

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant,

vs.

CARL M. MORRIS, JR.

Appellee.

SUPREME COURT CASE
NO. 2013-0251

ON APPEAL FROM THE
COURT OF APPEALS,
NINTH APPELLATE
DISTRICT 09CA0022-M

MEDINA COUNTY
COURT OF COMMON PLEAS
CASE NO. 08CR0408

MOTION FOR RECONSIDERATION OF REFUSAL TO GRANT JURISDICTION

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MEMORANDUM IN SUPPORT OF THE MOTION FOR RECONSIDERATION

Now comes the State of Ohio, Appellant in this matter, by and through the office of the Medina County Prosecuting Attorney, and respectfully moves this Court to reconsider its May 8, 2013, decision declining jurisdiction to hear this case for the reasons stated in the attached Memorandum in Support of the Motion for Reconsideration.

Pursuant to S. Ct. Prac. R. 18.02, an appellant may move the Court to reconsider its decision declining jurisdiction in a case. Under S. Ct. Prac. R. 18.02, a motion for reconsideration must be filed within ten (10) days after the Court's judgment entry or order is filed with the Clerk. By a divided 4-3 vote, the Court declined jurisdiction on May 8, 2013. Justices O'Donnell, French, and O'Neill dissented from the decision declining jurisdiction.

This case involves a jurisdictional appeal of the decision of the Ninth District Court of Appeals reversing Carl Morris, Jr.'s convictions for Rape. The Ninth District applied the more stringent "constitutional" harmless error analysis to the allegedly erroneous admission of evidence. As recently reaffirmed by this Court in *State v. Powell*, 132 Ohio St. 3d 233, 2012 Ohio 2577, at ¶¶63-64, a capital case, however, the "constitutional" harmless error standard does not apply to the admission of evidence at trial – the very situation presented in this case. The Ninth District therefore applied an improper standard of review when conducting its harmless error analysis. This Court should accept jurisdiction to clarify what the appropriate standard of review is when an appellate court confronts evidence it believes to have been erroneously admitted.

Proposition of Law I:

**WHEN REVIEWING THE ALLEGEDLY ERRONEOUS
ADMISSION OF EVIDENCE, AN APPELLATE COURT
SHOULD ANALYZE WHETHER SUBSTANTIAL OTHER
EVIDENCE SUPPORTS THE VERDICT.**

Since the decision of the court of appeals in this case in December of 2012, Ohio appellate courts have divided on application of the harmless error doctrine to the erroneous admission of evidence. The Ninth District in this case applied this Court's older decisions in *State v. Rahman*, 23 Ohio St. 3d 146, 492 N.E.2d 401 (1986) *State v. Bayless*, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976), and *State v. Williams*, 6 Ohio St. 3d 281, 452 N.E.2d 1323 (1983), to hold that the error it found was constitutional in nature and required reversal unless it could be shown to be harmless beyond a reasonable doubt. *State v. Morris*, 9th Dist. No. 09CA0022-M, 2012 Ohio 6151, at ¶ 50-52. *See also State v. Smith*, 9th Dist. No. 25834, 2012 Ohio 2614, *jur. declined*, 2012 Ohio 4902, 976 N.E.2d 915 (Oct. 24, 2012).

The Fourth District, on the other hand, recently applied this Court's decisions in *State v. Webb*, 70 Ohio St. 3d 325, 335, 638 N.E.2d 1023 (1994) and *State v. McKnight*, 107 Ohio St. 3d 101, 2005 Ohio 6046, to hold that errors in the admission of evidence are harmless if there is substantial other evidence which supports the conviction. *State v. Stone*, 4th Dist. No. 11CA3462, 2013 Ohio 209, at ¶ 25; *see also State v. Lusher*, 4th Dist. No. 11CA1, 2012 Ohio 5526, at ¶ 64.

Stone involved the precise situation as presented this case. There, the State introduced evidence under Evid. R. 404(B) which the appellate court assumed for purposes of deciding the case to be improperly admitted. *Stone*, 2013 Ohio 209, at ¶ 25. The Fourth District, however, noted that even if the admission of the other-acts evidence ran afoul of Evid. R. 404(B), it applied non-constitutional harmless error analysis and determined that the error, if any, was harmless. *Id.* at ¶ 25, citing *McKnight*, 107 Ohio St. 3d 101, at ¶ 88 and *State v. Conway*, 109

Ohio St. 3d 412, 2006 Ohio 2815, at ¶ 74. There was substantial other evidence which supported the jury's verdict; the error, if any, was therefore harmless. *Id.*

In *Lusher*, citing to its prior decision in *State v. Tyler*, 196 Ohio App. 3d 443, 2011 Ohio 3937, at ¶ 38, the Fourth District Court of Appeals specifically held that the nonconstitutional harmless error standard applies to the allegedly erroneous admission of evidence. *Lusher*, 2012 Ohio 5526, at ¶ 64. Rather than rubber-stamp on harmless error analysis, the Fourth District in *Lusher* noted that the State did not present substantial other evidence of Lusher's guilt. Because there was not such other substantiating evidence, the Fourth District held that the error was not harmless. *Id.* at ¶ 68. The court thus sustained Lusher's second assignment of error and reversed, remanding for further proceedings. *Id.* at ¶ 71, 73.

The Seventh District has also held that the admission of other-acts evidence involves non-constitutional claims. *State v. Fellows*, 7th Dist. No. 09JE36, 2010 Ohio 2699, at ¶ 25. Addressing the admission of other-acts evidence under Evid. R. 404(B), the Seventh District held that even if there was any error in admitting the other-acts evidence, the error was harmless because there was substantial other evidence which supported the jury's finding of guilt. *Id.* The *Fellows* court specifically noted that the appellant had argued the court should apply the constitutional harmless error standard from *Williams*, 6 Ohio St. 3d at 290. Citing to this Court's opinions in *McKnight*, 107 Ohio St. 3d 101, at ¶ 88, *State v. Skatzes*, 104 Ohio St. 3d 195, 2004 Ohio 6391, at ¶ 110, *State v. Keenan*, 81 Ohio St. 3d 133, 689 N.E.2d 929 (1988), *Conway*, 109 Ohio St. 3d 412, at ¶ 74, and *Webb*, 70 Ohio St. 3d at 335, the *Fellows* court noted that evidentiary questions regarding other-acts evidence involve non-constitutional claims.

This Court also held in *State v. Powell*, 132 Ohio St. 3d 233, at ¶ 63-64, that the constitutional harmless error standard does not apply to the erroneous admission of evidence at

trial. Rather than apply the constitutional harmless error standard as requested, this Court held that the nonconstitutional harmless error standard of *Webb* applied. *Id.* at ¶ 64, citing *Webb*, 70 Ohio St. 3d at 335. Applying the proper harmless error standard, this Court affirmed Powell's conviction and death sentence. *Id.*

In this case, the Ninth District's opinion relies heavily on *Rahman* (1986), *Bayless* (1976), and *Williams* (1983) to hold that the constitutional harmless error standard applies. *Morris*, 2012 Ohio 6151, at ¶ 50-51. Those decisions pre-date, by some time, this Court's decisions in *Webb* (1994), *Keenan* (1998), *Skatzes* (2004) *McKnight* (2005), *Conway* (2006), and *Powell* (2012). Those more recent decisions – in capital cases no less – do not specifically overrule *Rahman*, *Bayless*, or *Williams*. *Webb* and progeny involve application of harmless error analysis to the admission of other-acts evidence under Evid. R. 404(B), but they do not specifically overrule or distinguish the older cases.

The Ninth District's analysis and holding in this case therefore creates a conflict between the Fourth, Seventh, and Ninth Districts as well as this Court itself, unresolved by this Court's decision to decline jurisdiction, whether the admission of evidence under Evid. R. 404(B) is a constitutional issue such that the constitutional harmless error standard applies. The Ninth District holds that the allegedly erroneous admission of other-acts evidence is such a constitutional issue. The Fourth and Seventh Districts, relying on this Court's recent and repeated holdings from *Webb* on, hold that it is not. This Court should resolve that recently-created conflict and clarify the proper application of *Rahman*, *Bayless* and *Williams* in light of *Webb*, *Keenan*, *Skatzes*, *McKnight*, *Conway* and *Powell*.

Given the disregard of existing authority from this Court on the point by the appellate court below and the existence of a conflict between the Fourth and Ninth Districts on this

question, this Honorable Court should reconsider its previous decision declining jurisdiction and accept this case for review. The Ninth District's decision is in conflict with the decisions of the Fourth and Seventh Districts and this Court itself.

Certification of a conflict under App. R. 25 was inappropriate in this case because the conflict is not merely among the appellate districts but between the Ninth District and this Court. This Court should therefore reconsider its refusal to accept the jurisdictional appeal, clarify the application of the harmless error doctrine to other-acts evidence, reverse the Ninth District, and remand for further consideration.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should reconsider its May 8, 2013, decision declining jurisdiction in this case and accept jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Motion for Reconsideration was sent regular U.S. mail to David Sheldon, Counsel for Appellee Carl Morris, Jr., 669 West Liberty Street, Medina, Ohio 44256, this 15th day of May, 2013.



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