**[Cite as *State v. Sargent,* 2015-Ohio-704.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-13-1125

Appellee — Trial Court No. CR0201301361

v.

Kenneth R. Sargent, II — **DECISION AND JUDGMENT**

Appellant — Decided: February 27, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jennifer Liptack-Wilson, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

**PIETRYKOWSKI, J.**

**{¶ 1}** Kenneth Sargent appeals his conviction and sentence on a charge of felony domestic violence, a violation of R.C. 2919.25(A) and (D)(4), and a felony of the third

degree. The judgment is based upon a guilty verdict returned by a jury at trial in the Lucas County Court of Common Pleas. Under the judgment, the trial court sentenced appellant to serve a 36 month prison term.

**{¶ 2}** The Lucas County Grand Jury indicted appellant on one count of felony domestic violence, a violation of R.C. 2919.25(A) and (D)(4) on March 5, 2013. R.C. 2919.25(A) prohibits a person from knowingly causing or attempting to cause physical harm to a family or household member. R.C. 2919.25(D)(4) elevates the offense to a felony of the third degree for offenders who "previously pleaded guilty to or been convicted of two or more offenses of domestic violence." R.C. 2919.25(D)(4).

**{¶ 3}** The state placed in evidence at trial certified copies of judgments establishing two prior convictions of appellant for domestic violence, judgments in 2006 and 2009. Appellant stipulated that he was the defendant in those two prosecutions and does not contest the admissibility of evidence of the convictions on appeal. *See State v. Tate*, 138 Ohio St.3d 139, 2014-Ohio-44, 4 N.E.3d 1016, ¶ 17.

**{¶ 4}** The case proceeded to trial on June 10, 2013. Ann Beard is appellant's mother. She testified that on March 2, 2013, she and appellant resided together at her home in Toledo, Lucas County, Ohio and that appellant's daughter and Ann Beard's 14-year-old adopted son also resided there. Appellant's daughter was one and one half years old at the time.

**{¶ 5}** Ann Beard testified concerning an incident that occurred at her home on March 2, 2013. She testified that on that date appellant told her he wanted her to take

care of his daughter and "that he couldn't do it right then." Appellant went to his room and threw the child's pack and play bed, highchair, and diaper bag into the kitchen. Ms. Beard told appellant that she needed clothes for the baby.

**{¶ 6}** According to Ms. Beard, appellant then came through the door from his room, into the kitchen and grabbed her by the neck. He grabbed with both hands and choked her so hard that she defecated on herself. Ms. Beard testified that afterwards she returned to her bedroom with the child, fed her and changed her clothes. Ann Beard also testified that she called to her younger son, whose bedroom was across the hall, to come to her bedroom. She called a neighbor, Doris, and asked if they could come over to her house.

**{¶ 7}** Ann Beard testified that before they left for her neighbor's house, appellant came to her room, pointed at her, and stated "if you call the police I'm going to kill you." She testified that appellant then looked at her younger son and tried "to call him out," telling the boy "I am going to F'ing kill you, do you want to do something about it?" After the boy failed to respond, appellant left the house.

**{¶ 8}** Ms. Beard testified that after she cleaned herself up, she took both children to her neighbor's house, where she called police.

**{¶ 9}** The boy testified that his bedroom is located few yards from the kitchen at the house. He heard yelling, including yelling by his mother, as he awoke on the morning of March 2, 2013. His mother got him up and together they went to his

mother's bedroom. He did not see what caused the yelling and specifically did not see his mother being choked. He testified that his mother was very scared when she came to wake him up.

**{¶ 10}** He further testified that appellant spoke to him that morning and stated: "I'm going to F'ing kill you, and you want to do something about it, bitch?" He was in his mother's bedroom approximately ten minutes and then he, his mother, and the baby left for the neighbor's house.

**{¶ 11}** The next door neighbor, who had no contact with appellant, and two responding police officers also testified at trial. Over the objection of appellant, the state also offered other acts evidence through the testimony of Detective Eugene Kurtz of the Toledo Police Department. Detective Kurtz testified that on September 27, 2006, he investigated a prior domestic violence incident involving appellant and further testified as to a statement made by the victim of the crime. He testified that "[t]he victim of the crime stated that the Defendant placed his hands around her neck and strangled her and also assaulted her with his fist, punching her in the face."

**{¶ 12}** The jury returned a guilty verdict for the offense of felony domestic violence at trial. The trial court accepted the verdict and entered a judgment of conviction and sentence on June 14, 2013. Appellant appeals that judgment to this court.

**{¶ 13}** Appellant asserts three assignments of error on appeal:

1. The trial court abused its discretion by letting the State of Ohio present evidence of other acts during its case in chief.

2. Appellant's conviction fell against the manifest weight of the evidence.

3. The trial court abused its discretion in sentencing appellant to a maximum prison term.

**Admissibility of Other Acts Evidence**

**{¶ 14}** Under assignment of error No. 1, appellant contends that the trial court erred when it allowed the state to present other acts evidence at trial concerning his prosecution for domestic violence in 2006. The objection is directed to admissibility under Evid.R. 404(B) of the statement of the victim, describing the manner in which the 2006 offense occurred.

**{¶ 15}** "[T]he admission of evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 62, citing *State v. Issa*, 93 Ohio St.3d 49, 64, 752 N.E.2d 904 (2001). An abuse of discretion is demonstrated where the trial court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶ 16}** "As a general rule, evidence of previous or subsequent criminal acts, wholly independent of the criminal offense for which a defendant is on trial is inadmissible." *State v. Thompson*, 66 Ohio St.2d 496, 497, 422 N.E.2d 855 (1981). Evid.R. 404(B) provides in pertinent part:

> 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.

**{¶ 17}** In *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, the Ohio Supreme Court directed trial courts to conduct a three-step analysis when considering the admissibility of other acts evidence. *State v. Ridley*, 6th Dist. Lucas No. L-10-1314, 2013-Ohio-1268, ¶ 33. The analysis provides:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R 403. *Williams* at ¶ 20.

**{¶ 18}** Our review is limited to determining whether the trial court acted unreasonably, arbitrarily, or unconscionably in admitting other acts evidence in the case.

*State v. Hernandez*, 6th Dist. Lucas Nos. L-06-1388 and L-06-1389, 2009-Ohio-386, ¶ 32.

**{¶ 19}** The state argues that evidence that appellant committed the offense of domestic violence in 2006 by means of strangulation was admissible under Evid.R. 404(B) because the evidence was relevant to show modus operandi and identity in this case.

**{¶ 20}** Appellant argues first, that the other acts evidence was inadmissible because there was no material dispute of fact as to identity. The alleged victim and the alleged offender both know each other. They are mother and son. The identity of the claimed perpetrator has not been in dispute.

**{¶ 21}** We agree. No issue of identify is presented in this case as the dispute at bar is whether a crime occurred, not the identity of the alleged perpetrator. *See State v. Clay*, 187 Ohio App.3d 633, 2010-Ohio-2720, 933 N.E.2d 296, ¶ 45 (5th Dist.); *Mt. Vernon v. Hayes*, 5th Dist. Knox No. 09-CA-00007, 2009-Ohio-6819, ¶ 26.

**{¶ 22}** Under the three-step test in *Williams*, evidence of identity fails the first step because evidence of identity is undisputed and a determination of guilt is not furthered by such evidence. Under the second step, no legitimate purpose is served by use of other acts evidence to prove identity in this case. Finally, under the third step, use of other acts evidence to prove identify is of no probative value on any material issue in dispute and its use is substantially outweighed by the danger of unfair prejudice.

**{¶ 23}** The state's other argument is that the other acts evidence was admissible as evidence of appellant's modus operandi in committing domestic violence. Appellant argues that the state offered evidence of a single prior incident of domestic violence, that the incident occurred seven years before, and that the evidence did not demonstrate any unique method or pattern in committing the offense.

**{¶ 24}** The Ohio Supreme Court has considered admissibility of other acts evidence to prove scheme, plan, and pattern of conduct or modus operandi under Evid.R. 404(B). It has recognized use of other acts establishing modus operandi to prove identity:

> Other acts may also prove identity by establishing a *modus operandi* applicable to the crime with which a defendant is charged. "Other acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B)." *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, syllabus. "'Other acts' may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense." *State v. Smith* (1990), 49 Ohio St.3d 137, 141, 551 N.E.2d 190, 194. While we held in *Jamison* that "the other acts need not be the same as or similar to the crime charged," *Jamison*, syllabus, the acts should show a *modus operandi* identifiable with

the defendant. *State v. Hutton* (1990), 53 Ohio St.3d 36, 40, 559 N.E.2d 432, 438. *State v. Lowe*, 69 Ohio St.3d 527, 531, 634 N.E.2d 616 (1994).

**{¶ 25}** In *State v. Curry*, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975), the Ohio Supreme Court identified two issues on which other acts evidence of scheme, plan or system evidence may be relevant:

> "Scheme, plan or system" evidence is relevant in two general factual situations. First, those situations in which the 'other acts' form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment. In such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible pursuant to this sub-category of "scheme, plan or system" evidence, the "other acts" testimony must concern events which are inextricably related to the alleged criminal act. * * *.
>
> Identity of the perpetrator of a crime is the second factual situation in which "scheme, plan of system" evidence is admissible. One recognized method of establishing that the accused committed the offense set forth in the indictment is to show that he has committed similar crimes within a period of time reasonably near to the offense on trial, and that a similar scheme, plan or system was utilized to commit both the offense at issue and

the other crimes. *Whiteman v. State*, supra, 119 Ohio St. 285, 164 N.E. 51; *Barnett v. State* (1922), 104 Ohio St. 298, 135 N.E. 647. *Id.* at 72-73.

**{¶ 26}** We have determined that other acts evidence is not admissible in this case to prove identity as identity is not in dispute. The evidence does not support, nor does the state claim, that the 2006 incident of domestic violence is inextricably intertwined with the crime charged in this case such that the two are to be treated as one criminal transaction and evidence of other acts admitted on that ground. The 2006 offense is not part of the background of the offense charged in this case. We conclude that other act evidence of the 2006 offense was not admissible in this case under either ground considered in *Curry.*

**{¶ 27}** In *State v. Williams,* the Ohio Supreme Court stated that it did not limit admissibility of other acts evidence showing scheme, plan, or system to the two grounds considered in *Curry. Williams,* 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, at ¶ 18. However, the state has offered no other issue for which evidence of modus operandi is relevant in this case. We find none.

**{¶ 28}** We conclude that the trial court abused its discretion by admitting in evidence the other act evidence of the 2006 victim's statement under Evid.R. 404(B) at trial and that the trial court erred in admitting the other act evidence in this case.

**{¶ 29}** Appellant argues that the error was highly prejudicial and requires reversal of his conviction and sentence and remand for a new trial. The state argues that any error

in the admission of other acts evidence was minimized by the trial court's limiting instruction to the jury on the use of the evidence and that the trial court judgment should be affirmed.

**{¶ 30}** In *State v. Morris,* Slip Opinion No. 2014-Ohio-5052, the Ohio Supreme Court considered the standard to be applied in determining harmless error where a criminal defendant seeks a new trial because of the erroneous admission of evidence under Evid.R. 404(B). The court summarized its analysis in the subsequent decision of *State v. Harris,* Slip Opinion No. 2015-Ohio-166, ¶ 37:

> Recently, in *Morris*, a four-to-three decision, we examined the harmless-error rule in the context of a defendant's claim that the erroneous admission of certain evidence required a new trial. In that decision, the majority dispensed with the distinction between constitutional and nonconstitutional errors under Crim.R. 52(A). *Id.* at ¶ 22–24. In its place, the following analysis was established to guide appellate courts in determining whether an error has affected the substantial rights of a defendant, thereby requiring a new trial. First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. *Id.* at ¶ 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. *Id.* at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining

evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt. *Id.* at ¶ 29, 33.

**{¶ 31}** Ohio has long recognized the dangers presented by admitting other act evidence in criminal prosecutions. These include "[t]he overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts" and "the tendency to condemn not because * * * [the defendant] * * * is believed guilty of the present charge but because he has escaped punishment from other offenses." *Curry*, 43 Ohio St.2d at 68, 330 N.E.2d 720. The risk is "particularly high when the other acts are very similar to the charged offense or of an inflammatory nature." *State v. Miley*, 5th Dist. Richland Nos. 2005-CA-67 and 2006-CA-14, 2006-Ohio-4670, ¶ 58.

**{¶ 32}** A central issue in this case was the credibility of Ann Beard's testimony that appellant grabbed her by the neck with both hands and choked her. No other witness testified to the occurrence. The defense argued credibility, arguing that the responding police officers failed to note that there were any marks around Ms. Beard's neck, that Ms. Beard did not seek medical treatment, and that she delayed 40-45 minutes before leaving the house after the incident.

**{¶ 33}** In our view, the erroneous admission into evidence of other acts evidence of a strangulation by appellant in 2006 in another unrelated incident was highly prejudicial and would have caused a reasonable juror to judge appellant harshly. We conclude that the error impacted the fairness of the trial and had an impact on the jury verdict.

**{¶ 34}** Because we have concluded that the other acts evidence had an impact on the jury verdict, under *Morris* we must next must determine whether the error was not harmless beyond a reasonable doubt. *Morris,* Slip Opinion No. 2014-Ohio-5052, at ¶ 28; *Harris,* Slip Opinion No. 2015-Ohio-166, at ¶ 37. In our view there is a reasonable possibility that the other acts evidence may have contributed to the conviction and we cannot declare a belief that the error was harmless beyond a reasonable doubt.

**{¶ 35}** The third step of the *Morris* analysis requires a court to excise the prejudicial evidence and weigh the remaining evidence "to determine whether it establishes the defendant's guilt beyond a reasonable doubt." *Harris,* Slip Opinion No. 2015-Ohio-166, at ¶ 37, quoting *Morris,* Slip Opinion, 2014-Ohio-5052, at ¶ 29, 33. The state's case hinged on the credibility of Ann Beard's testimony that appellant choked and strangled her. Because of the erroneous admission of other acts evidence, the jury was unable to properly weigh credibility. There were no other witnesses to the incident. After excising the improperly admitted evidence, we cannot state that Ann Beard's testimony established appellant's guilt of felony domestic violence beyond a reasonable doubt.

**{¶ 36}** After conducting the analysis established by the Ohio Supreme Court in *Morris,* we conclude that the improper admission of other acts evidence in this case was not harmless, as it affected appellant's substantial rights. We conclude that appellant is entitled to a new trial.

**{¶ 37}** We find assignment of error No. 1 well-taken.

**{¶ 38}** In view of our ruling on assignment of error No. 1, we find assignments of error No. 2 (asserting that appellant's conviction is against the manifest weight of the evidence) and assignment of error No. 3 (that the trial court erred as to sentencing) to be moot.

**{¶ 39}** We reverse the judgment of the Lucas County Court of Common Pleas and remand the case to the trial court for a new trial. The state is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE