

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant

vs.

CARL M. MORRIS JR.

Defendant-Appellee

: CASE NO. 2010-1842
:
: On Appeal From The Court of Appeals,
: Ninth Appellate District
:
: Court of Appeals
: Case No. 09CA0022-M
:
:

MERIT BRIEF OF AMICUS CURIAE
OHIO PROSECUTING ATTORNEY'S ASSOCIATION
IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

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INTRODUCTION

This case tests the authority of a reviewing court to change the standard of review for evidentiary rulings, against the long-standing precedent of this Court. Specifically, the Ninth District Court of Appeals in *State v. Morris*, reviewed the trial court's admission of "other acts" evidence under a de novo standard, rather than the long held rule in Ohio, abuse of discretion.

While the first and foremost concern is the doctrine of established precedent, upon which the judicial system is based, the interest of judicial economy and fundamental fairness to all parties is also at stake.

This Court has not explicitly held that evidence under Evid.R. 404(B) is a question of law or fact. However, this Court has continually held that the admission of evidence, including "other acts" evidence rests in the trial court's sound discretion. Further, as of the writing of this brief, this Amicus's research has found no other Ohio district to review such evidence under a de novo standard. Rather, research has identified an example of each of Ohio's other eleven districts following this Court's long held rule.¹

The term "abuse of discretion" was defined by this court in *State v. Adams*, "[t]he term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable."²

"The standard of review has been defined by the Ohio Supreme Court as follows: [t]he term discretion itself involves the idea of choice, of an exercise of the will, of a determination

¹ *State v. Edwards*, 1st District, 2011-Ohio-1752, *State v. Caly*, 2nd District, 2010-Ohio-5748, *State v. Adams*, 3rd District, 2009-Ohio-6863, *State v. Wrage*, 4th District, 2009-Ohio-3390, *State v. Miller*, 5th District, 2008-Ohio-695, *State v. Bunce*, 6th District, 2010-Ohio-3629, *State v. Kaufman*, 7th District, 2010-Ohio-1536, *State v. Collymore*, 8th District, 2003-Ohio-3328, *State v. Bailey*, 10th District, 2005-Ohio-4068, *State v. Kanetsky*, 11th District, 199 Ohio App.3d., *State v. Moshos*, 12th District, 2010-Ohio-735.

² *State v. Adams* (1980), 62 Ohio St. 2d 151, 157, Citing *Steiner v. Custer* (1940), 137 Ohio St. 448; *Conner v. Conner* (1959), 170 Ohio St. 85; *Chester Township v. Geauga Co. Budget Comm.* (1976), 48 Ohio St. 2d 372.

made between competing [***] considerations.”³ “In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias.”⁴

The United States Supreme Court in *Lawrence v. Texas*⁵ stated, “[t]he doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”⁶ The stability in Ohio’s jurisprudence is imperative to the fundamental fairness to both sides during a trial. The whim of a reviewing court in a post conviction appeal, would serve to only disrupt the stability of which the United States Supreme Court spoke.

Amicus curiae Ohio Prosecuting Attorney’s Association respectfully requests that this Court reverse the Ninth District’s judgment in *Morris* and hold that the long standing precedent defining the standard of review in evidentiary rulings remain as an abuse of discretion.

STATEMENT OF AMICUS INTEREST

The Ninth District Court of Appeals decision in *State v. Morris* results in appellate review of evidence based on varying standards in spite of long held precedent by this Court.⁷ The dissent in *Morris* mirrored OPAA’s stance when it stated: “. . . this Court has repeatedly stated that this strict admissibility standard must be considered contemporaneously with the fact

³ *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 222, 15 Ohio B. Rep. 311, 361, 473 N.E.2d 264, 313, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810, 811-812.

⁴ *Nakoff v. Fairview General Hospital* (1996), 75 Ohio St. 3d 254, 256-257, 662 N.E.2d 1.

⁵ *Lawrence v. Texas*, 539 U.S. 558, 577, 123 S.Ct. 2472, 2483.

⁶ *Payne v. Tennessee*, 501 U.S. 808, 828, 115 L. Ed. 2d 720, 111 S. Ct. 2597.

⁷ *State v. Morris*, Medina App. No. 09CA0022-M, 2010-Ohio-4282.

that the trial court occupies a superior vantage in determining the admissibility of evidence.”⁸
(Internal quotations omitted.)

The State of Ohio must be able to rely on the long held standard of review of evidentiary issues in each and every one of the Twelve Appellate Districts. However, the Ninth District cannot agree, even in their district which standard to apply. It has recently decided cases using two different standards. The difference being the panel of judges selected to decide each case. This Court, in order to maintain the hierocracy of legal precedent, and the basic fundamental fairness to all parties, must assert that a reviewing court may not alter, at their will, the standard of review.

STATEMENT OF THE FACTS

The Amicus Curiae, the Ohio Prosecuting Attorney’s Association, fully adopts the Statement of Facts as contained in the Appellant State of Ohio’s brief.

ARGUMENT

Amicus Curiae O.P.A.A. Proposition of Law: A trial court sits as the fact finder for 404(B) evidentiary “other acts” rulings and is in the best position to view the evidence and weigh its value before deciding on its admissibility during the course of trial, a process that cannot be relived through examination of a cold record.

The abuse of discretion standard of review utilized for evidentiary issues has existed as precedent in Ohio for many years. The trial court, being in the best position to ascertain the effect of its ruling to the proceedings and on its participants, should retain its discretionary role.

⁸ Carr, J., dissenting, citing *State v. Ristich*, 9th Dist. No. 21701, 2004 Ohio 3086, at ¶12, citing *State v. Ali* (Sep. 9, 1998), 9th Dist. No. 18841, 1998 Ohio App. LEXIS 4183, citing *State v. Rutledge* (Nov. 19, 1997), 9th Dist. No. 96CA006619, 1997 Ohio App. LEXIS 5203.

Because this Court has not decided that such rulings are ones of substantive law, they should not be reviewed de novo. More importantly, the long held standard of review cannot be allowed to be discarded on the whim of a reviewing court. Rather, it should be decidedly affirmed by this Court in the best interest of stability through congruity of all Ohio's courts that an abuse of discretion is Ohio's evidentiary review, including "other acts" evidence.

I. IT IS WELL SETTLED IN OHIO THAT EVIDENTIARY RULINGS INCLUDING "OTHER ACTS" EVIDENCE IS REVIEWED UNDER AN ABUSE OF DISCRETION STANDARD.

A. "Other acts" evidence has consistently been reviewed under an abuse of discretion standard, giving great deference to the trial court's superior position as a firsthand witness to trial proceedings.

This Court has consistently held that 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."⁹ A reviewing court has at its disposal the authority to overturn a trial court's admission of such evidence if it finds that it "abused its discretion in the admission of evidence, the record [demonstrating] that the trial court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment."¹⁰

R.C. 2945.59 which pre-dates adoption of the Rules of Evidence contains an exception similar to that found in Evid.R. 404(B): 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

⁹ *State v. Perez*, 124 Ohio St. 3d 122, 136, citing *State v. Diar*, 120 Ohio St.3d 460, 2008 Ohio 6266. See also *State v. Curry* (1975), 43 Ohio St.2d 66, 72-73, 330 N.E.2d 720 (construing R.C. 2945.59.)

¹⁰ *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140.

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. With minor differences, the essence of the rule and statute is the same.

Rules regarding the admissibility of evidence govern procedure and do not confer substantive rights. R.C. 2945.59 simply expresses the common law rule on admissibility of certain evidence. It is a rule of evidence and not of substantive law. This court has stated repeatedly that it “ * * * review[s] questions of law de novo.”¹¹

There is little difference between Evid.R. 404(B) and R.C. 2945.59. As with the statute, Evid.R. 404(B) concerns the admissibility of evidence. Like the statute, the rule confers no substantive right. Therefore, were there a conflict between the statute and the rule, the rule would prevail.¹²

It is axiomatic that the eleven other districts in Ohio offer the stability and predictability necessary to sustain a working legal system because they follow the correct standard of review.¹³ These districts have recognized this Court has set forth its direction for evidentiary rulings, finding these decisions should be left to the fact finder sitting first hand at trial. A cold record review of the evidence, absent more, cannot be adequate for a reviewing court in such fact based situations to decide the admissibility of evidence. A trial judge has been afforded this responsibility, furthering both judicial economy and finality in decisions.

¹¹ See *In re A.J.S.*, 120 Ohio St. 3d 185, ¶47, citing *State v. Consilio*, 114 Ohio St. 3d 295, 2007-Ohio-4163.

¹² Section 5(B), Article IV, Ohio Constitution.

¹³ See footnote one (1) for examples of such cases.

B. Similar to its role regarding expert witnesses under Rule 702, and postconviction cases, the trial court plays the role of gatekeeper when reviewing other acts evidence for admissibility.

The Ohio Rules of Evidence are designed to work together with the common law.¹⁴ Further, the Rules of Evidence have been adopted to assure that only probative and non-prejudicial evidence be considered by a jury.¹⁵ The Rules of Evidence impose upon the trial court the duty to weigh the probative value of the evidence against the potential for unfair prejudice, confusion of the issues, and misleading of the jury. Evid.R. 403.

This Court in *Terry v. Caputo*,¹⁶ stated, “[t]he United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁷ interpreted Fed.R. Evid. 702, the federal version of Evid.R. 702, as vesting the trial court with the role of gatekeeper. This gatekeeping function imposes an obligation upon a trial court to assess both the reliability of an expert’s methodology and the relevance of any testimony offered before permitting the expert to testify. We adopted this role for Ohio trial judges in *Miller v. Bike Athletic Co.*”¹⁸

In another context, this Court specified that the trial court at certain times was exactly that, a gatekeeper. It is well settled that “a postconviction proceeding is not an appeal of a criminal conviction, but rather, a collateral civil attack on the judgment.”¹⁹ In postconviction cases, a trial court acts as a gatekeeper, determining whether a defendant will even receive a hearing.²⁰ In *State v. Calhoun*,²¹ this Court held that the “trial court’s gatekeeping function in the

¹⁴ Justice Lanzinger, *State v. Silverman*, 121 Ohio St.3d 581, ¶61.

¹⁵ Justice Sweeny, *State v. Kidder* (1987), 32 Ohio St. 3d 279, 289.

¹⁶ *Terry v. Caputo*, 115 Ohio St. 3d 351, 356.

¹⁷ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁷ (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. See, also, *Kumho*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238.

¹⁸ *Miller v. Bike Athletic Co.*” (1998), 80 Ohio St.3d 607, 1998 Ohio 178, 687 N.E.2d 735.

¹⁹ *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994 Ohio 111, 639 N.E.2d 67.

²⁰ *State v. Gondor*, 112 Ohio St.3d 377, 2006 Ohio 6679.

postconviction relief process is entitled to deference, including the court's decision regarding the sufficiency of the facts set forth by the petitioner and the credibility of the affidavits submitted. Accordingly, we review appellant's postconviction claims brought pursuant to R.C. 2953.21 under an abuse of discretion standard.”²²

Ohio's rules of evidence, which are generally modeled after the federal rules, inherently serve this gatekeeper function, and serve as a filter for what the jury is allowed to hear. The only way a filter is useful is if it is present (trial court), at a time when the subject matter (“other acts” evidence), is presented to the court. This is the critical time that the discretion of the trial court, given all the tangible and intangible elements of the trial proceedings can decide which evidence may be presented to the jury. The application of an abuse of discretion standard must be the continued standard of review for “other acts” and similar evidentiary rulings if juries are to hear relevant evidence necessary for them to decide the case.

C. The Ninth District has continued to make inconsistent rulings even after *Morris*.

Recent decisions within the Ninth District reveal an intra-district conflict on the standard of review.

***State v. Morris*, Medina App. No. 09CA0022-M (Case at hand), decided September 13, 2010. (Clair E. Dickinson, P.J. Belfance, concur, Carr J., dissents.)**

The *Morris* court applied a de novo standard of review of the trial court's admission of “other acts” evidence under Evid.R. 404(B). (Accepted by this Court for review.)

***State v. Hash*, Medina App. No. 10CA0008-M, 2011 Ohio 859, ¶71, decided, Feb. 28, 2011. (Donna J. Carr, Whitmore, J., concurs, Moore J., concurs in judgment only.)**

²¹ *State v. Calhoun*, 86 Ohio St.3d 279, 1999 Ohio 102, 714 N.E.2d 905.

²² *State v. Orr*, 2011 Ohio 1371, ¶11.

The decision to admit or exclude evidence lies in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 31 Ohio B. 375, 510 N.E.2d 343. *This Court, therefore, reviews the trial court's decision regarding evidentiary matters under an abuse of discretion standard of review.* 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, 5 Ohio B. 481, 450 N.E.2d 1140. 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, 1993 Ohio 122, 614 N.E.2d 748. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.* (Emphasis added.)

***State v. Thomas*, Lorain App. No. 10CA009756, 2011 Ohio 1629, ¶10 decided, Mar. 28, 2011. (Clair E. Dickinson, Whitmore, J., Moore J., concur.)**

This Court has held that Section 2945.59 and Evidence Rule 404(B) "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; see also *State v. Broom*, 40 Ohio St. 3d 277, 282, 533 N.E.2d 682 (1988) ("the standard for determining admissibility of such evidence is strict."). "*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*" that we review *de novo*. *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010 Ohio 4282, at ¶13. (Emphasis added.)

***State v. Horne*, Summit App. No. 25238, 2011 Ohio 1901, ¶8, decided April 20, 2011. (Donna J. Carr, Moore J., concurs, Dickinson concurs, stating that discussion of standard of review is dicta in which she does not join.)**

The Ohio Supreme Court has held that "[t]he admission of such evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Diar*, 120 Ohio St.3d 460, 2008 Ohio 6266, at ¶66, 900 N.E.2d 565, citing *State v. Conway*, 109 Ohio St.3d 412, 2006 Ohio 2815, at ¶62, 848 N.E.2d 810. This Court has typically applied this standard of review in regard to the admission of other acts evidence, most recently in *State v. Brown*, 9th Dist. No. 25287, 2011 Ohio 1041, at ¶ 19-20; see, also, *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; but, see, *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010 Ohio 4282, at ¶13 (applying a *de novo* standard of review). Although this Court has veered in recent weeks from applying the abuse of discretion standard of review, see *State v. Thomas*, 9th Dist. No. 10CA009756,

2011 Ohio 1629, at ¶10, we note that we are duty bound to follow the precedent established by the Ohio Supreme Court, and we do so now. (Emphasis added)

The foregoing cases demonstrate the need for this court to make an unambiguous statement of the appropriate standard of review to resolve the intra-district conflict and avoid such a disruptive effect from spreading to other districts.

II. IN THE INTEREST OF JUDICIAL ECONOMY, A TRIAL JUDGE'S DECISION TO ADMIT OR DENY EVIDENCE MUST BE GIVEN GREAT DEFERENCE OR THE DETERRENCE FOR A DEFENDANT TO APPEAL EVERY ADVERSE EVIDENTIARY RULING WILL BE ERODED.

A. Finality in a trial court's determination of admissibility of evidence is paramount to judicial economy and the court structure as a whole.

This court has not drawn a black and white rule for determining if evidentiary rulings are issues of fact or law. Rather, they have been classified as matters of discretion for the trial court to decide. Statutes and court rules have given judges wide discretion to make everyday types of decisions.²³ However, the Ninth District in *Morris* and *Thomas* decided on its own that such rulings are issues of law to review de novo.

Legal review must not become more about the reviewing judges and less about stability and precedent. The standard of review must not be determined by the make up of the appellate panel. Instead, the established standard of review must be followed in order to deter parties from appealing every adverse decision. If there is little or no deference given to the trial court's determination of the admissibility of evidence, then each trial will be decided in Ohio's twelve district courts' of appeals. Trials would essentially be decided from a cold record, at the will of

²³ See, e.g. Ohio Evid.R. 404(B), The word "may" usually implies some degree of discretion. *United States v. Rodgers* (1983), 461 U.S. 677, 706. See also *Dorrian v. Scioto Conservancy Dist.*(1971), 27 Ohio St.2d 102, 107, 271 N.E.2d 834, 837, where this Court recognized that "may", is generally construed as discretionary. Noting that the word, in some contexts, could be construed as mandatory.

the opinion of two appellate judges who never saw a participant in the trial, heard any arguments first hand, or observed the demeanor of any of the parties. This type of instability at the reviewing court level (which standard will be applied) prejudices the State's ability to formulate its trial strategy based on its evidence.

Results as outlined above deny finality through continuous appellate review of every evidentiary issue while a conviction hangs in the balance. The United States Supreme Court in *Beard v. Banks* spoke to this point when reiterated a key concept of finality and its importance to the State; "[i]n many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions,²⁴ for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards."²⁵ Such evidentiary decisions of the trial court should be shielded from a cold record review for all of the discussed reasons; the trial court is in a superior position to view the parties, hear arguments and testimony, and decide if the offered evidence is relevant. Similar to the other 400-series of rules, all which relate to relevance, 404 is a specific niche rule taken from the general relevance mold. Like decisions to admit relevant evidence which is not character evidence is subject to abuse of discretion review, decisions to admit or exclude character evidence should be subject to the same standard.

In addition, reviewing evidentiary issues de novo would lead to further congestion in the appellate systems through an increase in App. R. 26(B) applications. Numerous arguments could be made for ineffective assistance of appellate counsel, claiming, for example, that counsel erred

²⁴ cf. *Younger v. Harris* (1971), 401 U.S. 37, 43-54, 27 L. Ed. 2d 669, 91 S. Ct. 746.

²⁵ *Beard v. Banks*, 542 U.S. 406, 413, 124 S. Ct. 2504, citing *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, (speaking of the retroactivity principle which acts as a limitation on the power of federal courts to decide habeas petitions for state prisoners, holding that the *Teague* principle protects not only reasonable judgments of state courts but also the States' interest in finality.)

for only challenging half of the evidentiary determinations made at trial, when he should have challenged the other half the defendant now claims would be meritorious.

Section 5(A)(1) Article IV of the Constitution of Ohio provides: “In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.”

This Court has been faced with the issue of finality before. In *State v. Steffen*, this Court unanimously held, “[c]oncurrent with this court's supervisory power is our responsibility to assure finality to judgments. The purpose of a court is to resolve controversies, not to prolong them. When issues are constantly relitigated, there is no resolution and hence no finality. [* * *] The system threatens to devour itself unless the only tribunal with the ultimate authority to do so acts to take decisive action.”²⁶

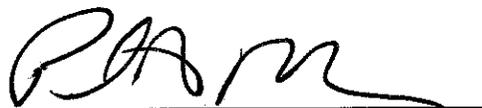
Lastly, a few decisions from one district to change the long held, well settled, evidentiary standard of review, begs the question: what's next? While this issue may not have been foreseen prior to *State v. Morris*, it reveals a Pandora's Box that must not be opened. Can this Court afford to allow its lower reviewing courts to ignore the standards of review that have shaped the law through thousands of decisions and rulings? This case can make the statement: You Shall Not Alter, and therefore restore the proper hierarchy for such decisions.

²⁶ *Steffen* at 409-410. (Recognizing that when a criminal defendant has exhausted his statutory and Murnahan appeals in state court, any further action a defendant files in a state court is likely to be interposed for delay and would constitute an abuse of the court system.)

CONCLUSION

The O.P.A.A. asks this Court to decidedly state that "other acts" evidence rulings by the trial court are to be reviewed under an abuse of discretion standard, in the interest of precedent, fundamental fairness, and judicial economy.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that on this 23rd day of May, 2010, I have sent a copy of the foregoing Merit Brief of Amicus Ohio Prosecuting Attorney's Association, by regular United States mail, addressed to the following: David Sheldon, 669 West Liberty Street, Medina, OH 44256.

A handwritten signature in black ink, appearing to read "David E. Romaker Jr.", with a stylized flourish at the end.

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