

NO. 2011-2094

ORIGINAL

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IN THE SUPREME COURT OF OHIO

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

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STATE OF OHIO,

Plaintiff-Appellant

-vs-

VAN WILLIAMS,

Defendant-Appellee

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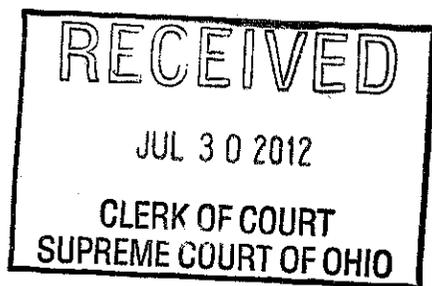
**REPLY BRIEF OF APPELLANT, STATE OF OHIO**

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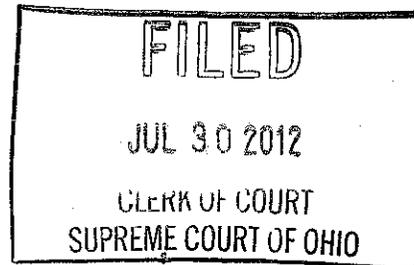
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## INTRODUCTION

The State does not ask that this Court re-write the law on 404(B) evidence, but rather permit the application of the rule as it was intended. Ohio Rule of Evidence 404(B) is first and foremost not a rule of exclusion, it dictates the circumstances for inclusion of evidence. Contrary to the rule's predecessor, R.C. 2945.59, which was designed to be a strict rule of exclusion, Evid.R. 404(B) was created to be a flexible rule of inclusion. Accordingly, the assertion that the rule and statute are interchangeable is mistaken. As the purposes of the rule and statute are inconsistent, that to the extent the rule conflicts with the statute, Evid.R. 404(B) supersedes R.C. 2945.09. Ohio Const. Art. IV, § 5(B).

Appellee seeks to create restrictions on the use of prior bad act evidence by limiting evidence of intent to only establish the statutorily required intent related to the crime a defendant is charged with, and limiting the use of similar prior bad acts probative of a common plan, to cases in which identity is at issue. Aside from these proposed restriction being inconsistent with the language and purpose of Evid.R.404 (B), it is also entirely inconsistent with Ohio case law.

## 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.***

***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.***

**I. Evid.R. 404(B) and R.C. 2945.59 are not interchangeable**

Appellee argues that Evid.R. 404(B) and R.C. 2945.09 are interchangeable, citing several appellate cases. (Appellee Brief at 12) However, because courts have previously used the statute and rule interchangeably, that does not change the fact that, to the extent the rule conflicts with the statute, Evid.R. 404(B) supersedes R.C. 2945.09. Ohio Const. Art. IV, § 5(B). Under Evid.Rule **404(B)**, does not require “other act” evidence to fit narrowly within one of the categories enumerated in the rule; it provides such evidence to be admissible so long as the evidence is admitted for *any* proper purpose other than proving the defendant's propensity to act in conformity with a particular trait of his character. *State v. Smith*, 49 Ohio St.3d 137, 140, 551 N.E.2d 190 (1990). Moreover, “[t]he listed exceptions within Evid.R. 404(B) are not exclusive \* \* \*.” *State v. Rocker*, 10th Dist. No. 97AP-1341 (1998).

To be probative for a non-propensity purpose, the “other act” need not even be “like” or “similar” to the charged offense, so long as the “other act” tends to have relevance to any non-propensity matter. *State v. Jamison*, 49 Ohio St.3d 182, 185 (1990). Relevant evidence is defined as evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid.R. 401. “[T]he question of whether evidence is relevant is ordinarily not one of law but rather one which the trial court can resolve based on common experience and logic.” *State v. Lyles*, 42 Ohio St.3d 98, 99, 537 N.E.2d 221 (1989).

Accordingly, Evid.R. 404(B) requires that matters be reviewed on a case-by-case basis, without the constraints of an inflexible standard. Appellee’s assertion that admissibility should be held to depend only upon a showing of how the evidence seeking admission fits precisely into one of the elements of the crime a defendant is charged with is unprecedented and

inconsistent with the purpose of Evid.R. 404(B). What must be presented for purposes of admissibility is a showing of how the evidence is relevant to the facts and circumstances of the various offenses in question.

**II. Intent is admissible under Evid.R. 404(B) if it is probative of the purpose of the crime or the means to commit the crime.**

Appellee seeks to place an unprecedented limitation on the admissibility of intent evidence under Evid. R. 404(B) by claiming that evidence of intent may not be admissible for the purpose of committing an element of the crime a defendant is charged with. Other acts evidence is admissible if there is substantial proof that the alleged other acts were committed by a defendant and the evidence tends to create motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Lowe*, 69 Ohio St.3d 527, 634 N.E.2d 616 (1994). This Court has long recognized the utility of other acts evidence in order to establish intent. Further, admissibility of evidence of intent is not limited to evidence that shows a defendant had the intent to commit the crime. See, *State v. Green*, 90 Ohio St.3d 352, 738 N.E.2d 1208; *State v. Waclemthaler*, 1st Dist. No. C-030901, 2004-Ohio-5501; *State v. Armstrong*, 74 Ohio App.3d 732, 600 N.E.2d 690; *State v. Weatherholtz*, 3rd Dist. No. 16-02-15, 2003-Ohio-3633; *State v. Walker*, 6th Dist. No. L-07-1156, 2008-Ohio-4614.

Evidence of intent may also be admissible under Evid.R. 404(B) to show the purpose of the crime, and may be admissible within the parameters of **Evid.R. 404(B)** to establish intent, even where intent is not disputed at trial. *State v. Nields*, 93 Ohio St.3d 6, 22, 752 N.E.2d 859 (2001); *State v. Smith*, 49 Ohio St.3d. 137, 141, 551 N.E.2d 190 (1991). The admission of this type of evidence may occur in domestic violence cases where courts have held prior bad acts can be used to show the victim's state of mind. See *Weatherholtz, supra*, at ¶ 32. Thus, Appellee's

reliance on *State v. Dunlap*, 129 Ohio St.3d 461, 2001-Ohio-4111, 953 N.E.2d 816, ¶ 25, is grossly misplaced.

In this case, it would circumvent the purpose of Evid.R. 404(B) to limit any evidence of intent to only apply directly proves whether or not Appellee gave or received sexual gratification with the child in this case. Rather intent under the rule encompasses the purpose a defendant has that leads him to commit the crime he has been charged with. This common sense application of the rule for this purpose has been approved in narcotics cases. See, e.g., *State v. Kolvek*, 9th Dist. No. 21752, 2004-Ohio-3706 , ¶25. In *Kolvek*, the Ninth District Court of Appeals found that the defendant's prior arrests for possession of methamphetamine and lab equipment was relevant of intent and supported his conviction for illegal assembly or possession of chemicals for narcotics. Accordingly, admitting evidence of intent under Evid.R. 404(B) should not be confined to Appellee's inflexible, exacting standard that prior bad acts can only be admitted for the purpose of intent to prove the intent required by statute. Rather, evidence is admissible upon a reasonable showing that the prior bad acts are probative of the purpose or intent rationally related to the crime a defendant is charged with.

### **III. Similarity of crimes is not limited to proving identity under Evid. R. 404(B).**

Within his brief, Appellee indicates that the stronger the similarity between prior bad acts and the crimes a defendant is charged, the more likelihood of prejudice. However, that similarity also increases the probative nature of the acts. See, e.g., *State v. Brown*, 8th Dist. No. 84059, 2004-Ohio-6862, at ¶33. Prohibiting admissibility of prior bad acts simply because the prior acts are more similar to the crime a defendant is charged with, unless identity is at issue, is inconsistent with the language of Evid.R. 404(B). Moreover, the assertion that evidence of a common plan, scheme or system, can only be viewed as propensity evidence unless identity at

issue is completely unfounded. (Appellee Brief at 15). While this Court did conclude that evidence of prior bad acts that are similar in nature are more probative when identity is at issue in *State v. Curry*, 43 Ohio St.2d 66, 330 N.E. 2d 720 (1975), the opposite is not always true. This Court has not concluded that similar prior crimes lose their probative value and become propensity evidence when identity is not at issue. On the contrary, the probative value of prior bad acts is largely dependent on its peculiar characteristics. Thus, requiring courts to categorize similar prior bad acts as propensity evidence when identity it not at issue, as advocated by Appellee, is inconsistent with both Evid.R. 404(B) and the prior holdings of this Honorable Court.

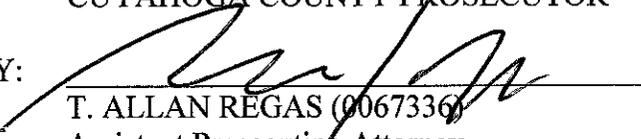
### **CONCLUSION**

For these reasons, this Honorable Court should vacate the judgment below and adopt the State's propositions of law.

Respectfully submitted,

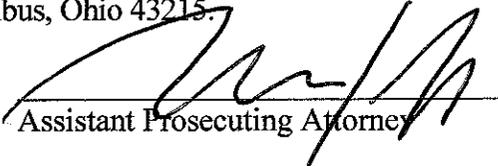
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### **CERTIFICATE AND SERVICE**

A copy of the foregoing Reply Brief of Appellant has been mailed this 27<sup>th</sup> day of July 2012 via U.S. regular mail to attorney for defendant-appellee: Stephen A. Goldmeier, Office Of The Ohio Public Defender, 250 East Broad St., 14th Fl. Columbus, Ohio 43215.

  
Assistant Prosecuting Attorney