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Memorandum Opinion Regarding Admissibility of Character Evidence, Other Acts of Richard Eberling, Other Acts of Samuel H. Sheppard, Statements of Samuel H. Sheppard, and Admissibility of Portions of Transcript From Prior Proceedings

Judge Ronald Suster
Cuyahoga County Court of Common Pleas

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3-5-00

STATE OF OHIO)
) SS.
CUYAHOGA COUNTY)

IN THE COURT COMMON PLEAS

CASE NO. 312322

CHARLES MURRAY, Administrator)
 of the Estate of)
 SAMUEL H. SHEPPARD,)
)
 Plaintiff,)
)
)
)
)
)
STATE OF OHIO,)
)
)
 Defendant.)
)

**MEMORANDUM OPINION
REGARDING ADMISSIBILITY OF
CHARACTER EVIDENCE, OTHER
ACTS OF RICHARD EBERLING,
OTHER ACTS OF SAMUEL H.
SHEPPARD, STATEMENTS OF
SAMUEL H. SHEPPARD, AND
ADMISSIBILITY OF PORTIONS
OF TRANSCRIPT FROM
PRIOR PROCEEDINGS**

Both parties have filed motions and memoranda regarding several issues which, because of their interrelatedness, will be addressed in this single Memorandum Opinion. This opinion should be considered in the context of the Court's prior rulings, both written and from the bench, on various evidentiary issues which have arisen thus far.¹

¹ This Opinion addresses the following motions and memoranda: Plaintiff's Memorandum Regarding Inadmissibility of Improper Hearsay and Character Evidence, Plaintiff's Memorandum in Support of Presenting Redacted Testimony From Previous Trials, Plaintiff's Memorandum in Response to State's Motion for Limiting Instruction, Plaintiff's Motion *in Limine* Regarding Inadmissibility of Prior Acts Evidence, Defendant's Memorandum Regarding Admissibility of Statements of Samuel H. Sheppard. Defendant's Supplemental Memorandum Regarding Admissibility of Statements of Samuel H. (sic) and Memorandum Regarding Admissibility of Character Evidence of Samuel H. Sheppard, Motion of Defendant State of Ohio for Limiting Instruction, State of Ohio's Memorandum of Law Re: Applicability of Evid. R. 404 to Non-Parties and Renewed Motion for Limiting Instruction Regarding Eberling Conviction of Murder of Ethel Durkin. In addition, Plaintiff's Motion to Exclude Testimony from 1954 Coroner's Inquest and Defendant's Brief in Opposition thereto, as well as Defendant's Motion in Limine to Exclude Testimony Regarding Other Murders or Deaths, are also revisited.

Admissibility of Partial Transcripts

Plaintiff and Defendant, pursuant to Ohio Evid. R. 804(B)(1), can attempt to introduce transcripts of the testimony of now-unavailable witnesses who testified in the 1954 and 1966 trials of State v. Sheppard. Admission of this testimony is subject to all other evidentiary considerations, such as relevance and inner hearsay. In addition, the Court previously ruled that, with respect to the 1954 trial testimony, it will consider Plaintiff's motion to exclude testimony for constitutional reasons on a witness-by-witness or question-by-question basis. *See*, Memorandum Opinion Regarding Admission of Testimony from 1954 Trial.

With respect to this previous trial testimony, as well as with deposition testimony of unavailable witnesses, the non-offering party has the right to contemporaneously introduce statements from the same transcript or from other written or recorded statements which ought in fairness be considered contemporaneously therewith. *See*, Ohio Evid. R. 106. Thus, the offering party initially holds the keys to the admission of the prior testimony. The offering party is under no requirement to introduce the entire transcript, subject to Rule 106's "rule of completeness."

For this reason, the Court has already advised the parties that it will permit Plaintiff, should it so desire, to offer selected portions of the 1966 transcript of Detective Robert Schottke, which Plaintiff has advised will not include Schottke's testimony about statements of Samuel H. Sheppard which were made to Schottke. The State of Ohio seeks to introduce the entire transcript, arguing that the excluded portions should be admitted contemporaneously. The Court disagrees; those portions which the Court has already advised the parties will be excluded are not found to be necessary to fairly consider the portions which Plaintiff desires to introduce. Whether Defendant wishes to introduce the excluded portions of the transcript during its own case in chief is a different

question which the Court will address during the Defendant's case in chief and subject to the Court's rulings regarding hearsay, character evidence and "other acts" evidence discussed *infra*.

Hearsay Questions Regarding Samuel H. Sheppard's Statements to Authorities

As the Court has already noted, Ohio does not recognize "privity admissions" as either non-hearsay or as an exception to the general prohibition on hearsay. The Court rejects the State's argument that statements made by Samuel H. Sheppard have been adopted as admissions by his Estate by virtue of the filing of this lawsuit or by virtue of any activity of the Estate of Samuel Reese Sheppard in the investigation or prosecution of this lawsuit, including the publishing of "Mockery of Justice." First, with respect to Samuel Reese Sheppard, he is not the successor in interest to Samuel H. Sheppard – the Estate of Samuel H. Sheppard is the successor.

Second, the State's argument regarding the Estate's having adopted Samuel H. Sheppard's statements by virtue of its having brought this lawsuit is not well taken. The State's argument would effectively write "privity admissions" into the law, in contravention of the authority on which the Court has previously relied in holding that there are no "privity admissions." Moreover, with respect to its previous holding that Ohio does not recognize "privity admissions," the Court notes that its interpretation is consistent with canons of statutory construction. In drafting the Rules of Evidence, the Legislature defined admissions to include statements of a party but not statements of a "predecessors in interest" of a party. Yet, elsewhere in the hearsay rules, the Legislature included the term "predecessor in interest" of a party when discussing the admissibility of former testimony which had been subject to cross examination by a party or a "predecessor in interest." Evid. R. 804(B)(1). Thus, the Legislature has demonstrated that it knows how to differentiate between a party and its "predecessor in interest." Accordingly, the Court concludes that the Legislature intended not

to include statements by predecessors in interest (such as Samuel H. Sheppard) as admissions against a party.

However, the Court's review of various statements which it anticipates will be offered by the State, including much of the statements about which Detective Schottke testified in 1966, do not appear to be offered for their truth. When analyzing out of court statements for potential hearsay, it is axiomatic that a court must first ask itself, "why is the statement being offered." If the statement is not offered for the "truth of the matter asserted," it is not hearsay and Article VIII of the Rules of Evidence, the hearsay rules, have no applicability. To be offered for the "truth of the matter asserted" means that the statement is offered to prove what it says is true.

If, for example, Samuel H. Sheppard described his assailant on one occasion in one manner and on another occasion in a different manner, it is highly likely that the State will want to introduce both statements to show that they were inconsistent. This is not a hearsay use -- the State is not trying to prove that either version is true (if the State were trying to prove that either of these two exculpatory statements were true, then it would be admitting that Plaintiff should win). Rather, the State is trying to prove that both are untrue and that the contradiction between the two statements is evidence that Samuel H. Sheppard was conscious of his own guilt.²

To describe these statements, as does Plaintiff, as being offered for "the truth of their falsity" misses the point -- a statement can only be hearsay if it is offered for the truth *of the matter asserted*.

² This is not to say that the State can offer every statement made by Samuel H. Sheppard to the police. For example, Sheppard's statements to Detective Schottke about the events leading up to his going to bed on July 4, 1954, if offered to prove that this was Sheppard's activity to that point, would be inadmissible hearsay because then the statements would be offered for their truth.

In addition, as discussed *infra*, some areas of the State's questioning of Samuel H. Sheppard may well be inadmissible for reasons of relevance or improper character evidence.

Statements not offered for the truth of their contents are not hearsay. Evid. R. 801. If the statement is not hearsay, then the court's hearsay inquiry is over – there is no need to look for an exception to the hearsay rule because the hearsay rules do not apply.³

Whether the inconsistencies are persuasive evidence of guilt, as opposed to merely the innocent inconsistencies that a person would be expected to state when truthfully trying to recall the same event on different occasions, is a question for the jury -- and Plaintiff will be entitled to make its argument in this regard. Moreover, to the extent that the State offers testimony from peace officers and public officials about allegedly false statements of Samuel H. Sheppard for the non-hearsay purpose discussed above, Plaintiff will then have the right to offer the same or other statements of Samuel H. Sheppard *for their truth* in order to rebut the testimony of these agents of the State. Evid. R. 804(B)(5) (estate of decedent can offer other statements of the decedent to rebut testimony by an adverse party about statements within the decedent's knowledge).⁴ Whether Plaintiff will be able to introduce those other statements (either from that same transcript or a different source) at the same time as the State introduces its statements, as opposed to having to wait for Plaintiff's rebuttal case,

³ The Court rejects the State's alternative argument that the allegedly false exculpatory statements about the events of the morning of July 4, 1954 could somehow be statements against interest under Evid. R. 804(B)(3). The statements are not inculpatory. Whether other statements made by Samuel H. Sheppard would so qualify as statements against interest will be addressed if and when the State proffers such statements to the Court with particularity.

⁴ This creates a disparity in treatment. Defendant can only use Samuel H. Sheppard's statements about his wife's death for the limited non-hearsay purpose of showing his reaction to, and explanation about, her death as probative of consciousness of guilt. If Defendant does so through the testimony of agents of the State, then Plaintiff can introduce statement of Samuel H. Sheppard about his wife's death, regardless of to whom made, for their truth. Such disparities in how different parties can treat a declarant's out-of-court statements are a characteristic of the hearsay rules. Cf. Evid. R. 801(D)(1)(a)-(b) (to be non-hearsay, prior inconsistent statement must be under oath and subject to cross-examination, while prior consistent statement offered to rebut charge of fabrication or improper influence need not be under oath).

is a question which the Court will decide under Rule 106 in the event Plaintiff makes a motion for contemporaneous introduction.

The Court also notes that Plaintiff was permitted to offer for their truth certain statements attributed to Samuel H. Sheppard, for example his statements to Mildred Adler about his desire to father another child. These statements were admissible under various hearsay exceptions, as more fully discussed in the Court's Memorandum Opinion Regarding Adler Deposition. Similarly the State may seek to offer particular statements of Samuel H. Sheppard for their truth under the various hearsay exceptions.

Constitutional Considerations Attendant to the 1954 Coroner's Inquest

In its February 12, 2000 Memorandum Opinion, the Court did not address Plaintiff's constitutional objections to the admission of Samuel H. Sheppard's testimony at the 1954 Coroner's Inquest. Now that the State has proffered a non-hearsay use for this testimony, those constitutional considerations are ripe to be addressed.

As the Court noted in relation to the 1954 trial testimony, the exclusionary rule generally does not apply in civil cases. Moreover, were Samuel H. Sheppard alive today, he would have no Fifth Amendment right not to testify in this civil case and any assertions of his Fifth Amendment right to individual questions would be the basis for an adverse inference by the jury as to that particular answer.

While the Court has heard varying accounts from the parties about whether Samuel H. Sheppard enjoyed representation by his counsel of choice when answering questions at the Inquest, the Court has heard no evidence that Samuel H. Sheppard's testimony at the Inquest was involuntary in such a manner as to be unreliable, as would be the case, for example, if he had been questioned

while under the influence of sedatives. In the absence of such a showing, the Court will not prohibit the State from introducing testimony from the Inquest on constitutional grounds. Thus, Plaintiff's motion for blanket exclusion of the Inquest testimony on constitutional bases is denied.

Character of Samuel H. Sheppard for Peacefulness or Violence

Evidence of Samuel H. Sheppard's character as a person who is violent or peaceful, as a person who is or is not of a nature to commit murder, *etc.* is not admissible in this civil case. Evid.

R. 404(A). The State's argument that other evidence introduced in this case has "opened the door" to the introduction of this evidence is rejected for two reasons. First, the Court notes that, to the extent character evidence has been introduced thus far in this regard, it was introduced largely through responses to the State's cross examination of witnesses. Second, the State has not objected to the introduction of whatever evidence has been adduced in this regard thus far. The State cannot open its own door – and the State's failure to object to inadmissible evidence does not mean that the Plaintiff has similarly failed to object. It also does not mean that the Court, in the exercise of its discretion, is required to now allow "open season" for the introduction of character evidence in contravention of Rule 404.

Admissibility of Prior Acts of Samuel H. Sheppard

The State has indicated that it will seek to introduce evidence that Samuel H. Sheppard was having an extramarital affair at the time of Marilyn Sheppard's killing. The Court finds that, if the State can offer proof that would cause a reasonable juror to find that Samuel H. Sheppard was in the throes of an affair at the time his wife was killed, then this evidence would be admissible as evidence of motive pursuant to Rule 404(B); however, evidence of prior extramarital affairs (if any) which a

reasonable juror could only find had ended prior to July 4, 1954 would most likely not be admissible.⁵

See, *Lesley v. Mississippi*, 606 So.2d 1084 (error to admit evidence of prior affairs but court properly admitted evidence of current affair as evidence of motive).

In allowing for the admissibility of evidence of a current extramarital affair but not of past extramarital affairs, the Court is necessarily rejecting Plaintiff's suggestion that any evidence of marital disharmony between the Sheppard's requires the impermissible stacking of inferences. *See generally, Donaldson v. N. Trading Co.* (1992), 82 Ohio App.3d 476, 481 n.1 (noting that the inference stacking rule is limited to merely insuring that "speculative or unreliable inferences may be identified and excluded.") Here, evidence of ongoing marital infidelity on the part of Samuel H. Sheppard (if any can be adduced) would lead to a permissible inference that Sheppard had a motive to kill his wife. Indeed, while the evidentiary rulings in the 1966 trial are not binding in this trial *de novo*, the Court notes that the Hon. Francis Talty, the respected jurist of this Court who presided over the 1966 trial, allowed the State to attempt to produce evidence of marital discord during the 1966 trial. *See, Testimony of Detective Schottke*, at Tr. 498-99.

In this regard, the State is instructed not to offer evidence of extramarital activity until the Court can make a determination that a reasonable juror could find that Samuel H. Sheppard had a motive to kill Marilyn Sheppard arising from his extramarital activity. If, as Plaintiff suggests, the testimony of State's witnesses Benitez and Weigle will only address alleged affairs which had long ceased ended, then those witnesses should be excluded.

Moreover, the State is prohibited from introducing, either for their truth or otherwise,

⁵ Of course, if the evidence were to show that an affair had ended on July 2nd, for example, it might still be admissible because resumption of the affair might be a reason for killing Marilyn Sheppard. A bright line by date cannot be drawn.

statements of Samuel H. Sheppard which simply relate to alleged affairs which were not continuing at or near the time of Marilyn Sheppard's death. The Court finds that the danger of unfair prejudice and confusion regarding such statements substantially outweighs any probative value attendant to such statements.

Finally, this Opinion is only addressing the issue of overall character of Samuel H. Sheppard, not the possibility of evidence limited to his character for truthfulness pursuant to Rules 806 and 608. However, the Court notes that, should the State seek to introduce character evidence for truthfulness on the basis that Samuel H. Sheppard is a hearsay declarant, the Court must be advised in advance of the introduction of that evidence. It is quite possible that such evidence will be excluded as unfairly prejudicial and confusing pursuant to Evid. R. 403.

Admissibility of Other Acts of Richard Eberling

A recurring question in this case has revolved around what, if any, evidence of other killings allegedly perpetrated by Richard Eberling can be admitted in this case. The Court is now satisfied that Rule 404(A)'s prohibition on the admission of character evidence applies to the acts of third parties. *See, State v. Mason* (1998), 82 Ohio St. 3d 144, 160. Accordingly, if such acts are to be admitted, they cannot be admitted for the purpose of proving that Eberling was a person of bad character.

This does not end the inquiry, however. First, the evidence thus far admitted concerning the Durkin murder was admissible at least to explain why the witness Dyal chose when she did to purportedly report to authorities that Eberling had confessed to killing Marilyn Sheppard. This would be a permissible non-character use of the evidence regarding the Durkin homicide.⁶

⁶ The Court notes that Rule 404(B)'s list of permissible uses of "other acts" is illustrative

More importantly, Plaintiff has represented that it is still pursuing the possibility of offering evidence relating to the Durkin and Fray homicides as evidence probative of “identity” under Rule 404(B). This type of “*modus operandi*” evidence is admissible under Rule 404(B). *State v. Bey* (1999), 85 Ohio St.3d 487, 490. In order to qualify under this permissible use of “other acts” evidence, there must be a showing that the other acts “must be related to and share common features with the crime in question,” to the point where the other acts “demonstrate a similar method of operation.” *Id.* at 490-91.

Whether evidence of the Durkin homicide, evidence of the Fray homicide and/or evidence of other homicides can be admitted for this reason is a fact-sensitive issue. Accordingly, if Plaintiff still desires to have this evidence admitted for this reason, it must make a detailed proffer, either in writing or on the record and outside the presence of the jury as to the similarities between the various homicides and how those similarities cause this evidence to be admissible under Rule 404(B). Naturally, Defendant will have the opportunity at that time to argue as to why rule 404(B)’s criteria have not been met. Without judging Plaintiff’s proffer of the evidence before it is presented, the Court notes that the mere fact that the victims were all women or that they died from blunt trauma will probably not be enough to cause other homicides to meet *Bey*’s criteria.

If the Court finds, pursuant to Evid. R. 104, that a preliminary showing in this regard has not been made, then the evidence will not be admitted and the jury will be instructed that the Durkin homicide evidence adduced thus far can only be admitted for the limited purpose of explaining the witness Dyal’s conduct. Conversely, if a showing of sufficient similarity is made for the evidence of

and not exclusive. While this use of the Durkin homicide evidence is not particularly covered by Rule 404(B), it is a non-character use which fits Rule 404(B)’s criteria.

other homicides to be admitted under Rule 404(B) as proof of identity, then jury will be given a limiting instruction consistent with the two "non-character" purposes of admissibility for which it will have been admitted: to explain the witness Dyal's conduct and as proof of identity.⁷

In the meantime, Plaintiff should refrain from introducing evidence relating to any "other acts" of Eberling.

Admissibility of Statement of Marilyn Sheppard to Donna Bailey

Plaintiff seeks to exclude evidence that Marilyn Sheppard told Donna Bailey that she (Mrs. Sheppard) planned to "drag Dr. Sheppard's name through the mud." If the circumstances surrounding the statement are as Plaintiff has indicated, the Court agrees that this statement is inadmissible. There is no indication that Dr. Sheppard was aware that his wife intended to drag his name through the mud. Without a link to Dr. Sheppard, this statement cannot provide a motive for him to kill Marilyn Sheppard. The Court finds that this evidence without a link to show that Dr. Sheppard heard it prior to Marilyn Sheppard's death, is irrelevant.⁸ The Court further finds that, even if relevant, the danger of unfair prejudice and confusion posed by this evidence substantially

⁷ It is because the reasons for thus far admitting evidence of the Durkin homicide are in flux, depending on whether Plaintiff makes a Rule 404(B) showing of identity, that the Court has delayed, and will continue to delay, giving any limiting instruction to the jury about the evidence of the Durkin homicide heard thus far. To instruct the jury that it is limited in considering the evidence for one reason at this point in the trial (*i.e.* to explain Dyal's actions), and then later have to revisit the issue and instruct the jury that it can also consider the evidence as proof of identity, would be confusing to the jury and could also have the adverse effect of drawing too much attention to the evidence. One instruction after the Rule 404(B) issues are all resolved is the better course.

⁸ Indeed, this may well be an example of attempting to improperly stack inferences, as the jury would be required to infer that (1) because Ms. Sheppard intended to drag Dr. Sheppard's name through the mud (the premise), that (2) Ms. Sheppard must have told Dr. Sheppard of this fact (inference no. 1) and (3) this must have infuriated Dr. Sheppard to the point where he would want to kill her (inference no. 2).

outweighs its probative value, thus requiring that it be excluded. Evid. R. 403.

Conclusion

The foregoing holdings are necessarily less than a "bright line" because evidentiary rulings are based on specific pieces of evidence or specific testimony. Nonetheless, the Court believes that the foregoing provides counsel with the direction necessary regarding the various motions raised. The parties are directed to err on the side of caution in presenting evidence whose admission may be questionable. Should counsel have concerns about the admissibility of particular testimony or other evidence, they are expected, as officers of the Court, to raise those concerns before attempting to admit the evidence.

MARCH 5th 2000

Date

Ronald Suster
Judge Ronald Suster