[Cite as *State v. McKim*, 2009-Ohio-5949.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

WILLIAM MCKIM

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 09CAA030024

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 08CRI060312

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 4, 2009

APPEARANCES:

For Plaintiff-Appellee

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Farmer, P.J.

{¶1} On June 6, 2008, the Delaware County Grand Jury indicted appellant, William McKim, on three counts of gross sexual imposition in violation of R.C. 2907.05, and seven counts of rape in violation of R.C. 2907.02, one with an attendant force specification. The charges arose from incidents between appellant and two children under the age of thirteen.

{¶2} A jury trial commenced on September 30, 2008. During the trial, the trial court permitted the testimony of similar acts from two other children. The jury found appellant guilty as charged. By nunc pro tunc judgment entry of sentence filed February 5, 2009, the trial court sentenced appellant to an aggregate term of life in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶4} "THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE BEFORE THE JURY OF OTHER SIMILAR CRIMES."

I

{¶5} Appellant claims the trial court erred in permitting evidence of other similar crimes. We disagree.

{¶6} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶7} The discretion afforded a trial court in determining evidentiary issues on similar acts is tempered by Evid.R. 404(B) and R.C. 2945.59 which state the following, respectively:

{¶8} "[Evid.R. 404(B)] 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.

{¶9} "[R.C. 2945.59] In 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, 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."

{¶10} Appellant also argues the following pertinent provision of R.C. 2907.05(E) is applicable:

{¶11} "Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of 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, 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."

{¶12} The gravamen of appellant's argument is that proof of "motive, intent, mistake, knowledge, identity and opportunity are irrelevant" in strict liability criminal cases. We find this argument is immaterial given the evidence presented in this case.

{¶13} Appellant was charged with violating R.C. 2907.05(A)(4) and R.C. 2907.02(A)(4)(b) which state the following, respectively:

{¶14} "[R.C. 2907.05(A)(4)] No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶15} "The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶16} "[R.C. 2907.02(A)(1)(b)] No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

{¶17} "The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶18} The matter was originally addressed via a motion to exclude the testimony of two other individuals, C.C. and Z.C., relative to prior acts. The trial court permitted the testimony for "the limited purposes of showing motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake." See, Judgment Entry filed July 24, 2008.

{¶19} The complaining witnesses, D.B. and J.B., both testified as to their sexual conduct and contact with appellant. Both witnesses were without their father and considered appellant to be a "father figure." T. at 72, 100-101. Appellant was a "cool guy." T. at 75. For a time, appellant lived with the witnesses and their mother. T. at 78, 107-108. The incidents of sexual activity/abuse began during walks in the woods and during a game of "Truth or Dare" wherein the dare began as sexual activity and culminated into sexual conduct. T. at 75-78, 105-107. Some of the incidents occurred in water. T. at 109, 114-115. Both witnesses were told not to tell. T. at 80-81, 110, 119. One child was threatened not to tell, and the other child was bribed not to tell. T. at 80-81, 119-120.

{¶20} The similar acts testimony came from Z.C. and C.C. who, when being sexually abused by appellant, were the same ages as D.B. and J.B. Z.C. and C.C. were also from single parent dysfunctional homes. T. at 134-135, 152. Appellant was their "cool uncle" who took them fishing, camping, and on walks and drives. T. at 138-142, 156-157. C.C. saw appellant as a "father figure." T. at 157. Z.C. told of playing "Truth or Dare" that escalated into sexual conduct/contact. T. at 139-141. C.C. told of sexual conduct/contact occurring in water, but did not speak of the "Truth or Dare" game. T. at 162. Appellant told C.C. not to say anything and told him "he'd buy me something the next time he went to the store." T. at 160. In letters to C.C., appellant made pseudo admissions of sexual activity. T. at 177-178; Plaintiff's Exhibits 10A and 10B.

{¶21} The trial court had the advantage of a pretrial hearing on the matter prior to making the decision. We are unable to determine if the testimony given at trial is the

same as was presented during the pretrial hearing because a transcript of the pretrial hearing has not been provided for our review. In *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, the Supreme Court of Ohio held the following:

{¶22} "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d 162. This principle is recognized in App.R. 9(B), which provides, in part, that '***the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record.***.' When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." (Footnote omitted.)

{¶23} With that above caveat in mind, it is difficult to determine if the July 24, 2008 ruling was correct. We are left with defense counsel's objections during the testimony and the testimony itself. We note the trial court instructed the jury on the use of similar acts evidence. T. at 381. We find the instruction was sufficient. During closing argument, defense counsel argued the case being tried had nothing to do with the allegations made by Z.C. and C.C. Defense counsel stated, "[z]ero times zero is still zero." T. at 368.

{¶24} In this case, the pattern between the two sets of similar aged children is striking. Appellant situated himself in the lives of all four children as a "cool" friend/uncle. He befriended children being raised in single parent homes with the

advent of becoming a new stepparent. He used gifts, fishing trips, camping trips, and hikes in the woods as an entrée to the sexual activity. The contorted use of the game "Truth or Dare" to lure or initiate the children into sexual activity in and of itself is a pattern. We find the complained of testimony was admissible to prove the defendant's "scheme, plan, or system in doing an act."

{¶25} We find the trial court's decision was not contrary to law, and the instructions to the jury on similar acts were correct.

{¶26} Appellant also claims the prosecutor misstated the similar acts instruction in its closing argument. T. at 357. No objection was made to the prosecutor's statement. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91; Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *Long*. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

{¶27} We find the trial court specifically gave the correct instructions, and the prosecutor told the jury that the judge would instruct them on the law. T. at 357, 381. Admittedly, the prosecutor's statement was incorrect, but not to the level of plain error.

{¶28} The sole assignment of error is denied.

{¶29} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. concur and

Hoffman, J. dissents.

_s/ Sheila G. Farmer___________________

_s/ John W. Wise____________________

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JUDGES

SGF/sg 0928

Hoffman, J., dissenting

{¶30} I respectfully, albeit reluctantly, dissent from the majority opinion. I say reluctantly because it is never pleasant to suggest someone convicted of sexual abuse of a child may be entitled to another trial.[1] But, the Ohio Rules of Evidence do not provide for special exceptions in child sexual abuse cases.[2]

{¶31} As the majority convincingly demonstrates, there exists a common pattern in Appellant's acts regarding the two separate sets of victims. By so doing, the majority finds the admission of the others acts testimony permissible to prove the "…defendant's scheme, plan, or system in doing the act in question…" as provided in R.C. 2945.59.

{¶32} Of interest is the State's concession in citing the trial court's July 24, 2008 Judgment Entry "…the Trial Court determined that the testimony of the C. brothers fit within the purview of Rule 404(B) and the statute but that the facts surrounding the sexual assault of the younger child was not sufficiently similar to show a pattern."[3]

{¶33} Review of the trial court's July 24, 2008 Judgment Entry reveals the trial court determined the testimony was admissible for the limited purposes of showing motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake. The trial court did not find the testimony admissible for the purpose relied upon by the majority in reaching its conclusion. Nevertheless, this Court reviews judgments, not reasons, when determining whether to affirm, reverse or modify. Accordingly, I believe

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[1] I elect not to proceed to analyze whether the error I find to have been committed affected a substantial right or was merely harmless in this case.
[2] The Federal Rules of Evidence do provide for special exceptions in child molestation cases.
[3] Appellee's Brief at p.1.

the majority may appropriately rely on the defendant's scheme, plan, or system in doing the act in question when analyzing whether the subject testimony was properly admitted.

{¶34} That being said, I still disagree with the conclusion reached by the majority. I do agree with my colleagues sufficient similarities exist to find a scheme, plan or system, i.e., a *modus operandi* evincing a "behavioral fingerprint." However, I believe such behavioral fingerprint evidence is limited to the purpose of establishing the perpetrator's identity. For example, see *State v. Jamison* (1990), 49 Ohio St.3d 182, 183; *State v. Smith* (1990), 49 Ohio St.3d 137, 141; and *State v. Coleman* (1988), 37 Ohio St.3d 286. As noted by the majority in *Jamison*, R.C. 2945.49 does not mention identity, but identity might be included in the same plan, system or method. *Jamison,* supra at 185, referencing *State v. Hector* (1969) 19 Ohio St.2d 167. In a similar vein, Evid.R. 404(B) does not mention scheme or system in doing an act, but does mention plan. The question then becomes should "plan" in Evid.R. 404(B) be used synonymously with "scheme, plan or system in doing an act" as found in the statute. I think not.

{¶35} It must be remembered "because R.C. 2945.59 and Evid.R. 404(B) codify an exception to the common law with respect to other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the

syllabus.[4] As cautioned by the Ohio Supreme Court in *State v. Lowe* (1994), 69 Ohio St.3d 527, "…we therefore 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." Id. at 530. Evidence to prove the "type" of person the defendant is evidence offered to show he acted in conformity therewith; therefore, barred by Evid.R. 404(B).

{¶36} I believe use of the other acts to demonstrate "preparation or plan" under Evid.R. 404(B) ought to be limited to admission of those other acts done in preparation or execution of the plan to commit the particular charge(s) being tried. It should not extend to other acts committed in a similar way for an unrelated offense when identity is not at issue. For example, evidence a defendant stole a car used later during commission of an aggravated robbery would be admissible under Evid.R. 404(B) to show preparation or plan.

{¶37} I agree with the majority in strict liability cases, motive and intent are irrelevant. In the case sub judice, I find knowledge, absence of mistake or accident, opportunity and identity, likewise, were not at issue. Having concluded

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[4] The Ohio Supreme Court found Evid.R. 404(B) controls over R.C. 2945.49 since it was adopted subsequent to the statute in *State v. Jamison*, supra, at 185.

{¶38} the other acts evidence of the C. brothers inadmissible to establish the defendant's preparation or plan for commission of the crime(s) being tried, I conclude the trial court erred in admitting their testimony.

__s/ William B. Hoffman________________
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
WILLIAM MCKIM	:	
Defendant-Appellant	:	CASE NO. 09CAA030024

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. Costs to appellant.

_s/ Sheila G. Farmer___________________

_s/ John W. Wise____________________

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JUDGES