

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO	:	NO. 2013-0251
Plaintiff-Appellant	:	On Appeal from the Medina County Court of Appeals
vs.	:	Court of Appeals
CARL M. MORRIS, JR.	:	Case Number 09CA0022-M
Defendant-Appellee	:	

**BRIEF OF AMICUS CURIAE, THE CUYAHOGA COUNTY PROSECUTOR'S OFFICE,
IN SUPPORT OF STATE OF OHIO'S MERIT BRIEF**

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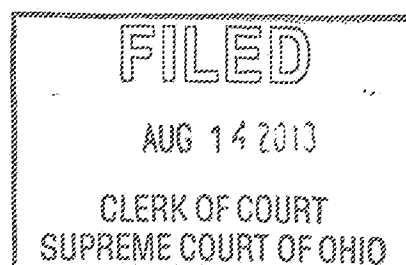


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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

The thirty-four judges of the Cuyahoga County Court of Common Pleas preside over an extremely large number of criminal trials each year. Within the number of cases that go to trial each year, a significant number of those cases involve the application of Evid. R. 404(B). Due to the large volume of criminal cases litigated by the Cuyahoga County Prosecutor's Office, the citizens of Cuyahoga County have a compelling interest in the uniform application of a settled and commonly understood legal standard governing whether the constitutional harmless error standard or the non-constitutional harmless error standard is to be applied when a reviewing court determines the admission of evidence under Evid. R. 404(b) is erroneous.

The Cuyahoga County Prosecutors Office, as amicus curiae in support of the State, submits that the Ninth District Court of Appeals incorrectly determined that a heightened standard of harmless error review was warranted for the admission of other acts evidence in this case. The Ninth District determined that a heightened standard of harmless error review was warranted because, "the injection of ... inflammatory ... material" violated Mr. Morris's right to a fair trial." *State v. Morris*, 985 N.E.2d 274, 2012-Ohio-6151 (9th Dist. Medina). The fact that the admission of other acts evidence may be inflammatory does not necessarily mean that its effect should be reviewed under the lens of constitutional harmless error. Rather than viewing the admission of other acts evidence as implicating the constitutional right to a fair trial it should be viewed as an evidentiary issue as Evid. R. 404(b) serves the trial court's gatekeeper function.

In support of the State of Ohio, amicus curiae asks this Court to reverse the decision of the Ninth District in *State v. Morris*, 985 N.E.2d 274, 2012-Ohio-6151 (9th Dist. Medina).

STATEMENT OF THE CASE AND FACTS

Amicus Curiae the Cuyahoga County Prosecutor's Office adopts and incorporates by reference the Statement of the Case and Statement of Facts as set forth by the appellant, the State of Ohio, in its merit brief.

LAW AND ARGUMENT

AMICUS CURIAE'S PROPOSITION OF LAW: ADMISSION OF IMPROPER OTHER ACTS EVIDENCE IMPLICATES NON-CONSTITUTIONAL HARMLESS ERROR ANALYSIS AND DOES NOT REQUIRE PROOF THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Under the United States Supreme Court's decision in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the prosecution must carry the burden of showing that a constitutional error is harmless beyond a reasonable doubt. The Court in *Chapman*, implicated a difference between a state harmless error standard and the harmless error standard to be used for federal constitutional error. *Chapman*, 21. That difference was examined in depth by the Eighth District Court of Appeals in *State v. Davis*, 44 Ohio App.2d 335, 338 N.E.2d 793 (8th Dist. Cuyahoga 1975):

Initially, harmless error in the trial of a criminal case must be broken down into one of two categories, either harmless constitutional error or harmless non-constitutional error.

The rule pertaining to harmless constitutional error was promulgated by the United States Supreme Court in the cases of *Harrington v. California*, supra, and *Chapman v. California*, supra. In *Chapman*, the Supreme Court held that before a federal constitutional error in the trial of a criminal case can be held harmless, the reviewing court must be able to conclude that it was harmless beyond a reasonable doubt, or stated differently, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. In *Harrington*, which was decided two years later, the Court extended the concept of what constituted harmless error beyond the definition in *Chapman* by holding that where evidence supplied in violation of constitutional right was merely cumulative, and the other evidence against the accused was overwhelming, that the reviewing court could conclude beyond a reasonable doubt that the denial of the accused's constitutional rights was harmless error.

On the other hand, Ohio law dictates the rule pertaining to harmless non-constitutional error. When errors are asserted in a criminal trial that do not relate to a violation of any of the accused's federal constitutional rights, Ohio Rule of Criminal Procedure 52(A) provides the governing general principle. Rule 52(A) states:

‘Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.’

[***]

The Ohio test then for determining whether the admission of inflammatory and otherwise erroneous evidence is harmless non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. If there is substantial evidence, the conviction should be affirmed, but if there is not other substantial evidence, then the error is not harmless and a reversal is mandated.

This test is similar to the one propounded for harmless constitutional error in *Chapman* and *Harrington*, supra. However, under the Ohio test the burden is on the accused to show that he ‘was or may have been prejudiced thereby’ while under the constitutional test the burden is on the prosecution to show beyond a reasonable doubt that the error was harmless. The Ohio test requires ‘substantial’ evidence exclusive of the tainted material to find the error harmless while the constitutional test requires ‘overwhelming’ evidence exclusive of the tainted material to find the error harmless beyond a reasonable doubt. The constitutional test provides a more exacting standard presumably because the accused has suffered a violation of his constitutionally-protected rights.

Davis, 44 Ohio App.2d 335, 347-348.

Thus the determination of which harmless error standard applies, rests upon whether the erroneous admission of other acts evidence constitutes constitutional error or non-constitutional error.

As a starting point, non-constitutional harmless-error analysis is generally applied to evidentiary errors. See *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶88; *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶74. In Ohio, non-constitutional error is harmless if there is substantial other evidence to support the guilty verdict. *State v. Webb*, 70 Ohio St.3d 325, 335, 1994-Ohio-425, 638 N.E.2d 1023, *State v. Bell*, 8th Dist. Cuyahoga No. 97123, 2012-Ohio-2624, ¶59. *State v. Yancy*, 8th Dist. Cuyahoga

No. 96527, 96528, 2011-Ohio-6274, ¶23. This Court in *State v. Morris*, 132 Ohio St. 3d 337, 2012-Ohio-2407, 972 N.E.2d 528, determined that the admission of other acts evidence is reviewed under an abuse of discretion standard because the admission of the other acts evidence is an evidentiary determination.

The Ninth District in *State v. Morris*, 985 N.E.2d 274, 8th Dist. Medina No. 09CA0022-M, 2012-Ohio-6151, applied a higher standard of review because Morris right to a fair trial was violated. *Morris*, at ¶51. In crafting a rule of law to be applied throughout the State of Ohio, the pertinent question is whether the erroneous admission of other acts evidence constitutes constitutional error or non-constitutional error. The exact harmless error standard has not been applied with uniformity in the Eighth District. See *State v. Wright*, 8th Dist. Cuyahoga No. 93068, 2011-Ohio-3575, ¶55, *Middleburgh Hts. v. Bunt*, 8th Dist. Cuyahoga No. 94149, 2010-Ohio-5479.

The erroneous admission of other acts evidence should be non-constitutional error because Evid. R. 404(b) itself is an evidentiary rule. In *State v. Morris*, this Court noted that “[t]he admission of such [other-acts] evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice.” *Id.* at ¶14, citing *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶66.

A review of decision from various state high courts and federal courts indicate that states and federal courts have applied state harmless error rules or a less stringent harmless error standard to determine whether the erroneous admission of other acts evidence requires reversal. In *State v. Collins*, 281 Neb. 927, 945-946 799 N.W.2d 693 (Neb. 2011), the Nebraska Supreme Court indicated that, “harmless error exists when there is some incorrect conduct by the trial

court which, on review of the entire record, did not materially influence the jury's verdict adversely to a defendant's substantial right." (But see *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (Neb. 2007)). The Wisconsin Supreme Court in *State v. Sullivan*, 216 Wis.2d 768, 791, 576 N.W.2d 30 (Wis. 1998) indicated the test to determine whether the erroneous admission of other acts evidence was, "whether there is a reasonable possibility that the error contributed to the conviction." See also *Martindale v. Ripp*, 2011 WI 113, ¶30, 246 Wis.2d 67, 629 N.W.2d 698. The Tennessee Supreme Court likewise applied a "probability" test in determining that the admission of other acts evidence as well as other issues was not harmless error. *State v. Toliver*, 117 S.W.3d 217 (Tenn. 2003).

The Supreme Court of North Dakota did not apply the constitutional harmless error standard to the admission of other acts evidence and instead applied the state rule of criminal procedure that stated, "Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded," and concluded that although notice requirements were not met, error was harmless because sufficient evidence and testimony supported the conviction. *State v. Dieterle*, 833 N.W.2d 473, ¶12-13 (N.D. 2013). The court's decision in *Dieterle* did not implicate a clear application of the constitutional harmless error standard.

The United States Court of Appeals for the Ninth Circuit referred to the erroneous admission of other acts evidence under the federal rule as not rising to the constitutional dimension, instead applying the test of whether it "is more probable than not that the erroneous admission of the evidence did not affect the jury's verdict." *U.S. v. Boateng*, 81 F.3d 170 (C.A. 9) citing *U.S. v. Brown*, 880 F.2d 1012, 1016 (9th Cir. 1989). The Third Circuit in *U.S. v. Joseph*, 178 Fed. Appx. 162 at **3 (C.A. 3 2006) applied a non-constitutional harmless error standard. So too did the Tenth Circuit in *U.S. v. Morrow*, 208 F.3d 228 (C.A. 10) apply a non-

constitutional harmless error standard to the erroneous admission of a prior arrest, as did the First Circuit in *U.S. v. Aguilar-Aranecta*, 58 F.3d 796 (C.A. 1).

Thus, courts appear to view the admission of other acts evidence as evidentiary determinations that are reviewed under an abuse of discretion standard. See *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565; *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810; *State v. Issa*, 93 Ohio St.3d 49, 2001-Ohio-1290, 752 N.E.2d 904. *State v. Morris*, 132 Ohio St. 3d 337, 2012-Ohio-2407, 972 N.E.2d 528. It follows that such an evidentiary ruling constitutes non constitutional harmless error, a standard followed by other courts.

CONCLUSION

Amicus curiae the Cuyahoga County Prosecutor's Office respectfully submits that this Honorable Court should hold that the erroneous admission of other acts evidence is reviewed under the non-constitutional harmless error standard. The judgment of the Ninth District in *Morris* should be reversed and remanded for application of the appropriate standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amicus Curiae has been set via U.S. regular mail this the 14th day of August 2013 to:

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