ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	**SUPREME COURT CASE NO. 2013-0251**
Appellant,	)	
vs.	)	**ON APPEAL FROM THE COURT OF APPEALS, NINTH APPELLATE DISTRICT 09CA0022-M**
CARL M. MORRIS, JR.	)	
Appellee.	)	**MEDINA COUNTY COURT OF COMMON PLEAS CASE NO. 08CR0408**

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STATEMENT OF FACTS

Carl Morris, Jr. ("Morris") lived with Susan K. ("Susan" or "Mother") while dating and after they became married. (Tr. at 62, 148, 184, 202-03.) Morris moved out of the house in June of 2007 when he and Susan separated. (Tr. at 185-86, 111.) Susan is the mother of Sarah Johnson ("Sarah"), a twenty-three (23) year-old adult, and S.K., a fifteen (15) year-old high school sophomore at the time of trial in January 2009. (Tr. at 58.) Sarah and S.K. are half-sisters by virtue of having the same mother but different fathers. (Tr. at 60.)

David K. ("David") is the biological father of S.K. and the ex-husband of Susan. (Tr. at 225.) David and Morris used to get along fine. (Tr. at 227.) Morris used to complain about his relationship with Susan to David, once saying that he wanted out of the relationship but stayed because of S.K. (Tr. at 228-29.) S.K. once told David she had a deep dark secret, but would not tell her father any more at the time. (Tr. at 230.)

David spoke with Morris about an incident involving Sarah. (Tr. at 241.) Morris was working on his car and was upset because Sarah went to her parents and told them that Morris had made sexual advances towards her. (Tr. at 241.) Sarah described how in Spring of 2005 she walked into her mother's bedroom in the evening. (Tr. at 293, 300.) Morris was sitting on the corner of the bed, and reached out, grabbing Sarah by the waist, pulling her towards him. (Tr. at 300.) As he did so, Morris said "You don't know what I would do to you but your mother would get mad." (Tr. at 300.) Sarah naturally interpreted that as a sexual advance. (Tr. at 300.) Susan was in the bathtub at that moment, but Sarah just laughed it off and left, telling Morris that he was dumb. (Tr. at 301.)

Sarah told her mother about the incident the next day. (Tr. at 301.) Susan promptly kicked Morris out of the house for the day, allowing him to return the following day. (Tr. at

301.) Upon his return, Morris apologized to Sarah, saying he did not remember doing it, but if he did or said anything inappropriate he was sorry, attributing his conduct to being drunk. (Tr. at 302.) Sarah never told S.K. about the incident before S.K. disclosed Morris' abuse of her, in part due the fact that they were not close growing up since they are seven (7) years separated. (Tr. at 303, 311.)

S.K. described the abuse as starting around first (1st) grade and continuing until approximately eighth (8th) grade, beginning with initial physical contact and progressing to more and more sexual contact, including vaginal penetration with his fingers and then penis. (Tr. at 67, 73, 359.)

When she first met Morris, S.K. thought he was nice, kind, sweet and funny guy. (Tr. at 66.) Part of the reason she initially thought he was those things was that he would do magic tricks, including disappearing coins and card tricks. (Tr. at 66.) At trial, S.K. described how Morris began the abuse through his use of "magic" tricks. (Tr. at 68.) When leaving the shower, Morris would sometimes use the towel he had wrapped around his body to cover his legs, and while lifting the towel, lift his leg so that it appeared that his foot was missing. (Tr. at 66.) S.K. thought this trick was kind of cool. (Tr. at 67.)

Then Morris sat down with S.K. and did a different "magic" trick. As S.K. described,

> He would put his thumb under the blanket and he would make me feel his thumb and it felt like his actual finger, a hard bone and like I knew it was his thumb and then he would say he can make it turn really soft and it was at that point where he would use his penis and I would feel that and I would think that that was his thumb turning in to jello.

Tr. at 68.

As Dr. Gregory Keck, a psychologist who treated S.K. testified, a number of sexual offenses against children are enabled by a process known as "grooming," in which a molester

readies a child to become sexualized. (Tr. at 361.) For strangers, this starts with making the child comfortable with physical contact with the molester. (Tr. at 361.) Dr. Keck described the jello game as a form of grooming because at first the playing with the thumb normalizes physical contact between the child and the molester. (Tr. at 358, 362.) After establishing that "normal" interaction, the molester substitutes a slightly different activity, thus establishing a connection to sexual activity as "normal." (Tr. at 362.) In this instance, Dr. Keck noted that Morris having S.K. play with his thumb was grooming behavior and the substitution of his penis for his thumb was sexual activity. (Tr. at 362.)

In another incident S.K. remembers, she was laying on the couch in the living room watching television. (Tr. at 69.) Morris, sitting or laying next to her on the couch, felt her leg and began to touch himself. (Tr. at 69.) S.K. did not understand what was happening, so she just went along with it. (Tr. at 69.) Morris began rubbing up and down on her thigh close to her vagina. (Tr. at 69.) S.K. looked at Morris and saw that he had his hand around his penis and was stroking himself. (Tr. at 70.) She was in the first (1st) grade and did not know what he was doing, so she just laid there. (Tr. at 70.)

Later, Morris would undress S.K. and put his penis by her vagina. (Tr. at 72.) Touching her with his hands and then his penis, Morris tried to make S.K. think that it would feel good and moved his hands around the outside of her vagina. (Tr. at 72-73.)

This progressed to a point where Morris would exit the shower and enter his and Susan's bedroom where S.K. would sometimes be watching television. (Tr. at 76.) Morris would slide into the bed and remove the towel before positioning himself next to S.K. (Tr. at 76.) Eventually, after years of repeated instances, Morris began inserting his penis partially into S.K.'s vagina. (Tr. at 75.) "After a period of time of slowly, I guess I would say, reassuring me

that everything wasn't hurting me, that he would actually put his penis by my vagina and have, I guess, sex from there. He never completely went in me all the way." (Tr. at 72.) S.K. clarified her "completely" comment by saying that Morris inserted his penis into her vagina on about ten (10) separate occasions, but did not insert himself entirely inside her. (Tr. at 75.)

S.K. recalled two specific instances where Morris penetrated her. (Tr. at 88-90, 93-96.) In the first, she remembered that Susan had gone to the hospital for surgery and stayed overnight. (Tr. at 88-89.) Morris took care of S.K. that night. (Tr. at 89.) Before they went to visit Susan in the hospital, Morris laid next to S.K. and inserted his penis into her vagina. (Tr. at 90.) Susan testified that she had a hysterectomy on April 22, 2003 after which she stayed overnight at the hospital. (Tr. at 183-84.) S.K. was born in May of 1993, making her about a month shy of ten (10) years old. (Tr. at 58.)

In the second incident S.K. specifically recalled, she noted that sometime between October 20 and November 1 of 2005, she was laying in her mother's bed watching a cartoon called "Scary Godmother." (Tr. at 93.) Laying on her left side watching television, and with Susan downstairs in the kitchen (tr. at 97,) Morris entered the room in a towel after showering. (Tr. at 94.) After sitting by the fan for a second to cool himself, Morris approached the bed and crawled under the covers. (Tr. at 94.) Sliding next to S.K. and positioning himself to also lay on his left side, Morris put his hand between S.K's thighs and began slowly rubbing upwards towards her pants button. (Tr. at 95.) As Morris tried to unbutton and unzip her jean pants, S.K. moved away a little bit. (Tr. at 95.) Undeterred, Morris kept reaching until S.K. finally gave in and let him do what he wanted. (Tr. at 95.) Succeeding in undoing the button for her pants, Morris pulled her pants down. (Tr. at 95.) He then pulled down her underwear. (Tr. at 95.) Using his hands first, Morris ran his fingers up and down over the outer part of her vagina. (Tr.

at 95.) Morris then inserted his penis part-way into S.K.'s vagina and "moved it around." (Tr. at 96.) When he was almost finished, Morris grabbed the towel he had entered the room with and used it to cover his ejaculation. (Tr. at 96.) S.K. noted that Morris used the towel every time he would ejaculate after molesting her. (Tr. at 97.)

During these acts, Morris would talk to S.K., whispering for her to "suck on it," and indicating his desire to lick it multiple times. (Tr. at 109.) And at various points Morris told S.K. to keep this to herself, saying "You don't tell anybody about this, do you." (Tr. at 110.) S.K. responded by shaking her head no. (Tr. at 110.)

S.K. also described how Morris was almost caught on a couple of occasions. One time in the apartment the family rented on Pinecrest Drive in Brunswick before moving to a house they bought on Ascot Drive, Morris and S.K. were on the couch while Morris was touching S.K. and himself. S.K.'s sister, Sarah, come down the stairs quickly as Morris was pleasuring himself, forcing him to cover himself quickly. (Tr. at 98.) Morris told Sarah that she scared them, but did not tell her what was going on. (Tr. at 98.)

Another time in Spring of 2005 (tr. at 187), Morris and S.K. were on the couch watching television. (Tr. at 98.) S.K. was laying on her side watching a late show or a movie. (Tr. at 98.) Morris was sitting straight up, but put his hand down his pants. (Tr. at 98.) As he slowly stroked himself, he put his other hand on her leg but was not moving his hands around. (Tr. at 98.) Susan quietly descended the stairs such that Morris did not hear her until she called out his name. (Tr. at 99.) Morris jumped a little when he heard Susan. (Tr. at 99.) S.K. ran to the bathroom. (Tr. at 187.)

Questioned by her mother, S.K. told Susan that nothing happened. (Tr. at 99.) Morris told Susan that he was holding the remote. (Tr. at 102.) S.K. recalled hearing her mom tell

Morris something about it being all over the newspaper. (Tr. at 103.) Susan did not do anything further at that time, however, because S.K. said that nothing happened. (Tr. at 188.) As she grew older, however, S.K. began to realize what was happening was wrong but was still afraid to tell anyone. (Tr. at 77.) Specifically, S.K. was afraid that if she told anyone they would call her a liar or a slut. (Tr. at 77.)

S.K. almost told her mother and David about the molestation in August of 2006. S.K., her mother Susan and David were supposed to go to California to visit Sarah, who had moved there with her recently-married husband. (Tr. at 84.) David told S.K. he was giving up his ticket for health reasons and to let Morris go with them, and S.K. began to cry. (Tr. at 84, 234.) Morris, who was pacing in the next room (tr. at 190), came over and stood over S.K. as she cried. (Tr. at 235.)

S.K. has had a number of emotional problems since being molested by Morris. In second (2nd) grade, S.K. would act like a dog, refused to play with other kids, and spoke about suicide. (Tr. at 229.) At her cousin's birthday party, S.K. hid under the stairs and refused to come out. (Tr. at 231.) In third (3rd) grade, S.K. said she wanted to die. (Tr. at 231.) David spoke to a counselor about setting up counseling, but Morris was adamant to "keep the problems at my house." (Tr. at 231.) Morris refused to allow counseling, insisting that if counseling was necessary, it should occur through the family. (Tr. at 232.)

After their house on Ascot Drive was foreclosed upon, Susan and S.K. moved in with a family friend, Darla, at her farm in Valley City, Ohio for just over a month. While staying there, S.K.'s best friend, D.B., visited. After working with some of the animals on the farm during the late fall of their ninth (9th) grade year, S.K. and D.B. were cleaning up in the downstairs bathroom – a private, quiet place – when S.K. told D.B. that Morris had raped her. (Tr. at 81,

323.) S.K. did not cry when she made the disclosure, instead trying to brush it off even though D.B. noted that it clearly affected her. (Tr. at 323.) D.B. was put off by the information, so she did not want to talk about it further. (Tr. at 327.)

Just before Christmas 2007, S.K. told her parents about the abuse. (Tr. at 78, 186, 227.) S.K. started by saying she had something to say, but could not get it out. (Tr. at 237.) She began pulling her hair, clawing at her head and crying hysterically. (Tr. at 237.) Her eyes beginning to roll back into her head, S.K. begged for David to hit her. (Tr. at 239, 265.) David complied, smacking her and snapping her out of her fit. (Tr. at 272.) S.K. then yelled "Carl raped me." (Tr. at 239.) Susan and David took S.K. to the Brunswick Police. (Tr. at 239.)

On the way to the police station, David called Morris, who did not answer. (Tr. at 240.) David left voicemail that he was going to the police and that Morris should meet them there. (Tr. at 240.) David did <u>not</u> tell Morris about the rape allegation S.K. made. (Tr. at 240.) When returning the call the next day, Morris asked "why didn't she say something years ago?" (Tr. at 253.)

After taking a report, Brunswick police forwarded a referral to Medina County Job and Family Services. (Tr. at 334.) Steven Sikora, an intake investigator with that agency, interviewed S.K. shortly after her report to make his own determination of credibility to determine if additional services were necessary. (Tr. at 334-36.) S.K. was cooperative and provided internally consistent accounts of the abuse during the interview. (Tr. at 337, 340.) Determining that the alleged perpetrator was no longer present in the home, that the parents were protective and supportive, Mr. Sikora established a safety plan for S.K., an option short of opening a full ongoing case which consisted of goals to ensure the parents protected the child. (Tr. at 341-42.)

Dr. Keck, S.K.'s treating psychologist, first became involved in treating S.K. in regards to a suicide gesture in early December 2007, before she disclosed the abuse. (Tr. at 351.) From his initial observation of S.K. it was clear that it was not a serious attempt to kill herself. (Tr. at 351.) Following her report to police on December 22, 2007, S.K. disclosed the abuse to Dr. Keck, indicating that Morris had raped her. (Tr. at 357.) S.K. disclosed all of the same relevant details regarding how the abuse started, how it generally occurred and Morris' use of a towel to cover his ejaculations. (Tr. at 358-367.) Noting that some patients have inaccurate memories, Dr. Keck stated that there was no clinical reason to disbelieve S.K. (Tr. at 368.) Dr. Keck was careful to note that he was not vouching for S.K.'s accuracy, rather there was no clinical reason not to believe her. (Tr. at 368.)

Susan met Morris in or around 1999 (tr. at 200) and married him on August 5, 2002, living with him until they separated in June 2007. (Tr. at 184.) Susan testified at trial that Morris would do magic tricks for people spontaneously. (Tr. at 191.) Specifically, she described one "trick" where Morris, after leaving the shower with a towel around his waist, would open the towel from behind so that one could not see his front while facing him. (Tr. at 191.) Morris would lower the towel a little bit just below his waist so that the towel touched the floor, then raise the towel and one of his legs so as to make it appear that one of his legs was then missing. (Tr. at 191.)

Susan also described the nature of the conflicts in their relationship, articulating how their issues related to money, Morris getting into an accident, and his apparent inability to maintain a job. (Tr. at 194.) Susan also admitted that she and Morris would argue over their sex life. (Tr. at 195.) Those fights related to Morris wanting to have sex every day and Susan not so. (Tr. at 197.) When Susan refused, Morris became verbally and mentally abusive. (Tr. at 197.) When

they did have sex, Morris would often ejaculate into a towel or t-shirt or whatever was available. (Tr. at 199.)

After being assigned this case as a member of the detective bureau of Brunswick Police, Detective Henry Papushak interviewed S.K. and took statements from other individuals involved in the case. (Tr. at 392-93, 396-97.) Morris had also filed a complaint of a threatening phone call after David left a voicemail. (Tr. at 398.) Using that complaint as an opportunity to talk to Morris, Detective Papushak invited Morris to the police station to discuss it. (Tr. at 398.) Detective Papushak did not inform Morris before the interview of the rape allegation. (Tr. at 398.) Morris met the detective at Brunswick Police Department on January 3, 2008 and sat with Det. Papushak in the interview room at the front of the building. (Tr. at 399.) In addition to taking notes during the interview, Det. Papushak video-taped the interview. (Tr. at 399; Exhibit 2.) Morris still had the phone call on his phone and played it for the detective. (Tr. at 409.)

From their initial conversation, it did not appear that Morris had any indication about the rape allegation. (Tr. at 410.) Despite the lack of any outside knowledge, and without Det. Papushak bringing the issue up, Morris offered that he thought the investigation would be about him molesting S.K. (Tr. at 410-11.) Asked why he thought that, Morris said he put two and two together. (Tr. at 411.)

Morris also contradicted himself in parts of the interview. After initially discussing S.K.'s emotional state as inclusive of suicidal before he separated from Susan, he denied that S.K. was suicidal mere minutes later. (Tr. at 418, 420-21.) Additionally, having expressed to David years before that S.K. was his daughter and that David and Morris would go "get" anyone who hurt her (tr. at 227), Morris told Det. Papushak in the interview that he did not think a person who raped a child should be punished, opining instead that they should get "help." (Tr. at

430.) Morris also explained that his relationship with Susan was strained because Susan and he only had sex one (1) or two (2) times a month. (Tr. at 422.) He then said if Susan had treated him as well as S.K. did, he and Susan would still be married. (Tr. at 423.)

After the State rested, Morris called Basillio Imbrigiotea ("Bill"). Bill is a C6 quadriplegic who has been friends with Morris for at least fifteen (15) years. (Tr. at 487.) Morris met Bill when Morris lived in an apartment above Bill for a number of years. (Tr. at 487.) As a result of his condition, Bill requires assistance at night to do household chores and assist him in hooking up gadgets which monitor him during the night. (Tr. at 487, 489-90.) Morris received certification five (5) or six (6) years ago through the state to be paid through a state program. (Tr. at 487.)

Morris would generally arrive at Bill's house between 7:00 and 8:00 p.m. and would stay for approximately three (3) hours every night. (Tr. at 489.) While there, Morris would help wash dishes, prepare dinner, vacuum, spend time with Bill watching tv or conversing, and then help Bill into bed by hooking up monitoring equipment. (Tr. at 489-90.) Morris did not go to Bill's house every night. Morris sometimes missed, but always made arrangements for someone else to go. (Tr. at 490-91.) Other times, Morris would bring his son, Todd, or S.K. (Tr. at 491.) Bill's ex-girlfriend has children who live next door to him, whom S.K. would play with or watch television. (Tr. at 491.)

Bill testified on direct that he was always home when Morris brought S.K. over with him, saying S.K. was only over six (6) to seven (7) times total. (Tr. at 493-94.) On cross-examination, however, Bill admitted that Morris had a key to his house, that Bill was not always home, and that Morris would be sometimes at the house already when Bill got home, waiting for him. (Tr. at 497.)

Bill noted on re-direct that his neighbors, aware of his condition, watch his house and would know if Morris was over and if anyone was with him. (Tr. at 498.) Morris did not offer any testimony of neighbors saying that Morris was never at the house with S.K. when Bill was not home, choosing instead to rest after his sole witness. (Tr. at 499.)

STATEMENT OF THE CASE

The Medina County Grand Jury indicted Morris on September 24, 2008, charging him with one (1) count of Rape (of a child under ten) in violation of R.C. 2907.02(A)(1)(b), (B), a felony of the first degree; and one (1) count of Rape (of a child under thirteen) in violation of R.C. 2907.02(A)(1)(b), also a felony of the first degree. At arraignment on October 3, 2008, Morris pleaded not guilty to both counts.

The case proceeded through the pre-trial process until January 26, 2009, when the case was tried to a jury. The jury returned guilty verdicts on both counts, with special finding that the victim was under ten (10) years old at the time. The trial court accepted the jury's verdict and sentenced Morris on March 18, 2009, to five (5) years on count II and life on count I, ordering the sentences to run consecutively. In addition to imposing the mandatory five (5) year period of postrelease control for felonies of the first degree, the trial court designated Morris a Tier III sex offender. (Appx. at A-49.)

Morris timely appealed to the Ninth District Court of Appeals, which reversed his conviction solely on Evid. R. 404(B) grounds. *State v. Morris*, 9th Dist. Medina Cty. No. 09CA0022-M, 2010 Ohio 4282. Thereafter, the State sought discretionary review in this Court. After initially declining to accept jurisdiction, the Court granted the State's motion for reconsideration and accepted jurisdiction on the State's first proposition of law as to the

appropriate standard of review of admission of evidence under Evid. R. 404(B). *State v. Morris, 04/06/2011 Case Announcements*, 2011-Ohio-1618. Holding that the abuse of discretion standard applies, the Court reversed the judgment of the Ninth District and remanded for the court of appeals to apply the correct standard. *State v. Morris*, 132 Ohio St. 3d 337, 2012 Ohio 2407.

On remand, the Ninth District again held that the trial court improperly admitted the other-acts evidence under Evid. R. 404(B). *State v. Morris*, 9th Dist. Medina Cty. No. 09CA0022-M, 2012 Ohio 6151. (Appx. at A-3.) The appellate court considered the State's argument that the error, if any, was harmless, and, applying the *constitutional* harmless error standard, held that the error was not harmless beyond a reasonable doubt. *Id.* at ¶ 59.

The State sought a jurisdictional appeal on February 11, 2013. (Appx. at A-1.) By a divided 4-3 vote, the Court initially declined to accept jurisdiction. *State v. Morris*, 135 Ohio St. 3d 1433, 2013 Ohio 1857, 986 N.E.2d 1022. The Court granted the State's timely motion for reconsideration and accepted the appeal on the sole proposition of law. *State v. Morris*, 06/26/13 *Case Announcements*, 2013-Ohio-2645. The clerk filed the record on July 5, 2013. The State presents the following brief and propositions of law for the Court's consideration.

LAW AND ARGUMENT

Proposition of Law I: WHEN REVIEWING THE ALLEGEDLY ERRONEOUS ADMISSION OF EVIDENCE, AN APPELLATE COURT SHOULD ANALYZE WHETHER SUBSTANTIAL OTHER EVIDENCE SUPPORTS THE VERDICT.

A. This Court Applies a Bifurcated Approach to Harmless Error Under Crim. R. 52(A).

This Court has traditionally enforced a two-pronged approach to harmless error analysis under Crim. R. 52(A). Simply stated, when the error involves the deprivation of a constitutional right, this Court has mandated that courts apply constitutional harmless error analysis. It is well-settled, and this appeal does not challenge the fact, that constitutional errors which do not rise to the level of structural error are subject to review for harmless error under the "beyond a reasonable doubt" standard. *E.g. Chapman v. California*, 386 U.S. 18, 24 (1967).

When the alleged error does not involve deprivation of constitutional rights, however, such as the alleged erroneous admission of evidence, this Court has held that courts should apply non-constitutional harmless error analysis. *E.g. State v. Webb*, 70 Ohio St. 3d 325, 335, 638 N.E.2d 1023 (1994). Under this standard, "[n]onconstitutional error is harmless if there is substantial other evidence to support the guilty verdict." *Id.*

This case is about the intersection of constitutional and non-constitutional harmless error. In a long line of cases, this Court has held that analysis of evidence alleged to have been improperly admitted is subject only to non-constitutional harmless error analysis. *Webb*, 70 Ohio St. 3d at 335, citing *State v. Cowans*, 10 Ohio St. 2d 96, 104, 227 N.E.2d 201 (1967). Non-constitutional harmless error analysis, however, pre-dates *Webb*.

As the Eighth District noted in 1975, when determining whether the admission of *evidence* is harmless error, the test is not whether the error is harmless beyond a reasonable

doubt or even whether there is a reasonable probability that the evidence may have contributed to the defendant's conviction. *State v. Davis*, 44 Ohio App. 2d 335, 347, 338 N.E.2d 793 (8th Dist. 1975). Rather:

> [t]he Ohio test then for determining whether the admission of inflammatory and otherwise erroneous evidence is harmless non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. If there is substantial evidence, the conviction should be affirmed, but if there is not other substantial evidence, then the error is not harmless and a reversal is mandated.

Id. at 347. This Court in *Webb* followed *Davis*, explicitly citing it together with its decision in *Cowans*, 10 Ohio St. 2d at 104. *Webb*, 70 Ohio St. 3d at 335.

Moreover, in the years since *Webb* this Court has consistently followed the distinction between constitutional and non-constitutional harmless error. *State v. McNeill*, 83 Ohio St. 3d 438, 447, 700 N.E.2d 596 (1998); *State v. Keenan*, 81 Ohio St. 3d 133, 142, 689 N.E.2d 929 (1998); *State v. Skatzes*, 104 Ohio St. 3d 195, 2004 Ohio 6391, at ¶ 110; *State v. McKnight*, 107 Ohio St. 3d 101, 2005 Ohio 6046, at ¶ 88; *State v. Conway*, 109 Ohio St. 3d 412, 2006 Ohio 2815, at ¶ 74; and *State v. Powell*, 132 Ohio St. 3d 233, 2012 Ohio 2577, at ¶ 63-64.

Cowans (1967)

In *Cowans*, this Court addressed the alleged improper admission into evidence of two (2) confessions and the rebuttal testimony of a police officer. 10 Ohio St. 2d at 99. After finding the first confession to have been properly admitted, the Court held the second confession was obtained in violation of Cowans's Sixth Amendment right to counsel, *id.* at 102, and thus improperly admitted at the trial. *Id.* at 103. The Court then went on to examine whether that error was harmless. Citing *Fahy v. Connecticut*, 375 U.S. 85 (1963) and *Chapman*, 386 U.S. 18

(decided earlier the same year as *Cowans*), the Court noted that when *constitutionally* inadmissible evidence has been admitted, reversal is required when there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Cowans*, 10 Ohio St. 2d at 104. Noting that the Sixth Amendment violation was a constitutional error, the Court observed that there was no question that the second confession might have contributed to the conviction and reversed. *Id.* at 105.

Webb (1994)

In *Webb*, a capital case, the defendant started a fire which ultimately killed his wife and children. 70 Ohio St. 3d at 331-332. As a result of that fire, Webb himself was hospitalized. *Id.* at 334. At trial the State introduced hospital records to show that Webb's injuries disproved his statements about where he was when the fire started as well as to show that he had lied to another person to make it appear to authorities that the other person was responsible, indicating prior calculation and design. *Id.* Webb argued on appeal that admission of the records violated R.C. 2317.02(B), the doctor-patient privilege statute. *Id.* The appellate court held the records inadmissible but concluded that admission of the records was harmless error. *Id.*

This Court held, contrary to an earlier holding in *State v. Rahman*, 23 Ohio St. 3d 146, 150, 492 N.E.2d 401 (1986), that error involving privilege is *not* a constitutional violation. *Webb*, 70 Ohio St. 3d at 334-335. "In the first place, the privilege is not a requirement of due process. Privileges do not make trials more fair; they neither 'facilitate the fact-finding process' nor 'safeguard its intregity.'" *Id.* at 334, quoting 1 McCormick on Evidence 269 (4th Ed. 1992), § 72. "Rather," the *Webb* Court observed, "they protect 'principle[s] or relationship[s] . . . that society deems worthy of preserving and fostering,' even at some cost to the court's truth-finding

function." *Id.*, quoting GRAHAM C. LILLY, INTRODUCTION TO THE LAW OF EVIDENCE 381 (2nd Ed. 1987), § 9.1. The Court noted that hospital records fall squarely within the business records exception to the hearsay rule and thus did not violate the Confrontation Clause. *Id.* at 335.

The *Webb* Court noted that the exception was a firmly rooted hearsay exception under *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), and thus noted that admission of such evidence does not abridge the Sixth Amendment's Confrontation Clause. *Id.*, citing *White v. Illinois*, 502 U.S. 346 (1992). Under any of the modern tests, hospital records are not made in anticipation of litigation and thus are not "testimonial." Thus even post-*Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), overruling *Roberts*, 448 U.S. 56, the admission of the hospital records in *Webb* would not be a constitutional error. *See State v. Hood*, 135 Ohio St. 3d 137, 2012 Ohio 6208, at ¶ 34.

The *Webb* Court then noted that "[n]onconstitutional error is harmless if there is substantial other evidence to support the guilty verdict." 70 Ohio St. 3d at 335, citing *Davis*, 44 Ohio App. 2d at 346-348; *Cowans*, 10 Ohio St. 2d at 104; *State v. Diehl*, 67 Ohio St. 2d 389, 399, 423 N.E.2d 1112 (1981) (Stephenson, J., dissenting); and *State v. Nichols*, 85 Ohio App. 3d 65, 73, 619 N.E.2d 80, 86 n.6 (4th Dist. 1993).

Applying the non-constitutional harmless error standard to the facts in that case, the *Webb* Court held that there was substantial evidence, independent of the hospital records, that Webb's injuries were inconsistent with his claims. *Id.* at 335. The Court further noted that even Webb's own expert opined that someone standing where Webb claimed he had stood would have been burned and would have died within three (3) days. *Id.* Yet Webb was not killed and his shirt was not burned. *Id.* The error in admitting the records was therefore harmless.

McNeill (1998)

In *McNeill* the State presented relevant victim-impact evidence as other-act testimony to refute or rebut the mitigation evidence offered in the penalty phase of a capital trial. 83 Ohio St. 3d at 446. The Court noted that McNeill offered mitigation testimony of a broad nature that he "[brought] a lot of joy . . . to . . . people around." *Id.* In presenting this broad character evidence, McNeill opened the door to "other evidence" in rebuttal that he did not bring joy to others. *Id.* The trial court's decision to allow such testimony was therefore not an abuse of the court's discretion. *Id.* at 447, citing *State v. Xie*, 62 Ohio St. 3d 521, 527, 584 N.E.2d 715 (1992).

After holding that the evidence was properly admitted, the Court analyzed the claim in the alternative. Even assuming for the sake of argument that the State's rebuttal testimony was improper, the Court held that the error would have been harmless. *Id.* "The use of victim-impact evidence during the penalty phase of a capital case is not a constitutional violation." *Id.*, citing *Payne v. Tennessee*, 501 U.S. 808 (1991) and Art. I, § 10a, Ohio Constitution. "Its admission constitutes a violation, if at all, of Ohio's statutory scheme. Thus, the standard for errors of a nonconstitutional nature would apply to the testimony at issue." *Id.* The Court then quoted the non-constitutional harmless error standard from *Webb* that such error is harmless if there is "substantial other evidence to support the . . . verdict." *Id.*, quoting *Webb*, 70 Ohio St. 3d at 335. Applying that standard, the Court held that any error would have been harmless. *Id.*

Keenan (1998)

In *Keenan*, also a capital case, the defendant complained that an investigating detective gave hearsay evidence during his trial. 81 Ohio St. 3d at 142. Over objection, the detective

testified that a co-defendant, D'Ambrosio, told the detective that the last time he had seen the victim was about 2:00 a.m. on Saturday morning. *Id.* This Court noted that the testimony was "certainly hearsay." *Id.* The admission of hearsay evidence does not present a Confrontation Clause issue, however, if the declarant (here, D'Ambrosio) testified at trial. *Id.*, citing *California v. Green*, 399 U.S. 149 (1970). D'Ambrosio testified as a defense witness, thus the improper admission of the detective's hearsay testimony was not constitutional error. *Id.*

Quoting the non-constitutional harmless error standard from *Webb*, the Court noted that there was "substantial other evidence" to support the guilty verdict. *Id.*, quoting *Webb*, 70 Ohio St. 3d at 335.

<u>*Skatzes* (2004)</u>

In one of the aggravated murder prosecutions following the Southern Ohio Correctional Facility at Lucasville prison riot, the State presented evidence under Evid. R. 404(B) revolving around uncharged acts which occurred during the riot including destroying property, disciplining other inmates using violence, and Skatzes's involvement in the Aryan Brotherhood. *Skatzes*, 104 Ohio St. 3d 195, at ¶ 109. The Court noted that Skatzes's involvement with the Aryan Brotherhood was offered to show his leadership role during the takeover, which bore directly upon the crimes with which he was charged. *Id.*, citing *State v. Sanders*, 92 Ohio St. 3d 245, 256-257, 750 N.E.2d 90 (2001).

Evidence about Skatzes's involvement in a hunger strike and stopping up toilets at Mansfield Correctional Institution *after* the takeover had ended, however, should have been excluded. *Id.* at ¶ 110. Opining that this other-act evidence was relatively minor and did not prejudice Skatzes, the Court held that the error was harmless. *Id.*, citing *State v. Robb*, 88 Ohio St. 3d 59, 69, 723 N.E.2d 1019 (2000), and *State v. Gumm*, 73 Ohio St. 3d 413, 426, 653 N.E.2d

253 (1995). The Court did not assess whether it found the error harmless beyond a reasonable doubt but simply noted that it was minor and did not prejudice Skatzes. *Id.* In effect, the Court applied the non-constitutional harmless error analysis from *Webb*.

McKnight (2005)

In a capital prosecution for aggravated murder, the State introduced evidence under Evid. R. 404(B) concerning the defendant's prior amorous relationships with individuals and his modus operandi or plan to be alone with the victim. *McKnight*, 107 Ohio St. 3d 101, at ¶ 83-84. The testimony demonstrated that McKnight developed romantic interest in his co-workers and asked them out. *Id.* at ¶ 84. This evidence tended to show the likelihood that McKnight also developed an interest in the victim, who worked with McKnight at a restaurant. *Id.* at ¶ 84.

The Court analyzed several pieces of other-act evidence admitted at the trial and found most of them to be properly admitted. *Id.* at ¶ 84-87. Some of the evidence, however, was improperly admitted. The Court held that testimony that McKnight and another woman had sex in McKnight's car before McKnight spent the night at the home which that woman and a third person shared was irrelevant and therefore inadmissible under Evid. R. 404(B). *Id.* at ¶ 88. The Court nevertheless found that the evidence had minimal impact and did not have a prejudicial effect given the other compelling evidence of McKnight's guilt. *Id.* at ¶ 88, citing *State v. Noling*, 98 Ohio St. 3d 44, 2002 Ohio 7044, at ¶ 49. The Court did not apply the constitutional harmless error. In effect, the Court applied the nonconstitutional harmless error standard in *Webb*. *Compare McKnight*, 107 Ohio St. 3d 101, at ¶ 88 *with Webb*, 70 Ohio St. 3d at 335.

In this case, the Ninth District held that the trial court improperly admitted evidence relating to Morris's sex life. Like *McKnight*, evidence was admitted in this case relating to other

instances bearing on Morris's sex life. Even assuming that the trial court in this case abused its discretion in admitting that evidence, *McKnight* holds that the admission of this sexual character evidence does not rise to the level of constitutional error and must instead be analyzed consistent with the non-constitutional harmless error standard in *Webb*. 107 Ohio St. 3d 101, at ¶ 88.

Conway (2006)

In *Conway*, the defendant had asked others to kill the eventual victim without providing a reason. *Conway*, 109 Ohio St. 3d 412, at ¶ 4. After the others did not kill the victim during a trip to West Virginia, they drove the victim back to Columbus where they met Conway in a cornfield. *Id.* at ¶ 7-8. Conway ordered one of the other men to pull the victim out of the car and choke him, which the other man pretended to do. *Id.* at ¶ 8. Conway then had the other man drag the victim further into the cornfield. *Id.* After the men removed all of the victim's clothes except for his underwear, Conway took a pick-ax from his truck and stabbed the victim twice before returning to the vehicles with the bloodied ax. *Id.* at ¶ 9. Conway cleaned his bloody pick-ax on the ground and disassembled it. *Id.* The men then poured lime over the victim's body and left it in the cornfield. *Id.*

As part of a plea agreement with the State one of Conway's cellmates at the jail, Ronny Trent, testified as to conversations he had with Conway in jail about the murder. *Id.* at ¶ 69. Trent also testified that Conway talked about an unrelated case in Chillicothe and Conway's concern that people would cooperate with the police. *Id.* at ¶ 69. Conway then said that he had a "hit list" of people and that he wanted Trent to kill one of the men who had been present when Conway killed the victim in the cornfield. *Id.*

This Court held that Trent's testimony on this point was relevant to show how the conversation turned towards Conway asking Trent to kill one of the men present for the murder. *Id.* at ¶ 70. The evidence that Conway wanted Trent to kill the other man to prevent his testimony was admissible to show Conway's consciousness of guilt. *Id.* at ¶ 70, citing *State v. Williams*, 79 Ohio St. 3d 1, 11, 679 N.E.2d 646 (1997). And though Trent's testimony touched on an unrelated racketeering case and an unrelated case where the victim saw Conway shoot someone at a White Castle, that evidence was probative of Conway's motive to kill the victim and thus his identity as the killer as well as the witness-murder specification under R.C. 2929.04(A)(8).

On appeal Conway argued that Trent's testimony referring to a Chillicothe robbery in relation to Conway's plan to kill one of the men present when Conway killed the victim was improper. *Id.* at ¶ 73-74. This Court held that the evidence of Conway's alleged involvement in that robbery was irrelevant to the charges in this case and should not have been admitted under Evid. R. 404(B). *Id.* at ¶ 73. Nevertheless, the admission of testimony about the Chillicothe robbery was of minor significance compared to the gravity of the aggravated murder. *Id.* at ¶ 74. It was not prejudicial error. *Id.*

Trent also testified that Conway had told him that there might be other people Conway wanted Trent to kill, that the "body count" was getting astronomical, and that Trent had showed Conway photos of two people he had killed for Conway. *Id.* at ¶ 79. This Court held that with the exception of the references to the photograph of the victim found in the cornfield, none of that testimony should have been admitted because it did not tend to show by substantial proof anything of the permissible purposes of Evid. R. 404(B). *Id.*

The Court held that the admission of this evidence, which related to other murders committed or the attempt to silence witnesses against him, was improper but did not rise to the level of prejudicial error. *Id.* at ¶ 82. The Court observed that the comments were gratuitous on Trent's part and not invited by the prosecutor. *Id.* "Moreover, other evidence showing similar acts and intentions of Conway was properly admitted." *Id.* Conway did not suffer material prejudice. *Id.*

Powell (2012)

Finally, in *Powell*, also a capital case, the State presented testimony from Powell's brother, Isaac, that Powell told Isaac that he had poured gasoline on the side door of the victims' house. 132 Ohio St. 3d 233, at ¶ 53. Isaac had previously testified before the grand jury that Powell had admitted to him that Powell had poured the gasoline on the door. *Id.* at ¶ 52. At trial, Isaac recanted some of his testimony, saying that he did not remember. *Id.* at ¶ 52-53. The State attempted to refresh Isaac's recollection through reviewing his grand jury testimony and playing a videotaped statement as a prior consistent statement. *Id.* at ¶ 56.

This Court held that the trial court properly allowed the prosecutor to attempt to refresh Isaac's recollection by requesting he review the grand jury testimony transcript. *Id.* at ¶ 58. When Isaac reviewed the grand jury transcript, he stated that it did "not really" refresh his recollection. *Id.* The prosecutor continued, however, to refer to the grand jury testimony during further questioning, asking what Isaac had told the grand jury under oath. *Id.* at ¶ 59. The Court noted that this question simply elicited what the witness had told the grand jury rather than attempt to refresh the recollection and was therefore inadmissible hearsay. *Id.*, citing *State v. Clay*, 187 Ohio App. 3d 633, 2010 Ohio 2720 (5th Dist.), at ¶ 25.

Isaac had also given a videotaped statement to police. *Id.* at ¶ 61. The State attempted to introduce the videotaped statement as a prior consistent statement. The Court observed that the admission of the videotaped statement as a prior consistent statement was itself premised on the admissibility of testimony about what Isaac had told the grand jury. *Id.* at ¶ 62. Thus, the videotaped statement was improperly admitted as a prior consistent statement because its admissibility was based upon testimony which was itself inadmissible. *Id.*

Having determined that evidence was improperly admitted, the Court conducted harmless error review. *Id.* at ¶ 63. The Court noted that the State argued on appeal that the admission of the evidence, both the testimony about prior grand jury testimony and the videotaped statement, was harmless beyond a reasonable doubt. *Id.* at ¶ 63. The Court observed that this is the standard which applies to errors involving *constitutional* rights. *Id.*, citing *Chapman,* 386 U.S. at 24.

The admission of hearsay does not violate the Confrontation Clause when its declarant testifies at trial. *Id.* at ¶ 64, citing *Green*, 399 U.S. at 155, and *Keenan,* 81 Ohio St. 3d at 142. Noting that Isaac testified at trial, the Court held that the admission of the prior grand jury testimony and the videotaped statement to police were non-constitutional error. *Id.* The Court cited *Webb*'s non-constitutional harmless error standard, and found that the erroneous admission of this evidence was harmless. *Id.* at ¶ 64-65. Other properly admitted evidence provided overwhelming proof of Powell's guilt. *Id.* at ¶ 65.

In the case presented for review, the error in admitting evidence under Evid. R. 404(B), if at all, was only a violation of the Ohio Rules of Evidence, not the Constitution. Like *Webb*, *McNeill*, *Keenan*, *Skatzes*, *McKnight*, *Conway* and *Powell*, the improper admission of evidence

generally, and other-act evidence under Evid. R. 404(B) specifically, does not implicate constitutional rights. Non-constitutional harmless error review is therefore appropriate.

B. *Bayless, Williams* And *Rahman* are Either Inapplicable On Their Facts or Should Be Overruled.

In the case presented for review, the Ninth District relied on the Court's older decisions in *State v. Bayless*, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976), *State v. Williams*, 6 Ohio St. 3d 281, 452 N.E.2d 1323 (1983), and *Rahman*, 23 Ohio St. 3d 146. In each case, this Court held that the constitutional harmless error standard applied when reviewing whether the evidence, improperly admitted, was harmless. Analysis of each case reveals why the Ninth District's reliance was either misplaced or the cases should be overruled to the extent they conflict with *Webb* and progeny.

1. *Bayless* (1976)

In *Bayless*, this Court applied the rule that in a murder prosecution that evidence the defendant made threats against a third person unrelated to the deceased prior to the killing, with which the deceased had no connection and which was not part of the affair in which the deceased was killed, is not admissible. 48 Ohio St. 2d at 106, citing *State v. Moore*, 149 Ohio St. 226, 78 N.E.2d 365 (1948), at paragraph two of the syllabus. The Court therefore held that the rebuttal testimony that Bayless had made threats against sheriff's deputies while in custody was improperly admitted. *Id.*

After holding that the evidence was improperly admitted, the Court analyzed whether the admission of that evidence at trial constituted harmless error. Citing to the constitutional harmless error standard in *Chapman*, 386 U.S. 18, and other previous cases, the Court held that "[i]n order to hold the error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt." *Bayless*, 48 Ohio St. 2d at 106. The Court further noted

in its syllabus: "Error in the admission of evidence in criminal proceedings is harmless if there is no reasonable possibility that the evidence may have contributed to the accused conviction. In order to hold the error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt. (Crim. R. 33[E][4]; Crim. R. 52[A]; *Chapman v. California*, 386 U.S. 18.)" *Id.* at paragraph seven of the syllabus. Finding that the evidence against Bayless was overwhelming, the Court overruled the proposition of law. *Id.* at 107.

2. *Williams* (1983)

Seven (7) years later in *Williams,* this Court considered whether the defendant's non-attendance during voir dire was prejudicial and/or harmless. 6 Ohio St. 3d at 285-286. After holding that the trial court erred in violation of the Fifth Amendment and Section 10, Article I of the Ohio Constitution in failing to secure Williams's attendance, the Court held that the error was non-prejudicial and harmless under the *Chapman* constitutional harmless error standard. *Id.* at 286-287.

Because Williams had a right to be present under the Fifth and Fourteenth Amendments to the United States Constitution as well as Article I, § 10 of the Ohio Constitution, the State does not dispute analysis of this claim under the constitutional harmless error standard. Violation of Williams's constitutional rights was properly analyzed under the constitutional harmless error standard.

The *Williams* Court also addressed the claim that the trial court erred in admitting over his objection a confession given while in police custody. *Id.* at 289. Williams claimed that his statement was obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981) because he claimed that he requested to speak with an attorney before making a further statement. *Williams,*

6 Ohio St. 3d at 289. After holding that Williams had in fact invoked his right to consult with an attorney before making a statement, the Court again applied the constitutional harmless error standard and held that the error in admitting the confession in violation of Edwards was harmless. *Id.* at 290.

Again, because Williams had a right under the Fifth and Fourteenth Amendments of the United States Constitution to consult with an attorney before making any statement, the State does not dispute analysis in that case of the error under the constitutional harmless error standard. The error in *Williams*, as found by this Court, involved a *constitutional* right. Constitutional harmless error analysis was properly applied.

The Ninth District in this case relies on paragraph six of the syllabus in *Williams*, which states that "[w]here constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt." *Williams* did not involve the admission of evidence under Evid. R. 404(B) but rather a confession taken in violation of a suspect's Fifth Amendment right under *Edwards* to consult an attorney before answering questions. Due to the nature of the constitutional violation attendant to the admission of the evidence in question, the State does not seek to overrule *Williams* but rather limit the sweeping language of its syllabus and the application thereof by the Ninth District in this case.

3. *Rahman* (1986)

Three (3) years after *Williams*, in *Rahman*, this Court dealt with the admission of testimony from the defendant's wife under Evid. R. 601(B). 23 Ohio St. 3d at 147. At issue was

not only whether the spouse was competent under Evid. R. 601(B) but application of the substantive spousal testimonial privilege under Evid. R. 501 and R.C. 2945.42.

Important to this Court's analysis in *Rahman* was the fact that R.C. 2945.42, which codifies the spousal testimonial privilege in a criminal trial, "creates a substantive right which cannot be abridged by this court or any other." *Id.* at 148. "Thus, although a spouse may be competent to testify in a criminal trial, R.C. 2945.42 confers a substantive right upon the accused to exclude privileged spousal testimony concerning a confidential communication made or act done during coverture unless a third person was present or one of the other specifically enumerated exceptions contained in the statute is applicable." *Id.* at 149.

This Court analyzed the State's claim that the decision in *State v. Mowery*, 1 Ohio St. 3d 192, 438 N.E.2d 897 (1982), abrogated part of R.C. 2945.42. *Rahman*, 23 Ohio St. 3d at 149. After rejecting that argument, and finding no exception permitting the testimony of Rahman's wife, the Court held that the trial court erred in allowing testimony from the wife concerning privileged marital communications. *Id.*

In addressing the question of harmless error, the Court noted that it ordinarily asked whether the error affected a substantial right of the accused. *Id.* at 150, citing Crim. R. 52(A). The Court held that admission of that *substantively* privileged testimony, however, "undermined appellant's constitutional right to a fair trial, thus bringing the case *sub judice* outside the harmless error doctrine." *Id.* Noting the centrality of the testimony in the State's case as the only evidence of motive in an otherwise entirely circumstantial case, the Court noted that the testimony in question played an important role in the State's case. *Id.* The Court then cited to the *Chapman* standard for constitutional harmless error analysis and held that it could not declare

its belief, beyond a reasonable doubt, that the evidence did not contribute to the defendant's conviction. *Id.* at 150-151.

As pointed about above, part B, *supra*, the decision in *Rahman* has since been abrogated if not overruled. *Webb*, 70 Ohio St. 3d at 334-335. The Court in *Webb* held, contrary to its earlier decision in *Rahman*, that "error involving privilege is *not* a constitutional violation." *Id.* at 334 (emphasis added). Noting that privileges are not a requirement of due process and do not make trials more fair because they neither facilitate fact-finding processes nor safeguard the integrity of a trial, the Court in *Webb* applied the non-constitutional harmless error standard to the assumptively improper admission of privileged evidence. *Id.* at 334-335. Noting that the State introduced substantial evidence, independent of the hospital records at issue, the Court found that any error in admitting the records was harmless. *Id.* at 335.

C. The Ninth District Stands Alone as the Only Appellate Court in the State Which Does Not Apply Non-Constitutional Harmless Error Analysis.

The Ninth District's decision conflicts not only with this Court's decisions in capital cases addressing the improper admission of evidence under Evid. R. 404(B), part B, *supra*, but with the decisions of every other appellate district in the state.

The First District Court of Appeals follows *Webb*. *E.g. State v. Campa*, 1st Dist. Hamilton No. C-010254, 2002 Ohio 1932, at *15-16, citing *State v. Griffin*, 142 Ohio App. 3d 65, 79, 753 N.E.2d 967 (1st Dist. 2001) (holding evidence improperly admitted and rose to level of due process violation requiring analysis as constitutional error), citing *Webb*, 70 Ohio St. 3d at 335.

So too does the Second District. *State v. Harding*, 2d Dist. Montgomery No. 20801, 2006 Ohio 481, at ¶ 24, citing *Cowans*, 10 Ohio St. 2d at 104.

The Third District adheres to *Webb* as well. *E.g. State v. Wegmann*, 3d Dist. Allen No. 1-06-98, 2008 Ohio 622, at ¶ 41, citing, *inter alia*, *Webb*, 70 Ohio St. 3d at 335.

The Fourth District likewise routinely applies the nonconstitutional harmless error standard. *See State v. Tyler*, 196 Ohio App. 3d 443, 2011 Ohio 3937 (4th Dist.), at ¶ 38, citing *McKnight*, 107 Ohio St. 3d 101, at ¶ 88, *Conway*, 109 Ohio St. 3d 412, at ¶ 74, and *Webb*, 70 Ohio St. 3d at 335; *State v. Lusher*, 4th Dist. Gallia No. 11CA1, 2012 Ohio 5526, at ¶ 64, citing *McKnight*, 107 Ohio St. 3d 101, at ¶ 88, and *Webb*, 70 Ohio St. 3d at 335; *State v. Stone*, 4th Dist. Scioto No. 11CA3462, 2013 Ohio 209, at ¶ 12, citing *McKnight*, 107 Ohio St. 3d 101, at ¶88, *Conway*, 109 Ohio St. 3d 412, at ¶ 74, and *Webb*, 70 Ohio St. 3d at 335.

The Fifth District too is in accord. *State v. Smith*, 5th Dist. Guernsey No. 2012-CA-17, 2013 Ohio 1226, at ¶ 32, citing *Webb*, 70 Ohio St. 3d at 335.

The Sixth District too analyzes appropriate situations under the non-constitutional harmless error. *State v. Skrzynski*, 6th Dist. Wood No. WD-09-027, 2010 Ohio 2579, at ¶ 43, citing *Cowans*, 10 Ohio St. 2d at 104.

The Seventh District also applies the non-constitutional harmless error standard. *State v. Fellows*, 7th Dist. Jefferson No. 09 JE 36, 2010 Ohio 2699, at ¶ 25 ("Evidentiary questions such as this [other acts evidence] involve non-constitutional claims."), citing *McKnight*, 107 Ohio St. 3d 101, at ¶ 88, *Skatzes*, 104 Ohio St. 3d 195, at ¶ 110, *Conway*, 109 Ohio St. 3d 412, at ¶ 74, *Keenan*, 81 Ohio St. 3d at 142, and *Webb*, 70 Ohio St. 3d at 335.

The Eighth District applies *Webb* too. *E.g. State v. Garcia*, 8th Dist Cuyahoga No. 79917, 2002 Ohio 4179, at ¶ 64, citing *Webb*, 70 Ohio St. 3d at 335.

The standard is also followed in the Tenth District. *State v. Hurst*, 10th Dist. Franklin No. 98AP-1549, 2000 Ohio App. LEXIS 816 (Mar. 7, 2000), at *28-29, citing *Davis*, 44 Ohio App. 2d at 346.

The Eleventh District similarly applies non-constitutional harmless error principles to the admission of other-acts evidence. *State v. Sands*, 11th Dist. Lake No. 2008 Ohio 6981, at ¶ 165 (holding that error in admitting evidence, if any, was harmless), citing *Webb*, 70 Ohio St. 3d at 335; *State v. Boczar*, 11th Dist. Ashtabula No. 2007-A-0034, 2008 Ohio 834, at ¶ 50, citing *Webb*, 70 Ohio St. 3d at 335.

Finally, the Twelfth District also applies non-constitutional harmless error analysis. *State v. Carpenter*, 12th Dist. Clermont No. CA2012-06-041, 2013 Ohio 1385, at ¶ 21, citing *Davis*, 44 Ohio App. 2d at 346.

Every one of the other appellate district applies the non-constitutional harmless error standard. What is more, the Ninth District itself previously applied non-constitutional harmless error principles. *State v. Leaver*, 9th Dist. Summit No. 25339, 2011 Ohio 4068, at ¶ 15, citing *State v. Murphy*, 4th Dist. Scioto No. 09CA3311, 2010 Ohio 5031, at ¶ 80 and *Fellows*, 2010 Ohio 2699, at ¶ 25. With the decision in this case, the Ninth District thus now stands alone in analyzing ordinary evidentiary issues with no clear connection to constitutional rights under the harmless error standard reserved for constitutional errors. Its analysis contradicts the clear holding of this Court in *Webb* and application of that rule in numerous subsequent cases.

D. The Appellate Court Upset the Rule of Law and the Doctrine of Stare Decisis.

As this Court has repeatedly and recently held, the doctrine of *stare decisis* is the bedrock of the American judicial system. *State v. Silverman*, 121 Ohio St. 3d 581, 2009 Ohio 1576, at ¶

30, quoting *State v. Kalish*, 120 Ohio St. 3d 23, 2008 Ohio 4912, at ¶ 22, itself quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003 Ohio 5849. As the *Galatis* Court noted, *stare decisis* provides continuity and predictability in our legal system. 100 Ohio St. 3d 216, at ¶ 43. Adherence to prior decisions thwarts the arbitrary administration of justice in addition to providing a clear rule of law by which people can organize their affairs. *Id.*, citing *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St. 3d 1, 4-5, 539 N.E.2d 103 (1989). While prior decisions are not sacrosanct, decisions to depart from a prior determination require special justification. *Id.* at ¶ 44.

Galatis recognized the tension in overruling prior precedent and adopted a test to apply when asked to do so. Under the test, a prior decision of the Ohio Supreme Court will not be overruled unless: 1) the decision was wrongly decided at that time or changed circumstances no longer justify continued adherence to the decision; 2) the decision defies practical workability; and 3) abandoning the precedent would not create undue hardship for those who have relied on it. 100 Ohio St. 3d 216, at ¶ 48 and n.5, citing *Lawrence v. Texas*, 539 U.S. 558 (2003). As part of the test, and as this Court reaffirmed recently in *Silverman*, "considerations in favor of stare decisis are at their acme . . . where reliance interests are involved." *Silverman*, 121 Ohio St. 3d 581, at ¶ 31, quoting *Payne*, 501 U.S. at 828.

In numerous other cases, the appellate court below has routinely noted that it is duty-bound to follow the decisions of this Court. *E.g.*, *State v. Evans*, 9th Dist. Medina No. 09CA0049-M, 2010 Ohio 3545, at ¶ 34 (discussing *Foster* claim and holding that it is bound as a lower court to adhere to controlling precedent until the higher court says otherwise), citing *State v. Nieves*, 9th Dist. Lorain No. 08CA009500, 2009 Ohio 6374, at ¶ 52 (same); *see also State v. Culgan*, 9th Dist. Medina No. 09CA0060-M, 2010 Ohio 2992, at ¶ 16 (noting that it, as a lower

court, is powerless to modify or overrule a decision of the Supreme Court of Ohio). Yet in this case, when it suited the appellate court to alter the standard of review, it disregarded not only controlling cases of this Court but its own prior authority. *Compare Morris*, 2012 Ohio 6151, at ¶ 51 (applying constitutional harmless error standard to admission of evidence) *with State v. Overholt*, 9th Dist. Medina No. 2905-M, 1999 Ohio App. LEXIS 3788 (Aug. 18, 1999), at *22 (applying nonconstitutional harmless error standard), and *Leaver*, 2011 Ohio 4068, at ¶ 15.

The Ninth District in this case also specifically noted that this Court has applied a "less stringent harmless-error standard in some cases involving non-constitutional errors in the admission of evidence." *Morris*, 2012 Ohio 6151, at ¶ 51. Nevertheless, the plurality[1] opinion below applied the constitutional harmless error standard because it believed that the injection of inflammatory material violated Morris' right to a fair trial. *Id.* The Ninth District's decision below thus identified the appropriate legal standard for review – whether allegedly improper evidence was harmless under the non-constitutional harmless error standard – but purposefully chose to apply a different standard. By doing so, the Ninth District abrogated the doctrine of *stare decisis* and usurped this Court's position in the hierarchy of courts created under Article IV of the Ohio Constitution.

E. Reading All Evidentiary Issues as Fair Trial Issues Renders Moot This Court's Non-Constitutional Harmless Error Jurisprudence.

The Ninth District in this case held that the allegedly erroneous admission of evidence created a constitutional issue because the evidence rendered the trial unfair. *Morris*, 2012 Ohio 6151, at ¶ 51-55. The Ninth District's analysis in this case is the same as its treatment of a

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[1] Judge Belfance did not join Judge Dickinson's opinion but rather concurred in judgment only. *Morris*, 2012 Ohio 6151. Although there were two (2) votes to reverse, Judge Dickinson's opinion failed to gain a majority of the three (3) judge panel and is thus only a plurality opinion.

similar issue in *State v. Smith*, 9th Dist. Summit No. 25834, 2012 Ohio 2614, *jur. appeal denied*, 133 Ohio St. 3d 1424, 2012 Ohio 4902 (Oct. 24, 2012). In that case, the State attempted to introduce evidence of a family member's attempt to bribe the victim/witness. *See State v. Walker*, 55 Ohio St. 2d 208, 215, 378 N.E.2d 1049 (1978) ("attempts by persons other than the accused to bribe witnesses . . . are evidence against the accused when, but only when, it is proven that he [or she] was connected with such attempts. Acts and statements of third persons, not known or authorized by him, are inadmissible."), quoting *Mefford v. State*, 13 Ohio App. 106, 107, 31 Ohio C.A. 543 (1920). The Ninth District, however, held that the prosecutor had committed reversible misconduct by simply asking questions to lay the foundation for the introduction of such testimony. *Smith*, 2012 Ohio 2614, at ¶ 16. In asking questions to lay a foundation for the admission of evidence, the Ninth District thus held that the admission of evidence violated Smith's right to a fair trial. *Id.*

The appellate court below has been converting evidentiary issues into constitutional issues through the prism of the right to a fair trial under the Due Process Clause. *E.g. Smith*, 2012 Ohio 2614, at ¶ 16; *Morris*, 2012 Ohio 6151, at ¶ 51. Reading evidentiary issues as putative fair trial issues, however, renders moot the non-constitutional nature of evidentiary trial errors. *See Powell*, 132 Ohio St. 3d 233, at ¶ 64 (admission of videotaped statement was improper, but when analyzed under nonconstitutional harmless error standard Court found there was substantial other evidence to support guilty verdict). Under the Ninth District's approach to evidentiary issues, there is no longer nonconstitutional harmless error. That approach is inconsistent with the decisions of this Court applying nonconstitutional harmless error principles. Like victim-impact testimony or privileged testimony or business records, evidentiary issues

including the admission of other-act evidence does not, without more, implicate constitutional rights. *See McNeill*, 83 Ohio St. 3d at 447; *Webb*, 70 Ohio St. 3d at 334-335.

F. The Ninth District's Opinion Creates Rigid Rules and Mandatory Presumptions Contrary to the Intent Behind Harmless Error Review.

Ohio's harmless error rule is patterned after the federal harmless error statute. *Compare* Ohio Crim. R. 52(A) *with* Fed. R. Crim. P. 52(A); 28 U.S. C. § 2111. *See also State v. Perry*, 101 Ohio St. 3d 118, 2004 Ohio 297, at ¶ 14 n.1 (noting that Fed. Crim. R. 52 is the analogous counterpart of Ohio Crim. R. 52). The federal harmless error rule, now clearly found in the Federal Rules of Criminal Procedure, was initially the product of congressional action. As the United States Supreme Court explained, the harmless error rule "grew out of a 'widespread and deep conviction' that appellate courts had become 'impregnable citadels of technicality.'" *O'Neal v. McAninch*, 513 U.S. 432, 441 (1995), quoting *Kotteakos v. United States*, 328 U.S. 750, 759 (1946), and former 28 U.S.C. § 391. The current federal harmless-error statute, 28 U.S.C. § 2111, "traces its lineage" to the former § 391 and applies to both criminal as well as civil proceedings. *Id.*, citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 n.4 (1984). Fed. R. Crim. P. 52(A) refers to § 391 as its statutory source. *Id.* Thus, Ohio's harmless error rule, Crim. R. 52(A), which traces its lineage through the Federal rule, likewise reflects the "widespread and deep conviction" that appellate courts should not act as "impregnable citadels of technicality." *O'Neal*, 513 U.S. at 441.

The current version of the federal harmless error rule tells appellate courts to review cases "without regard to errors" that do not affect the parties' "substantial rights." *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009), applying *Kotteakos*, 328 U.S. at 750. Under *Kotteakos*, "an error is harmless unless it had substantial and injurious effect or influence in determining the jury's verdict." *Fry v. Pliler*, 551 U.S. 112, 116 (2007) (internal quotations omitted), quoting

Brecht v. Abrahamson, 507 U.S. 619, 631 (1993), itself quoting *Kotteakos*, 328 U.S. at 776. In *Brecht*, the Court held that the non-constitutional harmless error standard applies to state habeas corpus cases. 507 U.S. at 638. In its opinion, however, the United States Supreme Court explained that it had already applied 28 U.S.C. § 2111, the current harmless-error statute, to claims of non-constitutional error in criminal cases. *Id.* at 632, citing *United States v. Lane*, 474 U.S. 438 (1986). The United States Supreme Court therefore noted that claims of non-constitutional error in federal criminal cases are subject to a different, less-stringent harmless error analysis. *Id.* That analysis asks, without application of any rigid rules or mandatory presumptions, whether the error had a materially prejudicial impact on the trier of fact. *Fry*, 551 U.S. at 116; *Lane*, 474 U.S. 438.

When an appellate court creates "rigid rules" or "mandatory presumptions," it sets an "evidentiary barrier so high that it could never be surmounted." *Sanders*, 556 U.S. at 408. Doing so "justif[ies] the very criticism that spawned the harmless-error doctrine, namely, reversing for error regardless of its effect on the judgment." *Id.* at 408-409 (internal quotations omitted), quoting *Neder v. United States*, 527 U.S. 1, 18 (1999).

Like the Federal Circuit's application in *Sanders* of judicial rules and presumptions which increased the likelihood of reversal in cases where the error was actually harmless, *id.* at 409, the Ninth District's heightened harmless error review increases the likelihood of reversal where the error complained of was surpassingly minor and did not substantially and prejudicially contribute to the conviction. "[The] likelihood [of needless reversal] encourages abuse of judicial process and diminishes the public's confidence in the fair and effective operation of the judicial system." *Id.*, citing *Neder*, 527 U.S. at 18. Here, the Ninth District's purposeful use of the heightened *constitutional* harmless error standard represents the application of rigid rules and

mandatory presumptions because the selection is founded on the belief that all alleged evidentiary errors render a trial unfair under the Fifth and Fourteenth Amendment's right to a fair trial under the Due Process Clause. The Ninth District thus holds, indirectly, that all evidentiary errors must be analyzed under the far more exacting constitutional harmless error standard. Its analysis presents additional hurdles to affirming a conviction when the error, assuming one was made, did not actually have a harmful effect.

The Constitution does not guarantee an error-free or perfect trial. *Brown v. United States*, 411 U.S. 223, 231 (1973), quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968) and *Lutwak v. United States*, 344 U.S. 604, 619 (1953). As *Brown* noted, there is no such thing as a perfect trial. *Id. See also State v. Hill*, 75 Ohio St. 3d 195, 212, 661 N.E.2d 1068 (1996), quoting *United States v. Hasting*, 461 U.S. 499, 508 (1983). This is so because while trials have institutional protections, like the right to counsel or the presumption of innocence, they are conducted using human participants who are fallible. *State v. Jones*, 90 Ohio St. 3d 403, 422, 739 N.E.2d 300 (2000), citing *State v. Lott*, 51 Ohio St. 3d 150, 166, 555 N.E.2d 293 (1991), and *Hasting*, 461 U.S. at 508. If courts insisted on perfect trials, very few, if any, people would ever be convicted. The harmless error doctrine thus balances the defendant's rights against society's interest in making sure the guilty are punished.

Even the constitutional harmless error in *Chapman* was a retreat from the previous rule of automatic reversals. "*Chapman* reflected the concern, later noted by Chief Justice Roger Traynor of the Supreme Court of California, that when courts fashion rules whose violations mandate automatic reversals, they 'retrea[t] from their responsibility, becoming instead impregnable citadels of technicality.'" *Hasting*, 461 U.S. at 509, quoting ROGER TRAYNOR, THE

RIDDLE OF HARMLESS ERROR 14 (1970), itself quoting Kavanaugh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925).

The safeguards built into the framework of the proceeding serve as the assurance that the trial was fair. The hallmarks of a fair trial are those things which courts generally analyze under the never-harmless "structural error" standard. *E.g. United States v. Davila*, 133 S. Ct. 2139, 2149 (June 13, 2013), citing, *inter alia*, *Neder*, 527 U.S. at 7, and *Arizona v. Fulminante*, 499 U.S. 279 (1991). Those rights include, but are not necessarily limited to, the right to counsel or to proceed *pro se*, the right to cross-examine witnesses, the right to call witnesses in the defendant's favor, the right to a public trial, and the right to an impartial adjudicator. *See Neder*, 527 U.S. at 8 (collecting cases). "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Id.*, quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986).

This Court held in *Perry* that even statutory defects did not rise to the level of constitutional error. 101 Ohio St. 3d 118, at ¶ 24, citing *State v. Esparza*, 74 Ohio St. 3d 660, 662, 660 N.E.2d 1194 (1996). The *Esparza* Court noted that the distinction between structural constitutional error and potentially-harmless constitutional error under *Fulminante* first requires a showing of *constitutional* error. 74 Ohio St. 3d at 662. In *Perry*, the error was failing to preserve the written jury instructions in the record. 101 Ohio St. 3d 118, at ¶ 24. That error was statutory, not constitutional. *Id.*, citing R.C. 2945.10(G).

In this case, the error found by the Ninth District below was the admission of evidence. *Morris*, 2012 Ohio 6151, at ¶ 37-38, 44. Courts across this State, and this Court itself, have held that evidentiary errors generally do not rise to the level of constitutional harmless error. *Webb*,

70 Ohio St. 3d at 335; *Keenan*, 81 Ohio St. 3d at 142; *McNeill*, 83 Ohio St. 3d at 447; *Skatzes*, 104 Ohio St. 3d 195, at ¶ 110; *Conway*, 109 Ohio St. 3d 412, at ¶ 74; *Powell*, 132 Ohio St. 3d 233, at ¶63-64.

In holding that evidentiary errors affecting no more than a few pages of a nearly six hundred (600) page transcript undermined Morris's right to a fair trial, the appellate court erected a rigid rule or a mandatory presumption rather than review the case on its particular facts. Had the appellate court applied the appropriate harmless error standard under *Webb* and progeny, the court of appeals would have affirmed Morris's conviction for raping S.K., a child under thirteen years old. The evidence in this record shows that, even setting aside the supposed erroneously admitted evidence, there is substantial other evidence which supports Morris's conviction.

The child victim testified about Morris's actions, including conduct which was later identified by the child victim's psychologist as grooming behavior, and gave detailed accounts of two (2) specific instances which the State could pinpoint to a particular point in time through other evidence and testimony. In addition to the specific, consistent accounts of the rapes, the State presented other evidence which corroborated the victim's testimony in the form of prior consistent statements made to a friend before the disclosure later to her parents as well as the testimony of the victim's mother that when he engaged in sexual activity Morris would commonly ejaculate into a towel. Simply put, the admission of the other-act evidence in question was harmless given the evidence in this case. Had the Ninth District applied the appropriate standard of review to the question whether the supposed erroneous admission of evidence was harmless, the appellate court should have found the remaining evidence substantial and should have overruled the assignment of error.

CONCLUSION

The Ninth District Court of Appeals erred in applying the more rigorous constitutional harmless error standard to the admission of evidence under Evid. R. 404(B). As numerous decisions of this Honorable Court indicate, the appropriate standard when reviewing whether the admission of evidence at trial was harmless is whether there is substantial other evidence which supports the conviction. Because the Ninth District applied the incorrect standard of review, the Court should reverse the judgment of the court of appeals below and remand for proceedings consistent with its opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Brief of Appellant was sent regular U.S. mail to David Sheldon, Counsel for Appellee Carl Morris, Jr., 669 West Liberty Street, Medina, Ohio 44256, William E. Breyer, Counsel for Amicus Curiae Ohio Prosecuting Attorneys Assocaition, 230 E. 9th Street, Suite 4000, Cincinnati, Ohio 45202, and Daniel T. Van, Counsel for Amicus Curiae Cuyahoga County Prosecutor's Office, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 12th day of August, 2013.

MATTHEW KERN
Assistant Prosecuting Attorney

APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	SUPREME COURT CASE NO. 13-0251
Appellant,	)	
vs.	)	ON APPEAL FROM THE COURT OF APPEALS, NINTH APPELLATE DISTRICT 09CA0022-M
CARL M. MORRIS, JR.,	)	
Appellee.	)	MEDINA COUNTY COURT OF COMMON PLEAS CASE NO. 08-CR-0408

NOTICE OF APPEAL OF THE STATE OF OHIO

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FILED
FEB 11 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL

Now comes the State of Ohio, Plaintiff and Appellant, by and through the office of the Medina County Prosecutor's Office, and respectfully submits this Notice of Appeal from the judgment of the Ninth District Court of Appeals dated December 28, 2012, case number 09CA0022-M. Said appeal both involves a felony and presents a question of public or great general interest, and is therefore a jurisdictional appeal pursuant to S. Ct. Prac. R. 5.02(A)(2) and (3).

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that copies of the foregoing State's Notice of Appeal was sent by regular U.S. Mail this 11th day of February, 2013 to David C. Sheldon, Counsel for Morris, 669 W. Liberty Street, Medina, Ohio 44256, and the Office of the Ohio Public Defender at 250 E. Broad Street, Suite 1400, Columbus, OH 43215.

_____
Matthew A. Kern
Assistant Prosecuting Attorney

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

CARL M. MORRIS, JR.

Appellant

C.A. No. 09CA0022-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08CR0408

DECISION AND JOURNAL ENTRY

Dated: December 28, 2012

DICKINSON, Judge.

INTRODUCTION

{¶1} A jury convicted Carl M. Morris Jr. of two counts of raping his stepdaughter, S.K. According to S.K., Mr. Morris sexually molested her over the course of several years. Mr. Morris appealed, and this Court reversed his convictions because the trial court prejudiced Mr. Morris by incorrectly admitting other-act evidence in violation of Rule 404 of the Ohio Rules of Evidence. *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, ¶ 44, *rev'd*, 132 Ohio St. 3d 337, 2012-Ohio-2407. In reaching that conclusion, this Court applied a de novo standard of review to consider whether the proffered evidence had a tendency to prove any of the enumerated permissible purposes for such evidence under Evidence Rule 404(B) and whether any of those things were of consequence to the determination of the action. *Id.* at ¶ 13. The Ohio Supreme Court reversed this Court's decision and remanded the matter for application of an abuse-of-discretion standard of review to the first assignment of error and, if necessary, a

COURT OF APPEALS, NINTH JUDICIAL DIST-STATE OF OHIO, MEDINA COUNTY S.S. I hereby certify that this is a true copy of the original on file in said Court. WITNESS my hand and the seal of said Court at Medina, Ohio this 1st day of August, 2013 David B. Wadsworth, Clerk of Courts.
By Mitchell W. Weis Jr. Deputy

review of the remaining assignments of error that were mooted by this Court's reversal of the convictions. *Morris*, 2012-Ohio-2407, ¶ 23. This Court reverses Mr. Morris's convictions because the trial court abused its discretion by admitting other-act evidence in violation of Rule 404 of the Ohio Rules of Evidence.

BACKGROUND

{¶2} When S.K. was in first grade, her mother married Mr. Morris and he moved into their house to live with S.K., her mother, her grandmother, and her older sister, Sarah. According to S.K., when she first met Mr. Morris, he would do magic tricks to entertain her. He would do card tricks, coin tricks, or make his leg "disappear" using a towel. Sarah and the girls' mother testified that Mr. Morris walked around the house in a towel before and after showering and would sometimes stop and do magic tricks, like the one involving manipulating the towel to make it seem as though one of his legs had disappeared.

{¶3} S.K. testified that, when she and Mr. Morris were alone, he used to show her a trick requiring her to feel his thumb covered by a towel across his lap. S.K. was amazed that he could make his "thumb" turn to Jell-o and then become very hard. She testified that Mr. Morris later showed her that it was his penis she had been touching behind the towel. According to S.K., at some point, Mr. Morris started lying on the couch beside her and masturbating while rubbing her thighs with his other hand.

{¶4} S.K. testified that Mr. Morris vaginally raped her at least 10 times between when she entered second grade and when her grandmother died. S.K. was 13 years old when her grandmother died. She testified that, after her grandmother died, she started walking away from Mr. Morris when he would try to touch her. According to S.K., Mr. Morris soon stopped trying.

{¶5} S.K. testified that, for the most part, she could not remember the dates of the events she described, but that, after talking to police, she found she was able to assign dates to two of the incidents. She testified that Mr. Morris raped her when they were home alone before taking her to the hospital to visit her mother after surgery. S.K.'s mother testified that she stayed overnight in a hospital on April 22, 2003, following a hysterectomy. S.K. was nine years old at that time. S.K. also testified that Mr. Morris raped her sometime between October 20 and November 1, 2005, when she was 12 years old. She testified that she remembered the date because Mr. Morris interrupted a Halloween cartoon on television.

{¶6} S.K. testified that Mr. Morris never grabbed her, used force, or threatened her; that he never told her not to tell anyone what he was doing; and that she did not tell anyone about his behavior until at least four months after he had separated from her mother and moved out of their house. S.K.'s best friend testified that, about four or five months after Mr. Morris had moved out of the house, S.K. told her that he had raped her, but did not share any details. Six months after Mr. Morris had moved out of the house, S.K. told her parents that Mr. Morris had raped her. They insisted that she repeat the information to the police and to a therapist she had been seeing. S.K.'s therapist testified that, although he cannot be certain whether a client is telling the truth, there was no clinical reason to disbelieve S.K.'s account. He further testified that her description of the magic tricks fit the pattern of something a pedophile would do to prepare a child for sexual activity.

{¶7} At trial, Mr. Morris argued that both S.K. and her mother had reasons to fabricate the allegations against him. S.K.'s mother testified that, after Mr. Morris moved out, she suffered financial hardship and lost the house they had purchased together. Although she said that Mr. Morris had difficulty keeping jobs, she admitted that she could not afford the house

without his help. Mr. Morris also elicited testimony from various witnesses that S.K. first told her parents that Mr. Morris had raped her in the middle of a dramatic confrontation between her and her parents regarding something they had seen on her MySpace page. The trial court excluded the details of the information contained on the page, but S.K. testified that the issue that provoked her parents' wrath had nothing to do with Mr. Morris.

{¶8} Although neither Sarah nor the girls' mother testified to ever having seen Mr. Morris molesting S.K., they both testified to situations that provoked some suspicion regarding his conduct with S.K. Sarah testified that she once saw Mr. Morris and S.K. "underneath the blankets" on the couch. Although the two had always been close and it was not uncommon to see them physically close to each other, it made her uncomfortable on that occasion.

{¶9} S.K.'s mother testified that she came downstairs late one night in the spring of 2005 "and both [S.K. and Mr. Morris] jumped off the couch really quick and [S.K.] went and ran in to the bathroom." She testified that she confronted both of them, but each repeatedly denied that anything inappropriate had happened. S.K. testified that she remembered being on the couch with Mr. Morris while he was masturbating and touching her leg with his other hand when her mother suddenly came down the stairs. According to S.K., "[Mr. Morris] jumped a little" while she just "tightened up" for a moment before heading to the bathroom. She said that when her mother asked her what was going on, she told her that nothing had happened.

OTHER-ACTS EVIDENCE

{¶10} Mr. Morris's first assignment of error is that the trial court incorrectly allowed the State to introduce evidence of his "other . . . acts to show proof of [his] character in violation of [Rule 404(B) of the Ohio Rules of Evidence] . . . ." Mr. Morris has pointed to three lines of questioning to which he objected at trial. First, he has argued that the trial court should have

excluded all references to an incident involving Sarah, S.K.'s adult sister. Second, he has argued that the trial court should have excluded S.K.'s mother's testimony regarding him sometimes ejaculating into towels or t-shirts during intercourse. Finally, he has argued that the trial court should have excluded S.K.'s mother's testimony regarding his penchant for kicking the dog if the mother refused to have sex with him.

{¶11} "A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime." *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975). Rule 404(B) of the Ohio Rules of Evidence provides 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[,]" but may be admissible for other purposes. Evid. R. 404(B). For example, evidence of other crimes, wrongs, or acts may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Although the permissible purposes for the use of character evidence found in Evidence Rule 404(B) are not limited to those delineated in the rule, such evidence is "not admissible to prove the character of a person in order to show action in conformity therewith[.]" *State v. Morris*, 132 Ohio St. 3d 337, 2012-Ohio-2407, ¶ 18.

{¶12} The Ohio Supreme Court has recently directed courts to conduct a three-step test to consider whether other-act evidence is admissible. *State v. Williams*, ___ Ohio St. 3d ___, 2012-Ohio-5695, ¶ 19. "The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Id.* at ¶ 20 (citing Evid. R. 401). The second step is to "consider whether evidence of the other crimes, wrongs, or acts is presented to prove

the character of the accused in order to show activity in conformity therewith or whether [it] is presented for a legitimate purpose, such as those stated in Evid.R. 404(B)." *Id.* "The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice." *Id.* (citing Evid. R. 403).

{¶13} This Court has held that the rule "is to be strictly construed against the state and conservatively applied by the trial courts." *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, ¶ 93 (citing *State v. DeMarco*, 31 Ohio St. 3d 191, 194 (1987) ("This court has held that R.C. 2945.59 is to be strictly construed against the state, and to be conservatively applied by a trial court. . . . The same logic should apply to Evid.R. 404(B).")). This Court will apply an abuse of discretion standard of review to determine whether the trial court properly exercised its discretion by admitting the proffered evidence. *State v. Morris*, 132 Ohio St. 3d 337, 2012-Ohio-2407, ¶ 19.

PROPOSITIONING HIS ADULT STEPDAUGHTER

{¶14} Mr. Morris has argued that the trial court incorrectly permitted Sarah to testify about an incident with Mr. Morris. Sarah is seven years older than S.K. In spring 2005, Sarah was an adult and had been married the previous Christmas, but was living in the same house with her grandmother, younger sister, mother, and Mr. Morris. Sarah testified that she walked into her mother's bedroom one evening and found Mr. Morris sitting on the corner of the bed. She said that he "grabbed [her] waist and pulled [her] toward him and said, 'You don't know what I would do to you but your mother would get mad.'" Sarah testified that she perceived the comment to be sexual in nature, but that she "just laughed it off," told him he was drunk, and pushed him away. She returned to her own bedroom and that was the end of the interaction.

{¶15} Sarah later told her mother about the incident, and her mother kicked Mr. Morris out of the house for the night. The next day, Mr. Morris tearfully apologized to Sarah, saying that he had been drunk at the time and did not remember making the comment. Sarah testified that she believed Mr. Morris had been drunk because she had seen him drinking earlier that evening. After the apology, Mr. Morris moved back into the house and, according to Sarah, never again made an inappropriate comment to her. S.K.'s mother also testified about kicking Mr. Morris out of the house briefly after learning about the incident with Sarah.

{¶16} The trial court overruled Mr. Morris's objection at trial, saying at sidebar that it "th[ought] it[ ] [was] covered by . . . 404(B)[.]" The trial court did not rule with any specificity why the testimony about Mr. Morris's encounter with Sarah was admissible under Evidence Rule 404(B). The court did not explain what permissible use the evidence could be put to or offer any analysis except to opine that the conduct with Sarah was "similar enough" to the charged conduct with S.K. because it could be interpreted as a "sexual come-on" and it happened "in the same bedroom" as some of the alleged abuse of S.K. The court did not analyze whether the evidence was admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident or whether any of those topics was even at issue at trial. Further, the trial court did not offer any other permissible use for the evidence not enumerated in Rule 404(B).

{¶17} On appeal, Mr. Morris has argued that all testimony about the incident with Sarah was inadmissible under Evidence Rules 404(B) and 403. He has specifically argued that evidence of the alleged incident with Sarah was highly prejudicial and not at all similar to the crimes with which he was charged. The State has argued on appeal that the incident with Sarah is similar to the crimes charged because the target of each incident was one of Mr. Morris's

stepdaughters and it happened in the mother's bedroom, as did some of the alleged incidents of molestation and rape described by S.K. On this basis, the State has now argued that the testimony was properly admitted because it "demonstrates a common scheme and motive."

Scheme, plan, or system

{¶18} In regard to other-act evidence, the Ohio Supreme Court has warned that "we . . . 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." *State v. Lowe*, 69 Ohio St. 3d 527, 530 (1994). According to the Ohio Supreme Court, as proof of identity, "[e]vidence of a defendant's scheme, plan, or system in doing an act can be relevant for two reasons: (1) the other acts are part of one criminal transaction such that they are inextricably related to the charged crime, and (2) a common scheme or plan tends to prove the identity of the perpetrator." *State v. Schaim*, 65 Ohio St. 3d 51, 63 n.11 (1992) (citing *State v. Curry*, 43 Ohio St. 2d 66, 72-73 (1975)). Thus, evidence of a scheme, plan, or system tends to prove the identity of the perpetrator either because the other act is part and parcel of the plan to commit the charged crime or because the other act is so similar to the crime charged and sufficiently idiosyncratic that it tends to prove the same person committed both acts. If the other act is part of the plan that culminated in the charged crime, it is inextricably related and need not be at all similar to it. For instance, evidence that the defendant stole a gun the day before he shot someone with it would be relevant in defendant's murder trial even though he is not charged with theft of the gun and theft and murder are not similar crimes. On the other hand, evidence of a scheme, plan, or system may tend to prove that the defendant committed the crime charged because the other act he is known to have committed is so similar and idiosyncratic that it tends to prove he is the most

likely perpetrator of the charged crime. For instance, a serial killer who attacks female prostitutes from a certain neighborhood of a certain city and mutilates the abdomen of each victim before dumping the body near the same riverbank leaves behind evidence of an idiosyncratic pattern that tends to show that the same person committed each murder. Evidence that the defendant is known to have committed two such idiosyncratic crimes in the recent past would be admissible in a trial of the man for a third murder following that same pattern. The Ohio Supreme Court has held that, under either scenario, evidence of a scheme, plan, or system cannot be relevant to prove identity unless the identity of the perpetrator is actually being disputed in the case. *Id.* (citing *Curry*, 43 Ohio St. 2d at 72-73).

{¶19} The Ohio Supreme Court has described inextricably related other acts evidence as that which "form[s] part of the immediate background of the alleged act which forms the foundation of the crime charged[.]" *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994) (quoting *State v. Curry*, 43 Ohio St. 2d 66, 73 (1975)). As examples of such "inextricably related" evidence, the Court suggested evidence that the defendant had trespassed on the murder victim's property on the evening of the attack, evidence that he had tried to remove something from the crime scene, or evidence that he had threatened a witness. *Id.* Generally speaking, if evidence of a scheme, plan, or system is inextricably related to the charged crime, "it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other act[ ]." *State v. Lytle*, 48 Ohio St. 2d 391, 403 (1976), vacated in part on other grounds, 438 U.S. 910 (1978) (quoting *Curry*, 43 Ohio St. 2d at 73).

{¶20} The comment that Sarah described did not form part of the immediate background of the crimes charged and is not part of a single criminal transaction involving the alleged rapes of her sister. It was not part of the plan that culminated in the alleged rapes of S.K. According

to the testimony, Mr. Morris made the inappropriate comment to Sarah two years after the first indicted rape of S.K. and six or eight months before the second indicted rape. There is nothing about the incident described by Sarah that facilitated the alleged rapes of S.K. and nothing about that evidence is necessary or even helpful to prove that Mr. Morris raped S.K. in April 2003 and again in late 2005. S.K. was not present to witness Mr. Morris's comment to Sarah and was apparently not even told that it happened. The alleged habitual molestation of S.K. is wholly unrelated to Mr. Morris's single drunken comment to Sarah. As the behavior is really not related at all, it cannot reasonably be described as 'inextricably related." *State v. Schaim*, 65 Ohio St. 3d 51, 63 n.11 (1992) (citing *State v. Curry*, 43 Ohio St. 2d 66, 72-73 (1975)).

{¶21} If evidence of a scheme, plan, or system is not part of the immediate background of the crime charged, it may still be admissible to prove identity because it is so similar to the crime charged in some idiosyncratic way that it tends to show that the same person committed both acts. This is because proof of a particular modus operandi or a unique scheme, plan, or system of doing something can provide "a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, [could] be used to identify the defendant as the perpetrator." *State v. Myers*, 97 Ohio St. 3d 335, 2002-Ohio-6658, ¶ 104 (quoting *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994)).

{¶22} There is no evidence of a common scheme or plan in this case because there are no such similarities between Mr. Morris's alleged conduct with Sarah and his alleged conduct with S.K. Neither the individuals targeted nor the methods Mr. Morris allegedly used to engage or attempt to engage in sexual relations with them are similar. Sarah's testimony did not have any tendency to show a common scheme, plan, system, motive or intent for Mr. Morris raping a child primarily because Sarah was not a child when Mr. Morris allegedly expressed a sexual

interest in her. Proving that a man is sexually attracted to an adult woman has no tendency to prove that he is sexually attracted to little girls under the age of ten or thirteen, even if the two are sisters.

{¶23} Moreover, the single drunken comment allegedly made to Sarah was not at all similar to the six-year pattern of fondling and rape described by S.K. There was nothing idiosyncratic about the comment or the situation surrounding its delivery that could reasonably be deemed to create "a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, [could] be used to identify the defendant as the perpetrator." *State v. Myers*, 97 Ohio St. 3d 335, 2002-Ohio-6658, ¶ 104 (quoting *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994)). Sarah's testimony did not have any tendency to prove that Mr. Morris engaged in a similar pattern of conduct with her as he had allegedly followed with S.K. S.K. did not testify that Mr. Morris ever approached her while drunk or in any way similar to what Sarah described. According to S.K., Mr. Morris never grabbed her or said anything similar to what he allegedly said to Sarah. S.K. testified that Mr. Morris spent time playing with her and entertaining her when they first met before slowly increasing their physical proximity and the sexual nature of their encounters. On the other hand, Sarah's testimony was that Mr. Morris was a great stepfather who had never said or done anything inappropriate to her when she was a minor. Her testimony was that his inappropriate behavior with her was limited to one incident, which occurred after she was married, in which he abruptly grabbed her and drew her to him one evening while he was drunk.

{¶24} Regardless of how similar and idiosyncratic the conduct, however, other-act evidence tending to prove identity is not admissible unless identity is actually being disputed in the case. *State v. Schaim*, 65 Ohio St. 3d 51, 63 n.11 (1992) (citing *State v. Curry*, 43 Ohio St.

2d 66, 72-73 (1975); *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994); R.C. 2945.59 (permitting other-act evidence only "[i]n any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material[.]"). "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. In that event other act evidence tends to show the defendant's identity as the perpetrator by showing that he committed crimes of a similar methodology within a period of time reasonably near to the offense on trial, which itself would constitute probative evidence of the probability that the same person, whoever he or she may be, committed both crimes." *State v. Smith*, 84 Ohio App. 3d 647, 666 (2d Dist. 1992).

{¶25} In *State v. Curry*, 43 Ohio St. 2d 66 (1975), the Ohio Supreme Court held that other-act evidence offered to show a common scheme, plan, or system was not admissible to prove identity because identity was not being disputed in that case. *Id.* at 73. In *Curry*, the defendant admitted that he drove the victim home on the date in question, but denied having sexual contact with her. In that situation, the Ohio Supreme Court determined that the defendant's denial "did not raise an identity question; it created, instead a factual dispute revolving around [his] conduct with [the victim] during the trip . . . ." *Id.*; *State v. Wilkins*, 135 Ohio App. 3d 26, 31 (9th Dist. 1999) (holding identity not at issue in state's case against defendant who admitted driving rape victim to the store and never raised defense of mistaken identity); *State v. Miley*, 5th Dist. Nos. 2005-CA-67, 2006-CA-14, 2006-Ohio-4670, ¶ 72-73 (holding identity not at issue in sexual molestation case in which brothers accused family friend because "[i]f a crime did in fact occur, no dispute exists that appellant was the perpetrator."). If identity is not in dispute, then evidence of identity is not "relevant to making any fact that is of

consequence to the determination of the action more or less probable than it would be without the evidence." *State v. Williams*, ___ Ohio St. 3d ___, 2012-Ohio-5695, ¶ 20.

{¶26} Identity was not disputed in this case. The main issue at trial was S.K.'s credibility. If the crimes occurred at all, there was no question about who committed them. *See State v. Curry*, 43 Ohio St. 2d 66, 73 (1975); *State v. Miley*, 5th Dist. Nos. 2005-CA-67, 2006-CA-14, 2006-Ohio-4670, ¶ 72-73. S.K. had lived in the same house with Mr. Morris for years. She had no trouble identifying him. There was no evidence tending to indicate that she was at all confused about the identity of the man whom she says repeatedly fondled and raped her in her own home over the course of several years. The defense theory was that the events S.K. described never happened, not that someone else committed them. Thus, identity was not at issue in this case and evidence of a scheme, plan, or system could not be admitted to prove identity no matter how similar to the crimes charged because identity is not a fact that is of consequence to the determination of the action. *State v. Schaim*, 65 Ohio St. 3d 51, 63 n.11 (1992) (citing *Curry*, 43 Ohio St. 2d at 73); *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994); *State v. Cullers*, 2d Dist. No. 18602, 2001 WL 1388506, *9-10 (Nov. 9, 2001) (concluding that identity was not at issue in child molestation case, even in light of defendant's claim that children's uncle may have molested them, because victims knew alleged perpetrator and alleged that all incidents occurred at his house while he was babysitting them).

{¶27} The Ohio Supreme Court has limited its holding in *Curry* and has explained that, under Evidence Rule 404(B), "evidence of other crimes, wrongs, or acts of an accused may be admissible to prove intent or plan, even if the identity of an accused or the immediate background of a crime is not at issue." *State v. Williams*, ___ Ohio St. 3d ___, 2012-Ohio-5695, ¶ 2. In *Williams*, the defendant was accused of engaging in sexual relations with a fourteen-year-

old boy he had mentored through his church. The Supreme Court held that evidence that the defendant had had a similar relationship with a different teenage boy he had coached on a swimming team twelve years earlier was admissible under Evidence Rule 404(B) "to show the plan of the accused and the intent for sexual gratification." *Id.* at ¶ 25. In *Williams*, the evidence indicated that the defendant had targeted young, fatherless males "to gain their trust and confidence and groom them for sexual activity with the intent of sexual gratification." *Id.* Mr. Williams befriended the victim, often bought him gifts, and paid him to do odd jobs at Mr. Williams's house. The other-act evidence showed that Mr. Williams had "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 . . . ." *Id.* at ¶ 11. Furthermore, part of Mr. Williams's defense was to claim that he was only sexually attracted to women. The Supreme Court overruled the Eighth District's en banc decision and held that the other-act evidence was admissible. *Id.* at ¶ 25. The Court held the other-act evidence tended to prove that Mr. Williams derived sexual gratification from engaging in sexual relations with teenage boys and that he had a certain plan or method of targeting a certain group of victims by gaining their trust through the role of an authority figure before abusing them. *Id.*

{¶28} The facts of *Williams* are distinguishable from this case. Sarah's testimony was not admissible because there is a fundamental difference between a man's desire to engage in sexual activity with his wife's adult daughter and his desire to rape his wife's little girl. The other-act evidence did not tend to show Mr. Morris's identity as the perpetrator, both because identity was not disputed and because there is nothing idiosyncratic or even similar about the two allegations. There was no evidence of a plan or particular method Mr. Morris engaged in for the purpose of abusing young girls or to gain access to a certain class of victims. One cannot

reasonably conclude that the evidence offered by Sarah has any tendency to prove that Mr. Morris engaged in a similar plan or method of conduct with the two sisters or that his alleged conduct with Sarah has some tendency to prove his motive or intent on certain occasions to derive sexual gratification from a child. Thus, Sarah's testimony could not reasonably be deemed admissible under Evidence Rule 404(B) to prove motive, intent, plan, or identity.

Other permissible uses

{¶29} No other support for the trial court's determination that the evidence of the incident with Sarah could have been admitted without violating Evidence Rule 404(B) has been suggested by the trial court, the State, or the dissent, and this Court cannot think of any permissible use for it. The evidence was not admissible to prove that Mr. Morris had an opportunity to engage in sexual conduct with his stepdaughter. Mr. Morris's single drunken comment to Sarah has no tendency to prove that he had the opportunity to rape S.K. The evidence showed that S.K. was not present when Mr. Morris allegedly grabbed Sarah, and nothing about that incident provided Mr. Morris an opportunity to rape S.K. He had every opportunity to rape S.K. because he lived in the same house with her during the entire period of the alleged abuse. Several witnesses testified that Mr. Morris and S.K. had always had a close relationship, and Mr. Morris did not deny that. In fact, his lawyer cross-examined S.K. about her spending time with Mr. Morris and even willingly leaving the house alone with him long after the first alleged rape. There could be no doubt that Mr. Morris had ample opportunity to rape her. The question at trial was whether she was telling the truth when she claimed that he had, in fact, done so. Sarah's testimony had no tendency to prove that Mr. Morris had an opportunity to rape S.K. in April 2003 and near Halloween 2005.

{¶30} Other-act evidence may be relevant to prove a defendant's preparation to commit the charged crime. For example, despite the lack of similarity of the conduct, evidence that a defendant had stolen a gun the day before using it to shoot his neighbor would be relevant to prove preparation for murder even though the defendant was not charged with theft. Similarly, evidence that a defendant had stolen the getaway car before robbing a bank would be relevant to prove preparation for the robbery even if the defendant is not charged with stealing the car. *See* James W. McElhaney, *McElhaney's Trial Notebook*, 292-93 (4th Ed. 2005).

{¶31} Evidence that Mr. Morris made a potentially sexual comment to his adult stepdaughter in the spring of 2005 does not have any tendency to prove that Mr. Morris was preparing to rape S.K. It certainly cannot be evidence of preparation to commit a crime that had already been committed. S.K. testified that Mr. Morris initiated sexual contact with her approximately thirty times, but that he had vaginal intercourse with her about 10 times starting when she was in first grade and ending when she was 13 years old. The two indicted offenses, for which she recalled fairly specific dates, occurred in April 2003 and near Halloween 2005. Evidence of his alleged comment to Sarah has no tendency to prove that Mr. Morris was in any way preparing to rape S.K., whom he had allegedly already been raping and molesting for at least two years.

{¶32} The remaining options listed in Rule 404(B) for proper use of other-acts evidence are if the evidence has some tendency to prove knowledge or absence of mistake or accident. Mr. Morris's defense was based on the theory that he never touched S.K. in an inappropriate manner. His defense was that she fabricated the story because she was a troubled teenager who was angry at him for leaving her mother and causing them to lose the family home to foreclosure. The statute under which he was convicted provides that, regardless of whether the

offender knows the age of the victim, "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender . . . when . . . [t]he other person is less than thirteen years of age[.]" R.C. 2907.02(A)(1)(b). Therefore, it would have done Mr. Morris no good to claim that he did not know that S.K. was under the age of thirteen. Mr. Morris did not claim that he accidently raped the child or that he mistakenly had sexual intercourse with her. There was no dispute about whether Mr. Morris knowingly raped S.K., had specialized knowledge facilitating the rapes, or whether he acted with the requisite criminal intent. *See* 1 Mueller & Kirkpatrick, *Federal Evidence*, Section 4:34 (3d Ed. 2012) (explaining the difference between the use of other acts to prove intent and knowledge under Rule 404(b) of the Federal Rules of Evidence). Mr. Morris simply denied the crimes occurred.

{¶33} Under the circumstances, the evidence could not reasonably be said to be permissibly used for any of the purposes mentioned in Evidence Rule 404(B), and the trial court did not assign any other purpose. The only plausible use for the evidence presented by Sarah was to draw the impermissible character inference forbidden by Evidence Rule 404(B): to show that Mr. Morris is the type of sexually perverted man who would like to engage in sexual activity with his wife's adult daughter and, therefore, is likely to have raped her little girl on the dates in question. *See State v. Deyling*, 9th Dist. No. 2672-M, 1998 WL 46753, *2 (Jan. 28, 1998) (excluding evidence in domestic violence trial of prior incident when defendant allegedly struck the victim during an argument because the "only plausible use" "was to draw the impermissible character inference").

Abuse of discretion

{¶34} The evidence of Mr. Morris making a sexually suggestive comment to Sarah was "obviously intended to prove the character of the appellant in order to show that he acted in

conformity therewith concerning the crimes of which he was convicted." *State v. Price*, 80 Ohio App. 3d 35, 41 (3d Dist. 1992) (holding that evidence that defendant had sexual intercourse with 15-year-old victim's older sister was "clearly inadmissible for any purpose" in rape trial of victim's stepfather). Such evidence is inadmissible under Evidence Rule 404(B) because it would be easy for a jury to assume that the type of man who would express an interest in having sex with his wife's adult daughter, could be just the type of man who would have the urge to sexually molest a young child, especially if the young child is also his wife's daughter.

{¶35} That is precisely the leap in logic that Rule 404 is designed to prevent. *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975). "Such evidence is inadmissible . . . [because] it is both legally irrelevant and highly prejudicial." *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, ¶ 90. "It poses a 'temptation . . . for the jury to try the case on evidence of character rather than on evidence of guilt . . . [because] it becomes difficult for the jury not to speculate that since the defendant . . . is a bad person, he probably committed the present crime.'" *Id.* at ¶ 90-91 (quoting *State v. Griffin*, 142 Ohio App. 3d 65, 71 (1st Dist. 2001)). "Rule 404(B) thus operates as a specialized application of the principle in Rule 403 that unfairly prejudicial evidence should be excluded." Glen Weissenberger, *Ohio Evidence Treatise*, Section 404.22, at 73 (2011). "[Extrinsic-act evidence is excluded] not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take proof of it as justifying a condemnation irrespective of guilt of the present charge." *Id.* (quoting 1A Wigmore, *Evidence*, Section 58.2). Sarah's testimony had no probative value other than to encourage the jury to make the inference prohibited by Rule 404 of the Ohio Rules of Evidence.

{¶36} "An abuse of discretion means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling." *Kish v. Kish*, 9th Dist. No. 12CA010185, 2012-Ohio-5430, ¶ 9 (citing *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219 (1983)). "It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments." *State v. Morris*, 132 Ohio St. 3d 337, 2012-Ohio-2407, ¶ 14. "'Abuse of discretion' has been described as including a ruling that lacks a 'sound reasoning process.'" *Id.* (quoting *AAAA Ent. Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St. 3d 157, 161 (1990)).

{¶37} The trial court's decision to admit evidence that Mr. Morris made a suggestive comment to his adult stepdaughter years after he allegedly began molesting and raping his minor stepdaughter lacks a sound reasoning process in light of Evidence Rule 404(B). The only "reasoning process" evident in the record is that the trial court deemed the incident with Sarah "similar enough" to the crimes charged. The trial court's ruling admitting the evidence of Mr. Morris's inappropriate comment to Sarah was unreasonable as it was not based on a sound reasoning process.

{¶38} Even if the evidence could be reasonably deemed admissible under the first two steps of the Ohio Supreme Court's test for admissibility of other-act evidence, it fails to satisfy the third prong because it should have been excluded under Evidence Rule 403(A). "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid. R. 403(A).

{¶39} In a case with no eye-witnesses beyond the victim and no physical evidence or confession of any kind, the jury had to determine the case largely based on credibility. The jury learned that, several months after her stepfather moved out and allegedly caused the loss of the family home to foreclosure, a troubled teenager accused him of molesting and raping her over the course of several years. To that, the State added evidence that Mr. Morris once made a suggestive comment to his adult stepdaughter while he was drunk. In this situation, Sarah's testimony was highly prejudicial and could have tipped the credibility scale in favor of S.K.

{¶40} Although the trial court gave a general limiting instruction to the jury, the State spent much of its time in closing argument trying to convince the jury to use Sarah's testimony in precisely the manner forbidden by Evidence Rule 404(B). During rebuttal close, the prosecutor went so far as to actually equate the sexual comment allegedly made to the adult sister to the alleged rape of the younger sister. The prosecutor told the jury that, although child molestation usually happens in private, ensuring a lack of eyewitnesses, in this case there was evidence of "it happening to [S.K.'s older sister]." Thus, the State asked the jury to convict Mr. Morris of raping S.K., not because of other-act evidence that tended to show he had similarly groomed other little girls for his own sexual pleasure, but because they heard evidence that he had once made an inappropriate comment to the child's adult sister. Evidence Rule 404(B) forbids that leap in logic. That is, such evidence is not admissible to prove that Mr. Morris is the type of man who would be willing to cross that moral boundary with his wife's adult daughter so he is probably also the type of man who would rape his wife's nine or twelve-year-old daughter. The trial court abused its discretion in admitting the evidence of the comment Mr. Morris made to Sarah because the decision lacks a sound reasoning process.

KICKING THE DOG

{¶41} Mr. Morris has also argued that the trial court incorrectly admitted evidence about him kicking the family dog if his wife refused to have sex with him. S.K.'s mother, who was once Mr. Morris's wife, testified that he wanted to have sex with her every day and would become verbally abusive and kick the family dog if she refused. Mr. Morris objected to this testimony at trial. The trial court overruled the objection, but permitted a continuing objection to the line of inquiry regarding the sexual relationship between Mr. Morris and S.K.'s mother. That line of inquiry included testimony about Mr. Morris ejaculating into towels during sex and kicking the dog if she refused to have sex with him. Other than stating that testimony on the topic "could be relevant" and that it fell under Evidence Rule 404(B), the trial court did not explain its reasons for overruling the objection. On appeal, the State has argued that the testimony was admissible because it showed "[a] motive and common plan" for rape. According to the State, Mr. Morris's "insatiable sexual appetite . . . is clearly the motive for [Mr.] Morris's sexual abuse of S.K." Mr. Morris has argued that his former wife's testimony on this topic should have been excluded under Evidence Rule 404.

{¶42} The State presented no evidence that an unfulfilling sexual life with one's spouse has a tendency to show motive for the rape of a child. Further, it presented no evidence that men with voracious sexual appetites are sexually attracted to young children. What is more, even if evidence of Mr. Morris's voracious sexual appetite were admissible, the added fact that he took out his sexual frustration by kicking the dog goes far beyond tending to prove that voracious appetite. The kick-the-dog evidence tended to show that Mr. Morris was prone to act out if his wife refused to have sex with him every day. The only possible reason for introducing that evidence was to demonstrate his character, that is, that he was sexually frustrated, mean, and

aggressive. The obvious reason to present that evidence was to encourage the jury to conclude that Mr. Morris acted in conformity with that character by committing the rapes with which he had been charged.

{¶43} The testimony about Mr. Morris kicking the family dog out of sexual frustration when his wife refused to have sex with him did not tend to prove any of the permissible topics enumerated in Rule 404(B) of the Ohio Rules of Evidence. Although the list of exceptions in Rule 404(B) is not exclusive, the trial court did not offer any additional permissible use for this other-act evidence under the circumstances. "The ultimate issue is a determination of the way in which the extrinsic act is relevant, because the Rule specifically authorizes the use of extrinsic acts where the evidence is offered to prove a relevant fact other than propensity and conforming conduct." Glen Weissenberger, *Ohio Evidence Treatise*, Section 404.23, at 76 (2011); *see also State v. Williams*, ___ Ohio St. 3d ___, 2012-Ohio-5695, ¶ 20. Although the trial court is not required to include a detailed analysis in the record, without any indication of any reasoning process, this Court is unable to analyze the soundness of the trial court's thinking beyond an analysis of the rule itself. This Court cannot think of any relevant permissible use for evidence that Mr. Morris kicked the dog when his wife refused to have sex with him.

{¶44} Based on the record before this Court, it appears that the evidence that Mr. Morris would kick the dog out of sexual frustration was admitted solely to prove that Mr. Morris would aggressively act out if his voracious sexual appetite was not satisfied on a daily basis, leading to the obvious inference that he acted in conformity with that character trait by raping his stepdaughter on the two occasions noted in the indictment. Thus, the trial court improperly exercised its discretion by admitting the evidence that Mr. Morris kicked the dog out of sexual frustration. *See* Evid. R. 404(B).

USING TOWELS DURING SEXUAL INTERCOURSE

{¶45} S.K. testified that, every time Mr. Morris ejaculated while molesting her, he would quickly cover his penis with a towel. Mr. Morris has argued that S.K.'s mother, who was married to him at the time of the alleged incidents, should not have been permitted to testify that "[w]hen [Mr. Morris] and I had sex, he would sometimes [ejaculate] in a towel or a T-shirt or whatever was around." She went on to say that she did not understand why he would do that because he knew she could not get pregnant. Mr. Morris objected at trial, and the State argued that the testimony should be admitted under Evidence Rule 404(B) because it "goes toward modus operandi, knowledge and other acts of evidence." The trial court admitted the testimony, but did not explain a basis for overruling the objection except to mention "[Evidence Rule] 404(B)." On appeal, Mr. Morris has argued that the trial court should not have allowed the mother's testimony on this point because it was not admissible under Evidence Rule 404(B) and 403(A).

{¶46} The State has argued that the testimony was admissible because it is evidence of "idiosyncratic behavior that shows a common plan" and "his modus operandi for disposal of semen . . . [that is,] [e]xcept when having sex with his wife, [Mr.] Morris always ejaculates into a towel." The State's argument is based on a misunderstanding of S.K.'s mother's testimony. What she said was that Mr. Morris "sometimes" ejaculated into a towel when they did have sex – not at times other than when they had sex.

{¶47} In any event, the testimony does not run afoul of Evidence Rule 404 because it is not "evidence of a person's character or a trait of character." Evid. R. 404(A); *see also State v. Shedrick*, 61 Ohio St. 3d 331, 337 (1991) (explaining that Evidence Rule 404 excludes evidence that "tends to show [the defendant's] bad character."). S.K.'s mother's testimony about Mr.

Morris unexpectedly ejaculating into towels during sex implied nothing about his character. The testimony was relevant because S.K. had previously said that Mr. Morris had always ejaculated into a towel when molesting her. Evid. R. 401. It could hurt Mr. Morris's case because it provided some corroboration of S.K.'s allegation that she had been involved in a sexually intimate situation with Mr. Morris. As relevant evidence, it was admissible unless otherwise objectionable. Evid. R. 402. It was not objectionable character evidence under Rule 404.

{¶48} Mr. Morris has also argued that this testimony was "inflammatory, confusing, [and] unreliable" and that any probative value was substantially outweighed by the danger of unfair prejudice. *See* Evid. R. 403(A). The testimony was clear, and it was not inherently unreliable. The jury was capable of determining what weight, if any, it deserved in light of the other evidence in the case. Admission of the testimony, harmful as it may have been to Mr. Morris's case, was not unfairly prejudicial and was not a violation of Evidence Rule 403(A).

{¶49} This Court has not considered the application of Ohio's rape shield law to this testimony because Mr. Morris neither raised an objection in the trial court nor an argument on appeal based on it. *See* R.C. 2907.02(D). To the extent that it addressed the mother's testimony regarding Mr. Morris ejaculating into towels, the first assignment of error is overruled because the trial court correctly overruled Mr. Morris's objection to the testimony, albeit on an incorrect basis. *See State v. Campbell*, 90 Ohio St. 3d 320, 329 (2000).

HARMLESS ERROR

{¶50} Having determined that the trial court erroneously admitted evidence of two instances of Mr. Morris's other acts in violation of Rule 404(B) of the Ohio Rules of Evidence, this Court must decide whether the errors were harmless. Under Rule 52(A) of the Ohio Rules of Criminal Procedure, "[a]ny error, defect, irregularity, or variance which does not affect

substantial rights shall be disregarded." The Ohio Supreme Court has repeatedly held that "[e]rror in the admission of evidence is harmless if there is no reasonable possibility that the evidence may have contributed to the accused's conviction." *State v. Rahman*, 23 Ohio St. 3d 146, 151 (1986) (quoting *State v. Bayless*, 48 Ohio St. 2d 73, 106 (1976), vacated in part on other grounds, 438 U.S. 911 (1978)). It has further written that, "[i]n order to hold the error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt." *Bayless*, 48 Ohio St. 2d at 106 (citing *State v. Abrams*, 39 Ohio St. 2d 53 (1974); *State v. Crawford*, 32 Ohio St. 2d 254 (1972); *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969)). The standard applied by the Ohio Supreme Court in *Bayless* was derived from United States Supreme Court case law describing the federal constitutional harmless-error standard. *Id.* (citing *Chapman*, 386 U.S. 18; *Harrington*, 395 U.S. 250). The Ohio Supreme Court has applied this test to evaluate whether an error in improperly admitting evidence of a defendant's other acts was harmless, and this Court has followed suit. *Id.*; *see also State v. Treesh*, 90 Ohio St. 3d 460, 483 (2001); *State v. Lytle*, 48 Ohio St. 2d 391, 403 (1976); *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, ¶ 96; *State v. Deyling*, 9th Dist. No. 2672-M, 1998 WL 46753, *2 (Jan. 28, 1998).

{¶51} In evaluating the impact of improperly admitted other-acts evidence, the appellate court must consider "[t]he severity of [the improper] reflections upon the defendant's credibility and character . . . in relation to the other evidence in the case." *State v. Bayless*, 48 Ohio St. 2d 73, 107 (1976). In *Bayless*, the Court determined that the error was harmless beyond a reasonable doubt because "[t]he mass of evidence in the case contradicted and impeached [the defendant's] testimony so thoroughly that the effect of the rebuttal testimony upon his credibility appears insignificant." *Id.* Thus, admission of improper evidence is harmless if, as is often the

case, "the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt." *State v. Williams*, 6 Ohio St. 3d 281, 290 (1983) (quoting *Harrington v. California,* 395 U.S. 250, 254 (1969)); *but see State v. Brown*, 100 Ohio St. 3d 51, 2003-Ohio-5059, ¶ 25; *State v. Webb*, 70 Ohio St. 3d 325, 335 (1994); *State v. Davis*, 44 Ohio App. 2d 335, 348 (8th Dist. 1975). Regardless of the fact that courts have sporadically applied a less stringent harmless-error standard in some cases involving non-constitutional errors in the admission of evidence, the higher standard applies in this case because "the injection of . . . inflammatory . . . material" violated Mr. Morris's right to a fair trial "as that term is understood under the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment." *Davis*, 44 Ohio App. 2d at 348.

{¶52} The application of the harmless error rule is simple if, in the absence of all erroneously admitted evidence, there remains "overwhelming" evidence of guilt. *State v. Williams*, 6 Ohio St. 3d 281, 290 (1983) (quoting *Harrington v. California,* 395 U.S. 250, 254 (1969)). The application is more difficult in a case such as this "in which the question of guilt or innocence is a close one." *Chapman v. California*, 386 U.S. 18, 22 (1967). In close cases, "harmless-error rules can work very unfair and mischievous results when . . . highly important and persuasive evidence . . . though legally forbidden, finds its way into a trial . . . ." *Id.*

{¶53} Setting aside the erroneously admitted character evidence, there is not overwhelming evidence of Mr. Morris's guilt in this case. In the absence of any confession, physical evidence, or eyewitnesses other than S.K. to sexual conduct or even sexual contact between Mr. Morris and S.K., the State's case rested largely on S.K.'s credibility. Although there was corroborating circumstantial evidence offered by S.K.'s mother and sister, each of whom testified that they had once seen a suspicious-looking situation, neither was able to testify as an eyewitness to any acts of molestation or rape. Various witnesses testified about S.K.'s

emotional problems and to certain times over the years when S.K. seemed to be struggling with a secret that she was unable to reveal. But S.K. admitted that her emotional problems were not entirely caused by Mr. Morris and that she had been depressed before her mother met him.

{¶54} S.K.'s mother's testimony about Mr. Morris's odd behavior during sexual intercourse provided some circumstantial corroboration of S.K.'s testimony. S.K.'s credibility was best supported by her own testimony describing how her relationship with Mr. Morris went through phases that seemed to move toward sexualization over time as bolstered by her counselor's testimony that her account was consistent with the "grooming" behavior of a pedophile preparing a child for molestation.

{¶55} Regardless of whether the verdict could have withstood a challenge based on the manifest weight of the evidence, the question of whether the errors were harmless requires a different analysis. As the Ohio Supreme Court has written, "[the appellate court's] role upon review [in such a] case is not to sit as the supreme trier of fact, but rather to assess the impact of this erroneously admitted testimony on the jury." *State v. Rahman*, 23 Ohio St. 3d 146, 151 n.4 (1986). "It is not the appellate court's function to determine guilt or innocence . . . ." *Id.* (quoting *United States v. Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring)). "[T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.* (quoting *Hasting*, 461 U.S. at 516 (Stevens, J., concurring)). Highly inflammatory evidence, erroneously admitted, can make it easy for a jury to believe the State's theory and the State's witnesses over those of the defense, especially in a close case.

{¶56} The "danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of

whether he . . . committed the crime charged in the indictment . . . is particularly high when the other acts are very similar to the charged offense or of an inflammatory nature . . . ." *State v. Miley*, 5th Dist. Nos. 2005-CA-67, 2006-CA-14, 2006-Ohio-4670, ¶ 58 (citing *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975); *State v. Schaim*, 65 Ohio St. 3d 51, 60 (1992)). Sexually deviant acts, especially those against children, carry a severe social stigma, leading to an increased risk that other sexually deviant acts by the defendant will influence a jury to convict because it assumes the defendant is a bad man. The evidence that Mr. Morris grabbed his adult stepdaughter, pulled her toward him, and made a sexually charged comment to her was highly inflammatory, especially in light of the fact that Mr. Morris was charged with raping her younger sister. The evidence that Mr. Morris would become verbally abusive toward his wife and even kick the dog if she refused to have sex with him every day is less inflammatory, but was similarly aimed at convincing the jury that Mr. Morris is a sex-crazed pervert.

{¶57} Although Sarah testified that in all her years of living with Mr. Morris, that drunken comment was the only inappropriate advance he ever made toward her, the State did its best to convince the jury that her testimony was evidence of Mr. Morris's motive and intent and plan to rape a little girl. During the State's closing argument, the prosecutor advised the jury that, "if you want to know a little bit about [Mr. Morris's] motives and his intent and his intent for [S.K.], just look at how he treated his other stepdaughter . . . ." Later in closing argument, the prosecutor said that S.K.'s story is "corroborated by the sister who had an incident with him that showed a similar plan and preparation and intent."

{¶58} The prosecutor directly asked the jury to equate the sexual comment allegedly made to the adult sister to the alleged rape of the younger sister. The prosecutor told the jury that there was evidence of "it happening to [S.K.'s older sister]." Thus, the State blatantly attempted

to persuade the jurors that they should convict Mr. Morris of raping the child victim based on evidence that he had done "it" to her older sister. In fact, the jury had heard absolutely no evidence that Mr. Morris had raped Sarah when Sarah was a child. They also had not heard any evidence that he had raped Sarah when she was an adult. Even so, the State used that improperly admitted evidence to attempt to persuade the jury to make the very leap in logic that is forbidden by Rule 404(B) of the Ohio Rules of Evidence. That is, if Mr. Morris is the type of man who would be willing to cross that moral boundary with his wife's adult daughter, then the jury should also believe he is "the type of person" who would rape his wife's nine or twelve-year-old daughter. *State v. Lowe*, 69 Ohio St. 3d 527, 530 (1994).

{¶59} The effect of the errors in this case is extensive because the inflammatory material was not limited to a brief, isolated comment. The State elicited testimony regarding the incident between Mr. Morris and Sarah from three witnesses, and referenced it on seven different occasions during closing argument, including referring to Sarah as Mr. Morris's "victim." This Court cannot say that "there is no reasonable possibility that the evidence may have contributed to the . . . conviction." *State v. Bayless*, 48 Ohio St. 2d 73, 106 (1976). It seems quite likely that the average juror would have considered the erroneously admitted evidence and would have found it easy to believe that Mr. Morris, being sexually frustrated and perverted, was likely guilty of raping his young stepdaughter. The improperly admitted other-acts testimony put inflammatory evidence of Mr. Morris's character before the jury. In a case based largely on S.K.'s credibility, evidence that Mr. Morris had once propositioned her older sister had a great probability of tipping the scale in favor of S.K.'s credibility and against Mr. Morris's. Based on a review of the entire record, this Court cannot "declare a belief that the error was harmless beyond a reasonable doubt." *Id.* (citing *State v. Abrams*, 39 Ohio St. 2d 53 (1974); *State v.*

Crawford, 32 Ohio St. 2d 254 (1972); *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969)). To the extent Mr. Morris's first assignment of error is addressed to the propositioning-of-Sarah testimony and the kicking-the-dog testimony, it is sustained.

CONCLUSION

{¶60} This Court must reverse Mr. Morris's convictions because the trial court abused its discretion by erroneously admitting evidence of other acts that did not fit within what is permissible under Rule 404(B) of the Ohio Rules of Evidence or any other permissible purpose. The State's repeated references to improper character evidence violated Mr. Morris's right to a fair trial. There is a reasonable possibility that the improper evidence may have contributed to the conviction and this Court cannot declare a belief that the errors were harmless beyond a reasonable doubt. This Court's resolution of the first assignment of error is dispositive, rendering the other assignments of error moot, so they will not be addressed. *See* App. R. 12(A)(1)(c). Therefore, the judgment of the Medina County Common Pleas Court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

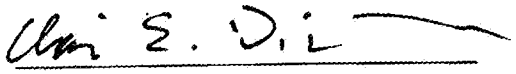
Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.



CLAIR E. DICKINSON
FOR THE COURT

BELFANCE, J.
CONCURS IN JUDGMENT ONLY.

CARR, P. J.
DISSENTING.

{¶61} I respectfully dissent.

{¶62} I would overrule Morris' first assignment of error in its entirety because I do not believe that the trial court abused its discretion when it admitted evidence relating to the incidents involving Morris' proposition of Sarah and his tendency to kick the family dog pursuant to Evid.R. 404(B).

{¶63} However, assuming arguendo that the trial court erred by admitting this evidence, I would conclude that it was harmless error because the remaining evidence constituted overwhelming proof of Morris' guilt. *See State v. Williams*, 6 Ohio St.3d 281 (1983), paragraph six of the syllabus. The victim's detailed and consistent testimony established that Morris repeatedly raped her over a period of seven or eight years. She described how Morris' behaviors

towards her evolved in a manner that the victim's counselor testified were consistent with the ways in which a pedophile would groom his victim to facilitate future molestation. In addition, this Court has consistently held that "[i]n sex offense cases, *** the testimony of the victim, if believed, is sufficient to support a conviction, even without further corroboration. Thus, the testimony of the victim may be enough, and does not need corroborating evidence." (Internal citations omitted.) *State v. Melendez*, 9th Dist. No. 08CA009477, 2009-Ohio-4425, ¶ 15, quoting *State v. Willard*, 9th Dist. No. 05CA0096-M, 2006-Ohio-5071, ¶ 11. The lack of physical evidence in a case where such evidence was unlikely due to the passage of time does not detract from the victim's testimony. In addition, although there were no third-party eye witnesses to any acts of rape, Mother testified that she observed what she believed to be inappropriate sexual activity between Morris and S.K. Accordingly, because the evidence of Morris' guilt was overwhelming based on other evidence, the admission of the challenged other-act evidence was harmless error, if it constituted error at all. Accordingly, I would overrule Morris' first assignment of error.

{¶64} In addition, upon review, I would overrule his remaining assignments of error and affirm his conviction for rape of a child.

APPEARANCES:

DAVID C. SHELDON, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL A. HOPKINS, Assistant Prosecuting Attorney, for Appellee.

COMMON PLEAS COURT

2009 MAR 18 PM 4:32

FILED
KATHY FORTNER
MEDINA COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
MEDINA COUNTY, OHIO

STATE OF OHIO **CASE NO. 08CR0408**

Plaintiff

v. **JUDGE JAMES L. KIMBLER**

CARL M. MORRIS, JR.

Defendant

SENTENCING
JUDGMENT ENTRY

On March 13, 2009, Defendant's sentencing hearing was held pursuant to R.C. 2929.19. Present were Assistant Medina County Prosecutor, Mr. Matt Razavi, representing the State of Ohio, and Attorneys, Mr. Carlos K. Johnson and Mr. Fernando Mack, representing the Defendant. The Defendant was also present and afforded all rights pursuant to Crim. R. 32.

The Court finds that the Defendant entered a plea of not guilty at arraignment on October 3, 2008. Defendant proceeded to a jury trial on January 26, 2009. After deliberation, on January 29, 2009, the jury returned the verdict of guilty on Count I, "Rape," in violation of R.C. 2907.02(A)(1)(b)(B), a felony of the first degree, and a verdict of guilty on Count II, "Rape," in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. The Court adopted the verdict of guilty on the charge of "Rape," in violation of R.C. 2907.02(A)(1)(b)(B), a felony of the first degree, and guilty on the charge of "Rape," in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. The Court ordered a presentence investigation prior to sentencing.

The Court finds the Defendant has been convicted of "Rape," a violation of R.C. 2907.02(A)(1)(b)(B), a felony of the first degree, and has been convicted of "Rape," a violation of R.C. 2907.02(A)(1)(b), a felony of the first degree.

The Court then imposed a prison term on Count I, of life in prison. to be served consecutive with Count II, a prison term of five (5) years. The Defendant has credit for one hundred sixty-five (165) days served.

MEDINA COUNTY COURT OF COMMON PLEAS-STATE OF OHIO, MEDINA COUNTY S.S. I hereby certify that this is a true copy of the original on file in said court. Witness my hand and the seal of said court at Medina, Ohio this 17th day of March 2013 David B. Wadsworth, Clerk of Courts
By Victoria Deputy

A-35

The Court has further notified the Defendant that post release control is mandatory. The Court also informed the Defendant that the post-release control would be for a term of five (5) years. As part of this sentence the Defendant is ordered to serve any term of post-release control imposed by the Ohio Parole Board, and any prison term for any violation of that post-release control.

The Defendant shall submit to a DNA sample and a DNA sample shall be collected pursuant to R.C. 2901.07.

The Defendant is ordered conveyed to the custody of the Ohio Department of Rehabilitation and Correction. Credit for time spent in jail awaiting sentencing as set forth above is granted as well as future custody days while Defendant awaits transport to the Lorain Correctional Institution.

The Defendant was designated as a Tier III Sexual Offender and was advised of his duties to register under the law.

All court costs are waived.

SO ORDERED, ADJUDGED and DECREED.

JUDGE JAMES L. KIMBLER