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IN THE SUPREME COURT OF OHIO

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| State of Ohio, | : | |
| | : | Case No. 11-2094 |
| Plaintiff-Appellee, | : | |
| | : | On Appeal from the |
| v. | : | Cuyahoga County Court of Appeals, |
| | : | 8th Appellate District, |
| Van Williams, | : | Case No. 94965 |
| | : | |
| Defendant-Appellee. | : | |

# MERIT BRIEF OF APPELLEE VAN WILLIAMS


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## INTRODUCTION

Ohio Evidence Rule 404(b) is, first and foremost, a prohibition on using other acts to show a defendant's propensity to act a certain way. It contains some exceptions to this general rule, including allowances for evidence that shows, among other things, the intent of a defendant, the identity of a perpetrator, or the fabric of the perpetrator's plan in the crime charged. But the first thing that 404(b) purports to do is protect a defendant from evidence of his propensity to act a certain way.

Yet the State here is attempting to twist these exceptions into something larger than themselves, something that renders the first sentence, indeed the primary mandate, of the rule meaningless. At Van Williams's trial related to an alleged illicit relationship with a young teenager named J.H., the State called another man who, at age 16, had what he described as a consensual sexual relationship with Mr. Williams. The trial court said the testimony regarding this consensual relationship was admissible as evidence of other acts to prove intent under 404(B). But on appeal, the Eight District used sound judgment and established precedent to hold that the trial court abused its discretion in including this other acts evidence. The en banc panel from the Eight District Court of Appeals held that the evidence was not admissible to prove intent, was not admissible to prove the defendant's plan, and even if it was admissible, it was too prejudicial to be admitted for either purpose.

The State now asks this court to rewrite the law on 404(b) evidence to overturn that court. But no such rewrite is necessary. The use of other acts evidence to establish intent is allowed by the rule, but the evidence presented in this case reached beyond that allowance. It instead crossed the line into pure propensity evidence. And evidence related to plan is also generally allowed by the rule, but the way that this plan evidence can be used is limited to either proving the identity of the defendant through particular and idiosyncratic prior plans or to

establishing the immediate background of the plan that led to the current charges. Neither purpose applied here.

These limitations are clearly established by this court's precedent regarding both the rule's predecessor statute, R.C. 2945.69, and Evid.R. 404(B) itself. The court of appeals understood, and appropriately applied, these limitations.

This Court is faced with nothing to clarify and no new law to write. Years upon years of development of the law leave the application of 404(B) clearly established: intent evidence must show the defendant's intent concerning the current victim rather than general propensity, and plan evidence must show either an idiosyncratic repeated plan for identification purposes or the structure of the defendant's plan for accomplishing the currently charged crime. Neither can, as the evidence here did, demonstrate only propensity to act in a certain way. And even if this court chooses to clarify the use of 404(B) to admit plan evidence, it can do so merely by reiterating the holding of *State v. Curry*, upon which the appellate court relied and which clearly defined the two categories of permissible plan evidence.

This court must either dismiss this case as improvidently granted or affirm the sound holding of the 8th District Appellate Court.

## STATEMENT OF THE CASE AND FACTS

J.H. was a 14 year old member of a church choir along with Van Williams. Through their involvement in the choir, the two became very close. J.H. described his relationship with Mr. Williams as a strong and protective one, in which Mr. Williams operated as a sort of surrogate father. Mr. Williams would buy J.H. gifts, cut his hair, take him to movies, and generally look out for him.

But J.H. also alleged that this relationship took a confusing and troubling turn. J.H. alleged that, during one of their many visits, Mr. Williams touched him inappropriately. J.H. claimed that this escalated into repeated instances of non-consensual sexual contact between himself and Mr. Williams, including fondling and anal sex, over the course of six months. J.H. claimed that Mr. Williams was motivated by a desire for sexual gratification and on one occasion told him he was abusing J.H. because he "wasn't getting any" from his wife.

These allegations went to a trial in Cuyahoga County Court of Common Pleas, where Mr. Williams was charged with 12 counts of kidnapping, 12 counts of rape, 12 counts of unlawful sexual conduct with a minor, 24 counts of gross sexual imposition, and one count of victim or witness intimidation. At trial, J.H. described his relationship with Mr. Williams and the instances of sexual contact. Mr. Williams responded by trying to establish J.H.'s sexual confusion and Mr. Williams's own heterosexuality.

In addition to J.H., the State also called A.B., another young man with whom Mr. Williams had had a relationship, to provide some detail of that prior relationship. The State moved to have this evidence admitted, arguing that A.B.'s testimony would be admissible prior acts evidence under Evid.R. 404(B). The State claimed that this evidence would establish Mr. Williams's intent or plan concerning J.H. Mr. Williams objected to the admission of this evidence, but the trial court allowed the evidence to be presented, saying that the evidence

established Mr. Williams's intent to receive sexual gratification from his acts with J.H. The Court specifically said that it did not know for what other purpose, aside from sexual motivation, one would "make out with somebody for; oral sex, mutual masturbation. There is really no other purpose for that." The court said that A.B.'s testimony rebutted claims by Mr. Williams that he was heterosexual. The court finally said that this probative value outweighed any prejudice from this evidence. The court did not consider the use of this evidence to show Mr. Williams's plan.

A.B.'s testimony concerned what he described as a consensual relationship with Mr. Williams that had taken place 12 years prior. A.B. was 16 when he and Mr. Williams became involved. A.B. testified that he was on the swim team that Mr. Williams coached, and that the two became close during that time. He described that Mr. Williams used to buy him gifts, and the two of them would engage in sexual activity together, including oral sex and mutual masturbation. This relationship eventually led to Mr. Williams pleading guilty to misdemeanor assault for having a relationship with an individual over whom he had a position of authority.

Before this testimony, as well as at the conclusion of trial, the court gave a limiting instruction, cautioning the jury that they could not use A.B.'s testimony to judge Mr. Williams's character. The jury subsequently found Mr. Williams guilty of five counts of rape, five counts of unlawful sexual conduct with a minor, seven counts of kidnapping, and six counts of gross sexual imposition. He was sentenced to 20 years in prison.

Mr. Williams then appealed his conviction to the Eighth District Court of Appeals, arguing that the trial court abused its discretion in admitting A.B.'s testimony of their prior relationship. The appellate court agreed, reversing the trial court's decision to include the testimony and ordering a new trial. *State v. Williams*, 8th Dist. No. 94965, 2011-Ohio-5650, ¶ 2. The appellate court specifically held that the intent evidence was not actually relevant to intent,

but was instead purely propensity evidence. *Id.* at ¶ 59. The appellate court also held that A.B.'s testimony, while it did describe some sort of plan, did not fall within the recognized purposes of plan evidence under Ohio's Evid.R. 404(B) and the precursor statute, R.C. 2945.69. *Id.* at ¶ 57. Specifically, the court held that the evidence was neither relevant to show Mr. Williams's identity as the perpetrator nor to show the direct background of the alleged offense. *Id.* at ¶ 58.

The State submitted a timely Notice of Appeal and Memorandum in Support of Jurisdiction to this Court, regarding the evidentiary issue. On March 7, 2012, this Court accepted the State's appeal. Both the State and the Ohio Attorney General, as amicus curiae, filed briefs in this case. Mr. Williams now urges this court to either dismiss the State's appeal or, alternatively, affirm the appellate court's decision.

## ARGUMENT AGAINST THE STATE'S PROPOSITIONS OF LAW

## APPELLEE'S PROPOSITION OF LAW

**Evidence of a defendant's prior sexual relationship is not admissible as evidence of "intent" or "plan" if it merely shows general propensity to engage in sex with young men and if the evidence is not introduced either to prove identity or to establish the immediate background of the charged offense.**

The State has sought to introduce impermissible evidence of propensity hidden under the cloak of permissible Evid.R. 404(B) evidence. But they have chosen the wrong cloak, and they now seek to have this court re-read that rule to expand that cloak and protect their subterfuge. What the State describes as "intent" evidence and "plan" evidence is actually evidence designed merely to show the propensity of a defendant to act a certain way. This is precisely the ill guarded against by the primary mandate of Evid.R. 404(B) and by the decisions regarding 404(B) by Ohio's courts. The character evidence rules have no teeth if, as the State argues, any even somewhat similar acts are admissible under 404(B) to show either intent or plan.

### 1. The legal structure of Evid.R. 404(B)

The use of prior bad acts evidence for purposes other than demonstrating the propensity of the defendant was first codified in R.C. 2945.69. The most recent version of that statute allowed such evidence for the purpose of showing "motive or intent, the absence of mistake or accident on [the defendant's] part, or the defendant's scheme, plan, or system in doing the act in question." R.C. 2945.69.

In 1980, this exception to the exclusion of prior bad acts evidence was codified by this Court into Evid. R. 404(B). In its opening sentence, the rule establishes the general proscription that evidence of prior bad acts is not admissible for the purpose of showing a defendant's propensity to act in a certain way. Evid.R. 404(B). The rule states that "[e]vidence of other

crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *Id.*

But the rule also carves out a narrow exception to the general prohibition, highlighting possible uses of prior acts evidence that are *not* for propensity, but for a legal purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* This list notably added "identity" as one of the enumerated exceptional categories for permissible other acts evidence.

**2. The use of "intent" evidence under Evid.R. 404(B).**

One of the enumerated exceptions to rule 404(B) is the use of prior acts to establish a defendant's "intent." Evid.R. 404(B). Evidence of this nature must act to support the State's proof of the intent portion of the offense. If a trial court determines that the proposed evidence is offered to prove "intent," then the evidence is admissible. In this case, the intent associated with gross sexual imposition and rape is the intent to either give or receive sexual gratification. *See State v. Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111, 953 N.E.2d 816, ¶ 25; R.C. 2907.01 (defining sexual contact as "touching of an erogenous zone of another . . . for the purpose of sexually arousing or gratifying either person"). Therefore, any evidence introduced under rule 404(B) must enhance the State's argument that Mr. Williams intended to give or receive sexual gratification from his contact with J.H, not merely that he committed the acts against J.H.

The determination by the trial court that the other acts evidence was admissible in this case is reviewed by the appellate court for an abuse of discretion. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66; *State v. Morris*, Slip Opinion No. 2012-Ohio-2407, ¶ 1. A court has abused its discretion when it makes such a decision with an

unreasonable, arbitrary, or unconscionable attitude. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**3. The State's reading of "intent" in Evid.R. 404(B) eviscerates the purpose of that rule.**

While it is true that evidence that establishes the intent of an individual is admissible under 404(B), the type of "intent" evidence must have some limit to prevent pure propensity evidence from being admitted. The State's seeming definition of "intent" here is almost interchangeable with "propensity" and has no limit.

The State's evidence that establishes that Mr. Williams "intended" the acts in this case is actually evidence that the defendant had a predilection for relationships with young men. The State says that the evidence tends to prove that he intended the acts in this case to be sexual in their nature, but what they actually prove is that Mr. Williams, in a prior relationship with a male, had a sexual intent, and he therefore likely had a sexual intent here. The State essentially sought to prove that this predilection created Mr. Williams's "intent" in this case.

But the State cannot seek to establish that a defendant had a propensity to form a certain intent in order to prove that he once again formed that intent in the current case. Evid.R. 404(B); *State v. Goines*, 111 Ohio App. 3d 840, 677 N.E.2d 412 (8th Dist. 1996) (holding that the State cannot prove the defendant committed the current robbery by proving that he had previously committed other robberies). The appellate court properly concluded that the intent to engage in a consensual relationship with a male teenager was not relevant to establish an intent to molest another young male. *Williams* at ¶ 47, citing *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 12.

There is no meaningful difference between this line of reasoning and pure propensity evidence. Evidence admitted to establish that a defendant acted a certain way in the past and is therefore more likely to have acted that way this time is exactly the kind of evidence forbidden by the rules of evidence. Evid.R. 404(B). No principle in the realm of character evidence is clearer, yet the State's application of 404(B) would abrogate it. This Court must not allow that to happen.

The State argues that the evidence that Mr. Williams had a prior homosexual relationship is relevant to show that he sought sexual gratification from the victim in this case. State's Brief at 11. But this argument is specious. At the hearing regarding this evidence, the trial judge said that there can clearly be no other purpose to the sexual acts with A.B. than for sexual gratification. If this is so, then this additional evidence of sexual intent is not probative at all; the same logic would apply to the alleged acts with J.H. Even the trial judge himself acknowledged that the truth of J.H.'s allegations would plainly be enough to establish sexual intent. Showing that Mr. Williams engaged in these acts previously does nothing to add to the proof of sexual motivation. *See State v. Smith*, 84 Ohio App. 3d 647, 665-666, 617 N.E.2d 1160 (2nd Dist. 1992) (holding that, in a trial for sexual abuse of two boys, evidence of abuse of a third boy had no probative value, since "the motive and intent of the alleged actor remain, nevertheless, those of sexual gratification. That fact is apparent from the charges and is not a material issue. Evidence of other crimes, wrongs, or acts may not be introduced to prove his motive or intent in committing the operative acts of the offenses alleged"). In fact, Mr. Williams's alleged statements that he wasn't "getting any" from his wife is a more direct, and entirely permissible, method for establishing desire for sexual gratification. The State's arguments that the evidence of Mr. Williams's relationship with A.B. would be necessary to

prove this intent is misleading and is mere smokescreen for the State's real purpose: to show that Mr. Williams has done this before, so it's more likely he's done it again. Evidence of prior molestation has been properly used to show intent to possess child pornography, but evidence of prior molestation to prove a *current* instance of molestation has a much greater chance of being nothing but propensity evidence. *United States v. Sebolt*, 460 F.3d 910 (7th Cir. 2006).

The State further argues that A.B.'s testimony regarding Mr. Williams's motivations was admissible to enhance the credibility of J.H.'s testimony. State's Brief at 14. It is true that such evidence would be admissible if it tends to show that a witness spoke truthfully. *State v. McNeil*, 83 Ohio St.3d 438, 442, 700 N.E.2d 596 (1998). But in *McNeill*, the State used prior interactions between the witness and the defendant to bolster the witness's identification of the defendant. *Id.* The other acts testimony went directly to what the testifying witness knew and believed about the defendant's identity. *Id.* Here, A.B.'s testimony is entirely distinct and unrelated to J.H.'s testimony and does not affect J.H.'s actual ability to truthfully recount what happened. Neither one bolsters the other. Things outside of J.H.'s knowledge have no effect on his ability to tell the truth and are therefore irrelevant to his character for truthfulness. A.B.'s testimony therefore is not admissible to bolster J.H.'s credibility.

And even if this evidence is properly admitted to show intent, it was not used for that limited purpose. A limiting instruction must accompany any evidence given for the purpose of Evid.R. 404(B). *Huddleston v. United States*, 485 U.S. 681, 691, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988); *State v. Crafton*, 15 Ohio App. 2d 160, 239 N.E.2d 571 (5th Dist. 1968). And such a limiting instruction was given here. But that instruction did not specify that the evidence must not be used for the purpose of establishing whether the acts took place, only for establishing whether the acts were intended for the purpose of sexual gratification. *See United States v.*

*Hadley*, 918 F.2d 848 (9th Cir. 1990) (holding that a proper Rule 404 instruction specifies that the jury could only consider the 404(B) evidence if they had already decided that the state proved that the alleged acts took place). This evidence cannot be used to prove that the crime actually occurred, only to prove the intent portion of the State's case. *State v. Flonnory*, 31 Ohio St. 2d 124, 285 N.E.2d 726 (1972), *vacated on other grounds as stated in State v. Diehl,* 64 Ohio St. 2d 179, 414 N.E.2d 410 (1980); *State v. McKnight*, 107 Ohio St. 3d 101, 2005-Ohio-6046, 837 N.E.2d 315 (trial court provided limiting instruction to jury indicating that other acts evidence could be considered only for the purpose of deciding whether it proved the defendant's motive, opportunity, intent, purpose, or plan to kidnap the victim). Yet here, the appellate court believed that the evidence improperly influenced the jury to believe that Mr. Williams acted in conformity with his propensity to engage in illicit relationships with teenagers and actually committed the acts that J.H. alleged. *Williams* at ¶ 59. This is plainly not the purpose of rule 404(B) intent evidence and therefore is an illegal use of such other acts evidence. This Court must therefore affirm the appellate court's holding.

**4. The use of "plan" evidence under Evid.R. 404(B).**

As explained above, in 1980, the rule, and related exceptions, of R.C. 2945.69 was codified by this Court into Evid. R. 404(B). That rule allowed prior acts evidence to be admitted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B). Again, this list notably added "identity" as one of the enumerated exceptional categories for permissible other acts evidence.

The relevant section of both rules allows the admission of prior acts to show "plan," though the statute further clarifies that this evidence must show the defendant's plan in perpetrating the *current* act. R.C. 2945.69. This exception for "plan" evidence has historically

been understood by this court to encompass two types of plans: repeated and idiosyncratic plans that show the identity of a perpetrator, and events leading up to the current charge that show the plan to perpetrate that charge. *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975); *State v. Lowe*, 69 Ohio St.3d 527, 531, 634 N.E.2d 616 (1994).

It is true that case law from before the rule's enactment is "not necessarily" controlling after the rule. *State v. Spradling*, 12th Dist. No. 81-07-0059, 1982 Ohio App. LEXIS 14308 (March 31, 1982). But courts around the state, even until now, generally treat the statute and the rule interchangeably. *Williams* at ¶ 77 (Gallagher, J., concurring); *see, e.g., State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), paragraph one of the syllabus.

Again, the determination by the trial court that the other acts evidence was admissible in this case is reviewed for an abuse of discretion. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66; *Morris*, Slip Opinion No. 2012-Ohio-2407, ¶ 1. A court has abused its discretion when it makes such a decision with an unreasonable, arbitrary, or unconscionable attitude. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**5. Ignoring the *Curry* limitations on "plan" evidence under 404(B) would directly contradict and entirely subsume the general purpose of 404(B).**

The State sought to admit evidence of Van Williams's prior plan to show he had the same plan here. But "plan" evidence under Evid.R. 404(B) is used either to show a common perpetrator of two very similar crimes or to show dissimilar acts that were the immediate background to the currently charged crime. Without a requirement that the evidence be used to show either identity or immediate background, evidence under 404(B) of entirely distinct prior acts is nothing but propensity evidence. Evidence of prior acts is meant to prove that the known person who committed the distinctive prior acts also committed the distinctive current acts, not

to prove that the known defendant who committed the prior acts is more likely to have committed the somewhat-similar current acts. *See State v. Hector*, 19 Ohio St. 2d 167, 174-175, 249 N.E. 2d 912 (1969) ("The average individual is prone to much more readily believe that a person is guilty of the crime charged if it is proved to his satisfaction that the defendant has committed a similar crime"). Such evidence is propensity evidence, not, as the State insists, "plan" evidence. These two modes of "plan" evidence are a recognized and logically sound part of Ohio's Evid.R. 404(B) jurisprudence. The appellate court recognized this, and this Court has no reason to revisit that court's conclusion.

The holding in *Curry* was an application of the statutory version of Evid.R. 404(B), but even absent the identity language, the only reasonable and meaningful reading of the current version of 404(B) compels the reasoning in *Curry* regarding the two categories of plan evidence.

In *Curry*, the Ohio Supreme Court defined the two types of "plan" evidence that are admissible under 404(B)'s statutory predecessor. *Curry* at 73. In *Curry*, the defendant was charged with statutory rape of one young woman. *Id.* at 70. The State sought to introduce evidence of a prior instance of sexual contact with another young woman. *Id.* at 68. The court held that this evidence was not admissible to establish "plan." *Id.* The court reasoned that the evidence did not fit into either of the two methods of using "plan" evidence: either repeated plans for identity or one-time plans for the background of the current charge. *Id.* at 73. The court determined that anything else would be propensity evidence that is inadmissible under the rule. *Id.* at 73-74.

Here, the evidence introduced of the prior sexual relationship with A.B. fell into neither of these accepted modes of using "plan" evidence. Identity was not an issue in this case, so the

prior act was not a repeated plan that established a common modus operandi. And the prior acts with A.B. were entirely unrelated to the acts with J.H., so they were not admissible as part of the immediate background of the defendant's current plan. The trial court entirely failed to apply the "plan" exception in Evid.R. 404(B) properly, and the appellate court recognized this failure as an abuse of that court's direction.

The purpose of repeated plan evidence under 404(B) is to use the unique and idiosyncratic prior acts of a defendant to prove that the same defendant acted in the same idiosyncratic and unique way in the current situation. *Curry* at 73; *Lowe* at 531. It is the uniqueness of the acts that ties the prior act to the current one, not the defendant herself. *See State v. Echols*, 128 Ohio App. 3d 677, 716 N.E.2d 728 (1st Dist. 1998) (holding that other acts evidence is very rarely admissible, since the other acts rarely rise to the level of similarity required to demonstrate a link between the incidents). The rule allows the comparison of one act to another act in order to disclose the perpetrator, not the disclosure of the perpetrator of the prior act to prove the second act happened.

Using prior acts evidence to prove that the second act is more likely to have happened is the very definition of impermissible propensity evidence. *United States v. Sebolt*, 460 F.3d 910 (7th Cir. 2006). Any reading of 404(B) that re-writes it to allow this kind of evidence removes any of the rule's protection. There is no other reasonable interpretation of rule 404(B) than one that requires either identity be at issue or there be a connection between the prior acts and the current charges for proof of plan. *See State v. Wilkins*, 135 Ohio App. 3d 26, 732 N.E.2d 1021 (9th Dist. 1999) (post-rule-404 case holding that, in a trial for rape, evidence of a prior rape was wrongly admitted, since the prior act did not either prove identity or form the immediate background of the charged crime).

Additionally, the State's argument that the similarity between the prior acts with A.B. and the current alleged acts with J.H. makes the prior acts more probative turns the traditional understanding of prejudice on its head. State's Brief at 26-27. In this case, the similarity of the previous "plan" does not weigh for admissibility. It actually weights against it. According to the Supreme Court of Ohio, acts that are more similar to the ones at issue in a given case are more prejudicial. *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992). The more similarity between the prior act and the current charge, the more likely that a jury will be impermissibly prejudiced by the inclusion of those acts. *Id.* And this is particularly true in sex abuse cases. *State v. Miley*, 5th Dist. Nos. 2005-CA-67 and 2006-CA-14, 2006-Ohio-4670.

That is, unless the evidence is establishing identity. When identity is the target of the evidence, then the closer the similarity of the events, the more probative it is. *Curry* at 73; *Lowe* at 531. It is the identity component that makes this evidence probative, not the similarity of the acts themselves, which actually make the evidence more *prejudicial*. A court must be careful to make the distinction between evidence that a defendant is the type of person who would have committed the crime and evidence that the defendant is the actual person who committed the crime. *Lowe* at 530. The Ohio Attorney General's amicus brief argues that evidence of a recurring plans is admissible to show that the same plan was used in the instant case. OAG's Amicus Brief at 12. But this evidence in Ohio has always only been admissible for purposes of showing identity. *Lowe* at 531. Anything else is necessarily only propensity evidence.

The State is correct in pointing out that the length of time between incidents is less important when the prior act is introduced for its idiosyncratic similarity to the current crime. State's Brief at 29; *State v. Craig*, 110 Ohio St. 3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 46. But such similarity is only relevant to prove identity. *Craig* at ¶ 46. There is no such

idiosyncratic similarity here. Not only were the sexual acts different in each case, the relationship described in A.B.'s testimony was consensual. And identity was not at issue in this case. As such, the length of time weighs against admissibility. *See also State v. Henderson*, 76 Ohio App. 3d 290, 295, 601 N.E.2d 596 (12th Dist. 1991) ("evidence of an act of sexual misconduct which occurred seven or eight years ago is simply too remote to be admissible. As a result, the evidence had no permissible probative value and was improperly admitted").

The State has confused the purpose of the similarity of the acts when 404(B) evidence is used. 404(B) evidence regarding plan is divided into two possible modes of proof: acts that are very similar and acts that are dissimilar. Similar acts establish identity, and dissimilar acts are admissible as background of the current charge. *See Curry* at 73; *Lowe* at 531. A.B.'s testimony is irrelevant to identity and is untethered to the charged acts. Neither method has any use in this case, as recognized by the appellate court, so A.B.'s testimony was improperly admitted.

The State finally argues that these two limitations no longer apply at all, as they only existed under R.C. 2945.69, and they have now disappeared under Rule 404(B). State's Brief at 21-25. It is true that the rule under R.C. 2945.69 was that other acts evidence to establish "plan" must either prove identity or be linked to the current offense. *Curry* at 73. But the State argues that now, since identity has been enumerated separately in Rule 404(B), there remains no limitation on how other acts evidence can be used to prove a defendant's plan. State's Brief at 22. This defies logic. If the separate enumeration of "identity" in the rule removed it as one of the two types of permissible "plan" evidence, then the subsequent rule regarding "plan" evidence would now only include the one remaining type of permissible "plan" evidence. This leaves only acts that form the immediate background of the current offense. The State suggests

no other source for reasonable limitation on "plan" evidence and does not explain why this Court should invent a new limitation when *Curry* has already provided a reasonable one.

Indeed, the Ohio Attorney General's amicus brief also asserts that these two categories of plan evidence still survive after the enactment of the rule. OAG'S Amicus Brief at 12. The first of the *Curry* evidentiary allowances is for common plans that show the identity of the common perpetrator, or what amicus calls recurring plans. *Id.* The second *Curry* category is that of other acts related to the current charge, or single instance plans in amicus's parlance. *Id.* at 13. The Ohio Attorney General seems to have no problem with the persistence of these two categories even after the enactment of Rule 404(B).

Here, the acts testified to by A.B. certainly are not part of the background of the alleged acts with J.H. And identity was not at issue. So even by the State's logic that the rule has changed, and by the Attorney general's logic that there remains two categories of plan evidence, the only logical reading of the law under Rule 404(B) still includes the *Curry* dichotomy and still precludes A.B.'s testimony.

The State also argues that *Curry's* rule unduly limits it from introducing evidence in any rape case. State's Brief at 30. This is a grossly misleading overstatement. The *Curry* holding says that other acts evidence is only relevant when it does more than just establish a defendant's propensity. *Curry* at 68. The State is still allowed to use other acts evidence under 404(B) to prove a defendant's plan, but only when those acts are relevant to one of the enumerated exceptions. *See State v. Hall*, 57 Ohio App. 3d 144, 567 N.E.2d 305 (8th Dist. 1989) (holding that acts that are common to rape cases in general are not probative under the rule). The current understanding of plan evidence, that it either establish identity or be related to the current

charge, does not, as the state alleges, "require corroboration" of allegations of sexual impropriety. State's Brief at 31. It does nothing more than require relevance.

**6. The appellate court properly held that the trial court abused its discretion in admitting this evidence, so there is no mistake of law to correct.**

Even if A.B.'s testimony was properly admitted as evidence of intent or plan, the appellate court held that this evidence was more prejudicial than it was probative, and the trial court abused its discretion in ruling otherwise. *Williams* at ¶ 64. This Court has no reason to revisit that holding.

Recently, in *State v. Morris*, this Court established that decisions regarding 404(B) evidence must be reviewed by the appellate court for abuse of discretion. *Morris*, Slip Opinion No. 2012-Ohio-2407, ¶ 1. An abuse of discretion has occurred when a court makes a decision that lacks a sound reasoning process. *Id.* at ¶ 14.

The appellate court here performed just such a review and properly found that the "intent" and "plan" evidence in this case should not have been admitted, and that the trial court's decision otherwise was an abuse of discretion. *Williams* at ¶ 60, 64. The appellate court also held that the probative value of this evidence to show either intent or plan was very limited, if not entirely irrelevant. *Id.* at ¶ 48. The evidence would have established that Mr. Williams had homosexual desires and might have previously acted on these desires in a consensual relationship with a teenager, but it would not establish that he intended to take advantage of J.H. *Id.* at 47. And there was nothing linking the prior "plan" to the currently charged one. The evidence was mere propensity evidence, attempting to show that Mr. Williams had a propensity for relationships with younger men and was therefore more likely to have committed this crime.

*Id* at 47. This kind of character evidence is explicitly forbidden by the rules of evidence. Evid.R. 404(B).

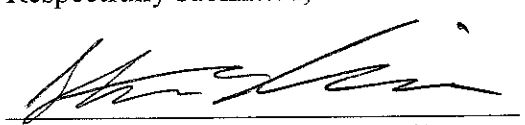
The Ohio Attorney General, as amicus, argues that this court would have to determine if the *trial court* abused its discretion in admitting A.B.'s testimony. OAG's Amicus Brief at 19. This is not true. The appellate court already established that the trial court abused its discretion, using established law and the standard recently reaffirmed by this court in *Morris*. *Williams* at ¶ 31; *Morris*, Slip Opinion No. 2012-Ohio-2407, ¶ 1. This court need not do anything, as the appellate court has already made a reasonable determination based on well-settled law.

The appellate court used the right standard and came to a reasonable conclusion that the prejudice of the "intent" and "plan" evidence in this case outweighed its value in actually demonstrating either intent or plan, and the trial court abused its discretion in holding otherwise. This Court has no reason to reexamine or revisit the appellate court's holding. This court should therefore either dismiss this case or affirm the decision of the appellate court.

## CONCLUSION

For the reasons stated above, Van Williams asks this Court to either affirm the judgment of the court of appeals or to dismiss this appeal as improvidently granted.

Respectfully submitted,



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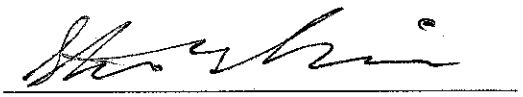
## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF APPELLEE VAN WILLIAMS** was sent by regular U.S. mail to Matthew E. Meyer, Assistant Prosecuting Attorney, Cuyahoga County Prosecutor's Office, 1200 Ontario Street, 8th Floor, Cleveland, OH 44113, this 9th day of July, 2012.



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