

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 2003CA00097
MICHAEL ANTHONY HORTON	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Criminal appeal from Stark County  
Common Pleas Court, Case No.  
2002CR1392

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: FEBRUARY 9, 2004

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Boggins, J.*

{¶1} Appellant appeals his conviction by a jury in the Stark County Common Pleas Court on one count of aggravated burglary and one count of assault.

{¶2} Appellee is the State of Ohio.

## STATEMENT OF THE FACTS AND CASE

{¶3} On September 21, 2002, Susan Yerkey was at the home of her daughter, Holly Randolph, babysitting two of her grandchildren. Appellant is the father of these two children.

{¶4} At approximately 6:00 p.m. Ms. Yerkey heard a noise at the back of the house. Upon investigating same, Ms. Yerkey found Appellant in the bathroom. Appellant had entered the bathroom through the window by pushing it from the outside. He also used a chair he found in the backyard to crawl in through the window.

{¶5} According to Ms. Yerkey, she attempted to have Appellant leave through the back door but that he instead continued to advance toward her, stating that he “wanted his children”. (T. at 86). She stated that Appellant smelled of alcohol. Id.

{¶6} Ms. Yerkey attempted to remain between Appellant and the children, holding up her hand to try to keep him back. (T. at 87). Appellant grabbed her hand and began twisting Ms. Yerkey’s little finger. Id. She then swung a tire iron which she had picked up in the living room and hit Appellant in the side of the head with it. Id. Appellant next began beating Ms. Yerkey in the head and about the face. (T. at 87-88). Appellant eventually stopped beating Ms. Yerkey and then asked her not to tell her daughter Holly. (T. at 89). He then left through the living room door. Id. At this point Ms. Yerkey grabbed the children who had been screaming throughout the incident, ran to her neighbor’s house and called 911. Id.

{¶7} Upon responding to the 911 call, Canton Police Officer John Gabbard observed Ms. Yerkey with “a very large lump on her forehead on the right side” that “was so large that when [he] looked at her from the side, it almost looked like a

deformity.” (T. at 123). Ms. Yerkey was transported to Aultman Hospital by paramedics where she was treated for injuries.

{¶8} Ms. Yerkey identified her assailant as Appellant Michael Anthony Horton.

{¶9} On September 28, 2002, Appellant was arrested.

{¶10} The Stark County Grand Jury indicted Appellant on one count of aggravated burglary, in violation of R.C. 2911.11(A)(1), a felony of the first degree and one count of assault, in violation of R.C. 2903.13(A), a first degree misdemeanor.

{¶11} The matter proceeded to a jury trial on December 9, 2002.

{¶12} Prior to voir dire, Appellant made two oral motions in limine, one to exclude any mention of a prior obstruction of justice charge, and one to exclude any mention of Appellant’s prior domestic violence charges as well as telephone messages left by Appellant on the witness’ machine four days prior to the assault. The trial court sustained the second motion as it pertained to Appellant’s prior criminal record but overruled it as to the telephone messages. With regard to the first motion, the trial court ruled that the State must first approach the bench before introducing such evidence. It should be noted that no evidence was presented at trial as to these charges.

{¶13} The jury returned verdicts of guilty as to each of the charges and the trial court sentenced Appellant to six years on the aggravated burglary charge to be served consecutively with six (6) months on the assault charge.

{¶14} It is from this conviction which Appellant now appeals, assigning the following errors for review:

#### **ASSIGNMENTS OF ERROR**

{¶15} “I. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF AND ARGUMENT ABOUT “OTHER ACTS” PROHIBITED BY EVIDENCE RULE 404.”

{¶16} “II. THE APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.”

I.

{¶17} In his first assignment of error, Appellant argues that the trial court erred when it allowed the State to introduce evidence of “other acts” allegedly committed by appellant. We disagree.

{¶18} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. Therefore, we will not disturb a trial court's evidentiary ruling unless we find the trial court abused its discretion. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶19} Evid. R. 404(A) generally provides for the exclusion of evidence as to a “person’s character or a trait of his character for the purpose of proving that he acted in conformity therewith on a particular occasion.” In turn, Evid. R. 404(B) provides as follows: 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. 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.

{¶20} Evid. R. 404(B) and the admissibility of “other acts” evidence is to be strictly construed against the State. See *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682, paragraph one of the syllabus. However, if the other acts “tend to show” by substantial proof any of those purposes enumerated in Evid. R. 404(B), such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, then the evidence of the other acts is admissible for such limited purpose. Id.

{¶21} Appellant assigns error to the testimony in the following two instances as well as a question asked of Appellant by the prosecutor which we shall address in Appellant’s second assignment of error:

{¶22} Holly Randolph testified at the trial in this matter that appellant had left threatening messages on her voice mail stating that he was going to “f\_ \_ \_ up her world”. This voice mail message was played for the jury.

{¶23} Officer Gabbard testified that he had responded to a domestic violence call at Ms. Randolph’s residence previously for a different victim other than Susan Yerkey.

{¶24} The trial court allowed the above testimony, holding that such evidence could be offered to establish motive. The trial court also provided the jury with the following limiting instruction after the testimony of each of the above witnesses:

{¶25} “...with regard to the testimony of this witness, ...You are not to consider that evidence as it relates to the character of the Defendant or that he may have acted in conformity with that character. You may only concern, for limited purposes, as it may relate to any alleged motive on the part of the Defendant on the night in question.”

{¶26} In *State v. Garner* (1995), 74 Ohio St.3d 49, the Supreme Court held a jury is presumed to follow the court's instructions, including curative instructions.

{¶27} We find the court did not abuse its discretion in overruling the motions in limine and allowing such evidence for the limited purpose of motive.

{¶28} Appellant's first assignment of error is overruled.

## II.

{¶29} In his second assignment of error, Appellant claims that he was denied a fair trial based on alleged prosecutorial misconduct. We disagree.

{¶30} Specifically, Appellant argues that the prosecutor committed misconduct when the prosecutor questioned him as to whether he had paid any child support.

{¶31} The test for prosecutorial misconduct is whether the prosecutor's comments and remarks were improper and if so, whether those comments and remarks prejudicially affected the substantial rights of the accused. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293. In reviewing allegations of prosecutorial misconduct, it is our duty to consider the complained of conduct in the context of the entire trial. *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶32} While we agree that such question was not relevant, we do not find that the asking of such denied him a fair trial, especially in light of the fact that the trial court sustained Appellant's counsel's objection to same, albeit after Appellant had answered, and further gave the jury an instruction to disregard same.

{¶33} Appellant's second assignment of error is overruled.

{¶34} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Boggins, J.

Gwinn, P.J. and

Edwards, J. concur