[Cite as *State v. Herrington*, 2015-Ohio-1820.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101322

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY HERRINGTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-572202-A

BEFORE: Celebrezze, A.J., Jones, J., and Boyle, J.

RELEASED AND JOURNALIZED: May 14, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Defendant-appellant, Anthony Herrington, appeals from his convictions in the Cuyahoga County Court of Common Pleas. After careful review of the record and relevant case law, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Procedural and Factual History

{¶2} On October 21, 2013, appellant was indicted and charged with six counts of gross sexual imposition in violation of R.C. 2907.05(A)(1); one count of kidnapping in violation of R.C. 2905.01(A)(4); and one count of illegal use of a minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(3). Five of the gross sexual imposition counts had sexually violent predator specifications. The kidnapping count contained a sexual motivation specification and a sexually violent predator specification.

{¶3} Prior to trial, the court addressed appellant's pretrial motions to exclude other acts evidence pursuant to Evid.R. 404(B). The evidence involved appellant's prior acts against 19-year-old victim, A.H., in 1995. Before the jury was selected, the trial court stated that it would permit A.H. to testify but that evidence of appellant's prior conviction would not be admitted. The court further dismissed the kidnapping count and the sexually violent predator specifications attached to the gross sexual imposition counts. The matter proceeded to jury trial on March 10, 2014.

{¶4} A.H., then 37 years old, was the state's first witness at trial. A.H. testified she knew appellant from the time of her birth. A.H.'s father and appellant were "best friends" and both served as associate ministers at their church. A.H. testified that in 1995, when she was approximately 19 years old, appellant approached her at her parents home and offered to give her driving lessons. A.H. accepted his offer because she wanted to get her drivers license and was excited for the opportunity to learn how to drive. A.H. could not recall whether the driving lessons were discussed with her parents.

{¶5} Over the course of approximately one month, appellant took A.H. for driving lessons on three separate occasions. A.H. stated that after the last driving lesson, she and appellant went to her father's house. When they entered the home, appellant suddenly kissed A.H. She testified that the situation was uncomfortable because she was not attracted to appellant and viewed him as "a second father." After the kiss, appellant took A.H. to the couch and laid her down. A.H. testified that appellant got on top of her and forced her to have sexual intercourse. She stated, "I tried to push him off, but I couldn't get him off of me."

{¶6} The victim in the instant case, T.B., testified that at the time of trial she was 20 years old. She testified that she first met appellant when he began a romantic relationship with her grandmother, Severia Herrington, when T.B. was approximately seven or eight years old. Appellant and Severia married and moved in together when T.B. was nine years old. On separate occasions, T.B. lived with appellant and Severia

when she was 14, 16, and 18 years old. During these instances, T.B. spent no longer than one month at their home.

{¶7} T.B. testified about several incidents when she was inappropriately touched by appellant. The first incident occurred when T.B. was 14 years old. T.B. testified that on that occasion appellant came to her bedroom door at approximately 3:00 a.m. while she and her brother, D.J., were sleeping. T.B. stated that she was awake but pretended to be sleeping when appellant walked to the top of her bed and touched her upper thigh, believing she was asleep. T.B. stated that she immediately moved her leg and appellant stood there for several minutes before he left the room. Subsequently, appellant came back upstairs and brought additional blankets for T.B. and D.J. to use.

{¶8} The remaining incidents occurred after appellant offered to provide T.B. driving lessons when she was 15 years old. On the evening of the first driving lesson, T.B. was in her bedroom watching television at approximately 1:00 a.m. when she went downstairs to get something to eat. As she walked past appellant, she noticed that he was watching "soft porn" on the television. Approximately ten minutes later, appellant came to her room and stated that he could not sleep. Appellant asked T.B. if she wanted to go driving and she said yes. After the driving lesson, T.B. went up to her bedroom. Appellant followed her to her bedroom and said he needed to "check [her] pulse" because "she seemed nervous and tense." Appellant claimed that he had to check T.B.'s pulse on her chest and had her take her shirt off. Appellant then "cupped" her breast over her bra. T.B. testified that she thought it was strange that appellant checked her pulse that way.

{¶9} Approximately two or three weeks later, appellant offered to give T.B. a second driving lesson. While in the vehicle, appellant warned T.B. not to tell anyone about the driving lessons. When they returned home, T.B. went upstairs to her bedroom and appellant followed her. Again, appellant asked if he could check her pulse. On this occasion, appellant had T.B. take off her pants so he could check her pulse by touching her inner leg. T.B. testified that she complied and appellant placed two fingers on her inner thigh and "brushed" his hand over her "private parts."

{¶10} One month later, T.B. went to Severia's home because she was locked out of her mother's home. T.B. testified that appellant was the only one home at the time. Appellant told T.B. that he was going to drive to Akron and that he would let her drive on the freeway if she wanted to join him. T.B. agreed to go with appellant. When they returned home, appellant followed T.B. upstairs to her bedroom and began to give her a massage because he thought she "looked tense." Appellant then asked her to take her shirt off. T.B. testified that she complied because they were alone and she did not know what would happen if she told him no. T.B. stated that appellant continued to give her a massage while she was lying face down on the bed. Appellant then unclasped her bra and took off her pants. T.B. testified that appellant "moved" her underwear to the side and "separated [her] privates" with his fingers. T.B. closed her legs and appellant went downstairs shortly thereafter.

{¶11} In addition to the instances of inappropriate touching, T.B. also recounted a time where appellant asked her to undress in front of a mirror when she was 16 years old. According to T.B., appellant was asking her questions about her aspiring modeling

career and wanted to see her new tattoos. T.B. testified that she undressed to her bra and underwear because she was scared and felt like she did not have a choice.

{¶12} When T.B. was 18 years old, she gave birth to her first child. Weeks later, T.B. told Severia about what appellant had done to her when she was younger. T.B. testified that Severia immediately called appellant on the telephone to question him about each of the incidents. T.B. stated that she could hear appellant responding to Severia's questions on the phone. At one point, T.B. heard appellant state "when were the dates?" Shortly thereafter, T.B. was taken to the police station to file a report against appellant.

{¶13} During her cross-examination, T.B. admitted she had taken appellant's digital camera without permission and was "pretty upset" when Severia barred her from their home for six months as punishment. T.B. further indicated that she did not immediately tell anyone about appellant's conduct and continued to stay in Severia's home after each incident because she did not want to hurt her family and was concerned Severia would stop supporting her financially. Finally, T.B. admitted that she routinely smoked marijuana and had an active warrant for her arrest at the time of trial.

{¶14} T.B.'s brother, D.J., testified that he sometimes would spend the night with T.B. at Severia's home. D.J. testified that one night he recalled seeing appellant standing in their bedroom for five or six minutes. When appellant finally left, T.B. turned the light on and appellant returned to the room with blankets.

{¶15} Charmaine Ross testified that she is friends with T.B.'s mother and considered T.B. to be a niece. Charmaine testified that while T.B. was in the hospital after giving birth to her first child, she became visibly upset and finally told Charmaine what had

happened to her when she was younger. Charmaine advised T.B. that she needed to tell her family. Thereafter, T.B. told her family about each incident. Charmaine testified that she was present in Severia's home when T.B. told her about appellant's actions. Charmaine stated that she witnessed Severia call appellant and confront him about the allegations. During the conversation, Charmaine overheard appellant ask "what were the dates?" She did not hear him deny the allegations.

{¶16} Latasha Harvey testified that she was the ex-girlfriend of T.B.'s uncle and considered T.B. to be a little sister. Latasha stated that she had several conversations with T.B. that caused her concern. She described T.B. as upset, worried, concerned, and afraid during these conversations.

{¶17} Kinshassa Brown, testified that she is T.B.'s aunt. Kinshassa was present in Severia's home the day T.B. told her about appellant's conduct. Kinshassa stated that T.B. was shaking and crying as she talked to her grandmother. Kinshassa testified that she was also able to overhear appellant's answers to Severia's questions on the phone. Kinshassa heard appellant respond, "what were the dates?"

{¶18} Detective Craig Schoffstall, of the Cleveland Heights Police Department testified that he was assigned to investigate the allegations made against appellant. In the course of his investigation Det. Schoffstall interviewed T.B. and her brother. Det. Schoffstall testified that T.B. and D.J.'s testimony at trial was "accurate to what [he] had been told during [his] investigation."

{¶19} At the close of the state's case, defense counsel made a motion for judgment of acquittal, which the court denied.

{¶20} Defense counsel's first witness was appellant's friend, Michael Baker. Baker testified that approximately three years earlier he had a phone conversation with appellant and was told that T.B. had broken into appellant's house. According to Baker, appellant was furious about the break-in and his missing camera. Thereafter, Baker changed the locks at appellant's home.

{¶21} Severia testified that she as aware of T.B.'s marijuana habit and refused to give her money because she feared T.B. would just use the money to purchase drugs. Severia testified that she controls the petty cash fund for her church and kept the money in a drawer in her bedroom. Severia noticed that the money in the drawer was not matching her ledger. One day, Severia found T.B. looking through the drawer and T.B. stated that she was just looking for socks. When Severia confronted T.B. about the missing money, T.B. denied taking any of it. Severia also confronted T.B. about stealing $20 dollars from her purse and about a bike missing from the house. T.B. denied both accusations.

{¶22} Severia also discussed appellant's missing camera. According to Severia, she was looking for the camera to use at appellant's graduation in Dayton but could not find it. After Severia and appellant returned home from Dayton they searched the entire house for the camera and found it in a box it did not belong in. Severia testified that the camera had pictures of T.B. on it and that a key to their house was missing. Based on this incident, T.B. was banned from her grandmother's home for six months.

{¶23} When questioned about the allegations brought against appellant, Severia testified that she is a light sleeper and that there is no way appellant could have taken T.B. driving without her waking up. Further, Severia testified that when she contacted

appellant on the phone after T.B. made her accusations, he did not admit to any of the allegations.

{¶24} Appellant testified on his own behalf and adamantly denied ever touching T.B. in an inappropriate manner. Appellant further denied ever taking T.B. for driving lessons. He explained that as a counselor for his church he actively avoided being alone with women because there are a lot of sexual charges being brought in this day and age.

{¶25} At the close of the defense's case, counsel renewed her motion for judgment of acquittal, which was denied. After a five-day trial, appellant was found guilty of gross sexual imposition as amended in counts 1, 2, 3, 5, and 6 of the indictment, guilty of gross sexual imposition as amended in count 4, and guilty of minor in nudity-oriented material or performance as charged in count 8.

{¶26} At sentencing, the trial court imposed a twelve-month term of imprisonment on each count, to run concurrently.

{¶27} Appellant now brings this timely appeal, raising three assignments of error for review.

II. Law and Analysis

A. Other Acts Evidence

{¶28} In his first assignment of error, appellant argues "the trial court committed prejudicial error by allowing A.H. to testify about a similar act occurring approximately twenty years earlier, in violation of the right to due process and Ohio Rules of Evidence 403 and 404(B)."

{¶29} The trial court has broad discretion in the admission and exclusion of evidence, including evidence of other acts under Evid.R. 404(B). *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 22. Unless the trial court has "clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere" with the exercise of such discretion. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

{¶30} Evid.R. 404(B) states that "[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." Such evidence may, however, be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B). Similarly, R.C. 2945.59 permits the admission of other acts evidence tending to show a defendant's "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."

{¶31} In determining whether to permit other acts evidence to be admitted, trial courts should conduct the three-step analysis set forth in *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278: (1) determine if 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 under Evid.R. 401; (2) determine if the other acts evidence "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); and (3) consider whether the

probative value of the other-acts evidence is substantially outweighed by the danger of unfair prejudice. *Id.* at ¶ 20.

{¶32} The Ohio Supreme Court's decision in *Williams* provides significant guidance to this matter. There, the defendant was charged with various crimes, including rape and gross sexual imposition, arising from his alleged sexual abuse of a minor. The state offered evidence of the defendant's previous sexual abuse of another minor. The previous victim showed similar characteristics with the current victim in that both did not have active relationships with their fathers. The defendant then filled that void in the victims' lives so that he could sexually exploit them. Based on these facts, the court reinstated the trial court's order allowing the evidence because it showed "the plan of the accused" to "gain [the victims'] trust and confidence" before abusing them. As a result, the evidence was admissible under R.C. 2945.59 and Evid.R. 404(B). *Id*. at ¶ 25.

{¶33} With regard to the first and second steps of the *Williams* test, we find A.H.'s testimony was relevant and was presented for a legitimate purpose under Evid.R. 404(B). Similar to the factual scenario in *Williams*, appellant's relationship and interaction with A.H. and T.B. were similar in character and method. Collectively, A.H.'s testimony demonstrated appellant's motives and the preparation and plan he exhibited, i.e., offering teenage girls driving lessons and manipulating their confidence and trust for his own sexual gratification. In our view, if believed by the jury, such testimony could corroborate portions of T.B.'s testimony. *See Williams* at ¶ 22. Moreover, as articulated by the trial court outside the presence of the jury, the state did not offer A.H.'s testimony to show that touching T.B. was in conformity with appellant's character. In

fact, the trial court gave limiting instructions that this evidence was not being offered to prove appellant's character. Under these circumstances, we must presume the jury followed those instructions. *See State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995); *Pang v. Minch*, 53 Ohio St.3d 186, 195, 559 N.E.2d 1313 (1990).

{¶34} Finally, we consider whether the probative value of the other acts evidence of the prior relationship with A.H. is substantially outweighed by the danger of unfair prejudice. In our view, the challenged evidence is not unduly prejudicial because the trial court instructed the jury that this evidence could not be considered to show that appellant had acted in conformity with a character trait. This instruction lessened the prejudicial effect of A.H.'s testimony, and A.H. corroborated T.B.'s testimony about appellant's pattern of conduct, which had been denied by appellant. Thus, Evid.R. 404(B) permitted admission of evidence of appellant's prior crime because it helped to prove appellant's motive, preparation, and plan. Accordingly, the prejudicial effect did not substantially outweigh the probative value of that evidence.

{¶35} Based on the foregoing, the trial court did not abuse its discretion by permitting A.H. to testify at trial.

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

B. Sufficiency and Manifest Weight of the Evidence

{¶37} In his second assignment of error, appellant argues that the trial court erred when it denied his motion for acquittal as the state failed to present sufficient evidence to support his convictions. In his third assignment of error, appellant argues that his convictions are against the manifest weight of the evidence. Although the terms

"sufficiency" and "weight" of the evidence are "quantitatively and qualitatively different," we address these issues together because they are closely related, while applying the distinct standards of review to appellant's arguments. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶38} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. The relevant inquiry is 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶39} In contrast to sufficiency, "weight of the evidence involves the inclination of the greater amount of credible evidence." *Thompkins* at 387. While "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387. The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine whether, "'in resolving conflicts in the 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.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

1. Gross Sexual Imposition

{¶40} In the case at hand, appellant was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(1), which states:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
> (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

{¶41} Sexual contact is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). Force is defined in R.C. 2901.01(A)(1) as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶42} After careful review of the record, we find that appellant's gross sexual imposition convictions were supported by sufficient evidence. T.B. testified that during the first incident, appellant touched her thigh while she pretended to sleep in her grandmother's guest bedroom. Subsequently, appellant used driving lessons to gain T.B.'s trust and confidence. After each lesson, appellant stated that he needed to check T.B.'s pulse because she seemed tense and nervous. In doing so, appellant "cupped" T.B.'s breast after the first driving lesson; "brushed" her vaginal area with his fingers after the second driving lesson; and rubbed her shoulders, breasts, and buttocks after the third driving lesson. In our view, T.B.'s descriptions of appellant's inappropriate touching constituted sufficient evidence from which a jury could find that appellant committed these acts for his own sexual gratification

{¶43} With respect to the element of force or threat of force, T.B. testified that she was "confused" as to why appellant was touching her and that she was scared and felt like she did not have a choice. Moreover, "the relationship of the parties is a relevant fact when examining whether the element of force has been proven." *State v. Pordash*, 9th Dist. Lorain No. 04CA008480, 2004-Ohio-6081, ¶ 12. Here, appellant was married to T.B.'s grandmother and acted as a guardian and authoritative figure in T.B.'s life, particularly during the time periods when she lived in appellant's home. T.B. testified that she did not immediately tell anyone about appellant's actions because she was worried about breaking up her family and how her grandmother, Severia, would react. In our view, T.B.'s testimony, coupled with appellant's abuse of his authoritative relationship with T.B., satisfied the requisite level of force or threat of force necessary to convict him of gross sexual imposition. *See State v. Byrd*, 8th Dist. Cuyahoga No. 79661, 2002-Ohio-661 (where there was not a parent-child relationship, but instead an uncle-niece relationship, this court held that psychological force could be inferred from the inherent authority the adult male held over the child); *see also State v. Oddi*, 5th Dist. Delaware No. 02CAA01005, 2002-Ohio-5926.

{¶44} Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of gross sexual imposition proven beyond a reasonable doubt.

{¶45} Moreover, we are unable to conclude that appellant's gross sexual imposition convictions were against the manifest weight of the evidence. As argued by appellant, T.B.'s testimony certainly demonstrated that on several occasions, T.B. exhibited poor

judgment as a teenager, including taking a camera from appellant without permission, using marijuana habitually, and having an active warrant for her arrest. However, the jury, as the trier of fact was in the best position to weigh the credibility of the witnesses and was free to believe all or part of T.B.'s testimony regarding appellant's conduct despite the mistakes she may have made in her past. Accordingly, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in finding appellant guilty of gross sexual imposition.

2. Illegal Use of Minor in Nudity-Oriented Material or Performance

{¶46} Appellant was also convicted of illegal use of minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(3), which states in relevant part: "[n]o person shall * * * [p]ossess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity * * *." The Ohio Supreme Court has recognized that "[b]ecause R.C. 2907.323 does not specify any degree of culpability, the degree of culpability required to commit the offense is recklessness." *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, 872 N.E.2d 894, ¶ 37.

{¶47} As it relates to the case at hand, nudity is defined as "the showing, representation, or depiction of a * * * a female buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, * * *." R.C. 2907.01(H).

{¶48} In support of this claim, the state relied on T.B.'s testimony that appellant had her undress down to her underwear in front of a mirror while he made comments about her tattoos and aspiring modeling career. Significantly, T.B. stated that she left her bra

and underwear on during the entirety of this incident. Thus, T.B.'s buttocks and her breasts were fully covered at the time. Not withstanding the abhorrent nature of appellant's conduct, we are unable to conclude that the state presented sufficient evidence to satisfy the nudity element of R.C. 2907.323(A)(3). Accordingly, we reverse appellant's illegal use of minor in nudity-oriented material or performance conviction and remand the matter for the court to enter a judgment of acquittal.

{¶49} Appellant's second and third assignments of error are sustained in part and overruled in part.

III. Conclusion

{¶50} In sum, the trial court did not abuse its discretion by permitting the state to introduce the testimony of A.H. Pursuant to Evid.R. 404(B), evidence that appellant had targeted teenage females and used driving lessons to gain their trust and confidence in order to groom them for sexual activity with the intent of sexual gratification may be admitted to show the common plan of the accused and his intent for sexual gratification. Further, the state presented sufficient evidence to support appellant's gross sexual imposition convictions and those convictions were not against the manifest weight of the evidence. However, the state presented insufficient evidence to support his illegal use of minor in nudity-oriented material or performance conviction. Although we reverse appellant's illegal use of minor in nudity-oriented material or performance conviction, we recognize that appellant's sentence may not change. However, we note, given the circumstances of this case and appellant's criminal history, a 12-month sentence, in our

view, does not adequately reflect the seriousness of the crime or the factors outlined in R.C. 2929.11 and 2929.12.

{¶51} Based on the foregoing, we affirm appellant's gross sexual imposition convictions but reverse his illegal use of minor in nudity-oriented material or performance conviction and remand the matter for the court to enter a judgment of acquittal.

{¶52} Judgment affirmed in part, reversed in part, and cause remanded to the lower court for proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., CONCURS;
LARRY A. JONES, SR., J., DISSENTS (WITH SEPARATE OPINION)

LARRY A. JONES, SR., J., DISSENTING:

{¶53} Respectfully, I dissent. I would sustain the first assignment of error and find that the trial court erred by allowing A.H. to testify about a similar act that occurred

approximately 20 years prior to the crimes Herrington was charged with committing. The trial court further erred by allowing in additional witness testimony about A.H. that improperly bolstered her testimony.

{¶54} I would find that this case cannot meet the third prong of *Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, that is, that the prejudicial effect outweighed the probative value of A.H.'s testimony.

{¶55} I find that the length of time between the crimes against A.H. and T.B. troubling and that it decreases the probative value of A.H.'s testimony. I also find it troubling that the state called A.H. as their first witness. This, to me, was done only to highlight Herrington's bad character, and to show that his later acts against T.B. were in conformity with his bad character. Such an action is clearly prohibited under Evid.R. 404(B).

{¶56} Although the majority finds that the court's limiting instruction to the jury "lessened the prejudicial effect of A.H.'s testimony," testimony about Herrington's acts against A.H. was not limited solely to her testimony.[1] The state highlighted A.H.'s testimony by eliciting statements from Severia about A.H., asking the grandmother whether she knew about A.H. and whether she believed A.H.'s story. The state also inquired of Herrington whether A.H. "lie[d] in her testimony," whether A.H.'s low self-esteem was similar to T.B.'s, and if Herrington used T.B.'s low self-esteem to exploit

[1]The court gave the jury a limiting instruction during A.H.'s testimony. Whether the limiting instruction was also given when the court verbally instructed the jury is unknown because, although the actual jury instructions are in the record, the jury instructions were not made part of the transcript on appeal.

her sexually for his own gratification. Then Herrington's counsel, perhaps in an attempt to rehabilitate him, asked Herrington numerous questions about A.H. and his professed remorse for the crimes he committed 20 years prior.[2]

{¶57} In light of these facts, not only would I find that the prejudicial effect of A.H.'s testimony outweighed any probative value, the additional questions posed to T.B.'s grandmother and Herrington about A.H. should have been excluded from evidence. Not only were the grandmother's statements improper opinion testimony that asked her to speculate about a situation that occurred before she even knew her husband, the statements were highly prejudicial and served to improperly bolster A.H.'s testimony.

{¶58} I would further find that the error in allowing in the other-acts evidence cannot be seen as harmless.

{¶59} Under Crim.R. 52(A), "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." The Ohio Supreme Court has repeatedly held that "[e]rror in the admission of evidence is harmless if there is no reasonable possibility that the evidence may have contributed to the accused's conviction." *State v. Rahman*, 23 Ohio St.3d 146, 151, 492 N.E.2d 401 (1986). More recently, the court explained:

> * * * the real issue when Evid.R. 404(B) evidence is improperly admitted at trial is whether a defendant has suffered any prejudice as a result. If not, the error may be disregarded as harmless error. And while courts may determine prejudice in a number of ways and use language that may differ, they focus on both the impact that the offending evidence had on the verdict and the strength of the remaining

[2]Whether A.H. was mentioned in opening or closing arguments is unknown as those arguments were not made part of the transcript on appeal.

> evidence. Both the error's impact on the verdict and the weight of the remaining evidence must be considered on appellate review.

State v. Morris, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 25.

{¶60} In *Morris*, the Ohio Supreme Court discussed three factors reviewing courts must consider in determining whether there is harmless error: (1) "there must be prejudice to the defendant as a result of the admission of the improper evidence at trial"; (2) "an appellate court must declare a belief that the error was not harmless beyond a reasonable doubt"; and (3) "in determining whether a new trial is required or the error is harmless beyond a reasonable doubt, the court must excise the improper evidence from the record and then look to the remaining evidence." *Id.* at ¶ 27-29.

{¶61} The application of the harmless error standard is more difficult in a case "in which the question of guilt or innocence is a close one." *State v. Morris*, 9th Dist. Medina No. 09CA0022-M, 2012-Ohio-6151, ¶ 52 (affirmed by *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153), citing *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967). In close cases, harmless-error rules can work very unfair results when highly important and persuasive evidence, though legally forbidden, finds its way into a trial. *Id.*, citing *id.*

{¶62} In *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, the Ohio Supreme Court concluded that "in determining whether to grant a new trial as a result of the erroneous admission of evidence under Evid.R. 404(B), an appellate court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record." *Id.* at ¶ 33.

The *Morris* court noted that, in the case it was considering, the appellate court had already determined that there was no physical evidence, questions regarding the credibility of the main witness, and that the state had repeatedly referred to the evidence in its closing argument. "These improper statements were thus highlighted for the jury." *Id.* at ¶ 30. "Given the weakness of the evidence that remained, the [appellate court's] opinion deemed that a new trial was necessary because the court could not find beyond a reasonable doubt that the improper evidence had no effect. The only remedy for the prejudice was a new trial." *Id.* I believe the same to be true in this case.

{¶63} The impact of the testimony that was allowed into evidence in regard to A.H. cannot be ignored. Not only did the jury hear about it from A.H. herself, but the state further questioned the victim's grandmother who stated she knew about the abuse and the defendant himself, who admitted to the past abuse against A.H.

{¶64} Setting aside the erroneously admitted character evidence, there is not overwhelming evidence of Herrington's guilt; the state's case rested largely on T.B.'s credibility. We have often noted that the danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he committed the crime charged in the indictment is particularly high when the other acts are very similar to the charged offense or of an inflammatory nature. *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975). Thus, I would find that it was not harmless error to allow the testimony about the past sexual abuse of A.H. into evidence.

{¶65} Therefore, I dissent.