[Cite as *State v. Morris*, 2010-Ohio-5973.]

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 for en banc consideration of this appeal. See *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282. Under Rule 26(A)(2)(a) of the Ohio Rules of Appellate Procedure, if a majority of the court of appeals judges in an appellate district determine that two or more decisions of the court on which they sit are in conflict, the court "may order that an appeal or other proceeding be considered en banc." The State has argued that the cases it has cited conflict with the opinion of this Court in this matter and consideration en banc is necessary to secure uniformity of decisions within the district. This matter is not appropriate for en banc consideration, however, because the differing description of the standard of review applicable to the admission of other-acts evidence does not create a true conflict within the district and the standard of review applicable to the admission of other-act evidence is not dispositive of this matter.

{¶2} Under the common law, evidence of other crimes committed by the accused was not admissible to show the accused's "propensity or inclination to commit crime." *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶11 (quoting *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975)). A statutory exception was created for criminal cases "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 . . . ." R.C. 2945.59. In such criminal cases, "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." *Id.* After the Modern Courts Amendment to the Ohio Constitution was adopted in 1968, the Ohio Supreme Court began to promulgate rules of practice and procedure for the various courts of the state. Ohio Const. Art. IV, § 5(B). Under the constitutional procedure, all rules proposed by the Supreme Court become effective "unless . . . the General Assembly adopts a concurrent resolution of disapproval." *Id.* In 1980, the Ohio Supreme Court adopted Rule 404 of the Ohio Rules of Evidence under the authority of article IV section 5(B) of the Ohio Constitution, giving the rule legal effect over any conflicting laws then existing. *Id.* Under Evidence Rule 404(B), "[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. [But], [i]t may . . . be admissible . . . [to prove] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶3} The State of Ohio has argued that this case must be considered en banc because its application of the de novo standard of review to the questions regarding the admission of evidence under Rule 404(B) of the Ohio Rules of Evidence conflicts with this Court's prior precedent. In *Morris*, this Court cited a de novo standard of review as applicable to the questions of "[w]hether 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 . . . ." *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶13.

{¶4} The State has cited eleven other-acts-evidence cases in which this Court has made the broad statement that the admission or exclusion of evidence rests in the discretion of the trial court. See *State v. Halsell*, 9th Dist No. 24464, 2009-Ohio-4166, at ¶11; *State v. Patel*, 9th Dist. No. 24030, 2008-Ohio-4693, at ¶16; *State v. Blazo*, 9th Dist. No. 23054, 2006-Ohio-5418, at ¶9; *State v. Arnott*, 9th Dist. No. 21989, 2005-Ohio-3, at ¶35; *State v. Kolvek*, 9th Dist. No. 21752, 2004-Ohio-3706, at ¶24; *State v. Owens*, 9th Dist. No. 21630, 2004-Ohio-601, at ¶16; *State v. Starcher*, 9th Dist. No. 03CA0014-M, 2003-Ohio-6588, at ¶21; *State v. Basford*, 9th Dist. No. 03CA0043-M, 2003-Ohio-5613, at ¶5; *State v. Galloway*, 9th Dist. No. 19752, 2001 WL 81257 at *5 (Jan. 31, 2001); *State v. Moore*, 9th Dist. No. 19544, 2000 WL 422412 at *2 (Apr. 19, 2000); *State v. Patton*, 9th Dist. Nos. 16475, 16634, 1995 WL 283767 at *3 (May 10, 1995). In nine of the State's cited cases, this Court determined that the other-act evidence did tend to prove at least one of the permissible issues listed in Evidence

Rule 404(B). In one case, the other-act evidence was never provided to the jury, so the trial court did not analyze whether it fit within the requirements of the rule. *State v. Moore*, 9th Dist. No. 19544, 2000 WL 422412 at *2 (Apr. 19, 2000). In the final case, this Court determined that the trial court had incorrectly admitted other-act evidence that did not fit within the requirements of the rule and reversed the judgment on that basis. *State v. Halsell*, 9th Dist No. 24464, 2009-Ohio-4166, at ¶18.

{¶5} In *Halsell*, this Court wrote that the other-act testimony the trial court had admitted was "a textbook example of improper character evidence." *State v. Halsell*, 9th Dist No. 24464, 2009-Ohio-4166, at ¶18. Mr. Halsell was charged with attempted murder and related counts stemming from an incident involving a man being shot in the back as he ran from an altercation in 2008. The State offered, and the trial court admitted, other-act evidence including testimony from a police officer that, in 2002, Mr. Halsell had been a passenger in a car stopped by police and was found to have a gun and crack cocaine in his possession at the time. The State also offered testimony from a Halsell family friend who said that Mr. Halsell had shot her in the back with a BB gun nine years earlier, when he was a juvenile. The trial court told the jury that this testimony was to be considered for the limited purpose of showing Mr. Halsell's "identity, plan, absence of mistake, or common scheme or mode of operation in the crime in question." *Id.* at ¶15. This Court reversed, determining that the testimony "[did] not serve to identify any peculiarities, idiosyncrasies, or pervasive modus operandi on the part of [Mr. Halsell]" and was offered merely to demonstrate Mr. Halsell's proclivity to carry or use a firearm. *Id.* at ¶18.

{¶6} There have been other cases in which this Court has held that a trial court incorrectly ruled on whether proffered other-act evidence tended to prove one of the permissible topics for the use of character evidence and/or whether that topic was at issue in the case. In *State v. Hahn*, 9th Dist. No. 3020-M, 2000 WL 1420288 (Sept. 27, 2000), the trial court admitted other-act evidence in a case involving a burglary charge. Mr. Hahn's neighbor, Mr. Corbett, said that he had found Mr. Hahn naked in the Corbett family apartment, but Mr. Hahn denied it. The trial court admitted testimony regarding an incident of public exhibitionism that Mr. Hahn had committed eighteen years earlier because it concluded it was relevant to Mr. Hahn's purpose in entering the Corbett apartment. This Court reversed the burglary conviction because the testimony regarding Mr. Hahn standing in his own apartment window masturbating eighteen years before had little relationship to whether he was guilty of breaking and entering an empty apartment with intent to expose himself to his neighbor on this occasion. This Court pointed out that the two incidents are far removed from one another temporally and not similar "except in their most general description." *Id.* at *3.

{¶7} In *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, the trial court admitted evidence that the defendant in a child rape case had previously been involved in drug use, had been arrested for cocaine use, served a six-month sentence at Oriana House, had exposed the child to marijuana smoke, and had been in an altercation with police. The trial court ruled that the State could present all of the other-acts testimony to rebut Mr. Bronner's implication that the State's witness, the father of Mr. Bronner's

girlfriend and grandfather of the victim, did not like him because he was African-American. *Id.* at ¶52. This Court determined that the disputed character evidence was irrelevant, unnecessarily prejudicial, and "was not relevant to proof of guilt of the defendant of the offense in question." *Id.* at ¶65, 89. This Court further held that the other-acts evidence did not tend to establish any of the permissible issues under Evidence Rule 404(B). *Id.* at ¶89. This Court in *Bronner* emphasized that, due to "the prejudice that might result from the admission of such evidence, the Ohio Supreme Court has indicated that both Evid. R. 404(B) and R.C. 2945.59 are to be strictly construed against the state and conservatively applied by the trial courts." *Id.* at ¶93 (citing *State v. DeMarco*, 31 Ohio St. 3d 191, 194 (1987)). Furthermore, "[d]oubts should be resolved against admissibility." *Id.* (citing *State v. Broom*, 40 Ohio St. 3d 277, 282 (1988)). This Court then held that the other-act evidence was not properly admitted because it "does not come within any of the enumerated matters [under the statute or the rule] and is not relevant to proof of guilt of the defendant on the charged offenses." *Id.* at ¶94.

{¶8} In *State v. Deyling*, 9th Dist. No. 2672-M, 1998 WL 46753 at *2 (Jan. 28, 1998), this Court held that the trial court incorrectly admitted testimony from Mr. Deyling's live-in girlfriend in a domestic violence trial. The testimony indicated that Mr. Deyling had once struck his girlfriend during an argument at some time prior to the events at issue. The trial court overruled Mr. Deyling's objection to the other-act evidence, but limited its use to proving "the absence of accident or the defendant's intent or purpose to commit the offense charged." *Id.* at *1. Due to the fact that Mr.

Deyling's defense was that his girlfriend's injuries were self-inflicted, this Court disagreed with the trial court and held that the other-act evidence "was not properly admissible on [those] bas[e]s . . . ." *Id.* This Court also held that the evidence was not admissible on the issue of identity because the victim accused the man she lived with of inflicting her injuries while he claimed they were self-inflicted. *Id.* at *2. Thus, identity was not at issue in the case, making other-act evidence tending to prove identity inadmissible. *Id.* The other-act evidence could not be properly admitted to prove any of the proposed exceptions to the rule against the admission of such evidence. *Id.* As this Court determined that the error was not harmless, it reversed the judgment. *Id.* at *3.

{¶9} In *State v. Wilkins*, 135 Ohio App. 3d 26, 32 (1999), this Court reversed a rape conviction because it determined Mr. Wilkins was prejudiced by the erroneous admission of testimony from a woman he had been convicted of raping twelve years earlier. This Court agreed with Mr. Wilkins that the other-act evidence did not fall within the requirements of the statute or the rule because it was "relevant only to show one's propensity to commit the crime charged . . . ." *Id.* at 29. The evidence of the prior rape was not admissible to prove a scheme, plan, or system because there was no evidence to connect the two rapes and evidence of the first crime did nothing to explain the events that culminated in the current charges. *Id.* at 32. Furthermore, identity was not at issue in the case because Mr. Wilkins admitted driving the victim to the video store. *Id.* at 31. Therefore, the issue was not whether the victim could

identify Mr. Wilkins as her attacker, but whether he raped her while she was in his car. *Id.*

{¶10} In addition to the five cases just mentioned, this Court has reversed at least four other trial court decisions based on violations of the prohibition against the admission of other-act evidence. See Evid. R. 404(B); R.C. 2945.59; *State v. McKinney*, 9th Dist. No. 01CA0038, 2002-Ohio-3194, at ¶22; *MGM Landscape Contractors Inc. v. Berry*, 9th Dist. No. 20979, 2002-Ohio-6763, at ¶15; *Gosden v. Louis*, 116 Ohio App. 3d 195, 217 (1996); *State v. Bersch*, 9th Dist. No. 1883, 1984 WL 4734 at *1 (Feb. 1, 1984); *State v. Clay*, 9th Dist. No. 10519, 1982 WL 5024 at *2 (May 26, 1982). In these cases, this Court did not weigh the evidence or consider its credibility. It merely applied the evidence to the standard presented in Evidence Rule 404(B) and/or Section 2945.59 of the Ohio Revised Code. In each case, this Court determined that the proffered other-act evidence did not meet the requirements of the rule or the statute, making the evidence inadmissible.

{¶11} What this Court has never done is determine that a trial court's admission of other-acts evidence in violation of Rule 404(B) or Section 2945.59 was not reversible because it was not an "abuse of discretion." In certain cases, this Court has determined that the error was harmless under the circumstances, but it has never deferred to a trial court's incorrect determination that other-act evidence was admissible when the evidence was not permitted by the statute or the rule. Thus, despite the fact that this Court has frequently made a broad statement that the admission of evidence rests within the discretion of the trial court, in practice, this

Court reviews other-act evidence issues de novo. As this Court has, in practice, been applying a de novo standard of review to this question despite referring to an abuse of discretion standard, *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶13, does not conflict with this Court's prior precedent.

{¶12} Regardless of the semantics used in this Court's treatment of Evidence Rule 404(B) questions, this appeal is also not appropriate for en banc consideration because the standard of review is not a dispositive issue in this matter. According to the Ohio Rules of Appellate Procedure, "[c]onsideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed." App. R. 26(A)(2)(a). Even applying an abuse of discretion standard of review, this case would be reversed because the trial court does not have discretion to admit evidence that is prohibited by Rule 404(B). Regardless of what this Court calls it, Mr. Morris was prejudiced by the admission of highly inflammatory testimony that tended to prove that Mr. Morris was the type of man who might act in a sexually inappropriate manner with his step-daughter.

{¶13} Character evidence tending to prove that the defendant has a propensity to commit the crime charged is precisely the type of evidence Rule 404 was designed to exclude. Evid. R. 404(B) ("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."). Evidence that Mr. Morris had kicked the family dog because his wife refused to have sex with him has no tendency to prove a motive to rape a child, an

opportunity to rape a child, an intent to rape a child, preparation to rape a child, a plan to rape a child, knowledge of or relating to the rape of a child, the rapist's identity, or the absence of a mistake or accident on Mr. Morris's part. See Evid. R. 404(B). "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 . . . 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." *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶25. Similarly, evidence that, on one occasion while he was drunk, Mr. Morris made a sexually suggestive comment to his wife's adult daughter had no tendency to prove any of the enumerated issues under Rule 404(B) in regard to the rape of a child. Contrary to the State's argument, the comment was not admissible to prove a common scheme and motive because the two acts were neither part of the same criminal transaction nor sufficiently similar to prove the identity of the perpetrator. *Id.* at ¶28 (citing *State v. Schaim*, 65 Ohio St. 3d 51, 63 n.11 (1992)). Even if Mr. Morris's inappropriate comment to the adult woman had borne a sufficient similarity to the rapes described by the child victim so as to aid in proving the identity of the perpetrator, identity was not at issue in this case. *Id.* at ¶17-18 (quoting *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994)) (describing the "unique, identifiable plan of criminal activity" required to create a "behavioral fingerprint which . . . [could] be used to identify the defendant as the perpetrator"). The child testified that Mr. Morris molested her over the course of several years while they lived in the same house. The question in this case was not who had molested the child, but

whether she had been molested by her step-father. Neither the State nor Mr. Morris suggested to the jury that anyone else could have committed the acts. Because identity was not at issue, even if the State had offered other-act evidence that tended to prove identity, it would not have been admissible under Evidence Rule 404(B). *Id.* at ¶28 (citing *State v. Curry*, 43 Ohio St. 2d 66, 73 (1975)). Even under the abuse of discretion standard of review, this case would have to be reversed because the prosecutor proffered, and the trial court admitted, highly-inflammatory other-act evidence that did not fit within the requirements of Rule 404(B) of the Ohio Rules of Evidence, depriving Mr. Morris of a fair trial. Therefore, the standard of review is not a dispositive issue in this case.

{¶14} The State's application for en banc consideration is denied.

Clair E. Dickinson, Presiding Judge

Moore, J.
Belfance, J.
Concur

Whitmore, J.
Dissents, Saying:

{¶15} As noted by a majority of the panel members in this Court's previous order, denying the State's motion to certify an inter-district conflict on this same issue, the Ohio Supreme Court has definitively applied an abuse-of-discretion standard of

review in appeals from evidence introduced through Evid.R. 404(B). See *State v. Morris* (Nov. 22, 2010), 9th Dist. No. 09CA0022-M, at ¶4, quoting *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, at ¶96 ("The 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.'"), quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, at ¶66. Many other decisions from this Court have done the same, see, e.g., *State v. Halsell*, 9th Dist. No. 24464, 2009-Ohio-4166, but *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, did not. That is a conflict.

{¶16} As to App.R. 26(A)(2)(a)'s requirement that a conflict be outcome-determinative for en banc certification, I cannot say that the application of the abuse-of-discretion standard of review would not be dispositive in this case. It is not clear from the *Morris* opinion why the trial court admitted certain evidence below, such as the victim's sister's testimony. Absent any knowledge as to how the trial court exercised its discretion, I cannot jump to the conclusion that the court abused it. Thus, I dissent from the decision to deny the State's motion for en banc consideration.

Carr, J.
Dissents, Saying:

{¶17} I agree with Judge Whitmore's statement that an intra-district conflict exists. Moreover, I believe that the application of the abuse of discretion standard of review in this case is outcome determinative, as I indicated in my dissent to the

majority's disposition of the appeal. See *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶45-63 (Carr, J., dissenting).