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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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.

The main thrust of Morris's argument why the Ninth District's application of constitutional harmless error principles should be affirmed is that the Ninth District applied controlling authority of this Court. Brief of Appellee at 12-13. As explained in the Appellant's brief, this Court holds that the erroneous admission of evidence is generally analyzed under the rubric of non-constitutional harmless error. That standard requires a reviewing court to determine whether there is "substantial other evidence to support the guilty verdict." *State v. Webb*, 70 Ohio St. 3d 325, 335, 638 N.E.2d 1023 (1994), citing *State v. Davis*, 44 Ohio App. 2d 335, 346,-348, 338 N.E.2d 793 (8th Dist. 1975). This Court has repeatedly applied the non-constitutional harmless error standard since *Webb*. *See 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 194, 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. *See also State v Brown*, 100 Ohio St. 3d 51, 2003 Ohio 5059, at ¶ 25 (declaring Evid. R. 404(B) error harmless), citing *State v. Getsy*, 84 Ohio St. 3d 180, 193, 702 N.E.2d 866 (1998) (holding that Evid. R. 404(B) error was harmless in light of the "substantial" evidence against the defendant).

The sub-theme of Morris's argument is that every allegedly erroneous admission of other-act evidence infringes on a defendant's right to a fair trial. Brief of Appellee at 14 ("The introduction of inflammatory and prejudicial 404(B) evidence rises to the level of constitutional error."). Morris asserts that when the admission of other-act evidence infringes on a defendant's

right to a fair trial, constitutional harmless error analysis must be employed. Brief of Appellee at 15 ("improper admission of 404(B) evidence is constitutional error when it materially prejudices the accused's right to a fair trial"). This argument, however, asserts a tautology; of course it would be *constitutional* error when the defendant's *constitutional* right to fair trial is abridged. Obviously, the right to a fair trial is a constitutional guarantee. Morris's position in defense of the Ninth District's decision below, however, skips over how the admission of evidence – seemingly all evidence in every case – constitutes a deprivation of the defendant's right to a fair trial.

Morris's argument and the decision of the Ninth District Court of Appeals assert that same fallacy. In conflating the alleged evidentiary error with the deprivation of a defendant's right to a fair trial, the Ninth District's decision in this case and Morris's argument would render moot the entirety of this Court's non-constitutional harmless error jurisprudence.

Furthermore, neither Morris nor the court of appeals in its opinion offers a limiting principle for why the erroneous admission of other-act evidence under Evid. R. 404(B) is different than the admission of privileged material under R.C. 2317.02(B), *see Webb*, 70 Ohio St. 3d at 335, victim-impact testimony in a capital case, *see McNeill*, 83 Ohio St. 3d at 447, or general hearsay under Evid. R. 802, *see Powell*, 132 Ohio St. 3d 233, at ¶ 59, 64-65. Morris claims that the State's reliance on several decisions of this Honorable Court in capital cases applying non-constitutional harmless error review is inapposite because those are not Evid. R. 404(B) cases. Brief of Appellee at 13-14. Evid. R. 404(B) is an evidentiary rule just like hearsay, Evid. R. 802, which has just as much potential for supporting introduction of inflammatory and prejudicial testimony as other-acts evidence. Yet the Court in *Powell* clearly

chose to apply the non-constitutional harmless error standard to the erroneous admission of hearsay evidence. *Powell*, 132 Ohio St. 3d 233, at ¶ 63-64.

Morris's position would therefore have this Court hold that the erroneous admission of any and all evidence under any Rule of Evidence infringes on the defendant's right to a fair trial and thus must be analyzed under the far more stringent constitutional harmless error standard. Morris concedes that this Court applies a bifurcated approach to harmless error analysis. Brief of Appellee at 11 ("The State is correct that this Court traditionally has analyzed harmless error in the context of constitutional vs. non-constitutional error."). If his argument why other-act evidence under Evid. R. 404(B) should be analyzed under the constitutional harmless error standard becomes the law of this State, the observation that the Court applies a bifurcated approach to harmless error analysis will no longer hold true. If this Court affirms, there will be but one (1) harmless error standard and every appellate court will have to find errors harmless beyond a reasonable doubt or reverse and remand for new trials.

Morris attempts to paint the State's argument as urging the Court to apply non-constitutional harmless error analysis as a per se rule. The authority of the United States Supreme Court and this Court need not be read in so strict a manner. The State does not contest that some evidentiary errors raise constitutional issues. As argued in the State's merit brief, in *State v. Williams*, 6 Ohio St. 3d 281, 452 N.E.2d 1323 (1983), the defendant was convicted despite the fact that the trial court failed to secure his attendance in violation of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution and the court admitted a confession taken in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981) (suspect has right to consult attorney before answering further questions and if invoked questioning must cease). The admission of the confession was initially an evidentiary issue

under Evid. R. 801(D)(2)(a) (party-opponent statement), but because the evidence was obtained in violation of Williams's constitutional rights, admission of his statement became a constitutional issue.

In this case, Morris attempts to persuade the Court that it is a constitutional violation in *every* instance when other-act evidence is erroneously admitted. Morris's argument oversimplifies and distorts the rule on this point. There must be an additional showing that the error complained of undermined a defendant's right to a fair trial, not just a per se rule that all errors automatically go to the defendant's right to a fair trial.

By skipping over the step of the analysis that a defendant must show, and a reviewing court must find, that the evidence was so unfair as to deprive the defendant of his right to a fair trial, the appellate court converts all alleged evidentiary errors into constitutional errors and renders moot non-constitutional harmless error. It also has the effect of unduly magnifying evidentiary issues by converting all errors in the admission of evidence, even *de minimis* ones, into nearly per se prejudice requiring reversal.

Moreover, as the State noted in its merit brief, Ohio's harmless error rule, Crim. R. 52(A), is patterned after the federal harmless error rule, Fed. R. Crim. P. 52(A). *See State v. Perry*, 101 Ohio St. 3d 118, 2004 Ohio 297, at ¶ 14 n.1 (noting Fed. R. Crim. P. 52 is the analogous counterpart of Ohio Crim. R. 52). The rule protects against appellate courts becoming "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).

In converting all instances of allegedly erroneous admission of evidence at trial into functionally per se prejudice, an appellate court creates the kind of "rigid rules" and "mandatory presumptions" the United States Supreme Court described in *Shinseki v. Sanders*, 556 U.S. 396,

408 (2009), applying *Kotteakos*, 328 U.S. at 750. The harmless error rule is designed to prevent the erection of "evidentiary barrier[s] so high that [they] could never be surmounted." *Id.* The evidentiary barriers erected by the Ninth District in the case presented for review and by this Court if the Court adopts Morris's construction of the harmless error rule, would "justify 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). As the United States Supreme Court noted in *Sanders*, "[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.

The effect of the Ninth District's converted evidentiary-error doctrine as necessarily undermining a defendant's right to a fair trial skips over the critical step where the reviewing court must first find that the alleged evidentiary error had a constitutional dimension. The effect of the Ninth District's decision in this case holding that the allegedly erroneous admission of other-acts evidence undermined Morris's right to a fair trial returns to the long-since discarded idea that a trial must be perfect in order to be fair. The United States Supreme Court and this Honorable Court have both previously rejected the idea that the Constitution demands error-free or perfect trials. *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); *State v. Hill*, 75 Ohio St. 3d 195, 212, 661 N.E.2d 1068 (1996); *State v. Jones*, 90 Ohio St. 3d 403, 422, 739 N.E.2d 300 (2000); *State v. Lott*, 51 Ohio St. 3d 150, 166, 555 N.E.2d 293 (1991).

The Ninth District Court of Appeals purposefully chose to apply the constitutional harmless error standard after explicitly stating that the non-constitutional harmless error standard

has traditionally been applied in these circumstances. *State v. Morris*, 9th Dist. Medina No. 09CA0022-M, 2012 Ohio 6151, at ¶ 51. The plurality opinion of the court of appeals below should be reversed and remanded for proper application of the non-constitutional harmless error standard.

CONCLUSION

For all the reasons advanced first in the State's Merit Brief and in the instant Reply brief, the State respectfully urges the Court to reverse the judgment of the Ninth District Court of Appeals and remand the case for further consideration in light of its opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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