[Cite as *State v. Morris*, 2010-Ohio-5682.]

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 JOURNAL ENTRY

{¶1} The State of Ohio has moved this Court to certify a conflict between its judgment in this case and the judgment of the Fifth District Court of Appeals in *State v. Kienzle*, 5th Dist. No. 2009 AP 03 0015, 2010-Ohio-2045, at ¶33; the Eighth District Court of Appeals in *State v. Wheeler*, 8th Dist. No. 93011, 2010-Ohio-1753, at ¶21, the Third District Court of Appeals in *State v. Adams*, 3d Dist. No. 4-09-16, 2009-Ohio-6863, at ¶28, the Twelfth District Court of Appeals in *State v. Ford*, 12th Dist. No. CA2009-01-039, 2009-Ohio-6046, at ¶40, and the Second District Court of Appeals in *State v. Hooper*, 2d Dist. No. 22883, 2010-Ohio-4041, at ¶25, *State v. Brandon*, 2d Dist. No. 23598, 2010-Ohio-3901, at ¶14, and *State v. Crowley*, 2d Dist. No. 2009 CA 65, 2009-Ohio-6689, at *2. This Court declines to do so because there is no conflict among appellate courts that requires resolution by the Ohio Supreme Court.

{¶2} The State has argued that this Court's decision conflicts with those of other district courts of appeals regarding: "[w]hether an abuse of discretion or de novo is the proper standard of review for the admission of Evid. R. 404(B) evidence." In each of the cases cited by the State, the appellate court determined that the other-act evidence at issue tended to prove at least one of the things listed in the exception to the general prohibition against the use of character evidence. See Evid. R. 404(B). The appellate court did not determine in any of those cases that the trial court violated Rule 404(B) but acted within its discretion in doing so, which is what this Court would have had to determine in order to affirm Mr. Morris's convictions. Rather, they applied the standard presented in Rule 404(B) to the proffered other-act evidence and determined that the evidence was admissible under the rule. Therefore, despite the fact that in each case the appellate court made a broad statement that the admission of evidence rests within the discretion of the trial court, in practice, each Court reviewed the other-act evidence questions de novo. Cf. *Med. Mut. Of Ohio v. Schlotterer*, 122 Ohio St. 3d 181, 2009-Ohio-2496, at ¶13 ("When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate.").

{¶3} The confusion in this area arises because of the interplay of Rules 404 and 403 of the Ohio Rules of Evidence. Under 403(A), even though 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" and, under Rule 403(B), even though relevant, evidence may be excluded "if its probative value is substantially outweighed by considerations of undue delay, or needless

presentation of cumulative evidence." The weighing required by both parts of Rule 403, as well as the determination whether to admit evidence falling within part (B), calls upon a trial court to exercise discretion based upon its first-hand knowledge of the case before it. Accordingly, an appellate court's review of the admission of evidence always potentially includes a discretionary element. That discretionary review, however, only takes place once it is determined that the evidence at issue is relevant and not otherwise inadmissible under another rule. For example, Rule 801 defines hearsay and Rule 802 prohibits its admission unless it falls within certain exceptions. There is no discretion involved in determining whether testimony falls within the definition of hearsay or, if it does, whether it also comes within an exception to the prohibition to the admission of hearsay. If it is hearsay and does not fall within an exception, it must be excluded. An appellate court is in as good of a position as the trial court to determine whether proffered evidence is hearsay and whether it falls within an exception to the prohibition of the admission of hearsay as is the trial court. But, if the testimony is not hearsay, or is hearsay that falls within an exception, that does not mean it must be received. The trial court still has discretion to apply Rule 403 and exclude it. Viewed properly, therefore, the cases cited by the State do not reveal a conflict with this Court's opinion in *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282.

{¶4} The majority of the State's cases cite *State v. Sage*, 31 Ohio St. 3d 173, paragraph two of the syllabus (1987), for the proposition that "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." In

Sage, however, the Supreme Court did not face an issue involving other-act evidence. As the State has pointed out in its application for en banc consideration of this appeal, the Ohio Supreme Court has more recently written that "[t]he admission of other-acts evidence under Evid.R. 404(B) '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. Perez*, 124 Ohio St. 3d 122, 2009-Ohio-6179, at ¶96 (quoting *State v. Diar*, 120 Ohio St. 3d 460, 2008-Ohio-6266, at ¶ 66). Assuming that what the Supreme Court wrote in *Perez* and *Diar* means that a trial court has discretion to violate Evidence Rule 404(B), certification of this appeal under Appellate Rule 25 is not appropriate. "An application to certify a conflict only applies to a conflict between judgments in appellate districts." *State v. Brown*, 2d Dist. No. 1747, 2009-Ohio-3430, at ¶23. If the decision "is in conflict with or contrary to a Supreme Court decision, [the] remedy is to appeal." *Id.* (citing, e.g., *Bae v. Dragoo and Associates Inc.*, 10th Dist. No. 03AP-254, 2004-Ohio-1297, ¶10).

{¶5} Article IV Section 3(B)(4) of the Ohio Constitution confers on the courts of appeals the power to certify inter-district conflicts of law to the Supreme Court "for the single purpose of promptly bringing such conflict to the attention of [the Supreme] [C]ourt when it has not previously had an opportunity to make a pronouncement as to the particular principle of law involved . . . ." *Whipp v. Indus. Comm'n of Ohio*, 136 Ohio St. 531, 533 (1940). Accordingly, the Court has held that, "after [the Supreme] [C]ourt has established the rule, any such conflict with a decision of another [c]ourt of [a]ppeals is of no consequence." *Id.* Due to the fact that the Ohio Supreme Court has

"ma[d]e a pronouncement as to the particular principle of law involved," it is not an appropriate legal issue for certification of a conflict among the districts. *Id.* If the State believes that this Court's application of the de novo standard of review in this case conflicts with Supreme Court precedent, the proper avenue of relief is for the State to appeal.

{¶6} The State's motion to certify a conflict is denied.

Clair E. Dickinson, Presiding Judge

Belfance, J.
Concurs

Carr, J.
Concurs, Saying:

{¶7} I agree that the motion to certify a conflict should be denied. The Ohio Supreme Court has already enunciated the standard of review applicable to the review of a trial court's admission of "other acts" evidence pursuant to Evid.R. 404(B). I cited and applied that standard of review in my dissent. *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶47 (Carr, J., dissenting). Because the high court has spoken on the issue, there no longer exists any interdistrict conflict. The State's recourse is to seek appeal to the Ohio Supreme Court.