In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2022-0099
Plaintiff-Appellee,	}	
	}	ON APPEAL FROM THE SUMMIT
v.	}	COUNTY COURT OF APPEALS
	}	NINTH APPELLATE DISTRICT
JUBA ALI,	}	
	}	COURT OF APPEALS CASE NO. 29611
Defendant-Appellant.	}	

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT JUBI ALI

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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

The purpose of the Amicus Committee of the OACDL is to present arguments to the Supreme Court on behalf of those charged with criminal offenses, in the hopes of aiding the Court in arriving at a just conclusion.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellant.

LAW AND ARGUMENT

Overview and Summary of Argument. There is little real dispute that the 404(B) evidence admitted against the Defendant, Juba Ali, in this case did not satisfy the requirements of the rule. Without deciding that question, the lower court in a split decision held that regardless of the admissibility of the evidence, its admission was harmless.

In doing so, the lower court erred in three respects. First, it did not recognize the special harm that wrongful introduction of 404(B) evidence causes. Second, it used a test which does not take into consideration that harm. Third, its conclusion that the error was harmless depended upon a determination that the remaining evidence was "overwhelming," using an analysis that is again contrary to the vast body of Ohio case law.

AMICUS CURIAE'S PROPOSITION OF LAW: When reviewing the improper admission of other-acts evidence for harmless error, a reviewing court must apply the standards outlined in State v. Tench, 156 Ohio St.3d 85, 2018-Ohio-5205, 123 N.E.3d 955, and State v. Morris, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153.

1. The testimony of A.B. and D.S. was not admissible as 404(B) evidence. Before addressing the issue of whether admission of the 404(B) evidence was harmless error, we must first determine whether it was error in the first place. That task need not occupy us for long. The court below dispensed with that claim in a single paragraph. *State v. Ali*, 9th Dist. Summit No. 29611, 2021-Ohio-4596, ¶38. Since identity wasn't at issue – this was a question of whether the acts complained of were actually done, not who did them – 404(B) evidence could not be used to prove *modus operandi*. *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, ¶37-39, 161 N.E.3d 651. Motive is not an issue in sexual assault cases, nor is intent when "the defense theory is that the act never occurred. *Hartman* ¶50, 55. To come within the "common scheme or plan" exception to the rule, the "evidence should show that the crime being charged and the other acts are part of the same grand design by the defendant." *Id.* at ¶46. Incidents which occurred decades ago do not satisfy this exception. While the State maintained in the appeal that the evidence was meant to show accident or mistake – it did not seek an instruction on that in the trial court – at no time did Ali allege that his actions were the result of an accident or mistake; he

alleged that he did not commit them at all. *Hartman* clearly prohibits the pre-emptive use of this exception, holding that such evidence is admissible as proof of absence of mistake or accident "to *negate* a defendant's claim of mistake or accident with respect to the commission of the alleged crime." ¶52 (emphasis supplied). *Cf. State v. Smith*, 162 Ohio St.3 353, 2020-Ohio-4441, 165 N.E.3d 1123.

There is no question there was error in the admission of the evidence. The next issue is what to do about it. The lower court's conclusion that the error was harmless presents numerous problems.

2. Erroneous admission of 404(B) evidence raises greater concerns than other trial court errors. Seasoned defense attorneys are generally loathe to have a defendant testify if he has prior convictions; the lawyer knows that despite instructions by the court and professions by jurors during *voir dire* that they won't consider those convictions in deciding guilt, they do. As Wigmore observed, the introduction of such evidence tempts "the tribunal [to]. . .to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." 1 Wigmore Evidence 646 (3d Ed. 1940).

But the dangers of the jury improperly considering the defendant's past acts in determining guilt are exponentially heightened when the past acts are admitted under Evid.R. 404(B). Any error by a trial court in its rulings – denying a motion, erroneously admitting hearsay evidence, failing to give a necessary jury instruction – can affect a jury's verdict, but none so profoundly as an error in admitting 404(B) evidence. As one court noted long ago in *State v. Saunders*, 14 Ore. 300, 12 P.441, 445 (1886),

> Place a person on trial upon a criminal charge, and allow the prosecution to show . . . that he has before been implicated in similar affairs, no matter what explanation of them he attempts to make, it will be more damaging evidence against him . . . than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this.

See also United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972) ("once [404(b) evidence is] introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality"); *State v. Hector*, 19 Ohio St.2d 167, 174-175, 249 N.E.2d 912 (1969) (typical juror will "much more readily believe that a person is guilty of the crime charged if it is proved to his satisfaction that the defendant has committed a similar crime").

The reason for this, as the unanimous court in *Hartman, supra*, explains, is the tendency of the jury to consider the evidence for the purposes enumerated in the rule, but as proof of the defendant's propensity to commit the crime charged, a use the rule specifically prohibits.

Because of that danger, this Court has formulated two basic tests to determine whether admission of 404(B) evidence is harmless. First, the court must consider the impact of the evidence. "Error in the admission of other act testimony is harmless when there is no reasonable possibility that the testimony contributed to the accused's conviction." *State v. Tench,* 156 Ohio St.3d 85, 2018-Ohio-5205, ¶177, 123 N.E.3d 955. Second, the court must consider the remaining evidence to determine if it is so overwhelming that the error is harmless beyond a reasonable doubt. *State v. Morris,* 141 Ohio St.3d 399, 2014-Ohio-5052, ¶32, 24 N.E.3d 1153.

This is a heightened standard from the harmless error standard under Crim.R. 52(A), where "the *government* bears the burden of demonstrating that the error did not affect the substantial rights of the defendant." *State v. Perry*, 101 Ohio St. 3d 118, 2004-Ohio-297, ¶15,

802 N.E.2d 643 (emphasis in original).

3. The lower court did not examine the impact of the evidence. Instead of applying the *Tench/Morris* test for determining whether the admission of 404(B) evidence was harmless, the majority in the lower court applied the test articulated in *State v. Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061, ¶63, 153 N.E.3d 44:

> First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. [Internal citations omitted.] Second, it must be determined whether the error was not harmless beyond a reasonable doubt. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt.

There is a substantial difference between the first step in the *Tench* analysis and the first step in *Boaston.* In the latter, the court need only find that the error did not have an impact on the verdict; in the former, there must be "no reasonable possibility" that the error affected the verdict.

That distinction is again due to the greater impact of 404(B) evidence. *Hartman* provides a classic example of that. The proposed evidence in *Hartman* was that he had fondled his twelve-year-old daughter while she was sleeping, supposedly to establish a *modus operandi* of sexually assaulting sleeping women. There was simply no reasonable possibility that that evidence did *not* contribute to the verdict: Hartman went from being accused of taking advantage of a sleeping woman to being branded a child molester.

More troublesome than the lower court's failing to articulate the proper standard is that the majority did not even engage in the analysis they articulated. There was no "first step"; the court moved immediately to gauging "the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record,"

and then decided that the "significant evidence presented … establishes Ali's guilt beyond a reasonable doubt." ¶39. The first step – determining whether there was any reasonable possibility that the evidence might have contributed to the conviction – is conflated with the second, examining the remaining evidence. And even here, there are major problems with the court's analysis.

4. The evidence against Ali was not overwhelming. The courts have routinely rejected claims of error where the evidence of guilt is overwhelming. But the lower court here did not engage in that analysis, instead choosing to determine whether S.B.'s testimony was "supported by other evidence." It found that it was: Ali had "no explanation" for why there was a bruise on S.B.'s breast, other family members noticed that she was upset when she came home after the trip with Ali, and that while the court could not view her testimony, "it is evident from the transcript that, at one point during her testimony, she needed to take a break."

Although that would be appropriate for an insufficiency or manifest weight challenge, it is a far cry from what is generally required for a finding that the error was harmless beyond a reasonable doubt.

Tench itself provides the proper analysis of whether the evidence is so overwhelming that it renders an error harmless.

> While the trial court erred in admitting evidence of other acts barred by Evid.R. 404(B), we hold that these errors are harmless, given the overwhelming evidence of Tench's guilt. Tench's bloodstained boots, his strong motive, his unusual behavior on the night of the murder, his anger toward his mother, his lies and shifting stories, the trail of footprints leading back to his neighborhood—these are the facts that prove that he killed Mary, and they would inevitably have done so even if drugs, robbery, embezzlement, and deletions from cell phones had never been mentioned at his trial. ¶191.

In fact, in every single case in which the Supreme Court has found evidence sufficiently

overwhelming to find any error harmless, that evidence has consisted of confessions, *State v. Cooey*, 46 Ohio St.3d 20, 23, 544 N.E.2d 895 (1989), *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, ¶ 17, 892 N.E.2d 864, *State v. Thompson*, 33 Ohio St. 3d 1, 2, 514 N.E.2d 407, 410 (1987), *State v. Cepec*, 149 Ohio St. 3d 438, 2016-Ohio-8076, ¶ 25, 75 N.E.3d 1185, *State v. Green*, 66 Ohio St. 3d 141. 1993-Ohio-26, 141, 609 N.E.2d 1253; eyewitness testimony, *State v. Brown*, 65 Ohio St. 3d 483, 1992-Ohio-61, 605 N.E.2d 46, *State v. Maxwell*, 139 Ohio St. 3d 12, 2014-Ohio-1019, ¶ 124, 9 N.E.3d 930; forensic evidence, *State v. McKnight*, 107 Ohio St. 3d 101, 2005-Ohio-6046, ¶ 15, 837 N.E.2d 315, *State v. Trimble*, 122 Ohio St. 3d 297, 2009-Ohio-2961, ¶111, 911 N.E.2d 242; or, more usually, some combination of the three. *Trimble, supra* (admission of guilt to family members, "wealth of forensic evidence," and eyewitness testimony); *State v. Bryan*, 101 Ohio St. 3d 272, 2004-Ohio-971, ¶7, 804 N.E.2d 433 (eyewitness testimony to shooting, defendant's admission, forensic and DNA evidence); *State v. Gillard*, 40 Ohio St. 3d 226, 229, 533 N.E.2d 272 (1988) (eyewitness account of murder, defendant's admission, and his possession of murder weapon); *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112 (defendant made incriminating statements to police and was found in possession of the murder weapon); *State v. Beuke*, 38 Ohio St. 3d 29, 31, 526 N.E.2d 274 (1988) (admissions, eyewitness testimony, forensic evidence).

State v. Thomas, 152 Ohio St. 3d 15, 2017-Ohio-8011, ¶ 70, 92 N.E.3d 821, demonstrates the high bar required to find 404(B) evidence error harmless. In *Thomas*, the defendant had been convicted and sentenced to death for killing a barmaid. At trial, the prosecutor introduced five knives, none of which were the murder weapon. The dissent described the evidence against Thomas:

> In fact, substantial and compelling evidence supported the jury's verdict. It is undisputed that Thomas and McSween [the victim] were both present at the bar within two hours before the murder. Thomas was seen that night in possession of a knife with a blade that was consistent in size with the medical examiner's description of the murder weapon. About an hour after McSween's death, a neighbor saw a man matching Thomas's general description standing by a fire in a barrel behind Thomas's residence. Investigators later found McSween's half-burned clothes in that same barrel. ¶69 (Fischer, J., dissenting.)

The majority nonetheless reversed the conviction and remanded the case for a new trial, finding that the admission of the knives was barred by Evid.R. 404(B). It is especially noteworthy that the reversal came on review for plain error; unlike this case, in *Thomas* there was no objection to the introduction of the evidence.

The lower court's treatment of the harmless error aspect of the case reads more like a discussion of a manifest weight argument. At no time did the lower court actually consider the impact of the erroneous admission of 404(B) evidence, instead deciding that any error was harmless because of what it termed as the "significant" evidence against Ali. This is not in keeping with the analysis required by *Tench* and *Morris*, and is completely inconsistent with the great body of Ohio case law on what constitutes overwhelming evidence. In this case, the evidence had to be so overwhelming that it eliminated any reasonable possibility that the improper evidence contributed to the verdict. It did not. The court below completely erred in its analysis of the wrongful admission of 404(B) evidence, and its improper analysis compels reversal of Ali's conviction.

CONCLUSION

A clear standard for harmless error is imperative for proper judicial review. A standard of review for the improper admission of 404(B) evidence must take into consideration the

heightened dangers that evidence poses. The *Tench/Morris* standard – determining first that there is no reasonable possibility that the evidence contributed to the verdict, and then determining whether the remaining evidence is so overwhelming that there is no reasonable doubt of the defendant's guilt – satisfies that standard. The court below did not apply that standard, and for that reason, *Amicus* respectfully prays the Court to vacate the Defendant's conviction, and to reverse and remand the case for a new trial.

Respectfully submitted,

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SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was served upon all parties by email.

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