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**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

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**REPLY BRIEF OF APPELLANT, STATE OF OHIO**

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## 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.**

It is worth noting at the top that **Morris concedes that the appellate court applied the wrong standard of review.** Brief of Appellee at 15 (“this Court has stated that admission of other acts evidence is reviewed under an abuse of discretion standard . . .”). What remains then is determining whether the appellate court’s abuse of discretion review, conducted in the alternative, in response to the State’s request for *en banc* consideration (*not* its opinion reversing Morris’ conviction), applied properly the appropriate standard.

Morris argues in his merit brief that a trial court lacks discretion to admit or exclude evidence. Brief of Appellee at 15. As opposed to Morris’ citation-less assertion that a court lacks discretion to admit evidence an appellate court would later determine is inadmissible, Brief of Appellee at 16, the State notes that this Court has long applied the abuse of discretion standard to evidentiary determinations. *See State v. Sage* (1987), 31 Ohio St. 3d 173, 510 N.E.2d 343, at ¶ 2 of the syllabus.

Morris also assaults this Court’s prior use of the term “attitude” in describing how abuse of discretion review unfolds. Brief of Appellee at 18. He asks whether the State “really believe[s] that is a workable or realistic method of ‘abuse of discretion’ review to observe the trial judge’s [‘bodily posture or his manner or his disposition when ruling on an objection?].” *Id.* The State’s use of the term is taken directly from prior holdings of this Court. *See* Brief of Appellant at 13, 17, citing *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140 (“The 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.”). Interestingly, *Blakemore*

itself quotes a case which Morris cites in his own merit brief. *See* Brief of Appellee at 19, citing *Steiner v. Custer* (1940), 137 Ohio St. 448, 31 N.E.2d 855.

As for the substance of his assault on this Court's use of the term "attitude," the State notes that, in context, this Court's use of the term refers to "a position assumed for a specific purpose" or "a mental position with regard to a fact or state." Merriam-Webster's Collegiate Dictionary 75 (10<sup>th</sup> ed. 1996). This definition is consistent with the psychological uses of the word, understanding an "attitude" to be a construct representing a person's degree of like or dislike for something. *See* Carl G. Jung, *Psychological Types*, COLLECTED WORKS, Vol. 6 (Princeton Univ. Press 1971) (1921). Contrary to Morris' argument, attorneys hardly need to be experts in body language or facial micro-expressions. What matters is whether the court in any way reveals a predetermination or says anything to suggest that its decision is unreasonable, arbitrary or unconscionable, *Blakemore*, 5 Ohio St. 3d at 219, or not supported by any sound reasoning process, *AAAA Enters. Inc. v. River Place Cmty. Redev. Corp.* (1990), 50 Ohio St. 3d 157, 161, 553 N.E.2d 597 ("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.").

Morris' citation to *Custer*, 137 Ohio St. at 451, actually supports the State's position in this case. In *Custer*, the Court opined that "abuse of discretion" meant *more* than a mere error of law or judgment. *Id.* The *Custer* Court held that an abuse of discretion was a view or action which no conscientious judge, acting intelligently, could honestly have taken. Morris argues that no judge could act conscientiously in allowing prejudicial character evidence. Notwithstanding the distinction this Court recognized in *State v. Crotts*, 104 Ohio St. 3d 432, 2004 Ohio 6550, at ¶ 23 between "prejudicial" evidence and "unfairly prejudicial" evidence under Evid. R. 403,

Morris' position would preclude a trial court from ever exercising discretion. Were the position Morris takes correct, a trial court's decision admitting evidence would either be correct or incorrect—black or white. Under that dichotomous paradigm, any time a trial court made (what in the appellate court's eyes would be) an incorrect determination to admit evidence, the decision would be unfairly prejudicial and thus require a new trial.

That position is exactly opposite the clear directives of this Court in *Conway* and *Perez*, which held that the inquiry is confined on appellate review to determining whether the trial court acted unreasonably, arbitrarily or unconscionably in deciding the evidentiary issues about which the defendant complains. *State v. Conway* (2006), 109 Ohio St. 3d 412, 2006 Ohio 2815, at ¶ 62 (“[T]he admission of 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. Perez*, 124 Ohio St. 3d 122, 136, 2009 Ohio 6179, at ¶ 96 (“The argument that the nonfatal bar robberies are relevant to motive and intent is a reasonable one. The trial court's decision to admit them for those purposes was not unreasonable, arbitrary, or unconscionable. Admitting the evidence was therefore not an abuse of discretion.”) (internal quotation and citation omitted).

The court of appeals below, in conducting abuse of discretion review in the alternative, specifically held that a trial court does not have discretion to make a good-faith decision to admit evidence. Yet according to Morris' own reliance on *Custer*, a trial court could not abuse its discretion simply by making an error of law or judgment. *Custer*, 137 Ohio St. at 451. When abuse of discretion review is conducted properly, an appellate court reviews the record to determine whether the judge's disposition or decision-making process is adequately supported by the record. Under previous authority issued by this Court, even if the appellate court later

determines that the trial court objectively erred in applying the rule, the trial court's decision to admit or exclude evidence cannot be reversed unless the trial court erred in a manner which was unreasonable, arbitrary or unconscionable. *Blakemore*, 5 Ohio St. 3d at 219; *AAAA Enters., Inc.*, 50 Ohio St. 3d at 161.

Morris' position is also belied by the language of Evid. R. 404(B). Specifically, the rule states that a trial court *may* admit evidence when it is relevant to prove a non-character fact. As both this Court and the United States Supreme Court have held, the language choice "may" generally implies discretion. *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St. 2d 102, 107, 271 N.E.2d 834; *United States v. Rogers* (1983), 461 U.S. 677, 706. Were the Court to adopt the analysis of the court of appeals below to hold that a court lacks discretion to admit evidence, not only would this re-write the well-settled rule in *Sage*, but it would invert a canon of statutory interpretation.

Unlike a situation where the trial court purposefully admits evidence it does not reasonably believe relevant to an issue under Evid. R. 404(B), trial courts must have discretion to make close calls whether evidence is admissible or not. The Court in *Sage* recognized this basic reality and thus held that a trial court has broad discretion to admit or exclude evidence. *Sage*, 31 Ohio St. 3d 173, at ¶ 2 of the syllabus. Simply because the appellate court might arrive at a different conclusion were it deciding the issue for the first time does not mean that the trial court abused its discretion. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St. 3d 619, 621, 614 N.E.2d 748. Courts must have the ability to make close calls. Otherwise, dockets will explode with cases being tried over and over again.

Morris also claims that the State misrepresents the record by attempting to shift the blame onto the defense. Brief of Appellee at 19. Morris mis-reads the State's earlier brief. At trial, the

prosecutor asked Susan Klasek a general question about what Morris would do if refused sex. The trial prosecutor was of the belief that Susan would testify that he would become mentally or physically abusive towards her. At no point did he think that she would offer testimony that Morris kicked the dog. Thus, despite the lack of a question specifically asking if Morris kicked the dog, Susan gratuitously volunteered that information.

Morris then argues that his counsel preserved the issue by timely objecting. Review of the record fails to establish that his counsel was objecting on Evid. R. 404(B) grounds. Reading the transcript in context, including the judge's *sua sponte* observation that there might be a 404(B) issue, (tr. at 197-98,) it is clear that his counsel was objecting on the basis of general relevance and Evid. R. 403. Despite his "continuing objection" to the line of questioning, Morris' trial counsel never preserved this specific issue by making the trial court aware of its objection to the issue under Evid. R. 404(B). Given the lack of a specific objection by trial counsel regarding "other acts," the observation that Morris' counsel did not request a curative instruction *about the other acts evidence* or move to strike the testimony *on that basis* demonstrates that the issue was actually forfeited except for plain error. *See State v. Payne*, 114 Ohio St. 3d 502, 2007 Ohio 4642, at ¶ 23.

Morris also argues that the testimony about his sexual advance towards S.K.'s older half-sister Sarah did not involve sexual contact and therefore could not be similar enough to the charged conduct to qualify as a behavioral fingerprint. Brief of Appellee at 22. Notwithstanding the fact that the "other act" in question helps the jury understand context and thus makes the offense more understandable to the jury, *State v. Diar*, 120 Ohio St. 3d 460, 2008 Ohio 6266 at ¶ 72, Morris' argument that the acts are dissimilar because there was no actual sexual contact between himself and S.K.'s older half-sister misses the point. There was no sexual contact

because Sarah was old enough to know better and thus rebuffed Morris' advance. S.K., on the other hand, was not yet old enough to appreciate why the abuse was wrong and had been "groomed" to accept the behavior as normal. (Tr. at 361-62 -- testimony of Dr. Keck regarding "grooming" and application in this case.)

Simply because Morris was not successful in his advance towards Sarah does not mean that the incident is irrelevant to show motive, common scheme or plan or identity. Far from the appellate court's assertion that these issues were not relevant in this case, this Court held in *Crotts*, 104 Ohio St. 3d 432, at ¶ 20, that those issues are *always* relevant because they help show why one version of events should be believed over another.

Moreover, the transcript shows that Morris did not object on 404(B) grounds to this testimony. The record reveals the following during Sarah's, S.K.'s older half-sister, testimony:

The Court: . . . . You're objecting because you think this is prejudicial under 403, right?  
Mr. Mack: Correct.

(Tr. at 295.) And far from the trial court cutting Morris' counsel off during discussion of a pending objection, the trial court was noting that it had already decided the 404(B) issue earlier in the trial. (See Tr. at 198-99.) Having previously decided the question and the only remaining issue at that point being whether to give a limiting instruction, the trial court did not evince an attitude of unreasonableness, arbitrariness or make a decision which was unconscionable. In fact, after Morris' counsel requested an instruction about 404(B), the trial court gave it. (Tr. at 568-69) (instructing jury that evidence of other acts was received but that it may only be considered for specific purposes and instructing them that they may not consider it for any other purpose). Juries are presumed to follow the instructions given. *State v. Treesh*, 90 Ohio St. 3d 460, 480, 2001 Ohio 4.

Morris also argues in his sub-section B that a trial court must determine whether evidence to be admitted fits one of the exceptions listed in the rule, and if it determines it does not, it must exclude the evidence. Aside from the implication that the exceptions in Evid. R. 404(B) constitute an exhaustive list, the State concurs. The disagreement in this case stems from the opinion of the appellate court, and now Morris, that that determination is a conclusion of law as opposed to an evidentiary ruling. Like a trial court deciding to admit or exclude evidence as relevant, *see Sage*, 31 Ohio St. 3d 173, at ¶ 2 of the syllabus, deciding whether *evidence* sought to be offered at trial fits an exception under Evid. R. 404(B) involves an *evidentiary* decision.

Morris supports his conclusion that the determination is a substantive one by citing to R.C. 2945.59. Claiming that the statute was enacted before the rule, and is therefore substantive, Morris' argument forgets this Court's longstanding analysis of rules which were promulgated after statutes. When a promulgated rule involves the same subject as a statute, the *rule* controls, not the statute. Article II, §5(B), Ohio Constitution. A leading evidence treatise also specifically notes that Evid. R. 404(B) supersedes R.C. 2945.59. PAUL C. GIANELLI & BARBARA ROOK SNYDER, RULES OF EVIDENCE HANDBOOK 175 (2008) (author's comment to rule).

The Ohio Prosecuting Attorneys Association Amicus Brief artfully points out that R.C. 2945.59 simply expresses the common law rule on admissibility of specific evidence. The statute merely governs procedure; it does not confer a substantive right. OPAA Brief at 6. As a rule of evidence, not substantive law, application of the rule is subject only to abuse of discretion. *Sage*, 31 Ohio St. 3d 173, at ¶ 2 of the syllabus. *See also Perez*, 124 Ohio St. 3d 122, 2009 Ohio 6179, at ¶ 96 (holding that evidence admitted pursuant to Evid. R. 404(B) is reviewed on appeal for an abuse of discretion).

Unlike privileges which are substantive law, rules of evidence are rules of procedure because they do not themselves “alter primary conduct” or generally “affect the way in which the parties order their affairs.” *See State v. Silverman*, 121 Ohio St. 3d 581, 2009 Ohio 1576, at ¶ 33, quoting *Hohn v. United States* (1998), 524 U.S. 236, 252, *United States v. Gaudin* (1995), 515 U.S. 506, 521, and *Pearson v. Callahan* (2009), 555 U.S. 223, 129 S. Ct. 808, 816.

For illustrative purposes, consider that federal courts would apply R.C. 2317.02 to a diversity suit where Ohio law applies, but would apply Fed. R. Evid. 404(B) (which is applicable in civil suits as well as criminal prosecutions). *See In re Professionals Direct Ins.* (6th Cir. 2009), 578 F.3d 432, 440 (noting attorney-client privilege under R.C. 2317.02(A) was properly applied in federal declaratory judgment action); *Kelso v. Noble* (6th Cir. 1998), No. 97-3568, 1998 U.S. App. LEXIS 20552, at \*7 (“Whether potentially relevant evidence in a diversity case is protected from discovery as privileged is determined in accordance with state law), citing *Jewell v. Holzer Hosp. Found., Inc.* (6th Cir. 1990), 899 F.2d 1507, 1513. Federal courts, however, would never apply the Ohio Rules of Evidence. *See Hanna v. Plumer* (1965), 380 U.S. 460, 469-74. This distinction between the law of privileges and the rules of evidence illustrates the substantive nature of the privileges, *see Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St. 3d 181, 2009 Ohio 2496, at ¶ 13, and the procedural, evidentiary nature of the rules of evidence.

The attempt to shake free of the double bind created by the court of appeals below is likewise not persuasive. Morris claims that “[u]nder either standard – abuse of discretion or *de novo* review – the appellate court’s function is still the same. It must determine whether admission of evidence was proper or improper.” Brief of Appellee at 26. With all due respect to Morris’ able counsel, he is wrong. While *de novo* review tasks a reviewing court with deciding for itself whether the admission of evidence was proper or improper, abuse of discretion review

tasks the appellate court with determining whether the trial court acted in a manner that was unreasonable, arbitrary or unconscionable. This Court has specifically held that when conducting abuse of discretion review it is not enough that the appellate court, were it deciding the issue for itself, would not have found the trial court's reasoning persuasive perhaps in view of a countervailing reasoning process which would support a contrary result. *AAAA Enters., Inc.*, 50 Ohio St. 3d at 161. The court of appeals' decision below deciding for itself whether it would have admitted the evidence were it the trial court acts as a direct substitute for the judgment of the trial court, an action which the appellate court may not take. *Pons v. Ohio St. Med. Bd.*, 66 Ohio St. 3d at 621.

The double bind created by the court of appeals remains true. Either Evid. R. 404(B) is a substantive law supporting substantial reliance interests thus invoking the doctrine of *stare decisis* (when previous decisions of the court have held that admission of such evidence is subject only to review for abuse of discretion) *OR* it is a procedural rule of evidence such that *stare decisis* is less applicable but supporting its review for abuse of discretion as an evidentiary matter. Under either scenario, and as Morris concedes, *see* Brief of Appellee at 15 ("this Court has stated that admission of other acts evidence is reviewed under an abuse of discretion standard . . ."), the court of appeals below applied the wrong standard in its opinion sustaining Morris' first assignment of error. Reversal and remand for proper adjudication of the issue is therefore the only appropriate outcome.

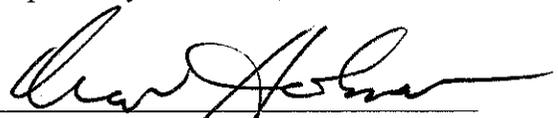
Finally, the State concurs with Morris' claim that the appellate court should review all of ~~the assignments of error were this Court to reverse and remand for reconsideration of the proper~~ standard of abuse of discretion. The appellate court abbreviated its consideration of the issues presented in light of its disposition of the first assignment of error. App. R. 12(A)(1)(c). Now

that Morris concedes the appellate court applied an improper standard of review to the case *sub judice*, the State respectfully submits that this Court should hold that the admission of evidence under Evid. R. 404(B) is a procedural ruling reviewed on appeal for an abuse of discretion. The Court should thus reverse the judgment of the Ninth District Court of Appeals below and remand the case with instructions for the appellate court to conduct an appropriate abuse of discretion review and then proceed to consider the remaining issues.

**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. Proper application of the abuse of discretion standard by the court of appeals below would show that the trial court did not err in admitting the challenged evidence.

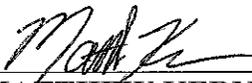
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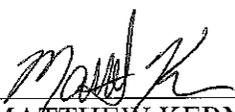


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**CERTIFICATE OF SERVICE**

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; David Romaker, Jr., Counsel for Amicus Curiae Ohio Prosecuting Attorneys Association, Wood County Prosecutor's Office, One Courthouse Square, Bowling Green, Ohio 43402; and Matthew Meyer and Daniel Van, Counsel for Amicus Curiae Cuyahoga County Prosecutor's Office, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 29<sup>th</sup> day of July, 2011.

  
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