



CSU  
College of Law Library

Cleveland State University  
**EngagedScholarship@CSU**

---

1995-2002 Court Filings

2000 Trial

---

2-25-2000

## Defendant State of Ohio's Memorandum Regarding Voir Dire of Emanuel Tanay

Kathleen A. Martin  
*Cuyahoga County Assistant Prosecutor*

William D. Mason  
*Cuyahoga County Prosecutor*

Follow this and additional works at: [https://engagedscholarship.csuohio.edu/sheppard\\_court\\_filings\\_2000](https://engagedscholarship.csuohio.edu/sheppard_court_filings_2000)

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

---

### Recommended Citation

Martin, Kathleen A. and Mason, William D., "Defendant State of Ohio's Memorandum Regarding Voir Dire of Emanuel Tanay" (2000). *1995-2002 Court Filings*. 147.  
[https://engagedscholarship.csuohio.edu/sheppard\\_court\\_filings\\_2000/147](https://engagedscholarship.csuohio.edu/sheppard_court_filings_2000/147)

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](mailto:library.es@csuohio.edu).

FILED

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

2000 FEB 25 P 1:39

CLERK OF  
COURT OF COURTS  
CUYAHOGA COUNTY

CHARLES MURRAY, Administrator  
of the Estate of Samuel H. Sheppard,

Plaintiff,

v.

STATE OF OHIO

Defendant.

) CASE NO. 312322

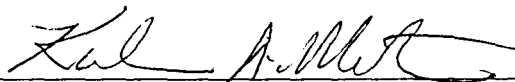
) JUDGE RONALD SUSTER

) DEFENDANT STATE OF OHIO'S  
) MEMORANDUM REGARDING  
) VOIR DIRE OF EMANUEL  
) TANAY

Defendant State of Ohio submits the attached memorandum of law for the Court's consideration while conducting the voir dire examination of Emanuel Tanay, who is being called by plaintiff to provide expert testimony in this case.

Respectfully submitted,

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



KATHLEEN A. MARTIN (0040017)  
Litigation Manager, Civil Division  
The Justice Center, Courts Tower  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7785  
ATTORNEYS FOR DEFENDANT

## MEMORANDUM OF LAW

### INTRODUCTION

The Rules of Evidence regarding the admission of expert testimony place upon the trial court a special obligation as “gatekeeper” to ensure that expert testimony is both relevant and reliable. See Kumho Tire Co., LTD v. Charmichael (1999), 119 S. Ct. 1167, 1174; Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), 113 S. Ct. 2786; Evid. R. 702. Additionally, the witness must be qualified as an expert regarding this subject matter of the testimony, First Nat’l Bank of Southwestern Ohio v. Miami University (1997), 121 Ohio App.3d 170. Moreover, expert testimony must be “helpful” to the jury in that it relates to a matter beyond the knowledge or experience possessed by lay persons.

Hearsay may not be the basis of an expert’s opinion. Am. States Ins. Co. v. Caputo (Ohio App. 8 Dist. 1998), 126 Ohio App.3d 401, 414. There, the appeals court reversed the admission of an experts’ opinion regarding the progress and burn pattern of a fire because the opinion was based upon hearsay statements found in the State Fire Marshall’s reports. Also, expert testimony is not admissible when it contains the propensity inference prohibited by Evid. R. 404. State v. Smith (Ohio App. 2 Dist. 1992), 84 Ohio App.3d 647.

### TANAY’S PRINCIPLE OPINION

Although Dr. Tanay has several additional opinions, it is fair to say that his principle opinion is stated in the conclusion paragraph of his opinion report, p4. There, he opines, “... it is my firm opinion that the available information supports the view that Marilyn Reese Sheppard was murdered in her bed in July 1954 by Richard Eberling and not by her husband Sam Sheppard.”

The logic supporting Tanay's opinion that Samuel H. Sheppard is innocent and that Richard Eberling is as follows.

In Tanay's view, the crime scene and wounds of Marilyn Sheppard suggests that the crime was committed by a "sadistic compulsive murderer." Next, according to Tanay, Richard Eberling's "antisocial behavior" and his "personality" conform to that crime. On the other hand, according to Tanay, Samuel H. Sheppard's "personality" and his history as a "law abiding conscientious altruistic individual" do not conform to the crime.

The first problem is whether this opinion is based upon facts and data received by Tanay or otherwise admitted in evidence in this case, as required by Evid. R. 703, or whether they are impermissibly based on hearsay. It is the understanding of the State of Ohio that Tanay's knowledge base includes such hearsay items as the "Mockery of Justice" book, the AMSEC report, etc. It is respectfully urged that the voir dire of Tanay should include a careful examination of whether his opinions are based on competent evidence.

Apparently anticipating, correctly, that the State of Ohio will object to Tanay's evidence as violating Evid. R. 404, plaintiff has submitted three cases for the Court's consideration, State v. Tomlin (1992), 63 Ohio St.3d 724; State v. Nemeth (1998), 82 Ohio St.2d 202; State v. Stowers (1998), 81 Ohio St.3d 260. None of those cases even remotely support the proposition that Tanay should be permitted to offer testimony that the character of Samuel H. Sheppard was inconsistent with a purported "sadistic compulsive murderer" and that the character of Richard Eberling was consistent with a "sadistic compulsive murderer".

In the Tomlin, supra., the defendant was charged with having a weapon under disability in violation of R.C. 2923.13(A)(4). A "chronic alcoholic" is a person under

disability for purposes of that statute. Evidence was introduced at trial regarding the defendant's prior abuse of alcohol and related criminal offenses while intoxicated and the testimony of a clinical psychologist was admitted to define "chronic alcoholic" and to opine that a person with defendant's history of prior alcohol-related incidents is a "chronic alcoholic." Establishing that a person is a "chronic alcoholic" was an element of the crime charged. State v. Tomlin stands for the established principle that character evidence is admissible when it is an element of a crime or cause of action. When character is "in issue", "other acts" testimony and related opinion testimony it is not used as a basis for the impermissible "propensity" inference, it is a terminal point of required proof.

In State v. Nemeth, supra., the court held that it was error to preclude introduction of expert testimony, on behalf of a sixteen year old defendant charged with the murder of his mother, regarding the psychological effects of long-term child abuse, including the effect on a child's perception of danger. The court determined that the testimony was allowable in support of a self-defense theory or to justify an instruction on a lesser included defense to murder. The purpose of the proffered testimony was to support a terminal point of proof in which defendant bore the burden, i.e. self defense. Also, as the accused in a criminal case, Evid. R. 404(A)(1) provides a special exception to the general exclusion of character testimony and permits the accused to offer evidence of a pertinent trait of his character.

Nor does State v. Stowers, supra., support the proposition that Dr. Tanay should be permitted to testify that the character of Richard Eberling conforms with a sadistic compulsive murder and that the character of Samuel H. Sheppard does not. In Stowers, a defendant was convicted of four counts of rape. All the victims were his children and all four testified at trial. Three of the children changed their stories between their initial questioning

and the time of trial. The court determined that it was permissible to allow a clinic psychologist to testify that the behavior of the children that had changed their stories was consistent with the behavior of other children who had been sexually abused. The testimony was permitted to help assist the fact finder in assessing the children's veracity to "counter balance the trier of fact's natural tendency to assess recantation and delayed disclosures as going against the believability and the truthfulness of the witness." *Id.* at 263. Permitting a psychologist to explain that the children victim's behavior in recantation or delayed disclosure of their victimization is common in cases of sexual abused children, is a far cry from allowing Tanay to suggest to the jury that they should conclude the Richard Eberling killed Marilyn Sheppard because of his antisocial character or that they should infer that Samuel H. Sheppard is innocent because of his altruistic character.

Tanay's opinion and the series of impermissible inferences on which it is based is similar to the testimony determined to be reversible error in *State v. Smith*, (Ohio App. 2 Dist. 1992), 84 Ohio App.3d 647. There, the trial court impermissibly admitted expert testimony concerning behavior typical of pedophiles who engage in sexual activity with children. The admissibility of the evidence was deemed reversible error because it was offered to suggest that the defendant possessed the character traits as a typical pedophile and that he acted in conformity to that trait.

The prosecution strategy in *Smith*, which the court rejected, was built as follows. First, it introduced evidence of the defendant's prior behavior and association with the victims. If the matter had ended there, the prosecution's case would have been acceptable since the defendant's prior behavior with the alleged victims tended to establish defendant's scheme or plan. However, the prosecution then submitted expert testimony regarding

pedophiles in general and the behavior they typically exhibit which leads to their eventual sexual abuse of children. In explaining that the expert's testimony violated Evid. R. 404, the court stated:

Though the content of Dr. Bergman's testimony was general in nature, it was, when connected with evidence of the defendant's other acts with the children, offered by the state circumstantially to infer that the defendant is a pedophile, that is, one who is sexually orientated to and attracted toward children. This aspect of his personality was then offered as a propensity from which the jury was asked to infer that he acted in accordance with his propensity to commit the crimes alleged.

\*\*\*

We find that the expert testimony of Dr. Bergman constituted evidence tending to show a trait of the defendant's character offered for the purpose of proving that he acted in conformity with that trait on the occasion of the crime alleged. The fact that the evidence were circumstantial in nature and provided a set of typical behaviors or "profile" to which the defendant's behavior was then matched does not avoid the objectionable feature, which is determined by the purpose for which it is offered. When that purpose is the inference prohibited by Evid. R. 404, the evidence is inadmissible.

Id. at 662-663.

In the instant case, plaintiff's strategy seems identical to that rejected in State v.

Smith.

Plaintiff's would like to display the life history and personality of Richard Eberling as consisting of various "other acts" of antisocial behavior and then advance that he has the propensity of a "sadistic compulsive murder" who acted in conformity therewith murdering Marilyn Sheppard. Then, plaintiff wants to advance the life history of Samuel H. Sheppard as constituting "other acts" of consciousness, abiding by the law and possessing an altruistic character which is not in conformity with a sadistic compulsive murder.

The inappropriateness of Tanay's strategy and its violence to the Rules of Evidence it is further demonstrated in State v. Rogers (Ohio App. 8<sup>th</sup> Dist. 1991), Case No. 58557, unreported, and State v. Clemons (Ohio App. 12 Dist. 1994), 94 Ohio App.3d 701.

In State v. Rogers supra. defendant was indicted with a single count of theft involving computers. The court determined that permitting the prosecution to display throughout the trial legal weapons which were found in the defendant's home and to suggest that the defendant was "suicidal" violated Evid. R. 404. In citing United States v. Phillips (1979), 599 of 2<sup>nd</sup> 134, the court explained:

Two concerns are expressed by the first sentence of Rule 404(b): (1) that the jury may convict a "bad man" who deserves to be punished ... not because he is guilty of the crime charged but because of his prior or subsequent misdeed; and (2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged. Id. @ 4.

State v. Clemons, supra., is also instructive. There the court reversed a conviction for gross sexual imposition based upon the admission of evidence of the defendant's "problem" with masturbation, watching pornographic movies and the like because there was no valid Rule 404(B) purpose for the testimony. Rather, the appeals court determined that the testimony was inflammatory and elicited for the improper purpose of showing that the defendant had a tendency to engage in the types of crimes for which he was charged.

It is respectfully requested that the voir dire examination of Tanay includes a careful probe to determine whether his opinion, in the end, amounts to nothing more than the impermissible inference that Richard Eberling killed Marilyn Sheppard in conformity with his other "bad" character traits.

#### TANAY'S OTHER OPINIONS

Based upon Tanay's June 30, 1999 opinion report, it is requested that the voir dire of Tanay be conducted to insure that Tanay will not be offering opinions outside of the realm of his expertise or on topics irrelevant to this case. Examples include:




1. Samuel H. Sheppard's conviction was the result of pseudo evidence;
2. Eberling was able to kill Ethel Durkin because of the inadequacy of the investigation of Marilyn Sheppard;
3. Recognition of a sadistic compulsive type homicide requires the assistance of experts
4. The killing of Marilyn Sheppard included sexual abuse;
5. Any criticism of the work of the pathologist in 1954;
6. The injuries Samuel H. Sheppard were not self inflicted;
7. Self infliction of injury is not consistent with Samuel H. Sheppard's personality;
8. The State of Ohio takes the position in this case that the murder was a "carefully plan homicide";
9. That there is physical evidence contradicting a quarrel as a precipitant for a sudden rage response.
10. That there is no evidence in supportive of the conclusion that Samuel H. Sheppard killed his wife other than the fact that he was in the house at the time of the murder.
11. That the 1954 conviction of Samuel H. Sheppard was due to unfounded publicity.

The opinions above are largely irrelevant to whether Plaintiff's are able to prove in this Court to this jury that Samuel H. Sheppard is innocent of the murder of his wife and certainly beyond whatever expertise Tanay has as a forensic psychologist.

Respectfully submitted,

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



---

KATHLEEN A. MARTIN (0040017)  
Litigation Manager, Civil Division  
The Justice Center, Courts Tower  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7785  
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

A copy of the foregoing Motion of Defendant, State of Ohio, for Limiting Instruction was hand delivered to Terry H. Gilbert, 1370 Ontario Street, Cleveland, Ohio 44113, this 25<sup>th</sup> day of February, 2000.

A handwritten signature in black ink, appearing to read 'Kathleen A. Martin', written over a horizontal line.

KATHLEEN A. MARTIN (0040017)  
Litigation Manager, Civil Division



LAW AND ARGUMENT

The Ohio Supreme Court stated in 1998, “Evidence. R. 404, by its terms, applies to all character evidence, not simply to persons accused of crimes...”, *State v. Mason*, (1998) 82 Ohio St.3d 144, at 160, Emphasis Added. The issue the court evaluated was the exclusion by the trial court of evidence of other acts of the victim’s husband, whom the defendant (Mason) alleged had committed the murder. In finding that such evidence is properly excluded under Evid. R. 404, the court stated:

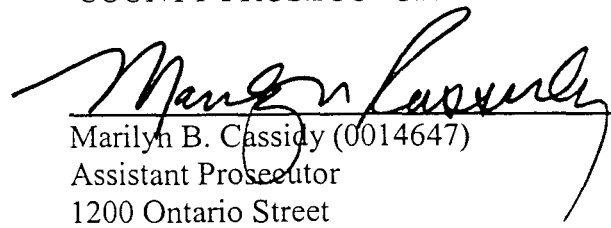
“Exclusion from a murder trial of evidence of prior specific violent acts by the victim’s husband, who defendant claimed was the killer, did not violate defendant’s constitutional rights, where the evidence was inadmissible under the rule generally prohibiting character evidence”, *State v. Mason, supra*, syllabus.

Also it is clear that Evid. R. 404 fully applies to civil action. *Tschantz v. Ferguson* (Eighth District 1994) , 97 Ohio App.3d 693.

Under the foregoing authority it is abundantly clear that Evid.R. 404 ‘s prohibition against the use of character evidence in order to prove that a person acted in conformity therewith applies to all character evidence. Accordingly, defendant respectfully renews its motion for a limiting instruction to the jury regarding the conviction of Richard Eberling for the murder of Ethel Durkin.

Respectfully submitted,

WILLIAM D. MASON, CUYAHOGA  
COUNTY PROSECUTOR

  
Marilyn B. Cassidy (0014647)  
Assistant Prosecutor  
1200 Ontario Street  
Cleveland, Ohio 44113

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Law Re: Applicability of Evid. R. 404 to Nonparties was served personally upon Terry Gilbert, counsel for plaintiff, in Court Room 20 B, Courts Tower, 1200 Ontario Street, Cleveland, Ohio 44113.

Respectfully Submitted,

  
Marilyn Cassidy  
Assistant Prosecutor