

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2013-0251
Plaintiff-Appellant	:	On Appeal from the Medina County Court of Appeals
vs.	:	
CARL M. MORRIS, JR.	:	Court of Appeals Case Number 09CA0022-M
Defendant-Appellee	:	

BRIEF OF AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS ASSOCIATION, IN SUPPORT OF STATE OF OHIO'S MERIT BRIEF

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STATE OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (“OPAA”) offers this amicus brief in support of the State of Ohio’s Merit Brief on Proposition of Law 1 in its Appeal.

The Ohio Prosecuting Attorneys Association is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads: “To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members.”

Amicus has a great interest that the proper standard of review for admission of evidence be consistently and uniformly interpreted and enforced in all districts of the State of Ohio. Pursuant to case law, even if a court has abused its discretion in erroneously admitting evidence, such non-constitutional error is harmless if there is substantial remaining evidence to support the guilty verdict. The decision of the Ninth District below to the contrary is properly reversed.

STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of case and facts contained in the State of Ohio's Merit Brief.

AMICUS CURIAE PROPOSITION OF LAW NO. 1

When reviewing the allegedly erroneous admission of evidence, an appellate court should analyze whether substantial other evidence supports the verdict.

Even with this Court's explicit directions on remand, the Ninth District again failed to apply an abuse-of-discretion standard of review.

In *State v. Morris*, this Court cited Evid.R. 402, saying "[t]he general principle that guides admission of evidence is that '[a]ll relevant evidence is admissible * * *.'" 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶11. This Court also noted that "[t]he admission of such [other-acts] evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice." *Id.* at ¶14, citing *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶66.

Even with such clear direction, on remand, the Ninth District Court of Appeals failed to apply the abuse of discretion standard required for allegedly erroneous admission of evidence. Not only did the Ninth District engage in the same analysis as it had performed when it applied a de novo review, it was not deferential to the trial court's determinations. This Court previously advised that "[i]t 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." *Id.* But this is exactly what the Ninth District did in this case.

Under Evid.R. 404(B), evidence of other crimes, wrongs, or acts, may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake

or accident. But, as this Court noted in *Morris*, this list is not exhaustive, and the Ninth District has mistakenly treated it as such. *Id.* at ¶18.

The four primary motivations of rapists are opportunity, pervasive anger, sexual gratification and vindictiveness. Knight, *Validation of a typology for rapists*, *Journal of Interpersonal Violence*, v.14 (1999) 303-330. Thus, any evidence that Morris exhibited these motivations was admissible under Evid.R. 404(B). Sarah's testimony that Morris propositioned her, and her mother's testimony that Morris would kick the dog in anger when she refused to have sex with him were exactly this kind of evidence.

But, the Ninth District concluded that "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." *Id.* at ¶28; *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, ¶30. The court cited no authority for this sweeping characterization of every rapist's intent. Moreover, the evidence at trial showed that Morris wanted to, and did, have sex with both adult women, including his wife, and at least one child, S.K. The Ninth District's baseless distinction between Morris' sexual acts distorted the court's entire analysis of the trial court's admission of other-acts evidence.

On remand, the Ninth District held that Evid.R. 404(B) must be "strictly construed against the state, and . . . conservatively applied by a trial court." *State v. Morris*, 9th Dist. No. 09CA0022-M, 2012-Ohio-6151, ¶13, citing *State v. DeMarco*, 31 Ohio St.3d 191, 194, 509 N.E.2d 1256 (1987). Recent decisions by this Court indicate that such a narrow application of Evid.R. 404(B) is not called for, and instead, a defendant must show he suffered material prejudice. *See State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810; *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315; *State v. Webb*, 70 Ohio St.3d

325, 334-335, 638 N.E.2d 1023 (1994). The Ninth District did not require Morris to show that he was materially prejudiced by the other-acts evidence of which he complained, and so erred.

Even if Evid.R. 404(B) is conservatively applied, the Ninth District's reasoning in this case was far too limited an application of the rule. In this case, Sarah's testimony was relevant because it showed Morris' opportunity, preparation, motive, and intent. Sarah was S.K.'s sister, and, like S.K., lived with her mother and Morris. Like S.K., Sarah was in a position where Morris had access to and power over her that he did not have with other women and girls. Sarah's testimony that Morris tried to sexually engage her fell within the enumerated exceptions of Evid.R. 404(B) during Morris' trial for raping his other stepdaughter, S.K.

But the Ninth District opined that the admission of Sarah's testimony "was unreasonable as it was not based on a sound reasoning process." *Morris*, 9th Dist. No. 09CA0022-M, 2012-Ohio-6151, ¶37. Although the court used the "magic words" indicating that the trial court abused its discretion, it clearly applied a more stringent standard of review. The analysis in both of the Ninth District's opinions is essentially the same.

However, even if the Ninth District correctly found that the trial court abused its discretion, this Court should still reverse its decision. Any error in admitting the evidence of Sarah's testimony was harmless.

The Ninth District should have found that any error in the admission of evidence was harmless. The erroneous admission of evidence is normally not a constitutional issue, and only requires a showing that the State presented substantial other evidence to support the verdict.

Evidentiary issues including the admission of other-act evidence does not, without more, implicate constitutional rights. *See State v. McNeill*, 83 Ohio St.3d 438, 447, 700 N.E.2d 596 (1998); *State v. Webb*, 70 Ohio St.3d 325, 334-335, 638 N.E.2d 1023 (1994). Non-constitutional error is harmless if there is substantial other evidence to support the guilty verdict. *Webb*, at 335.

The Ninth District has previously applied non-constitutional harmless error principles. *State v. Leaver*, 9th Dist. No. 25339, 2011-Ohio-4068, ¶15, citing *State v. Murphy*, 4th Dist. No. 09CA3311, 2010-Ohio-5031, ¶80 and *State v. Fellows*, 7th Dist. No. 09 JE 36, 2010-Ohio-2699, ¶25. In *Leaver*, the Ninth District said that “[e]rror in the admission or exclusion of evidence is usually non-constitutional error.” *Id.*

The Ninth District deviated from its previous holdings in this case. Here, the court applied a constitutional standard of harmless error review, such 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.” *Morris*, 9th Dist. No. 09CA0022-M, 2012-Ohio-6151, ¶50, citing *State v. Bayless*, 48 Ohio St.2d 73, 106 (1976). The Ninth District acknowledged that a less stringent harmless-error standard has been applied in cases involving non-constitutional errors in the admission of evidence, but applied the higher standard in this case because it opined that the evidence admitted was so inflammatory that it violated Morris’ right to a fair trial.

Morris’ right to a fair trial was not violated in this case. Even if other-acts evidence was improperly admitted, the trial court gave a proper limiting instruction. “Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions . . . a defendant is entitled to a fair trial but not a perfect one.” *State v. Bruton*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627 (1968). Jurors are presumed to follow the court’s limiting instructions. *See State v. McNeill*, 83 Ohio St.3d 438, 441, 700 N.E.2d 596 (1998), citing *State v. Woodard*, 68 Ohio St.3d 70, 73-74, 623 N.E.2d 75, 78 (1993). The Ninth District ignored this rule of law when it ruled that the admission other acts evidence implicated the fairness of this case.

Even more outrageously, the Ninth District found that this case is a close one because the State did not present a confession, physical evidence, or eyewitnesses to the rapes. In so finding, the court wholly abandoned its duty as an appellate court.

In this case, the defendant, Morris, made a confession. Before being told that the police were investigating him for rape, Morris offered that he thought the investigation would be about him molesting S.K. And, 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.” Morris also explained that his relationship with his wife, Susan, was strained because Susan and he only had sex one or two times a month. He then said if Susan had treated him as well as S.K. did, he and Susan would still be married. Morris clearly made at least a partial confession to his crime. This evidence was ignored by the Ninth District in its review of harmless error.

Even so, the court did not thoroughly review the remaining evidence the jury had to consider. The Ninth District concluded that this case “rested largely on S.K.’s credibility.” *Morris*, 9th Dist. No. 09CA0022-M, 2012-Ohio-6151, ¶53. And it is clear that most judges on the Ninth District panel simply did not believe the victim. The opinion repeatedly prefaces S.K.’s rapes with the term “allegedly”. But the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). And here, not only was there evidence corroborating S.K.’s testimony, but her psychologist, who testified at trial, said that there was no clinical reason not to believe her testimony. The Ninth District did everything it could to justify overturning Morris’ conviction. That an appellate court would so abuse its power in a case of child rape is abhorrent.

Even the dissent applied a constitutional standard of harmless error review, but found that “the remaining evidence constituted overwhelming proof of Morris’ guilt.” *Morris*, 9th Dist. No.

09CA0022-M, 2012-Ohio-6151, ¶63. At trial, the victim, S.K., provided detailed and consistent testimony that Morris repeatedly raped her over seven or eight years. She was subjected to cross examination, and the defense presented a witness to dispute S.K.'s testimony of where the abuse sometimes occurred. But the jury, which had the opportunity to view every witness at trial, must have believed S.K. Additionally, S.K.'s mother testified to Morris' idiosyncrasy of ejaculating in a towel, which corroborated S.K.'s description of how he behaved when he abused her. And S.K.'s mother and sister also testified that they had seen inappropriate sexual activity between Morris and S.K.

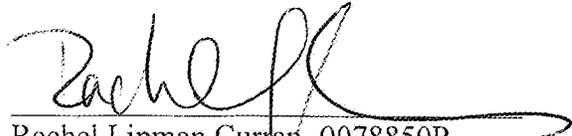
The Ninth District erred when it ruled that Morris was denied his right to a fair trial, and should have applied a non-constitutional test for harmless error. *State v. Webb*, 70 Ohio St.3d 325, 335, 638 N.E.2d 1023 (1994). If it had done so, it clearly would have found that there is substantial other evidence to support the guilty verdict. *See State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865. This Court's previous decision in *Webb* mandates such review, and there is no reason to alter this long-standing rule. The Ninth District's decision in this case went far beyond the appropriate bounds of appellate review.

CONCLUSION

It is not patently unreasonable for a trial court to admit testimony by a rape victim's sister of the defendant stepfather's sexual proposition to her. The Ninth District has repeatedly refused to apply an abuse of discretion standard of review to admission of other-acts evidence under Evid.R. 404(B) in this case. And even when such evidence is wrongly admitted, appellate courts still must determine whether such error is harmless. The appropriate test is whether there is substantial other evidence to support the guilty verdict. The Ninth District wrongly applied a more stringent constitutional standard of review. The OPAA urges this Court to reverse the decision of the Ninth District below.

Respectfully,

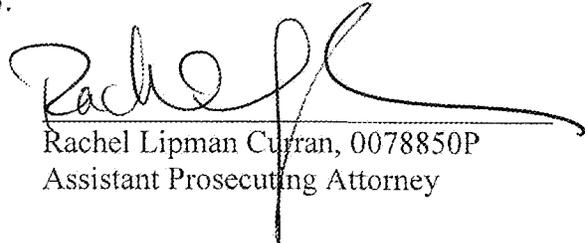
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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to David Sheldon, 669 West Liberty Street, Medina, Ohio 44256, counsel of record, this 12th day of August, 2013.



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