



4-6-2000

Memorandum Opinion Regarding Further Admission of Evidence of the Durkin Homicide

Judge Ronald Suster
Cuyahoga County Court of Common Pleas

How does access to this work benefit you? Let us know!

Follow this and additional works at: https://engagedscholarship.csuohio.edu/sheppard_court_filings_2000

Recommended Citation

Suster, Judge Ronald, "Memorandum Opinion Regarding Further Admission of Evidence of the Durkin Homicide" (2000).
1995-2002 Court Filings. 133.
https://engagedscholarship.csuohio.edu/sheppard_court_filings_2000/133

This Davis v. State of Ohio, Cuyahoga County Common Pleas Case No. CV96-312322 is brought to you for free and open access by the 2000 Trial at EngagedScholarship@CSU. It has been accepted for inclusion in 1995-2002 Court Filings by an authorized administrator of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS

CASE NO. 312322

ALAN DAVIS, et al.,)
)
) Plaintiff)
)
) vs.)
)
STATE OF OHIO)
)
) Defendant)

MEMORANDUM OPINION
REGARDING FURTHER ADMISSION
OF EVIDENCE OF THE
DURKIN HOMICIDE

Ronald Suster, J.

Plaintiff seeks to admit evidence of the Durkin homicide beyond what has already been offered for two purposes: primarily, Plaintiff contends that there are sufficient similarities between the Durkin and Sheppard homicides to cause the Durkin homicide to be admissible as proof of Richard Eberling’s identity as the killer of Mrs. Sheppard. For the reasons set forth below, the State of Ohio’s motion *in limine* to limit further evidence of the Durkin homicide is **GRANTED**.

**Evidence of the Durkin Homicide as Proof of Eberling’s
“Identity” as the Sheppard Killer¹**

After consideration of Plaintiff’s detailed proffer, the Court is not persuaded that the Durkin homicide is admissible as proof of “identity” (commonly known as “*modus operandi*”) under R. Evid. 404(B). The similarities between the two homicides are not sufficiently distinctive to cause me to admit this evidence under rule 404(b). *State v. Bey*, 85 Oh. St. 3d 487; *State v. Lowe*, 69 Oh. St. 3d 527. In the end, the Durkin homicide, while it may show that Eberling is *the type of person*

¹ The Court previously announced this aspect of its opinion from the bench.

who would kill Ms. Sheppard, does not show that Eberling *is* the person who killed Ms. Sheppard. This is the distinction which the *Lowe* case makes between that which is and which is not admissible under rule 404(b).

Evidence of Eberling’s Statements to Ms. Scheidler Concerning the Durkin Homicide²

This leads to the closer question of Plaintiff’s alternative argument, that evidence of Eberling’s conversation with Ms. Scheidler, in which he admitted killing Ms. Durkin, should be admitted as an “other act” of Eberling to show that, when drinking and making admissions concerning the commission of a homicide (or any other serious crime for that matter), Eberling has been truthful in the past. Plaintiff contends that this is probative of whether Eberling was truthful when he confessed to Dyal under similar circumstances. Plaintiff contends that this is a non-character use of evidence of Eberling’s other acts. Plaintiff contends that this evidence shows the absence of fabrication on the part of Eberling which plaintiff contends would be a non-character use akin to “the absence of mistake” or “identity” explicitly recognized under rule 404(b).

The starting point for analyzing Plaintiff’s argument is Evid. R. 806, which provides that a hearsay declarant’s credibility may be supported or attacked as if the declarant were testifying from the witness stand in the case *sub judice*. Thus, the issue becomes whether, if Eberling had appeared in court and testified that he killed Marilyn Sheppard, his statement to Scheidler could be admitted for the limited purpose of supporting his credibility. Evid. R. 404(A)(3) states that a witness’ character for credibility should be evaluated pursuant to Rules 607, 608 and 609. Here, because the issue is one of specific instances of conduct affecting credibility, Rule 608 is operative.

² The Court previously advised all counsel informally of this ruling; the within Memorandum Opinion places this ruling on the record.

A witness' credibility may not be supported unless and until it has been attacked. Evid. R. 608(A).³ Under Evid. R. 608(B), prior instances of truthfulness offered to support a witness' truthful character must be "*clearly probative of truthfulness.*" The circumstances of Eberling's confession to Scheidler are not clearly probative of a truthful character. Scheidler was an accomplice in the fraudulent scheme. As an accomplice, Eberling had reason to believe that Scheidler would not disclose his statements to anyone. Accordingly, the fact that he would speak freely and truthfully to an accomplice does not mean he is necessarily of truthful character. Second, Ms. Scheidler's status as an accomplice aside, the circumstances of having truthfully confessed to murder on one occasion when speaking with a young woman over drinks, as is the case with Eberling's comments to Scheidler, does not clearly tend to show that he is a person of truthful character.

Because this is an issue of specific instances of conduct affecting a witness' credibility, the Court looks to rule 608(B) and not to Rule 404(B). In essence, Plaintiff's argument, while couched in terms of Rule 404(B)'s "absence of mistake" or "identity" necessarily boils down to a question of whether Eberling's honest confession about the Durkin homicide is probative of his honesty when confessing to the Sheppard homicide. Accordingly, Rule 608(B) is the controlling rule of evidence.

³ The Court notes that the State of Ohio, which would be most likely to attack Eberling's credibility, has done so to a very limited extent. There were some questions put to the witness Dyal about Eberling's prior thefts. Neither party has requested that the jury be allowed to consider the Eberling murder conviction in weighing his credibility as a hearsay declarant -- the State of Ohio has only sought to have the murder conviction considered for the much narrower purpose of explaining Dyal's timing in reporting Eberling's statements to the police. The State's main attack has been on the witness Dyal's credibility as the person who has related Eberling's hearsay statement to the jury -- the State has not chosen to focus its attack on Eberling, the purported hearsay declarant.

Because there has been some attack on Eberling's credibility, the Court will address whether Plaintiff's proffered evidence is an appropriate attempt to support Eberling's credibility.

Even if the Court were to evaluate this matter under a Rule 404(B) analysis, there is nothing so distinctive about these conversations to tend to say that, as a matter of identity, proof of one truthful statement shows proof that the other is truthful. Similarly, the Court is not persuaded that proof of one truthful statement shows the absence of fabrication on the other occasion, or to say that proof of one truthful statement establishes a pattern of truthfulness. The fact that Eberling has truthfully admitted to killing Ms. Durkin in a discussion over drinks with his younger female accomplice Ms. Scheidler does not mean that he was truthful when he told his younger female friend Ms. Dyal that he killed Ms. Sheppard. Moreover, the lapse in time between the time of the murder and the time of the confession is dissimilar between the confession to Scheidler, which was to a relatively recent murder, and the alleged confession to Dyal, which was to a murder long since committed.

For the foregoing reasons, the motion *in limine* is GRANTED.



RONALD SUSTER, JUDGE

DATE: 4.06.00