

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2008-08-197
 :
 - vs - : OPINION
 : 8/24/2009
 :
 WALTER M. THOMAS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR08-05-0897

Robin N. Piper, Butler County Prosecuting Attorney, Kelly E. Heile, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Patrick E. McKnight, P.O. Box 621, Monroe, Ohio 45050, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Walter M. Thomas, appeals his conviction for felonious assault, possession of cocaine, and abduction. We affirm.

{¶2} Appellant and Donna Mathers have known each other for over 30 years and were involved in a romantic relationship between January 2006 and February 2008. On March 26, 2008, appellant was scheduled to look after Mathers' sister, who was in poor health and needed assistance for nearly all of her daily activities. Upon arrival at the sister's

residence in Middletown, appellant discovered that nobody was present at the house and that he could not get inside. Appellant went next door to call Mathers by telephone. Mathers arrived about 25 minutes later.

{¶3} Appellant requested that Mathers drive him to his mother's home, but Mathers ignored appellant's request and went inside the residence. Appellant accompanied her inside, where they continued to argue. Appellant walked towards Mathers. According to appellant, Mathers told appellant to hit her and he did. The blow knocked the chair Mathers was sitting in over and Mathers fell to the floor. Appellant then struck Mathers two or three times with the chair. According to appellant, Mathers came at him with a knife, a struggle ensued, and appellant stabbed her in the back with the knife. According to Mathers, she never went after him with a knife. Mathers testified that after he hit her, "I was hurt and frightened to death. I was scared he was going to kill me."

{¶4} Appellant told Mathers not to run because he could run faster and that he would finish her when he caught her. Appellant then forced her outside at knifepoint. As they walked outside, Mathers told appellant that she could not go any further because she was short of breath. Appellant instructed her to go back in the house. Appellant then tucked the knife into his coat pocket and walked down the street.

{¶5} Appellant was apprehended shortly thereafter. He was confronted by an officer and ordered to the ground at gunpoint. As appellant went to the ground, the officer observed him drop a baggy containing cocaine.

{¶6} Appellant was charged with one count of felonious assault in violation of R.C. 2903.11(A)(2), one count of possession of cocaine in violation of R.C. 2925.11, and one count of abduction in violation of R.C. 2905.02(A). Prior to trial, appellant's counsel filed a motion in limine to prevent the prosecution from introducing evidence of appellant's prior conviction for voluntary manslaughter resulting from an incident where appellant stabbed a

previous girlfriend in the chest. The trial court denied the motion. Following a jury trial, appellant was found guilty as charged. Appellant was sentenced to eight years in prison for felonious assault to run consecutive to one year for possession of cocaine, and five years for abduction, with an additional seven years for a repeat violent offender specification. Appellant timely appeals, raising two assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE REGARDING PRIOR ACTS COMMITTED BY APPELLANT."

{¶9} In his first assignment of error, appellant claims the trial court abused its discretion by allowing the introduction of evidence relating to a previous conviction. Appellant urges that the evidence violates Evid.R. 404(B).

{¶10} A trial court's decision to admit or exclude evidence will not be reversed by a reviewing court absent an abuse of discretion. *State v. Craft*, Butler App. No. CA2006-06-145, 2007-Ohio-4116, ¶48. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶11} Evid.R. 404(B) provides, "[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."

{¶12} Before trial, the prosecution informed appellant that it intended to introduce evidence relating to appellant's conviction in 1994 for voluntary manslaughter. In that earlier conviction, appellant stabbed a former girlfriend. Appellant's trial counsel filed a motion in limine to prevent introduction of the evidence. The trial court denied the motion.

{¶13} Before introduction of the evidence at trial, the trial court provided the following

limiting instruction, "The court is going to permit at this point a limited amount of testimony to come in about a prior incident, which occurred years before this particular incident. * * * And before you hear the evidence, I want you to make sure you understand why the Court is going to permit this evidence to come in, okay. It's relevant because it goes to this victim's state of mind. Again, when the court gives you an instruction of abduction, one of the elements that must be considered by you is whether or not the victim was in fear of her life or not * * *. The Court wants to make sure that you understand this evidence is received only for that limited purpose to show her state of mind at the time this act occurred, and it was not received and you may not consider it to prove the character of the defendant in order to show that he acted in conformity or in accordance with that character, okay. So it has a very limited purpose * * *. It's only to show her state of mind. So please keep that in mind with this admonition."

{¶14} Mathers testified at trial that she was in fear when appellant forced her outside the house at knifepoint and that she believed he was capable of killing her "because he stabbed a woman back in 1994." Appellant also testified regarding the previous conviction and his version of the incident. According to appellant, the former girlfriend wished to commit suicide and that she provoked him into stabbing her in the chest.

{¶15} The crime of "abduction," for the purposes of this case, is defined as: "[n]o person, without the privilege to do so, shall knowingly * * * by force or threat restrain the liberty of another person, under circumstances which create a risk of physical harm to the victim or place the other person in fear." R.C. 2905.02(A)(2).

{¶16} After review, we find no abuse of discretion by the trial court. The testimony relating to appellant's prior criminal actions was relevant to an element of the crime, specifically the victim's fear based upon her knowledge of appellant's previous attack of a girlfriend. *State v. Kelly* (1993), 89 Ohio App.3d 320, 323-324. In addition, the trial court

properly limited the scope of the evidence.

{¶17} Even if the issues of stabbing and the previous conviction had not been introduced at trial, overwhelming evidence of appellant's guilt was still introduced. Appellant admitted hitting Mathers in the face and repeatedly hit her with a chair. He then forced her outside at knifepoint. Accordingly, we also do not find that the probative value of the evidence relating to appellant's previous conviction is substantially outweighed by the danger of unfair prejudice. Evid.R. 403(A).

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

{¶19} Assignment of Error No. 2:

{¶20} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO ISSUE A JURY INSTRUCTION REGARDING THE ISSUE OF ACCIDENT."

{¶21} In his second assignment of error, appellant argues that he was entitled to an accident instruction and the trial court erred by failing to provide the instruction to the jury. Appellant cites his testimony at trial, claiming that Mathers ran at him with the knife and he accidentally stabbed her in the back as he attempted to disarm her.

{¶22} Appellant acknowledges that his trial counsel failed to request an instruction based upon a defense of accident, limiting this court's review to a plain error standard. *State v. Hill*, 92 Ohio St.3d 191, 196, 2001-Ohio-141. However, appellant urges that the trial court's error was obvious and resulted in prejudice.

{¶23} "Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, ¶38. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage

of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 95.

{¶24} "Accident is that which is unintentional and unwilled and implies a lack of criminal culpability." *State v. Ross* (1999), 135 Ohio App.3d 262, 276. "Accident will be found only if the defendant's action or the resulting injury were a 'mere physical happening or event, out of the usual order of things and not reasonably (anticipated) (foreseen) as a natural or probable result of a lawful act.'" *Id.* To be entitled to a jury instruction on accident, there must be evidence to support the argument that appellant acted lawfully and that the result was unintended. *Id.* at 277, citing *State v. Poole* (1973), 33 Ohio St.2d 18, 20.

{¶25} Appellant has failed to demonstrate that he would have been entitled to an instruction on accident, even had trial counsel requested one, or that such an instruction would have altered the outcome of the trial. Overwhelming evidence was presented that appellant acted unlawfully. Appellant admitted hitting Mathers repeatedly, first with his fist and then multiple times with a chair. Even assuming that Mathers was retaliating against appellant by coming at him with the knife, appellant initiated the attack, creating the situation in which she was injured, and failed to avoid further confrontation. *Ross* at 277.

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

{¶27} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.

[Cite as *State v. Thomas*, 2009-Ohio-4261.]