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Defendant's Motion in Limine to Exclude Testimony Regarding Other Murders or Deaths

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY OHIO

2000 JAN 27 10 4: 25

ALAN DAVIS, Special Administrator of the Estate of Samuel H. Sheppard, ~~CLERK OF COURTS~~ CASE NO. 312322

~~CUYAHOGA COUNTY~~ JUDGE RONALD SUSTER

Plaintiff,

vs.

STATE OF OHIO,

Defendant.

DEFENDANT'S MOTION
IN LIMINE TO EXCLUDE
TESTIMONY REGARDING
OTHER MURDERS OR DEATHS

Now comes Defendant who respectfully moves this Court to exclude any reference or argument by counsel, any questioning by counsel, and any testimony by any witness suggesting that Richard Eberling killed persons other than Marilyn Sheppard.


Specifically, it is expected that plaintiff may attempt to introduce evidence of the deaths of five other persons, Ethel Durkin, Myrtle Fray, Ruth McNeil, Barbara Kinzel and Sarah Belle Farrow. It is believed that plaintiff will attempt to establish that Richard Eberling killed these other women and that he therefore, in conformity with a supposed murderous character, is guilty of the prior murder of Marilyn Sheppard.

Also, all argument, questioning, and testimony, by opinion or otherwise, that Richard Eberling is allegedly a "serial killer" should also be excluded.

The evidence described above is inadmissible pursuant to Evid.R. 404, as more fully explained in the attached brief in support

Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney
of Cuyahoga County, Ohio


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BRIEF IN SUPPORT

Marilyn Sheppard, a 31 year old married woman, was murdered during the early morning hours of July 4, 1954 in her bed. She was bludgeoned to death, suffering in excess of twenty-seven heavy forceful blows to her head and face.

On January 3, 1984, Ethel Durkin, age 90, died after lingering for several weeks in the hospital. She had been found at the bottom of stairs in her home. Her murder was made to look like an accident. In 1989, Richard Eberling was convicted of her murder.¹

On May 20, 1962, Myrtle Fray, age 63, was murdered, having been beaten, strangled and suffocated.

In October, 1981, Ruth McNeal, age 78, was murdered..

In July, 1956, Barbara Kinzel, age 23, was killed in an automobile accident in Michigan.

On March 10, 1970, Sarah Belle Farrow, age 79, was found dead at the bottom of stairs. Her death was ruled accidental.

Plaintiff should be prohibited from introducing into the trial of this case any matter involving the deaths of Durkin, Fray, McNeal, Kinzel and Farrow, and from inferring or eliciting testimony that Richard Eberling is a "serial killer."

Evid.R. 404 provides in pertinent part as follows:

(A) Character Evidence Generally. Evidence of the person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. . . .

* * *

(B) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person

¹ The fact that Eberling was convicted of murdering Ethel Durkin 1989 is not admissible under Evid.R. 609(A) because he did not provide testimony as witness subsequent to that conviction.

in order to show that he acted 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.

The basic thrust of Evid.R. 404 concerns the “propensity rule”, which provides that evidence of a person’s character trait or specific examples of that person’s other acts is not admissible for the purpose of proving that he acted in conformity with his character or other acts on a particular occasion.

In the instant case, it is expected that plaintiffs will attempt to establish that Richard Eberling committed several post-Sheppard murders and that, in conformity with his supposed murderous propensities, he also killed Marilyn Sheppard. The plaintiff’s plan is prohibited by Evid.R. 404.

None of the permissible uses of “other act” evidence applies to the instant case. For example, as a matter of simple logic, any alleged behavior of Richard Eberling years after the murder of Marilyn Sheppard says nothing about his motives in 1954. No one takes the position that the death of Marilyn Sheppard was by mistake or accident. It is anticipated that plaintiff may attempt to argue that the purpose of allowing evidence of the other deaths is to establish identity. However, there is not sufficient similarity between the Sheppard murder and the other deaths to permit admission of evidence of the other deaths.

Evidence of “other acts” to prove the identity of the perpetrator is admissible where crimes occur under almost identical circumstances. State v. Smith (1990), 49 Ohio St. 3d 137, syllabus. There, the Court held that it was permissible in a murder trial to admit evidence regarding a subsequent death which occurred two months after the crime involved in the trial

because the circumstances in both deaths were “remarkably similar”. Indeed, the similarities are striking. As described by the Court.

1. Both decedents died in the accused’s trailer.
2. Both victims were friends of the defendant.
3. Both victims were overnight guests of the defendant at his trailer.
4. Both victims were frequent drug users.
5. Defendant waited one or more hours in both instances before calling the police.
6. Defendant cleaned the trailer both times to remove any incriminating evidence.
7. In both instances, defendant met the officers at his trailer and told them that the victim had apparently died of an overdose of illegal drugs.
8. Both victims died of acute morphine intoxication, having .07 milligrams percent of morphine in their blood.

Id. at 141.

Other act evidence is admissible when it reveals a “behavioral fingerprint” linking the accused to a crime. State v. Bey (1999), 85 Ohio St. 3d 487.

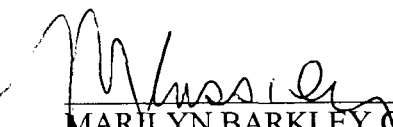
In contrast, where conduct is not sufficiently distinctive to demonstrate the identity of the perpetrator, other acts must be excluded. State v. Hall (Cuy. App. 1989), 57 Ohio App. 3d 144. There, the Court determined that the lower court erred by admitting in a rape trial evidence of two earlier rapes committed by the defendant. The prior two rapes were similar to each other in that they occurred on successive days, at approximately the same time and while the victims were leaving a rapid transit station. Despite the similarity between the first two crimes, there was insufficient commonality between them and the crime at issue. The crime at issue occurred

in a different part of the city almost two years after the first two. Importantly, although there were some characteristics common to all three offenses, (they were all rapes involving oral intercourse, robbery was also involved, a gun was used, and the offender was conversational with the victim), the similarities were insufficient because they are common in rape cases generally. The common characteristics between the three crimes were not “sufficiently distinctive” behavior to demonstrate the identity of the perpetrator.

In the instant case, the circumstances surrounding the deaths of the other women did not involve a “behavioral fingerprint”. The circumstances surrounding the death of Marilyn Sheppard are not “remarkably similar” to the deaths of the other women. Decades separate the deaths. In two instances, it is not even determined that a homicide occurred. Four out of five of the other deaths involved elderly women. Indeed, gender is the only common factor in the deaths.

Plaintiff’s attempt to divert attention from its proper focus, whether Sam Sheppard is innocent of the murder of Marilyn Sheppard, through the introduction of evidence regarding deaths occurring in completely dissimilar manners with the conjecture that Richard Eberling is a serial killer, must be rejected.


Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion in Limine to Exclude Testimony Regarding Other Murders or Deaths has been sent, by ordinary United States mail, postage prepaid, and facsimile transmission, this 27 day of January, 2000, to: Terry H. Gilbert, 1700 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113.


MARILYN BARKLEY CASSIDY
Assistant Prosecuting Attorney