

[Cite as *Middleburg Hts. v. Bunt*, 2010-Ohio-5479.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94149

CITY OF MIDDLEBURG HEIGHTS

PLAINTIFF-APPELLEE

vs.

MICHAEL J. BUNT, JR.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Berea Municipal Court
Case No. 08-CRB-01672

BEFORE: McMonagle, J., Rocco, P.J., and Dyke, J.

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Michael J. Bunt, Jr., appeals from the trial court's judgment, rendered after a jury trial, finding him guilty of assault and sexual imposition, sentencing him to 120 days in jail, and ordering him to register as a Tier I sexual offender. We affirm.

I

{¶ 2} Two complaints were filed against Bunt in Berea Municipal Court. The first alleged a single count of assault in violation of R.C.

2903.13;¹ the second alleged a single count of sexual imposition in violation of R.C. 2907.06.² Specifically, the first complaint alleged that on September 11, 2008, Bunt knowingly caused or attempted to cause physical harm to K.M., who was then 14 years old, by striking him 60 times with a wooden paddle. The second complaint alleged that then 31-year-old Bunt had sexual contact³ with K.M., a minor, on September 11, 2008.

{¶ 3} Bunt pleaded not guilty and the case proceeded to trial. The evidence at trial demonstrated that K.M. and Bunt's step-son bowled on the same bowling team. K.M.'s mother, Kellie Greene, met Bunt and his wife through the bowling league.

{¶ 4} In early September 2008, Greene became concerned about K.M. because he had missed several homework assignments at school and once failed to come home as scheduled without advising her where he was. Greene confided her concerns to Bunt's wife. Shortly thereafter, Bunt called Greene and offered to help K.M. Bunt explained that he could set up a

¹"No person shall knowingly cause or attempt to cause physical harm to another * * * ."

²"No person shall have sexual contact with another * * * when * * * the other person * * * is thirteen years of age or older but less than sixteen years of age * * * and the offender is at least eighteen years of age and four or more years older than such other person."

³R.C. 2907.01 defines sexual contact as "any touching of an erogenous zone of another, including, without limitation, the thigh, genital, buttock, pubic region or * * * breast for the purpose of sexually arousing or gratifying either person."

computerized calendar to help K.M. keep track of his homework assignments.

{¶ 5} On September 11, 2008, Bunt and his family stopped by Greene's apartment. Greene accepted the Bunt family's offer that K.M. spend the next two nights at their apartment so Bunt could start helping him with the calendar. Greene testified that there was no discussion about disciplining K.M. and she never agreed that Bunt could spank him.

{¶ 6} K.M. testified that after Bunt's children were in bed, Bunt told him to come to his bedroom, where they talked for awhile. Bunt then told K.M. that his mother had given Bunt permission to spank him. Bunt told K.M. that he had two options: Bunt could use a paddle while K.M. wore his underwear, or Bunt could use his hand on K.M.'s bare buttocks. K.M. said that he chose the first option, and Bunt proceeded to paddle him as he was straddled over Bunt's knees. According to K.M., Bunt would paddle him 10-12 times, then stop, talk to him, hug him, and then paddle him again. This was repeated 5-6 times. K.M. testified that the pain from the paddling lasted 3 or 4 days and his bottom was bruised for a week.

{¶ 7} The next day, Bunt gave K.M. a "three strikes and out" rule that if K.M. missed three school assignments within one week, he would receive 10 swats from Bunt.

{¶ 8} After learning what had happened, Greene and her ex-husband reported the incident to the Middleburg Heights Police Department.

Detective Jim Steinmetz contacted Bunt, who subsequently brought a prepared statement with him to the police station. In his statement, Bunt admitted that he had spanked K.M. but contended that he had permission from K.M.'s mother "to do whatever [was] needed to get [K.M.] back in line," including spanking him.

{¶ 9} As part of its case in chief, the city proffered the testimony of Deborah Gurney, who testified that in 1994, she was a clinical supervisor and coordinator of a sexual aggression, drug, and alcohol program at Crossroads, an adolescent counseling agency in Lake County. She stated that in February and March of that year she interviewed Bunt, who was then 17 years old, as part of a sex offender risk assessment for the Lake County Juvenile Court. As a result of those interviews, she prepared an extensive report, lengthy portions of which she read to the jury, over defense counsel's objection.

{¶ 10} Gurney reported that Bunt told her about a pattern of behavior that began when he was 13 years old. Bunt told Gurney that he would manipulate his seven-year-old sister into believing she had done something wrong, and then tell her that he would not inform their parents if she would let him spank her. Bunt reported being sexually aroused by the spanking and seeing his sister's bare bottom. Bunt told Gurney that this behavior escalated to him touching his sister's genitals and masturbating.

{¶ 11} Gurney also read to the jury what Bunt had told her about his sexual activity with seven other child victims, all of whom Bunt admitting to spanking for sexual pleasure. Bunt also told Gurney about his fantasy of being approached by a mother who was having a problem with her child and his offering to intervene. Bunt told Gurney that his fantasy was to become the disciplinarian for the child and to spank the child.

{¶ 12} The city also proffered the testimony of Carlie Delpercio, a social worker employed by Lake County Children Services as an intake social worker. Delpercio investigates reports of child abuse.

{¶ 13} She testified that she interviewed Bunt on February 28, 2006, when he was 28 years old, in connection with incidents involving an 11-year-old boy and a 12-year-old boy. Delpercio prepared a report of the interview and testified from that report. She reported that Bunt told her that the 11-year-old boy lived in his neighborhood and had spent several nights at his apartment. Bunt told Delpercio that he had “tapped” the boy on his buttocks for misbehaving and “smacked” him on his buttocks while they were wrestling. Delpercio testified that when she questioned Bunt about other incidents that had been reported, including Bunt’s fondling of the boy’s buttocks, Bunt told her that he could not recall touching him inappropriately, but did not deny doing so. When Delpercio asked Bunt why, given his history, he would have young boys at his residence and spank them,

he told her that he was not then in a “grooming period,” which Bunt told Delpercio meant getting boys “used to having contact with him so that he could possibly do more things to them in the future.”

{¶ 14} Bunt told Delpercio that the 12-year-old boy had stayed at his apartment for two months when his foster mother became ill. He reported an incident when he picked the boy up while he was undressed, put him in the bathtub, and then looked in the bathroom while the boy was bathing.

{¶ 15} The jury convicted Bunt of both counts as charged. On the assault charge, the trial court imposed a sentence of 90 days in jail, a fine of \$250, and five years probation with conditions including counseling and treatment. On the sexual imposition charge, the court imposed a sentence of 30 days in jail consecutive to the 90-day sentence, for a total of 120 days. The court also ordered Bunt to register as a Tier I sex offender.

II

{¶ 16} Before trial, Bunt moved in limine to exclude any reference to the Lake County Children Services records pertaining to him. Bunt argued that the records contained “other acts” evidence that was too remote in time to be relevant and, even if relevant, unfairly prejudicial. The trial court denied the motion after a hearing, ruling that the records were relevant and their probative value was not outweighed by any prejudice. In his single assignment of error, Bunt challenges the trial court’s ruling.

{¶ 17} 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.

{¶ 18} 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.” (Emphasis added.)

{¶ 19} Evid.R. 404(B) is in accord with R.C. 2945.59, which states 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.”

{¶ 20} Because the statute and the rule codify an exception to the common law with respect to other acts of wrongdoing, they are to be

construed against admissibility. *State v. Murray*, 8th Dist. No. 91268, 2009-Ohio-2580, citing *State v. Broom* (1988), 40 Ohio St.3d 277, 281-282, 533 N.E.2d 682; *State v. Lowe* (1994), 69 Oho St.3d 527, 530, 634 N.E.2d 616.

{¶ 21} 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. Additionally, the prior acts must not be too remote in time, and must be closely related in nature, time, and place to the offense charged. *State v. Sawyer*, 8th Dist. No. 79197, 2002-Ohio-1095, citing *State v. Henderson* (1991), 76 Ohio App.3d 290, 294, 601 N.E.2d 596. A prior act that is “too distant in time or too removed in method or type has no permissible probative value.” *State v. Snowden* (1976), 49 Ohio App.2d 7, 10, 359 N.E.2d 87.

{¶ 22} Further, like all evidence, other acts evidence is subject to the limitations provided in Evid.R. 402 and 403; therefore, the proffered evidence must be relevant and its probative value must outweigh its potential for unfair prejudice. *Murray*, supra, citing *State v. Gaines*, 8th Dist. No. 82301, 2003-Ohio-6855, ¶16. Bunt argues that the “other acts” evidence contained in the Lake County Children Services records was not relevant because the events referred to therein were too remote in time from the alleged offense

against K.M. He further contends that even if the other acts were relevant, their probative value was outweighed by the danger of unfair prejudice and should have been excluded under Evid.R. 403(A).⁴ The city, on the other hand, contends that the “other acts” evidence was properly admitted as evidence of Bunt’s intent in spanking K.M., i.e., to obtain sexual pleasure, a necessary element of the offense of sexual imposition.

{¶ 23} We find no error in the admission of Delpercio’s testimony about the incidents that occurred in 2006, when Bunt was 28 years old. Those events occurred only two years prior to the offenses at issue here and, like the incident with K.M., involved Bunt’s spanking and inappropriate touching of young boys. These events were not so remote in time or unrelated to the offenses charged as to render them irrelevant. Furthermore, these prior acts were relevant to the issue of Bunt’s intent in paddling K.M., one of the permissible purposes for admission of other acts evidence. Although the dissent contends that Delpercio’s testimony was “replete” with hearsay, Bunt did not raise any objection on this basis in his motion in limine, at the hearing on the motion, or on appeal.

{¶ 24} Nor do we find the statements unfairly prejudicial under Evid.R. 403(A). “All evidence is prejudicial to the opposing party in the sense that all

⁴Evid.R. 403(A) states that “[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.”

evidence is unfavorable to the party against whom it is introduced. Evid.R. 403(A) requires more than a demonstration of prejudice but, rather, requires a showing of unfair prejudice.” *Vitti v. LTV Steel Co.* (Feb. 9, 1995), 8th Dist. No. 67052. “Evidence that arouses emotions, evokes a sense of horror, or appeals to an instinct to punish may be unfairly prejudicial.” *State v. Cooper*, 147 Ohio App.3d 116, 2002-Ohio-617, 768 N.E.2d 1223, ¶57. Unfairly prejudicial evidence appeals to emotions rather than intellect. *Oberling v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 159, 172, 2001-Ohio-248, 743 N.E.2d 890. But evidence of the accused’s own actions is rarely unfairly prejudicial so long as it is relevant to the essential elements of the offense. *State v. Geasley* (1993), 85 Ohio App.3d 360, 372, 619 N.E.2d 1086.

{¶ 25} We do not find Delpercio’s testimony about Bunt’s reported “tapping” and “smacking” a young boy on his buttocks while wrestling or carrying a naked boy to the bathtub to be such emotionally-charged or horrible testimony that a jury would be unable to rationally evaluate the evidence in this case and decide whether Bunt’s actions constituted assault and sexual imposition. Thus, the trial court did not abuse its discretion in determining that the probative value of the evidence case outweighed its potential for unfair prejudice.

{¶ 26} Gurney’s testimony about the events that occurred prior to 1994 should have been excluded, however, because the events were too remote in

time to the charged offenses to be relevant to anything. Although the city contends the evidence was relevant to Bunt's intent in spanking K.M., "[e]vidence of a defendant's previous sexual activity is not admissible to show motive or intent if it is too remote from, or not closely related in time to, the offense charged. For other acts evidence 'to be relevant to the issue of intent, [it] must have such a temporal, modal, and situational relationship with the acts constituting the crime charged that evidence of the other acts discloses purposeful action in the commission of the offense in question.'" *State v. Williams*, 8th Dist. No. 92714, 2010-Ohio-70, ¶48. Gurney's testimony was about events that occurred some 15 years before the offenses charged in the complaints. Bunt was a juvenile when the events occurred (some of the events occurred when he was only 13 years old) and when he reported the incidents to Gurney. His statements to Gurney were made without the assistance of counsel and there was no evidence regarding any criminal adjudication with respect to the incidents. Because the incidents Gurney testified about "occurred in an entirely different setting and time," they are too remote to be admissible under either Evid.R. 404(B) or R.C. 2945.59. *State v. Chapman* (1959), 111 Ohio App. 441, 442, 68 N.E.2d 14.

{¶ 27} Nevertheless, we find admission of this other acts evidence to be harmless error. Before an error can be considered harmless, we must be able to "declare a belief that it was harmless beyond a reasonable doubt." *State*

v. Craig, 8th Dist. No. 93137, 2010-Ohio-1857, ¶32, quoting *Chapman v. California* (1967), 386 U.S. 18, 24, 876 S.Ct. 824, 17 L.Ed.2d 705. “Where there is no reasonable possibility that the unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal.” *Id.*, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623, paragraph three of the syllabus, vacated on other grounds in (1978), 438 U.S. 910, 98 S.Ct. 3135.

{¶ 28} Here, we find sufficient evidence was presented to convict Bunt exclusive of Gurney’s improper other acts testimony. With respect to the assault charge, K.M. testified that Bunt spanked him 60 times with a paddle and that he suffered pain and bruising from the spanking. His mother testified that she never gave Bunt permission to spank K.M. Thus, the jury could have concluded beyond a reasonable doubt that Bunt assaulted K.M.

{¶ 29} Regarding the sexual imposition charge, Delpercio testified about two incidents that occurred only two years prior to the incident at issue, when Bunt was 28 years old, and likewise involved Bunt’s inappropriate spanking and touching of young boys. She testified further that Bunt told her he knew when he was in a “grooming period,” which he explained meant “getting boys used to having contact with him so that he could possibly do more things to them in the future.” In light of this testimony, the jury could have easily concluded beyond a reasonable doubt that Bunt’s intent in spanking K.M. was

sexual gratification, not discipline. Accordingly, the admission of any other acts evidence related to Bunt's actions as a juvenile, as testified to by Gurney, was harmless error and not grounds for reversal. Appellant's assignment of error is therefore overruled. Affirmed.

It is ordered that appellee recover from appellant 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.

CHRISTINE T. McMONAGLE, JUDGE

ANN DYKE, J., CONCURS;
KENNETH A. ROCCO, P.J., DISSENTS WITH OPINION.

KENNETH A. ROCCO, P.J., DISSENTING:

{¶ 30} Since, in my review of the record in this case, I believe that the trial court erred in admitting all of the evidence to which Bunt objected, I respectfully dissent.

{¶ 31} In setting forth the facts of this case, the majority opinion gives great credence to the testimony of the victim and his parents. However, I do not find

their accounts to be either convincing or consistent. For instance, according to the victim's written statement that he provided to the police, his mother *sent* him to Bunt for "discipline"; the family members' testimony on this point, therefore, vacillated.

{¶ 32} The evidence presented at trial clearly demonstrated that the victim's parents were divorced and had shared custody of him, but strongly disagreed about child-rearing practices. Moreover, the victim's mother had health problems and, at the time the incident occurred, she was having difficulty relating to the victim.

{¶ 33} As the majority opinion states, the victims' mother confided her problems to Bunt's wife. Bunt's wife suggested Bunt could perhaps help with the situation. The testimony demonstrates that the three adults conducted a meeting with the victim to discuss whether Bunt should become involved, and the four of them all decided it was worth a try.

{¶ 34} None of this, however, was shared with the victim's father until afterward. By the time of trial, the victim's mother declared she never gave Bunt permission to administer any physical discipline to the victim. She also stated her ex-husband felt "insulted" by Bunt's involvement.

{¶ 35} In any case, the victim testified that, on the night in question, Bunt gave him a sort of "intervention" for failing to meet his school responsibilities. It consisted of a long talk between the victim and Bunt in Bunt's bedroom, followed by a "paddling," followed by a hug, then more talk, then another paddling, etc.

{¶ 36} The victim testified Bunt administered 6 sets of 10 strikes, for a total of 60, leaving the victim sore and in tears. The victim also testified that, prior to administering the punishment, Bunt gave him a choice: “use the paddle and keep my underwear on, or bare hand, but it would be with my underwear off.” This latter detail, however, *was not included* in the victim’s statement to the police.

{¶ 37} The incident upon which Bunt’s convictions were based came to light only when the victim’s father snooped in his son’s notebook and read some details about Bunt’s methods. The father confronted the victim, expressed outrage about the situation, and took his son to the police. In light of his father’s disapproval, the victim went along with him in making a formal complaint against Bunt of assault and sexual imposition.

{¶ 38} The case was assigned to Det. Jim Steinmetz. Steinmetz quickly performed a “background check” on Bunt, and discovered he had been the subject of an investigation by the Lake County Children Services Department for possible sexual abuse of two teenaged boys. Steinmetz telephoned the social worker who had conducted the investigation, Carlie Delpercio.

{¶ 39} When Delpercio heard about the allegations made by the victim and his father, she urged Steinmetz to request a “fax” of *all* the records pertaining to her investigation. Steinmetz followed her urging; by this means, he obtained all of Bunt’s records from his early years in Lake County. Although no charges against Bunt had resulted from Delpercio’s investigation, psychological assessments made of Bunt *as a teenager* indicated he administered “spankings”

to get sexual gratification.

{¶ 40} When the case proceeded to a jury trial, the city presented *as its first witness* Deborah Gurney, an adolescent counselor at “Crossroads.” She testified in lengthy and exquisite detail about her interview with Bunt in 1994, when he was referred for a “risk assessment” for sexual deviancy. The majority opinion acknowledges that the trial court improperly admitted her testimony.

{¶ 41} The city’s *second* witness was Delpercio; she also testified about her investigation of Bunt that took place in 2006, and *described what the alleged victims told her*. The defense continually objected to these two witnesses’ testimony without avail.

{¶ 42} Thereafter, the victim’s mother, father and the victim himself testified. None of them indicated Bunt obtained obvious sexual gratification from “paddling” the victim; nevertheless, the jury convicted Bunt on both counts.

{¶ 43} In his sole assignment of error, Bunt asserts the admission of this evidence contravened both Evid.R. 404(A) and R.C. 2945.59. In my view, it would be difficult to find a case in which the error could be more obvious. In fact, during the hearing, the trial court actually stated, on the record, that the city intended to introduce the “other acts” evidence in order to prove Bunt’s “propensity” to “spank” young children to obtain sexual gratification. Thus, the record demonstrates the trial court believed that this was exactly what the rule *permitted*, in complete contravention of the language of Evid.R. 404(B).

{¶ 44} The majority opinion concludes that Delpercio’s testimony was

admissible to prove “intent.” It is important to note, however, that Delpercio’s testimony was replete with hearsay. Moreover, the record reflects the trial court exercised no discernment whatsoever in overruling Bunt’s objections throughout the proceeding.

{¶ 45} Likewise, the majority opinion exhibits no discernment in stating the admission of Gurney’s testimony constituted “harmless error.” The majority opinion concedes that Bunt spoke with Gurney when he was a child and had no awareness of its potential use against him in the future, but fails to consider that Gurney not only was the city’s first witness, but that she testified at great length. The sheer amount of the “other acts” evidence presented prior to the testimony of the victim and his parents was so profuse that the jury could hardly fairly consider the remaining evidence. Therefore, in my view, it was unduly prejudicial.

{¶ 46} Under the circumstances presented in this case, I believe the trial court abused its discretion. I would, accordingly, sustain Bunt’s assignment of error, reverse his convictions, and remand this case for a new trial.