[Cite as *State v. Morris*, 2010-Ohio-4282.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

STATE OF OHIO Appellee v. CARL M. MORRIS, JR. Appellant	C.A. No. 09CA0022-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 08CR0408

DECISION AND JOURNAL ENTRY

Dated: September 13, 2010

Per Curiam.

INTRODUCTION

{¶1} A jury convicted Carl M. Morris Jr. of two counts of raping his stepdaughter, S.K. According to S.K., Mr. Morris sexually molested her over the course of several years while he was living with her and her mother. The trial court sentenced Mr. Morris to life in prison on one count of rape of a child less than ten years old and five years in prison on one count of rape of a child less than thirteen years old. The trial court adjudicated Mr. Morris a Tier III sex offender/child victim offender. Mr. Morris timely appealed his convictions, raising six assignments of error. This Court reverses because the trial court prejudiced Mr. Morris by incorrectly admitting testimony of Mr. Morris's character in violation of Rule 404 of the Ohio Rules of Evidence.

BACKGROUND

{¶2} When S.K. was in the first grade, her mother married Mr. Morris, and he moved into their house to live with S.K., her grandmother, and her older half-sister, Sarah. According to S.K., when she first met Mr. Morris, he would do magic tricks to entertain her. He would do card tricks, coin tricks, or make his leg "disappear" using a towel. Sarah and their mother testified that Mr. Morris walked around the house in a towel before and after showering and would sometimes stop and do magic tricks, like the one involving manipulating the towel to make it seem as though one of his legs had disappeared.

{¶3} S.K. testified that, when the two of them were alone, Mr. Morris used to show her a trick requiring her to feel his thumb through a towel across his lap. S.K. was amazed that he could make his "thumb" turn to Jell-o and then become very hard. She testified that Mr. Morris later showed her that it was his penis she had been touching behind the towel. According to S.K., at some point, Mr. Morris started lying on the couch beside her and masturbating while rubbing her thighs with his other hand.

{¶4} S.K. testified that Mr. Morris vaginally raped her at least 10 times between when she entered second grade and when her grandmother died. S.K. was 13 years old when her grandmother died. She testified that, after her grandmother died, she started walking away from Mr. Morris when he would try to touch her. According to S.K., Mr. Morris soon stopped trying.

{¶5} S.K. testified that, for the most part, she could not remember the dates of the events she described, but that, after talking to police, she found she was able to assign dates to two of the incidents. She testified that Mr. Morris raped her when they were home alone before taking her to the hospital to visit her mother after surgery. S.K.'s mother testified that she stayed overnight in a hospital on April 22, 2003, following a hysterectomy. S.K. was nine years old at

that time. S.K. also testified that Mr. Morris raped her sometime between October 20 and November 1, 2005, when she was 12 years old. She testified that she remembered the date because Mr. Morris interrupted a Halloween cartoon on television.

{¶6} S.K. testified that Mr. Morris never grabbed her, used force, or threatened her. She said that he never told her not to tell anyone what he was doing. She testified that she did not tell anyone about Mr. Morris's behavior until at least four months after he had separated from her mother and moved out of their house. S.K.'s best friend testified that, about four or five months after Mr. Morris had moved out of the house, S.K. told her that he had raped her, but did not share any details. Six months after Mr. Morris had moved out of the house, S.K. told her parents that Mr. Morris had raped her. They insisted that she repeat the information to the police and to a therapist she had been seeing. S.K.'s therapist testified that, although he cannot be certain whether a client is telling the truth, there was no clinical reason to disbelieve S.K.'s account. He further testified that her description of the magic tricks fit the pattern of something a pedophile would do to prepare a child for sexual activity.

{¶7} At trial, Mr. Morris argued that both S.K. and her mother had reasons to fabricate the allegations against him. S.K.'s mother testified that, after Mr. Morris moved out, she suffered financial hardship and lost the house they had purchased together. Although she said that Mr. Morris had difficulty keeping jobs, she admitted that she could not afford the house without his help. Mr. Morris also elicited testimony from various witnesses that S.K. first told her parents that Mr. Morris had raped her in the middle of a dramatic confrontation between her and her parents regarding something they had seen on her MySpace page. The trial court excluded the details of the information contained on the page, but S.K. testified that the issue that provoked her parents' wrath had nothing to do with Mr. Morris.

{¶8} Although there were no eyewitnesses in this case other than S.K., S.K.'s mother and half-sister, Sarah, both testified to situations that provoked some suspicion regarding Mr. Morris's conduct with S.K. Sarah testified that she once saw Mr. Morris and S.K. "underneath the blankets" on the couch. Although the two had always been close and it was not uncommon to see them physically close to each other, it made her uncomfortable on that occasion.

{¶9} S.K.'s mother testified that she came downstairs late one night in the spring of 2005 "and both [S.K. and Mr. Morris] jumped off the couch really quick and [S.K.] went and ran in to the bathroom." She testified that she confronted both of them, but each repeatedly denied that anything inappropriate had happened. S.K. testified that she remembered being on the couch with Mr. Morris while he was masturbating and touching her leg with his other hand when her mother suddenly came down the stairs. According to S.K., "[Mr. Morris] jumped a little" while she just "tightened up" for a moment before heading to the bathroom. She said that when her mother asked her what was going on, she told her that nothing had happened.

OTHER-ACTS EVIDENCE

{¶10} Mr. Morris's first assignment of error is that the trial court incorrectly allowed the State to introduce evidence of his "other . . . acts to show proof of [his] character in violation of [Rule 404(B) of the Ohio Rules of Evidence]." Mr. Morris has pointed to three lines of questioning to which he objected at trial. First, he has argued that the trial court should have excluded S.K.'s mother's testimony regarding him sometimes ejaculating into towels or t-shirts during intercourse. Second, he has argued that the trial court should have excluded all references to an incident involving Sarah, S.K.'s adult half-sister. Finally, he has argued that the trial court should have excluded S.K.'s mother's testimony regarding his penchant for kicking the dog if the mother refused to have sex with him.

{¶11} "A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime." *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975). Many years ago, the General Assembly codified that principle, but specified several alternative purposes for which such evidence may be used. Under Section 2945.59, "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 . . . notwithstanding that such proof may show or tend to show the commission of another crime by the defendant," provided that the permissible alternative purpose for the evidence "is material" in the case. Rule 404 of the Ohio Rules of Evidence broadened the principle beyond the realm of criminal behavior. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." Evid. R. 404(A). "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," but may be admissible for certain other purposes. Evid. R. 404(B). For example, evidence of other crimes, wrongs, or acts may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

{¶12} "The rule is in accord with [the statute]." *State v. Broom*, 40 Ohio St. 3d 277, 281 (1988). "If the other act does in fact 'tend to show' by substantial proof any of those things enumerated, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, then evidence of the other act may be admissible." *Id.* at 282 (quoting *State v. Flonnory*, 31 Ohio St. 2d 124, 126 (1972)); see also *State v. Gross*, 97 Ohio St. 3d 121, 2002-Ohio-5524, at ¶46 (quoting *Broom*, 40 Ohio St. 3d 277 at paragraph one of the

syllabus). Evidence that tends to prove one of the things enumerated by the statute or the rule is admissible if the alternative purpose for which the evidence is being offered is a material issue in the case. *State v. Curry*, 43 Ohio St. 2d 66, 71 (1975); *State v. DePina*, 21 Ohio App. 3d 91, 92 (1984) (citing *State v. Burson*, 38 Ohio St. 2d 157, 158 (1974)). This Court has held that both the rule and the statute "are to be strictly construed against the state and conservatively applied by the trial courts." *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, at ¶93 (citing *State v. DeMarco*, 31 Ohio St. 3d 191, 194 (1987)). The Ohio Supreme Court has held that "the standard for determining admissibility of such evidence is strict." *Broom*, 40 Ohio St. 3d at 282.

{¶13} Whether proffered other-act evidence has a tendency to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and whether any of those things is of consequence to the determination of the action in a given case are questions of law. See *State v. Lester*, 2d Dist. No. 8679, 1984 WL 4043 at *3 (Oct. 2, 1984). This Court reviews questions of law de novo. See *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St. 3d 181, 2009-Ohio-2496, at ¶13.

He used towels during sexual intercourse.

{¶14} S.K. testified that, every time Mr. Morris ejaculated while molesting her, he would quickly cover his penis with a towel. Mr. Morris has argued that S.K.'s mother, who was married to him at the time of the alleged incidents, should not have been permitted to testify that "[w]hen [Mr. Morris] and I had sex, he would sometimes [ejaculate] in a towel or a T-shirt or whatever was around." She went on to say that she did not understand why he would do that because he knew she could not get pregnant. Mr. Morris has argued that the trial court should not have allowed the mother's testimony under Evidence Rule 404(B).

{¶15} The State has argued that the testimony was admissible because it is evidence of "idiosyncratic behavior that shows a common plan" and "his modus operandi for disposal of semen . . . [that is,] [e]xcept when having sex with his wife, [Mr.] Morris always ejaculates into a towel." The State's argument is based on a misunderstanding of S.K.'s mother's testimony. What she said was that Mr. Morris "sometimes" ejaculated into a towel when they did have sex – not at times other than when they had sex.

{¶16} The State has cited this Court's opinion in *State v. DePina*, 21 Ohio App. 3d 91 (1984), for the proposition that evidence of "idiosyncratic behavior that shows [a] common plan and modus operandi" is admissible in a rape prosecution. In *DePina*, this Court determined that the trial court correctly admitted testimony from a woman who had been raped by the defendant in a manner similar to that described by the victim in the *DePina* case. The similarities included the defendant threatening her, taking her into the woods, ordering her to disrobe, laying his own shirt or jacket on the ground for her to lie on, vaginally raping her, ordering her to get dressed, and escorting her out of the woods.

{¶17} In order for evidence of other acts to be admissible under Rule 404(B), "[p]roof of one of the other [non-character] purposes outlined in Evid.R. 404(B) must go to an issue which is material to proof of the defendant's guilt for the crime with which he is charged." *State v. DePina*, 21 Ohio App. 3d 91, 92 (1984) (citing *State v. Burson*, 38 Ohio St. 2d 157, 158 (1974)); see also *State v. Curry*, 43 Ohio St. 2d 66, 71 (1975). In *DePina*, this Court approved the trial court's admission of the evidence regarding the many similarities in the two rapes because proving identity is one of the approved purposes for use of such evidence and "[the] defendant's identity as the rapist was both controverted and material" in that case. *Id.* The evidence of the prior rape in *DePina* was admissible as proof of modus operandi because "it provide[d] a

behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, [could] be used to identify the defendant as the perpetrator." *State v. Myers*, 97 Ohio St. 3d 335, 2002-Ohio-6658, at ¶104 (quoting *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994)).

{¶18} In describing such evidence, the Ohio Supreme Court has written that "[o]ther acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B)." *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994) (quoting *State v. Jamison*, 49 Ohio St. 3d 182, syllabus (1990)). "To be admissible to prove identity through a certain *modus operandi*, other-acts evidence must be related to and share common features with the crime in question." *Id.* at paragraph one of the syllabus.

{¶19} A modus operandi describes a pattern of behavior, not one isolated detail that is not necessarily a unique identifier. A single act, that does not involve criminal activity or even moral turpitude, does not demonstrate "a unique, identifiable plan of criminal activity." *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994) (quoting *State v. Jamison*, 49 Ohio St. 3d 182, syllabus (1990)). S.K.'s mother's testimony about Mr. Morris ejaculating into "a towel or a T-shirt or whatever was around" was just such testimony about a single act that does not involve criminal activity or even moral turpitude. Furthermore, identity was not an issue in this case. There was no dispute that, if S.K. was telling the truth when she said she was raped, Mr. Morris was the perpetrator. His denial of any sexual contact or conduct between him and S.K. created a factual dispute regarding Mr. Morris's treatment of S.K. – not a dispute about his identity. See *State v. Schaim*, 65 Ohio St. 3d 51, 61 (1992); *State v. Curry*, 43 Ohio St. 2d 66, 73 (1975); *State v. Wilkins*, 135 Ohio App. 3d 26, 31 (1999). Therefore, "identity was not a material issue properly

subject to proof by other-acts evidence in the trial court . . . ." *Wilkins*, 135 Ohio App. 3d at 31-32; see also *Curry*, 43 Ohio St. 2d at 71.

{¶20} The State's second argument was that the testimony was admissible to prove Mr. Morris's motive to rape S.K., that is, a frustrated reaction to her mother refusing to have sex with him. One's proclivity for ejaculating into a towel during consensual sex with one's adult wife has no tendency to show a motive to rape a child. Mr. Morris has correctly argued that S.K.'s mother's testimony about him ejaculating into towels is not within the exceptions listed in Evidence Rule 404(B).

{¶21} The mother's testimony is not excluded by Evidence Rule 404, however, because it is not "evidence of a person's character or a trait of character." Evid. R. 404(A); see also *State v. Shedrick*, 61 Ohio St. 3d 331, 337 (1991) (explaining that Evidence Rule 404 excludes evidence that "tends to show [the defendant's] bad character."). S.K.'s mother's testimony about Mr. Morris unexpectedly ejaculating into towels during sex implied nothing about his character. The testimony was relevant because S.K. had previously said that Mr. Morris had always ejaculated into a towel when molesting her. Evid. R. 401. It could hurt Mr. Morris's case because, if believed, it provided some corroboration of S.K.'s allegation that she had been involved in a sexually intimate situation with Mr. Morris. As relevant evidence, it was admissible unless otherwise objectionable. Evid. R. 402. It was not objectionable character evidence under Rule 404.

{¶22} Mr. Morris has also argued that this testimony was "inflammatory, confusing, [and] unreliable" and that any probative value was substantially outweighed by the danger of unfair prejudice. See Evid. R. 403(A). The testimony was clear, and it was not inherently unreliable. The jury was capable of determining what weight, if any, it deserved in light of the

other evidence in the case. Admission of the testimony, harmful as it may have been to Mr. Morris's case, was not unfairly prejudicial and was not a violation of Evidence Rule 403(A).

{¶23} This Court has not considered the application of Ohio's rape shield law to this testimony because Mr. Morris neither raised an objection in the trial court nor an argument on appeal based on it. See R.C. 2907.02(D). To the extent that it addressed the mother's testimony regarding Mr. Morris ejaculating into towels, the first assignment of error is overruled because the trial court correctly overruled Mr. Morris's objection to the testimony, albeit on an incorrect basis. See *State v. Campbell*, 90 Ohio St. 3d 320, 329 (2000).

He would kick the dog if his wife refused to have sex with him.

{¶24} S.K.'s mother, who was once Mr. Morris's wife, testified that he wanted to have sex every day and would become verbally abusive and kick the family dog if she refused. Mr. Morris has argued that his former wife's testimony on this topic should have been excluded under Evidence Rule 404. The State has argued that the testimony was admissible because it showed "a motive and common plan" for rape. According to the State, Mr. Morris's "insatiable sexual appetite . . . is clearly the motive for [Mr.] Morris's sexual abuse of S.K."

{¶25} The State presented no evidence that an unfulfilling sexual life with one's spouse has a tendency to show motive for the rape of a child. Further, it presented no evidence that men with voracious sexual appetites are sexually attracted to young children. What is more, even if evidence of Mr. Morris's voracious sexual appetite were admissible, the added fact that he took out his sexual frustration by kicking the dog goes far beyond tending to prove that voracious appetite. The kick-the-dog evidence tended to show that Mr. Morris was prone to act out if his wife refused to have sex with him every day. The only possible reason for introducing that evidence was to demonstrate his character, that is, that he was both sexually frustrated and mean

and aggressive. The obvious reason to present that evidence was to encourage the jury to conclude that Mr. Morris acted in conformity with that character by committing the rapes with which he had been charged. The testimony had no relevance to any fact at issue in the case and did not tend to prove any of the permissible topics enumerated in Rule 404(B) of the Ohio Rules of Evidence. The evidence that Mr. Morris kicked the dog out of sexual frustration was received by the trial court in violation of Rule 404(B) of the Ohio Rules of Evidence.

He propositioned S.K.'s half-sister.

{¶26} Mr. Morris has also argued that the trial court incorrectly permitted S.K.'s older half-sister, Sarah, to testify about an incident with Mr. Morris. Sarah is seven years older than her half-sister, S.K. In spring 2005, Sarah was an adult and had been married the previous Christmas, but was living in the same house with her grandmother, younger half-sister, mother, and Mr. Morris. Sarah testified that she walked into her mother's bedroom one evening and found Mr. Morris sitting on the corner of the bed. She said that he "grabbed [her] waist and pulled [her] toward him and said, 'You don't know what I would do to you but your mother would get mad.'" Sarah testified that she perceived the comment to be sexual in nature, but that she "just laughed it off," told him he was drunk, and pushed him away. She returned to her own bedroom and that was the end of the interaction. Sarah later told her mother about the incident, and her mother kicked Mr. Morris out of the house for the night. The next day, Mr. Morris tearfully apologized to Sarah, saying that he had been drunk at the time and did not remember making the comment. Sarah testified that she believed Mr. Morris had been drunk because she had seen him drinking earlier that evening. After the apology, Mr. Morris moved back into the house and, according to Sarah, never again made an inappropriate comment to her.

{¶27} Mr. Morris has argued that all testimony about the incident with Sarah was inadmissible under Evidence Rule 404(B) because the other act was not similar to the crime with which he was charged. The State has argued that the incident with Sarah was similar to the crime charged because the target of each incident was one of Mr. Morris's stepdaughters and it happened in the mother's bedroom, as did many of the incidents of molestation and rape described by S.K. On this basis, the State has argued that the testimony was properly admitted because it "demonstrates a common scheme and motive."

{¶28} The State has cited *State v. Broom* for the proposition that the other act need not be similar to the crime charged provided it tends to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Broom*, 40 Ohio St. 3d 277, 281 (1988). According to the Ohio Supreme Court, "[e]vidence of a defendant's scheme, plan, or system in doing an act can be relevant for two reasons: (1) the other acts are part of one criminal transaction such that they are inextricably related to the charged crime, and (2) a common scheme or plan tends to prove the identity of the perpetrator." *State v. Schaim*, 65 Ohio St. 3d 51, 63 n.11 (1992) (citing *State v. Curry*, 43 Ohio St. 2d 66, 72-73 (1975)). If evidence of a scheme, plan, or system is offered because it is inextricably related to the charged crime, it is admissible because "it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts." *State v. Lytle*, 48 Ohio St. 2d 391, 403 (1976), vacated in part on other grounds, 438 U.S. 910 (1978) (quoting *Curry*, 43 Ohio St. 2d at 73). The incident that Sarah described was not part of a single criminal transaction involving the rapes of her half-sister and was, in fact, wholly unrelated to the rape charges Mr. Morris was facing. Additionally, identity was not an issue in this case, so other act evidence tending to prove identity was not admissible. *Curry*, 43 Ohio St. 2d at 73.

{¶29} Sarah's testimony did not have any tendency to show a common scheme, plan, or system for Mr. Morris raping a child. At worst, the evidence tended to show that Mr. Morris had a desire to engage in sexual activity with Sarah. A man's attempt to engage in sexual activity with an adult, married woman does not demonstrate a common scheme, plan, or system for using a child under the age of ten or thirteen for his sexual gratification, even if the two are sisters. This is especially true in this instance because the incident described by Sarah bore no real similarity to the crimes charged. S.K. did not testify that Mr. Morris ever approached her while drunk or in any way similar to that described by Sarah. According to S.K., Mr. Morris never grabbed her or said anything similar to that which he allegedly said to Sarah. Sarah's testimony was not admissible as evidence of a common scheme, plan, or system under Evidence Rule 404(B).

{¶30} Sarah's testimony had no tendency to show a motive for rape. If Sarah's testimony is believed, Mr. Morris, while drunk, expressed his desire to engage in sexual activity with her. Even if motive had been at issue, Sarah's testimony was not admissible because there is a fundamental difference between a man's desire to engage in sexual activity with his wife's adult daughter and his desire to rape his wife's little girl.

{¶31} It might be easy, however, for a jury to assume that the type of man who would express an interest in crossing that moral boundary with his wife's adult daughter, could be just the type man who would have the urge to sexually molest a young child, especially if the young child is also his wife's daughter. That is precisely the leap in logic that Rule 404 is designed to prevent. *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975). "Such evidence is inadmissible . . . [because] it is both legally irrelevant and highly prejudicial." *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, at ¶90. "It poses a 'temptation . . . for the jury to try the case on

evidence of character rather than on evidence of guilt . . . [because] it becomes difficult for the jury not to speculate that since the defendant . . . is a bad person, he probably committed the present crime.'" *Id.* at ¶90-91 (quoting *State v. Griffin*, 142 Ohio App. 3d 65, 71 (2001)).

{¶32} Sarah's testimony regarding the comment Mr. Morris made to her reflected poorly on his character and did not tend to prove any of the enumerated topics deemed acceptable under Evidence Rule 404(B). Sarah's testimony on this subject had no probative value other than to encourage the jury to make the inference prohibited by Rule 404 of the Ohio Rules of Evidence. The evidence regarding Mr. Morris's comment to Sarah was received by the trial court in violation of Rule 404(B) of the Ohio Rules of Evidence.

HARMLESS ERROR

{¶33} Having determined that the trial court erroneously admitted evidence of two instances of Mr. Morris's other acts in violation of Rule 404(B) of the Ohio Rules of Evidence, this Court must decide whether the errors were harmless. The State has argued that the jury hearing the older half-sister testify about Mr. Morris's "unwelcomed advance . . . can hardly be more damaging to the defense than hearing S.K. testify about far worse acts." Apparently, the State's position is that Mr. Morris's conduct with the older half-sister was so insignificant in comparison to the acts S.K. accused him of perpetrating that the testimony could not have prejudiced him.

{¶34} Under Rule 52(A) of the Ohio Rules of Criminal Procedure, "[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 (1986) (quoting *State v. Bayless*, 48 Ohio St. 2d 73,

106 (1976), vacated in part on other grounds, 438 U.S. 911 (1978)). It has further written that, "[i]n order to hold the error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt." *Bayless*, 48 Ohio St. 2d at 106 (citing *State v. Abrams*, 39 Ohio St. 2d 53 (1974); *State v. Crawford*, 32 Ohio St. 2d 254 (1972); *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969)). The standard applied by the Ohio Supreme Court in *Bayless* was derived from United States Supreme Court caselaw describing the federal constitutional harmless-error standard. *Id.* (citing *Chapman*, 386 U.S. 18; *Harrington*, 395 U.S. 250). The Ohio Supreme Court has applied this test to evaluate whether an error in improperly admitting evidence of a defendant's other acts was harmless, and this Court has followed suit. *Id.*; see also *State v. Treesh*, 90 Ohio St. 3d 460, 483 (2001); *State v. Lytle*, 48 Ohio St. 2d 391, 403 (1976); *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, at ¶96; *State v. Deyling*, 9th Dist. No. 2672-M, 1998 WL 46753 at *2 (Jan. 28, 1998).

{¶35} In evaluating the impact of improperly admitted other-acts evidence, the appellate court must consider "[t]he severity of [the improper] reflections upon the defendant's credibility and character . . . in relation to the other evidence in the case." *State v. Bayless*, 48 Ohio St. 2d 73, 107 (1976). In *Bayless*, the Court determined that the error was harmless beyond a reasonable doubt because "[t]he mass of evidence in the case contradicted and impeached [the defendant's] testimony so thoroughly that the effect of the rebuttal testimony upon his credibility appears insignificant." *Id.* Thus, admission of improper evidence is harmless if, as is often the case, "the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt." *State v. Williams*, 6 Ohio St. 3d 281, 290 (1983) (quoting *Harrington v. California*, 395 U.S. 250, 254 (1969)); but see *State v. Brown*, 100 Ohio St. 3d 51, 2003-Ohio-5059, at ¶25; *State v. Webb*, 70 Ohio St. 3d 325, 335 (1994); *State v. Davis*, 44 Ohio App. 2d 335, 348 (1975).

Regardless of the fact that courts have sporadically applied a less stringent harmless-error standard in some cases involving non-constitutional errors in the admission of evidence, the higher standard applies in this case because "the injection of . . . inflammatory . . . material" violated Mr. Morris's right to a fair trial "as that term is understood under the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment." *Davis*, 44 Ohio App. 2d at 348.

{¶36} The application of the harmless error rule is simple if, in the absence of all erroneously admitted evidence, there remains "overwhelming" evidence of guilt. *State v. Williams*, 6 Ohio St. 3d 281, 290 (1983) (quoting *Harrington v. California*, 395 U.S. 250, 254 (1969)). The application is more difficult in a case such as this "in which the question of guilt or innocence is a close one." *Chapman v. California*, 386 U.S. 18, 22 (1967). In close cases, "harmless-error rules can work very unfair and mischievous results when . . . highly important and persuasive evidence . . . though legally forbidden, finds its way into a trial . . . ." *Id.*

{¶37} Contrary to the State's argument, setting aside the erroneously admitted character evidence, there is not overwhelming evidence of Mr. Morris's guilt in this case. In the absence of any physical evidence or eyewitnesses other than S.K. to sexual conduct or even sexual contact between Mr. Morris and S.K., the State's case rested largely on S.K.'s credibility. Although there was corroborating circumstantial evidence offered by S.K.'s mother and half-sister, each of whom testified that they had seen a suspicious-looking situation, nobody was able to testify as an eyewitness to any acts of molestation or rape. Various witnesses testified about S.K.'s emotional problems and to various times over the years when S.K. seemed to be struggling with a secret that she was unable to reveal. But, S.K. admitted that her emotional problems were not entirely caused by Mr. Morris and that she had been depressed before her mother met him.

{¶38} S.K.'s mother's testimony about Mr. Morris's odd behavior during sexual intercourse provided some circumstantial corroboration of S.K.'s testimony. S.K.'s credibility was best supported by her own testimony describing how her relationship with Mr. Morris went through phases that seemed to move toward sexualization over time as bolstered by her counselor's testimony that her account was consistent with the "grooming" behavior of a pedophile preparing a child for molestation.

{¶39} Regardless of whether the verdict could have withstood a challenge based on the manifest weight of the evidence, the question of whether the errors were harmless requires a different analysis. As the Ohio Supreme Court has written, "[the appellate court's] role upon review in [such a] case is not to sit as the supreme trier of fact, but rather to assess the impact of this erroneously admitted testimony on the jury." *State v. Rahman*, 23 Ohio St. 3d 146, 151 n.4 (1986). "It is not the appellate court's function to determine guilt or innocence . . . ." *Id.* (quoting *United States v. Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring)). "[T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.* (quoting *United States v. Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring)). Highly inflammatory evidence, erroneously admitted, can make it easy for a jury to believe the State's theory and the State's witnesses over those of the defense, especially in a close case.

{¶40} 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.*

Miley, 5th Dist. Nos. 2005-CA-67, 2006-CA-14, 2006-Ohio-4670, at ¶58 (citing *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975); *State v. Schaim*, 65 Ohio St. 3d 51, 60 (1992)). The evidence that Mr. Morris grabbed his adult stepdaughter, pulled her toward him, and made a sexually charged comment to her was highly inflammatory, especially in light of the fact that Mr. Morris was charged with raping her younger half-sister. The evidence that Mr. Morris would become verbally abusive toward his wife and even kick the dog if she refused to have sex with him every day is somewhat less inflammatory, but was similarly aimed at convincing the jury that Mr. Morris is a sex-crazed pervert.

{¶41} Although Sarah testified that in all her years of living with Mr. Morris, that drunken comment was the only inappropriate advance he ever made on her, the State did its best to convince the jury that her testimony was evidence of Mr. Morris's motive and intent to rape S.K. During the State's closing argument, the prosecutor advised the jury that, "if you want to know a little bit about [Mr. Morris's] motives and his intent and his intent for [S.K.], just look at how he treated his other stepdaughter . . . ." Later in closing argument, the prosecutor said that S.K.'s story is "corroborated by the sister who had an incident with him that showed a similar plan and preparation and intent."

{¶42} During rebuttal close, the prosecutor went so far as to actually equate the sexual comment made to the adult sister to rape of the younger sister. The prosecutor told the jury that, although child molestation usually happens in private, ensuring a lack of eyewitnesses, in this case there was evidence of "it happening to [S.K.'s older half-sister]." The State blatantly attempted to persuade the jurors that they should convict Mr. Morris of raping S.K. because they heard evidence that he had done "it" to her older half-sister. Thus, despite the fact that the incident with S.K.'s half-sister was not factually similar to the crimes with which Mr. Morris had

been charged, the State attempted to convince the jury that it should make the very leap in logic that is forbidden by Rule 404(B) of the Ohio Rules of Evidence. That is, if Mr. Morris is the type of man who would be willing to cross that moral boundary with his wife's adult daughter, then the jury should also believe he is the type of man who would rape his wife's nine or twelve-year-old daughter.

{¶43} The effect of the errors in this case is extensive because the inflammatory material was not limited to a brief, isolated comment. The State elicited testimony regarding the incident between Mr. Morris and Sarah from three witnesses, and referenced it on seven different occasions during closing argument, including referring to Sarah as Mr. Morris's "victim." This Court cannot say that "there is no reasonable possibility that the evidence may have contributed to the . . . conviction." *State v. Bayless*, 48 Ohio St. 2d 73, 106 (1976). It seems quite likely that the average juror would have considered the erroneously admitted evidence and would have found it easy to believe that Mr. Morris, being sexually frustrated and perverted, was likely guilty of raping his young stepdaughter. The improperly admitted other-acts testimony put inflammatory evidence of Mr. Morris's character before the jury. Based on a review of the entire record, this Court cannot "declare a belief that the error was harmless beyond a reasonable doubt." *Id.* (citing *State v. Abrams*, 39 Ohio St. 2d 53 (1974); *State v. Crawford*, 32 Ohio St. 2d 254 (1972); *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969)). To the extent Mr. Morris's first assignment of error is addressed to the kicking-the-dog testimony and the propositioning-of-Sarah testimony, it is sustained.

CONCLUSION

{¶44} This Court must reverse Mr. Morris's convictions because the trial court erroneously admitted evidence of other acts that did not fit within what is permissible under Rule

404(B) of the Ohio Rules of Evidence. The State's repeated references to improper character evidence violated Mr. Morris's right to a fair trial. There is a reasonable possibility that the improper evidence may have contributed to the conviction and this Court cannot declare a belief that the errors were harmless beyond a reasonable doubt. This Court's resolution of the first assignment of error is dispositive, rendering the other assignments of error moot, so they will not be addressed. See App. R. 12(A)(1)(c). Therefore, the judgment of the Medina County Common Pleas Court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

CARR, J.
DISSENTS, SAYING:

{¶45} I respectfully dissent.

{¶46} I would overrule Morris' first assignment of error because I believe that the trial court properly admitted evidence relating to the incidents involving Morris' ejaculating into a towel, his sexual advances toward Sarah, and his abuse of the family dog pursuant to Evid.R. 404(B).

{¶47} The majority deviates from the well-established standard of review relevant to this issue. Regarding the admission of "other acts" evidence, the Ohio Supreme Court has stated that the "admission of such evidence [to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident] 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. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, at ¶66. This Court has consistently applied this standard when reviewing the admissibility of "other acts" evidence. See, e.g., *State v. Halsell*, 9th Dist. No. 24464, 2009-Ohio-4166, at ¶10-19; *State v. Stevenson*, 9th Dist. No. 24408, 2009-Ohio-2455, at ¶22-27. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶48} Although the above-referenced exceptions allowing the admission of "other acts" evidence "must be construed against admissibility, and the standard for determining admissibility of such evidence is strict[,]" a reviewing court's "inquiry is confined to determining whether the trial court acted unreasonably, arbitrarily, or unconscionably in deciding the evidentiary issues[.]" (Internal citations and quotations omitted.) *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, at ¶61-62. Furthermore, this Court has repeatedly stated that "this strict admissibility standard must be considered contemporaneously with the fact that the trial court occupies a superior vantage in determining the admissibility of evidence." (Internal quotations omitted.) *State v. Ristich*, 9th Dist. No. 21701, 2004-Ohio-3086, at ¶12, citing *State v. Ali* (Sep. 9, 1998), 9th Dist. No. 18841, citing *State v. Rutledge* (Nov. 19, 1997), 9th Dist. No. 96CA006619.

{¶49} Evid.R. 402 provides that relevant evidence is generally admissible. Evid.R. 403 provides two exceptions to the general rule, including where exclusion of the evidence is mandatory:

> "(A) Although 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."
>
> Evid.R. 404(B), which addresses other crimes, wrongs or acts, states:
>
> "Evidence of the other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. In may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."
>
> In addition, R.C. 2945.59 states:

> "In 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."

{¶50} The *Diar* case referenced above involved a mother who was convicted and sentenced to death for the death of her son. The high court concluded that "other acts" evidence that Diar left her child unattended, fed him mainly fast food, and acted as though the child was a bother, was not improper because it "provided the context for the alleged crimes and made Diar's actions more understandable to the jurors." *Diar* at ¶72. In addition,

> "[e]vidence showing a modus operandi [or plan] is admissible because it provides a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator." (Internal quotations omitted.) *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶83.

{¶51} Moreover, "'[o]ther acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B).'" *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, at ¶45, quoting *State v. Jamison* (1990), 49 Ohio St.3d 182, syllabus. "Other acts" evidence used to show the defendant's plan "must be related to and share common features with the crime in question." *Noling* at ¶45, citing *State v. Lowe* (1994), 69 Ohio St.3d 527, paragraph one of the syllabus.

Morris' sexual advances toward Sarah

{¶52} I disagree with the majority's conclusion that the testimony that Morris grabbed and confronted Sarah was inadmissible. I further disagree with the majority that identity is not at issue in this case. It is axiomatic that, before a defendant may be convicted of a crime, it must be established beyond a reasonable doubt that he was the perpetrator of the criminal act. Identity,

therefore, is always at issue except in very limited situations where the defendant has admitted his commission of the act but asserts some defense to negate the criminality of the conduct. In my opinion, the majority interprets too narrowly the term "identity" as it is used in Evid.R. 404(B). That term is not limited to merely the identity of the perpetrator. Rather, it goes to the identity of the crime itself, i.e., the "behavioral fingerprint" associated with the criminal act. Evidence of modus operandi serves to identify the nature of the criminal conduct which is in turn linked to the identity of the perpetrator. Child sexual assault cases are distinct in that the criminal defendant's theory of the case generally is not to concede that the victim has been raped, only by someone else. Rather, the theory is that the victim is lying about the assault. In such cases, the behavioral fingerprint of the criminal conduct serves two evidentiary purposes, specifically, to establish the nature and identity of the crime committed, as well as to establish the identity of the perpetrator.

{¶53} I believe that the trial court properly admitted the testimony regarding the incident involving Morris and Sarah because it shows a common plan and opportunity to engage in sexual conduct with his step-daughters. Morris pursued sexual activity with Sarah in his bedroom, a frequent location for the incidents with S.K. Evidence of his sexual advances while Mother was elsewhere and not likely to interrupt, coupled with his comment that Mother would be mad if she knew what he was pursuing, demonstrates his knowledge of the need for secrecy in these situations. Mother's testimony that she threw Morris out of the house after learning of his inappropriate conduct with Sarah emphasized that Morris knew he must make an effort to hide these activities from his wife.

{¶54} Although there was no evidence that Morris ever grabbed S.K. in his pursuit of sexual activity with her, the testimony that he grabbed Sarah and forcibly pulled her to him

demonstrates preparation. The efforts to compel an adult, married woman to engage in sexual activity are necessarily different from those used to manipulate a very young and trusting child to engage in the same acts. Morris' act of grabbing and pulling Sarah, coupled with his threatening and suggestive comment, could reasonably be interpreted as his plan to compel S.K. to engage in sexual intercourse whereby he groomed her in pursuit of sexual activity. Moreover, S.K. testified that he also made sexually explicit comments to her in relation to sexual activity. Accordingly, I would conclude that the trial court did not abuse its discretion by admitting evidence regarding the incident between Morris and Sarah.

Evidence that Morris kicked the dog

{¶55} I believe that the trial court properly admitted Mother's testimony that Morris became verbally and mentally abusive, and would kick the dog, if she refused to have sex with him. The trial court could reasonably have interpreted this evidence as indicative of Morris' frustration when his wife refused his sexual advances, his anger at being rejected, and his plan to obtain sex with a victim who would not reject him. Mother's testimony in this regard "provided the context for the alleged crimes and made [Morris'] actions more understandable to the jurors." See *Diar* at ¶72.

{¶56} The majority dismisses the State's argument that this testimony is indicative of Morris' "insatiable sexual appetite" which gives rise to his motive to sexually abuse S.K. I would conclude that the trial court did not abuse its discretion in admitting the testimony notwithstanding the weak argument by the State on appeal. That is not to say that a criminal defendant cannot be motivated by sexual gratification to commit rape. While I do not agree with the State's rationale in this case, the State nevertheless has the right to present its theory of the case as it chooses. While the testimony at issue may not evidence an "insatiable sexual

appetite," it may in fact evidence a motive for sexual gratification, or something completely different, such as power, control, or the opportunity to demean another. In any event, I would conclude that Mother's testimony that Morris would kick the dog when she refused his sexual advances was admissible pursuant to Evid.R. 404(B).

{¶57} Assuming, however, that the trial court improperly admitted the above testimony, I would conclude that any error was harmless. Crim.R. 52(A) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Morris argues that the admission of the testimony was not harmless because the evidence of guilt was not overwhelming, specifically because there was no physical evidence of rape, no witnesses to the alleged acts, and no evidence to corroborate the victim's testimony. Even where the admission of evidence constitutes constitutional error, the error is harmless "if the remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt." *State v. Williams* (1983), 6 Ohio St.3d 281, at paragraph six of the syllabus.

{¶58} I strongly disagree with the majority's implication that this is a "close case." In fact, I believe that the remaining evidence did constitute overwhelming proof of Morris' guilt. The victim's detailed and consistent testimony established that Morris repeatedly raped her over a period of seven or eight years. This Court has consistently held that "[i]n sex offense cases, *** the testimony of the victim, if believed, is sufficient to support a conviction, even without further corroboration. Thus, the testimony of the victim may be enough, and does not need corroborating evidence." (Internal citations omitted.) *State v. Melendez*, 9th Dist. No. 08CA009477, 2009-Ohio-4425, at ¶15, quoting *State v. Willard*, 9th Dist. No. 05CA0096-M, 2006-Ohio-5071, at ¶11.

{¶59} S.K. detailed how Morris groomed her using magic tricks to accept his sexual advances. She described how his behavior quickly escalated from having her touch his penis which she believed was only his thumb under a blanket, to his touching her with his hand around the outside of her vagina, to using his penis to touch her on the outside of her vagina, to inserting his penis into her vagina on numerous occasions. The victim's counselor testified regarding S.K.'s disclosures to him during their sessions, which testimony closely mirrored the victim's. The evidence indicated that S.K. was consistent in her description of Morris' behavior when she disclosed the incidents to the police, her friend, and her counselor.

{¶60} The lack of physical evidence in a case where such evidence was unlikely due to the passage of time does not detract from the victim's testimony. In addition, although there were no third-party eye witnesses to any acts of rape, Mother testified that she observed what she believed to be inappropriate sexual activity between Morris and S.K. Sarah also testified that she once saw Morris and S.K. under a blanket together and that the image made her feel uncomfortable. Sarah also testified that S.K. told her some things which caused her concern. Both Mother and the victim's father testified to S.K.'s extreme and hysterical behavior when she learned that Morris, and not she, would be accompanying her mother on a trip to California. The victim testified that she was upset by the change of plans and she wanted to tell her parents what Morris had done to her. Based on the victim's testimony, it is reasonable to infer that the change in plans upset her to the point of hysteria because it deprived her of the opportunity to spend time with her mother and sister in a safe environment away from Morris, where she could disclose information regarding her long-term abuse by Morris. Mother and Father further testified that Morris nervously paced as the victim exhibited that behavior. The victim's parents both testified that S.K. exhibited the same extreme and hysterical behavior immediately before she was able to

finally disclose to them that "Carl raped me." Upon thorough review, I believe that the other evidence of Morris' guilt was overwhelming. Accordingly, the admission of the challenged "other acts" evidence was harmless error, if it constituted error at all.

{¶61} The majority tries to bolster its conclusion that admission of the challenged other acts evidence in this case was highly inflammatory and requires reversal by emphasizing comments made by the assistant prosecutor during closing arguments. It is well settled, however, that closing arguments do not constitute evidence, and the jury was so instructed. The majority here uses those comments to attempt to demonstrate prejudice caused by the admission of the challenged evidence, an analysis which I believe is improper within the context of this appeal. Morris could have challenged the propriety of the prosecutor's comments by objecting at the appropriate time during trial and by assigning error as to prosecutorial misconduct. He declined to do so. Accordingly, I believe that the majority exceeds the scope of this appeal by discussing the effect of closing arguments.

{¶62} Finally, I recognize the State's insistence in many cases to present other acts evidence when it is simply unnecessary to prove the elements of the charged offenses beyond a reasonable doubt. Although I believe that the admission of the challenged testimony in this case was proper, or, at worst, harmless error, the majority believes otherwise. The ramifications of this practice are severe, especially in a case such as this where a retrial forces the victim to again relive the horrors of abuse in open court. I would caution the State in any case to carefully consider the evidence it has accumulated to determine whether the presentation of other acts evidence is in fact necessary and significantly outweighs the grave risks of reversal, the waste of state and judicial resources required for retrial, and the revictimization of the innocent.

{¶63} In conclusion, I would overrule Morris' first assignment of error. In addition, upon review, I would further overrule his remaining assignments of error and affirm his conviction.

APPEARANCES:

DAVID C. SHELDON, attorney at law, for appellant.

DEAN HOLMAN, prosecuting attorney, and RUSSELL A. HOPKINS, assistant prosecuting attorney, for appellee.