



1-3-2000

Motion in Limine to Exclude Plaintiff's Proposed Exhibits (#65, 66, 67)

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IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

ALAN J. DAVIS, Special Administrator
of the Estate of
SAMUEL H. SHEPPARD

Plaintiff

vs.

THE STATE OF OHIO

Defendant

Judge Ronald Suster

Case No. 312322

MOTION IN LIMINE TO
EXCLUDE PLAINTIFF'S
PROPOSED EXHIBITS
(EVID. R. 401-404)

Defendant, State of Ohio, by and through counsel, William D. Mason,
Prosecuting Attorney for Cuyahoga County, Assistant Prosecutor Marilyn Barkley
Cassidy, and Assistant Prosecutor A. Steven Dever, moves this Honorable Court to
exclude Plaintiff's proposed Exhibits numbered: 65, 66, and 67 for the reasons set forth
fully in the following brief.

Respectfully Submitted,

WILLIAM D. MASON
Prosecuting Attorney
Cuyahoga County



Marilyn Barkley Cassidy (0014647)
A. Steven Dever (0024982)
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Attorneys for Defendant

BRIEF

Facts and Introduction

The current Plaintiff's Exhibit List contains three items as proposed exhibits. Those exhibits are numbered on the current Plaintiff's Exhibit List as follows: 65, 66, and 67. These exhibits include two documents and one article relating to the death Ethel Durkin. Under Evid. R. 401 – 404, these exhibits are not admissible for the following reasons.

Law and Argument

Evid. R. 401 & Evid. R. 402

Evid. R. 401 defines "relevant evidence" as being any "evidence having any tendency to make the existence of any fact that is of consequences to the determination of the action more probable or less probable than it would be without the evidence." See also Brown v. City of Cleveland, (1981), 66 Ohio St.2d 93. The Plaintiff's proposed exhibits listed above do not meet this definition. The conduct of Richard Eberling demonstrated by these exhibits does not make the existence of any fact more or less probable than without the introduction of the evidence.

Richard Eberling was convicted of murder for the death of Ethel Durkin in 1989. That is not relevant to the determination of whether Samuel H. Sheppard is innocent of his wife's murder on July 4, 1954. It is sheer speculation to implicate Richard Eberling in the death of Marilyn Sheppard simply because he was convicted of murdering Ethel Durkin 35 years after Marilyn Sheppard's death. Speculation that Richard Eberling murdered Marilyn Sheppard simply because he was convicted of another murder thirty

years later certainly will not make it more probable or less probable that Samuel H. Sheppard murdered his wife. Therefore, the proposed exhibits should not be admitted since they are not relevant under Evid. R. 402.

Evid. R. 404(B)

Assuming *arguendo* that the evidence is relevant, the evidence “is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” Evid. R. 404(B).

The rule and statute governing admission of other acts evidence codify common law respecting evidence of other acts of wrongdoing, and are construed *against* admissibility. State v. Lowe, (1994), 69 Ohio St.3d 527 (emphasis added). The standard for determining admissibility is strict. State v. Coleman, (1989), 45 Ohio St.3d 298.

The evidence being introduced is being offered to prove that Richard Eberling murdered Marilyn Sheppard on July 4, 1954, simply because he was convicted of murdering Ethel Durkin over thirty years later. Evid. R. 404(B) prohibits exactly this. Evidence of other crimes, wrongs or bad acts independent of, and unrelated to, the offenses for which a defendant is on trial is generally inadmissible to show criminal propensity. State v. Wogenstahl, (1996), 75 Ohio St.3d 344; see also State v. Goines, (8th Dist. 1996), 111 Ohio App.3d 840 (stating that evidence of prior acts may not be used to prove inference that, in committing alleged crime, defendant acted in conformity with his other acts or that he has propensity to act in such a manner). Other acts evidence under Evid. R. 404(B) is never admissible when its only purpose is to establish that defendant committed the act alleged in the indictment. See State v. Clemons, (12th Dist. 1994), 94 Ohio App.3d 701.

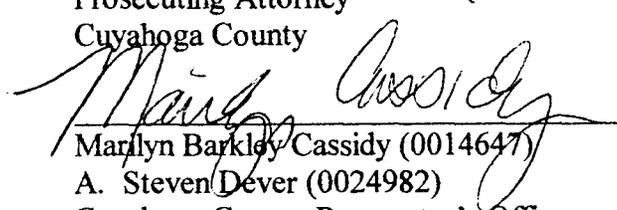
The use of such evidence can be used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" as enumerated in the Evid. R. 404(B). See Goines, 111 Ohio app.3d 840. Plaintiff's intended use of this evidence is not for one of these enumerated purposes. It is for the *sole* purpose of proving that Richard Eberling murdered Marilyn Sheppard on July 4, 1954, simply because he was later convicted of murdering Ethel Durkin. Therefore, Plaintiff's proposed exhibits 65, 66, and 67 should be excluded from this trial pursuant to Evid. R. 404(B).

Conclusion

For the reasons above, the State of Ohio respectfully requests the court exclude plaintiff's proposed exhibits 65, 66, and 67 from this trial.

Respectfully Submitted,

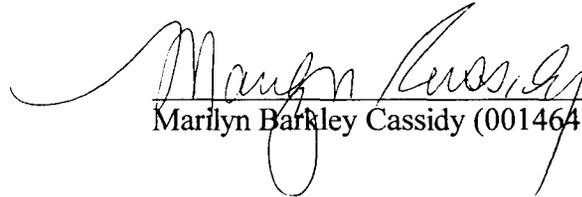
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CERTIFICATE OF SERVICE

The foregoing Motion to Exclude Plaintiff's Exhibits was served upon plaintiff's counsel Terry Gilbert at 1370 Ontario Street, 17th Floor, Cleveland, Ohio 44113 this 3 day of January, 2000, by regular U.S. Mail.


Marilyn Barkley Cassidy (0014647)