[Cite as *State v. Williams*, 2010-Ohio-70.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92714

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
REVERSED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512151

BEFORE: Sweeney, J., McMonagle, P.J., and Blackmon, J.

RELEASED: January 14, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Joseph Williams ("defendant"), appeals his rape and kidnapping convictions. After reviewing the facts of the case and pertinent law, we affirm in part and reverse in part.

{¶ 2} In July 2004, 27-year-old M.H.[1] told his mother, Rita, that defendant, who is Rita's brother and M.H.'s uncle, molested him when he was 12 and again when he was 15. Rita questioned defendant about this accusation. Defendant sent Rita a letter admitting to the incident stating: "This is the saddest letter I will ever have to write. Yes, I had sexual contacts with [M.H.] when he was just a kid."

{¶ 3} M.H. and his parents decided not to report defendant to the authorities. However, Rita told her family, including her brother Glenn, about what defendant did to her son M.H. In turn, Glenn asked his three sons if defendant ever had inappropriate sexual relations with them. K.W., who is one of Glenn's sons and the victim in this case, said no.

{¶ 4} However, in the Fall of 2007, when K.W. was 23 years old, he told his parents that defendant raped him in March 1992, when K.W. was seven years old. K.W. was troubled by flashbacks of the molestation by his uncle. On

[1]The parties are referred to herein by their initials or title in accordance with this Court's established policy regarding non-disclosure of identities of juveniles.

December 14, 2007, K.W. checked himself into the hospital for mental health issues stemming from "an incident of being abused by his uncle when he was a small child."

{¶ 5} K.W.'s father, Glenn, questioned defendant about K.W.'s accusations. Defendant denied that anything happened; however, he eventually answered, "Unless I was drunk or out of it."

{¶ 6} On January 2, 2008, Glenn and K.W. reported the rape to the police, armed with defendant's letter admitting that he had raped K.W.'s cousin, M.H.

{¶ 7} On June 18, 2008, defendant was indicted for the following against K.W.: three counts of rape of a victim less than 13 years old, with specifications that "defendant purposely compelled the victim to submit by force or threat of force" in violation of R.C. 2907.02(A)(1)(b); and one count of kidnapping in violation of R.C. 2905.01(A)(4), with a sexual motivation specification in violation of R.C. 2941.147. On December 19, 2008, a jury found defendant guilty of all charges and the court sentenced him to mandatory life in prison.

{¶ 8} Defendant appeals and raises three assignments of error for our review. We address assignments of error one and two together:

{¶ 9} "I. The State failed to present sufficient evidence to sustain a conviction against appellant.

{¶ 10} "II. Appellant's convictions are against the manifest weight of the evidence."

{¶ 11} When reviewing sufficiency of the evidence, an appellate court must determine, "after viewing the evidence in a light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶ 12} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 13} "The appellate court sits as the 'thirteenth juror' and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶ 14} The elements of rape pertaining to defendant are found in R.C. 2907.02(A)(1)(b), which states:

{¶ 15} "No person shall engage in sexual conduct with another * * * when * * * [t]he other person is less than thirteen years of age * * *." Sexual conduct may include, "anal intercourse, fellatio, and, * * * without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the * * * anal opening of another. Penetration, however slight, is sufficient to complete * * * anal intercourse." R.C. 2907.01(A). Furthermore, in the instant case, the jury found that "defendant purposely compelled the victim to

submit by force or threat of force." Defendant was also convicted of kidnapping in violation of R.C. 2905.01(A)(4), which reads in pertinent part: "No person * * * shall * * * restrain the liberty of [another] * * * [t]o engage in sexual activity * * * with the victim against the victim's will * * *."

{¶ 16} The following testimony was presented at trial:

{¶ 17} Glenn testified that he and his extended family, including defendant and K.W., stayed at Little Sisters of the Poor nursing home in Warrensville Heights, Ohio, from March 16 - 19, 1992, when Glenn and defendant's mother was ill and passed away.

{¶ 18} K.W. testified that he was seven and a half years old when his grandmother passed away, and that he remembered staying at Little Sisters of the Poor at the time, with much of his extended family. K.W. testified that he, his brothers, and his cousins, "would just pretty much have free reign of the facility, play hide and go seek, play in the game room, go outside and [have] snowball fights, average kid stuff when parents aren't around."

{¶ 19} K.W. testified about the events leading up to the rape:

{¶ 20} "I was the youngest, so I was automatically it. It wouldn't be hide and go seek as much as it was ditch [K.W.], that was the game since I was the youngest. I was looking for them close to the day of my grandmother's passing. * * *.

{¶ 21} "I was looking for them in the usual places we hide, which is the parlor, the game room downstairs. The parlor was on the second floor. There

was a third floor like where the workers took their breaks, which were favorite hiding places we had. I went into the parlor and came upon [defendant] drinking. That's where I saw him."

{¶ 22} According to K.W., defendant, who was alone in the parlor, told K.W. to lay down because they were going to play a game. Defendant unzipped K.W.'s pants and told K.W. to close his eyes. Defendant put K.W.'s penis in defendant's mouth. Defendant then forced K.W. to kneel and put defendant's penis into K.W.'s mouth. Defendant then turned K.W. around and put him on his stomach on the floor. From behind, defendant inserted something between K.W.'s knees. K.W. testified that it "could have been a finger, it could have been anything."

{¶ 23} K.W. testified that he was in the parlor with defendant for approximately 30-35 minutes, and the molestation lasted "probably 20 to 25 of those minutes." K.W. recalled various additional details from the incident, such as, at one point his face was on the carpet, which he described as "a reddish color with like a floral pattern on it," and the entry to the parlor has "double doors that close in front." He remembered the sounds defendant made during the oral sex, such as "slurping" and "grunting." After the first incident of oral sex, defendant told K.W. that the game would not be over until K.W. did the same thing to defendant. Afterward, defendant left K.W. to pull his own pants up and told K.W. not to tell anyone. K.W. left the parlor and caught up with his brother

and cousin. He distinctly remembered being teased because the fly on his pants was still open.

{¶ 24} Asked what was going through his mind during the rape, K.W. testified, "I knew something was wrong, but I didn't know what to do. I was terrified." Asked if he thought about getting up and walking out of the room, K.W. replied, "That's all I wanted to do, but I felt that I couldn't because I was too afraid."

{¶ 25} K.W. testified that he initially lied to his parents about being sexually abused by defendant and kept the rape secret from his family. "I felt guilty and shameful for what had happened because I didn't fight and I didn't run. I didn't get out of the situation I was faced with. * * * I was afraid. I didn't know how they would react. I felt like for some reason it was my fault. From after that day I was an adult and I had to take care of myself."

{¶ 26} Detective Dennis Fossett of the Warrensville Heights Police Department testified that defendant admitted to "having a relationship" with M.H.; however, defendant denied K.W.'s accusations.

{¶ 27} Defendant's brother Donald testified that defendant admitted "his encounters" with M.H.; however, defendant denied K.W.'s allegations.

{¶ 28} Defendant testified that he had inappropriate sexual contact with M.H.; however, asked if he molested K.W., defendant stated as follows:

{¶ 29} "Absolutely not. I never, ever in my life inappropriately touched him in any way whatsoever. I don't know what happened to him, I hope he was not

abused by anybody, but certainly I never, ever at any time in his life did what he accused me of doing."

{¶ 30} Defendant admitted to drinking alcohol heavily around the time of his mother's death. Defense counsel asked him, "Are you saying that despite the fact that you may have inebriated yourself, you don't think you could have gotten drunk enough to do this?" Defendant replied, "No, no. I would never get that drunk because I can't perform well when I'm drunk. I can't have sex much when I'm drunk. The heavy drugs I have to take, my libido just disappeared. I'll never have sex again. Again, a lot of people think that's God['s] punishment, that's the way it should be."[2] Defendant further testified that "it's preposterous to even imagine it could happen in that nursing home at that particular time, to be alone by yourself and one other person for more than a half-hour, almost? That's just bewildering to me. I can't imagine that. I don't recall it."

{¶ 31} On appeal, defendant argues that K.W.'s testimony is uncorroborated, K.W. initially denied any abuse by defendant, K.W. did not accuse defendant of rape until 15 years after it allegedly occurred, there is no evidence of force, and there is no evidence of the third count of rape, because "knees" is not an erogenous zone.

{¶ 32} In reviewing the testimony presented at trial, we conclude that it is sufficient to meet the elements of the first and second counts of rape, which

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[2] Defendant was diagnosed with AIDS on June 24, 1998.

correspond with the oral sex acts, as well as the elements of kidnapping. K.W. testified that defendant performed fellatio on him, and forced K.W. to perform fellatio on defendant. These acts fall within the ambit of sexual conduct contemplated by R.C. 2907.01 and 2907.02. Furthermore, Ohio courts have consistently held that a victim's testimony, if believed, is sufficient to support a rape conviction. "There is no requirement that a rape victim's testimony be corroborated as a condition precedent to conviction." *State v. Lewis* (1990), 70 Ohio App.3d 624, 638. See, also, *State v. Blankenship* (Dec. 13, 2001), Cuyahoga App. No. 77900.

{¶ 33} Additionally, the rape of a seven-year-old child by an adult family member is "inevitably forcible." Compare *State v. Eskridge* (1988), 38 Ohio St.3d 56 (holding that substantial evidence of force was inherent in a four-year-old's testimony that her father sexually abused her). "Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established." Id. at 58 (internal citations omitted). See, also, *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418 (holding that the elements of rape and kidnapping have "such a singularity of purpose and conduct that kidnapping may be said to be implicit within every forcible rape").

{¶ 34} We also find that the convictions for kidnapping and the first two counts of rape are not against the manifest weight of the evidence. "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the

trier of the facts" to decide. *State v. Amburgey* (1987), 33 Ohio St.3d 115, 117 (emphasis omitted) (citing *State v. DeHass* (1967), 10 Ohio St.2d 230). Given the detail of K.W.'s testimony, we cannot say that the jury lost its way in believing K.W. rather than defendant.

{¶ 35} In reviewing the evidence of the third rape conviction, which the State alleges corresponds with defendant putting "his finger or penis in K.W.'s anus," we find merit to defendant's first assignment of error. K.W. testified that defendant put something between his knees. K.W. did not refer to a part of his body other than his "knees," nor did K.W. testify about penetration. In *State v. Wells*, 91 Ohio St.3d 32, 34, 2001-Ohio-227, the Ohio Supreme Court held that "[i]f the evidence shows that the defendant made contact only with the victim's buttocks, there is not sufficient evidence to prove the defendant guilty of the crime of anal rape." Simply put, "between the knees" does not mean "insertion * * * into the * * * anal opening."

{¶ 36} Ohio law makes a distinction between "sexual conduct," which is an element of rape, and "sexual contact," which is an element of gross sexual imposition. See R.C. 2907.02 and 2907.05. "Sexual conduct," which we defined earlier in our analysis, contemplates intercourse, oral sex, or penetration. R.C. 2907.01(A). "'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, [or] pubic region, * * * for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). While we offer no opinion on whether putting something

between another's knees, in the abstract, could be the basis for any sex-related offense, we hold that it does not amount to sexual *conduct* as defined in R.C. 2907.01(A), and therefore is insufficient to show rape in the instant case.

{¶ 37} Accordingly, Assignments of Error I and II are overruled regarding Counts 1 and 2, the oral rapes, and Count 4, the kidnapping. Assignment of Error I is sustained insomuch as the State presented insufficient evidence to prove anal rape.

{¶ 38} Defendant's third assignment of error states that:

{¶ 39} "III. The trial court erred when it admitted other acts testimony in violation of R.C. 2945.59, Evid. R. 404(B) and appellant's rights under Article I, Section 10 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution."

{¶ 40} Generally, evidence of other crimes committed by a defendant is inadmissible to prove that the defendant committed the offense in question. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B).

{¶ 41} Pursuant to R.C. 2907.02(D), "[e]vidence of specific instances of the defendant's sexual activity * * * shall not be admitted under this section unless it * * * is admissible against the defendant under section 2945.59 of the Revised

Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." R.C. 2945.59 states that a defendant's other acts which "tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶ 42} We review the admission of evidence under an abuse of discretion standard. *State v. Mauer* (1984), 15 Ohio St.3d 239. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. Additionally, the Ohio Supreme Court has held that "R.C. 2945.59 and Evid.R. 404(B) codify the common law with respect to evidence of other acts of wrongdoing, and are construed against admissibility." *State v. Lowe* (1994), 69 Ohio St.3d 527, 530.

{¶ 43} In the instant case, defendant argues that the court erred when it allowed evidence at trial of his sexual abuse of M.H. to prove that he committed the sex offenses against K.W. In admitting this evidence, the court found "that the showing of 'other acts' presented by the State 'tend[s] to show' by substantial proof the exceptions enumerated in the statute section 2945.59 or Evid.R. 404(B), such as motive, intent, opportunity, preparation, plan, or knowledge."

{¶ 44} The instant case is similar to *State v. Russell*, Cuyahoga App. No. 83699, 2004-Ohio-5031. In 2003, Russell was charged with raping his step-daughter during the years 1987 to 1989, when she was 10 to 12 years old. The trial court allowed the State to introduce into evidence testimony that Russell sexually abused his biological daughters during the early-mid 1980's, when they were under the age of 12. Russell was convicted of the crimes against his step-daughter, and he appealed, arguing, among other things, that the court erred in allowing this "other acts" testimony. This court affirmed Russell's convictions, stating the following:

{¶ 45} "In this case, the trial court properly permitted appellant's daughters to testify pursuant to [R.C. 2945.59 and the second sentence of Evid.R. 404(B)]. The State's position was that appellant used the same modus operandi, or 'pattern of conduct,' in his crimes. *State v. Ervin*, Cuyahoga App. No. 80473, 2002-Ohio-4093; *State v. Murphy* (Jul. 30, 1998), Cuyahoga App. No. 71775.

{¶ 46} "The State proved appellant chose female victims of a filial position to him who were under the age of 12. Appellant began touching his victims in a progressively sexual manner. When he became sure he could do so, he then sexually gratified himself, also in a progressive manner. He initially forced his penis against his eldest daughter's bare skin. He eventually forced his penis into his younger daughter's vagina. Since he could not accomplish actual sexual intercourse with [his step-daughter], he settled with forcing his penis into her mouth." Id. at ¶36-37. See, also, *State v. Paige*, Cuyahoga App. No. 84574,

2004-Ohio-7029, at ¶14 (noting that "[t]his Court has previously concluded that evidence regarding prior acts of molestation upon family members, even if not included in the indictment, was material in establishing a defendant's pattern of conduct"); *State v. Ervin*, supra, at ¶51 (holding that "evidence of defendant's previous sexual advances toward [his daughter and niece], both eight years old at the time of the abuse, was presented to demonstrate defendant's pattern of engaging in sexual intercourse with young girls in his family while occupying a position of trust and authority").

{¶ 47} We find that the evidence of defendant raping M.H. in the instant case was not used for impermissible purposes, in that it tended to show defendant's motive, intent, scheme, or plan in committing the rape of K.W.

{¶ 48} Defendant sexually abused M.H. between 1989 and 1992. He allegedly sexually abused K.W. in March 1992. Evidence of a defendant's previous sexual activity is not admissible to show motive or intent if it is too remote from, or not closely related in time to, the offense charged. For other acts evidence "to be relevant to the issue of intent, [it] 'must have such a temporal, modal and situational relationship with the acts constituting the crime charged that evidence of the other acts discloses purposeful action in the commission of the offense in question.'" *State v. Gardner* (1979), 59 Ohio St.2d 14, 20 (citing *State v. Burson* (1974), 38 Ohio St.2d 157, 159).

{¶ 49} Both M.H. and K.W. testified that defendant was intoxicated at the time of the offense.[3] Both victims are defendant's nephews and both were under the age of 13 when defendant first molested them. Both rapes happened only after defendant knew he was alone with one of his nephews. Both victims testified that the sexual assault started with defendant putting his mouth on the victims' penises.

{¶ 50} Furthermore, M.H. testified that one of the reasons he delayed disclosing the rape is that when he was 12 years old, after the first time defendant molested him, defendant said to him, "This is what uncles do." In the letter defendant wrote to his sister Rita admitting that he raped M.H., defendant stated that he had a "severe sex addiction leading to literally hundreds of sexual partners." In another letter defendant wrote to his family, which he referred to as "a confession/apology and an expression of concern," defendant stated the following:

{¶ 51} "Because of my moral weakness, I therefore embarked on years of sexual encounters with literally hundred of guys, most of them anonymous one-night stands. If I couldn't have love like a normal person, I was determined to have lots of sex. The therapy that I eventually and belatedly undertook made me realize that I was in a state of severe sexual addiction. Like the strongest drug, too much was never enough and I was always yearning for that next 'hit'. I

[3] There was testimony that defendant abused alcohol and suffered from black-outs during the time in question.

had become the man I didn't recognize. I was a sexual predator. Black or white, brown, yellow, gay, straight, married, old or (and I am most sad to admit this) even young guys. It was all to me just another thrill."

{¶ 52} We find that the court acted within its discretion when it determined that evidence of defendant raping his young nephew M.H. tended to show his motive, intent, or plan in raping his young nephew K.W., especially in light of defendant's admission to being a sexual predator and his tendency to have sex with anyone, "even young guys." See *Lowe*, supra, at 531 (holding that "[a] certain modus operandi is admissible not because it labels a defendant as a criminal, but because it provides a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator").

{¶ 53} Additionally, this Court noted that the trial court in *Russell*, supra at ¶39, "carefully instructed the jury on the limited use of [other acts] evidence." In *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195, the Ohio Supreme Court held that a "presumption always exists that the jury has followed the instructions given to it by the trial court." Likewise, in the instant case, the court instructed the jury regarding "other acts" as follows:

{¶ 54} "Evidence was received about the commission of acts other than the offenses with which the defendant is charged in this trial. That evidence was received only for a limited purpose. It was not received, and you may not

consider it, to prove the character of the defendant in order to show that he acted in conformity with that character.

{¶ 55} "If you find that the evidence of other acts is true and that the defendant committed them, you may consider that evidence only for the purpose of deciding whether it proves the defendant's motive, opportunity, intent or purpose, preparation or plan, to commit the offenses that have been charged in this trial."

{¶ 56} Accordingly, the court did not abuse its discretion in admitting evidence of defendant's other acts and his third assignment of error is overruled.

{¶ 57} Judgment affirmed in part and reversed in part. Defendant's conviction for Count 3, anal rape, and the associated sentence of life in prison are vacated. Case remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share equally their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

PATRICIA A. BLACKMON, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J., DISSENTS
IN PART

CHRISTINE T. McMONAGLE, J., DISSENTING IN PART:

{¶ 58} Respectfully, I dissent from the finding of the majority that it was not error to admit "other acts" testimony, to wit; the testimony concerning a nephew who was molested by the appellant twice about 15 years ago. The court admitted testimony concerning a nephew who had been "molested" by the appellant once when he was 12 years old, and again at age 15. The appellant admitted then, and admitted again at trial, this molestation. He, however, vigorously denied molesting another nephew, the victim in this matter. Contrary to the majority, I would follow the Ohio Supreme Court's analysis in *State v. Eubank* (1979), 60 Ohio St.2d 183, 398 N.E.2d 567, and the Fifth District's analysis of the same issue in *State v. Miley*, 5th Dist. Nos. 2005-CA-67 and 2006-CA-14, 2006-Ohio-4670, appeal not accepted for review, 112 Ohio St.3d 1420, 859 N.E.2d 558.

{¶ 59} In the case sub judice, the appellant was charged with rape, a violation of R.C. 2907.02. Section D of that statute provides that "evidence of specific instances of the defendant's sexual activity, opinion evidence of the

defendant's activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves the origin of semen, pregnancy or disease, the defendant's past sexual activity with the victim or is admissible against the defendant under section 2945.59 of the Revised Code, only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."[4]

{¶ 60} "The legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses, and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible. The rape statute and the gross sexual imposition statute both contain subsections that address the admissibility of evidence of other sexual activity by either the victim or the defendant. Because of the severe social stigma attached to crimes of sexual assault and child molestation, evidence of these past acts poses a higher risk, on the whole, of influencing the jury to punish the defendant for the similar act rather than the charged act." *Miley* at ¶59. (Internal citations omitted.)

{¶ 61} The only fact at issue in this case is whether the victim is telling the truth. The "origin of semen, pregnancy or disease" are not at issue. The

[4]This section of the rape statute is repeated in section D, and also prohibits evidence of the **victim's** sexual history under the same circumstances.

defendant has no past sexual history with the victim. The only possible argument for admission of this testimony would hence have to come from R.C. 2945.59, which "is to be strictly construed against the State, and to be conservatively applied by a trial court." *State v. DeMarco* (1987), 31 Ohio St.3d 191, 194, 509 N.E.2d 1256.

{¶ 62} R.C. 2945.59 reads: "[i]n any criminal case in which 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, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶ 63} "The admissibility of other acts evidence is carefully limited because of the substantial 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 or she committed the crime charged in the indictment. See *State v. Curry* (1975), 43 Ohio St.2d 66, 68, 72 O.O.2d 37, 38, 330 N.E.2d 720, 723. This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, as is certainly true in this case. *State v.*

Schaim, 65 Ohio St.3d 51, 60, 1992-Ohio-31, 600 N.E.2d 661, 669." *Miley* at ¶58.

{¶ 64} In *Eubank*, supra, the Supreme Court held that where the defendant maintains that he never had sexual conduct with the victim, "absence of mistake or accident is not a material issue at trial." Id. at 186. Likewise, the court in *Eubank* rejected the State's argument that evidence of the defendant's past sexual history was a material issue at trial under the "scheme, plan or system" exception. The court, quoting *Curry*, supra, stated: "'Scheme, plan or system' evidence is relevant in two general factual situations. First, those situations in which the 'other acts' form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment. In such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible pursuant to this sub-category of 'scheme, plan or system' evidence, the 'other acts' testimony must concern events which are inextricably related to the alleged criminal act.

{¶ 65} "Identity of the perpetrator of a crime is the second factual situation in which 'scheme, plan or system' evidence is admissible. One recognized method of establishing that the accused committed the offense set forth in the indictment is to show that he has committed similar crimes

within a period of time reasonably near to the offense on trial, and that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes.'" *Eubank* at 186.

{¶ 66} Here, the 'scheme, plan or system' exception is not apposite. The nephew's rapes are not a background act that form the foundation of the crime charged.[5] And identity of the perpetrator of the crime is not an issue here; if this crime happened, the perpetrator is indeed appellant.

{¶ 67} I think it is also important to review the concluding phrase of Section D of R.C. 2907.02, which provides that even if the disputed evidence might be considered admissible under R.C. 2945.59, it **is admissible only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.** This portion of the rape statute places an added burden upon the proponent of the evidence; it must be material and its prejudicial nature must not outweigh its probative worth.

{¶ 68} As already mentioned, the only issue in this case is whether the victim is telling the truth. And I find that the only purpose to admitting the disputed evidence is to create an inference that "he did it before, he must

[5]An example of such a background act might be introducing testimony that a murderer went to the victim's house in order to sell him drugs and then killed the victim when he refused to pay. The trafficking in drugs (other bad act) is inextricably related to the killing.

have done it again." This is precisely the inference that is prohibited. In *State v. Nucklos*, 171 Ohio App.3d 38, 2007-Ohio-1025, 869 N.E.2d 674, the court reviewed the claim that "evidence concerning defendant's treatment of other patients in a way similar to his treatment of the three named in the indictment was admissible to show 'intent, preparation, plan, knowledge and absence of mistake or accident.'" The court held that "the state's argument relies on the very inferential pattern that Evid.R. 404(B) prohibits:[6] **proof of an extrinsic act that inferentially indicates a propensity that, in turn, inferentially indicates commission of an act that is part of the operative facts of the offenses alleged. Weissenberger, Section 404.21. Stated more simply, because he did it once, it is reasonable to find that he did it again."** Id. at ¶87-88. (Emphasis added.) I would find that in this case, evidence that the defendant admitted to previously molesting a young man was introduced only to compel the same inference — he did it before and he must have done it again. See, also, *McQueen v. Goldey* (1984), 20 Ohio App.3d 647, 617 N.E.2d 1160; *State v. Smith* (1992), 84 Ohio App.3d 647, 617 N.E.2d 1160.

{¶ 69} Having concluded that it was error to admit the testimony about the nephew, pursuant to *Eubank* we must then review for harmless error. The testimony revealed that in the fall of 2007, the victim in this matter,

[6]Evid.R. 404(B) is the analog of R.C. 2945.59 at issue in this case.

K.W., was 23 years old when he told his parents that he had been molested by appellant some 16 years earlier. K.W. alleged that the abuse that was the subject of the indictment took place when he was seven years old in a parlor at the Little Sisters of the Poor nursing home where he and his family were staying while his grandmother, a patient at the nursing home, was dying. He testified that he was in this parlor alone with the appellant for approximately half an hour, and that the abuse itself took place over a span of 20-25 minutes. He testified that no one entered the parlor during that time and there were no witnesses to the incident. He further testified that he has always known of this abuse, and that, in fact, subsequent to the abuse, the appellant lived with his family for four or five years. (Tr. 330.)

{¶ 70} Until the fall of 2007, when K.W. was admitted to Barberton Hospital, he told no one of the incident. While the majority cites the fact that he had "mental health issues stemming from abuse," the transcript indicates that he was admitted to Barberton Hospital with a diagnosis that he suffered from "some somewhat severe mental health issues," to wit: "major depression," "paranoia," and "schizophrenia," (tr. 234) and from "auditory hallucinations," (tr. 344), "cannabis abuse," and "alcohol abuse." (Tr. 345.)

{¶ 71} The question that hence confronts us squarely is whether this evidence of appellant's guilt is otherwise so overwhelming that introduction of evidence that he molested another nephew was inconsequential. I suggest it

is not. While a jury might well convict upon the testimony of the victim alone, factors suggested above might as well have resulted in a verdict of not guilty. In short, the evidence exclusive of the challenged evidence is not so overwhelming that the error in admitting the challenged evidence was harmless.

{¶ 72} While I concur with the majority that there is no evidence whatsoever of anal rape, so that conviction must be remanded with orders to vacate, I would reverse and remand for new trial on the remaining counts.