

ORIGINAL

NO. 2011-2094

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

MERIT BRIEF OF APPELLANT

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INTRODUCTION AND SUMMARY

The State requests that this Honorable Court hold that the admission of evidence is governed solely by the Ohio Rules of Evidence. Pre-1980 cases that mandate departures from the clear language of these rules are no longer valid in light of this Court's exclusive authority to promulgate rules governing practice and procedure in courts of this state.

Courts across Ohio continue to refer to R.C. 2945.59 and Evid.R. 404(B) interchangeably in determining the admissibility of other acts evidence. In the overwhelming majority of cases, this blurring of the lines is not outcome-determinative because the statute and the rule express the same general requirements and utilize similar language. This case, however, touches upon the one area in which some courts have mistakenly relied upon the absence of some terms in the statute to restrict the interpretation of the subsequent and more expansive rule.

R.C. 2945.59, effective October 1, 1953, does not refer to identity as a permissible basis for the introduction of other acts evidence. Identity is merely a possible method by which the State may introduce evidence to show the defendant's scheme, plan, or system. In 1980, however, this Court adopted the Ohio Rules of Evidence. Evid.R. 404(B) explicitly recognizes identity as an independent basis for admission. But rather than viewing this inclusion of an additional term as superseding the older statute, the Eighth District instead has looked backwards to the statute to hold that identity continues to function merely as a prerequisite to

plan under the rule. Instead, the court held that the State could not offer other acts evidence to show plan because identity was not at issue in the case. This Court should reverse the Eighth District's reliance upon a pre-1980 decision interpreting the statute and hold that the State may introduce other acts evidence to show a defendant's plan regardless of whether identity is at issue in the case.

The State also submits that the other acts evidence in this case is admissible to show the defendant's intent. Prior acts of sexual abuse committed against a comparable victim are relevant because they tend to establish the intent to receive sexual gratification with a similar subsequent victim. In rejecting this basis for admission, the Eighth District erroneously relied on facts and characterizations from outside the record in an attempt to distinguish what it referred to as the "consensual sexual relationship" with the prior victim from the "pedophilia" involved in the charged offenses. *State v. Williams*, 8th Dist. No. 94965, 2011-Ohio-5650, ¶¶ 46-47. Where the intent to receive such gratification is a prima facie element of the statute, the State may introduce other acts evidence tending to prove that element regardless of whether the acts differ in some details.

STATEMENT OF THE CASE AND RELEVANT FACTS

On Jun 16, 2009, the Cuyahoga County Grand Jury returned a 61-count indictment against Defendant-Appellee Van Williams. The indictment included 12 counts of Kidnapping under R.C. 2905.01(A)(4), 12 counts of Rape under R.C. 2907.02(A)(2), 12 counts of Unlawful Sexual Conduct with a Minor under R.C. 2907.04(A), 24 counts of Gross Sexual Imposition under R.C. 2907.05(A)(1), and 1

count of Intimidation of Crime Victim or Witness under R.C. 2921.04(A). All counts stemmed from a 6-month period between November 2008 and April 2009 during which Williams committed repeated acts of sexual abuse against a minor boy, J.H., when J.H. was 14 and 15 years old. A jury convicted Williams 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. On April 1, 2010, the trial court imposed a prison sentence of 20 years.

Williams 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. (Tr. 61). Williams frequently brought J.H. back to his house for long periods of time during which Williams later told J.H.'s grandmother that J.H. was doing various chores. (Tr. 62-63). Williams took J.H. to the movies and constantly gave him gifts such as clothing, video games, a guitar, and money. (Tr. 63, 208). Williams became someone J.H. completely trusted and functioned as a surrogate father-figure to him. (Tr. 162, 209).

Williams began sexually abusing J.H. when J.H. was 14 years old. Williams brought J.H. to the upstairs area of his house, where Williams then gave J.H. a back massage before moving to touch J.H.'s legs and groin. (Tr. 209-212). Williams instructed J.H. not to tell anyone about the incident because Williams could go to jail, statements that stunned and frightened J.H. into compliance. (Tr. 212, 221). J.H. did not give Williams permission to touch him in any of these encounters and did not understand what was going on because of his own sexual inexperience. (Tr.

212, 215). J.H. believed, however, that Williams was trying to make him feel good by touching him. (Tr. 215-216).

Williams then escalated the abuse to forced anal sex in which he pushed J.H. over, pulled his pants down, engaged in intercourse, and then wiped J.H.'s behind with a cold rag. (Tr. 218-221). 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." (Tr. 226). J.H. continued not to resist Williams because he was afraid that Williams would try to hurt him if he did. (Tr. 248). When J.H. begged Williams to stop the abuse before J.H.'s fifteenth birthday, Williams agreed, only to continue raping J.H. after his birthday had passed. (Tr. 230, 233). J.H. was confused as to whether the acts Williams was performing on him were something that boys were supposed to do. (Tr. 235). In total, Williams engaged in sexual acts with J.H. on 12 separate occasions. (Tr. 384). These incidents continued for a period of roughly six months until J.H. disclosed the abuse to a guidance counselor at his school. (Tr. 384, 107).

Shawana Cornell, a sexual abuse intake social worker for the Cuyahoga County Department of Children and Family Services, contacted Williams as part of her follow-up investigation into J.H.'s allegations. (Tr. 277). Williams told Cornell that another boy had accused him of this same conduct 12 years earlier and that he had pleaded guilty to misdemeanor assault in that instance. (Tr. 291). Williams denied ever having sexual contact with J.H. and stated that J.H. was "manipulative," "had big mood swings," and was going "through this phase where

everything was gay.” (Tr. 294-295). Williams further told Cornell that he was sexually attracted only to women. (Tr. 295).

At trial, Williams’ strategy was to discredit J.H. by emphasizing the lateness of his disclosure and raising the issue of J.H.’s own sexual orientation. Williams’ defense counsel argued in opening statements that J.H. had a “penchant for pornography,” and that “he may be confused about his sexual preference. Mr. Williams is not.” (Tr. 48). Counsel attempted to impeach J.H.’s testimony on cross-examination with his previous failure to come forward and disclose the abuse. (Tr. 256, 268, 274). Counsel also asked whether J.H. had ever been involved in sexual conduct with other male and female children, and whether he looked at pornography “every chance that you thought that you could get away with it.” (Tr. 258, 263). Following J.H.’s testimony, the trial court decided to permit the introduction of the other acts testimony.

Prior to trial, the State had filed a Motion to Admit Evidence Pursuant to Evid.R. 404(B) regarding the testimony of A.B., the victim in the prior sexual assault case to which Williams had pleaded guilty. A.B. was 16 years old at the time of the abuse and was without any male role model in his life. (Tr. 391-392). A.B. had met Williams while participating as a member of the high school swim team that Williams coached at the time. (Tr. 390). While on the swim team, A.B. spent a great deal of time with Williams and developed a trusting and confiding relationship with him by discussing A.B.’s life at home. (Tr. 394-395). Williams began sexually abusing A.B. two or three times a week, performing mutual

masturbation and oral sex on A.B. resulting in mutual sexual gratification. (Tr. 397-398). The abuse lasted for the duration of the school year. (Tr. 395). A.B. eventually transferred to a different school and disclosed the abuse to a tutor. (Tr. 399-400).

The trial court granted the State's motion and allowed A.B.'s testimony to show Williams' intent and to rebut Williams' claims that he did not commit the acts in question because he was not attracted to underage boys:

Intent is the strongest one. The sexual gratification of the Defendant, 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 Defendant 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 Defendant, 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.

(Tr. 363-365).¹ The trial court gave the requisite limiting instruction to the jury prior to A.B.'s testimony, and again during the final jury charge, that they could not consider the evidence to prove Williams' character to show that he acted in conformity therewith. (Tr. 387-388, 656-657).

On direct appeal, the Eighth District reversed, finding that evidence of Williams' consensual homosexual relationship with A.B. was not relevant to show Williams' intent to receive gratification through pedophilia. *State v. Williams*, 8th Dist. No. 94965, 2011-Ohio-5650, ¶¶ 46-47. The Eighth District further held that the State could not offer other acts evidence to show Williams' plan unless the identity of the perpetrator was at issue in the case. *Williams* at ¶¶ 49-59.

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 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:

¹ Because the trial court granted the State's Motion to Admit Evidence on grounds of intent, it did not reach the alternative basis for admission under Evid.R. 404(B) offered in the State's motion that the evidence was also admissible because it tended to show Williams' plan. The Eighth District nonetheless considered this basis for admissibility in reversing. *Williams* at ¶¶ 49-59. The issue is thus properly before this Court in its discretionary review because the issue has been raised and briefed before both the trial court and the court of appeals. *Buckeye Fed. S. & L. Assn. v. Guirlinger*, 62 Ohio St.3d 312, 316, 581 N.E.2d 1352 (1991).

“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 other acts do not need to be identical or even similar to the crime charged, but must only “tend to show” certain things. *State v. Jamison*, 49 Ohio St.3d 182, 187, 552 N.E.2d 180 (1990). 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, ¶ 66.

An abuse of discretion connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). This requires the reviewing court to find not merely a difference in opinion; the result must be so palpably and grossly violative of fact and logic that it demonstrates not the exercise of reason but rather of passion or bias. *State v. Jenkins*, 15 Ohio St.3d 164, 222, 473 N.E.2d 264 (1984).

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. See also *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶¶ 19-20 (rejecting appellate court's assertion that other acts evidence was inadmissible to show intent because intent was immaterial to whether the defendant committed gross sexual imposition; presence of a sexual-motivation specification required the State to prove a specific intent). Because the defendant has no burden of proof in a criminal trial, the State bears the burden of proving each and every element of the offense by proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

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.” Both of these statutes therefore require an element of specific intent to cause a certain result. See *State v. Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111, 953 N.E.2d 816, ¶ 25 (“The [GSI] statute requires a specific intent behind the touching – the touching must be intended to achieve sexual arousal or gratification. Since there is a specific intent motivating the touching, it follows that the act of touching must be intentional”).

Federal courts likewise permit the testimony of prior sexual assault victims to demonstrate a defendant's intent to achieve sexual gratification. See *United States v. Sebolt*, 460 F.3d 910, 917 (7th Cir.2006) ("Prior instances of sexual misconduct with a child victim may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the sexual exploitation of children. * * * It also may serve to identify the defendant to the crime"); *Bower v. Curtis*, 118 Fed.Appx. 901, 906-907 (6th Cir.2004) (other acts evidence of uncharged sex acts occurring during the same time frame as charged offenses of sexual conduct with two minors was admissible because it "tended to show that [defendant's] intent and motivation were sexual gratification and arousal"); *United States v. Breitweiser*, 357 F.3d 1249, 1254 (11th Cir.2004) (evidence that defendant had previously fondled two 13-year old girls was admissible to show defendant's motive, intent, knowledge, plan, preparation, and lack of mistake or accident in his trial for abusive sexual contact with a minor); *United States v. Hadley*, 918 F.2d 848, 851 (9th Cir.1990) (testimony that defendant repeatedly isolated student victims and performed sexual acts on them was admissible as evidence of intent).

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

Although the Eighth District agreed that Williams' intent was at issue in this case, it nevertheless rejected the State's argument that the other acts evidence tended to show that intent. *Williams* at ¶¶ 43-47. The Eighth District held that the other acts evidence of the sexual gratification Williams received from A.B. was not

relevant to Williams' intent to receive sexual gratification in the charged offenses against J.H. because the sexual conduct with A.B. was consensual and was not pedophilic in nature. "Evidence of homosexuality is not relevant to establish pedophilia." *Williams* at ¶ 47, citing *Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 12.

Williams' previous sexual abuse of A.B. was admissible because it tended to establish his intent to achieve similar gratification through his abuse of J.H. A.B. stated that the sexual abuse between him and Williams resulted in mutual sexual gratification. (Tr. 397-398). The trial court likewise found that the evidence tended to show that the abuse of J.H. was committed for the purpose of Williams' own sexual gratification. Because this was an element of both the rape and GSI counts in the indictment, it was necessary for the State to prove Williams' specific intent in its case-in-chief. Direct testimony that Williams had received sexual gratification through the abuse of a 16-year old boy was relevant and admissible because it tended to show that Williams received such gratification through the abuse of 14 to 15-year old J.H.

In rejecting the evidentiary link between the two courses of abuse, the Eighth District erroneously relied on facts and representations outside the record. The trial court did not find, and the State did not argue, that the evidence was admissible to generally show that Williams was a pedophile. (Tr. 358-360). The record reflects that the trial court admitted the evidence to show Williams' intent to receive sexual gratification through his abuse of J.H. (Tr. 363-365). The Eighth

District's approach conflated evidence of Williams' specific intention in past instances of abuse with evidence of his general character to find the evidence outside the scope of Evid.R. 404(B). This generalized shift from specific instances to propensities would have been fatal to the introduction of any other acts evidence. This is not the proper standard reviewing the admission of other acts evidence on appeal. The lower court erred by expanding the range of inferences beyond either that which the State argued or the trial court allowed as a permissible basis for the introduction of the evidence.

Moreover, the purported factual distinctions that the Eighth District attempted to draw in this case are wrong. First, the Eighth District's opinion mischaracterizes Williams' abuse of J.H. as pedophilia, which is properly defined as "sexual activity with a prepubescent child (generally age 13 years or younger)." *United States v. Pritchard*, 392 Fed.Appx. 433, 442-443 (6th Cir.2010), 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 at 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., less than two years younger than A.B. when the abuse began. *Williams* at ¶¶ 46-47. This distinction was based on the Eighth District's misunderstanding of what constitutes pedophilia, which neither course of abuse was.

The Eighth District's characterization of Williams' abuse of A.B. as a "consensual sexual relationship" is also inaccurate. *Williams* at ¶ 46. Williams pleaded guilty to Assault in violation of R.C. 2903.13(A), a misdemeanor of the first degree, for having a sexual relationship with a 16-year old student over whom he had a position of trust and authority. A.B. also testified that he was in fear of Williams after Williams grabbed his shoulder when A.B. announced his intention to transfer to a different high school. (Tr. 401-402). A.B.'s testimony that Williams' intent was that of mutual gratification is consistent with J.H.'s stated belief that Williams was touching him to make him feel good. (Tr. 215-216). Though the specific sexual acts differ in each case, those differences are not relevant to the issue of intent to receive sexual gratification where Williams received such gratification through every sexual act. "[T]he fact that the [other] acts differ in some detail from the charged offenses does not affect the admissibility of the other-acts evidence. Such differences go to weight, not admissibility." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 115.

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

Evidence that tended to show Williams' intent was properly admissible in the State's case-in-chief to show an essential element of the GSI and rape charges. *Smith*, 49 Ohio St.3d at 141, 551 N.E.2d 190. Even if the other acts evidence were not admissible in a prima facie case for GSI/rape, however, the evidence was admissible in this case to show Williams' intent where Williams placed his intent at issue through his own self-serving statements and his defense strategy at trial.

Two witnesses provided direct evidence of Williams placing his intent at issue in this case. Williams told J.H. during one of the sexual assaults that Williams was doing this to him because “[he] was not getting any from his wife.” (Tr. 226). Williams further told Shawana Cornell, the social worker who contacted Williams after J.H. came forward, that J.H.’s accusations were false and that Williams was attracted only to adult women. (Tr. 295). Williams also personally raised the issue of J.H.’s credibility and his sexual orientation, telling Cornell that J.H. was “manipulative,” “had big mood swings,” and was going “through this phase where everything was gay.” (Tr. 294-295).

These self-serving statements created a factual dispute as to Williams’ intent, and directly attacked the credibility of J.H. as a witness. A.B.’s testimony was therefore relevant because it rebutted Williams’ assertion that he could not have abused J.H. because he was attracted only to adult females. A.B.’s testimony was also probative as to the truthfulness of J.H.’s testimony. Other acts are admissible under Evid.R. 404(B) to rehabilitate the credibility of a witness where “[t]he testimony tended to make it more believable that the witness spoke truthfully when testifying * * *.” *State v. McNeil*, 83 Ohio St.3d 438,-442, 1998-Ohio-293, 700 N.E.2d 596.

Defense counsel also opened the door to the admission of this testimony at trial. During opening statements, Williams’ defense counsel argued that J.H. had a “penchant for pornography,” and that “he may be confused about his sexual preference. Mr. Williams is not.” (Tr. 48). Although opening statements are not

evidence, this Court has recognized that where the defendant chooses to attack a victim's credibility during opening statements, such a strategy opens the door to the State's presentation of rehabilitative evidence in its case-in-chief. See *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, ¶ 44 (expert testimony regarding battered-woman syndrome is admissible where the victim's credibility is attacked in opening; such testimony is relevant to the victim's credibility by explaining delays in reporting the abuse); *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶¶ 55-64 (withdrawn guilty plea is inadmissible at trial unless defense counsel opens the door to it in opening statements); *State v. Hill*, 75 Ohio St.3d 195, 202, 661 N.E.2d 1068 (1996) (defense counsel's mention of character evidence in opening statements is one method of opening the door).

**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.**

1. Evid.R. 404(B) supersedes R.C. 2945.59 as the procedural law governing the admissibility of other acts evidence.

The Modern Courts Amendment to the Ohio Constitution vests this Honorable Court with exclusive authority to "prescribe rules governing practice and procedure in all courts of the state." *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270, ¶ 2, citing Ohio Constitution, Article IV, Section 5(B). This same section further states that "[a]ll laws in conflict with such rules

shall be of no further force or effect after such rules have taken effect.” Article IV, Section 5(B). This Court has “carefully guarded [its] rule-making authority against legislative attempts to influence courtroom practice and procedure.” *Havel* at ¶ 40 (McGee Brown, J., dissenting).

In construing the Modern Courts Amendment, this Court has distinguished between those rules relating to matters of procedure and those that abridge, enlarge, or modify any substantive right. *Havel* at ¶ 2. Only statutes that affect a substantive right remain viable following this Court’s promulgation of rules in a given area. *Id.*; see also *State v. Williams*, 8th Dist. No. 94965, 2011-Ohio-5650, ¶ 77 (Gallagher, J., concurring). This principle is codified in Evid.R. 102, which provides in part:

“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.”

This Court’s adoption of the Ohio Rules of Evidence in 1980 therefore supersedes all pre-existing statutes in the areas of procedure or evidence that merely codify the common law.

R.C. 2945.59 “is merely expressive of the common law and is a rule of evidence and not a rule of substantive law.” *State v. Pack*, 18 Ohio App.2d 76, 82, 246 N.E.2d 912 (2d Dist.1968), citing *Clyne v. State*, 123 Ohio St. 234, 236, 174 N.E. 767 (1931). As such, Evid.R. 404(B) supersedes R.C. 2945.59 following this Court’s adoption of the rule in 1980. Ohio appellate courts – including the Eighth District –

have repeatedly recognized that Evid.R. 404(B) prevails in the event of any conflict between the statute and the rule.²

As a result of this change in the law governing other acts evidence, “cases * * * decided prior to the enactment of the Ohio Rules of Evidence in 1980 * * * are not necessarily controlling in light of Evid.R. 404(B).” *State v. Spradling*, 12th Dist. No. 81-07-0059, 1982 WL 6092, *3 (Mar. 31, 1982). Despite this change, Ohio courts continue to cite R.C. 2945.59 interchangeably with Evid.R. 404(B) when applying the law of other acts evidence. *Williams* at ¶ 77 (Gallagher, J., concurring).

In the overwhelming majority of cases dealing with the introduction of other acts evidence, this is a distinction without a difference. Ohio courts generally resolve any issue arising from a difference in language between the statute and rule by holding the two are to be construed together. See *State v. Broom*, 40 Ohio St.3d 277, 281, 533 N.E.2d 682 (1988) (“The rule is in accord with R.C. 2945.59”). The

² See *State v. Horsley*, 10th Dist. No. 05AP-350, 2006 WL 648849, ¶ 22 (“Neither the statute nor the rule confers a substantive right. Therefore, were there a conflict between the statute and the rule, the rule would prevail”); *State v. Brown*, 2d Dist. No. 17343, 1999 WL 301479, *2 (May 14, 1999) (“Under the circumstances of the case before us, there does not appear to be any meaningful conflict between R.C. 2945.59 and Evid.R. 404(B). If there were, Evid.R. 404(B) would presumably prevail * * * ”); *State v. Jones*, 8th Dist. No. 61279, 1992 WL 369257, *4 (“evidence of other bad acts is now governed by [Evid.R. 404(B)] and, to the extent that R.C. 2945.59 conflicts with [Evid.R. 404(B)], the rule prevails”); *State v. Corl*, 5th Dist. No. 87-CA-6, 1987 WL 25303, *5 (Milligan, J., concurring) (“Initially, analysis of admissibility of the other acts testimony should begin with Evid.R. 404(B), not R.C. 2945.59. See Evid.R. 102 and Staff Note thereto. Rule 404(B) supercedes R.C. 2945.59 (“similar acts” statute)”).

prosecution's use of other acts evidence in this case, however, lies squarely upon the one fault-line where the change in language from the statute to the rule is outcome-determinative. Where the State has evidence that tends to show a defendant's plan, but identity is not at issue in the case, the introduction of such evidence is prohibited under R.C. 2945.59 but permitted under Evid.R. 404(B).

2. The requirement of *State v. Curry* that identity must be at issue in a case before the State may introduce other acts evidence tending to show the defendant's plan is no longer valid.

In reversing, the Eighth District relied on this Court's decision in *State v. Curry*, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975) for the use of a limiting framework as to when other acts evidence may be admitted. Because *Curry* pre-dated this Court's adoption of Evid.R. 404(B), *Curry's* holding was based exclusively on R.C. 2945.59, which provided:

'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.'

Curry interpreted this statute to require that at least one of two prerequisite factual situations must have been satisfied before the State could introduce other acts evidence under the "scheme, plan, or system" prong of R.C. 2945.59. First, the evidence was admissible in "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.” *Curry* at 73. Second, other acts evidence was also admissible in certain cases to show the identity of the perpetrator by demonstrating that the defendant had committed similar crimes in the past. *Id.*

R.C. 2945.59 therefore does not recognize proof of identity as an independent purpose for which other acts evidence may be introduced.³ 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.” *Curry* at 73. If the evidence did not fall under one of the two enumerated methods, it was not admissible. Identity was not itself an independent justification for the introduction of evidence, but rather was a means by which the State could use to prove something else – namely, the defendant’s scheme, plan, or system.

This limited use of other acts evidence to prove identity is no longer true following this Court’s promulgation of the Ohio Rules of Evidence in 1980. Evid.R. 404(B), now the governing law in this area, provides:

“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.”

³ 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”); *State v. Corl*, 5th Dist. No. 87-CA-6, 1987 WL 25303, *5 (Milligan, J., concurring) (“[T]he Rule and statute do not contain the same terminology. For example, the Rule (but not the statute) contains the term “identity”).

Evid.R. 404(B) therefore severs identity from plan and recognizes it as a separate basis for the admission of other acts evidence. Following the promulgation of this rule, this Court now adheres to a new two-part framework to determine when other acts evidence is admissible to prove identity: The evidence may be admissible 1) to show the immediate background of the crime, or 2) to establish the defendant's modus operandi by providing a behavioral fingerprint for the crime. *State v. Lowe*, 69 Ohio St.3d 527, 531, 634 N.E.2d 616 (1994). *Lowe* thus establishes independent criteria for the admissibility of other acts evidence under the identity exception, but provides for no prerequisites for the admissibility of other acts evidence to show plan.

This distinction is outcome-determinative in this case because the State has evidence that tends to show Williams' plan to groom specific types of victims by first isolating and then repeatedly sexually abusing them. Identity, however, is not at issue under *Curry* because Williams' plea of not guilty requires the State to prove the fact of the crime itself.⁴ The Eighth District's reversal relies upon *Curry* for the

⁴ The State is not arguing in the present appeal that the other acts evidence is admissible to show Williams' identity because the State has not argued that issue to either the trial court or to the Eighth District. In the future, however, this Court may wish to examine the viability of *Curry*'s holding that other acts evidence is not admissible to show identity where the fact of the crime itself is not open and obvious because the identity of the perpetrator is not considered to be at issue. *Curry*, 43 Ohio St.2d at 73. It is a fundamental principle of criminal law that a defendant has no burden of proof in a criminal trial. By entering a plea of not guilty to the indictment, the defendant places the burden on the State to prove each and every element of the offense by proof beyond a reasonable doubt. *Winship*, 397 U.S. at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368. This includes a requirement that the State prove the identity of the perpetrator. *State v. Cook*, 65 Ohio St.3d 516, 526, 605 N.E.2d 70 (1992).

proposition that the State cannot introduce other acts evidence to show a defendant's plan unless either identity is at issue, or the other acts form the immediate background of the charged offense. *Williams* at ¶ 54. Such a requirement is now precluded under the plain language of Evid.R. 404(B) listing plan and identity as separate bases for admission.

3. *Curry's linkage between plan and identity is contrary to the plain language of Evid.R. 404(B).*

Evid.R. 404(B) provides: "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." (Emphasis added). This Court has therefore promulgated the rule as a list of separate bases for the introduction of other acts evidence. Because each basis is complete in itself, the word "or" merits its normal disjunctive meaning, i.e., the

This Court has previously rejected the argument that the State cannot introduce other acts testimony where identity is not a genuinely-contested issue at trial. *State v. McNeill*, 83 Ohio St.3d 438, 442, 1998-Ohio-293, 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 * * *"). At least one federal appeals court has likewise held that a defendant cannot preclude the government from introducing other acts evidence to prove a necessary element of the offense simply by focusing his defense at trial on other elements of the crime. *United States v. Hadley*, 918 F.2d 848, 852 (9th Cir.1990). Even if the framework of *Curry* were still viable following this Court's adoption of Evid.R. 404(B), its distinction between cases in which identity is at issue and cases where it is not is inaccurate as a matter of law.

introduction of an alternative standard.⁵ See *In re Estate of Centrobi*, 129 Ohio St.3d 78, 2011-Ohio-2267, 950 N.E.2d 505, ¶ 18 (“The legislature’s use of the word ‘or,’ a disjunctive term, signifies the presence of alternatives”); 1A Sutherland, *Statutes and Statutory Construction* (7th Ed. 2011) § 21:14 (“The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately”).

This Court’s use of a disjunctive “or” in Evid.R. 404(B) indicates that each basis is to be treated as an independent alternative distinct from every other enumerated purpose in the rule. None of the listed bases may be treated merely as a prerequisite to another or otherwise given less than its full meaning. The language of Evid.R. 404(B) therefore precludes *Curry’s* interpretation that other acts evidence may be admitted to show a defendant’s plan only where the evidence also tends to show identity. Such an interpretation would effectively read the word “plan” out of the rule. Nor can identity and plan be inextricably linked together such that the each functions as a necessary prerequisite for the other. Evid.R.

⁵ For example, the United States Supreme Court recently held that the False Claim Act’s prohibition on actions based on the public disclosure of allegations or transactions in “a congressional, administrative, or [GAO] report,” could not be read to “rob” any of those three terms “of its independent and ordinary significance.” *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, ___ U.S. ___, 130 S.Ct. 1396, 1403, 176 L.Ed.2d 225 (2010), quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) (“Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not”).

404(B)'s listing of separate items mandates that each item be independently sufficient for the introduction of other acts evidence.

Evid.R. 102 limits the power of Ohio courts to modify the rules of evidence as promulgated. *State v. Boston*, 46 Ohio St.3d 108, 116, 545 N.E.2d 1220 (1989) (noting that Ohio is the only state to have adopted a version of Evid.R. 102 that omitted language allowing courts to interpret the rules of evidence in furtherance of "the promotion of growth and development of the law of evidence"). Evid.R. 102 instead requires that courts strictly adhere to the rules of evidence as written. Moreover, "[a]ny change in the Ohio Rules of Evidence must be accomplished through amendment." *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's*, 125 Ohio St.3d 362, 2010-Ohio-1043, 928 N.E.2d 685, ¶ 16.

This Court's role when evaluating a statute is to interpret it strictly in accordance with its full literal meaning. The statute

"* * * must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative."

Boley v. Goodyear Tire & Rubber Co., 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21, quoting *Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917). Statutes "may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act." *Id.*, quoting *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the

syllabus. This rule of statutory construction applies equally to judicially-prescribed rules of practice and procedure that have the full force and effect as a statute. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382, 627 N.E.2d 538 (1994).

4. *Curry's* framework is not being followed by Ohio appellate courts.

In reversing, the Eighth District noted that it had found at least seven of its own prior decisions after 1980 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 “[t]hese cases * * * seemingly ignore the Ohio Supreme Court’s holding in *Curry*.” *Id.* Because the Eighth District felt that it was bound to follow *Curry*, it reversed *Williams*’ conviction and disregarded its own post-1980 case law on this issue.

The Eighth District’s pre-*Williams* jurisprudence accurately reflects the view of appellate courts throughout Ohio that other acts evidence is admissible to show plan without first requiring that identity be at issue in the case because the fact of the crime is open and obvious. See *State v. Short*, 1st Dist. No. C-100552, 2011-Ohio-5245, ¶¶ 6-7 (other acts testimony of unrelated victims was admissible to show “a pattern or sequence of events that Short used to gradually build trust with the boys before sexual abusing them”); *State v. Valsadi*, 6th Dist. No. WD-09-064, 2010-

Ohio-5030, ¶ 49 (other acts testimony was admissible to show that defendant used the a pattern of conduct where the defendant preyed upon two women in the same manner); *State v. Poling*, 11th Dist. No. 2008-A-0071, 2010-Ohio-1155, ¶¶ 23-27 (other acts testimony that defendant had showed the victim a pornographic movie was admissible to show the grooming process defendant used to gain the victim's trust); *State v. Ristich*, 9th Dist. No. 21701, 2004-Ohio-3086, ¶¶ 17-25 (testimony of previous child victim of molestation 11-16 years earlier was admissible to demonstrate defendant's distinct pattern of sexual conduct).

These cases do not simply "ignore" *Curry*, but are instead a proper application of Evid.R. 404(B) as interpreted by *Lowe*. "Evidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Lowe*, 69 Ohio St.3d at 530, 634 N.E.2d 616. This two-part test is the only criteria that the State must satisfy for other acts evidence to be admissible under the plan exception of Evid.R. 404(B).

5. The other acts evidence is admissible to show Williams' plan to groom young boys into sexual partners.

The evidence in this case is admissible because it satisfies the two-part test from *Lowe*. There is substantial proof of Williams' abuse of A.B. because Williams pleaded guilty to misdemeanor Assault for his conduct. Under the second prong of *Lowe*, the only issue is therefore whether A.B.'s testimony tends to show Williams'

plan to systematically isolate and abuse J.H. The dissenting opinion in the Eighth District summarized Williams' plan as follows:

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.

Williams, ¶ 89 (Celebrezze, J., dissenting).

In its first other acts decision following the adoption of Evid.R. 404(B), this Court held that such evidence is admissible to show “an ongoing course of dealings between the defendant and a witness.” *State v. Wilkinson*, 64 Ohio St.2d 308, 317, 415 N.E.2d 261 (1980). This is because a jury is entitled to know the setting of a case and cannot be expected to make its decision without knowledge of the circumstances surrounding the acts alleged in the indictment. *Id.* citing *United States v. Roberts*, 548 F.2d 665, 667 (6th Cir.1977). Even where the other acts do not form a part of the immediate background of the charged offenses, the evidence is nonetheless admissible to explain the relationship between Williams' seemingly beneficent behavior towards J.H. and each subsequent instance of sexual abuse.

Ohio courts already recognize the validity of this use of other acts evidence in cases of stalking. Although the pattern of conduct involved in menacing by stalking is not part of the offense itself, it is admissible to “assist the jury in

understanding that a defendant's otherwise innocent appearing acts, when put into the context of previous contacts he has had with the victim, may be knowing attempts to cause mental distress." *State v. Horsley*, 10th Dist. No. 05AP-350, ¶ 26, citing *State v. Bilder*, 99 Ohio App.3d 653, 658, 651 N.E.2d 502 (9th Dist.1994). Such evidence is likewise admissible in domestic violence cases "to explain the context in which subsequent events occurred and why the events were perceived as they were by the victim." *State v. Skeens*, 2d Dist. No. 17528, 1999 WL 1082658 (Dec. 3, 1999).

Although there was no indication that J.H. was aware of the prior relationship with A.B., the evidence tended to show how Williams ingratiated himself into the lives of each boy and then used that position of trust to silence them after he began the abuse. Williams' preyed upon J.H.'s affections for him as a fatherlike-figure when he instructed J.H. not to tell anyone about the abuse because Williams might go to prison if he did. (Tr. 212, 221). Williams worked to earn J.H.'s trust over a course of months in which Williams gave J.H. gifts, spent time with him alone, and seemed to other witnesses to be mentoring him. (Tr. 63, 208-209).

These acts would have had little or no meaning to a trier-of-fact if viewed in a vacuum absent evidence that could explain the relationship between them and the subsequent abuse. To illustrate the importance of the background leading up to the offenses – to draw a line from grooming to sexual abuse – the trial court allowed the

other acts evidence to show that Williams operated based on a proven plan to isolate young boys and then to engage in repeated acts of sexual conduct with them.

Evidence of Williams' plan was admissible in the State's case-in-chief because it went to the Kidnapping charges. The 12 counts of Kidnapping in the indictment required the State to prove that Williams "did, by force, threat, or deception, purposely remove [J.H.] from the place where he was found or restrain the liberty of him for the purpose of engaging in sexual activity * * * ." R.C. 2905.01(A)(4). This necessarily entailed demonstrating the cause-and-effect relationship between a sequence of events that Williams had undertaken for the purpose of engaging in sexual activity with J.H. To convict Williams of kidnapping, the State had to show that he removed J.H. from the place where he was found with a plan in mind to sexually abuse him. The interconnectivity of Williams' actions was central to the State's theory of the case where the indictment alleged 12 rapes over a six month period.

Even if the evidence were not admissible in the case-in-chief, it nevertheless became admissible after defense counsel opened the door to it. Williams' strategy at trial was to discredit J.H. by raising issues of J.H.'s own sexuality and by impeaching him with his previous failure to come forward with his allegations. (Tr. 256, 268, 274). A.B.'s testimony was crucial to the State's theory of the case to explain why J.H. did not resist or disclose sooner. Other acts evidence is admissible to explain a victim's failure to come forward regarding past abuse. See *State v. Soke*, 65 Ohio App.3d 590, 593, 584 N.E.2d 1273 (11th Dist.1989) (other acts

evidence of defendant's violent character was admissible to explain victim's failure to resist defendant's physical and sexual abuse). Evidence that a previous victim had likewise failed to immediately disclose the abuse tended to rehabilitate J.H.'s testimony by demonstrating that sexual assault victims frequently fail to come forward in such cases.

Finally, the probative value of the other acts evidence is not diminished by the length of time between the offenses. A.B.'s testimony that Williams' engaged in sexual conduct with him 12 years prior to the sexual conduct with J.H. is admissible to show the idiosyncratic behavior of Williams. "While other acts evidence aimed at showing an idiosyncratic pattern of conduct should not be so remote from the offense charged as to render them non-probative, logic does not require that they necessarily be near the offense at issue in both place and time. * * * The key to the probative value of such conduct lies in its peculiar character rather than its proximity to the event at issue." *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 46, quoting *State v. DePina*, 21 Ohio App.3d 91, 92, 486 N.E.2d 1155 (9th Dist.1984).

The proper method of analysis for the admission of other acts evidence is to weigh both the idiosyncratic character of the evidence and its relationship with the charged offense as two distinct qualities to consider in its admission. The length of time between the offenses is a factor to consider in admissibility, but it is not the only factor. Ohio courts thus routinely permit the introduction of other acts that occur several years prior to the charged offense. *Craig* at ¶ 46 (five-year separation

in time between prior, uncharged rape and murder did not preclude admission of evidence of prior rape to prove identity and motive), citing *DePina*, 21 Ohio App.3d at 92, 486 N.E.2d 1155 (other acts rape committed five years prior to charged offense was admissible to show defendant's idiosyncratic pattern of conduct). See also *State v. Powers*, 12th Dist. No. CA2006-01-002, 2006-Ohio-6547, ¶¶ 9-12 (testimony of improper touching of a different victim more than 12 years earlier was admissible to show defendant's plan or preparation), *State v. Banks*, 10th Dist. No. 86AP-1009, 1987 WL 16801, *7 ("The lapse of time between the robberies does not significantly lessen the probative value of one to the other").

6. *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, ¶ 58 (nurse examiner testified that lack of physical injuries to the victim is 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, ¶ 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 requirement of *Curry* that identity must be at issue in a case means that the fact of the crime itself cannot be in dispute. This necessitates the existence of some other evidence, physical or witness testimony, to corroborate the victim's accusation. It is well-settled, however, that Ohio law does not contain any corroboration requirement in rape cases. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 53. This places the State in the illogical position where corroboration is required to introduce other acts evidence but not to obtain the conviction itself despite the fact that the other acts evidence must only satisfy the burden of "substantial proof," a standard less than proof beyond a reasonable doubt. *Lowe*, 69 Ohio St.3d at 530, 634 N.E.2d 616. Such a requirement also makes the entire process circular because the State would now be required to prove the charged offense before it could justify the introduction of the other acts evidence.

CONCLUSION

The State submits that the Eighth District has incorrectly applied the clear language of Evid.R. 404(B) by holding that plan and identity must be concurrently shown to justify the introduction of other acts evidence to show a defendant's plan. These purposes are listed separately and must be treated as distinct bases for admission under the rule. The Eighth District's reliance upon a pre-1980 statute to read the word "plan" out of a rule of evidence cannot be justified in light of this

Court's subsequent adoption of Evid.R. 404(B). This Court should affirm that it has the exclusive authority to promulgate procedural rules regarding the admissibility of evidence and that such rules now supersede *Curry*. Evid.R. 404(B) is therefore now governing law in this area.

This Court should also reverse the Eighth District's holding that testimony showing that a defendant has received sexual gratification from a prior victim is not relevant to whether he has received such gratification from a subsequent victim where that gratification is a prima facie element of the statute.

In the alternative, this Court should remand this case to the Eighth District to reconsider the admissibility of the evidence under the plain exception of Evid.R. 404(B) in the absence of a requirement that identity first be at issue in the case.

Respectfully submitted,

WILLIAM D. MASON
Cuyahoga County Prosecuting Attorney

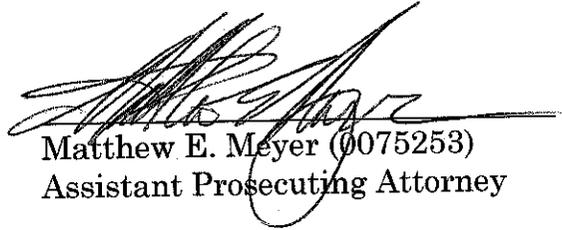


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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant was sent by regular U.S. Mail this 17th day of April, 2012 to Stephen A. Goldmeier, 250 East Broad St., Suite 1400, Columbus, Ohio 43215.


Matthew E. Meyer (0075253)
Assistant Prosecuting Attorney

ORIGINAL

CASE 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

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Counsel for Plaintiff-Appellant

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RECEIVED
DEC 14 2011
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SUPREME COURT OF OHIO

FILED
DEC 15 2011
CLERK OF COURT
SUPREME COURT OF OHIO

CASE NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
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STATE OF OHIO,

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-vs-

VAN WILLIAMS,

Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

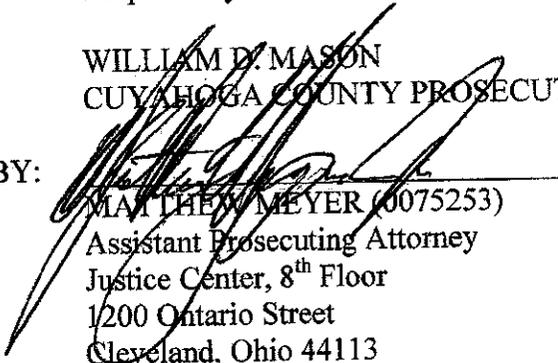
Now comes the State of Ohio to hereby give Notice of Appeal to this Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized November 3, 2011, which reversed and remanded the trial court's decision. S.Ct. Prac. R. II, §2(A)(1).

This cause did not originate in the Court of Appeals, it is a felony, it involves a substantial constitutional question, and it is of great general and public interest.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY:


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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal has been mailed this 13th day of December

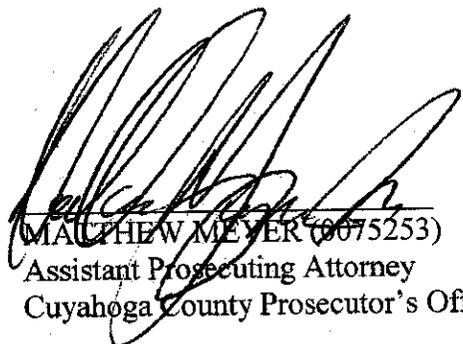
2011 to:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
EN BANC
No. 94965

THE STATE OF OHIO,

APPELLEE,

v.

WILLIAMS,

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

William D. Mason , Cuyahoga County Prosecuting Attorney, and Richard J. Bombik,
Assistant Prosecuting Attorney, for appellee.

Craig T. Weintraub, for appellant.

LARRY A. JONES, Judge.

{¶ 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.¹

{¶ 5} Prior to trial, the state filed a motion to admit evidence pursuant to Evid.R. 404(B) and R.C. 2945.59,” indicating that it intended to admit into 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 that 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 before opening statements. The trial court denied counsel’s request to rule on the motion before 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

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

him, since her grandson did not otherwise have a “male role model” in his life. The grandmother testified that Williams took J.H. various places, including to get his hair cut, to shop for video games, to see 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 its 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 had 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 had 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 [J.H.'s] 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 so. Williams replied that "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 [him]" 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 as to whether 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 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 had asked Williams "if he would mind telling [her] about the allegation from 12 years ago with the other boy, and [he] did not want to tell [her] about that." Cornell testified that 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 that 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 that he had been 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 its 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 had 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 because 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 that 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 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. Maurer (1984), 15 Ohio St.3d 239, 264, 473 N.E.2d 768.² “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* (1992), 65 Ohio St.3d 51, 59, 600 N.E.2d 661. Consequently, R.C. 2907.02(D), which governs the crime of rape, and 2907.05(E), which governs gross sexual imposition, both provide, “Evidence 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 not outweigh its probative value.” Id.³

{¶ 33} Because of the severe social stigma attached to crimes of sexual assault and

² The standard of review with regard to the admission of other-acts evidence is currently pending before the Ohio Supreme Court. *State v. Morris*, 128 Ohio St.3d 1448 2011-Ohio-1618, 944 N.E.2d 697. 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.

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

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.

Evid.R. 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} Evid.R. 404(B) is codified in R.C. 2945.59, which provides, “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.”⁴

{¶ 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*

⁴We 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.

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 that 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, quoting *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 [Fed.R.Evid.] 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 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.” (Emphasis sic.) *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*, 65 Ohio St.3d 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, “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.” *Id.* The court further 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., *United States v. Hernandez-Guevara* (C.A.5, 1998), 162 F.3d 863, 870-871; *United States 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 had pleaded not guilty and asserted that the victim had 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 that Williams’s intent was sexual gratification; (2) the defense had included testimony that Williams was not attracted to males; (3) the state had a right to rebut testimony through A.B. that Williams was not attracted to males; (4) the evidence showed Williams’s motive in committing the acts against J.H.; and (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,”⁵ 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 interested only 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*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 12, 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 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.

⁵R.C. 2907.01(B).

{¶ 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*, 65 Ohio St.3d at 63, 600 N.E.2d 661, fn. 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*, 43 Ohio St.2d 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, 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*, 43 Ohio St.2d 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* (1999), 85 Ohio St.3d 487, 709 N.E.2d 484, 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 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; *State v. Williams*, Cuyahoga App. No. 92714, 2010-Ohio-70; *State v. Russell*, Cuyahoga App. No. 83699, 2004-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 191.⁶

⁶We 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.

{¶ 57} Because we must follow precedent established by the Ohio Supreme Court, we are bound by the holding in *Curry*. Therefore, 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 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 that 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*, 2006-Ohio-4670. 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*, 2010-Ohio-70, at ¶ 68 (McMonagle, J., dissenting in part).

{¶ 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*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed2d 771.

{¶ 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, "Prior 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, because 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, "The 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 the testimony that was before the trial court, whether or not it was properly admitted. *Id.* *Brewer* held, "[W]here 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 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.

Judgment reversed

and cause remanded.

KILBANE, A.J., and BLACKMON, BOYLE, COONEY, ROCCO, STEWART, and SWEENEY, JJ., concur.

GALLAGHER and ROCCO, JJ., concur separately.

SWEENEY, GALLAGHER, and KEOUGH, JJ., concur separately.

CELEBREZZE JR., J., dissents.

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.”

{¶ 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 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 both the rule and the statute, suggesting that 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 rulemaking 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.

ROCCO, J., concurs in the foregoing opinion.

JAMES J. SWEENEY, J., concurring.

{¶ 87} Although I concur in the judgment, I join in only 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

{¶ 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 (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 (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.”



Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
 Chapter 2903. Homicide and Assault
 Assault
 →→ 2903.13 Assault

- (A) No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.
- (B) No person shall recklessly cause serious physical harm to another or to another's unborn.
- (C) Whoever violates this section is guilty of assault, and the court shall sentence the offender as provided in this division and divisions (C)(1), (2), (3), (4), (5), and (6) of this section. Except as otherwise provided in division (C)(1), (2), (3), (4), or (5) of this section, assault is a misdemeanor of the first degree.
- (1) Except as otherwise provided in this division, if the offense is committed by a caretaker against a functionally impaired person under the caretaker's care, assault is a felony of the fourth degree. If the offense is committed by a caretaker against a functionally impaired person under the caretaker's care, if the offender previously has been convicted of or pleaded guilty to a violation of this section or section 2903.11 or 2903.16 of the Revised Code, and if in relation to the previous conviction the offender was a caretaker and the victim was a functionally impaired person under the offender's care, assault is a felony of the third degree.
- (2) If the offense is committed in any of the following circumstances, assault is a felony of the fifth degree:
- (a) The offense occurs in or on the grounds of a state correctional institution or an institution of the department of youth services, the victim of the offense is an employee of the department of rehabilitation and correction, the department of youth services, or a probation department or is on the premises of the particular institution for business purposes or as a visitor, and the offense is committed by a person incarcerated in the state correctional institution, by a person institutionalized in the department of youth services institution pursuant to a commitment to the department of youth services, by a parolee, by an offender under transitional control, under a community control sanction, or on an escorted visit, by a person under post-release control, or by an offender under any other type of supervision by a government agency.
- (b) The offense occurs in or on the grounds of a local correctional facility, the victim of the offense is an employee of the local correctional facility or a probation department or is on the premises of the facility for business purposes or as a visitor, and the offense is committed by a person who is under custody in the facility subsequent to the person's arrest for any crime or delinquent act, subsequent to the person's being charged with or convicted of any crime, or subsequent to the person's being alleged to be or adjudicated a delinquent child.

(c) The offense occurs off the grounds of a state correctional institution and off the grounds of an institution of the department of youth services, the victim of the offense is an employee of the department of rehabilitation and correction, the department of youth services, or a probation department, the offense occurs during the employee's official work hours and while the employee is engaged in official work responsibilities, and the offense is committed by a person incarcerated in a state correctional institution or institutionalized in the department of youth services who temporarily is outside of the institution for any purpose, by a parolee, by an offender under transitional control, under a community control sanction, or on an escorted visit, by a person under post-release control, or by an offender under any other type of supervision by a government agency.

(d) The offense occurs off the grounds of a local correctional facility, the victim of the offense is an employee of the local correctional facility or a probation department, the offense occurs during the employee's official work hours and while the employee is engaged in official work responsibilities, and the offense is committed by a person who is under custody in the facility subsequent to the person's arrest for any crime or delinquent act, subsequent to the person being charged with or convicted of any crime, or subsequent to the person being alleged to be or adjudicated a delinquent child and who temporarily is outside of the facility for any purpose or by a parolee, by an offender under transitional control, under a community control sanction, or on an escorted visit, by a person under post-release control, or by an offender under any other type of supervision by a government agency.

(e) The victim of the offense is a school teacher or administrator or a school bus operator, and the offense occurs in a school, on school premises, in a school building, on a school bus, or while the victim is outside of school premises or a school bus and is engaged in duties or official responsibilities associated with the victim's employment or position as a school teacher or administrator or a school bus operator, including, but not limited to, driving, accompanying, or chaperoning students at or on class or field trips, athletic events, or other school extracurricular activities or functions outside of school premises.

(3) If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, a firefighter, or a person performing emergency medical service, while in the performance of their official duties, assault is a felony of the fourth degree.

(4) If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation and if the victim suffered serious physical harm as a result of the commission of the offense, assault is a felony of the fourth degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the fourth degree that is at least twelve months in duration.

(5) If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, assault is either a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony

of the fourth degree.

(6) If an offender who is convicted of or pleads guilty to assault when it is a misdemeanor also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall sentence the offender to a mandatory jail term as provided in division (G) of section 2929.24 of the Revised Code.

If an offender who is convicted of or pleads guilty to assault when it is a felony also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in division (C)(4) of this section, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of section 2929.14 of the Revised Code.

(D) As used in this section:

(1) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(2) "Firefighter" has the same meaning as in section 3937.41 of the Revised Code.

(3) "Emergency medical service" has the same meaning as in section 4765.01 of the Revised Code.

(4) "Local correctional facility" means a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, a minimum security jail established under section 341.23 or 753.21 of the Revised Code, or another county, multicounty, municipal, municipal-county, or multicounty-municipal facility used for the custody of persons arrested for any crime or delinquent act, persons charged with or convicted of any crime, or persons alleged to be or adjudicated a delinquent child.

(5) "Employee of a local correctional facility" means a person who is an employee of the political subdivision or of one or more of the affiliated political subdivisions that operates the local correctional facility and who operates or assists in the operation of the facility.

(6) "School teacher or administrator" means either of the following:

(a) A person who is employed in the public schools of the state under a contract described in section 3319.08 of the Revised Code in a position in which the person is required to have a certificate issued pursuant to sections 3319.22 to 3319.311 of the Revised Code.

(b) A person who is employed by a nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code and who is certificated in accordance with section

3301.071 of the Revised Code.

(7) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(8) "Escorted visit" means an escorted visit granted under section 2967.27 of the Revised Code.

(9) "Post-release control" and "transitional control" have the same meanings as in section 2967.01 of the Revised Code.

(10) "Investigator of the bureau of criminal identification and investigation" has the same meaning as in section 2903.11 of the Revised Code.

CREDIT(S)

(2011 H 86, eff. 9-30-11; 2008 H 280, eff. 4-7-09; 2006 H 347, eff. 3-14-07; 2002 H 490, eff. 1-1-04; 2000 H 412, eff. 4-10-01; 1999 S 142, eff. 2-3-00; 1999 S 1, eff. 8-6-99; 1997 S 111, eff. 3-17-98; 1997 H 106, eff. 11-21-97; 1996 H 480, eff. 10-16-96; 1996 S 239, eff. 9-6-96; 1995 S 2, eff. 7-1-96; 1994 H 571, eff. 10-6-94; 1994 S 116, eff. 9-29-94; 1992 H 561, eff. 4-9-93; 1988 H 642; 1972 H 511)

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Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2905. Kidnapping and Extortion

▣ Kidnapping and Related Offenses

→→ **2905.01 Kidnapping**

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

- (1) To hold for ransom, or as a shield or hostage;
- (2) To facilitate the commission of any felony or flight thereafter;
- (3) To terrorize, or to inflict serious physical harm on the victim or another;
- (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will;
- (5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority;
- (6) To hold in a condition of involuntary servitude.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

- (1) Remove another from the place where the other person is found;
- (2) Restrain another of the other person's liberty.

(C)(1) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division or division (C)(2) or (3) of this section, kidnapping is a felony of the first degree. Except as otherwise provided in

this division or division (C)(2) or (3) of this section, if an offender who violates division (A)(1) to (5), (B)(1), or (B)(2) of this section releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

(2) If the offender in any case also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code and, except as otherwise provided in division (C)(3) of this section, shall sentence the offender to a mandatory prison term as provided in division (B)(7) of section 2929.14 of the Revised Code.

(3) If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in section 2929.14 of the Revised Code, the offender shall be sentenced pursuant to section 2971.03 of the Revised Code as follows:

(a) Except as otherwise provided in division (C)(3)(b) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

(b) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section:

(1) "Involuntary servitude" has the same meaning as in section 2905.31 of the Revised Code.

(2) "Sexual motivation specification" has the same meaning as in section 2971.01 of the Revised Code.

CREDIT(S)

(2011 H 86, eff. 9-30-11; 2010 S 235, eff. 3-24-11; 2008 H 280, eff. 4-7-09; 2007 S 10, eff. 1-1-08; 1995 S 2, eff. 7-1-96; 1982 H 269, § 4, eff. 7-1-83; 1982 S 199; 1972 H 511)

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Title XXIX. Crimes--Procedure (Refs & Annos)
 ▣ Chapter 2907. Sex Offenses (Refs & Annos)
 ▣ Definitions
 →→ **2907.01 Definitions**

As used in sections 2907.01 to 2907.38 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) "Harmful to juveniles" means that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:

(1) The material or performance, when considered as a whole, appeals to the prurient interest of juveniles in sex.

(2) The material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.

(3) The material or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is

“obscene” if any of the following apply:

- (1) Its dominant appeal is to prurient interest;
 - (2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;
 - (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
 - (4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;
 - (5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.
- (G) “Sexual excitement” means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
- (H) “Nudity” means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.
- (I) “Juvenile” means an unmarried person under the age of eighteen.
- (J) “Material” means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch and includes an image or text appearing on a computer monitor, television screen, liquid crystal display, or similar display device or an image or text recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device.
- (K) “Performance” means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.
- (L) “Spouse” means a person married to an offender at the time of an alleged offense, except that such person

shall not be considered the spouse when any of the following apply:

- (1) When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;
 - (2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation;
 - (3) In the case of an action for legal separation, after the effective date of the judgment for legal separation.
- (M) "Minor" means a person under the age of eighteen.
- (N) "Mental health client or patient" has the same meaning as in section 2305.51 of the Revised Code.
- (O) "Mental health professional" has the same meaning as in section 2305.115 of the Revised Code.
- (P) "Sado-masochistic abuse" means flagellation or torture by or upon a person or the condition of being fettered, bound, or otherwise physically restrained.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 2006 H 23, eff. 8-17-06; 2006 H 95, eff. 8-3-06; 2002 H 490, eff. 1-1-04; 2002 H 8, eff. 8-5-02; 2002 S 9, eff. 5-14-02; 1997 H 32, eff. 3-10-98; 1996 H 445, eff. 9-3-96; 1990 H 514, eff. 1-1-91; 1988 H 51; 1975 S 144; 1972 H 511)

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Title XXIX. Crimes--Procedure (Refs & Annos)
 ▣ Chapter 2945. Trial (Refs & Annos)
 ▣ Proof
 → → **2945.59 Proof of defendant's motive**

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.

CREDIT(S)

(1953 H 1, eff. 10-1-53; GC 13444-19)

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Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2907. Sex Offenses (Refs & Annos)

Sexual Assaults

→ → **2907.02 Rape; evidence; marriage or cohabitation not defenses to rape charges**

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. Except as otherwise provided in this division, notwithstanding sections 2929.11 to 2929.14 of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to section

2971.03 of the Revised Code, and instead the court shall sentence the offender as otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of section 2971.03 of the Revised Code applies, and the offender automatically is classified a tier III sex offender/child-victim offender, as described in that division.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, 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 not outweigh its probative value.

Evidence 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 not outweigh its probative value.

(E) Prior 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.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 2006 S 260, eff. 1-2-07; 2002 H 485, eff. 6-13-02; 1997 H 32, eff. 3-10-98; 1995 S 2, eff. 7-1-96; 1993 S 31, eff. 9-27-93; 1985 H 475; 1982 H 269, § 4, S 199; 1975 S 144; 1972 H 511)

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Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
 Chapter 2907. Sex Offenses (Refs & Annos)
 Sexual Assaults
 → → 2907.05 Gross sexual imposition

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

(5) The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

(B) No person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age, whether or not the offender knows the age of that person, and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(C) Whoever violates this section is guilty of gross sexual imposition.

(1) Except as otherwise provided in this section, gross sexual imposition committed in violation of division (A)(1), (2), (3), or (5) of this section is a felony of the fourth degree. If the offender under division (A)(2) of this section substantially impairs the judgment or control of the other person or one of the other persons by administering any controlled substance described in section 3719.41 of the Revised Code to the person surreptitiously or by force, threat of force, or deception, gross sexual imposition committed in violation of division (A)(2) of this section is a felony of the third degree.

(2) Gross sexual imposition committed in violation of division (A)(4) or (B) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) or (B) of this section there is a presumption that a prison term shall be imposed for the offense. The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree if either of the following applies:

- (a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;
 - (b) The offender previously was convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.
- (D) A victim need not prove physical resistance to the offender in prosecutions under this section.

(E) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, 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 not outweigh its probative value.

Evidence 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 not outweigh its probative value.

(F) Prior 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.

(G) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other

proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the vic- tim.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 2006 H 95, eff. 8-3-06; 1997 H 32, eff. 3-10-98; 1993 S 31, eff. 9-27-93; 1990 H 208; 1977 H 134; 1975 S 144; 1972 H 511)

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Ohio Rules of Evidence (Refs & Annos)

▣ Article IV. Relevancy and Its Limits

→ → **Evid R 404 Character evidence not admissible to prove conduct; exceptions; other crimes**

(A) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(3) Character of witness. Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

(B) 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.

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(Adopted eff. 7-1-80; amended eff. 7-1-07)

Current with amendments received through January 1, 2012.

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