

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-2256

CITY OF MIDDLEBURG HEIGHTS,

Appellee,

V.

MICHAEL BUNT, JR.

Appellant.

On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate
District

Court of Appeals
Case No. 2009-CA-094149

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT MICHAEL BUNT, JR.

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FILED
DEC 27 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED AND WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.

In *City of Middleburg Heights v. Bunt*, 2010-Ohio-5479 (Ohio App. 8th Dist. 2010), two (2) complaints were filed with the Berea Municipal Court against the Appellant. The first alleged a single count of Assault in violation of R.C. § 2903.13, a misdemeanor of the first degree. It was alleged that the Appellant, “on or about [September 11, 2008] did knowingly cause or attempt to cause physical harm to another by striking [K.M., a juvenile] sixty times with a wooden paddle.” The second alleged a single count of Sexual Imposition in violation of R.C. § 2907.06, a misdemeanor of the first degree. It was alleged that the Appellant, “on or about [September 11, 2008] did have sexual contact with victim [K.M.] while victim was fourteen years of age and the defendant was thirty-one years of age.”

At pre-trial, the defense was informed that the prosecution possessed records from Lake County Children Services. Motion in Limine, Pg. 3. Although the records concerned the Appellant, they were not related to the allegations in the instant case and concerned circumstances from a period that extended to a time when Appellant was thirteen (13) years old. The Appellant filed a Motion in Limine and requested, pursuant to Crim. R. 12(C) and Evid. R. 401, 402, 403 and 404, that the trial court preclude any reference to the records at trial.

Prior to the hearing, the records at issue increased to “literally hundreds of pages of documents” that spanned a period of many years. (Mtn. Limine Tr. 7). At hearing, it was argued that the records contained “other acts” evidence that was too remote in time and not closely related in nature or place to be relevant and, even if relevant, unfairly prejudicial due to its disturbing nature. Although the records stemmed from a period of time when the Appellant was a

juvenile, the trial court denied the Motion and held that the evidence was relevant, admissible and, not so prejudicial as to outweigh its probative value.

At trial, the graphic testimony was admitted into evidence and the jury returned a verdict of guilty on all counts. In a two (2) to one (1) decision, the Eighth District found no error in the admission of testimony about other alleged incidents, unrelated to K.M, and that occurred in 2006, two (2) years prior to the offenses at issue. *Bunt*, at ¶23. The majority determined those events were not so remote in time or unrelated to the offenses charged as to render them irrelevant and that they were relevant to the issue of Appellant's intent in paddling K.M. *Id.* The majority further held that the testimony was not unfairly prejudicial and that the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed its potential for unfair prejudice. *Id.*, at ¶25.

With regard to testimony about alleged events that occurred prior to 1994, the majority concluded that the testimony should have been excluded as the events were too remote in time to the charged offenses to be relevant to anything. *Id.*, at ¶26. The majority noted that the testimony occurred some fifteen (15) years prior to the offenses charged and that the Appellant was a juvenile (only thirteen (13) years old at some points) when the events occurred. *Id.* Nevertheless, the majority held that the admission of the improper testimony was harmless error. *Id.*, at ¶27.

The dissent found that the trial court erred in admitting all of the evidence to which the Appellant objected and opined that "it would be difficult to find a case in which the error could be more obvious." *Id.*, at ¶43. The dissent noted that the "record reflects the trial court exercised no discernment whatsoever in overruling [Appellant's] objections throughout the proceeding. *Id.*, at ¶44. Finally, the testimony was unduly prejudicial in that the "sheer amount of the 'other acts'

evidence presented prior to the testimony of the victim and his parents was so profuse that the jury could hardly fairly consider the remaining evidence.” *Id.*, at ¶45.

This case involves, the improper admission of testimony concerning allegations of other alleged acts by the Appellant by way of an unconstitutional application of Evid.R. 401, 403(A), 404(B) and R.C. § 2945.59. The improper introduction of the testimony deprived the Appellant of his constitutional right to due process of law and fair trial. Adoption of the Eighth District’s reasoning makes certain that the prosecution will be permitted to introduce “other acts” evidence, irrespective of the fact that the disputed evidence occurred years prior to the allegations at issue, involved different individuals and circumstances, and occurred at a different location. The court’s reasoning ignored the directive issued by this Honorable Court that R.C. § 2945.59 and Evid.R. 404(B) codify the common law with respect to other act evidence or wrongdoing, and are construed against admissibility. *State v. Lowe*, 69 Ohio St.3d 527 (Ohio 1994).

The Eighth District also employed an improper standard in concluding that the improper admission of portions of the testimony was harmless. The court failed to determine whether there is a reasonable possibility that the unlawful testimony contributed to a conviction. Instead, the court focused on whether sufficient evidence was presented to convict the Appellant exclusive of the improperly admitted testimony. *Bunt*, at ¶28. Adoption of this analysis will result in improperly admitted evidence being deemed harmless error, even if there is a reasonable possibility that the unlawful testimony contributed to a conviction.

STATEMENT OF THE CASE AND FACTS

The charges stemmed from a single incident on September 11, 2008. K.M. resided with his mother, Kellie Greene. (Tr. 92). K.M.’s father, Kevin Moehring, divorced Ms. Greene and they had joint custody and shared parenting of K.M. (Tr. 121, 131). The Appellant’s son bowled

on the same bowling team as K.M.. (Tr. 93). Ms. Greene was close to the Appellant's wife and confided in her about problems with K.M. (Tr. 95). On September 2, 2008, K.M. failed to come home and went missing for a period of time. (Tr. 95). Ms. Greene was frustrated with K.M.'s behavior and that he lied to her about his whereabouts. (Tr. 154, 168). She also told Mrs. Bunt about K.M.'s poor grades (D's and F's) and missed assignments. (Tr. 97, 110). In response, Mrs. Bunt suggested she discuss K.M.'s disciplinary issues with the Appellant. (Tr. 97). On September 9, 2008, Ms. Greene spoke with the Appellant, an IT specialist, about developing an electronic calendar to help K.M. get organized and enable his parents to track him. (Tr. 97).

On September 11, 2008, the Appellant, Mrs. Bunt and their children met with Ms. Greene at her residence. (Tr. 99). K.M. testified that during this lengthy meeting, the Appellant, Mrs. Bunt and Ms. Greene discussed K.M.'s schooling, structure, organization and discipline. (Tr. 166-167). Ms. Greene acknowledged that "[she] sat down with [K.M.] and [Appellant], we talked about his grades and why he took off after school that day." (Tr. 115-117). Prior to K.M. going missing on September 2, he had spent several nights at the Appellant's home without incident. (Tr. 118). After the meeting, they decided that K.M. would spend the night at the Appellant's home on Thursday and Friday and return on Saturday during bowling. (Tr. 113).

As planned, K.M. spent the night at the Appellant's on September 11, 2008. He ate dinner, watched a movie, and then the Appellant's two (2) children were put to bed. (Tr. 156). Thereafter, the Appellant and K.M. engaged in a ninety (90) minute conversation regarding organization, the death of K.M.'s grandmother and his parent's divorce. (Tr. 157). K.M. testified that the Appellant indicated that Ms. Greene gave him permission to swat him (Tr. 157). K.M. testified that the Appellant swatted him with a paddle, over the Appellant's knees and while his underwear remained on. (Tr. 158). K.M. testified that there were five (5) sets of twelve (12)

swats and that in between each set the Appellant would have K.M. sit up and they would talk “about like organization” and how the paddling was for K.M.’s own good. (Tr. 159-160). After the paddling, conversation continued with regard to organizational issues. (Tr. 160). K.M. felt he deserved the paddling due to his wrongdoing. (Tr. 166). He failed to respond to his mother’s discipline and his misbehavior continued. (Tr. 166). He testified that there was further discussion about organization the next day. (Tr. 160).

Ms. Greene saw K.M. on Friday, September 12, 2008 and felt he was in “fine spirits.” (Tr. 119). They discussed school and he showed her his work. (Tr. 120). She felt K.M. was “pleased with himself at that time.” (Tr. 120). On September 12, Mr. Moehring was made aware that K.M. stayed at the Appellant’s home. (Tr. 102). As planned, K.M. returned to the Appellant’s on September 12, but no further discipline was imposed. (Tr. 168).

On September 13, Mr. Moehring was present at the bowling alley with K.M. and he seemed fine and normal. (Tr. 145). The Appellant and Mr. Moehring spoke in a friendly manner at that time. (Tr. 165). On September 13, K.M. stayed with his mother. On September 14, he stayed with his father. (Tr. 113). The week following September 11, 2008 went well and K.M. completed his assignments. (Tr. 121). Ms. Greene permitted the Appellant to contact K.M.’s teachers and provided him a login password to access K.M.’s grades. (Tr. 106, 111-112). She acknowledged that the Appellant suggested that Mr. Moehring be contacted with regard to the assistance that the Appellant was providing to K.M. and his mother. (Tr. 121). However, she told the Appellant that “he should be careful with his approach, from experience with [Mr. Moehring.]. (Tr. 121-122). Despite the warning, the Appellant contacted Mr. Moehring and they met to discuss the calendar and parenting issues. (Tr. 132). As Ms. Greene anticipated, Mr. Moehring got angry at the Appellant because parenting was discussed. (Tr. 123). Further, he was

upset that Ms. Greene had the Appellant contact K.M.'s teachers without him being informed. (Tr. 146). Upset by her actions, Mr. Moehring consulted with an attorney. (Tr. 147-148).

K.M. testified that when his father learned he was going to the Appellant's home he got angry because he did not consent per the terms of the "split parenthood, that the divorce gives them." (Tr. 173). K.M. recalled an intense meeting on September 16, wherein Mr. Moehring drilled K.M. with questions and used vulgarity. (Tr. 173-174). K.M. testified that on September 16, he informed his father that the Appellant had disciplined him. (Tr. 175). However, K.M. testified that they went to the police a couple weeks thereafter. (Tr. 176).

K.M. testified to another argument between his father and mother on September 18 that concerned whether Ms. Greene had authority to consent to the Appellant being involved in K.M.'s school and discipline. (Tr. 176). Despite these arguments, K.M. testified that on September 21, he went to a restaurant with both of his parents, the Appellant and his family. (Tr. 177). Both of his parents were aware of the corporal punishment imposed. (Tr. 177). K.M. testified that during this dinner, there was again discussion about discipline. (Tr. 178). K.M. was not sure what prompted his parents to go to the police a week after this meeting. (Tr. 178).

Ms. Greene and Mr. Moehring contradicted their son's testimony. Ms. Greene testified that K.M. never told her of the discipline imposed and she denied ever speaking to the Appellant about it. (Tr. 103-104, 113). Despite this claim, she noted within her written statement to the police that K.M. had gone missing days prior to K.M.'s night at the Appellant's home. (Tr. 108). Further, in contradiction with K.M.'s testimony, Mr. Moehring claimed he first learned of the discipline towards the end of September and that he reported it the day he learned of it. (Tr. 140).

Ms. Greene admitted K.M.'s attitude, behavior and grades improved after the Appellant became involved. (Tr. 127). K.M. confirmed that the Appellant provided him with organizational

skills and structure and that his attitude, grades and self-esteem improved with Appellant's help. (Tr. 171). Ms. Greene acknowledged that K.M. wrote her a letter and apologized for going missing. (Tr. 125-126). The letter was written at the Appellant's suggestion. (Tr. 126, 172).

K.M. testified that the Appellant had permission from his parents to impose discipline. (Tr. 161). He testified that he learned later that Ms. Greene had allegedly not given the Appellant authority to discipline him. (Tr. 162). However, K.M.'s statement to the police indicates: "My mother and I had a misunderstanding and she called [the Appellant] to punish me." (Tr. 165).

Detective Sergeant Jim Steinmetz investigated the matter and secured a statement from the Appellant. The Appellant explained that Ms. Greene needed help with K.M. and reached out to him and his wife. (Tr. 194-196). Specifically, Ms. Greene complained to Appellant of K.M. schooling, behavior and recent disappearance. *Id.* She indicated that Mr. Moehring did not want to be involved and she requested that the Appellant help her get K.M.'s behavior back in line. *Id.* Ms. Greene consented for him to "spank [K.M.] as needed" (Tr. 197). Per the discussions, the Appellant did discipline K.M. and afterwards K.M. called Ms. Greene. (Tr. 197). Mrs. Bunt confirmed that Ms. Greene provided consent. (Tr. 198).

Prior to trial, the Appellant filed a Motion in Limine to Preclude Reference to Lake County Children Services Records pursuant to Crim. R. 12(C) and Evid. R. 401, 402, 403 and 404. Prior to the hearing, the records at issue increased from thirty-six (36) pages to "literally hundreds of pages of documents" that spanned a period of many years. (Mtn. Limine Tr. 7). At hearing, it was argued that the records contained "other acts" evidence that was too remote in time and not closely related in nature or place to be relevant and, even if relevant, unfairly prejudicial. The records were from prior to 1994, when the Appellant was a juvenile. A Post-Hearing Brief was filed by the defense. The trial court denied the Motion in Limine.

At trial, graphic testimony concerning numerous other alleged acts, from a period spanning over a decade, was admitted into evidence. The jury returned a guilty verdict on all counts. A Notice of Appeal was filed October 26, 2009. The Eighth District issued its Opinion on November 10, 2010. In a two (2) to one (1) decision, the majority held that a large portion of the testimony was improperly admitted, but the error was harmless. This appeal followed.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: The Eighth District erroneously concluded that the improper introduction of testimony, concerning irrelevant ‘other acts’ evidence, was harmless beyond a reasonable doubt and employed an improper standard in reaching its conclusion.

The prosecution’s first witness, Ms. Deborah Gurney, was employed as the coordinator of a sexual aggression program at Crossroads, a counseling agency in Lake County. (Tr. 41). She was presented with the records that were the subject of the Motion in Limine, and testified at length, over objection, with regard to their contents.

The majority opinion from the Eighth District concluded that her testimony should have been excluded, because “the events were too remote in time to be relevant to anything.” *Bunt*, at ¶26. Further, because the events occurred in an entirely different setting and time, they were too remote to be admissible under either Evid.R. 404(B) or R.C. 2945.59. *Id.* The Eighth District majority opinion noted that the events occurred fifteen (15) years prior to the offenses charged and that the Appellant was a juvenile when the events occurred (only thirteen (13) during some of the events) and when he met with Ms. Gurney. *Id.* Finally, the majority noted that the Appellant’s statements were made without the assistance of counsel and there was no evidence regarding any criminal adjudication with respect to the incidents.

Nevertheless, the majority concluded that the improper admission of Ms. Gurney’s testimony was harmless error. *Id.*, at ¶27. Before an error can be considered harmless, a

reviewing court must be able to “declare a belief that it was harmless beyond a reasonable doubt.” *State v. Craig*, 2010-Ohio-1857 (Ohio App. 8th Dist. 2010), quoting *Chapman v. California*, 386 U.S. 18 (1967). “Where there is no reasonable possibility that the unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal.” *Id.*, citing *State v. Lytle*, 48 Ohio St.2d 391 (Ohio 1976), paragraph three of the syllabus, vacated on other grounds in 438 U.S. 910, (1978).

In this case, there is a reasonable possibility that the improper testimony of Ms. Gurney, the first witness, contributed to Appellant’s conviction. She testified in graphic detail with regard to the records generated from interviews she had with the Appellant in 1994. First, she testified as to incidents involving the Appellant and his sister as follows (The testimony at trial was extensive and only a sampling of the testimony is provided herein. The complete testimony concerning the events from prior to 1994 can be found on pages 42-63 of the transcript):

Mike reported that he first began spanking Amy, who is his sister, approximately four years previously, when Amy was seven and he was thirteen. Mike stated that he first began spanking Amy over the clothes when they would play games . . . Mike stated that he only spanked Amy when his parents were not home, and he spanked Amy approximately one time per week. Mike reported that his behavior continued on for approximately one year. Mike began spanking Amy on the bare bottom when Amy was approximately eight years old. . . . Mike would then tell her to pull down her pants. Mike reported that he felt aroused by the actual spanking, and seeing Amy's bare bottom. Mike also reported that at that time he felt pleasure . . . Mike would think about the offense later at night while masturbating. Mike began spanking Amy with increasing frequency because his parents were out more. . . . Mike stated that he saw Amy's bare chest because she stood up after I spanked her and he could see up her shirt. Mike reported that he would touch Amy's vulva in a scenario as follows. Amy would break something, Mike would tell her a guilt-trip, and Amy would say, don't tell mom or dad. Mike would ask her what they should do, Mike would suggest spanking Amy, Amy would agree, Mike would tell her to pull down her pants, which Amy would do. Mike would tell her to bend over his knee, which Amy would do. Mike would spank her three or four times with his right hand. Mike would have Amy stand up, Mike would touch Amy's vulva, Mike did not say anything. The first

time Mike touched Amy for one to two seconds . . . Mike would masturbate about the offense that night when he went to bed. . . Mike stated that he wanted Amy to spank him. Mike reported being sexually aroused at this thought. Amy would come to Mike, say that he broke something. Mike stated that he told Amy that she had to spank him, or that he would spank her. Mike would turn around, pull down his pants, bend over, and wait for Amy to spank him. Amy would spank him one to two times. Mike was unsure if Amy saw his penis when he bent over. . . Mike reported that soon after that, another scenario developed. Mike would tell Amy that he wanted her to pull down her pants and stand in front of him. Mike would have Amy stand there and he would look at her genitals. Amy would never ask if Mike was going to spank her, Mike would look at her genitals for 20 to 30 seconds. Mike would slowly walk up and use his right hand to touch her genitals. When Mike would touch her vagina, he reported that he would immediately get an erection. After a while he would tell her, okay, and Amy would pull up her pants and go back to playing . . . Mike reported that when Amy was approximately nine years old, the behavior that he had been engaging in up to that point was no longer enough. Mike compared it to being like a drug addiction. Mike reported that he began to blow on her vagina and that he started to show Amy his penis. Mike reported several scenarios at this point, both involved Amy and Mike playing a game, such as Uno. In the first scenario, Amy would lose, Mike would tell her, you lost, so I'm going to touch your vagina and do some things. Mike would tell her to pull down her pants and underwear. Mike would have her lie down on the floor on her back with her legs together, Mike would sit next to her and touch her vagina. Mike would lean closer and blow on her vagina. In the second scenario, Mike would lose, Mike would pull down his pants and underwear and he would have an erection. Mike would lay on the floor on his back, Mike would tell Amy where to sit, Mike would tell Amy to touch me here, and point toward his penis. Sometimes Mike would tell Amy to lean down and blow on it, on his penis. Mike would have Amy stroke his penis, and have her continue to masturbate him until just before ejaculation, he would then tell her, that's enough. . . . Mike ejaculated onto his own body and he would wipe it up. . . . Mike began putting his mouth on Amy's vagina and would give it a kiss. Several scenarios followed, each starting with Amy losing a game. After Amy lost the game, Mike would tell her to take off all of her clothes and get onto his bed. In the first scenario, Amy would be naked on the bed on her back. Mike would have an erection and he would fondle her body - . . . [additional objections lodged and overruled]. . .

Mike would have an erection and he would fondle her body, including her bottom, legs and breasts. Mike would also spread Amy's legs apart and would touch her genitals. Mike would have Amy roll over on her stomach and he would spank her, then Mike would roll her over on her back and

continue to fondle her. The later scenario involved, in which Mike would also take off his clothes and would have Amy touch his bottom and his penis. He would have Amy blow on his penis and masturbate him, while she masturbated him, he would fantasize about other sexual behaviors that he would like to do to Amy. Mike would also have Amy spank him. . . Mike would have Amy put her mouth on his penis. Mike also reported that he would lick her vagina. Mike reported being very aroused whenever there was genital contact. Mike did admit to having fantasies about penetrating his sister . . . Mike stated that he thought that as long as he was not raping or penetrating Amy, then the behaviors that he was doing to Amy were appropriate. Mike admitted that he would blackmail Amy by reminding her about the things that she broke. Mike stated that he would play upon Amy's fear of mother and make Amy perform sexual acts stated above in order to keep Mike from telling their mother. Mike stated that he stopped the spanking behavior in May '93 . . . (Tr. 49-52).

In addition to the graphic testimony regarding Amy, Ms. Gurney, testified as to incidents involving Kristen (again, only a sampling is presented):

Mike reported that he spanked Kristen on the bare bottom two times around January or February of '93. . . Mike told them both to pull down their pants and bend over and he spanked them. The second time . . . Mike spanked them on the bare bottom. (Tr. 52-53).

Ms. Gurney also testified as to Ashley, a sample of which follows:

. . . When confronted, Mike admitted that he had attempted to spank Ashley three or four times . . . he asked Ashley to pull down her pants, and she refused . . . Mike reported that he thought if he could get her to let him spank her over the clothes, that he could, over time, get her to pull down her pants and allow him to spank her bare bottom . . . Mike stated that he spanked both Ashley and Amy over the clothes at that time. (Tr. 53-54).

Ms. Gurney also testified as to Bud, a sample of which follows:

Mike reported spanking Bud on the bare behind at least 15 times since February 1993 . . . Mike reported fondling Bud's penis five times . . . Mike stroked Bud's penis. Mike reported that he had an erection . . . Mike would later masturbate to these offenses . . . Mike had Bud take off his pants and underwear and had him lie face down on his bed. Mike took a piece of plastic rod . . . pressed the pointed end of the rod into Bud's naked buttocks, until Bud said that it was enough . . . (Tr. 54-57).

Ms. Gurney also testified as to incidents involving Eddie, a sample of which follows:

. . . he spanked Eddie on the bare bottom several times . . . Mike admitted to using the same test of endurance that he used with Bud . . . he touched Eddie's crotch the last four to five times that he wrestled with Eddie . . . he showed Eddie pornographic software. . . Mike admitted to spanking Eddie on the bare bottom about ten times. . . Mike stated that he fondled Eddie's penis the last four times he spanked Eddie . . . Mike reported having an erection when he was stroking Eddie's penis . . . (Tr. 57-59).

Ms. Gurney also testified regarding incidents involving Mikey, Chris and Matt (Tr. 59-62). Finally, she testified in graphic detail as to Appellant's struggles and fantasies. (Tr. 62).

On cross-examination, she stated she has not seen the Appellant since 1994. (Tr. 64). He was under the age of eighteen (18) and portions of her testimony concerned events that occurred when he was as young as thirteen (13). (Tr. 68). She had no personal knowledge or information pertaining to K.M. and the events that she testified to occurred in Lake County. (Tr, 68- 69).

The dissent opined that "the majority opinion exhibits no discernment in stating the admission of Gurney's testimony constituted 'harmless error.'" *Bunt*, at ¶45. It also noted that the majority conceded that Ms. Gurney spoke with the Appellant when he was a child, but failed to consider that she was the first witness and she also testified at length. The dissent concluded that the "sheer amount of the 'other acts' evidence presented prior to the testimony of the victim and his parents was so profuse that the jury could hardly consider the remaining evidence." *Id.*

The prosecution's second witness, Ms. Carlie Delpercio, a social worker with the Lake County Job and Family Services, also relied upon the 1994 records and noted she "had read the report done by Crossroads when [Appellant] was a teenager." (Tr. 77). The Detective also testified as to incidents prior to 1994 involving Amy, Kristen, Eddie and Matthew. (Tr. 203-204). Finally, the Detective testified as follows:

Q. . . . did you understand what his motive was in taking this action with regard to [K.M.]?

A. After seeing the threat assessment that was prepared in 1994, I had a pretty good idea what his --

... [Objection] ... [Overruled] ...

A. I had a real good idea what his motivation was. (Tr. 204-205).

In its conclusion that the improperly admitted testimony referenced above constituted harmless error, the majority also failed to apply the appropriate rule of law. Specifically, rather than finding that there was no reasonable possibility that the unlawful testimony contributed to the conviction, the majority instead concluded that “sufficient evidence was presented to convict [the Appellant] exclusive of Gurney’s improper other acts testimony. *Bunt*, at ¶28. The majority further found that “the jury could have concluded beyond a reasonable doubt that [the Appellant] assaulted K.M. *Id.* Likewise, the majority found that “the jury could have easily concluded beyond a reasonable doubt that [the Appellant’s] intent in spanking K.M. was sexual gratification, not discipline.” *Id.*, at ¶29.

The issue is not whether the jury could have concluded that the Appellant was guilty of the offense charged. Nor is the issue whether sufficient evidence was presented to convict the Appellant exclusive of the improper ‘other acts’ testimony. The issue is whether there is a reasonable possibility that the unlawful testimony contributed to a conviction. The majority correctly begins its harmless error analysis by noting that before an error can be considered harmless, a reviewing court must be able to “declare a belief that it was harmless beyond a reasonable doubt.” *Bunt*, at ¶27, citing *Craig*, 2010-Ohio-1857, quoting *Chapman*, 386 U.S. 18. The majority further noted that “[w]here there is no reasonable possibility that the unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for

reversal.” *Id.*, citing *Lytle*, 48 Ohio St.2d 391. Although the majority cited the correct standard, it failed to apply it.

Given the graphic detail and nature of the extensive testimony presented by the prosecution’s first witness, second witness, and investigator, there is a reasonable possibility that the improper testimony contributed to the Appellant’s conviction. The Appellant respectfully submits that the error was not harmless under any standard and that the Appellant’s right to due process and right to fair trial were denied. The conviction should be vacated and the case remanded for a new trial.

PROPOSITION OF LAW NO. 2: The Eighth District erroneously concluded that the introduction of testimony, concerning ‘other acts’ evidence, was not an abuse of discretion, that it was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury.

The prosecution’s second witness, Ms. Delpercio, also testified as to records objected to within the Motion in Limine. In 2006, she investigated reports of child abuse or neglect and interviewed the Appellant. (Tr. 73). Her testimony, like Ms. Gurney’s, concerned incidents unrelated in time, location and persons involved to the charged conduct. She testified as to allegations involving Josh and referenced the 1994 records in doing so. (Tr. 75-79). She also testified as to alleged incidents involving Abraham. (Tr. 81-82). On cross-examination, she confirmed that the police investigated the matters that involved Josh and Abraham and the Appellant was never charged with any crime. (Tr. 85, 87). She also confirmed that she had no personal knowledge of Ms. Greene or K.M.. (Tr. 88).

The prosecution’s last witness, Detective Steinmetz, also testified as to the records that were objected to within the Defendant’s Motion in Limine. The Detective answered questions in regard to Ms. Delpercio’s report from 2006, Josh, Abraham, Amy, Kristen, Eddie, Matthew and the reports from 1994. (Tr. 188-207).

Although the majority concluded that Ms. Gurney's testimony was improper, it found that Ms. Delpercio's testimony concerning Josh and Abraham was properly admitted and that the trial court did not abuse its discretion in determining that the probative value of the testimony outweighed its potential for unfair prejudice. *Bunt*, at ¶25. The Eighth District erred in its determination that this "other act" evidence was properly admitted. This Honorable Court has held that R.C. § 2945.59 and Evid. R. 404(B) codify the common law with respect to evidence of other acts or wrongdoing, and are construed against admissibility. *Lowe*, 69 Ohio St.3d 527. The testimony's probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues and the jury was misled as a result. Evid.R. 403(A). The trial court abused its discretion and the Eighth District erred in its conclusion. The Appellant was denied his constitutional right to due process and right to fair trial. The conviction should be vacated and the matter remanded for a new trial.

CONCLUSION

For the reasons above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this Honorable Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served via regular United States mail, this 27th day of December, 2010, to Peter H. Hull, Prosecutor for City of Middleburg Heights, 15700 E. Bagley Road, Middleburg Heights, Ohio 44130-4896.



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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94149

CITY OF MIDDLEBURG HEIGHTS

PLAINTIFF-APPELLEE

vs.

MICHAEL J. BUNT, JR.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Berea Municipal Court
Case No. 08-CRB-01672

BEFORE: McMonagle, J., Rocco, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: November 10, 2010

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FILED AND JOURNALIZED
PER APP.R. 22(C)

NOV 10 2018

GERALD E. FORST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

CHRISTINE T. McMONAGLE, J.:

Defendant-appellant, Michael J. Bunt, Jr., appeals from the trial court's judgment, rendered after a jury trial, finding him guilty of assault and sexual imposition, sentencing him to 120 days in jail, and ordering him to register as a Tier I sexual offender. We affirm.

I.

Two complaints were filed against Bunt in Berea Municipal Court. The first alleged a single count of assault in violation of R.C. 2903.13;¹ the second alleged a single count of sexual imposition in violation of R.C. 2907.06.² Specifically, the first complaint alleged that on September 11, 2008, Bunt knowingly caused or attempted to cause physical harm to K.M., who was then 14 years old, by striking him 60 times with a wooden paddle. The second complaint alleged that then 31-year-old Bunt had sexual contact³ with K.M., a minor, on September 11, 2008.

¹"No person shall knowingly cause or attempt to cause physical harm to another * * *"

²"No person shall have sexual contact with another * * * when * * * the other person * * * is thirteen years of age or older but less than sixteen years of age * * * and the offender is at least eighteen years of age and four or more years older than such other person."

³R.C. 2907.01 defines sexual contact as "any touching of an erogenous zone of another, including, without limitation, the thigh, genital, buttock, pubic region or * * * breast for the purpose of sexually arousing or gratifying either person."

Bunt pleaded not guilty and the case proceeded to trial. The evidence at trial demonstrated that K.M. and Bunt's step-son bowled on the same bowling team. K.M.'s mother, Kellie Greene, met Bunt and his wife through the bowling league.

In early September 2008, Greene became concerned about K.M. because he had missed several homework assignments at school and once failed to come home as scheduled without advising her where he was. Greene confided her concerns to Bunt's wife. Shortly thereafter, Bunt called Greene and offered to help K.M. Bunt explained that he could set up a computerized calendar to help K.M. keep track of his homework assignments.

On September 11, 2008, Bunt and his family stopped by Greene's apartment. Greene accepted the Bunt family's offer that K.M. spend the next two nights at their apartment so Bunt could start helping him with the calendar. Greene testified that there was no discussion about disciplining K.M. and she never agreed that Bunt could spank him.

K.M. testified that after Bunt's children were in bed, Bunt told him to come to his bedroom, where they talked for awhile. Bunt then told K.M. that his mother had given Bunt permission to spank him. Bunt told K.M. that he had two options: Bunt could use a paddle while K.M. wore his underwear, or Bunt could use his hand on K.M.'s bare buttocks. K.M. said that he chose the first

option, and Bunt proceeded to paddle him as he was straddled over Bunt's knees. According to K.M., Bunt would paddle him 10-12 times, then stop, talk to him, hug him, and then paddle him again. This was repeated 5-6 times. K.M. testified that the pain from the paddling lasted 3 or 4 days and his bottom was bruised for a week.

The next day, Bunt gave K.M. a "three strikes and out" rule that if K.M. missed three school assignments within one week, he would receive 10 swats from Bunt.

After learning what had happened, Greene and her ex-husband reported the incident to the Middleburg Heights Police Department. Detective Jim Steinmetz contacted Bunt, who subsequently brought a prepared statement with him to the police station. In his statement, Bunt admitted that he had spanked K.M. but contended that he had permission from K.M.'s mother "to do whatever [was] needed to get [K.M.] back in line," including spanking him.

As part of its case in chief, the city proffered the testimony of Deborah Gurney, who testified that in 1994, she was a clinical supervisor and coordinator of a sexual aggression, drug, and alcohol program at Crossroads, an adolescent counseling agency in Lake County. She stated that in February and March of that year she interviewed Bunt, who was then 17 years old, as part of a sex offender risk assessment for the Lake County Juvenile Court. As a result of

those interviews, she prepared an extensive report, lengthy portions of which she read to the jury, over defense counsel's objection.

Gurney reported that Bunt told her about a pattern of behavior that began when he was 13 years old. Bunt told Gurney that he would manipulate his seven-year-old sister into believing she had done something wrong, and then tell her that he would not inform their parents if she would let him spank her. Bunt reported being sexually aroused by the spanking and seeing his sister's bare bottom. Bunt told Gurney that this behavior escalated to him touching his sister's genitals and masturbating.

Gurney also read to the jury what Bunt had told her about his sexual activity with seven other child victims, all of whom Bunt admitting to spanking for sexual pleasure. Bunt also told Gurney about his fantasy of being approached by a mother who was having a problem with her child and his offering to intervene. Bunt told Gurney that his fantasy was to become the disciplinarian for the child and to spank the child.

The city also proffered the testimony of Carlie Delpercio, a social worker employed by Lake County Children Services as an intake social worker. Delpercio investigates reports of child abuse.

She testified that she interviewed Bunt on February 28, 2006, when he was 28 years old, in connection with incidents involving an 11-year-old boy and

a 12-year-old boy. Delpercio prepared a report of the interview and testified from that report. She reported that Bunt told her that the 11-year-old boy lived in his neighborhood and had spent several nights at his apartment. Bunt told Delpercio that he had "tapped" the boy on his buttocks for misbehaving and "smacked" him on his buttocks while they were wrestling. Delpercio testified that when she questioned Bunt about other incidents that had been reported, including Bunt's fondling of the boy's buttocks, Bunt told her that he could not recall touching him inappropriately, but did not deny doing so. When Delpercio asked Bunt why, given his history, he would have young boys at his residence and spank them, he told her that he was not then in a "grooming period," which Bunt told Delpercio meant getting boys "used to having contact with him so that he could possibly do more things to them in the future."

Bunt told Delpercio that the 12-year-old boy had stayed at his apartment for two months when his foster mother became ill. He reported an incident when he picked the boy up while he was undressed, put him in the bathtub, and then looked in the bathroom while the boy was bathing.

The jury convicted Bunt of both counts as charged. On the assault charge, the trial court imposed a sentence of 90 days in jail, a fine of \$250, and five years probation with conditions including counseling and treatment. On the sexual imposition charge, the court imposed a sentence of 30 days in jail consecutive to

the 90-day sentence, for a total of 120 days. The court also ordered Bunt to register as a Tier I sex offender.

II.

Before trial, Bunt moved in limine to exclude any reference to the Lake County Children Services records pertaining to him. Bunt argued that the records contained "other acts" evidence that was too remote in time to be relevant and, even if relevant, unfairly prejudicial. The trial court denied the motion after a hearing, ruling that the records were relevant and their probative value was not outweighed by any prejudice. In his single assignment of error, Bunt challenges the trial court's ruling.

We review the admission of evidence under an abuse of discretion standard. *State v. Mauer* (1984), 15 Ohio St.3d 239, 264, 473 N.E.2d 768. "Abuse of discretion" connotes more than error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

Under Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove" a defendant's character as to criminal propensity. "It may, however, be admissible for other purposes, such as proof of motive, opportunity, *intent*, preparation, plan, knowledge, identity, or absence of mistake or accident."

(Emphasis added.)

Evid.R. 404(B) is in accord with R.C. 2945.59, which states that “[i]n any criminal case 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, 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, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.”

Because the statute and the rule codify an exception to the common law with respect to other acts of wrongdoing, they are to be construed against admissibility. *State v. Murray*, 8th Dist. No. 91268, 2009-Ohio-2580, citing *State v. Broom* (1988), 40 Ohio St.3d 277, 281-282, 533 N.E.2d 682; *State v. Lowe* (1994), 69 Oho St.3d 527, 530, 634 N.E.2d 616.

Evidence of other acts by a defendant is admissible only when it tends to show one of the matters enumerated in the statute and rule and only when the evidence offered is relevant to prove that the defendant is guilty of the offense in question. *State v. Burson* (1974), 38 Ohio St.2d 157, 158, 311 N.E.2d 526. Additionally, the prior acts must not be too remote in time, and must be closely related in nature, time, and place to the offense charged. *State v. Sawyer*, 8th

Dist. No. 79197, 2002-Ohio-1095, citing *State v. Henderson* (1991), 76 Ohio App.3d 290, 294, 601 N.E.2d 596. A prior act that is “too distant in time or too removed in method or type has no permissible probative value.” *State v. Snowden* (1976), 49 Ohio App.2d 7, 10, 359 N.E.2d 87.

Further, like all evidence, other acts evidence is subject to the limitations provided in Evid.R. 402 and 403; therefore, the proffered evidence must be relevant and its probative value must outweigh its potential for unfair prejudice. *Murray*, supra, citing *State v. Gaines*, 8th Dist. No. 82301, 2003-Ohio-6855, ¶16.

Bunt argues that the “other acts” evidence contained in the Lake County Children Services records was not relevant because the events referred to therein were too remote in time from the alleged offense against K.M. He further contends that even if the other acts were relevant, their probative value was outweighed by the danger of unfair prejudice and should have been excluded under Evid.R. 403(A).⁴ The city, on the other hand, contends that the “other acts” evidence was properly admitted as evidence of Bunt’s intent in spanking K.M., i.e., to obtain sexual pleasure, a necessary element of the offense of sexual imposition.

We find no error in the admission of Delpercio’s testimony about the

⁴Evid.R. 403(A) states that “[a]lthough 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.”

incidents that occurred in 2006, when Bunt was 28 years old. Those events occurred only two years prior to the offenses at issue here and, like the incident with K.M., involved Bunt's spanking and inappropriate touching of young boys. These events were not so remote in time or unrelated to the offenses charged as to render them irrelevant. Furthermore, these prior acts were relevant to the issue of Bunt's intent in paddling K.M., one of the permissible purposes for admission of other acts evidence. Although the dissent contends that Delpercio's testimony was "replete" with hearsay, Bunt did not raise any objection on this basis in his motion in limine, at the hearing on the motion, or on appeal.

Nor do we find the statements unfairly prejudicial under Evid.R. 403(A). "All evidence is prejudicial to the opposing party in the sense that all evidence is unfavorable to the party against whom it is introduced. Evid.R. 403(A) requires more than a demonstration of prejudice but, rather, requires a showing of unfair prejudice." *Vitti v. LTV Steel Co.* (Feb. 9, 1995), 8th Dist. No. 67052. "Evidence that arouses emotions, evokes a sense of horror, or appeals to an instinct to punish may be unfairly prejudicial." *State v. Cooper*, 147 Ohio App.3d 116, 2002-Ohio-617, 768 N.E.2d 1223, ¶57. Unfairly prejudicial evidence appeals to emotions rather than intellect. *Oberling v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 159, 172, 2001-Ohio-248, 743 N.E.2d 890. But evidence of the accused's own actions is rarely unfairly prejudicial so long as it is relevant to the

essential elements of the offense. *State v. Geasley* (1993), 85 Ohio App.3d 360, 372, 619 N.E.2d 1086.

We do not find Delpercio's testimony about Bunt's reported "tapping" and "smacking" a young boy on his buttocks while wrestling or carrying a naked boy to the bathtub to be such emotionally-charged or horrible testimony that a jury would be unable to rationally evaluate the evidence in this case and decide whether Bunt's actions constituted assault and sexual imposition. Thus, the trial court did not abuse its discretion in determining that the probative value of the evidence case outweighed its potential for unfair prejudice.

Gurney's testimony about the events that occurred prior to 1994 should have been excluded, however, because the events were too remote in time to the charged offenses to be relevant to anything. Although the city contends the evidence was relevant to Bunt's intent in spanking K.M., "[e]vidence of a defendant's previous sexual activity is not admissible to show motive or intent if it is too remote from, or not closely related in time to, the offense charged. For other acts evidence 'to be relevant to the issue of intent, [it] must have such a temporal, modal, and situational relationship with the acts constituting the crime charged that evidence of the other acts discloses purposeful action in the commission of the offense in question.'" *State v. Williams*, 8th Dist. No. 92714, 2010-Ohio-70, ¶48. Gurney's testimony was about events that occurred some 15

years before the offenses charged in the complaints. Bunt was a juvenile when the events occurred (some of the events occurred when he was only 13 years old) and when he reported the incidents to Gurney. His statements to Gurney were made without the assistance of counsel and there was no evidence regarding any criminal adjudication with respect to the incidents. Because the incidents Gurney testified about "occurred in an entirely different setting and time," they are too remote to be admissible under either Evid.R. 404(B) or R.C. 2945.59. *State v. Chapman* (1959), 111 Ohio App. 441, 442, 68 N.E.2d 14.

Nevertheless, we find admission of this other acts evidence to be harmless error. Before an error can be considered harmless, we must be able to "declare a belief that it was harmless beyond a reasonable doubt." *State v. Craig*, 8th Dist. No. 93137, 2010-Ohio-1857, ¶32, quoting *Chapman v. California* (1967), 386 U.S. 18, 24, 876 S.Ct. 824, 17 L.Ed.2d 705. "Where there is no reasonable possibility that the unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal." *Id.*, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623, paragraph three of the syllabus, vacated on other grounds in (1978), 438 U.S. 910, 98 S.Ct. 3135.

Here, we find sufficient evidence was presented to convict Bunt exclusive of Gurney's improper other acts testimony. With respect to the assault charge, K.M. testified that Bunt spanked him 60 times with a paddle and that he

suffered pain and bruising from the spanking. His mother testified that she never gave Bunt permission to spank K.M. Thus, the jury could have concluded beyond a reasonable doubt that Bunt assaulted K.M.

Regarding the sexual imposition charge, Delpercio testified about two incidents that occurred only two years prior to the incident at issue, when Bunt was 28 years old, and likewise involved Bunt's inappropriate spanking and touching of young boys. She testified further that Bunt told her he knew when he was in a "grooming period," which he explained meant "getting boys used to having contact with him so that he could possibly do more things to them in the future." In light of this testimony, the jury could have easily concluded beyond a reasonable doubt that Bunt's intent in spanking K.M. was sexual gratification, not discipline. Accordingly, the admission of any other acts evidence related to Bunt's actions as a juvenile, as testified to by Gurney, was harmless error and not grounds for reversal. Appellant's assignment of error is therefore overruled.

Affirmed.

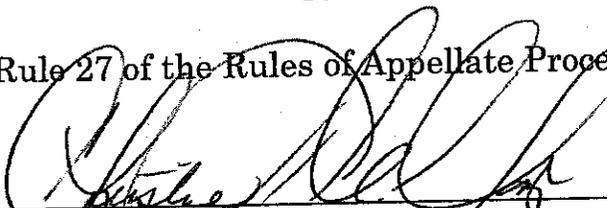
It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case

remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


CHRISTINE T. McMONAGLE, JUDGE

ANN DYKE, J., CONCURS;
KENNETH A. ROCCO, P.J., DISSENTS WITH OPINION.

KENNETH A. ROCCO, P.J., DISSENTING:

Since, in my review of the record in this case, I believe that the trial court erred in admitting all of the evidence to which Bunt objected, I respectfully dissent.

In setting forth the facts of this case, the majority opinion gives great credence to the testimony of the victim and his parents. However, I do not find their accounts to be either convincing or consistent. For instance, according to the victim's written statement that he provided to the police, his mother *sent* him to Bunt for "discipline"; the family members' testimony on this point, therefore, vacillated.

The evidence presented at trial clearly demonstrated that the victim's parents were divorced and had shared custody of him, but strongly disagreed about child-rearing practices. Moreover, the victim's mother had health problems and, at the time the incident occurred, she was having difficulty

relating to the victim.

As the majority opinion states, the victims' mother confided her problems to Bunt's wife. Bunt's wife suggested Bunt could perhaps help with the situation. The testimony demonstrates that the three adults conducted a meeting with the victim to discuss whether Bunt should become involved, and the four of them all decided it was worth a try.

None of this, however, was shared with the victim's father until afterward. By the time of trial, the victim's mother declared she never gave Bunt permission to administer any physical discipline to the victim. She also stated her ex-husband felt "insulted" by Bunt's involvement.

In any case, the victim testified that, on the night in question, Bunt gave him a sort of "intervention" for failing to meet his school responsibilities. It consisted of a long talk between the victim and Bunt in Bunt's bedroom, followed by a "paddling," followed by a hug, then more talk, then another paddling, etc.

The victim testified Bunt administered 6 sets of 10 strikes, for a total of 60, leaving the victim sore and in tears. The victim also testified that, prior to administering the punishment, Bunt gave him a choice: "use the paddle and keep my underwear on, or bare hand, but it would be with my underwear off." This latter detail, however, *was not included* in the victim's statement to the police.

The incident upon which Bunt's convictions were based came to light only when the victim's father snooped in his son's notebook and read some details about Bunt's methods. The father confronted the victim, expressed outrage about the situation, and took his son to the police. In light of his father's disapproval, the victim went along with him in making a formal complaint against Bunt of assault and sexual imposition.

The case was assigned to Det. Jim Steinmetz. Steinmetz quickly performed a "background check" on Bunt, and discovered he had been the subject of an investigation by the Lake County Children Services Department for possible sexual abuse of two teenaged boys. Steinmetz telephoned the social worker who had conducted the investigation, Carlie Delpercio.

When Delpercio heard about the allegations made by the victim and his father, she urged Steinmetz to request a "fax" of *all* the records pertaining to her investigation. Steinmetz followed her urging; by this means, he obtained all of Bunt's records from his early years in Lake County. Although no charges against Bunt had resulted from Delpercio's investigation, psychological assessments made of Bunt *as a teenager* indicated he administered "spankings" to get sexual gratification.

When the case proceeded to a jury trial, the city presented *as its first witness* Deborah Gurney, an adolescent counselor at "Crossroads." She testified

in lengthy and exquisite detail about her interview with Bunt in 1994, when he was referred for a "risk assessment" for sexual deviancy. The majority opinion acknowledges that the trial court improperly admitted her testimony.

The city's *second* witness was Delpercio; she also testified about her investigation of Bunt that took place in 2006, and *described what the alleged victims told her*. The defense continually objected to these two witnesses' testimony without avail.

Thereafter, the victim's mother, father and the victim himself testified. None of them indicated Bunt obtained obvious sexual gratification from "paddling" the victim; nevertheless, the jury convicted Bunt on both counts.

In his sole assignment of error, Bunt asserts the admission of this evidence contravened both Evid.R. 404(A) and R.C. 2945.59. In my view, it would be difficult to find a case in which the error could be more obvious. In fact, during the hearing, the trial court actually stated, on the record, that the city intended to introduce the "other acts" evidence in order to prove Bunt's "propensity" to "spank" young children to obtain sexual gratification. Thus, the record demonstrates the trial court believed that this was exactly what the rule *permitted*, in complete contravention of the language of Evid.R. 404(B).

The majority opinion concludes that Delpercio's testimony was admissible to prove "intent." It is important to note, however, that Delpercio's testimony

was replete with hearsay. Moreover, the record reflects the trial court exercised no discernment whatsoever in overruling Bunt's objections throughout the proceeding.

Likewise, the majority opinion exhibits no discernment in stating the admission of Gurney's testimony constituted "harmless error." The majority opinion concedes that Bunt spoke with Gurney when he was a child and had no awareness of its potential use against him in the future, but fails to consider that Gurney not only was the city's first witness, but that she testified at great length. The sheer amount of the "other acts" evidence presented prior to the testimony of the victim and his parents was so profuse that the jury could hardly fairly consider the remaining evidence. Therefore, in my view, it was unduly prejudicial.

Under the circumstances presented in this case, I believe the trial court abused its discretion. I would, accordingly, sustain Bunt's assignment of error, reverse his convictions, and remand this case for a new trial.