

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)
)
 Appellant,)
)
 vs.)
)
 CARL M. MORRIS, JR.)
)
 Appellee.)
)
)

**SUPREME COURT CASE
NO. 2010-1842**

**ON APPEAL FROM THE
COURT OF APPEALS,
NINTH APPELLATE
DISTRICT 09CA0022-M**

**MEDINA COUNTY
COURT OF COMMON PLEAS
CASE NO. 08CR0408**

BRIEF OF APPELLANT, STATE OF OHIO

***DEAN HOLMAN (#0020915)**
Prosecuting Attorney, Medina County

***DAVID SHELDON (#0040523)**
669 West Liberty Street
Medina, Ohio 44256
(330) 723-8788
(330) 723-4788 (fax)

***MATTHEW KERN (#0086415)**
Assistant Prosecuting Attorney
Medina County Prosecutor's Office
72 Public Square
Medina, Ohio 44256
(330) 723-9536
(330) 723-9532 (fax)

COUNSEL FOR APPELLEE

COUNSEL FOR APPELLANT

FILED
MAY 23 2011
CLERK OF COURT
SUPREME COURT OF OHIO

WILLIAM D. MASON (#0037540)
Prosecuting Attorney, Cuyahoga County

PAUL A. DOBSON (#0064126)
Prosecuting Attorney, Wood County

***MATTHEW MEYER (#0075253) &
*DANIEL VAN (#0084614)**
Assistant Prosecuting Attorneys
Cuyahoga County Prosecutor's Office
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

***DAVID E. ROMAKER, JR. (#0085683)**
Assistant Prosecuting Attorney
Wood County Prosecutor's Office
One Courthouse Square
Bowling Green, Ohio 43402
(419) 354-9250

**COUNSEL FOR AMICUS CURIAE,
OHIO PROSECUTING ATTORNEYS
ASSOCIATION**

**COUNSEL FOR AMICUS CURIAE,
CUYAHOGA COUNTY PROSECUTOR'S
OFFICE**

RECEIVED
MAY 23 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
STATEMENT OF THE CASE.....	12
LAW AND ARGUMENT	13
Proposition of Law I: 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.....	13
A. None of the Parties Asked the Appellate Court to Apply De Novo Review.	14
B. <i>Schlotterer</i> Does Not Support Application of De Novo Review to Evidentiary Matters.....	15
C. A Trial Court Has Discretion to Admit Evidence the Appellate Court Would Not Admit If the Reasoning Process is Not Unreasonable, Arbitrary or Unconscionable.....	18
D. The Trial Court Properly Admitted Challenged Evidence.	21
E. The Appellate Court Upset the Rule of Law and the Doctrine of Stare Decisis.....	26
F. The Appellate Court’s Decision Creates an Untenable Double-Bind.	28
CONCLUSION.....	30
CERTIFICATE OF SERVICE	30
APPENDIX	<u>Appx. Page</u>

Notice of Appeal to the Supreme Court of Ohio (October 27, 2010)	A-1
Decision/Judgment Entry of the Ninth District Court of Appeals (Sept. 13, 2010)	A-3
Journal Entry of the Ninth District Court of Appeals Refusing to Certify a Conflict (Nov. 22, 2010)	A-32
Journal Entry of Ninth District Court of Appeals Refusing to Hear Case En Banc (Dec. 7, 2010)	A-37
Judgment Entry of Medina County Court of Common Pleas (Mar. 18, 2009)	A-49

TABLE OF AUTHORITIES

CASES

AAAA Enters., Inc. v. River Place Cmty. Urban Redev. Corp. (1990), 50 Ohio St. 3d 157, 161, 553 N.E.2d 597	<i>passim</i>
Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140	13, 17, 19, 21
Castlebrook, Ltd. v. Dayton Props. Ltd. P'ship (1992), 78 Ohio App. 3d 340, 346, 604 N.E.2d 808.....	16
Hohn v. United States (1998), 524 U.S. 236	28
Lawrence v. Texas (2003), 539 U.S. 558	26
Med. Mut. of Ohio v. Schlotterer, 122 Ohio St. 3d 181, 2009 Ohio 2496	15, 16
Payne v. Tennessee (1991), 501 U.S. 808	27
Pearson v. Callahan (2009), 555 U.S. 223, 129 S. Ct. 808.....	29
Pons v. Ohio State Med. Bd. (1993), 66 Ohio St. 3d 619, 621, 1993 Ohio 122.....	13, 20, 21
Rocky River v. State Emp. Relations Bd. (1989), 43 Ohio St. 3d 1, 4-5, 539 N.E.2d 103	26
Seasons Coal Co. v. City of Cleveland (1984), 10 Ohio St. 3d 77, 80, 461 N.E.2d 1273.....	18
State <i>ex rel.</i> Sawyer v. Cuyahoga Cty. Dept. of Children and Family Servs., 110 Ohio St. 3d 343, 2006 Ohio 4574.....	16
State <i>ex rel.</i> Special Prosecutors v. Judges, Ct. Common Pleas (1978), 55 Ohio St. 2d 94	28
State v. Adams, 3 rd Dist. No. 4-09-16, 2009 Ohio 6863	13
State v. Ahmed (2004), 103 Ohio St. 3d 27, 40, 2004 Ohio 4190.....	13, 15, 20, 29
State v. Clemons (2d Dist. 1994), 94 Ohio App. 3d 701	14
State v. Conway (2006), 109 Ohio St. 3d 412, 2006 Ohio 2815	13, 15, 20, 29
State v. Crotts, 104 Ohio St. 3d 432, 2004 Ohio 6550	24, 25
State v. Culgan, 9 th Dist. No. 09CA0060-M, 2010 Ohio 2992	27
State v. Diar, 120 Ohio St. 3d 460, 2008 Ohio 6266	<i>passim</i>
State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084.....	29
State v. Eskridge (1988), 38 Ohio St. 3d 56, 58-59, 526 N.E.2d 304.....	24, 25
State v. Evans, 9 th Dist. No. 09CA0049-M, 2010 Ohio 3545.....	27
State v. Ford, 12 th Dist. No. CA2009-01-039, 2009 Ohio 6046	13
State v. Hooper, 2d Dist. No. 22883, 2010 Ohio 4041	13, 14
State v. Kalish, 120 Ohio St. 3d 23, 2008 Ohio 4912.....	26

State v. Kienzle, 5 th Dist. No. 2009 AP 03 0015, 2010 Ohio 2045	13
State v. Lester (2d Dist., Oct. 2, 1984), 2d Dist. No. 8679 (unreported), 1984 Ohio App. LEXIS 11311, 1984 WL 4043	14
State v. Liddle, 9 th Dist. No. 23287, 2007 Ohio 1820	26
State v. Maple, 9 th Dist. No. 25331, 2011 Ohio 1516.....	15, 17
State v. McKnight, 107 Ohio St. 3d 101, 2005 Ohio 6046.....	23
State v. Morris, 9 th Dist. No. 09CA0022-M, 2010 Ohio 4282.....	<i>passim</i>
State v. Morris, 9 th Dist. No. 09CA0022-M, 2010 Ohio 5682.....	15, 18
State v. Morris, 9 th Dist. No. 09CA0022-M, 2010 Ohio 5973.....	15
State v. Nieves, 9 th Dist. No. 08CA009500, 2009 Ohio 6374	27
State v. Perez, 124 Ohio St. 3d 122, 136, 2009 Ohio 6179	<i>passim</i>
State v. Sage (1987), 31 Ohio St. 3d 173.....	18, 28, 29
State v. Silverman, 121 Ohio St. 3d 581, 2009 Ohio 1576.....	26, 27, 28
State v. Wheeler, 8 th Dist. No. 93011, 2010 Ohio 1753	13
Teague v. Lane (1989), 489 U.S. 288.....	27
United State v. Gaudin (1995), 515 U.S. 506.....	28
Westfield Ins. Co. v. Galatis, 100 Ohio St. 3d 216, 2003 Ohio 5849.....	26
Williams v. Taylor (2000), 529 U.S. 362	19

RULES

Evid. R. 404(B).....	<i>passim</i>
----------------------	---------------

STATUTES

28 U.S.C. § 2254(d)(1)	19
R.C. 2317.02(B)(1).....	16, 17
R.C. 2907.02(A)(1)(b)	12

OTHER AUTHORITIES

Art. IV of the Ohio Constitution.....	28, 29
---------------------------------------	--------

STATEMENT OF FACTS

Carl Morris, Jr. ("Morris") lived with Susan Klasek ("Susan") while dating and after they became married. (Tr. at 62, 148, 184, 202-03.) Morris moved out of the house in June of 2007 when he and Susan separated. (Tr. at 185-86, 111.) Susan is the mother of Sarah Johnson ("Sarah"), a twenty-three (23) year-old adult, and S.K., a fifteen (15) year-old high school sophomore at the time of trial in January 2009. (Tr. at 58.) Sarah and S.K. are half-sisters by virtue of having the same mother but different fathers. (Tr. at 60.)

David Klasek ("David") is the biological father of S.K. and the ex-husband of Susan. (Tr. at 225.) David and Morris used to get along fine. (Tr. at 227.) Morris used to complain about his relationship with Susan to David, once saying that he wanted out of the relationship but stayed because of S.K. (Tr. at 228-29.) S.K. once told David she had a deep dark secret, but would not tell her father any more at the time. (Tr. at 230.)

David spoke with Morris about an incident involving Sarah. (Tr. at 241.) Morris was working on his car and was upset because Sarah went to her parents and told them that Morris had made sexual advances towards her. (Tr. at 241.) Sarah described how in Spring of 2005 she walked into her mother's bedroom in the evening. (Tr. at 293, 300.) Morris was sitting on the corner of the bed, and reached out, grabbing Sarah by the waist, pulling her towards him. (Tr. at 300.) As he did so, Morris said "You don't know what I would do to you but your mother would get mad." (Tr. at 300.) Sarah naturally interpreted that as a sexual advance. (Tr. at 300.) Susan was in the bathtub at that moment, but Sarah just laughed it off and left, telling Morris that he was dumb. (Tr. at 301.)

Sarah told her mother about the incident the next day. (Tr. at 301.) Susan promptly kicked Morris out of the house for the day, allowing him to return the following day. (Tr. at

301.) Upon his return, Morris apologized to Sarah, saying he did not remember doing it, but if he did or said anything inappropriate he was sorry, attributing his conduct to being drunk. (Tr. at 302.) Sarah never told S.K. about the incident before S.K. disclosed Morris' abuse of her, in part due the fact that they were not close growing up since they are seven (7) years separated. (Tr. at 303, 311.)

S.K. described the abuse as starting around first (1st) grade and continuing until approximately eighth (8th) grade, beginning with initial physical contact and progressing to more and more sexual contact, including vaginal penetration with his fingers and then penis. (Tr. at 67, 73, 359.)

When she first met Morris, S.K. thought he was nice, kind, sweet and funny guy. (Tr. at 66.) Part of the reason she initially thought he was those things was that he would do magic tricks, including disappearing coins and card tricks. (Tr. at 66.) At trial, S.K. described how Morris began the abuse through his use of "magic" tricks. (Tr. at 68.) When leaving the shower, Morris would sometimes use the towel he had wrapped around his body to cover his legs, and while lifting the towel, lift his leg so that it appeared that his foot was missing. (Tr. at 66.) S.K. thought this trick was kind of cool. (Tr. at 67.)

Then Morris sat down with S.K. and did a different "magic" trick. As S.K. described,

He would put his thumb under the blanket and he would make me feel his thumb and it felt like his actual finger, a hard bone and like I knew it was his thumb and then he would say he can make it turn really soft and it was at that point where he would use his penis and I would feel that and I would think that that was his thumb turning in to jello.

Tr. at 68.

As Dr. Gregory Keck, a psychologist who treated S.K. testified, a number of sexual offenses against children are enabled by a process known as "grooming," in which a molester

readies a child to become sexualized. (Tr. at 361.) For strangers, this starts with making the child comfortable with physical contact with the molester. (Tr. at 361.) Dr. Keck described the jello game as a form of grooming because at first the playing with the thumb normalizes physical contact between the child and the molester. (Tr. at 358, 362.) After establishing that “normal” interaction, the molester substitutes a slightly different activity, thus establishing a connection to sexual activity as “normal.” (Tr. at 362.) In this instance, Dr. Keck noted that Morris having S.K. play with his thumb was grooming behavior and the substitution of his penis for his thumb was sexual activity. (Tr. at 362.)

In another incident S.K. remembers, she was laying on the couch in the living room watching television. (Tr. at 69.) Morris, sitting or laying next to her on the couch, felt her leg and began to touch himself. (Tr. at 69.) S.K. did not understand what was happening, so she just went along with it. (Tr. at 69.) Morris began rubbing up and down on her thigh close to her vagina. (Tr. at 69.) S.K. looked at Morris and saw that he had his hand around his penis and was stroking himself. (Tr. at 70.) She was in the first (1st) grade and did not know what he was doing, so she just laid there. (Tr. at 70.)

Later, Morris would undress S.K. and put his penis by her vagina. (Tr. at 72.) Touching her with his hands and then his penis, Morris tried to make S.K. think that it would feel good and moved his hands around the outside of her vagina. (Tr. at 72-73.)

This progressed to a point where Morris would exit the shower and enter his and Susan’s bedroom where S.K. would sometimes be watching television. (Tr. at 76.) Morris would slide into the bed and remove the towel before positioning himself next to S.K. (Tr. at 76.) Eventually, after years of repeated instances, Morris began inserting his penis partially into S.K.’s vagina. (Tr. at 75.) “After a period of time of slowly, I guess I would say, reassuring me

that everything wasn't hurting me, that he would actually put his penis by my vagina and have, I guess, sex from there. He never completely went in me all the way." (Tr. at 72.) S.K. clarified her "completely" comment by saying that Morris inserted his penis into her vagina on about ten (10) separate occasions, but did not insert himself entirely inside her. (Tr. at 75.)

S.K. recalled two specific instances where Morris penetrated her. (Tr. at 88-90, 93-96.) In the first, she remembered that Susan had gone to the hospital for surgery and stayed overnight. (Tr. at 88-89.) Morris took care of S.K. that night. (Tr. at 89.) Before they went to visit Susan in the hospital, Morris laid next to S.K. and inserted his penis into her vagina. (Tr. at 90.) Susan testified that she had a hysterectomy on April 22, 2003 after which she stayed overnight at the hospital. (Tr. at 183-84.) S.K. was born in May of 1993, making her about a month shy of ten (10) years old. (Tr. at 58.)

In the second incident S.K. specifically recalled, she noted that sometime between October 20 and November 1 of 2005, she was laying in her mother's bed watching a cartoon called "Scary Godmother." (Tr. at 93.) Laying on her left side watching television, and with Susan downstairs in the kitchen (tr. at 97,) Morris entered the room in a towel after showering. (Tr. at 94.) After sitting by the fan for a second to cool himself, Morris approached the bed and crawled under the covers. (Tr. at 94.) Sliding next to S.K. and positioning himself to also lay on his left side, Morris put his hand between S.K.'s thighs and began slowly rubbing upwards towards her pants button. (Tr. at 95.) As Morris tried to unbutton and unzip her jean pants, S.K. moved away a little bit. (Tr. at 95.) Undeterred, Morris kept reaching until S.K. finally gave in and let him do what he wanted. (Tr. at 95.) Succeeding in undoing the button for her pants, Morris pulled her pants down. (Tr. at 95.) He then pulled down her underwear. (Tr. at 95.) Using his hands first, Morris ran his fingers up and down over the outer part of her vagina. (Tr.

at 95.) Morris then inserted his penis part-way into S.K.'s vagina and "moved it around." (Tr. at 96.) When he was almost finished, Morris grabbed the towel he had entered the room with and used it to cover his ejaculation. (Tr. at 96.) S.K. noted that Morris used the towel every time he would ejaculate after molesting her. (Tr. at 97.)

During these acts, Morris would talk to S.K., whispering for her to "suck on it," and indicating his desire to lick it multiple times. (Tr. at 109.) And at various points Morris told S.K. to keep this to herself, saying "You don't tell anybody about this, do you." (Tr. at 110.) S.K. responded by shaking her head no. (Tr. at 110.)

S.K. also described how Morris was almost caught on a couple of occasions. One time in the apartment the family rented on Pinecrest Drive in Brunswick before moving to a house they bought on Ascot Drive, Morris and S.K. were on the couch while Morris was touching S.K. and himself. S.K.'s sister, Sarah, come down the stairs quickly as Morris was pleasuring himself, forcing him to cover himself quickly. (Tr. at 98.) Morris told Sarah that she scared them, but did not tell her what was going on. (Tr. at 98.)

Another time in Spring of 2005 (tr. at 187), Morris and S.K. were on the couch watching television. (Tr. at 98.) S.K. was laying on her side watching a late show or a movie. (Tr. at 98.) Morris was sitting straight up, but put his hand down his pants. (Tr. at 98.) As he slowly stroked himself, he put his other hand on her leg but was not moving his hands around. (Tr. at 98.) Susan quietly descended the stairs such that Morris did not hear her until she called out his name. (Tr. at 99.) Morris jumped a little when he heard Susan. (Tr. at 99.) S.K. ran to the bathroom. (Tr. at 187.)

Questioned by her mother, S.K. told Susan that nothing happened. (Tr. at 99.) Morris told Susan that he was holding the remote. (Tr. at 102.) S.K. recalled hearing her mom tell

Morris something about it being all over the newspaper. (Tr. at 103.) Susan did not do anything further at that time, however, because S.K. said that nothing happened. (Tr. at 188.) As she grew older, however, S.K. began to realize what was happening was wrong but was still afraid to tell anyone. (Tr. at 77.) Specifically, S.K. was afraid that if she told anyone they would call her a liar or a slut. (Tr. at 77.)

S.K. almost told her mother and David about the molestation in August of 2006. S.K., her mother Susan and David were supposed to go to California to visit Sarah, who had moved there with her recently-married husband. (Tr. at 84.) David told S.K. he was giving up his ticket for health reasons and to let Morris to go with them, and S.K. began to cry. (Tr. at 84, 234.) Morris, who was pacing in the next room (tr. at 190), came over and stood over S.K. as she cried. (Tr. at 235.)

S.K. has had a number of emotional problems since being molested by Morris. In second (2nd) grade, S.K. would act like a dog, refused to play with other kids, and spoke about suicide. (Tr. at 229.) At her cousin's birthday party, S.K. hid under the stairs and refused to come out. (Tr. at 231.) In third (3rd) grade, S.K. said she wanted to die. (Tr. at 231.) David spoke to a counselor about setting up counseling, but Morris was adamant to "keep the problems at my house." (Tr. at 231.) Morris refused to allow counseling, insisting that if counseling was required, it should be done through the family. (Tr. at 232.)

After their house on Ascot Drive was foreclosed upon, Susan, S.K. moved in with a family friend, Darla, at her farm in Valley City, Ohio for just over a month. While staying there, S.K.'s best friend, D.B., visited. After working with some of the animals on the farm during the late fall of their ninth (9th) grade year, S.K. and D.B. were cleaning up in the downstairs bathroom, a private, quiet place, when S.K. told D.B. that Morris had raped her. (Tr. at 81, 323.)

S.K. did not cry when she made the disclosure, instead trying to brush it off even though it clearly affected her. (Tr. at 323.) D.B. was put off by the information, so she did not want to talk about it further. (Tr. at 327.)

Just before Christmas 2007, S.K. told her parents about the abuse. (Tr. at 78, 186, 227.) S.K. started by saying she had something to say, but could not get it out. (Tr. at 237.) She began pulling her hair, clawing at her head and crying hysterically. (Tr. at 237.) Her eyes beginning to roll back into her head, S.K. begged for David to hit her. (Tr. at 239, 265.) David complied, smacking her and snapping her out of her fit. (Tr. at 272.) S.K. then yelled "Carl raped me." (Tr. at 239.) Susan and David took S.K. to Brunswick Police. (Tr. at 239.)

On the way to the police station, David called Morris, who did not answer. (Tr. at 240.) David left voicemail that he was going to the police and that Morris should meet them there. (Tr. at 240.) David did not tell Morris about the rape allegation S.K. made. (Tr. at 240.) When Morris returned the call the next day, he said "why didn't she say something years ago?" (Tr. at 253.)

After taking a report, Brunswick police forwarded a referral to Medina County Job and Family Services. (Tr. at 334.) Steven Sikora, an intake investigator with that agency, interviewed S.K. shortly after her report to make his own determination of credibility to determine if additional services were necessary. (Tr. at 334-36.) S.K. was cooperative and provided internally consistent accounts of the abuse during the interview. (Tr. at 337, 340.) Determining that the alleged perpetrator was no longer present in the home, that the parents were protective and supportive, Mr. Sikora established a safety plan for S.K., an option short of opening a full ongoing case which consisted of goals to ensure the parents protected the child. (Tr. at 341-42.)

Dr. Keck, S.K.'s treating psychologist, first became involved in treating S.K. in regards to a suicide gesture in early December 2007 before she disclosed the abuse. (Tr. at 351.) From his initial observation of S.K., it was clear that it was not a serious attempt to kill herself. (Tr. at 351.) Following her report to police on December 22, 2007, S.K. disclosed the abuse to Dr. Keck, indicating that Morris had raped her. (Tr. at 357.) S.K. disclosed all of the same relevant details regarding how the abuse started, how it generally occurred and Morris' use of a towel to cover his ejaculations. (Tr. at 358-367.) Noting that some patients have inaccurate memories, Dr. Keck stated that there was no clinical reason to disbelieve S.K. (Tr. at 368.) Dr. Keck was careful to note that he was not vouching for S.K.'s accuracy, rather there was no clinical reason not to believe her. (Tr. at 368.)

Susan Klasek met Morris in or around 1999 (tr. at 200) and married him on August 5, 2002, living with him until they separated in June 2007. (Tr. at 184.) Susan testified at trial that Morris would do magic tricks for people spontaneously. (Tr. at 191.) Specifically, she described one "trick" where Morris, after leaving the shower with a towel around his waist, would open the towel from behind so that one could not see his front while facing him. (Tr. at 191.) Morris would lower the towel a little bit just below his waist so that the towel touched the floor, then raise the towel and his legs to make it appear that one of his legs was missing. (Tr. at 191.)

Susan also described the nature of the conflicts in their relationship, articulating how their issues related to money, Morris getting into an accident, and his ability (or seeming lack thereof) to maintain a job. (Tr. at 194.) Susan also admitted that she and Morris would argue over their sex life. (Tr. at 195.) Those fights related to Morris wanting to have sex every day and Susan not so. (Tr. at 197.) When Susan refused, Morris became verbally and mentally abusive. (Tr. at

197.) When they did have sex, Morris would often ejaculate into a towel or t-shirt or whatever was available. (Tr. at 199.)

After being assigned this case as a member of the detective bureau of Brunswick Police, Detective Henry Papushak interviewed S.K. and took statements from other individuals involved in the case. (Tr. at 392-93, 396-97.) Morris had also filed a complaint of a threatening phone call after David left voicemail. (Tr. at 398.) Using that complaint as an opportunity to talk to Morris, Detective Papushak invited Morris to the police station to discuss it. (Tr. at 398.) Detective Papushak did not inform Morris before the interview of the rape allegation. (Tr. at 398.)

Morris met the detective at Brunswick Police Department on January 3, 2008 and sat with Det. Papushak in the interview room at the front of the building. (Tr. at 399.) In addition to taking notes during the interview, Det. Papushak video-taped the interview. (Tr. at 399; Exhibit 2.) Morris still had the phone call on his phone and played it for the detective. (Tr. at 409.)

From their initial conversation, it did not appear that Morris had any indication about the rape allegation. (Tr. at 410.) Despite the lack of any outside knowledge, and without Det. Papushak bringing the issue up, Morris offered that he thought the investigation would be about him molesting S.K. (Tr. at 410-11.) Asked why he thought that, Morris said he put two and two together. (Tr. at 411.)

Morris contradicted himself in parts of the interview. After initially discussing S.K.'s emotional state as inclusive of suicidal before he separated from Susan, he denied that S.K. was suicidal mere minutes later. (Tr. at 418, 420-21.) Additionally, having expressed to David years before that S.K. was his daughter and that David and Morris would go "get" anyone who hurt her

(tr. at 227), Morris told Det. Papushak in the interview that he did not think a person who raped a child should be punished, offering that they should get “help.” (Tr. at 430.)

Morris explained that his relationship with Susan was strained because Susan and he only had sex one (1) or two (2) times a month. (Tr. at 422.) He then said if Susan had treated him as well as S.K. did, he and Susan would still be married. (Tr. at 423.)

After the State rested, Morris called Basillio Imbrigiotea (“Bill”). Bill is a C6 quadriplegic who has been friends with Morris for at least fifteen (15) years. (Tr. at 487.) Morris met Bill when Morris lived in an apartment above Bill for a number of years. (Tr. at 487.) As a result of his condition, Bill requires assistance at night to do household chores and assist him in hooking up gadgets which monitor him during the night. (Tr. at 487, 489-90.) Morris received certification five (5) or six (6) years ago through the state to be paid through a state program. (Tr. at 487.)

Morris would generally arrive at Bill’s house between 7:00 and 8:00 p.m. and would stay for approximately three (3) hours every night. (Tr. at 489.) While there, Morris would help wash dishes, prepare dinner, vacuum, spend time with Bill watching tv or conversing, and then help Bill into bed by hooking up monitoring equipment. (Tr. at 489-90.) Morris did not go to Bill’s house every night. Morris sometimes missed, but always made arrangements for someone else to go. (Tr. at 490-91.) Other times, Morris would bring his son, Todd, or S.K. (Tr. at 491.) Bill’s ex-girlfriend has children who live next door to him, whom S.K. would play with or watch television. (Tr. at 491.)

Bill testified on direct that he was always home when Morris brought S.K. over with him, saying S.K. was only over six (6) to seven (7) times total. (Tr. at 493-94.) On cross-examination, however, Bill admitted that Morris had a key to his house, that Bill was not always

home, and that Morris would be sometimes at the house already when Bill got home, waiting for him. (Tr. at 497.)

Bill noted on re-direct that his neighbors, aware of his condition, watch his house and would know if Morris was over and if anyone was with him. (Tr. at 498.) Morris did not offer any testimony of neighbors saying that Morris was never at the house with S.K. when Bill was not home, choosing instead to rest after his sole witness. (Tr. at 499.)

STATEMENT OF THE CASE

The Medina County Grand Jury indicted Morris on September 24, 2008, charging him with one (1) count of Rape (of a child under ten) in violation of R.C. 2907.02(A)(1)(b), (B), a felony of the first degree; and one (1) count of Rape (of a child under thirteen) in violation of R.C. 2907.02(A)(1)(b), also a felony of the first degree. At arraignment on October 3, 2008, Morris pleaded not guilty to both counts.

The case proceeded through the pre-trial process until January 26, 2009, when the case was tried to a jury. The jury returned guilty verdicts on both counts, with special finding that the victim was under ten (10) years old at the time. The trial court accepted the jury's verdict and sentenced Morris on March 18, 2009, to five (5) years on count II and life on count I, ordering the sentences to run consecutively. In addition to imposing the mandatory five (5) year period of postrelease control for felonies of the first degree, the trial court designated Morris a Tier III sex offender. (Appx. at A-49.)

Morris timely appealed to the Ninth District Court of Appeals, which reversed his conviction solely on Evid. R. 404(B) grounds. (Appx. at A-3.) The State moved for the Ninth District to certify a conflict regarding its departure from the abuse of discretion standard, which it denied. (Appx. at A-32.) The State also moved for *en banc* consideration of the panel's decision, which it likewise denied. (Appx. at A-37.)

Thereafter, the State timely filed this discretionary appeal. (Appx at 1.) The Court granted the State's timely motion for reconsideration and accepted jurisdiction on the first proposition of law. The State hereby submits its merit brief for consideration.

LAW AND ARGUMENT

Proposition of Law I: 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.

Without regard to existing Ohio Supreme Court precedent, in this case the Ninth District Court of Appeals became the only court in the state to hold that admission of “other acts” evidence under Evid. R. 404(B) is subject to *de novo* review on appeal. Compare *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010 Ohio 4282, at ¶ 13, with *State v. Hooper*, 2d Dist. No. 22883, 2010 Ohio 4041, at ¶ 25; *State v. Adams*, 3rd Dist. No. 4-09-16, 2009 Ohio 6863, at ¶ 28; *State v. Kienzle*, 5th Dist. No. 2009 AP 03 0015, 2010 Ohio 2045, at ¶ 33; *State v. Wheeler*, 8th Dist. No. 93011, 2010 Ohio 1753, at ¶ 21; *State v. Ford*, 12th Dist. No. CA2009-01-039, 2009 Ohio 6046. In so holding, a majority of the Ninth District—both the 2-1 panel majority and the 3-2 *en banc* refusal—unabashedly rejected the longstanding abuse of discretion standard for admission of other acts evidence under Evid. R. 404(B). *State v. Perez*, 124 Ohio St. 3d 122, 136, 2009 Ohio 6179, at ¶ 96, citing *State v. Diar*, 120 Ohio St. 3d 460, 2008 Ohio 6266, at ¶ 66; see also *State v. Conway* (2006), 109 Ohio St. 3d 412, 2006 Ohio 2815 at ¶ 61-62; *State v. Ahmed* (2004), 103 Ohio St. 3d 27, 40, 2004 Ohio 4190, at ¶ 78-79.

An abuse of discretion connotes more than a mere error in law or judgment. An abuse of discretion implies that the trial court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140. A court abuses its discretion when its decision is not supported by any sound reasoning process. *AAAA Enters., Inc. v. River Place Cmty. Urban Redev. Corp.* (1990), 50 Ohio St. 3d 157, 161, 553 N.E.2d 597. An appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St. 3d 619, 621, 1993 Ohio 122. “A decision is unreasonable if there

is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *AAAA Enters., Inc.*, 50 Ohio St. 3d at 161.

A. None of the Parties Asked the Appellate Court to Apply De Novo Review.

In this case, in neither his merit brief nor his reply brief to the court of appeals below did Morris advance a contention that the “other acts” evidence should be tested under a more exacting standard of review. In fact, in multiple instances Morris himself argued that the standard to be applied should be abuse of discretion and even entitled his Assignment of Error accordingly. Brief of Appellant to Ninth District at iii and 15 (“Assignment of Error No. 1: THE TRIAL COURT *ABUSED ITS DISCRETION* AND COMMITTED REVERSIBLE ERROR . . .”); *id.* at 19, citing and quoting parenthetically *State v. Clemons* (2d Dist. 1994), 94 Ohio App. 3d 701, 710 (“This court can only conclude that the trial court *abused its discretion* in allowing the evidence”) (emphasis added). Certainly the State did not ask the Ninth District to apply a *de novo* standard. Yet, citing to abandoned precedent from the Second District Court of Appeals, compare *State v. Lester* (2d Dist., Oct. 2, 1984), 2d Dist. No. 8679 (unreported) (suggesting *de novo* review), 1984 Ohio App. LEXIS 11311, 1984 WL 4043, with *State v. Hooper*, 2d Dist. No. 22883, 2010 Ohio 4041, at ¶ 25 (applying abuse of discretion review), the Ninth District applied *de novo* review.

This Honorable Court has not previously considered the question whether admission of evidence under Evid. R. 404(B) is a substantive legal conclusion or a question of evidence. The Court has clearly indicated in previous decisions that the admission of evidence, including “other

acts” evidence, rests in the trial court’s sound discretion. *See Perez*, 124 Ohio St. 3d at 136, 2009 Ohio 6179, at ¶ 96; *Diar*, 120 Ohio St. 3d 460, 2008 Ohio 6266, at ¶ 66; *Conway*, 109 Ohio St. 3d 412, 2006 Ohio 2815, at ¶ 61-62; *Ahmed*, 103 Ohio St. 3d at 40, 2004 Ohio 4190, at ¶ 78-79. The Court has not, however, explicitly framed this standard in terms of legal conclusions versus evidentiary rulings.

At first glance, this distinction between legal and evidentiary matters may seem to be one without difference. The decision of the Ninth District Court of Appeals in this case, however, draws that very line in citing to a since-abandoned case of the Second District from over twenty (20) years ago to justify its: 1) application of a *de novo* standard, *Morris*, 9th Dist. No. 09CA0022-M, 2010 Ohio 4282, at ¶ 13 (Appendix at A-3); 2) rejection of the State’s motion to certify a conflict, *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010 Ohio 5682 (2-1 panel vote) (Appendix at A-32); and 3) refusal to hear the case *en banc*, *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010 Ohio 5973 (3-2 refusal) (Appendix at A-37).

B. *Schlotterer* Does Not Support Application of De Novo Review to Evidentiary Matters.

Principally, the Ninth District relies on this Court’s decision in *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St. 3d 181, 2009 Ohio 2496, at ¶ 13, to support its application of *de novo* standards of review. *E.g. State v. Maple*, 9th Dist. No. 25331, 2011 Ohio 1516, at ¶ 24 (applying *de novo* review to admission of hearsay evidence, citing *Schlotterer*). Accordingly, although the Ninth District did not explicitly rely on *Schlotterer* in this case, it is evident from recent decisions of the court below that its application of *de novo* review to evidentiary determinations uses the same rationales as underlie its decision in this case. Discussion of why application of *Schlotterer* is not appropriate in cases such as this, where resolution of the matter revolves

around evidentiary questions and not issues of substantive law, therefore further illustrates how the Ninth District erred.

In *Schlotterer*, the Court reviewed whether the physician-patient privilege prevents discovery of medical records by an insurance company in a civil fraud action against a physician when patients had already given broad consent to release their records to the insurer. 122 Ohio St. 3d 181 at ¶ 1. In light of Dr. Schlotterer's refusal to provide patient files and his assertion of the physician-patient privilege during discovery, Medical Mutual moved for an order compelling Schlotterer to turn over patient files. The trial court granted the motion and ordered Schlotterer to disclose the files. Schlotterer appealed, and the appellate court vacated the order, holding that the order violated the physician-patient privilege as codified in R.C. 2317.02(B)(1).

Applying a *de novo* standard of review, this Court specifically noted that discovery orders are ordinarily reviewed for abuse of discretion. *Id.* at ¶ 13, citing *State ex rel. Sawyer v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 110 Ohio St. 3d 343, 2006 Ohio 4574, at ¶ 9. In *Schlotterer*, however, whether the information sought was non-discoverable was a question of substantive law- *i.e.*, whether the information sought was protected from disclosure under the physician-patient privilege in R.C. 2317.02(B)(1). Thus, the Court applied *de novo* review because the issue turned on a question of *substantive law*. *Id.*, citing *Castlebrook, Ltd. v. Dayton Props. Ltd. P'ship* (1992), 78 Ohio App. 3d 340, 346, 604 N.E.2d 808. Moreover, the Court noted that when a court's judgment is based on an erroneous interpretation of the law, abuse of discretion analysis is not appropriate. *Id.*

That straightforward application of *de novo* review to questions of substantive law in *Schlotterer* is not only long-standing but unquestioned in this appeal. Rather, the State contends that the Ninth District erroneously conflated *de novo* review for questions of *substantive law* (as

required in *Schlotterer*) with the similarly long-standing application of abuse of discretion review to *evidentiary rulings*. Unlike resolution of the issue regarding the discovery order in *Schlotterer* – which involved determining whether the records were protected by the physician-patient privilege under R.C. 2317.02(B)(1) – this case tasked the appellate court with answering whether the trial court properly admitted *evidence*. Therefore, the appellate court’s reliance on *Schlotterer* to justify its extension of *de novo* review to evidentiary rulings is misplaced.

The Ninth District makes repeated use of that paragraph of *Schlotterer*, arguing that the decision means that whenever the appellate court believes the trial court came to the wrong conclusion, it may review the decision *de novo*. *Maple*, 2011 Ohio 1516, at ¶ 24. This is precisely the kind of cart-before-the-horse thought process that abuse of discretion review prohibits. Asking if the trial court came to the *right* conclusion ignores the inquiry under an abuse of discretion standard whether the trial court’s *attitude* was unreasonable, arbitrary or unconscionable. *AAAA Enters., Inc.*, 50 Ohio St. 3d at 161; *Blakemore*, 5 Ohio St. 3d at 219. Instead of making its own after-the-fact determination, the appellate court should be looking to the decision and trying to decide whether that decision is plausibly supported by the record in the case. The appellate court should thus be examining whether the trial court’s *attitude* was unreasonable, arbitrary or unconscionable. In place of that mandated inquiry, the Ninth District’s decision below substitutes the appellate court’s own determination of what the appellate court would have done in that situation to see if the trial court’s contemporaneous action mirrors that after-the-fact analysis. This type of review not only permits, but outright requires the appellate court to substitute its judgment for the trial court, as specifically prohibited by *Pons v. Ohio State Med. Bd.*, 66 Ohio St. 3d at 621.

C. A Trial Court Has Discretion to Admit Evidence the Appellate Court Would Not Admit If the Reasoning Process is Not Unreasonable, Arbitrary or Unconscionable.

The Ninth District Court of Appeals in this case placed special emphasis on its belief that a trial court does not have discretion to make a good faith determination whether evidence is admissible or not. *Morris*, 9th Dist. No. 09CA0022-M, 2010 Ohio 5682, at ¶ 4 (order refusing to certify a conflict). Citing to what looks like otherwise dispositive language from *State v. Perez*, 124 Ohio St. 3d 122, 2009 Ohio 6179, at ¶ 96 (itself quoting *State v. Diar*, 120 Ohio St. 3d 460, 2008 Ohio 6266, at ¶ 66), the Ninth District in *Morris* noted that this Court has held that “[t]he admission of other-acts evidence under Evid. R. 404(B) ‘lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice.’” The Ninth District opined that, read literally, this Honorable Court would appear to grant discretion to trial judges to violate Evid. R. 404(B). *Morris*, 2010 Ohio 5682, at ¶ 4 (opinion refusing to certify conflict). The Ninth District below refused to follow existing authority, preferring instead to apply its own analysis, reach its own conclusion, and *then* determine if the trial court decided the issue the same way.

Here again, the appellate court is inserting its own belief, from a cold record, about what *it* would have decided. A trial court, based on its superior position relative to the parties in the case and facts and circumstances which may or may not appear in a cold record, *see Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St. 3d 77, 80, 461 N.E.2d 1273, is in a better position to make a fully informed decision about the case. Its decision to admit or exclude evidence has long been subject to review only for abuse of discretion. *State v. Sage* (1987), 31 Ohio St. 3d 173, ¶ 2 of the syllabus. As noted above, an appellate court should only find an

abuse of discretion where the trial court's *attitude* in deciding a case is unreasonable, arbitrary or unconscionable. *Blakemore*, 5 Ohio St. 3d at 219.

Federal courts conducting habeas review under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1) (emphasis added), review state court judgments deferentially, asking whether the state court's decision is "contrary to or involved an *unreasonable* application of clearly established federal law." In its seminal decision delineating what constitutes an "unreasonable" application of law, the U.S. Supreme Court held that a court may make an unreasonable application of law in one (1) of two (2) ways: 1) the court identifies the correct legal precedent but proceeds to apply that precedent in an unreasonable way to the facts in the case; or 2) the court unreasonably extends a legal principle from existing precedent to a new context where it should not apply or unreasonably refuses to extend a principle where it should apply. *Williams v. Taylor* (2000), 529 U.S. 362, 407. Importantly, Justice O'Connor's majority opinion¹ further clarified that "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original).

This Court has consistently applied a similar understanding of unreasonableness in its abuse of discretion jurisprudence. As the Court observed in *Blakemore*, an abuse of discretion connotes more than a mere error in law or judgment; it implies that the trial court's *attitude* is unreasonable, arbitrary or unconscionable. 5 Ohio St. 3d at 219. Then in *AAAA Enters, Inc.*, the Court held that a court abuses its discretion when its decision is not supported by *any sound reasoning process*. 50 Ohio St. 3d at 161. The *AAAA Enters, Inc.* Court specifically cautioned that "[i]t is not enough that the reviewing court, were it deciding the issue de novo, would not

¹ Although Justice Stevens announced the decision of the Court with respect to Parts I, III, and IV, Justice O'Connor's opinion with respect to Part II was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia, making it the majority opinion as to that part.

have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *Id.*

As this Court has repeatedly held that evidentiary rulings, and specifically “other acts” evidence under Evid. R. 404(B), are subject to review for abuse of discretion, *see Perez*, 124 Ohio St. 3d at 136, 2009 Ohio 6179, at ¶ 96; *Diar*, 120 Ohio St. 3d 460, 2008 Ohio 6266, at ¶ 66; *Conway*, 109 Ohio St. 3d 412, 2006 Ohio 2815, at ¶ 61-62; *Ahmed*, 103 Ohio St. 3d at 40, 2004 Ohio 4190, at ¶ 78-79, the Ninth District’s decision to apply a *de novo* standard is contrary to numerous recent authorities of this Honorable Court. Its decision applying a *de novo* standard of review was therefore error in that the appellate court directly substituted its judgment for that of the trial court. *Pons*, 66 Ohio St. 3d at 621. The judgment must be reversed and remanded for application of the proper standard.

Furthermore, the appellate court noted, in its decision refusing to hear the case *en banc*, that the same result would obtain were it to conduct abuse of discretion review. *Morris*, 2010 Ohio 5973, at page 9. Consideration of the appellate court’s decision reflects that, unlike the trial court’s review, the appellate court’s attitude in deciding the issue was unreasonable, arbitrary or unconscionable. Specifically, the appellate court flagrantly mis-applied the abuse of discretion standard when conducting its alternative evaluation of the evidence.

When ostensibly conducting abuse of discretion review in its opinion refusing to hear the case *en banc*, the Ninth District’s opinion maintains its belief that the trial court does not have discretion to decide in good faith whether evidence is admissible under Evid. R. 404(B). *Morris*, 2010 Ohio 5973, at page 9. This reasoning, like the application of *de novo* review, flies in the face of review for abuse of discretion. Rather than permit the appellate court to conduct its own review without discretion before comparing what the trial court did in the case to determine

whether the trial court's action was the same, abuse of discretion review merely allows the appellate court to review the record in the case to determine whether the trial court's attitude in making its determination was unreasonable, arbitrary or unconscionable. *AAAA Enters., Inc.*, 50 Ohio St. 3d at 161; *Blakemore*, 5 Ohio St. 3d at 219. The appellate court's decision indicates a refusal to view deferentially rulings admitting or excluding evidence, substituting its own determination what *it* would have done. The abuse of discretion standard acts to insulate trial courts by affording them latitude to make close calls regarding the admission of evidence without fear of constant reversal.

By insisting that the trial court lacks discretion to admit evidence under Evid. R. 404(B), the appellate court majority necessarily constructed its own view of the application of the Rule in this case *before* it tested the trial court's decision against what the appellate court just determined should have happened. As noted above, this is precisely the kind of cart-before-the-horse reasoning process that abuse of discretion expressly protects against. In making its own *ex post* determination whether the evidence was admissible, the appellate court substituted its judgment for the trial court contra *Pons v. Ohio St. Med. Bd.*, 66 Ohio St. 3d at 621. Therefore, even in conducting abuse of discretion review in the alternative, the appellate court erred.

D. The Trial Court Properly Admitted Challenged Evidence.

In conducting its own review, the appellate court determined that the trial court erroneously admitted certain evidence. For the appellate court, this evidence came in the form of one of two categories: evidence that Morris acted out when refused sex by Susan; and evidence that Morris made sexual advances to S.K.'s half-sister, Sarah.

At least with regard to the evidence that Morris kicked the dog, the appellate court overlooks the fact that the State did not ask Susan about that specific act. Rather, Susan volunteered that information without that question being put before her. (Tr. at 197.) And the appellate court overlooked the fact that the State did not make any use of that testimony afterwards, avoiding that issue during its closing argument. Rather, the defense picked up the issue, asking on cross examination how the dog felt about being kicked. (Tr. at 222.) Defense counsel then also asked about marital arguments related to Susan's drinking, to which she denied it was related to her drinking, offering instead that it was due to Morris' use of Valium and marijuana. (Tr. at 221.) Susan's testimony also described specific acts which occurred during sex, which the appellate court correctly determined were not character evidence. *Morris*, 2010 Ohio 4282, at ¶ 23 (the evidence that Morris ejaculated into a towel).

During his cross examination, defense counsel asked Susan whether she thought Morris caused her mother's stroke in 2006. (Tr. at 213.) When Susan responded that she would not put it past him, defense counsel moved to strike her response. (Tr. at 213.) Thus, the record indicates that when he thought it appropriate, defense counsel moved to strike a witness' testimony. Yet, with regard to the two (2) instances in question on appeal, defense counsel never moved to strike. In fact, defense counsel did not even make a request for a mistrial in response to the testimony, choosing instead to use the subject matter for himself on cross-examination. Given trial counsel's decision not to challenge the specific statements and in fact use the subject during cross examination, the trial court did not err because it was never presented with an opportunity to rule on the specific testimony about which Morris now complains. The trial judge in this case, even though he possesses over twenty-five (25) years of judicial experience, is not a psychic. In order for a trial court to act, it must be presented with an opportunity to act. In the

absence of a motion to strike, a request for a mistrial, a request for a curative/limiting instruction at the time, or any other act directing the trial court's attention to a specific issue, the trial court did not err because the trial court was not asked to take any action. In fact, Morris could be said to have waived his objection to this testimony by inquiring on the subject during cross-examination.

Evid. R. 404(B) provides that while evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that they acted in conformity therewith, it may be admissible for other purposes, such as proof of motive, intent, common scheme or plan, and identity. As Judge Carr wrote in dissent, this evidence was admissible under Evid. R. 404(B).

Judge Carr observed that this Court has long applied the abuse of discretion standard to decisions to admit evidence under Evid. R. 404(B). *Morris*, 2010 Ohio 4282, at ¶ 47. Citing *Diar*, 120 Ohio St. 3d 460, at ¶ 72, Judge Carr noted that in that case the Ohio Supreme Court allowed "other acts" evidence that Diar left her child unattended, fed the child mainly fast food, and acted as though the child was a bother, because it provided context for the alleged crime and made the defendant's actions more comprehensible to the jury. *Id.*

Judge Carr also noted that evidence showing a modus operandi or plan is admissible because it provides a behavioral fingerprint which, when compared to the fingerprint of the crime in question, can be used to identify the defendant as the perpetrator. *Id.*, citing *State v. McKnight*, 107 Ohio St. 3d 101, 2005 Ohio 6046, at ¶ 83. Her dissenting opinion also pointed out that the evidence established Morris' identity as the perpetrator. As Judge Carr correctly notes, identity is always at issue except in very limited circumstances where the defendant has admitted the commission of the acts but asserts some defense to negate criminality. *Id.* at ¶ 52.

This Court ruled similarly in *State v. Crotts*, 104 Ohio St. 3d 432, 2004 Ohio 6550, at ¶ 20, when it held that evidence of a defendant's motive, intent, scheme, and plan are always material because they each tend to show why one version of events should be believed over another.

In this case, evidence that Morris made sexual advances to S.K.'s older half-sister, Sarah, was admissible because it tended to show his identity as the perpetrator, and proved the identity of the crime charged through a behavioral fingerprint. As Judge Carr noted in dissent, the trial court properly admitted evidence because, unlike other criminal cases, the general theory in child sexual assault cases is to allege that the victim is lying about the assaults. In these cases, the behavioral fingerprint of the criminal conduct serves two (2) evidentiary purposes: 1) it establishes the nature and identity of the crime committed; and 2) it establishes the identity of the perpetrator.

Here, the evidence showed a common plan and opportunity to engage in sexual conduct with his step-daughters, in secret, in the same bedroom, with knowledge that Susan would become upset if anyone found out. The testimony that Susan threw Morris out of the house for the night upon learning of the advance directed at Sarah further informed the jury that Morris was well aware of the need for secrecy and thus the question to S.K., "you don't tell anybody about this, do you." (Tr. at 110.) This stern warning is also evidence of force. *State v. Eskridge* (1988), 38 Ohio St. 3d 56, 58-59, 526 N.E.2d 304 (fact that victim's will was overcome by fear or duress sufficient to establish "force" element of rape). The testimony that Sarah, being older and already socialized to know that the advance was inappropriate, refused his sudden advances also indicates that Morris was well aware of the need to "groom" the much younger S.K. to normalize his sexual activity with her. Therefore, the testimony that Morris made sexual advances towards Sarah showed that Morris: 1) was the perpetrator of the crime charged; 2)

acted with a plan or scheme in committing the offense; and 3) that his motive or intent in committing the crime was fulfilling his apparently unfulfilled sexual appetite. Given the multiple justifications for its admission, the trial court did not err in admitting the evidence, let alone abuse its discretion by doing so.

There was also evidence that Morris kicked the dog when refused sex by Susan. Judge Carr's dissenting opinion in this case is again entirely correct. *Morris*, 2010 Ohio 4282, at ¶ 55. As Judge Carr notes, the trial court could have believed that this evidence provided relevant background for Morris' frustration at his wife refusing his sexual advances, his anger at being rejected, and his plan to obtain sex from a victim who would not reject him. *Id.* In this regard, the testimony provided the "context for the alleged crimes and made [Morris'] actions more understandable to the jurors." *Id.*, quoting *Diar*, 120 Ohio St. 3d 460, at ¶ 72 (internal quotations omitted). This evidence also showed force or threat of force in that all members of the household understood that there were repercussions to disappointing Morris or denying him something he wanted. *Eskridge*, 38 Ohio St. 3d at 58-59.

In providing relevant background informing why Morris did the things he did, the evidence establishes his motive, a specifically-enumerated admissible purpose for Evid. R. 404(B) evidence. As this Court held in *Crotts*:

[i]n any criminal case in which the defendant's motive or intent . . . 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.

104 Ohio St. 3d 432, at ¶ 18 (omission in original). Evidence of motive, intent, scheme or plan is *always* material because it tends to show why one version of events should be believed over another. *Id.* at ¶ 20. In fact, the Ninth District itself had previously noted in *State v. Liddle*, 9th

Dist. No. 23287, 2007 Ohio 1820, at ¶ 55, that other acts evidence testimony which forms part of the background of the charged crime may be admissible as demonstrating a scheme, plan or system. The appellate court's decision holding that the trial court erroneously admitted evidence not only applies an improper standard of review, but erroneously construes the substance of Evid. R. 404(B).

E. The Appellate Court Upset the Rule of Law and the Doctrine of Stare Decisis.

As this Court has repeatedly and recently held, the doctrine of *stare decisis* is the bedrock of the American judicial system. *State v. Silverman*, 121 Ohio St. 3d 581, 2009 Ohio 1576, at ¶ 30, quoting *State v. Kalish*, 120 Ohio St. 3d 23, 2008 Ohio 4912, at ¶ 22, itself quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003 Ohio 5849. As the *Galatis* Court noted, *stare decisis* provides continuity and predictability in our legal system. 100 Ohio St. 3d 216, at ¶ 43. Adherence to prior decisions thwarts the arbitrary administration of justice in addition to providing a clear rule of law by which people can organize their affairs. *Id.*, citing *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1, 4-5, 539 N.E.2d 103. While prior decisions are not sacrosanct, decisions to depart from a prior determination require special justification. *Id.* at ¶ 44.

Galatis recognized the tension in overruling prior precedent and adopted a test to apply when asked to do so. Under the test, a prior decision of the Ohio Supreme Court will not be overruled unless: 1) the decision was wrongly decided at that time or changed circumstances no longer justify continued adherence to the decision; 2) the decision defies practical workability; and 3) abandoning the precedent would not create undue hardship for those who have relied on it. 100 Ohio St. 3d 216, at ¶ 48 and n.5, citing *Lawrence v. Texas* (2003), 539 U.S. 558. As part

of the test, and as this Court reaffirmed recently in *Silverman*, “considerations in favor of stare decisis are at their acme . . . where reliance interests are involved.” *Silverman*, 121 Ohio St. 3d 581, at ¶ 31, quoting *Payne v. Tennessee* (1991), 501 U.S. 808, 828.

Although there is a reduced reliance interest in this particular matter because the applicable decisions are in regard to evidentiary decisions, the decision of the Court has the potential to throw the criminal appellate process into considerable chaos if the Court were to affirm. Specifically, if the Court were to affirm the Ninth District’s application of *de novo* review, it would mandate a different standard of review for every case in this state. This upheaval would pit appellate courts against trial courts in determinations of whether Evid. R. 404(B) evidence had been properly admitted. Even though the upheaval would not apply retroactively to cases already “final,” it would apply to all cases pending *on direct review*. See *Teague v. Lane* (1989), 489 U.S. 288, 304. After litigating in the trial courts and having already secured convictions unafraid of what the appellate court might do, a decision in this case affirming the Ninth District’s judgment would cast significant doubt on hundreds, if not thousands, of criminal convictions. This potential chaos is precisely the interest that the doctrine of stare decisis guards against.

In numerous other cases, the appellate court below has routinely noted that it is duty-bound to follow the decisions of this Court. *E.g.*, *State v. Evans*, 9th Dist. No. 09CA0049-M, 2010 Ohio 3545, at ¶ 34 (discussing *Foster* claim and holding that it is bound as a lower court to adhere to controlling precedent until the higher court says otherwise), citing *State v. Nieves*, 9th Dist. No. 08CA009500, 2009 Ohio 6374, at ¶ 52 (same); *see also State v. Culgan*, 9th Dist. No. 09CA0060-M, 2010 Ohio 2992, at ¶ 16 (noting that it, as a lower court, is powerless to modify or overrule a decision of the Ohio Supreme Court). Yet in this case, when it suited the appellate

court to alter the clear standard of review, it disregarded not only cases of the Ohio Supreme Court but its own authority- when neither party asked it to do so.

F. The Appellate Court's Decision Creates an Untenable Double-Bind.

The appellate court's decision in this case is the focus of a double bind. On the one hand, if Evid. R. 404(B) is an evidentiary rule, there is a reduced reliance interest for purposes of the doctrine of *stare decisis*. Against that reduced reliance interest, however, analysis as an evidentiary rule undoes the legal foundation of the appellate court's reliance on *de novo* review, since the Court has long held that *evidentiary* matters are reviewed for an abuse of discretion. *State v. Sage* (1987), 31 Ohio St. 3d 173, 510 N.E.2d 343, ¶ 2 of the syllabus.

On the other hand, if the Court somehow finds Evid. R. 404(B) to be a legal rule within the ambit of *Schlotterer's* application of *de novo* review, a different problem occurs. While *Schlotterer* would prove more permissive of conducting *de novo* review to legal questions, the reliance interest under *Galatis* would become significantly stronger. *Silverman*, 121 Ohio St. 3d 581, at ¶ 31-32. The appellate court having failed to articulate any need to overrule a decision of this Court, because neither party asked it to do so and a lower court is powerless to alter the decision of a higher court, *see State ex rel. Special Prosecutors v. Judges, Ct. Common Pleas* (1978), 55 Ohio St. 2d 94, 97, its decision fails to surmount the obstacle of *stare decisis* or our constitutional division of power under Art. IV of the Ohio Constitution.

Here, the rule of *evidence* at issue in this case does not itself "alter primary conduct" or generally "affect the way in which parties order their affairs," Evid. R. 404(B) is an evidentiary rule. *Silverman*, 121 Ohio St. 3d 581, at ¶ 33, quoting *Hohn v. United States* (1998), 524 U.S. 236, 252, *United State v. Gaudin* (1995), 515 U.S. 506, 521, and *Pearson v. Callahan* (2009),

555 U.S. 223, 129 S. Ct. 808, 816. As a *rule of evidence*, the appellate court was required to analyze the admission of *evidence* for an abuse of the trial court's sound discretion. *State v. Drummond*, 111 Ohio St. 3d 14, 2006 Ohio 5084, at ¶ 74, quoting *Sage*, 31 Ohio St. 3d 173, ¶ 2 of the syllabus. Even without a strong reliance interest under *Galatis*, the Ninth District's opinion applying *de novo* review is thus contrary to controlling authority of the Ohio Supreme Court. Art. IV, Ohio Constitution.

Ultimately, the fact remains that this Court in *Perez*, 124 Ohio St. 3d at 136, 2009 Ohio 6179, at ¶ 96; *Diar*, 120 Ohio St. 3d 460, 2008 Ohio 6266, at ¶ 66; *Conway*, 109 Ohio St. 3d 412, 2006 Ohio 2815, at ¶ 61-62; and *Ahmed*, 103 Ohio St. 3d at 40, 2004 Ohio 4190, at ¶ 78-79, has repeatedly and specifically held that the admission of evidence under Evid. R. 404(B) is reviewed for abuse of discretion. The appellate court disregarded that unambiguous authority and the argument of both the State and Appellee Carl Morris in applying *de novo* review. This Court should therefore hold that the Ninth District applied the wrong standard of review, vacate the judgment below and remand this case to the Ninth District with instructions to apply correctly the abuse of discretion standard.

CONCLUSION

The Ninth District Court of Appeals erred in applying a *de novo* standard of review to the admission of “other acts” evidence. As numerous decisions of this Honorable Court indicate, the appropriate standard when reviewing the admission of evidence is whether the trial court abused its discretion.

Respectfully submitted,



DEAN HOLMAN (#0020915)
Medina County Prosecuting Attorney
72 Public Square
Medina, Ohio 44256
(330) 723-9536
(330) 723-9532 (fax)

AND



MATTHEW KERN (#0086415)
Assistant Prosecuting Attorney
Medina County Prosecutor’s Office
72 Public Square
Medina, Ohio 44256
(330) 723-9536
(330) 723-9532 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Brief of Appellant was sent regular U.S. mail to David Sheldon, Counsel for Appellee Carl Morris, Jr., 669 West Liberty Street, Medina, Ohio 44256, this 23rd day of May, 2011.



MATTHEW KERN
Assistant Prosecuting Attorney

APPENDIX

IN THE SUPREME COURT OF OHIO

10-1842

STATE OF OHIO,
Plaintiff-Appellant,

vs.

CARL M. MORRIS, JR.,
Defendant-Appellee.

ON APPEAL FROM THE MEDINA
COUNTY COURT OF APPEALS,
NINTH JUDICIAL DISTRICT

SUPREME COURT OF OHIO
CASE NO.

COURT OF APPEALS CASE
NO. 09CA0022-M

NOTICE OF APPEAL

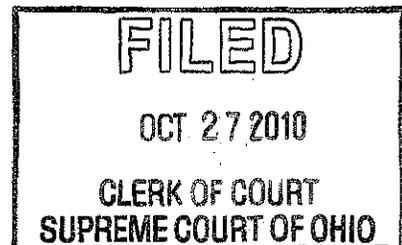
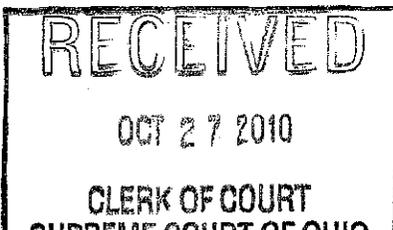
Discretionary appeal, Sup. Ct. R. II, sec. 1(A)(3).

DEAN HOMAN (#0020915)
Medina County Prosecuting Attorney
RUSSELL A. HOPKINS (#0063798)
Assistant Prosecuting Attorneys
72 Public Square
Medina, Ohio 44256
(330) 723-9536
fax: (330) 723-9532

Counsel for Appellant,
State of Ohio

DAVID SHELDON (0040523)
669 W. Liberty St.
Medina, OH 44256
(330) 723-8788
FAX: (330) 723-4788

Counsel for Appellant,
Carl M. Morris, Jr.



A-1

Now comes the State of Ohio, Plaintiff and Appellant, by and through the office of the Prosecuting Attorney for Medina County, Ohio, and respectfully submits this Notice of Appeal from the judgment of the Ninth District Court of Appeals dated September 13, 2010, case number 09CA0022-M. Said appeal involves a question of public or great general interest and is a discretionary appeal pursuant to Sup. Ct. R. II, sec. 1(A)(3).

Respectfully submitted,



RUSSELL A. HOPKINS (#0063798)
Assistant Prosecuting Attorney

PROOF OF SERVICE

The undersigned hereby certifies that a copies of the foregoing State's Notice of Appeal was sent by ordinary, prepaid U.S. Mail on this 25th day of October, 2010 to: David C. Sheldon, 669 W. Liberty St., Medina, OH 44256 and Office of the Ohio Public Defender at 250 E. Broadway St., suite 1400, Columbus, OH 43215.



COURT OF APPEALS

STATE OF OHIO)
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
10 SEP 13 AM 11:57

STATE OF OHIO

FILED
KATHY FORTNEY
MEDINA COUNTY
CLERK OF COURTS

C.A. No. 09CA0022-M

Appellee

v.

CARL M. MORRIS, JR.

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08CR0408

DECISION AND JOURNAL ENTRY

Dated: September 13, 2010

COMMON PLEAS COURT
10 SEP 13 PM 12:35
FILED
KATHY FORTNEY
MEDINA COUNTY
CLERK OF COURTS

Per Curiam.

INTRODUCTION

{¶1} A jury convicted Carl M. Morris Jr. of two counts of raping his stepdaughter, S.K. According to S.K., Mr. Morris sexually molested her over the course of several years while he was living with her and her mother. The trial court sentenced Mr. Morris to life in prison on one count of rape of a child less than ten years old and five years in prison on one count of rape of a child less than thirteen years old. The trial court adjudicated Mr. Morris a Tier III sex offender/child victim offender. Mr. Morris timely appealed his convictions, raising six assignments of error. This Court reverses because the trial court prejudiced Mr. Morris by incorrectly admitting testimony of Mr. Morris's character in violation of Rule 404 of the Ohio Rules of Evidence.

COURT OF APPEALS, NINTH JUDICIAL DIST - STATE OF OHIO, MEDINA COUNTY, ss
I hereby certify that this is a true copy of the original on file in said Court.
Witness my hand and the seal of said Court at Medina, Ohio this 13th
of September, 2010. Kathy Fortney, Clerk of Courts.
Mitchell W. Jess Deputy.

A-3

BACKGROUND

{¶2} When S.K. was in the first grade, her mother married Mr. Morris, and he moved into their house to live with S.K., her grandmother, and her older half-sister, Sarah. According to S.K., when she first met Mr. Morris, he would do magic tricks to entertain her. He would do card tricks, coin tricks, or make his leg "disappear" using a towel. Sarah and their mother testified that Mr. Morris walked around the house in a towel before and after showering and would sometimes stop and do magic tricks, like the one involving manipulating the towel to make it seem as though one of his legs had disappeared.

{¶3} S.K. testified that, when the two of them were alone, Mr. Morris used to show her a trick requiring her to feel his thumb through a towel across his lap. S.K. was amazed that he could make his "thumb" turn to Jell-o and then become very hard. She testified that Mr. Morris later showed her that it was his penis she had been touching behind the towel. According to S.K., at some point, Mr. Morris started lying on the couch beside her and masturbating while rubbing her thighs with his other hand.

{¶4} S.K. testified that Mr. Morris vaginally raped her at least 10 times between when she entered second grade and when her grandmother died. S.K. was 13 years old when her grandmother died. She testified that, after her grandmother died, she started walking away from Mr. Morris when he would try to touch her. According to S.K., Mr. Morris soon stopped trying.

{¶5} S.K. testified that, for the most part, she could not remember the dates of the events she described, but that, after talking to police, she found she was able to assign dates to two of the incidents. She testified that Mr. Morris raped her when they were home alone before taking her to the hospital to visit her mother after surgery. S.K.'s mother testified that she stayed overnight in a hospital on April 22, 2003, following a hysterectomy. S.K. was nine years old at

that time. S.K. also testified that Mr. Morris raped her sometime between October 20 and November 1, 2005, when she was 12 years old. She testified that she remembered the date because Mr. Morris interrupted a Halloween cartoon on television.

{¶6} S.K. testified that Mr. Morris never grabbed her, used force, or threatened her. She said that he never told her not to tell anyone what he was doing. She testified that she did not tell anyone about Mr. Morris's behavior until at least four months after he had separated from her mother and moved out of their house. S.K.'s best friend testified that, about four or five months after Mr. Morris had moved out of the house, S.K. told her that he had raped her, but did not share any details. Six months after Mr. Morris had moved out of the house, S.K. told her parents that Mr. Morris had raped her. They insisted that she repeat the information to the police and to a therapist she had been seeing. S.K.'s therapist testified that, although he cannot be certain whether a client is telling the truth, there was no clinical reason to disbelieve S.K.'s account. He further testified that her description of the magic tricks fit the pattern of something a pedophile would do to prepare a child for sexual activity.

{¶7} At trial, Mr. Morris argued that both S.K. and her mother had reasons to fabricate the allegations against him. S.K.'s mother testified that, after Mr. Morris moved out, she suffered financial hardship and lost the house they had purchased together. Although she said that Mr. Morris had difficulty keeping jobs, she admitted that she could not afford the house without his help. Mr. Morris also elicited testimony from various witnesses that S.K. first told her parents that Mr. Morris had raped her in the middle of a dramatic confrontation between her and her parents regarding something they had seen on her MySpace page. The trial court excluded the details of the information contained on the page, but S.K. testified that the issue that provoked her parents' wrath had nothing to do with Mr. Morris.

{¶8} Although there were no eyewitnesses in this case other than S.K., S.K.'s mother and half-sister, Sarah, both testified to situations that provoked some suspicion regarding Mr. Morris's conduct with S.K. Sarah testified that she once saw Mr. Morris and S.K. "underneath the blankets" on the couch. Although the two had always been close and it was not uncommon to see them physically close to each other, it made her uncomfortable on that occasion.

{¶9} S.K.'s mother testified that she came downstairs late one night in the spring of 2005 "and both [S.K. and Mr. Morris] jumped off the couch really quick and [S.K.] went and ran in to the bathroom." She testified that she confronted both of them, but each repeatedly denied that anything inappropriate had happened. S.K. testified that she remembered being on the couch with Mr. Morris while he was masturbating and touching her leg with his other hand when her mother suddenly came down the stairs. According to S.K., "[Mr. Morris] jumped a little" while she just "tightened up" for a moment before heading to the bathroom. She said that when her mother asked her what was going on, she told her that nothing had happened.

OTHER-ACTS EVIDENCE

{¶10} Mr. Morris's first assignment of error is that the trial court incorrectly allowed the State to introduce evidence of his "other . . . acts to show proof of [his] character in violation of [Rule 404(B) of the Ohio Rules of Evidence]." Mr. Morris has pointed to three lines of questioning to which he objected at trial. First, he has argued that the trial court should have excluded S.K.'s mother's testimony regarding him sometimes ejaculating into towels or t-shirts during intercourse. Second, he has argued that the trial court should have excluded all references to an incident involving Sarah, S.K.'s adult half-sister. Finally, he has argued that the trial court should have excluded S.K.'s mother's testimony regarding his penchant for kicking the dog if the mother refused to have sex with him.

{¶11} “A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused’s propensity or inclination to commit crime.” *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975). Many years ago, the General Assembly codified that principle, but specified several alternative purposes for which such evidence may be used. Under Section 2945.59, “any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant’s scheme, plan, or system in doing the act in question may be proved . . . notwithstanding that such proof may show or tend to show the commission of another crime by the defendant,” provided that the permissible alternative purpose for the evidence “is material” in the case. Rule 404 of the Ohio Rules of Evidence broadened the principle beyond the realm of criminal behavior. “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion” Evid. R. 404(A). “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith,” but may be admissible for certain other purposes. Evid. R. 404(B). For example, evidence of other crimes, wrongs, or acts may be admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.*

{¶12} “The rule is in accord with [the statute].” *State v. Broom*, 40 Ohio St. 3d 277, 281 (1988). “If the other act does in fact ‘tend to show’ by substantial proof any of those things enumerated, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, then evidence of the other act may be admissible.” *Id.* at 282 (quoting *State v. Flonnory*, 31 Ohio St. 2d 124, 126 (1972)); see also *State v. Gross*, 97 Ohio St. 3d 121, 2002-Ohio-5524, at ¶46 (quoting *Broom*, 40 Ohio St. 3d 277 at paragraph one of the

syllabus). Evidence that tends to prove one of the things enumerated by the statute or the rule is admissible if the alternative purpose for which the evidence is being offered is a material issue in the case. *State v. Curry*, 43 Ohio St. 2d 66, 71 (1975); *State v. DePina*, 21 Ohio App. 3d 91, 92 (1984) (citing *State v. Burson*, 38 Ohio St. 2d 157, 158 (1974)). This Court has held that both the rule and the statute “are to be strictly construed against the state and conservatively applied by the trial courts.” *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, at ¶93 (citing *State v. DeMarco*, 31 Ohio St. 3d 191, 194 (1987)). The Ohio Supreme Court has held that “the standard for determining admissibility of such evidence is strict.” *Broom*, 40 Ohio St. 3d at 282.

{¶13} 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. See *State v. Lester*, 2d Dist. No. 8679, 1984 WL 4043 at *3 (Oct. 2, 1984). 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.

He used towels during sexual intercourse.

{¶14} S.K. testified that, every time Mr. Morris ejaculated while molesting her, he would quickly cover his penis with a towel. Mr. Morris has argued that S.K.’s mother, who was married to him at the time of the alleged incidents, should not have been permitted to testify that “[w]hen [Mr. Morris] and I had sex, he would sometimes [ejaculate] in a towel or a T-shirt or whatever was around.” She went on to say that she did not understand why he would do that because he knew she could not get pregnant. Mr. Morris has argued that the trial court should not have allowed the mother’s testimony under Evidence Rule 404(B).

{¶15} The State has argued that the testimony was admissible because it is evidence of “idiosyncratic behavior that shows a common plan” and “his modus operandi for disposal of semen . . . [that is,] [e]xcept when having sex with his wife, [Mr.] Morris always ejaculates into a towel.” The State’s argument is based on a misunderstanding of S.K.’s mother’s testimony. What she said was that Mr. Morris “sometimes” ejaculated into a towel when they did have sex -- not at times other than when they had sex.

{¶16} The State has cited this Court’s opinion in *State v. DePina*, 21 Ohio App. 3d 91 (1984), for the proposition that evidence of “idiosyncratic behavior that shows [a] common plan and modus operandi” is admissible in a rape prosecution. In *DePina*, this Court determined that the trial court correctly admitted testimony from a woman who had been raped by the defendant in a manner similar to that described by the victim in the *DePina* case. The similarities included the defendant threatening her, taking her into the woods, ordering her to disrobe, laying his own shirt or jacket on the ground for her to lie on, vaginally raping her, ordering her to get dressed, and escorting her out of the woods.

{¶17} In order for evidence of other acts to be admissible under Rule 404(B), “[p]roof of one of the other [non-character] purposes outlined in Evid.R. 404(B) must go to an issue which is material to proof of the defendant’s guilt for the crime with which he is charged.” *State v. DePina*, 21 Ohio App. 3d 91, 92 (1984) (citing *State v. Burson*, 38 Ohio St. 2d 157, 158 (1974)); see also *State v. Curry*, 43 Ohio St. 2d 66, 71 (1975). In *DePina*, this Court approved the trial court’s admission of the evidence regarding the many similarities in the two rapes because proving identity is one of the approved purposes for use of such evidence and “[the] defendant’s identity as the rapist was both controverted and material” in that case. *Id.* The evidence of the prior rape in *DePina* was admissible as proof of modus operandi because “it provide[d] a

behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, [could] be used to identify the defendant as the perpetrator.” *State v. Myers*, 97 Ohio St. 3d 335, 2002-Ohio-6658, at ¶104 (quoting *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994)).

{¶18} In describing such evidence, the Ohio Supreme Court has written that “[o]ther acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B).” *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994) (quoting *State v. Jamison*, 49 Ohio St. 3d 182, syllabus (1990)). “To be admissible to prove identity through a certain *modus operandi*, other-acts evidence must be related to and share common features with the crime in question.” *Id.* at paragraph one of the syllabus.

{¶19} A *modus operandi* describes a pattern of behavior, not one isolated detail that is not necessarily a unique identifier. A single act, that does not involve criminal activity or even moral turpitude, does not demonstrate “a unique, identifiable plan of criminal activity.” *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994) (quoting *State v. Jamison*, 49 Ohio St. 3d 182, syllabus (1990)). S.K.’s mother’s testimony about Mr. Morris ejaculating into “a towel or a T-shirt or whatever was around” was just such testimony about a single act that does not involve criminal activity or even moral turpitude. Furthermore, identity was not an issue in this case. There was no dispute that, if S.K. was telling the truth when she said she was raped, Mr. Morris was the perpetrator. His denial of any sexual contact or conduct between him and S.K. created a factual dispute regarding Mr. Morris’s treatment of S.K. – not a dispute about his identity. See *State v. Schaim*, 65 Ohio St. 3d 51, 61 (1992); *State v. Curry*, 43 Ohio St. 2d 66, 73 (1975); *State v. Wilkins*, 135 Ohio App. 3d 26, 31 (1999). Therefore, “identity was not a material issue properly

subject to proof by other-acts evidence in the trial court” *Wilkins*, 135 Ohio App. 3d at 31-32; see also *Curry*, 43 Ohio St. 2d at 71.

{¶20} The State’s second argument was that the testimony was admissible to prove Mr. Morris’s motive to rape S.K., that is, a frustrated reaction to her mother refusing to have sex with him. One’s proclivity for ejaculating into a towel during consensual sex with one’s adult wife has no tendency to show a motive to rape a child. Mr. Morris has correctly argued that S.K.’s mother’s testimony about him ejaculating into towels is not within the exceptions listed in Evidence Rule 404(B).

{¶21} The mother’s testimony is not excluded by Evidence Rule 404, however, because it is not “evidence of a person’s character or a trait of character.” Evid. R. 404(A); see also *State v. Shedrick*, 61 Ohio St. 3d 331, 337 (1991) (explaining that Evidence Rule 404 excludes evidence that “tends to show [the defendant’s] bad character.”). S.K.’s mother’s testimony about Mr. Morris unexpectedly ejaculating into towels during sex implied nothing about his character. The testimony was relevant because S.K. had previously said that Mr. Morris had always ejaculated into a towel when molesting her. Evid. R. 401. It could hurt Mr. Morris’s case because, if believed, it provided some corroboration of S.K.’s allegation that she had been involved in a sexually intimate situation with Mr. Morris. As relevant evidence, it was admissible unless otherwise objectionable. Evid. R. 402. It was not objectionable character evidence under Rule 404.

{¶22} Mr. Morris has also argued that this testimony was “inflammatory, confusing, [and] unreliable” and that any probative value was substantially outweighed by the danger of unfair prejudice. See Evid. R. 403(A). The testimony was clear, and it was not inherently unreliable. The jury was capable of determining what weight, if any, it deserved in light of the

other evidence in the case. Admission of the testimony, harmful as it may have been to Mr. Morris's case, was not unfairly prejudicial and was not a violation of Evidence Rule 403(A).

{¶23} This Court has not considered the application of Ohio's rape shield law to this testimony because Mr. Morris neither raised an objection in the trial court nor an argument on appeal based on it. See R.C. 2907.02(D). To the extent that it addressed the mother's testimony regarding Mr. Morris ejaculating into towels, the first assignment of error is overruled because the trial court correctly overruled Mr. Morris's objection to the testimony, albeit on an incorrect basis. See *State v. Campbell*, 90 Ohio St. 3d 320, 329 (2000).

He would kick the dog if his wife refused to have sex with him.

{¶24} S.K.'s mother, who was once Mr. Morris's wife, testified that he wanted to have sex every day and would become verbally abusive and kick the family dog if she refused. Mr. Morris has argued that his former wife's testimony on this topic should have been excluded under Evidence Rule 404. The State has argued that the testimony was admissible because it showed "a motive and common plan" for rape. According to the State, Mr. Morris's "insatiable sexual appetite . . . is clearly the motive for [Mr.] Morris's sexual abuse of S.K."

{¶25} The State presented no evidence that an unfulfilling sexual life with one's spouse has a tendency to show motive for the rape of a child. Further, it presented no evidence that men with voracious sexual appetites are sexually attracted to young children. What is more, even if evidence of Mr. Morris's voracious sexual appetite were admissible, the added fact that he took out his sexual frustration by kicking the dog goes far beyond tending to prove that voracious appetite. 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 the 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. The evidence that Mr. Morris kicked the dog out of sexual frustration was received by the trial court in violation of Rule 404(B) of the Ohio Rules of Evidence.

He propositioned S.K.'s half-sister.

{¶26} Mr. Morris has also argued that the trial court incorrectly permitted S.K.'s older half-sister, Sarah, to testify about an incident with Mr. Morris. Sarah is seven years older than her half-sister, S.K. In spring 2005, Sarah was an adult and had been married the previous Christmas, but was living in the same house with her grandmother, younger half-sister, mother, and Mr. Morris. Sarah testified that she walked into her mother's bedroom one evening and found Mr. Morris sitting on the corner of the bed. She said that he "grabbed [her] waist and pulled [her] toward him and said, 'You don't know what I would do to you but your mother would get mad.'" Sarah testified that she perceived the comment to be sexual in nature, but that she "just laughed it off," told him he was drunk, and pushed him away. She returned to her own bedroom and that was the end of the interaction. Sarah later told her mother about the incident, and her mother kicked Mr. Morris out of the house for the night. The next day, Mr. Morris tearfully apologized to Sarah, saying that he had been drunk at the time and did not remember making the comment. Sarah testified that she believed Mr. Morris had been drunk because she had seen him drinking earlier that evening. After the apology, Mr. Morris moved back into the house and, according to Sarah, never again made an inappropriate comment to her.

{¶27} Mr. Morris has argued that all testimony about the incident with Sarah was inadmissible under Evidence Rule 404(B) because the other act was not similar to the crime with which he was charged. The State has argued that the incident with Sarah was similar to the crime charged because the target of each incident was one of Mr. Morris's stepdaughters and it happened in the mother's bedroom, as did many of the incidents of molestation and rape described by S.K. On this basis, the State has argued that the testimony was properly admitted because it "demonstrates a common scheme and motive."

{¶28} The State has cited *State v. Broom* for the proposition that the other act need not be similar to the crime charged provided it tends to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Broom*, 40 Ohio St. 3d 277, 281 (1988). According to the Ohio Supreme Court, "[e]vidence of a defendant's scheme, plan, or system in doing an act can be relevant for two reasons: (1) the other acts are part of one criminal transaction such that they are inextricably related to the charged crime, and (2) a common scheme or plan tends to prove the identity of the perpetrator." *State v. Schaim*, 65 Ohio St. 3d 51, 63 n.11 (1992) (citing *State v. Curry*, 43 Ohio St. 2d 66, 72-73 (1975)). If evidence of a scheme, plan, or system is offered because it is inextricably related to the charged crime, it is admissible because "it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts." *State v. Lytle*, 48 Ohio St. 2d 391, 403 (1976), vacated in part on other grounds, 438 U.S. 910 (1978) (quoting *Curry*, 43 Ohio St. 2d at 73). 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. *Curry*, 43 Ohio St. 2d at 73.

{¶29} 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).

{¶30} Sarah's testimony had no tendency to show a motive for rape. If Sarah's testimony is believed, Mr. Morris, while drunk, expressed his desire to engage in sexual activity with her. Even if motive had been at issue, Sarah's testimony was not admissible because there is a fundamental difference 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.

{¶31} It might be easy, however, for a jury to assume that the type of man who would express an interest in crossing that moral boundary with his wife's adult daughter, could be just the type man who would have the urge to sexually molest a young child, especially if the young child is also his wife's daughter. That is precisely the leap in logic that Rule 404 is designed to prevent. *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975). "Such evidence is inadmissible . . . [because] it is both legally irrelevant and highly prejudicial." *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, at ¶90. "It poses a 'temptation . . . for the jury to try the case on

evidence of character rather than on evidence of guilt . . . [because] it becomes difficult for the jury not to speculate that since the defendant . . . is a bad person, he probably committed the present crime.” *Id.* at ¶¶90-91 (quoting *State v. Griffin*, 142 Ohio App. 3d 65, 71 (2001)).

{¶32} Sarah’s testimony regarding the comment Mr. Morris made to her reflected poorly on his character and did not tend to prove any of the enumerated topics deemed acceptable under Evidence Rule 404(B). Sarah’s testimony on this subject had no probative value other than to encourage the jury to make the inference prohibited by Rule 404 of the Ohio Rules of Evidence. The evidence regarding Mr. Morris’s comment to Sarah was received by the trial court in violation of Rule 404(B) of the Ohio Rules of Evidence.

HARMLESS ERROR

{¶33} Having determined that the trial court erroneously admitted evidence of two instances of Mr. Morris’s other acts in violation of Rule 404(B) of the Ohio Rules of Evidence, this Court must decide whether the errors were harmless. The State has argued that the jury hearing the older half-sister testify about Mr. Morris’s “unwelcomed advance . . . can hardly be more damaging to the defense than hearing S.K. testify about far worse acts.” Apparently, the State’s position is that Mr. Morris’s conduct with the older half-sister was so insignificant in comparison to the acts S.K. accused him of perpetrating that the testimony could not have prejudiced him.

{¶34} Under Rule 52(A) of the Ohio Rules of Criminal Procedure, “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” The Ohio Supreme Court has repeatedly held that “[e]rror in the admission of evidence is harmless if there is no reasonable possibility that the evidence may have contributed to the accused’s conviction.” *State v. Rahman*, 23 Ohio St. 3d 146, 151 (1986) (quoting *State v. Bayless*, 48 Ohio St. 2d 73,

106 (1976), vacated in part on other grounds, 438 U.S. 911 (1978)). It has further written that, “[i]n order to hold the error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt.” *Bayless*, 48 Ohio St. 2d at 106 (citing *State v. Abrams*, 39 Ohio St. 2d 53 (1974); *State v. Crawford*, 32 Ohio St. 2d 254 (1972); *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969)). The standard applied by the Ohio Supreme Court in *Bayless* was derived from United States Supreme Court caselaw describing the federal constitutional harmless-error standard. *Id.* (citing *Chapman*, 386 U.S. 18; *Harrington*, 395 U.S. 250). The Ohio Supreme Court has applied this test to evaluate whether an error in improperly admitting evidence of a defendant’s other acts was harmless, and this Court has followed suit. *Id.*; see also *State v. Treesh*, 90 Ohio St. 3d 460, 483 (2001); *State v. Lytle*, 48 Ohio St. 2d 391, 403 (1976); *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, at ¶96; *State v. Deyling*, 9th Dist. No. 2672-M, 1998 WL 46753 at *2 (Jan. 28, 1998).

{¶35} In evaluating the impact of improperly admitted other-acts evidence, the appellate court must consider “[t]he severity of [the improper] reflections upon the defendant’s credibility and character . . . in relation to the other evidence in the case.” *State v. Bayless*, 48 Ohio St. 2d 73, 107 (1976). In *Bayless*, the Court determined that the error was harmless beyond a reasonable doubt because “[t]he mass of evidence in the case contradicted and impeached [the defendant’s] testimony so thoroughly that the effect of the rebuttal testimony upon his credibility appears insignificant.” *Id.* Thus, admission of improper evidence is harmless if, as is often the case, “the remaining evidence alone comprises ‘overwhelming’ proof of defendant’s guilt.” *State v. Williams*, 6 Ohio St. 3d 281, 290 (1983) (quoting *Harrington v. California*, 395 U.S. 250, 254 (1969)); but see *State v. Brown*, 100 Ohio St. 3d 51, 2003-Ohio-5059, at ¶25; *State v. Webb*, 70 Ohio St. 3d 325, 335 (1994); *State v. Davis*, 44 Ohio App. 2d 335, 348 (1975).

Regardless of the fact that courts have sporadically applied a less stringent harmless-error standard in some cases involving non-constitutional errors in the admission of evidence, the higher standard applies in this case because “the injection of . . . inflammatory . . . material” violated Mr. Morris’s right to a fair trial “as that term is understood under the [D]ue [P]rocess [C]ause of the [F]ourteenth [A]mendment.” *Davis*, 44 Ohio App. 2d at 348.

{¶36} The application of the harmless error rule is simple if, in the absence of all erroneously admitted evidence, there remains “overwhelming” evidence of guilt. *State v. Williams*, 6 Ohio St. 3d 281, 290 (1983) (quoting *Harrington v. California*, 395 U.S. 250, 254 (1969)). The application is more difficult in a case such as this “in which the question of guilt or innocence is a close one.” *Chapman v. California*, 386 U.S. 18, 22 (1967). In close cases, “harmless-error rules can work very unfair and mischievous results when . . . highly important and persuasive evidence . . . though legally forbidden, finds its way into a trial” *Id.*

{¶37} Contrary to the State’s argument, setting aside the erroneously admitted character evidence, there is not overwhelming evidence of Mr. Morris’s guilt in this case. In the absence of any physical evidence or eyewitnesses other than S.K. to sexual conduct or even sexual contact between Mr. Morris and S.K., the State’s case rested largely on S.K.’s credibility. Although there was corroborating circumstantial evidence offered by S.K.’s mother and half-sister, each of whom testified that they had seen a suspicious-looking situation, nobody was able to testify as an eyewitness to any acts of molestation or rape. Various witnesses testified about S.K.’s emotional problems and to various times over the years when S.K. seemed to be struggling with a secret that she was unable to reveal. But, S.K. admitted that her emotional problems were not entirely caused by Mr. Morris and that she had been depressed before her mother met him.

{¶38} S.K.'s mother's testimony about Mr. Morris's odd behavior during sexual intercourse provided some circumstantial corroboration of S.K.'s testimony. S.K.'s credibility was best supported by her own testimony describing how her relationship with Mr. Morris went through phases that seemed to move toward sexualization over time as bolstered by her counselor's testimony that her account was consistent with the "grooming" behavior of a pedophile preparing a child for molestation.

{¶39} Regardless of whether the verdict could have withstood a challenge based on the manifest weight of the evidence, the question of whether the errors were harmless requires a different analysis. As the Ohio Supreme Court has written, "[the appellate court's] role upon review in [such a] case is not to sit as the supreme trier of fact, but rather to assess the impact of this erroneously admitted testimony on the jury." *State v. Rahman*, 23 Ohio St. 3d 146, 151 n.4 (1986). "It is not the appellate court's function to determine guilt or innocence" *Id.* (quoting *United States v. Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring)). "[T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.* (quoting *United States v. Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring)). Highly inflammatory evidence, erroneously admitted, can make it easy for a jury to believe the State's theory and the State's witnesses over those of the defense, especially in a close case.

{¶40} The "danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he . . . committed the crime charged in the indictment . . . is particularly high when the other acts are very similar to the charged offense or of an inflammatory nature" *State v.*

Miley, 5th Dist. Nos. 2005-CA-67, 2006-CA-14, 2006-Ohio-4670, at ¶158 (citing *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975); *State v. Schaim*, 65 Ohio St. 3d 51, 60 (1992)). The evidence that Mr. Morris grabbed his adult stepdaughter, pulled her toward him, and made a sexually charged comment to her was highly inflammatory, especially in light of the fact that Mr. Morris was charged with raping her younger half-sister. The evidence that Mr. Morris would become verbally abusive toward his wife and even kick the dog if she refused to have sex with him every day is somewhat less inflammatory, but was similarly aimed at convincing the jury that Mr. Morris is a sex-crazed pervert.

{¶41} Although Sarah testified that in all her years of living with Mr. Morris, that drunken comment was the only inappropriate advance he ever made on her, the State did its best to convince the jury that her testimony was evidence of Mr. Morris's motive and intent to rape S.K. During the State's closing argument, the prosecutor advised the jury that, "if you want to know a little bit about [Mr. Morris's] motives and his intent and his intent for [S.K.], just look at how he treated his other stepdaughter" Later in closing argument, the prosecutor said that S.K.'s story is "corroborated by the sister who had an incident with him that showed a similar plan and preparation and intent."

{¶42} During rebuttal close, the prosecutor went so far as to actually equate the sexual comment made to the adult sister to rape of the younger sister. The prosecutor told the jury that, although child molestation usually happens in private, ensuring a lack of eyewitnesses, in this case there was evidence of "it happening to [S.K.'s older half-sister]." The State blatantly attempted to persuade the jurors that they should convict Mr. Morris of raping S.K. because they heard evidence that he had done "it" to her older half-sister. Thus, despite the fact that the incident with S.K.'s half-sister was not factually similar to the crimes with which Mr. Morris had

been charged, the State attempted to convince the jury that it should make the very leap in logic that is forbidden by Rule 404(B) of the Ohio Rules of Evidence. That is, if Mr. Morris is the type of man who would be willing to cross that moral boundary with his wife's adult daughter, then the jury should also believe he is the type of man who would rape his wife's nine or twelve-year-old daughter.

{¶43} 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." *State v. Bayless*, 48 Ohio St. 2d 73, 106 (1976). 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." *Id.* (citing *State v. Abrams*, 39 Ohio St. 2d 53 (1974); *State v. Crawford*, 32 Ohio St. 2d 254 (1972); *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969)). To the extent Mr. Morris's first assignment of error is addressed to the kicking-the-dog testimony and the propositioning-of-Sarah testimony, it is sustained.

CONCLUSION

{¶44} This Court must reverse Mr. Morris's convictions because 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. There is a reasonable possibility that the improper evidence may have contributed to the conviction and this Court cannot declare a belief that the errors were harmless beyond a reasonable doubt. This Court's resolution of the first assignment of error is dispositive, rendering the other assignments of error moot, so they will not be addressed. See App. R. 12(A)(1)(c). Therefore, the judgment of the Medina County Common Pleas Court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.


CLAIR E. DICKINSON
FOR THE COURT

A-22

DICKINSON, P. J.
BELFANCE, J.
CONCUR

CARR, J.
DISSENTS, SAYING:

{¶45} I respectfully dissent.

{¶46} I would overrule Morris' first assignment of error because I believe that the trial court properly admitted evidence relating to the incidents involving Morris' ejaculating into a towel, his sexual advances toward Sarah, and his abuse of the family dog pursuant to Evid.R. 404(B).

{¶47} The majority deviates from the well-established standard of review relevant to this issue. Regarding the admission of "other acts" evidence, the Ohio Supreme Court has stated that the "admission of such evidence [to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident] lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, at ¶66. This Court has consistently applied this standard when reviewing the admissibility of "other acts" evidence. See, e.g., *State v. Halsell*, 9th Dist. No. 24464, 2009-Ohio-4166, at ¶10-19; *State v. Stevenson*, 9th Dist. No. 24408, 2009-Ohio-2455, at ¶22-27. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.*

{¶48} Although the above-referenced exceptions allowing the admission of “other acts” evidence “must be construed against admissibility, and the standard for determining admissibility of such evidence is strict[,]” a reviewing court’s “inquiry is confined to determining whether the trial court acted unreasonably, arbitrarily, or unconscionably in deciding the evidentiary issues[.]” (Internal citations and quotations omitted.) *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, at ¶¶61-62. Furthermore, this Court has repeatedly stated that “this strict admissibility standard must be considered contemporaneously with the fact that the trial court occupies a superior vantage in determining the admissibility of evidence.” (Internal quotations omitted.) *State v. Ristich*, 9th Dist. No. 21701, 2004-Ohio-3086, at ¶12, citing *State v. Ali* (Sep. 9, 1998), 9th Dist. No. 18841, citing *State v. Rutledge* (Nov. 19, 1997), 9th Dist. No. 96CA006619.

{¶49} Evid.R. 402 provides that relevant evidence is generally admissible. Evid.R. 403 provides two exceptions to the general rule, including where exclusion of the evidence is mandatory:

“(A) Although 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.”

Evid.R. 404(B), which addresses other crimes, wrongs or acts, states:

“Evidence of the other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. 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.”

In addition, R.C. 2945.59 states:

“In 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.”

{¶50} The *Diar* case referenced above involved a mother who was convicted and sentenced to death for the death of her son. The high court concluded that “other acts” evidence that Diar left her child unattended, fed him mainly fast food, and acted as though the child was a bother, was not improper because it “provided the context for the alleged crimes and made Diar’s actions more understandable to the jurors.” *Diar* at ¶72. In addition,

“[e]vidence showing a modus operandi [or plan] is admissible because it provides a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator.” (Internal quotations omitted.) *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶83.

{¶51} Moreover, “[o]ther acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B).” *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, at ¶45, quoting *State v. Jamison* (1990), 49 Ohio St.3d 182, syllabus. “Other acts” evidence used to show the defendant’s plan “must be related to and share common features with the crime in question.” *Noling* at ¶45, citing *State v. Lowe* (1994), 69 Ohio St.3d 527, paragraph one of the syllabus.

Morris’ sexual advances toward Sarah

{¶52} I disagree with the majority’s conclusion that the testimony that Morris grabbed and confronted Sarah was inadmissible. I further disagree with the majority that identity is not at issue in this case. It is axiomatic that, before a defendant may be convicted of a crime, it must be established beyond a reasonable doubt that he was the perpetrator of the criminal act. Identity,

therefore, is always at issue except in very limited situations where the defendant has admitted his commission of the act but asserts some defense to negate the criminality of the conduct. In my opinion, the majority interprets too narrowly the term "identity" as it is used in Evid.R. 404(B). That term is not limited to merely the identity of the perpetrator. Rather, it goes to the identity of the crime itself, i.e., the "behavioral fingerprint" associated with the criminal act. Evidence of modus operandi serves to identify the nature of the criminal conduct which is in turn linked to the identity of the perpetrator. Child sexual assault cases are distinct in that the criminal defendant's theory of the case generally is not to concede that the victim has been raped, only by someone else. Rather, the theory is that the victim is lying about the assault. In such cases, the behavioral fingerprint of the criminal conduct serves two evidentiary purposes, specifically, to establish the nature and identity of the crime committed, as well as to establish the identity of the perpetrator.

{¶53} I believe that the trial court properly admitted the testimony regarding the incident involving Morris and Sarah because it shows a common plan and opportunity to engage in sexual conduct with his step-daughters. Morris pursued sexual activity with Sarah in his bedroom, a frequent location for the incidents with S.K. Evidence of his sexual advances while Mother was elsewhere and not likely to interrupt, coupled with his comment that Mother would be mad if she knew what he was pursuing, demonstrates his knowledge of the need for secrecy in these situations. Mother's testimony that she threw Morris out of the house after learning of his inappropriate conduct with Sarah emphasized that Morris knew he must make an effort to hide these activities from his wife.

{¶54} Although there was no evidence that Morris ever grabbed S.K. in his pursuit of sexual activity with her, the testimony that he grabbed Sarah and forcibly pulled her to him

demonstrates preparation. The efforts to compel an adult, married woman to engage in sexual activity are necessarily different from those used to manipulate a very young and trusting child to engage in the same acts. Morris' act of grabbing and pulling Sarah, coupled with his threatening and suggestive comment, could reasonably be interpreted as his plan to compel S.K. to engage in sexual intercourse whereby he groomed her in pursuit of sexual activity. Moreover, S.K. testified that he also made sexually explicit comments to her in relation to sexual activity. Accordingly, I would conclude that the trial court did not abuse its discretion by admitting evidence regarding the incident between Morris and Sarah.

Evidence that Morris kicked the dog

{¶55} I believe that the trial court properly admitted Mother's testimony that Morris became verbally and mentally abusive, and would kick the dog, if she refused to have sex with him. The trial court could reasonably have interpreted this evidence as indicative of Morris' frustration when his wife refused his sexual advances, his anger at being rejected, and his plan to obtain sex with a victim who would not reject him. Mother's testimony in this regard "provided the context for the alleged crimes and made [Morris'] actions more understandable to the jurors." See *Diar* at ¶72.

{¶56} The majority dismisses the State's argument that this testimony is indicative of Morris' "insatiable sexual appetite" which gives rise to his motive to sexually abuse S.K. I would conclude that the trial court did not abuse its discretion in admitting the testimony notwithstanding the weak argument by the State on appeal. That is not to say that a criminal defendant cannot be motivated by sexual gratification to commit rape. While I do not agree with the State's rationale in this case, the State nevertheless has the right to present its theory of the case as it chooses. While the testimony at issue may not evidence an "insatiable sexual

appetite,” it may in fact evidence a motive for sexual gratification, or something completely different, such as power, control, or the opportunity to demean another. In any event, I would conclude that Mother’s testimony that Morris would kick the dog when she refused his sexual advances was admissible pursuant to Evid.R. 404(B).

{¶57} Assuming, however, that the trial court improperly admitted the above testimony, I would conclude that any error was harmless. Crim.R. 52(A) provides that “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” Morris argues that the admission of the testimony was not harmless because the evidence of guilt was not overwhelming, specifically because there was no physical evidence of rape, no witnesses to the alleged acts, and no evidence to corroborate the victim’s testimony. Even where the admission of evidence constitutes constitutional error, the error is harmless “if the remaining evidence, standing alone, constitutes overwhelming proof of defendant’s guilt.” *State v. Williams* (1983), 6 Ohio St.3d 281, at paragraph six of the syllabus.

{¶58} I strongly disagree with the majority’s implication that this is a “close case.” In fact, I believe that the remaining evidence did constitute overwhelming proof of Morris’ guilt. The victim’s detailed and consistent testimony established that Morris repeatedly raped her over a period of seven or eight years. This Court has consistently held that “[i]n sex offense cases, *** the testimony of the victim, if believed, is sufficient to support a conviction, even without further corroboration. Thus, the testimony of the victim may be enough, and does not need corroborating evidence.” (Internal citations omitted.) *State v. Melendez*, 9th Dist. No. 08CA009477, 2009-Ohio-4425, at ¶15, quoting *State v. Willard*, 9th Dist. No. 05CA0096-M, 2006-Ohio-5071, at ¶11.

{¶59} S.K. detailed how Morris groomed her using magic tricks to accept his sexual advances. She described how his behavior quickly escalated from having her touch his penis which she believed was only his thumb under a blanket, to his touching her with his hand around the outside of her vagina, to using his penis to touch her on the outside of her vagina, to inserting his penis into her vagina on numerous occasions. The victim's counselor testified regarding S.K.'s disclosures to him during their sessions, which testimony closely mirrored the victim's. The evidence indicated that S.K. was consistent in her description of Morris' behavior when she disclosed the incidents to the police, her friend, and her counselor.

{¶60} The lack of physical evidence in a case where such evidence was unlikely due to the passage of time does not detract from the victim's testimony. In addition, although there were no third-party eye witnesses to any acts of rape, Mother testified that she observed what she believed to be inappropriate sexual activity between Morris and S.K. Sarah also testified that she once saw Morris and S.K. under a blanket together and that the image made her feel uncomfortable. Sarah also testified that S.K. told her some things which caused her concern. Both Mother and the victim's father testified to S.K.'s extreme and hysterical behavior when she learned that Morris, and not she, would be accompanying her mother on a trip to California. The victim testified that she was upset by the change of plans and she wanted to tell her parents what Morris had done to her. Based on the victim's testimony, it is reasonable to infer that the change in plans upset her to the point of hysteria because it deprived her of the opportunity to spend time with her mother and sister in a safe environment away from Morris, where she could disclose information regarding her long-term abuse by Morris. Mother and Father further testified that Morris nervously paced as the victim exhibited that behavior. The victim's parents both testified that S.K. exhibited the same extreme and hysterical behavior immediately before she was able to

finally disclose to them that "Carl raped me." Upon thorough review, I believe that the other evidence of Morris' guilt was overwhelming. Accordingly, the admission of the challenged "other acts" evidence was harmless error, if it constituted error at all.

{¶61} The majority tries to bolster its conclusion that admission of the challenged other acts evidence in this case was highly inflammatory and requires reversal by emphasizing comments made by the assistant prosecutor during closing arguments. It is well settled, however, that closing arguments do not constitute evidence, and the jury was so instructed. The majority here uses those comments to attempt to demonstrate prejudice caused by the admission of the challenged evidence, an analysis which I believe is improper within the context of this appeal. Morris could have challenged the propriety of the prosecutor's comments by objecting at the appropriate time during trial and by assigning error as to prosecutorial misconduct. He declined to do so. Accordingly, I believe that the majority exceeds the scope of this appeal by discussing the effect of closing arguments.

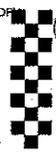
{¶62} Finally, I recognize the State's insistence in many cases to present other acts evidence when it is simply unnecessary to prove the elements of the charged offenses beyond a reasonable doubt. Although I believe that the admission of the challenged testimony in this case was proper, or, at worst, harmless error, the majority believes otherwise. The ramifications of this practice are severe, especially in a case such as this where a retrial forces the victim to again relive the horrors of abuse in open court. 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 risks of reversal, the waste of state and judicial resources required for retrial, and the revictimization of the innocent.

{¶63} In conclusion, I would overrule Morris' first assignment of error. In addition, upon review, I would further overrule his remaining assignments of error and affirm his conviction.

APPEARANCES:

DAVID C. SHELDON, attorney at law, for appellant.

DEAN HOLMAN, prosecuting attorney, and RUSSELL A. HOPKINS, assistant prosecuting attorney, for appellee.



STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

COURT OF APPEALS
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
10 NOV 22 PM 12:37

FILED
KATHY FORTHEY
MEDINA COUNTY
CLERK OF COURTS

STATE OF OHIO,

C.A. No. 09CA0022-M

Appellee

v.

CARL M. MORRIS, JR.

Appellant

JOURNAL ENTRY

{¶1} The State of Ohio has moved this Court to certify a conflict between its judgment in this case and the judgment of the Fifth District Court of Appeals in *State v. Kienzle*, 5th Dist. No. 2009 AP 03 0015, 2010-Ohio-2045, at ¶33; the Eighth District Court of Appeals in *State v. Wheeler*, 8th Dist. No. 93011, 2010-Ohio-1753, at ¶21, the Third District Court of Appeals in *State v. Adams*, 3d Dist. No. 4-09-16, 2009-Ohio-6863, at ¶28, the Twelfth District Court of Appeals in *State v. Ford*, 12th Dist. No. CA2009-01-039, 2009-Ohio-6046, at ¶40, and the Second District Court of Appeals in *State v. Hooper*, 2d Dist. No. 22883, 2010-Ohio-4041, at ¶25, *State v. Brandon*, 2d Dist. No. 23598, 2010-Ohio-3901, at ¶14, and *State v. Crowley*, 2d Dist. No. 2009 CA 65, 2009-Ohio-6689, at *2. This Court declines to do so because there is no conflict among appellate courts that requires resolution by the Ohio Supreme Court.

{¶2} The State has argued that this Court's decision conflicts with those of other district courts of appeals regarding: "[w]hether an abuse of discretion or de novo is the proper standard of review for the admission of Evid. R. 404(B) evidence." In each of the cases cited by the State, the appellate court determined that the other-act evidence at issue tended to prove at least one of the things listed in the exception to the general prohibition against the use of character evidence. See Evid. R. 404(B). The appellate court did not determine in any of those cases that the trial court violated Rule 404(B) but acted within its discretion in doing so, which is what this Court would have had to determine in order to affirm Mr. Morris's convictions. Rather, they applied the standard presented in Rule 404(B) to the proffered other-act evidence and determined that the evidence was admissible under the rule. Therefore, despite the fact that in each case the appellate court made a broad statement that the admission of evidence rests within the discretion of the trial court, in practice, each Court reviewed the other-act evidence questions de novo. Cf. *Med. Mut. Of Ohio v. Schlotterer*, 122 Ohio St. 3d 181, 2009-Ohio-2496, at ¶13 ("When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate.").

{¶3} The confusion in this area arises because of the interplay of Rules 404 and 403 of the Ohio Rules of Evidence. Under 403(A), even though 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" and, under Rule 403(B), even though relevant, evidence may be excluded "if its probative value is substantially outweighed by considerations of undue delay, or needless

presentation of cumulative evidence.” The weighing required by both parts of Rule 403, as well as the determination whether to admit evidence falling within part (B), calls upon a trial court to exercise discretion based upon its first-hand knowledge of the case before it. 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.

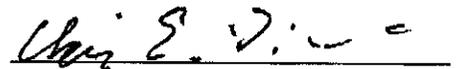
{¶4} The majority of the State’s cases cite *State v. Sage*, 31 Ohio St. 3d 173, paragraph two of the syllabus (1987), for the proposition that “[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court.” In

Sage, however, the Supreme Court did not face an issue involving other-act evidence. As the State has pointed out in its application for en banc consideration of this appeal, the Ohio Supreme Court has more recently written that “[t]he admission of other-acts evidence under Evid.R. 404(B) ‘lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice.’” *State v. Perez*, 124 Ohio St. 3d 122, 2009-Ohio-6179, at ¶96 (quoting *State v. Diar*, 120 Ohio St. 3d 460, 2008-Ohio-6266, at ¶ 66). Assuming that what the Supreme Court wrote in *Perez* and *Diar* means that a trial court has discretion to violate Evidence Rule 404(B), certification of this appeal under Appellate Rule 25 is not appropriate. “An application to certify a conflict only applies to a conflict between judgments in appellate districts.” *State v. Brown*, 2d Dist. No. 1747, 2009-Ohio-3430, at ¶23. If the decision “is in conflict with or contrary to a Supreme Court decision, [the] remedy is to appeal.” *Id.* (citing, e.g., *Bae v. Drago and Associates Inc.*, 10th Dist. No. 03AP-254, 2004-Ohio-1297, ¶10).

{¶5} Article IV Section 3(B)(4) of the Ohio Constitution confers on the courts of appeals the power to certify inter-district conflicts of law to the Supreme Court “for the single purpose of promptly bringing such conflict to the attention of [the Supreme] [C]ourt when it has not previously had an opportunity to make a pronouncement as to the particular principle of law involved” *Whipp v. Indus. Comm’n of Ohio*, 136 Ohio St. 531, 533 (1940). Accordingly, the Court has held that, “after [the Supreme] [C]ourt has established the rule, any such conflict with a decision of another [c]ourt of [a]ppeals is of no consequence.” *Id.* Due to the fact that the Ohio Supreme Court has

"ma[d]e a pronouncement as to the particular principle of law involved," it is not an appropriate legal issue for certification of a conflict among the districts. *Id.* If the State believes that this Court's application of the de novo standard of review in this case conflicts with Supreme Court precedent, the proper avenue of relief is for the State to appeal.

{¶6} The State's motion to certify a conflict is denied.


Clair E. Dickinson, Presiding Judge

Belfance, J.
Concurs

Carr, J.
Concurs, Saying:

{¶7} I agree that the motion to certify a conflict should be denied. The Ohio Supreme Court has already enunciated the standard of review applicable to the review of a trial court's admission of "other acts" evidence pursuant to Evid.R. 404(B). I cited and applied that standard of review in my dissent. *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶47 (Carr, J., dissenting). Because the high court has spoken on the issue, there no longer exists any interdistrict conflict. The State's recourse is to seek appeal to the Ohio Supreme Court.

COURT OF APPEALS

IN THE COURT OF APPEALS

)

)ss:

10 DEC -7 AM 11:10 9TH JUDICIAL DISTRICT

STATE OF OHIO

COUNTY OF MEDINA)

FILED
KATHY FORTNEY
MEDINA COUNTY
CLERK OF COURTS

C.A. No. 09CA0022-M

STATE OF OHIO,

Appellee

v.

CARL M. MORRIS, JR.

Appellant

JOURNAL ENTRY

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

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

The State of Ohio has argued that this case must be considered en banc because its application of the de novo standard of review to the questions regarding the admission of evidence under Rule 404(B) of the Ohio Rules of Evidence conflicts with this Court's prior precedent. In *Morris*, this Court cited a de novo standard of review as applicable to the questions of "[w]hether proffered other-act evidence has a tendency to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and whether any of those things is of consequence to the determination of the action in a given case" *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶13.

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

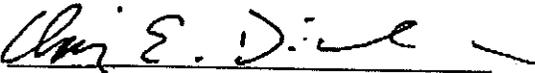
Regardless of the semantics used in this Court's treatment of Evidence Rule 404(B) questions, this appeal is also not appropriate for en banc consideration because the standard of review is not a dispositive issue in this matter. According to the Ohio Rules of Appellate Procedure, "[c]onsideration en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

Character evidence tending to prove that the defendant has a propensity to commit the crime charged is precisely the type of evidence Rule 404 was designed to exclude. Evid. R. 404(B) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). Evidence that Mr. Morris had kicked the family dog because his wife refused to have sex with him has no tendency to prove a motive to rape a child, an opportunity to rape

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

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

The State's application for en banc consideration is denied.


Clair E. Dickinson, Presiding Judge

Moore, J.
Belfance, J.
Concur

Whitmore, J.
Dissents, Saying:

As noted by a majority of the panel members in this Court's previous order, denying the State's motion to certify an inter-district conflict on this same issue, the Ohio Supreme Court has definitively applied an abuse-of-discretion standard of review in appeals from evidence introduced through Evid.R. 404(B). See *State v. Morris* (Nov. 22, 2010), 9th Dist. No. 09CA0022-M, at ¶4, quoting *State v. Perez*, 124 Ohio

St.3d 122, 2009-Ohio-6179, at ¶96 (“The admission of other-acts evidence under Evid.R. 404(B) ‘lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice.’”), quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, at ¶66. Many other decisions from this Court have done the same, see, e.g., *State v. Halsell*, 9th Dist. No. 24464, 2009-Ohio-4166, but *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, did not. That is a conflict.

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

Carr, J.

Dissents. Saying:

I agree with Judge Whitmore’s statement that an intra-district conflict exists. Moreover, I believe that the application of the abuse of discretion standard of review in this case is outcome determinative, as I indicated in my dissent to the majority’s disposition of the appeal. See *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶45-63 (Carr, J., dissenting).

COMMON PLEAS COURT

2009 MAR 18 PM 4: 32

**IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
MEDINA COUNTY, OHIO**

FILED
KATHY FOICHTAL
MEDINA COUNTY
CLERK OF COURT

STATE OF OHIO

CASE NO. 08CR0408

Plaintiff

v.

JUDGE JAMES L. KIMBLER

CARL M. MORRIS, JR.

Defendant

**SENTENCING
JUDGMENT ENTRY**

On March 13, 2009, Defendant's sentencing hearing was held pursuant to R.C. 2929.19. Present were Assistant Medina County Prosecutor, Mr. Matt Razavi, representing the State of Ohio, and Attorneys, Mr. Carlos K. Johnson and Mr. Fernando Mack, representing the Defendant. The Defendant was also present and afforded all rights pursuant to Crim. R. 32.

The Court finds that the Defendant entered a plea of not guilty at arraignment on October 3, 2008. Defendant proceeded to a jury trial on January 26, 2009. After deliberation, on January 29, 2009, the jury returned the verdict of guilty on Count I, "Rape," in violation of R.C. 2907.02(A)(1)(b)(B), a felony of the first degree, and a verdict of guilty on Count II, "Rape," in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. The Court adopted the verdict of guilty on the charge of "Rape," in violation of R.C. 2907.02(A)(1)(b)(B), a felony of the first degree, and guilty on the charge of "Rape," in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. The Court ordered a presentence investigation prior to sentencing.

The Court finds the Defendant has been convicted of "Rape," a violation of R.C. 2907.02(A)(1)(b)(B), a felony of the first degree, and has been convicted of "Rape," a violation of R.C. 2907.02(A)(1)(b), a felony of the first degree.

The Court then imposed a prison term on Count I, of life in prison. to be served consecutive with Count II, a prison term of five (5) years. The Defendant has credit for one hundred sixty-five (165) days served.

A-49

The Court has further notified the Defendant that post release control is mandatory. The Court also informed the Defendant that the post-release control would be for a term of five (5) years. As part of this sentence the Defendant is ordered to serve any term of post-release control imposed by the Ohio Parole Board, and any prison term for any violation of that post-release control.

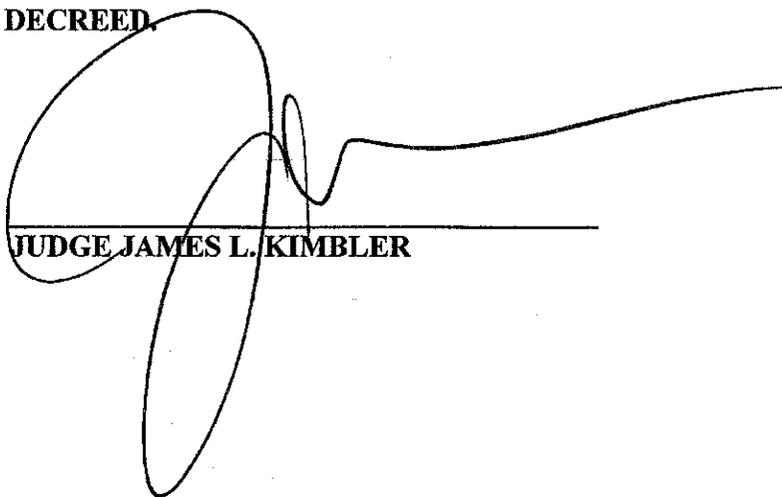
The Defendant shall submit to a DNA sample and a DNA sample shall be collected pursuant to R.C. 2901.07.

The Defendant is ordered conveyed to the custody of the Ohio Department of Rehabilitation and Correction. Credit for time spent in jail awaiting sentencing as set forth above is granted as well as future custody days while Defendant awaits transport to the Lorain Correctional Institution.

The Defendant was designated as a Tier III Sexual Offender and was advised of his duties to register under the law.

All court costs are waived.

SO ORDERED, ADJUDGED and DECREED.



JUDGE JAMES L. KIMBLER