of the Tuscarawas County Common Pleas Court convicting him of assault of a peace officer in violation of R.C. 2903.13(B) and (C)(3). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On May 13, 2008, Patrolman Chad Hilty of the Bolivar Police Department received a complaint of a four wheeler operating illegally on a roadway. Patrolman Hilty remembered seeing a four wheeler in the driveway of the Kienzle residence at 349 East Street in the village. Patrolman Hilty and an officer in training headed toward the Kienzle residence in a patrol car.

{¶3} Upon approaching the area of the Kienzle residence, Hilty saw a four wheeler traveling on the roadway. The four wheeler turned into the Kienzle driveway. When the operator of the four wheeler saw the police cruiser, he continued out the back of the property and across a field toward Ladyne Street. Patrolman Hilty got out of the cruiser and waited in the driveway, out of view of the four wheeler, while the officer in training proceeded to Ladyne Street in the cruiser.

{¶4} The four wheeler returned to the Kienzle driveway. At that point, Patrolman Hilty stepped out from where he was hiding so the driver could see him. The driver hit the back brake and came to a sliding stop. Hilty told the driver to get off the vehicle. The driver then accelerated the four wheeler and came toward the officer. Hilty jumped to the side and grabbed the operator, and the four wheeler stopped right next to him.

{¶5} Hilty threw his other arm around the driver and said, "Get off," trying to pull the operator off the four wheeler. The driver then accelerated rapidly. Patrolman Hilty was pulled off his feet and drug by the four wheeler. Hilty pulled himself up and told the driver to stop. The driver continued to go faster and faster. Hilty attempted to turn the ignition off, but the four wheeler kept going faster and he was losing his grip. Hilty said to the driver, "If I fall off here I'm gonna shoot you in the back." Tr. 172. Hilty fell off the four wheeler, after traveling about one hundred yards, and slid 10-15 feet after the fall. The driver kept going.

{¶6} Hilty was unable to identify the driver of the four wheeler, who was wearing a full face helmet with the eye area open. The driver smelled like alcohol, and there were beer cans in the Kienzle driveway where Hilty encountered the four wheeler.

{¶7} Patrolman Hilty broke the knuckle on the middle finger of his right hand and sought treatment at Union Hospital. The injury caused his middle finger to be stuck in a rigid, stiff position even after the splint was removed. Hilty underwent one month of physical therapy for the injury and did not return to work until August or September of 2008.

{¶8} John Yant worked with appellant at Slesnicks Iron and Metal. Appellant came to work one day with a red neck. Appellant told Yant that he ran from police on his four wheeler. According to appellant, the cop hid in the bushes and appellant thought the police were gone, but the cop "jumped out and grabbed him." Tr. 204. Appellant tried to get away and the cop had him around the neck. Appellant relayed that he finally hit third gear and the cop fell off, and that "the cop said that [appellant]

needed to pull over or he was going to shoot.” Tr. 205. After the policeman fell off, appellant got away.

{¶9} Yant later became aware that appellant sold the four wheeler to a coworker and bought two minibikes. Yant saw the minibikes at Rocky’s Bar in Bolivar, including a red and white “crotch rocket” bike.

{¶10} Joey Jay Owens was employed as a Bolivar police officer on May 31, 2008. While on duty, he received a report of minibikes traveling in the roadway on Rte. 212 in the village. Almost immediately after receiving the complaint, Owens saw a minibike traveling on the roadway coming toward him. The bike left the roadway, entered a truck turn around and crashed. The driver picked the bike up and ran away carrying the bike. Officer Owens directed the driver to stop, which he did not. Officer Owens walked into the woods where he found a red and white “crotch rocket” minibike leaning against a tree. When he walked over to confiscate the bike, he saw appellant hiding about ten feet away. Appellant jumped up, looked at the officer and ran.

{¶11} Appellant was indicted by the Tuscarawas County grand jury with one count of assault on a peace officer. Following jury trial in the Tuscarawas County Common Pleas Court, he was convicted as charged and sentenced to twelve months incarceration. He assigns two errors on appeal:

{¶12} “I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION AND THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF EVIDENCE (SIC).

{¶13} “II. THE TRIAL COURT ERRED IN PERMITTING ‘OTHER ACTS’ EVIDENCE TO BE PRESENTED TO THE JURY.”

I

{¶14} Appellant argues that his conviction is against the manifest weight and sufficiency of the evidence.

{¶15} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and “in reviewing the entire record, ‘weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury clearly lost its way and created 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-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶16} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶17} Appellant was convicted of violating R.C. 2903.13(B) and (C)(3):

{¶18} “(B) No person shall recklessly cause serious physical harm to another or to another’s unborn.

{¶19} “(C) Whoever violates this section is guilty of assault, and the court shall sentence the offender as provided in this division and divisions (C)(1), (2), (3), (4), (5), and (6) of this section. Except as otherwise provided in division (C)(1), (2), (3), (4), or (5) of this section, assault is a misdemeanor of the first degree.

{¶20} “(3) If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, a firefighter, or a person performing emergency medical service, while in the performance of their official duties, assault is a felony of the fourth degree.”

{¶21} Appellant argues that the state failed to prove that he was the driver of the four wheeler. He argues that Patrolman Hilty was unable to identify him as the operator of the four wheeler, and John Yant only came forward with information regarding the statement appellant made to him at work when Yant was arrested and held at the Bolivar Police Department for reckless operation and operating a motor vehicle while intoxicated.

{¶22} Although Patrolman Hilty was unable to identify appellant, he encountered appellant in the driveway of the Kienzle residence. While Yant may have been motivated to share appellant’s story with the police by his personal circumstances at the time, his account of events as reported to him by appellant were consistent with Hilty’s account of the incident. Further, Yant was aware that appellant sold his four wheeler and purchased a small red and white minibike soon after the incident. Shortly thereafter, appellant was seen fleeing from the police on a red and white minibike. Officer Joey Owens was able to identify appellant in court as the driver of the minibike.

{¶23} The verdict is not against the manifest weight and sufficiency of the evidence. The first assignment of error is overruled.

II

{¶24} In his second assignment of error, appellant argues that the court erred in admitting evidence of the incident in which he fled from Officer Owens on the red and white “crotch rocket” minibike, because such evidence is inadmissible “other acts” evidence and its probative value is outweighed by the danger of unfair prejudice.

{¶25} The admission or exclusion of relevant evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343. Any error in the admission of evidence must be analyzed under an abuse of discretion standard of review. “The term ‘abuse of discretion’ implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶26} Evid. R. 404(B) provides:

{¶27} “Evidence 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.”

{¶28} Because Evid.R. 404(B) codifies an exception to the common law with respect to evidence of other acts of wrongdoing, it must be construed against admissibility, and the standard for determining admissibility of such evidence is strict. See *State v. Broom* (1988), 40 Ohio St.3d 277, 281-282, 533 N.E.2d 682, citing *State v. Burson* (1974), 38 Ohio St.2d 157, 158-159, 67 O.O.2d 174, 175, 311 N.E.2d 526, 528; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 194, 31 OBR 390, 392, 509 N.E.2d 1256, 1259. Neither the rule nor the statute contains the words “like” or “similar.” *Id.* at 282.

The rule and statute contemplate acts which may or may not be similar to the crime at issue. *Id.* If the other act does in fact “tend to show” by substantial proof any of the things enumerated, including identity, then evidence of the other act may be admissible. *Id.*

{¶29} Appellant also argues that the evidence was inadmissible under Evid. R. 403(A):

{¶30} “Although 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.”

{¶31} As an appellate court, we will not interfere with a trial court's balancing of probative value and prejudice “unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby.” *State v. Slagle* (1992), 65 Ohio St.3d 597, 602, 605 N.E.2d 916.

{¶32} Appellant filed a motion in limine to exclude Officer Owens’s testimony about the incident on the minibike and also registered a continuing objection at trial. Tr. 219.

{¶33} The evidence concerning the incident with Officer Owens was admissible to prove identity. Patrolman Hilty was unable to identify the driver of the four wheeler. Appellant recounted the incident to John Yant, who also knew that appellant sold the four wheeler and bought two minibikes, at least one of which was red and white. Officer Owens later saw appellant on a red and white “crotch rocket” bike. He was able to identify appellant when appellant initially fled from the police and when he saw him hiding near the bike in the woods. The evidence of the incident with Owens was used

to connect with John Yant's testimony to prove that appellant was the operator of the four wheeler during the May 13, 2008, incident with Patrolman Hilty. The court did not abuse its discretion in admitting the evidence under Evid. R. 404(B).

{¶34} Further, the probative value of the evidence was not outweighed by the danger of unfair prejudice. The evidence of the other incident was probative on the issue of identity. The evidence in this case was simple and straightforward, and presented through the testimony of only three witnesses, reducing the possibility of confusion. Appellant has not demonstrated unfair prejudice through the admission of Officer Owens's testimony.

{¶35} Appellant also argues that the court committed plain error in failing to give a limiting instruction on the use of the other acts evidence. Appellant failed to request a limiting instruction or object to the instructions as given, but argues that the failure to do so was plain error under Crim. R. 52(B). In order to prevail under a plain error analysis, appellant must demonstrate that the result of the proceeding would clearly have been different but for the error. E.g, *State v. Gibbons* (March 30, 2000), Stark App. No.1998CA00158, unreported. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, syllabus 3.

{¶36} Appellant has not demonstrated that the result of the proceeding clearly would have been different had the court given a limiting instruction concerning the use of the other acts evidence. While the court did not instruct the jury as to how to use the other acts evidence, the prosecutor made the following argument in closing:

{¶37} “Now, I offered that testimony about the red and white minibike. The red and white minibike has nothing to do with this case. The reason that testimony is offered is simply this. It corroborates what Mr. Yant told you. Corroborates that what he told you was that the Defendant was bragging about running from the officer, that he sold the four wheeler, bought a minibike. That’s all corroborated by the fact that two weeks later we have the Defendant on a minibike running from the police. And the event was clearly indentified. You heard from Officer Joe Owens. He provided you with those details. Could clearly identify him. Pointed out the Defendant as being the person that ran from him on that minibike on May 31st, 2008.” Tr. 270.

{¶38} Therefore, although not instructed by the court as to how to use the evidence, the prosecutor explained to the jury that the incident on the red and white minibike had nothing to do with the substance of this case, and explained to the jury that the reason the evidence was offered was to link the incidents together through the testimony of Hilty, Yant, and Owens to prove the identity of the driver of the four wheeler.

{¶39} The second assignment of error is overruled.

{¶40} The judgment of the Tuscarawas County Common Pleas Court is affirmed.

By: Edwards, P.J.

Gwin, J. and

Farmer, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Sheila G. Farmer

JUDGES

JAE/r0224

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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-vs-	:	JUDGMENT ENTRY
	:	
STEVEN S. KIENZLE	:	
	:	
Defendant-Appellant	:	CASE NO. 2009 AP 03 0015

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/Sheila G. Farmer

JUDGES