

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

|                          |   |                                |
|--------------------------|---|--------------------------------|
| <b>STATE OF OHIO</b>     | ) | <b>CASE NO. 2010-1842</b>      |
|                          | ) |                                |
| <b>Appellant</b>         | ) |                                |
|                          | ) |                                |
| <b>-vs-</b>              | ) |                                |
|                          | ) |                                |
| <b>CARL MORRIS, JR.,</b> | ) | <b>APPEAL FROM THE</b>         |
|                          | ) | <b>MEDINA COUNTY COURT OF</b>  |
| <b>Appellee</b>          | ) | <b>APPEALS, NINTH JUDICIAL</b> |
|                          | ) | <b>DISTRICT</b>                |

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**CARL MORRIS JR.'S MEMORANDUM OPPOSING JURISDICTION**

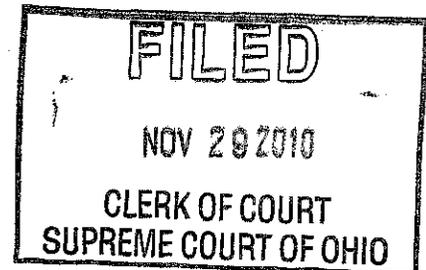
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## Explanation As To Why Leave To Appeal Should Not Be Granted

This case merits no consideration by this court. It is one among hundreds, if not thousands, of cases that come before courts of appeals each year in which the introduction of “other acts” evidence is challenged. The jury convicted Carl Morris, Jr. of rape based on the erroneous admission of prejudicial other acts evidence. The State argues that the Ninth District Court of Appeals applied an erroneous standard of review for the admission of other acts evidence. The appellate court explained its application of a *de novo* standard of review:

“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. . . 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.” (citation omitted)

*State v. Morris* (September 13, 2010), 2010 Ohio 4282, at p. 6. The State insists that the appellate court should have applied an abuse of discretion standard of review in its analysis of the trial court’s admission of 404(B) evidence. The State reasons that if the appellate court had applied an abuse of discretion standard of review, a different result would obtain. The State is wrong.

The Ninth District Court of Appeals explained why the State is wrong. In its decision denying the State of Ohio’s motion to certify a conflict, the appellate court explained why no conflict exists:

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.

*State v. Morris* (November 22, 2010), 2010-Ohio-5682, p. 3 (Journal Entry denying motion to certify a conflict).

The appellate court properly ruled that the trial court erred in determining that the proffered other acts evidence fell within any of the exceptions noted in Evid. R. 404(B).

The State claims that 404(B) evidence is "often critical to demonstrating that a victim's testimony is not mistaken or that a divorcing parent did not put words in the child's mouth. It is extremely difficult to see how the State can ever prove child sexual abuse by a care-giver when one considers how secretive such offenders are and how impressionable their victims are." (State's Memorandum In Support of Jurisdiction, pp. 1-2). Yet in its merit brief in the court of appeals, the State argued that even if the admission of other acts evidence amounted to constitutional error, any such error was harmless beyond a reasonable doubt because the remaining evidence constituted overwhelming proof of the defendant's guilt (Answer Brief Of Appellee State of Ohio, *State v. Morris*, Medina App. No. 09CA0022-M, p. 18).

Judge Carr in her dissenting opinion specifically cautioned the State of Ohio about its reliance upon unnecessary other act evidence to secure a conviction:

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. . . 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 risk of reversal, the waste of state and judicial resources required for retrial, and the revictimization of the innocent.*

*State v. Morris* (September 13, 2010), 2010-Ohio-4282, p. 28 (Carr, J., dissenting, emphasis added).

According to Judge Carr, the State did not properly evaluate its case when it made a conscious decision to introduce highly prejudicial and inflammatory evidence against Mr. Morris. The majority determined that admission of that evidence by the trial court prejudiced Mr. Morris's right to a fair trial.

This case is not a case of great public interest. This is a case where the appellate court determined that the trial court erred in admitting prejudicial and inflammatory evidence. It does not matter that the appellate court applied a *de novo* standard of review as opposed to an abuse of discretion standard of review.

The same result obtains. The majority reasoned:

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." 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.”

*Morris, supra*, 2010-Ohio-4282 at 19 (citations omitted).

Admission of the other acts evidence prejudiced Mr. Morris’s right to a fair trial. Whether a reviewing court applies an abuse of discretion standard or *de novo* standard of review, the reviewing court must come to the same conclusion as the court did in this case. The Ninth District Court of Appeals carefully reviewed the admission of other acts evidence in this case and arrived at the correct decision. The trial court’s admission of the other acts evidence was erroneous and prejudiced Mr. Morris’s right to a fair trial.

This Court should refuse to accept jurisdiction of this appeal and allow the appellate court’s decision to remain. Carl Morris, Jr., respectfully requests that this Court deny leave to appeal. This is not a case of great public or general interest. This case is similar to the hundreds and thousands of cases that come before courts of appeal throughout this state which call into question the admission of other acts evidence by the trial court. The Ninth District Court of Appeals determined correctly that admission of such evidence in this case was erroneous and substantially affected the outcome of the trial. Mr. Morris deserves a new trial where such inflammatory and prejudicial evidence is not brought before the jury.

**APPELLANT’S PROPOSITION OF LAW NO. 1: The Court of Appeals erred in applying a *de novo* standard of review to the admissibility of “other acts” evidence and substituted its own judgment for that of the trial court.**

The Ninth District Court of Appeals carefully reviewed the 404(B) evidence in this case and determined that its admission by the trial court was erroneous. Whether the appellate court applies a *de novo* standard of review or an abuse of

discretion standard, the result is the same. Admission by the trial court of erroneous and prejudicial evidence is unreasonable. If the evidence does not fall within one of the enumerated exceptions, as the appellate court explained, its admission is erroneous and unreasonable. The trial court necessarily abuses its discretion when it admits erroneous evidence that does not fall within an exception under Evid. R. 404(B). If the evidence is erroneous and prejudicial, it should not be admitted by the trial court. The appellate court properly held that the trial court's decision to admit the 404(B) evidence in this case amounted to a violation of the law, that the evidence did not meet any of the enumerated exceptions, and that its admission materially prejudiced appellee's right to a fair trial.

The Court of Appeals did not substitute its judgment for the trial court's judgment. Instead, the appellate court stated that any reviewing court, given the same evidence proffered by the state, would have to conclude that such evidence did not fall within any of the exceptions enumerated under Evid. R. 404(B). This Court stated that "the standard for determining admissibility of such evidence is strict." *State v. Broom* (1988), 40 Ohio St. 3d 277, 282. The determination in the first instance whether the evidence falls within an exception is a question of law. If the court determines that the evidence falls within an exception, then the court must determine whether its probative value is substantially outweighed by its prejudicial effect under Evid. R. 403. That decision is a discretionary decision which the trial court is in the best position to determine and should not be overturned absent an abuse of discretion.

Even if this court determines that the Court of Appeals should have applied an abuse of discretion standard and not a *de novo* standard of review, the same result occurs. The trial court acted unreasonably in admitting clearly erroneous evidence. The evidence in question did not fall within one of the exceptions noted under Evid. R. 404(B). The trial court's admission of such evidence amounted to an abuse of discretion.

This Court should refuse to accept jurisdiction of this appeal because the appellate court correctly found that the trial court erroneously admitted inflammatory and prejudicial evidence that denied Mr. Morris a fair trial. The questionable evidence did not meet any of the enumerated criteria under Evid. R. 404(B). Leave to appeal should be denied.

**APPELLANT'S PROPOSITION OF LAW NO. 2: The Court of Appeals prejudicially erred in finding that Appellee's sexual advance toward the victim's adult sister under the same circumstances he raped the victim or that his punitive conduct toward the dog was inadmissible.**

Defense counsel requested a limiting instruction at the time of the introduction of 404(B) evidence. The trial court, however, did not give a cautionary instruction at the time it admitted the 404(B) evidence. The trial court gave a limiting instruction regarding the admission of other acts evidence during general jury instructions following closing arguments. The court's cautionary instruction cannot overcome the prejudice created to appellee when the court admitted the 404(B) evidence.

In an attempt to justify introduction of Mr. Morris's verbal abuse of his wife and his kicking of the dog when his wife refused him sex, the State argues that such evidence goes to the issue of identity, i.e., that Mr. Morris was the person who committed these sexual acts against his stepdaughter. The State's argument is

specious and bordering on the ridiculous. The alleged victim, SK, testified that appellee sexually molested her. There was no argument at trial or evidence presented that if sexual abuse did occur, it was someone other than Carl Morris, Jr. Carl Morris, Jr., denied that he sexually molested SK. The defense was that the claimed sexual assault “did not happen.” Mr. Morris never claimed that his stepdaughter was sexually molested but that someone else molested her. He denied that he molested her. Identity was never an issue.

There was nothing in common between Carl Morris’s incident with Sarah and the acts involving SK. As the Court of Appeals explained, “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.” *Morris, supra*, 2010-Ohio-4282 at 12. The appellate court also rejected the State’s argument that the incident with Sarah showed a common plan or scheme. The appellate court reasoned:

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).

*Morris*, at 13.

The State argues that the evidence of Carl Morris, Jr., being verbally abusive toward his wife and kicking the dog when his wife refused him sex shows his motive to use power and control over SK to fulfill his sexual appetite. This claim is also ridiculous. In order for this evidence to be relevant, SK would have to see and hear her stepfather exhibiting this behavior in order to become subservient to her stepfather's desire when he wanted to have sex with her. However, there was no evidence at trial that Carl Morris, Jr. was verbally abusive or kicked the dog around SK when he allegedly had sex. In fact, there was evidence to the contrary. There was evidence that Mr. Morris never threatened or used force against SK. As the appellate court stated,

“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 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.”

*Morris*, 2010-Ohio-4282 at 10-11.

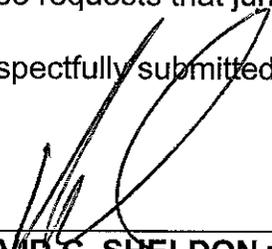
The introduction into evidence of the incident involving Sarah Johnson is even more inappropriate when one considers the fact that Carl Morris, Jr. never had sex with Sarah. The State remarks “Morris actions involving Sarah Johnson, his crimes against SK and his *bad behavior* when refused by his wife show that Morris feels he has a right to ignore any rule of sexual propriety concerning the females living in his house and that they are all proper objects of his sexual gratification.” (Memorandum In Support, pp. 8-9). The appellant further states: “Appellee Morris implied to

Johnson in such a way that his meaning was clear that he would have sex with her if he could do it without repercussions.” But the fact is he never had sex with Sarah Johnson! If through his actions of violence and power he could control any of the women living in his house, and fulfill his sexual appetite, why is Sarah Johnson not a victim of his sexual desire? Instead, the State points to one isolated incident between Mr. Morris and Sarah Johnson where no sexual activity occurred, Mr. Morris was drunk, and Ms. Johnson forgave him and considered him a great stepfather afterward. And, as the Court of Appeals pointed out, there is no connection 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.

#### CONCLUSION

This case does not merit review by this court. The Ninth District Court of Appeals properly held that Mr. Morris’s right to a fair trial was violated. The Court ruled that “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.” *Morris*, at 29-30. Appellee requests that jurisdiction be denied.

Respectfully submitted,

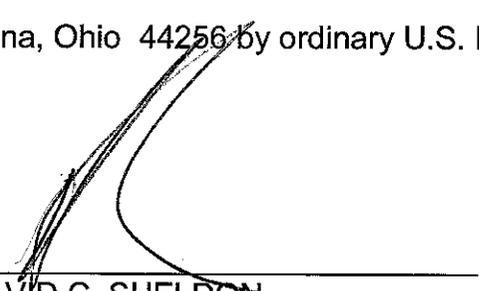


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Carl Morris, Jr.'s Memorandum Opposing Jurisdiction was forwarded to Dean Holman, Medina County Prosecutor, 72 Public Square, Medina, Ohio 44256 by ordinary U.S. Mail this 24<sup>th</sup> day of November, 2010.



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DAVID C. SHELDON  
Attorney for Carl Morris, Jr.