

ORIGINAL

NO. 11-2094

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 94965

STATE OF OHIO,

Plaintiff-Appellant

-vs-

VAN WILLIAMS,

Defendant-Appellee

**MEMORANDUM IN SUPPORT OF JURISDICTION**

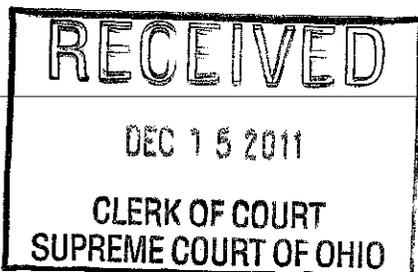
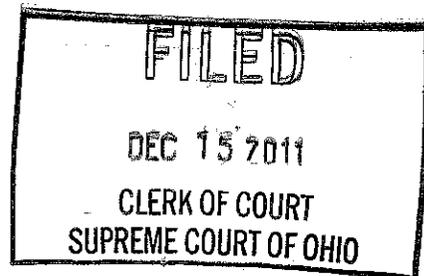
Counsel for Plaintiff-Appellant

**BILL MASON**  
**CUYAHOGA COUNTY PROSECUTOR**

**MATTHEW E. MEYER (0075253)**  
Assistant Prosecuting Attorney  
The Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800

Counsel for Defendant-Appellee

**CRAIG T. WEINTRAUB**  
323 W. Lakeside Ave. Suite 450  
Cleveland, Ohio 44113  
(216) 896-9090



**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST..... 1

STATEMENT OF THE CASE AND RELEVANT FACTS ..... 4

LAW AND ARGUMENT ..... 5

    PROPOSITION OF LAW I: OTHER ACTS EVIDENCE OF PRIOR INSTANCES OF SEXUAL ABUSE COMMITTED BY A DEFENDANT ARE ADMISSIBLE TO SHOW HIS INTENT, WHERE INTENT IS AN ELEMENT OF THE STATUTE AND BOTH ACTS ARE COMMITTED AGAINST TEENAGE BOYS OF SIMILAR AGES..... 5

        1. Legal standard for the admission of other acts evidence. .... 6

        2. Intent to receive sexual gratification is a permissible basis for the introduction of other acts evidence in GSI/rape cases..... 6

        3. The other acts evidence in this case is relevant to establish intent. .... 7

        4. Williams placed his intent at issue through his own admissions. .... 8

    PROPOSITION OF LAW II: OTHER ACTS EVIDENCE DEMONSTRATING THAT A DEFENDANT EXHIBITED A PATTERN OF ISOLATING CERTAIN TYPES OF VICTIMS AND THEN ABUSED A POSITION OF AUTHORITY TO ENGAGE IN GROOMING BEHAVIORS FOR THE PURPOSE OF SEXUAL GRATIFICATION IS ADMISSIBLE TO SHOW HIS UNIQUE, IDENTIFIABLE PLAN, INDEPENDENT OF WHETHER IT SHOWS IDENTITY..... 9

        1. R.C. 2945.59, as interpreted by *State v. Curry*, has been superseded by Evid.R. 404(B) and is no longer governing law in cases where the State offers other acts evidence to prove a defendant’s plan and identity is not at issue. .... 9

        2. Other appellate courts have allowed 404(B) evidence where the fact of the crime itself is at issue..... 12

        3. *Curry*’s rule, if followed, unduly prohibits the State from introducing other acts evidence in virtually all rape cases. .... 13

CONCLUSION..... 14

CERTIFICATE OF SERVICE ..... 15

**APPENDIX:**

Journal Entry & Opinion, *State of Ohio v. Van Williams*, 2011-Ohio-5650.....1-33

**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

The controversy surrounding the application of Evid. R. 404(B) in Ohio is evident from the Eighth District Court of Appeals introduction to its *en banc* opinion in this case: “[t]here is perhaps no more muddled area of evidence law than that surrounding Evid.R. 404(B) and its application to crimes of sexual assault.” *State v. Williams*, Cuyahoga App. No. 94965, 2011-Ohio-5650, at ¶ 3. Attempting to unuddle the confusion, the Eighth District has severely restricted Evid. R. 404(B) by making “identity” a prerequisite to admitting evidence of a defendant’s plan. After *Williams*, the State cannot introduce other acts evidence to show a defendant’s plan unless identity is at issue, or the other acts form the immediate background of the charged offense.

The Cuyahoga County Court of Appeals is the largest appellate district in Ohio and Cuyahoga County has one of the busiest criminal dockets in the state. The statewide precedential value of the Eighth District’s *en banc* opinion in *Williams* makes this case an issue of great public or general interest throughout Ohio.

The Eighth District’s “attempt to define a path through the quagmire” has resulted in an unworkable approach that unduly restricts the ability of the State to utilize other acts evidence to show intent during its case-in-chief. In this case, the Eighth District did this first by incorrectly characterizing prior sexual abuse of a 16-year-old boy—for which Williams pleaded guilty to misdemeanor assault—as a “consensual sexual relationship.” *Williams* at ¶ 46. The appellate court then arbitrarily declared that “[e]vidence of homosexuality is not relevant to establish pedophilia.” *Id.*, at ¶ 47. Instead, by introducing the prior relationship, the State sought to prove “[t]he scheme, plan, or system conceived by appellant required him to befriend J.H. and A.B.

over a fairly substantial course of time before using his position of trust and authority to initiate sexual activity.” *Id.*, at ¶ 90 (Celebrezze, J., dissenting).

Finally, the *Williams* Court insisted that the evidence of the defendant’s prior molestation of a minor child whom he groomed for sexual activity, would only be admissible in rebuttal rather than in the State’s case-in-chief, abrogating both the statutory requirement that the State prove intent and the fact that Williams placed his intent at issue through self-serving admissions made to other witnesses. *Williams, supra*, at ¶ 47.

Williams informed the victim of his intent during a sexual act, and Williams attorney argued during opening statements that he could not have committed the acts because Williams was not attracted to underage boys. That evidence and the asserted defense was sufficient to place the defendant’s intent at issue such that the State was allowed to introduce Evid. R. 404(B) evidence to show evidence of intent during its case-in-chief.

The Eighth District also found that the evidence was not admissible under Evid.R. 404(B) to show William’s “common plan” because evidence of a defendant’s plan is inadmissible unless either the identity of the perpetrator is at issue, or the other acts form part of the immediate background of the alleged act. *Williams, supra*, at ¶¶ 50-51, citing *State v. Curry*, 43 Ohio St.2d 66, 72-73, 330 N.E.2d 720 (1975). Under *Curry*, identity is not at issue where there is a factual dispute over the defendant’s conduct, and the fact of the crime itself is therefore not open and obvious. *Id.* After determining that a conflict existed among previous Eighth District decisions on the question, and that at least seven of its own decisions conflicted with this application of *Curry*, the Eighth District attempted to wipe the slate clean by ignoring all contrary precedent and returning to the framework established in *Curry*.

However, *Curry* is no longer governing law in this area. Although correctly decided at the time, it remains rooted in R.C. 2945.59, which has since been superseded by the adoption of Evid.R. 404(B). In the overwhelming majority of cases dealing with other acts evidence, this is a distinction without a difference. Courts generally resolve any issue arising from a difference in language between statutes and rules by holding that they are to be construed together. *See State v. Broom* (1988), 40 Ohio St.3d 277, 281, 533 N.E.2d 682 (“The rule is in accord with R.C. 2945.59.”). This case, however, rests exactly upon the one fault-line where the statute and the rule are in tension with one another: cases where the State has clear evidence of a defendant’s common plan, but identity is not at issue.

*Curry* held, consistent with the governing statute at the time, that identity was a proper basis for admission only as one of two possible prerequisites to showing a defendant’s plan. Ohio’s adoption of Evid.R. 404(B) in 1980 fundamentally changed this framework, because under Evid.R. 404(B) identity and plan are now separate and distinct bases for admission. At least one appellate court in this state has acknowledged the difference. *See State v. Smith*, 84 Ohio App.3d 647, 664, 617 N.E.2d 1160 (2nd Dist. 1992) (“R.C. 2945.59 is consistent with Evid.R. 404(B) except that the statute is not directly concerned with proof of identity, which is a matter specified in the rule.”).

The State submits that the Eighth District’s approach is based on an obsolete understanding of the admissibility of other acts evidence. This Court should adopt the dissenting opinion in *Williams* as governing law in the State of Ohio and prohibit a defendant from using the fact that his identity is not in question as a legal shield to prohibit the admissibility of other acts evidence. This Court should further clarify that the law of other acts is properly controlled

by Evid.R. 404(B) and that R.C. 2945.59 as interpreted by *Curry* is no longer an accurate statement of governing law in this area.

In short, *Williams* recognized the need for uniform interpretation of Evid. R. 404(B) in Ohio. That uniform interpretation, however, should be decided by this Court.

Accordingly, the State of Ohio requests that this Honorable Court accept jurisdiction and review this case on its merits.

### **STATEMENT OF THE CASE AND RELEVANT FACTS**

Van Williams was convicted of 5 counts of Rape, 5 counts of Unlawful Sexual Conduct with a Minor, 7 counts of Kidnapping, and 6 counts of Gross Sexual Imposition of a 14-15 year old boy, J.H. He developed a mentor-type relationship with J.H., who did not have any significant male role models in his life, through a male choir group in his church. Williams would frequently bring J.H. back to his house for long periods of time while he claimed J.H. was doing various chores. Williams would take J.H. to the movies, and buy gifts for him such as clothing and a guitar. Williams became someone J.H. completely trusted.

Williams began sexually abusing J.H. when he was 14. After bringing J.H. to the upstairs area of his house, Williams gave him a back massage before moving to touch his legs and groin. Williams told J.H. not to tell anyone about the incident because he could go to jail, frightening J.H. into compliance. The abuse escalated from there to forced anal sex in which Williams would push J.H. over, engage in intercourse, and then wipe his behind with a rag. In one incident, J.H. asked Williams why he was doing this to him, to which Williams responded that, "He was not getting any from his wife." These incidents continued for a period of roughly seven months until J.H. disclosed the abuse to a guidance counselor at his school.

Prior to trial, the State filed a Motion to Admit Evidence Pursuant to Evid.R. 404(B) relating to prior sexual abuse committed by Williams against another teenage boy, A.B. Williams had pleaded guilty to misdemeanor-assault for sexual acts committed with A.B., 16 at the time, who also was without any male role model in his life. The acts committed included masturbation and oral sex resulting in mutual sexual gratification. The trial court granted the State's 404(B) motion and allowed A.B.'s testimony to show Williams' intent and plan in molesting J.H., as well as to rebut Williams' claims that he did not commit the acts in question because he was not attracted to underage boys.

On direct appeal, the Eighth District reversed, finding that evidence of a consensual homosexual relationship was not relevant to show intent to receive gratification through pedophilia<sup>1</sup> and that the State could not offer other acts evidence to show Williams' plan unless identity was at issue. *State v. Williams*, Cuyahoga App. No. 94965, 2011-Ohio-5650, at ¶¶ 31-65.

Now before this Honorable Court is the State's request that this Honorable Court accept discretionary jurisdiction and hear this case on its merits.

### **LAW AND ARGUMENT**

#### ***PROPOSITION OF LAW I: OTHER ACTS EVIDENCE OF PRIOR INSTANCES OF SEXUAL ABUSE COMMITTED BY A DEFENDANT ARE ADMISSIBLE TO SHOW HIS INTENT, WHERE INTENT IS AN ELEMENT***

---

<sup>1</sup>It should also be noted that the Eighth District's opinion misuses the term "pedophilia," properly defined as "sexual activity with a prepubescent child (generally age 13 years or younger)." *U.S. v. Pritchard* (C.A.6, 2010), 392 Fed.Appx. 433, 442-443, quoting The Diagnostic and Statistical Manual of Mental Disorders, Text Revision, at 571 (4th ed. 2000). Neither A.B. nor J.H. was prepubescent at the time of the abuse. J.H. was 14 years old when the abuse started and testified that he was already sexually attracted to females by that time. The Eighth District attempted to divorce what it referred to as a "consensual sexual relationship" with A.B. from what it referred to as the acts of "pedophilia" Williams performed on J.H. This distinction is based on the Eighth District's misunderstanding of what constitutes pedophilia, which neither act was.

***OF THE STATUTE AND BOTH ACTS ARE COMMITTED AGAINST  
TEENAGE BOYS OF SIMILAR AGES.***

**1. Legal standard for the admission of other acts evidence.**

Evid.R. 404(B) provides: “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. 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.” 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 the evidentiary decisions of the trial court absent an abuse of discretion that results in material prejudice. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, at ¶ 66.

**2. Intent to receive sexual gratification is a permissible basis for the introduction of other acts evidence in GSI/rape cases.**

“Evidence of extrinsic acts may be used to prove intent or guilty knowledge when it is a genuine issue in a case. The acts should tend to prove that the accused understood the wrongful nature of his act by virtue of the fact that he committed prior or subsequent wrongful acts.” *State v. Smith* (1990), 49 Ohio St.3d 137, 140, 551 N.E.2d 190. A defendant places his intent at issue by pleading not guilty to a charge that contains a specific intent as an element of the crime. *Id.* at 141.

Williams pleaded not guilty to 12 counts of rape in violation of R.C. 2907.02(A)(2) and 24 counts of Gross Sexual Imposition in violation of R.C. 2907.05(A)(1), both of which require the State to prove that he “purposely compel[led] the other person to submit by force or threat of force.” The GSI statute further requires that the act in question be “sexual contact,” defined in R.C. 2907.01 as “any touching of an erogenous zone of another \* \* \* for the purpose of sexually

arousing or gratifying either person.” The trial court permitted the introduction of the other acts evidence to show Williams’ intent to achieve sexual gratification in the abuse of J.H. The Eighth District likewise did not contest that intent was at issue in this case. *Williams*, at ¶¶ 43-45. See also *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302 at ¶¶ 19-20 (rejecting appellate court’s assertion that other acts could not be admitted to show intent because intent was immaterial to whether the defendant committed gross sexual imposition).

**3. The other acts evidence in this case is relevant to establish intent.**

In rejecting the State’s argument that the evidence was relevant to establish Williams’ intent, the Eighth District fundamentally misconstrued the nature of the 404(B) evidence in this case. The court held that the other acts evidence of the sexual gratification Williams received from A.B. was not relevant to Williams’ intent to give or receive sexual gratification in the charged offenses against J.H. because “[e]vidence of homosexuality is not relevant to establish pedophilia.” *Williams* at ¶ 47.

This evidence was not introduced to establish Williams’ sexual orientation. The other acts evidence in this case involved the abuse of a teenage boy of almost the same age as the victim at the time of the prior offense, for which Williams pleaded guilty to misdemeanor-assault. *Williams*, at ¶ 17. In drawing its conclusion that the other acts evidence was not relevant to establish intent, the Eighth District apparently ignored the fact that A.B. was himself a minor at the time of the prior bad acts. The evidence was used to establish a 1-for-1 comparison between Williams’ prior sexual abuse of a 16-year old boy to the charged offenses involving the sexual abuse of a 14-to-15-year old boy. The other acts evidence is not “evidence of homosexuality” as the Eighth District has characterized it; it is evidence of the same type of

grooming behavior in which the defendant used his position of authority to manipulate minors into performing sex acts.

The State respectfully submits that the other acts evidence was admissible to show Williams' intent to achieve sexual gratification through the abuse of J.H.. The fact that Williams has sexually abused teenage boys in the past demonstrates that subsequent abuse was done for the same purpose, because it places Williams in a minute percentage of the population that is sexually attracted to underage boys and willing to purposely compel them to submit to sexual contact through force. This is idiosyncratic behavior that tends to show an unmistakable specific intent. *See State v. DePina* (1984), 21 Ohio App.3d 91, 486 N.E.2d 1155 (“The key to the probative value of such conduct lies in its peculiar character rather than its proximity to the event at issue.”)

**4. Williams placed his intent at issue through his own admissions.**

In reversing, the Eighth District concluded that the evidence was not admissible in the State's case-in-chief, and would be admissible only in rebuttal in the event that Williams placed his intent at issue. *Williams* at ¶ 47. Williams did place his intent at issue, however, through a series of admissions made to both J.H. and to Shawana Cornell, a social worker at the Department of Children and Family Services. Williams told J.H. during one of the sexual assaults that he was doing this to him because “[h]e was not getting any from his wife.” He further told Cornell during a follow-up interview regarding J.H.'s accusations that what J.H. was saying was false and that he was attracted to adult women. These admissions place Williams' intent directly at issue in the case. Knowing these admissions would come out during the trial, defense counsel argued during opening statements that J.H. was lying because he was confused about his sexual preferences, while Williams was not.

Although opening statements are not evidence, Williams placed his intent at issue both before and during trial, which opened the door to this evidence during the State's case-in-chief. See *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, at ¶44 (when victim's credibility is attached during opening statements, the prosecution can present rehabilitative evidence during the state's case-in-chief); *State v. Warmus*, 8<sup>th</sup> Dist. No. 96026, 2011-Ohio-5827, at ¶ 24 (defense counsel's referencing during opening statements of what police officers would have done in similar circumstances opened the door to testimony during State's case in chief of what a police officer would have done in a similar situation).

***PROPOSITION OF LAW II: OTHER ACTS EVIDENCE DEMONSTRATING THAT A DEFENDANT EXHIBITED A PATTERN OF ISOLATING CERTAIN TYPES OF VICTIMS AND THEN ABUSED A POSITION OF AUTHORITY TO ENGAGE IN GROOMING BEHAVIORS FOR THE PURPOSE OF SEXUAL GRATIFICATION IS ADMISSIBLE TO SHOW HIS UNIQUE, IDENTIFIABLE PLAN, INDEPENDENT OF WHETHER IT SHOWS IDENTITY.***

The State submits that the other acts testimony is relevant to establish Williams' common plan: That he systematically ingratiates himself into the lives of adolescent boys without significant father figures in their lives before using his position of authority to sexually exploit them.

- 1. R.C. 2945.59, as interpreted by *State v. Curry*, has been superseded by Evid.R. 404(B) and is no longer governing law in cases where the State offers other acts evidence to prove a defendant's plan and identity is not at issue.**

The Eighth District held that the other acts evidence in this case was not admissible to show Williams' scheme or plan because the evidence did not fall within either of two requirements established by this Court in *State v. Curry* (1975), 43 Ohio St.2d 66, 330 N.E.2d 720. In *Curry*, this Court established a framework for when other acts evidence is admissible under the "scheme, plan, or system" exception: 1) "those situations in which the 'other acts'

form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment,” or 2) to show the identity of the perpetrator by demonstrating that he has committed similar crimes in the past. *Id.* at 73. Identity was not at issue in this case because the fact of the crime itself was not open and obvious, meaning that it was unclear if a rape occurred at all. Nor were the other acts part of the immediate background of the charged offenses. The Eighth District thus held that the State could not offer evidence under the “scheme, plan, or system” prong of the statute because the evidence did not meet either prerequisite method.

The Eighth District noted that it had found at least seven of its own precedents that permitted the use of other acts testimony to show the existence of a common plan or scheme even though neither requirement from *Curry* was met. *Williams*, at ¶ 56. In each case, identity was not at issue and the facts of the other acts evidence did not form the immediate background of the crime as charged. *Id.* After surveying the landscape, the Eighth District could come to no other conclusion than that, “These cases \* \* \* seemingly ignore the Ohio Supreme Court’s holding in *Curry*.” *Williams*, at ¶ 56. Because it felt it was bound to follow *Curry*, the Eighth District reversed *Williams*’ conviction and disregarded the body of its precedents on this issue. The State submits, however, that the Eighth District’s attempt to wipe the slate clean and return to the *Curry* framework was not necessary or justified under subsequent law.

This Court decided *Curry* prior to the adoption of Evid.R. 404(B), and its holding was therefore based solely on the language of R.C. 2945.59, Ohio’s statutory provision governing the introduction of other acts evidence. R.C. 2945.59 does not recognize proof of identity as an independent purpose for which other acts evidence may be introduced. In *Curry*, this Court held that identity was included under the statute, but only as one of two methods that the State was

limited to using to show a defendant's "scheme, plan, or system." If the evidence did not fall under one of the two, it was not admissible. Identity was not itself an independent justification for the introduction of evidence, but rather was a method the State could use to prove something else – namely, the defendant's scheme, plan, or system.

Nearly 20 years later, this Court decided *State v. Lowe* (1994), 69 Ohio St.3d 527, 634 N.E.2d 616. *Lowe* was based upon Evid.R. 404(B), adopted in 1980 following this Court's decision in *Curry* and which is substantially similar to R.C. 2945.59. Evid.R. 404(B), however, differs from the statute in that it recognizes identity as an independent justification for the introduction of other acts evidence separate from preparation or plan: "Evidence of other crimes, wrongs, or acts \* \* \* \* may \* \* \* be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This Court in *Lowe* created a new framework, holding that other acts evidence may be used to prove identity in only two circumstances: 1) to show the immediate background of the crime, or 2) to establish defendant's modus operandi by providing a behavioral fingerprint. *Lowe, supra*, at 531. *Lowe* thus essentially flipped *Curry*'s framework on its head, and the decisions of appellate courts throughout this state continue to reflect the tension between the two approaches.<sup>2</sup>

The confusion surrounding this area of law is what led the Eighth District to find that at least seven of its own precedents based upon Evid.R. 404(B) were incompatible with R.C. 2945.59 as interpreted by *Curry*. These seven decisions did not simply "ignore" *Curry*, but were instead a proper application of *Lowe*. If *Curry* remains governing law in this area, it means that the State cannot introduce other acts evidence to show a defendant's plan unless identity is at

---

<sup>2</sup>The concurring opinion in this case also suggested that the Supreme Court "may want to assess the viability of statutes like R.C. 2945.59 in an effort to provide clarity by keeping future reviews to one area of law." *Williams, supra*, at ¶ 86 (Gallagher, J., concurring).

issue, or the other acts form the immediate background of the charged offense. Indeed, this Honorable Court has on multiple occasions held that “need is irrelevant to an Evid. R. 404(B) objection. See *State v. McNeil* (1998), 83 Ohio St.3d 438, 442, 700 N.E.2d 596 (“McNeill further contends Berrios's testimony was unnecessary to prove identity because the four children also identified McNeill. However, need is irrelevant to an Evid.R. 404(B) objection[.]”); *State v. Brown*, 100 OhioSt.3d 51, 2003-Ohio-5059, at ¶ 24.

Requiring the State to demonstrate the need to provide identity as a prerequisite to allowing evidence of a plan under Evid. R. 404(B) would effectively read the word “plan” out of the rule. It is counter-intuitive to say that the State can only put on other acts evidence to show a defendant’s plan when identity is at issue, when plan and identity are listed separately in Evid.R. 404(B). But if *Lowe* superseded *Curry* in this context, the State can introduce evidence to show the defendant’s plan regardless of whether identity is at issue because those two things are treated as separate under the rule. Each of the Eighth District’s seven prior decisions followed the latter application of *Lowe* and did not treat identity as a prerequisite to plan. The State submits that this is the correct application of Evid.R. 404(B) under *Lowe*.

**2. Other appellate courts have allowed 404(B) evidence where the fact of the crime itself is at issue.**

Appellate courts all across Ohio have routinely permitted the use of 404(B) evidence in rape cases to show modus operandi where the fact of the crime itself is at issue. See *State v. Short*, 1st Dist. No. C-100552, 2011-Ohio-5245, at ¶ 7 (evidence that outlined a formula for grooming the young boys into sexual partners was relevant to show motive, intent, and modus operandi); *State v. Lopez*, 8th Dist. No. 94312, 2011-Ohio-182, at ¶ 58 (prior act that involved taking sexual advantage of a developmentally disabled woman was probative in proving opportunity and plan); *State v. Valsadi*, 6th Dist. No. WD-09-064, 2010-Ohio-5030, at ¶ 49

(testimony was admissible to show that appellant used the same modus operandi in his crimes where defendant preyed upon two women in the same manner); *State v. Robinson*, 6th Dist. No. L-09-1001, 2010-Ohio-4713, at ¶ 41 (evidence of a behavioral fingerprint consisting of taking advantage of a position of trust with vulnerable young girls and having sexual conduct with them tends to identify appellant as the perpetrator). The *Curry's* statutory holding is therefore not being followed with any degree of consistency in this State.

**3. *Curry's* rule, if followed, unduly prohibits the State from introducing other acts evidence in virtually all rape cases.**

The Eighth District's interpretation of *Curry* effectively prohibits the State from relying upon 404(B) evidence in rape cases, because the fact of the crime itself is almost always at issue. In only a slim minority of rape cases is there physical injury present to corroborate the accusation. *See State v. Johnson*, 8th Dist. No. 91900, 2009-Ohio-4367, at ¶ 58 (nurse examiner testified that lack of physical injuries to the victim was not surprising because "in 85 percent of rape cases there are no vaginal injuries."); *State v. Henderson*, 10th Dist. No. 04AP-1212, 2005-Ohio-4970, at ¶ 25 ("Not all rape victims exhibit signs of physical injury. . . . [the sexual assault nurse testified that] approximately 85 percent of the rape cases she sees do not have any visible injuries."). Rarer still are cases where there is an eyewitness to the sexual acts other than the victim and defendant. With nothing else to go on besides the victim's testimony, the State is left in a severely handicapped position whereby it is limited to the victim's testimony to obtain a conviction.

The Eighth District's interpretation effectively introduces a corroboration requirement in rape cases before the State can introduce 404(B) evidence. The State must now independently prove to the trial court that the rape occurred and that identity is an issue before it can introduce evidence intended to show the identity of the perpetrator. This requirement is alien to Ohio law.

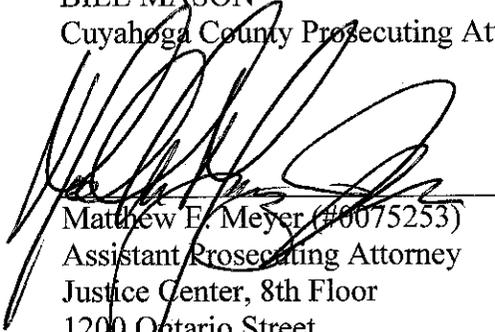
See *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, at ¶ 53 (“Corroboration of victim testimony in rape cases is not required.”). It also misplaces the burden of introducing the other acts and makes the entire process circular, because the State would now be required to prove the charged offense to justify the introduction of the other acts evidence.

### **CONCLUSION**

The State submits that Supreme Court review in this case is warranted because the largest appellate court in Ohio has, in an *en banc* opinion, severely curtailed the use of Evid. R. 404(B) evidence beyond the scope and meaning of the rule. The precedential importance of this case rises to the level of an issue of great public or general interest. The State therefore submits that this case is worthy of Supreme Court review and respectfully requests that this Honorable Court accept jurisdiction to hear this case on its merits.

Respectfully submitted,

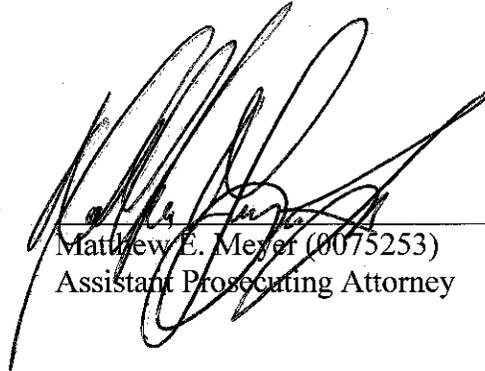
BILL MASON  
Cuyahoga County Prosecuting Attorney



Matthew E. Meyer (#0075253)  
Assistant Prosecuting Attorney  
Justice Center, 8th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7821  
(216) 443-7602 *fax*  
*mmeyer@cuyahogacounty.us email*

**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 4<sup>th</sup> day of December, 2011 to Craig T. Weintraub, Esq., 323 W. Lakeside Ave., Cleveland, Ohio 44113.



Matthew E. Meyer (0075253)  
Assistant Prosecuting Attorney

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
EN BANC  
No. 94965

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**VAN WILLIAMS**

DEFENDANT-APPELLANT

---

**JUDGMENT:  
REVERSED AND REMANDED**

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-525486

**BEFORE:** En Banc Court

**RELEASED AND JOURNALIZED:** November 3, 2011

**ATTORNEY FOR APPELLANT**

Craig T. Weintraub  
323 W. Lakeside Avenue, Suite 450  
Cleveland, Ohio 44113

**ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor

BY: Richard J. Bombik  
Assistant Prosecuting Attorney  
The Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Pursuant to App.R. 26 and Loc.App.R. 26, this court determined that a conflict existed among this court's decisions on the question of whether evidence of other similar acts is admissible pursuant to Evid.R. 404(B) to demonstrate a scheme, plan, or system when the evidence is not part of the immediate background of the present crime and the offender's identity is not at issue. Accordingly, we granted en banc consideration in this matter sua sponte and convened an en banc conference in accordance with *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, on this question.

{¶ 2} In the case at bar, defendant-appellant, Van Williams, appeals his convictions

for rape, unlawful sexual conduct with a minor, kidnapping, and gross sexual imposition.

For the reasons that follow, we reverse and remand for a new trial.

{¶ 3} There is perhaps no more muddled area of evidence law than that surrounding Evid.R. 404(B) and its application to crimes of sexual assault. Through our review of Ohio and, in particular, this district’s case law on the subject, we have found cases that have applied the evidence rule in different and conflicting ways. While we are not at this time going to attempt to define each exception to the common-law rule prohibiting the admission of character evidence, we will attempt to define a path through the quagmire surrounding the issues that apply to the case at bar, that is, the Evid.R. 404(B) exceptions for other acts evidence to prove “intent” or a “scheme, plan, or system.”

#### Procedural History and Facts

{¶ 4} In 2009, Williams was charged in a 61-count indictment with 12 counts of rape, 12 counts of unlawful sexual conduct with a minor, 12 counts of kidnapping, 24 counts of gross sexual imposition, and one count of intimidation of a crime victim or witness. All criminal activity was alleged to have occurred between November 1, 2008, and April 30, 2009, when the victim, “J.H.,” was 14 and 15 years old.<sup>1</sup>

{¶ 5} Prior to trial, the state filed a “Motion to Admit Evidence Pursuant to Evidence Rule 404(B) and R.C. 2945.59,” indicating that it intended to admit into

---

<sup>1</sup>The victim in this case is referred to by his initials in accordance with this court’s longstanding policy not to identify juveniles or victims in sexual assault cases.

evidence prior allegations of sexual abuse committed by Williams against a teenage boy, "A.B." Williams filed a brief in opposition to the state's motion and requested an evidentiary hearing.

{¶ 6} On February 16, 2010, the day trial was to commence, Williams's attorney again asked for a hearing on the Evid.R. 404(B) motion. He explained to the court that he thought his client would be prejudiced if the decision on the admission of the Evid.R. 404(B) evidence was further delayed. The trial court denied the request and began voir dire. The next day, defense counsel filed a motion in limine asking the trial court to prohibit any Evid.R. 404(B) testimony, again requesting an evidentiary hearing. In court, defense counsel asked the trial court to rule on his motion prior to opening statements. The trial court denied counsel's request to rule on the motion prior to opening statements and trial commenced.

{¶ 7} J.H.'s grandmother testified that she had custody of J.H. They belonged to the same church as Williams and once J.H. joined the men's choir, Williams began to mentor him, since her grandson did not otherwise have a "male role model" in his life. The grandmother testified Williams took J.H. various places including to get his hair cut, to shop for video games, to the movies, and to see J.H.'s friends. She testified that Williams was constantly buying J.H. gifts, such as video games, clothes, shoes, a guitar and guitar lessons, and he also gave J.H. money to do odd jobs around his house.

{¶ 8} Michael Tessler testified that he worked at J.H.'s school. During a May 2009 counseling session, J.H. disclosed to Tessler that a man at his church had been

molesting him. Tessler reported the allegations to the Cuyahoga County Department of Children and Family Services (“CCDCFS”).

{¶ 9} After Tessler testified, the trial court excused the jury and began the Evid.R. 404(B) hearing. A.B. took the witness stand, testified, and was subject to cross-examination. A.B. testified that when he was 16 years old, he attended a local high school where Williams served as the swim coach. A.B. was not close to his own father, but he joined the swim team and developed a close relationship with Williams. In 1997, after a swim meet at a high school in Perry, Ohio, Williams took A.B. behind that school’s concession stand, kissed A.B. and “fondled” him. When the team returned to their school later that night, he and Williams engaged in oral sex in the locker room. He testified that although he and Williams never engaged in anal intercourse, they engaged in oral sex two to three times per week in the school’s locker room and that activity lasted until the end of the school year. He further testified that the sexual activity was consensual. After A.B.’s testimony, the trial court continued the evidentiary hearing at Williams’s request because he had a witness to rebut A.B.’s testimony.

{¶ 10} The trial court resumed the jury trial. J.H.’s mother was the next witness to testify in the state’s case-in-chief. She testified that she had a drug problem when her son was young so she sent J.H. to live with his grandmother. She testified that Williams was the only influential male figure in her son’s life.

{¶ 11} J.H., who was 16 years old at the time of trial, testified that he developed a

close relationship with Williams after joining the men's choir at church. He testified that Williams would often pick him up and take J.H. to his house. Williams bought him gifts, including a watch, clothing, and a guitar.

{¶ 12} J.H. testified that over time Williams became someone that he "completely trusted." But Williams eventually began to molest him. The first incident occurred in September 2008 when J.H. was 14 years old. J.H. testified he was sitting on a bed in Williams's house and the older man began to massage J.H.'s back. Williams then massaged his legs and "groin area." Williams told J.H. not to tell anyone because Williams could go to jail.

{¶ 13} The next incident occurred later the same month. Williams massaged J.H.'s back and groin area. The next incident occurred in Williams's basement when Williams was giving J.H. a haircut. J.H. testified that during the haircut Williams put the clippers down, began to massage J.H.'s back, pulled J.H.'s pants down and bent him forward, and then "[stuck] his private part in my behind." When he was "done," J.H. explained, Williams got a cold rag and wiped J.H.'s buttocks. J.H. testified that the sexual intercourse hurt.

{¶ 14} The next act of anal intercourse occurred in Williams's bedroom and was also preceded by Williams massaging J.H.'s back and groin area. This time, when Williams touched J.H.'s penis, J.H. asked him why he was doing this. Williams replied "he wasn't getting any from his wife." During this incident, Williams abruptly stopped the intercourse, thinking his wife was coming home. When Williams realized they were

still alone, he took J.H. to the basement and resumed anal intercourse. J.H. testified Williams told him he would stop “doing this to me” before J.H. turned 15 years old.

{¶ 15} Then next time Williams assaulted him, Williams used Vaseline on his (Williams’s) penis. J.H. testified that the last assault happened in January 2009 when he was 15 years old, in the computer room at Williams’s house.

{¶ 16} J.H. testified that he was confused if sexual activity was something boys were supposed to do with older men. He stated he did not put up much resistance because he was afraid Williams would hurt him.

{¶ 17} Shawana Cornell, a CCDCFS social worker, testified that she was assigned to J.H.’s case after the county received a report that J.H. had been sexually abused. The state inquired about the conversation she had with Williams as part of her investigation. Cornell testified, over defense counsel’s objection, that Williams “said he was accused of this about 12 years ago, and that the charge was taken down to a misdemeanor assault.” During a subsequent conversation with Williams, Cornell testified that she asked Williams “if he would mind telling me about the allegation from 12 years ago with the other boy, and [he] did not want to tell me about that.” Cornell testified Williams denied any sexual activity occurred with J.H. and did not know why the boy would make such an allegation.

{¶ 18} After Cornell testified, defense counsel asked for a mistrial, arguing his client had been unduly prejudiced by the social worker’s testimony, especially since the trial court had not yet made a ruling on the state’s Evid.R. 404(B) motion. The trial

court denied the motion for a mistrial.

{¶ 19} The trial court then resumed the Evid.R. 404(B) hearing. Williams called Terrance Gaither, an assistant swim coach at A.B.'s high school, to testify. Gaither testified he was an assistant swim coach when A.B. was on the swim team. He stated that after the swim meet in Perry, the team immediately left to go back to their school. He and Williams drove some students home and then went out to clubs in the Flats district of Cleveland. He stated that Williams was well-liked and no other students ever made any allegations against him.

{¶ 20} After Gaither's testimony, the trial court heard arguments from both parties on the state's Evid.R. 404(B) motion. The state argued that A.B.'s testimony should be admitted into evidence as it tended to show Williams's intent in committing sexual acts with J.H. and because it showed his scheme or plan to mentor young boys who did not have strong male role models in their lives, gain their trust, and then groom them to be his victims.

{¶ 21} The trial court granted the state's motion, finding that the evidence should be admitted to show Williams's "intent." The trial court based its reasoning as follows:

"Intent is the strongest one. The sexual gratification of the [d]efendant, with respect to his acts with [J.H.], which so far there is just some inferences there could be some sexual gratification, it becomes much more clear when you hear the testimony of [A.B.] with respect to their conduct together. Certainly [A.B.'s] testimony indicated that this [d]efendant was sexually gratified by that conduct. I don't know for what other purpose you make out with somebody for; oral sex, mutual masturbation. There is really no other purpose for that.

"Although there was no testimony from [J.H.] about other sex, in fact, I believe [defense counsel] brought out on cross-examination of the social worker [J.H.] told

her that he, the [d]efendant, wanted oral sex but [J.H.] wouldn't let him. So that evidence is out there as well. As well as opening statements, which defense counsel made clear to jurors that \* \* \* Mr. Williams['s] sexual preference was not in question at all. It was directly in opening statement as well as what was brought out from the social worker's testimony with respect to he is not attracted to males.

"So [A.B.'s] testimony directly rebuts that. And if that is the defense that the Defense is putting before these jurors, then the State has a right to rebut that and show with other acts that his intent in these acts with [J.H.] were for his sexual gratification. And it goes to his motive as well. I think that is a proper purpose.

"The probative value in this case, because of the nature of the defense proposed by the Defense, is it's highly probative. I think in this case it will outweigh any potential for unfair prejudice than the Defense is going to put on a witness that will cast into doubt when [A.B.] says as, well, if there is substantial evidence that the crime occurred. \* \* \* I think it's proper for the jurors to hear that."

{¶ 22} Defense counsel again asked for a mistrial, citing the prejudice to his client in commencing trial prior to the court ruling on the Evid.R. 404(B) motion. The trial court denied the motion and A.B. took the stand to testify before the jury. His testimony was substantially the same as the testimony he gave during the motion hearing.

{¶ 23} After A.B. testified, Williams moved for acquittal pursuant to Crim.R. 29. The trial court dismissed Counts 6-12 (rape), 18-24 (unlawful sexual conduct with a minor), 32-36 (kidnapping), and 43-61 (gross sexual imposition).

{¶ 24} Terrance Gaither was the first defense witness to testify in front of the jury and his testimony was substantially the same as his testimony during the motion hearing.

{¶ 25} Antoine Abrams testified that he was a former student of Williams. He grew up with the Williams family, Williams was a father figure to him, and Williams helped

ensure that other neighborhood children stayed out of trouble. Abrams testified that Williams was a selfless role model and helped the Abrams family pay for field trips.

{¶ 26} Robert Moss testified that he sang in the men's choir with J.H. and Williams. Moss believed J.H. was a troubled teenager.

{¶ 27} Charles Bell testified that he knew Williams for 23 years and cut his hair. Williams took J.H. to Bell's home for haircuts on three or four occasions. Regina Williams testified that she was married to Williams, who often mentored troubled boys. She stated that she was often at home during the time-frame of the alleged abuse. She testified on cross-examination that she did not trust J.H. but did not believe that J.H. was a "bad kid."

{¶ 28} The jury returned a guilty verdict as to six counts of gross sexual imposition, seven counts of kidnapping, five counts of rape, and five counts of unlawful sexual conduct with a minor. The trial court subsequently sentenced Williams to 20 years in prison.

{¶ 29} On appeal, Williams raises six assignments of error (see appendix). In his first assignment of error, Williams sets forth the following proposition:

{¶ 30} "I. Appellant was denied his constitutional rights to a fair trial because the trial court erred by admitting highly prejudicial evidence and by not complying with Ohio Evidence Rule 403."

#### Standard of Review

{¶ 31} We review the admission of evidence under an abuse of discretion standard.

*State v. Mauer* (1984), 15 Ohio St.3d 239, 264, 473 N.E.2d 768.<sup>2</sup> “Abuse of discretion” connotes more than error of law or judgment; it implies that the court’s attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

#### Other Acts Evidence in Sexual Assault Cases

{¶ 32} The Ohio legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses, and has carefully limited the circumstances in which evidence of the defendant’s other sexual activity is admissible. *State v. Schaim*, 65 Ohio St.3d 51, 59, 1992-Ohio-31, 600 N.E.2d 661. As such, R.C. 2907.02(D), which governs the crime of rape, and R.C. 2907.05(E), which governs gross sexual imposition, both provide that “[e]vidence of specific instances of the defendant’s sexual activity, opinion evidence of the defendant’s sexual activity, and reputation evidence of the defendant’s sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant’s past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does

---

<sup>2</sup> The standard of review with regard to the admission of other acts evidence is currently pending before the Ohio Supreme Court. *State v. Morris*, Supreme Ct. Case No. 2010-1842. In *State v. Morris*, Medina App. No. 09CA0022-M, 2010-Ohio-5973, the Ninth District Court of Appeals determined that a de novo standard of review should apply to other acts evidence issues.

not outweigh its probative value.” Id.<sup>3</sup>

{¶ 33} Because of the severe social stigma attached to crimes of sexual assault and child molestation, evidence of the past sexually-related acts of a defendant poses a higher risk, on the whole, of influencing the jury to punish the defendant for the similar act rather than the charged act. *State v. Miley*, Richland App. Nos. 2005-CA-67 and 2006-CA-14, 2006-Ohio-4670, appeal not accepted, 112 Ohio St.3d 1420, 2006-Ohio-6712, 859 N.E.2d 558.

Ohio Evidence Rule 404(B) and R.C. 2945.59

{¶ 34} Pursuant to Evid.R. 404(B), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove” a defendant’s character as to criminal propensity. “It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Id.

{¶ 35} Rule 404(B) is codified in R.C. 2945.59, which provides that “[i]n any criminal case in which the defendant’s motive or intent, the absence of mistake or accident on his part, or the defendant’s scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant’s scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the

---

<sup>3</sup>No enumerated basis for admission applies to the case at bar other than the exceptions listed in R.C. 2945.59.

commission of another crime by the defendant.”<sup>4</sup>

{¶ 36} Because R.C. 2945.59 and Evid.R. 404(B) carve out exceptions to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict. *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682, paragraph one of the syllabus. Consequently, any analysis under this rule must begin with the assumption that the evidence the moving party wishes to admit is inadmissible, and that party must demonstrate its admissibility. But neither R.C. 2945.59 nor Evid.R. 404(B) “requires that the other act be ‘like’ or ‘similar’ to the crime charged, as long as the prior act tends to show one of the enumerated factors.” *State v. Crotts*, 104 Ohio St.3d 432, 435, 2004-Ohio-6550, 820 N.E.2d 302, citing *State v. Shedrick* (1991), 61 Ohio St.3d 331, 337, 574 N.E.2d 1065.

{¶ 37} Courts have long recognized the danger of admitting other acts evidence. In *United States v. Phillips* (1979), 599 F.2d 134, 136, the Sixth Circuit Court of Appeals stated as follows: “two concerns are expressed by the first sentence of Rule 404(b): (1) that the jury may convict a ‘bad man’ who deserves to be punished — not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes, he probably

---

<sup>4</sup>We note that the statute and the rule are not identical; R.C. 2945.59 predates the evidence rule and requires that the evidence be relevant to an issue that is material to the case. Evid.R. 404(B), on the other hand, does not require materiality, although materiality is generally required for evidence to be admissible. See Evid. R. 401 and 402.

committed the crime charged.” As cautioned by the Ohio Supreme Court in *State v. Lowe* (1994), 69 Ohio St.3d 527, 634 N.E.2d 616, “\* \* \* we therefore must be careful to recognize the distinction between evidence which shows that a defendant is the type of person who might commit a particular crime and evidence which shows that a defendant is the person who committed a particular crime.” *Id.* at 530. This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, as in the case at bar. See *Schaim* at 60.

{¶ 38} The United States Supreme Court has set forth several factors for courts to consider when determining whether evidence should be admitted pursuant to Evid.R. 404(B): “(1) the other crimes evidence must have a proper purpose, (2) the proffered evidence must be relevant, (3) its probative value must outweigh its potential for unfair prejudice, and (4) the court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted.” *State v. Gus*, Cuyahoga App. No. 85591, 2005-Ohio-6717, at ¶18, citing *Huddleston v. United States* (1988), 485 U.S. 681, 691, 108 S.Ct. 1496, 99 L.Ed.2d 771.

{¶ 39} Finally, pursuant to Evid.R. 403(A), even relevant evidence that is admissible under ordinary circumstances must be excluded if the probative value of the evidence is outweighed by the danger of unfair prejudice. *State v. Ben*, 185 Ohio App.3d 832, 2010-Ohio-238, 925 N.E.2d 1045, appeal not allowed by 125 Ohio St.3d 1450, 2010-Ohio-2510, 927 N.E.2d 1129, citing *State v. Chaney*, Seneca App. No. 13-05-12, 2006-Ohio-6489, at ¶24.

## Intent

{¶ 40} Although this court realizes that the issues surrounding the admission of evidence pursuant to Evid.R. 404(B) are vast, we limit our analysis to the instant case and, therefore, to an analysis regarding the admission of other acts to demonstrate the defendant's "intent" or "scheme, plan, or system."

{¶ 41} Pursuant to Evid.R. 404(B), other acts evidence may be admissible to prove an accused's intent in committing a crime.

{¶ 42} In *State v. Smith* (1990), 49 Ohio St.3d 137, 141, 551 N.E.2d 190, the Ohio Supreme Court explained that "[e]vidence of extrinsic acts may be used to prove intent or guilty knowledge when it is a genuine issue in a case. The acts should tend to prove that the accused understood the wrongful nature of his act by virtue of the fact that he committed prior or subsequent wrongful acts." *Id.* at 141. The *Smith* Court explained:

"It is a fundamental principle of criminal law that when an accused pleads not guilty to a charge which contains 'specific intent' as an element of the crime, he places intent squarely at issue and the state is required to prove this element beyond a reasonable doubt." *Id.*

{¶ 43} To be convicted of rape or gross sexual imposition by force or threat of force the state must prove that the defendant "purposely compel[led] the [victim] \* \* \* to submit by force or threat of force." R.C. 2907.02(A)(2) and 2907.05(A)(1). A person acts purposely "when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the

offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.” R.C. 2901.22(A).

{¶ 44} Generally, a defense of mere presence at the crime scene places the intent of the defendant at issue. See, e.g., *U. S. v. Hernandez-Guevara* (C.A.5, 1998), 162 F.3d 863, 870-71; *U. S. v. Moore* (C.A.8, 1996), 98 F.3d 347, 350. For example, in *State v. Ditzler* (Mar. 28, 2001), Lorain App. No. 00CA007604, the court found that evidence was properly admitted on the issue of the appellant’s intent in bringing the victim to a campground and plying him with alcohol and pornography with the purpose of committing forcible rape and gross sexual imposition. See, also, *State v. Wagner* (May 28, 1991), 12th App. No. CA90-07-049 (finding evidence of other acts admissible when appellant was charged with a violation of R.C. 2907.02(A)(2), which requires proof that he “purposely” compelled the victim to submit to sexual conduct by force or the threat of force. The court found that because the appellant pled not guilty and asserted the victim initiated any contact, he placed the question of intent at issue).

{¶ 45} Here, the trial court allowed A.B. to testify about his past sexual relationship with Williams finding that 1) the other acts evidence would show Williams’s intent was sexual gratification; 2) the defense included testimony that Williams was not attracted to males; 3) the state had a right to rebut testimony that Williams was not attracted to males through A.B.; 4) the evidence showed Williams’s motive in committing the acts against J.H.; 5) the probative value outweighed prejudice to Williams.

{¶ 46} We do not see how A.B.’s testimony could show “intent.” The state argues

that because the definition of sexual contact, which is an element of gross sexual imposition, includes “for the purpose of sexually arousing or gratifying either person,”<sup>5</sup> it carried the burden of proving that the sexual contact that occurred between Williams and J.H. was for such a purpose. Therefore, to prove that element, the state contends that A.B.’s testimony that Williams received sexual gratification from their sexual activity was introduced to show that Williams received sexual gratification from J.H. But we fail to see how Williams’s consensual sexual relationship with A.B. 12 years prior to the alleged abuse of J.H. demonstrates Williams’s purpose to achieve sexual gratification with J.H.

{¶ 47} We also note the trial court acted prematurely in allowing the other acts evidence into the state’s case-in-chief. Although defense counsel alluded to a possible defense that Williams was not attracted to males, the statements made by defense counsel during opening argument would not necessarily allow other acts testimony into the state’s case-in-chief. If the state had wanted to use A.B.’s testimony to rebut a claim that Williams was only interested in females, the rebuttal testimony would have had to come in during cross-examination of defense witnesses. Even then, we doubt it would have been admissible as it would be irrelevant. Evidence of homosexuality is not relevant to establish pedophilia. See *Crotts* at 434-435, citing *State v. Bates* (Minn.App. 1993), 507 N.W.2d 847, 852.

{¶ 48} Moreover, even if the state were able to successfully argue that A.B.’s

---

<sup>5</sup>R.C. 2907.01(B)

testimony was properly introduced to show intent, the young man's testimony was so prejudicial that it outweighed any possible probative benefit (see *infra*).

Scheme, Plan, or System

{¶ 49} While the trial court allowed A.B. to testify based on the “intent” exception, we also consider whether his testimony is admissible under the “scheme, plan, or system” exception as the state additionally argued for admissibility based on this exception. Specifically, the state argued that A.B.’s testimony was admissible because it tended to show Williams’s “scheme, plan, or system” to mentor young boys who lacked male role models and groom them to be his victims.

{¶ 50} In *State v. Curry* (1975), 43 Ohio St.2d 66, 68, 330 N.E.2d 720, the Ohio Supreme Court explained when other acts evidence is admissible pursuant to the “scheme, plan, or system” exception: “Evidence of a defendant’s scheme, plan, or system in doing an act is only relevant in two situations: (1) the other acts are part of one criminal transaction such that they are inextricably related to the charged crime, or (2) a common scheme or plan tends to prove the identity of the perpetrator.” *Id.* at 72-73; *Schaim* at 63, n. 11.

{¶ 51} Thus, there are *only* two situations in which other acts evidence is admissible to show a defendant’s “scheme, plan, or system”: (1) to show the background of the alleged crime or (2) to show identity.

{¶ 52} If evidence of a “scheme, plan, or system” is offered to show background, then it is inextricably related to the charged crime and 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* (1976), 48 Ohio St.2d 391, 403, 358 N.E.2d 623, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154, citing *Curry* at 73. Thus, extrinsic evidence is admissible to prove a defendant’s scheme, plan, or system when the evidence is either probative of a sequence of events leading up to the crime charged or preparatory of the crime charged. *State v. Nucklos*, 171 Ohio App.3d 38, 2007-Ohio-1025, 869 N.E.2d 674, affirmed by 121 Ohio St.3d 332, 2009-Ohio-792, 904 N.E.2d 512.

{¶ 53} In *Maple Hts. v. Boyd* (Feb. 18, 1999), Cuyahoga App. No. 73900, this court allowed other acts into evidence, namely that prior to the assault of the bank’s manager, the defendant was attempting to make a withdrawal from another individual’s savings account with an invalid power of attorney. This court held that the evidence of the defendant’s actions concerning the power of attorney explained the circumstances surrounding the alleged assault and formed part of the immediate background of that charge as it was inextricably related to the alleged criminal act. *Id.*

{¶ 54} If evidence is offered to show identity, then the proponent of the evidence is trying to prove the identity of the criminal with evidence of other acts committed by the defendant that are so similar to the present crime that a single person, the defendant, must have committed both crimes. This is also known as “modus operandi” or a criminal’s “behavioral footprint.” In order to qualify under this exception, identity must be a material issue in the trial. *Curry* at 72. “Identity is in issue when the fact of the crime

is open and evident but the perpetrator is unknown and the accused denies that he committed the crime.” *State v. Ogletree*, Cuyahoga App. No. 94512, 2011-Ohio-819, ¶36, appeal not allowed by 129 Ohio St.3d 1409, 2011-Ohio-3244, 949 N.E.2d 1004, citing *State v. Smith* (1992), 84 Ohio App.3d 647, 666, 617 N.E.2d 1160. The exception does not, however, extend to other acts committed in a similar way for an unrelated offense when identity is not at issue. See *State v. Eubank* (1979), 60 Ohio St.2d 183, 186, 398 N.E.2d 567; see, also, *State v. Thompson* (1981), 66 Ohio St.2d 496, 422 N.E.2d 855.

{¶ 55} In *State v. Bey*, 85 Ohio St.3d 487, 1999-Ohio-283, 709 N.E.2d 484, certiorari denied by (1999), 528 U.S. 1049, 120 S.Ct. 587, 145 L.Ed.2d 488, the Ohio Supreme Court affirmed the trial court’s decision allowing other acts evidence to show identity, finding that the other acts evidence established a “behavioral fingerprint” linking the appellant to the crime due to the common features. The Court noted that the deaths of the current and prior victims occurred under nearly identical circumstances: both victims were businessmen who were killed at their place of business, both died after being stabbed with a knife in the chest, both men had their trousers removed and their shoes were placed next to their bodies, and although both businesses were robbed, jewelry was left on each person. *Id.* at 491. The Court found that because the evidence demonstrated a similar method of operation, it was probative of identity. *Id.*

{¶ 56} This court is aware of a number of sexual assault cases from this district and others that have allowed other acts testimony to show scheme, plan, and system even

though identity was not at issue and the facts of the other acts evidence did not form the “immediate background” of the crime as charged. These cases, however, seemingly ignore the Ohio Supreme Court’s holding in *Curry*. See, e.g., *State v. Fortson*, Cuyahoga App. No. 92337, 2010-Ohio-2337, appeal not allowed by 127 Ohio St.3d 1447, 2010-Ohio-5762, 937 N.E.2d 1037; *State v. Williams*, Cuyahoga App. No. 92714, 2010-Ohio-70; *State v. Russell*, Cuyahoga App. No. 83699, 2009-Ohio-5031; *State v. Bess*, Cuyahoga App. No. 91560, 2009-Ohio-2032; *State v. Sharp*, Cuyahoga App. No. 84346, 2005-Ohio-390; *State v. Paige*, Cuyahoga App. No. 84574, 2004-Ohio-7029; *State v. Ervin*, Cuyahoga App. No. 80473, 2002-Ohio-4093; *State v. Cornell* (Nov. 27, 1991), Cuyahoga App. No. 59365, affirmed by (1993), 68 Ohio St.3d 1416, 624 N.E.2d 191.<sup>6</sup>

{¶ 57} Because we must follow precedent established by the Ohio Supreme Court, we are bound by the holding in *Curry*. Therefore, in order to be admissible, other acts evidence purporting to show a defendant’s common plan, scheme, or system must conform with *Curry*. Moreover, in cases that deal with sexual assault, the Ohio Supreme Court has carved out no exceptions based on a defendant’s filial relationship with the victim, a defendant’s propensity to “groom” his victim, or a defendant’s pattern of purchasing gifts for his victim. Therefore, these “schemes” may not be used to justify admission of other acts evidence unless they fall within the exceptions stated in *Curry* or

---

<sup>6</sup>We do note that in some of the above-cited cases, the other acts evidence was also permitted pursuant to other stated exceptions in Evid.R. 404(B), i.e., in *Ervin*, this court found that the other acts evidence was permitted to show a lack of accident or mistake.

another enumerated exception.

{¶ 58} In considering the case at bar, the state never claimed that the perpetrator's identity was at issue. If a crime occurred in this case, Williams was the perpetrator. Furthermore, the sexual acts with A.B. were not a background act that formed the foundation of the crime charged — they occurred more than a decade before the alleged abuse against J.H.; therefore, they were chronologically and factually separate occurrences.

{¶ 59} The evidence the state offered was not submitted to establish Williams as the person who had committed the acts of sexual abuse; rather the evidence was submitted for the purpose of showing that Williams had a character trait of molesting teenage boys and that he acted in conformity with his past behavior. See *Miley*, supra. The state's argument relies on the very inferential pattern that Evid.R. 404(B) prohibits; evidence that Williams previously molested a teenage boy was introduced only to compel the same inference — he did it before so he must have done it again. See *Williams*, supra at ¶68 (dissent).

{¶ 60} In reviewing the rest of the Evid.R. 404(B) exceptions, we see no other exception that applies to the case at bar. Therefore, the trial court improperly allowed A.B.'s testimony into evidence. The trial court also improperly allowed into evidence testimony from the social worker regarding Williams's past conviction stemming from his relationship with A.B.

#### Prejudicial Effect

{¶ 61} Next we look to what prejudicial effect the admission of A.B.'s testimony and the social worker's statements had on the outcome of Williams's trial. If the testimony did not prejudice Williams, then it is harmless error and he is not entitled to a reversal.

{¶ 62} Even if a court finds that the other acts evidence was offered for a valid purpose under Evid.R. 404(B), the court must still consider whether the evidence is substantially more prejudicial than probative; if so, then it must still be excluded because of its deleterious effects on an accused's right to a fair trial. See *State v. Matthews* (1984), 14 Ohio App.3d 440, 471 N.E.2d 849; Evid.R. 403(A). "Prejudice occurs if there is a reasonable possibility that the error might have contributed to the conviction." *State v. Basen* (Feb. 16, 1989), Cuyahoga App. No. 55001, citing *State v. Cowans* (1967), 10 Ohio St.2d 96, 104-105, 227 N.E.2d 201.

{¶ 63} The trial court's determination of whether admission of other acts is unduly prejudicial turns upon consideration of whether the evidence is offered for a proper purpose, whether it is relevant (could the jury reasonably conclude that the other act occurred and that the defendant was the actor), whether the probative value of evidence of the other acts substantially outweighs the potential for unfair prejudice, and whether the jury is instructed that the evidence is to be considered only for the proper purpose for which it was admitted. *Huddleston*, supra.

{¶ 64} There is no doubt that A.B.'s testimony coupled with the social worker's statements unfairly prejudiced Williams. Although we are cognizant that a defendant in

a case such as this may be convicted based solely on the victim's testimony, here, there was testimony that the victim was a troubled teenager and no physical evidence of sexual abuse was found. The case essentially hinged on the credibility of the witnesses. In cases such as these, there is a real risk that a jury will believe that if Williams did it once, he must have done it again. That is the danger cautioned of and protected against by Evid.R. 403 and 404. Therefore, the trial court erred in finding that the probative value of A.B.'s testimony outweighed any prejudicial effect.

{¶ 65} We are further troubled by the trial court's decision to wait until mid-trial to rule on the Evid.R. 404(B) motion. R.C. 2907.02(E) provides that "[p]rior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial." Although for good cause shown the evidentiary hearing may be held during trial, we think a more prudent course of action is for a trial court to hold the hearing before trial begins, as a decision prior to trial gives both parties a chance to adequately prepare. Here, the trial court's procedure in handling the state's motion further prejudiced Williams, especially since the hearing was spaced out between the testimony of several witnesses.

{¶ 66} The first assignment of error is sustained.

#### Sufficiency of the Evidence

{¶ 67} In the third assignment of error, Williams claims "[t]he trial court erred in

failing to grant appellant's motion for judgment of acquittal on all charges because the evidence presented was not legally sufficient to support a conviction."

{¶ 68} In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, the Supreme Court of Ohio held as follows:

{¶ 69} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶ 70} In *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶1, the Ohio Supreme Court held that in evaluating the sufficiency of the evidence to support an appellant's conviction, a reviewing court must consider all of the testimony that was before the trial court, whether or not it was properly admitted. *Id.* The *Brewer* Court held "where the evidence offered by the State and admitted by the trial court — whether erroneously or not — would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial." *Id.*, quoting *Lockhart v. Nelson* (1988), 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265.

{¶ 71} In this case, after viewing the admitted evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. For purposes of evaluating the

sufficiency of the evidence, we note that, if believed, all of the testimony that was before the trier of fact, whether or not it was properly admitted, would convince the average mind of Williams's guilt beyond a reasonable doubt. Therefore, while we find that a reversal is necessary based upon trial errors, we do not find that a discharge is warranted based upon insufficient evidence. Accordingly, we overrule Williams's third assignment of error.

{¶ 72} The remaining assignments of error are moot. See App.R. 12(A)(1)(c).

{¶ 73} Accordingly, the case is remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

LARRY A. JONES, JUDGE

PATRICIA A. BLACKMON, J.,  
MARY J. BOYLE, J.,  
COLLEEN CONWAY COONEY, J.,  
MARY EILEEN KILBANE, A.J.,  
KENNETH A. ROCCO, J.,  
MELODY J. STEWART, J., and  
JAMES J. SWEENEY, J., CONCUR

SEAN C. GALLAGHER, J., CONCURS WITH

A SEPARATE CONCURRING OPINION IN WHICH  
KENNETH A. ROCCO, J., ALSO CONCURS

JAMES J. SWEENEY, J., CONCURS IN PART WITH  
A SEPARATE CONCURRING OPINION IN WHICH  
EILEEN A. GALLAGHER, J., and  
KATHLEEN ANN KEOUGH, J., CONCUR

FRANK D. CELEBREZZE, JR., J., DISSENTS WITH A  
SEPARATE DISSENTING OPINION

SEAN C. GALLAGHER, J., CONCURRING:

{¶ 74} I concur fully with the judgment and analysis of the majority with respect to the application of Evid.R. 404(B) to the facts in this case. I write separately to address my concern about the reference to R.C. 2945.59 in the analysis of “other acts” evidence by the majority. I question the reference to R.C. 2945.59, not only in this case, but in other Ohio courts addressing Evid.R. 404(B) issues in light of the adoption of the Ohio Rules of Evidence.

{¶ 75} Evid.R. 102 outlines the purpose of evidentiary rules like 404(B).

{¶ 76} “The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. The principles of the common law of Ohio shall supplement the provisions of these rules, and the rules shall be construed to state the principles of the common law of Ohio unless the rule clearly indicates that a change is intended. These rules shall not supersede substantive statutory provisions.” Evid.R. 102.

{¶ 77} With the adoption of the Ohio Rules of Evidence, effective July 1, 1980, the

rules effectively trumped the existing statutory mandates in areas of procedure or the admission of evidence that codified the common law. Arguably, only those statutes that mandated a substantive statutory procedure remained viable. Despite this change, Ohio courts continued to cite to R.C. 2945.59 when dealing with issues involving Evid.R. 404(B).

{¶ 78} R.C. 2945.59, reads as follows:

{¶ 79} “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.”

{¶ 80} This statute, enacted in the Code of Criminal Procedure of Ohio in 1929, is merely expressive of the common law and is a rule of evidence and not a rule of substantive law. *State v. Pack* (1968), 18 Ohio App.2d 76, 246 N.E.2d 912, citing *Clyne v. State* (1931), 123 Ohio St. 234, 174 N.E. 767.

{¶ 81} Evid.R. 404(B) states as follows:

{¶ 82} “Other crimes, wrongs or acts. 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. 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.”

{¶ 83} The Ohio Supreme Court has often cited to both the rule and the statute, suggesting it is unconcerned about the existence of both as they simply codify the common law previously in existence. Nevertheless, Section 5(B), Article IV, Ohio Constitution, vests the supreme court with exclusive authority over the rule-making provisions for Ohio courts.

{¶ 84} Section 5(B), Article IV, Ohio Constitution, makes this point clear.

{¶ 85} “The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”

{¶ 86} While there may not be much of a debate over whether R.C. 2945.59 is in conflict with Evid.R. 404(B), in my view, Evid.R. 404(B) is the controlling law on “other acts” evidence. At some point, the Supreme Court of Ohio may want to assess the viability of statutes like R.C. 2945.59 in an effort to provide clarity by keeping future

reviews to one area of law.

JAMES J. SWEENEY, J., CONCURRING:

{¶ 87} Although I concur with the judgment, I only join in some of the reasons articulated by the majority. Specifically, with regard to the first assignment of error, concerning the admission of evidence pursuant to Evid.R. 404(B), I believe that the other acts evidence was probative and potentially admissible as proof of defendant's intent. However, I agree that such evidence, if admissible, would have been in rebuttal of evidence placing defendant's intent in issue. Even though defendant's counsel suggested that the evidence would not establish the requisite intent during opening arguments, I would agree it was error to allow the State to introduce such inflammatory other acts evidence during its case-in-chief. I would otherwise concur with the reasoning of the majority as to the first assignment of error.

FRANK D. CELEBREZZE, JR., J., DISSENTING:

{¶ 88} I respectfully dissent from the majority's conclusion that the other acts evidence presented to the jury through the testimony of A.B. was not admissible pursuant to Evid.R. 404(B) and R.C. 2945.59. In my view, the state's presentation of appellant's purposeful dealings and subsequent manipulation of his position of trust with the young boys and their families established his modus operandi and common scheme, plan, and system in this matter.

{¶ 89} Over the course of appellant's trial, the state presented evidence that

appellant's relationships with J.H. and A.B. began while the boys were between the ages of 14 and 16 years old. The record reflects that appellant forged a bond with each of the boys while he occupied a position of trust and authority — as A.B.'s high school teacher and as J.H.'s mentor. The testimony adduced from J.H. and A.B. indicates that, over time, each of the boys developed strong feelings for appellant based, in part, on the lack of a strong father figure in their lives. Subsequently, appellant used his position of trust and authority to instigate sexual activity with these young boys, who were led to believe that such conduct was normal.

{¶ 90} In my view, appellant's conduct constituted a unique, identifiable plan of criminal activity that is applicable to the crime with which appellant is now charged. The fact that appellant's identity was not in question in this matter should not provide him with a legal shield when it was apparent that the scheme, plan, or system conceived by appellant required him to befriend J.H. and A.B. over a fairly substantial course of time before using his position of trust and authority to initiate sexual activity.

{¶ 91} Therefore, I would apply the analysis set forth in *State v. Fortson*, Cuyahoga App. No. 92337, 2010-Ohio-2337, ¶32 (holding that evidence of a correction officer's past sexual conduct with inmates established a modus operandi that shared common features with the crimes for which defendant was presently charged, despite defendant's identity not being an issue); *State v. Ervin*, Cuyahoga App. No. 80473, 2002-Ohio-4093, ¶51 ("evidence of defendant's previous sexual advances toward [young girls], both eight years old at the time of the abuse, was presented to demonstrate defendant's pattern of

engaging in sexual intercourse with young girls in his family while occupying a position of trust and authority.”); *State v. Paige*, Cuyahoga App. No. 84574, 2004-Ohio-7029, ¶15 (holding that testimony of the defendant’s daughters was properly “used to demonstrate a pattern of sexual abuse with young female family members” and the defendant’s practice of purchasing “gifts for the victims if they engaged in sexual conduct with him”); *State v. Russell*, Cuyahoga App. No. 83699, 2004-Ohio-5031, ¶37 (holding that the “state proved appellant chose female victims of a filial position to him who were under the age of twelve. Appellant began touching his victims in a progressively sexual manner. When he became sure he could do so, he then sexually gratified himself, also in a progressive manner.”); see, also, *State v. Williams*, Cuyahoga App. No. 92714, 2010-Ohio-70; *State v. Bess*, Cuyahoga App. No. 91560, 2009-Ohio-2032; *State v. Sharp*, Cuyahoga App. No. 84346, 2005-Ohio-390; *State v. Cornell* (Nov. 27, 1991), Cuyahoga App. No. 59365, affirmed by (1993), 68 Ohio St.3d 1416, 624 N.E.2d 191; *State v. Ristich*, Summit App. No. 21701, 2004-Ohio-3086, ¶16.

{¶ 92} Accordingly, I believe that an accurate interpretation of Evid.R. 404(B) does not require the reversal of the conviction in the instant case. I would, therefore, affirm appellant’s convictions.

#### APPENDIX

“II. Appellant was denied his federal and state due process rights to notice because he was tried for offenses not contained in the indictment and the indictment did not

charge him with sufficient specificity.

“IV. The verdict was against the manifest weight of the evidence.

“V. The court abused its discretion and committed cumulative errors that violated appellant’s constitutional rights to a fair trial and due process.

“VI. Appellant was denied his constitutional right as guaranteed by the United States and Ohio Constitutions to effective assistance of counsel when his attorney failed to timely object to hearsay testimony and failed to move for a mistrial.”