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2017 FEB 27 PM 3:11

BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2016 CR 000397**
vs.	:	**Judge McBride**
JOHN R. WITZEL, II	:	**DECISION/ENTRY**
Defendant	:	

Matthew E. Wiseman, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Ronald A. Mason, assistant public defender and counsel for the defendant, John R. Witzel, II, 302 East Main Street, Batavia, Ohio 45103

This cause is before the court for consideration of the defendant's motion in limine filed on December 5, 2016. The court heard oral argument on the motion on February 2, 2017, after which time the court took the motion under advisement.

Upon consideration of the motion, the record of the proceedings, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On July 5, 2016, the defendant John R. Witzel II was indicted on one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree. The charge stems from an incident that occurred on December 25, 2015 in Clermont County, Ohio. On that date, the defendant had occasion to be sitting in the backseat of an SUV next to the victim T.E. in the presence of five of T.E.'s family members. At the time, T.E. was ten years old.

The state alleges that the defendant reached over and patted T.E.'s vagina on the outside of her clothing. T.E. then yelled for the defendant to stop touching her, and her family told them to stop playing around.

Before the December 25th incident, the defendant allegedly engaged in the following other acts with T.E.: 1) He kissed T.E. on her cheeks and then on her lips, and 2) he instructed T.E. to shower in her swimsuit while he remained in the bathroom to watch her.

On November 28, 2016 the state filed a notice of its intent to use other acts evidence. The state intends to introduce the following testimony and evidence:

> "* * * testimony from a number of potential witnesses who were 1) listed victims, witnesses and officers in two prior cases against the defendant, *State v. John R. Witzel, II*, 1996 CR 005209 and *State v. John R. Witzel, II*, 2005 CR 2085 and 2) juvenile victims of unwanted touching discovered in 2005 * * *. Additionally, the State intends to introduce testimony from the victim in the present case along with other witnesses regarding prior incidents of concern between this defendant and the victim of the instant allegation."[1]

Following the state's notice, the defendant filed a motion in limine on December 5, 2016 to exclude:

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[1] Pls. Mem. pgs. 1-2.

> "1. All evidence and testimony listed in the State's Notice of Intent to Use Other Act Evidence * * * including but not limited to witnesses and facts related to State v. John R. Witzel, 1996 006209 and State v. John R. Witzel, 2005 CR 2085, and other juveniles alleged to be victims of uncharged sexual crimes occurring in 2005; and all evidence and testimony of witnesses listed in the State's Supplemental Discovery, filed herein on November 23, 2016.
>
> 2. All testimony, evidence and recorded interviews with Cindy Banfield, related to the State's Supplemental Discovery, filed herein on November 14, 2016.
>
> 3. Any and all criminal convictions and other criminal matters pending against the Defendant."[2]

The case of *State v. John Witzel II*, 1996 CR 005209 involved the conviction of the defendant for importuning charges, to which the defendant pled guilty.[3] The charges arose after the defendant and another man picked up two teenaged girls and brought them to a hotel room. At the hotel room, the defendant instructed the girls to get in the shower, and he then watched them shower.

The case of *State v. John Witzel, II*, 2005 CR 02085 involved multiple convictions for the possession of child pornography.[4] During the course of the investigation into the child pornography in 2005, detectives learned of two other minor girls whom the defendant had allegedly sexually abused. These two minor victims were abused in 2005 when they were between the ages of 11 and 13. No charges were filed in connection with these incidents.

One of the victims, Lindsay McCrory, alleges that she was watching a movie with her sisters in her family's home when the defendant unbuttoned her pants and touched

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[2] Defs. Mot., pg. 1.

[3] Neither party submitted the defendants' guilty plea, the courts sentencing entry, or any other information specifying exactly how many charges the defendant pled guilty to or the precise statutes under which he was convicted.

[4] Neither party submitted the defendants' guilty plea or the fact finders' finding of guilty, the courts sentencing entry, or any other information specifying exactly how many charges the defendant was convicted of or the precise statutes under which he was convicted.

her vagina. In another instance, Lindsay alleges that, while in the presence of her parents, the defendant reached under a blanket, placed his hand in her pants, and touched her vagina.

The second 2005 victim, Jessica Emery, alleges that on one occasion she was with the defendant in her family's living room while her family was just outside of the living room, when the defendant reached into her pants and touched her vagina. Jessica ended the touching by running outside to her family members. On another occasion, Jessica had poison ivy, and her mother was nearby running a bath of oatmeal for her. Jessica was putting calamine lotion on her welts when the defendant began putting lotion on her as well. While doing so, he reached under the swimsuit she was wearing and touched her vagina. At the time, Jessica's family had a very close relationship with the defendant, of almost familial closeness.

At the time the motion in limine was filed, this case was before Judge Herman of the Clermont County Court of Common Pleas. After a hearing on the motion in limine in front of Judge Herman on December 6, 2016, Judge Herman issued a decision on December 7th denying the defendant's motion in limine. At the defendant's request, the trial was continued.[5] Thereafter, Judge Herman retired. Judge Brock was elected to replace Judge Herman, and on January 12, 2017, after assuming office, Judge Brock recused himself from hearing this case.

This case was then reassigned to Judge McBride on January 17th. The court determined to re-hear the motion in limine because the court's ruling on a motion in limine is tentative and the assigned judge will ultimately be called upon to rule on the

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[5] The court had invited the defendant to move to continue the trial date if the defendant believed he had inadequate time to prepare a defense against the new other acts evidence, which the defendant did. Thus, the issue in the defendant's motion in limine concerning the proximity of the state's notice of intent to use other acts evidence to the trial is no longer an issue.

issues involved at trial. Accordingly, the court held a hearing on the motion in limine on February 2nd. Upon the close of the hearing, the court took the motion in limine under advisement.

LEGAL STANDARD

"A trial court has broad discretion in the admission and exclusion of evidence * * *."[6] A motion in limine is a "precautionary request, directed to the inherent discretion of the trial judge," to limit the examination of witnesses or admission of certain evidence.[7] If the motion in limine is granted, it remains "a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue."[8] A motion in limine functions to "avoid error, prejudice, and possibly a mistrial."[9] The trial court retains the discretion to "change its ruling on the disputed evidence in its actual context at trial."[10] The admission or exclusion of evidence rests in the sound discretion of the trial court.[11]

LEGAL ANALYSIS

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[6] *Ohio v. Stevens*, 12th Dist. Fayette No. CA2015-09-020, 2017-Ohio-498, ¶26, quoting *State v. Martin*, 12th Dist. Butler No. CA2007-01-022, 2007-Ohio-7073, ¶ 9.
[7] *State v. Grubb* 28 Ohio St.3d 199, 201, 503 N.E.2d 1420 (1986), quoting *State v. Spahr*, 47 Ohio App.2d 221, 353 N.E.2d 624 (2nd Dist. 1976).
[8] *Grubb* 28 Ohio St.3d at 201-202.
[9] Id. at 201.
[10] *State v. French*, 72 Ohio St.3d 446, 450, 650 N.E.2d 887 (1995).
[11] *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987).

As with the admission of evidence generally, the trial court likewise has broad discretion to decide whether to admit or exclude other acts evidence.[12] As a general rule, evidence that a defendant "committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime or that he acted in conformity with bad character."[13]

Admissibility of such evidence is "carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment."[14] Because of these risks, exceptions established by rule or statute must be "strictly construed against admissibility."[15]

Under R.C. 2907.05(E), when the defendant's prior sexual activity does not involve "the origin of semen, pregnancy, or disease, [or] the defendant's past sexual

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[12] *State v. Ward*, 12th Dist. Clermont No. CA2013-07-059, 2014-Ohio-990, ¶ 16. *See State v. Powers*, 12th Dist. Clinton No. CA2006-01-002, 2006-Ohio-6547, ¶ 7, citing *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶ 43 ("The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.").

[13] *Stevens*, 2017-Ohio-498 at ¶ 27, quoting *Ward*, 2014-Ohio-990 at ¶ 19. *See State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 15 (holding same); *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 18, citing Evid.R. 404(B) ("Generally, extrinsic acts may not be used to suggest that the accused has the propensity to act in a certain manner."); *State v. Curry*, 43 Ohio St.2d 66, 69, 330 N.E.2d 720 (1975), citing *State v. Burson*, 38 Ohio St.2d 157, 311 N.E.2d 526 (1974) ("[E]vidence which tends to show that an accused has committed another crime wholly independent of the offense for which he is on trial is generally inadmissible.").

[14] *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992). *See State v. Dove*, 8th Dist. Cuyahoga No. 101809, 2015-Ohio-2761, ¶ 21 (Citation omitted.) ("A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime.").

[15] *State v. Clemens*, 94 Ohio App.3d 701, 707, 641 N.E.2d 778 (12th Dist. 1994); R.C. 2907.05(E).

activity with the victim," such evidence may only be admitted if it is admissible under R.C. 2945.59, which provides:[16]

> "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."[17]

Furthermore, the "Ohio Supreme Court has promulgated certain exceptions to the common law regarding the admission of other acts evidence," which are in Evid.R. 404(B):[18]

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action 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."[19]

The Ohio Supreme Court recognizes that Evid.R. 404(B) is in accord with R.C. 2945.59, and both represent codifications of the common law prohibiting evidence of "other acts of evidence to prove a character trait in order to demonstrate that the defendant acted in conformity with that trait."[20] Both the statute and the rule provide exceptions to the general prohibition against other acts evidence.[21] Neither the rule nor the statute requires the "other act to be 'like' or 'similar' to the crime charged, as long as the prior act tends to show one of the enumerated factors."[22] Notably, evidence of

[16] *Clemens*, 94 Ohio App.3d at 707.
[17] R.C. 2945.59
[18] *Stevens*, 2017-Ohio-498 at ¶ 27.
[19] Evid.R. 404(B).
[20] *Williams*, 2012-Ohio-5695 at ¶ 16, citing *State v. Brown*, 40 Ohio St.3d 277, 281, 533 N.E.2d 682 (1988).
[21] *Williams*, 2012-Ohio-5695 at ¶ 16.
[22] *Ward*, 2014-Ohio-990 at ¶ 20.

motive, intent, scheme, or plan is always material "because it tends to show why one version of events should be believed over another."[23]

As a threshold matter, in order for other acts evidence to be admissible, "there must be substantial proof the alleged other acts were committed by the defendant * * *."[24] Of note, "substantial proof" is less than "proof beyond a reasonable doubt."[25] Moreover, "it is not necessary to present independent evidence of 'other acts' * * *."[26] Even so, other acts evidence is inadmissible when "it is of a vague or remote character."[27]

In the seminal case of *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, the Ohio Supreme Court enunciated a three part analysis to determine the admissibility of other acts evidence.[28] Since then, the *Williams* test is "routinely applied in addressing challenges to the admissibility of 'other acts' evidence."[29]

First, courts consider "whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence" under Evid.R. 401.[30] Second, courts determine "whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in

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[23] *Crotts*, 2004-Ohio-6550 at ¶ 18.
[24] *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994). *See Stevens*, 2017-Ohio-498 at ¶ 27, citing *Lowe*, 69 Ohio St.3d at 530 (holding same); *State v. Mills*, 12th Dist. Clermont No. CA2015-12-101, 2016-Ohio-6985, ¶ 10, citing *Lowe*, 69 Ohio St.3d at 530 (holding same).
[25] *State v. Bromagen*, 12th Dist. Clermont No. CA2005-09-087, 2006-Ohio-4429, ¶ 14.
[26] *Ward*, 2014-Ohio-990 at ¶ 26, quoting *State v. Phillips*, 12th Dist. Preble No. CA2001-01-002, 2001 WL 1112668 (Sept. 24, 2001).
[27] *Bromagen*, 2006-Ohio-4429 at ¶ 14, citing *State v. Carter*, 26 Ohio St.2d 79, 82 (1971).
[28] *Stevens*, 2017-Ohio-498 at ¶ 28, citing *Williams*, 2012-Ohio-5695 at ¶¶ 19-20.
[29] *Ward*, 2014-Ohio-990 at ¶ 17, citing *State v. Freeze*, 12th Dist. Butler No. CA2011-11-209, 2012-Ohio-5840, ¶ 33.
[30] *Williams*, 2012-Ohio-5695 at ¶ 19.

Evid.R. 404(B)."[31] Finally, courts consider "whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice" under Evid.R. 403.[32] Evidence may be "unfairly prejudicial," if it "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish * * *."[33]

In *Williams* the defendant was convicted of rape, gross sexual imposition, and unlawful sexual conduct with a minor.[34] The victim was a 14 year old boy that the defendant mentored at his church.[35] The trial court admitted evidence that the defendant had a similar relationship with a 16 year old boy 11 years prior.[36] With respect to the 16 year old, the defendant had coached him on a swim team.[37]

Regarding the first prong of the analysis, which is relevancy, the Court found the testimony relevant because it tended to show the defendant's motive, as well as his preparation and plan to target and groom teenage boys so that he could sexually abuse them.[38] The evidence showed that the defendant targeted teenage males who had no father figure in order to gain the boys' trust and confidence.[39] The Court specifically noted that the testimony was additionally relevant because it spoke to whether the defendant's intent was sexual gratification and it rebutted the defendant's suggestion that the victim had made false accusations with the hope of escaping trouble at school.[40]

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[31] Id.
[32] Id.
[33] *State v. Hignite*, 12th Dist. Warren No. CA2015-07-063, 2015-Ohio-5204, ¶ 16, quoting *Crotts*, 2004-Ohio-6550 at ¶ 24. *See Ward*, 2014-Ohio-990 at ¶ 37, citing *State v. Bowman*, 144 Ohio App.3d 179, 286, 759 N.E.2d 856 (12th Dist. 2001) ("Unfairly prejudicial evidence is that which might result in an improper basis for a jury decision.").
[34] *Williams*, 2012-Ohio-5695 at ¶ 9.
[35] Id.
[36] Id. at ¶ 5.
[37] Id.
[38] Id. at ¶ 22.
[39] Id. at ¶ 25.
[40] Id. at ¶ 22.

As to the second step, without much additional explanation, the Court found that the evidence served a purpose other than showing the defendant acted in conformity with his character.[41] In so finding, the Court noted that the jury received a limiting instruction not to use the evidence to conclude the defendant acted in conformity with his character.[42] When a limiting instruction is given, the court presumes that "the jury has followed the instructions given to it by the trial court."[43]

The final inquiry is whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice.[44] Without much analysis, the Court determined that the trial court's instruction to the jury lessened the effect of the other acts testimony, and that it corroborated the victim's testimony about sexual abuse.[45]

Turning to the present case, as a threshold issue, the court finds that the state will be able to provide substantial proof that (1) the defendant previously kissed T.E. and watched her shower, via T.E.'s own testimony, (2) the defendant previously sexually abused Lindsay and Jessica via their testimony and evidence from a Child Protective Services investigation into the abuse, (3) the defendant was previously convicted of importuning in *State v. John R. Witzel, II,* 1996 CR 005209 via the defendant's guilty plea, and (4) the defendant was previously convicted of possession of child pornography in *State v. John R. Witzel, II*, 2005 CR 2085 via either the defendant's guilty plea or the fact finder's finding of guilty. None of the types of other acts evidence

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[41] *Williams*, 2012-Ohio-5695 at ¶ 23.
[42] Id.
[43] *Ward*, 2014-Ohio-990 at ¶ 36 quoting *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 194.
[44] *Williams*, 2012-Ohio-5695 at ¶ 24. The term "prejudice" means "simply to '[d]amage or detriment one's legal rights or claims." *Crotts*, 2004-Ohio-6550 at ¶ 23 quoting Black's Law Dictionary (8th Ed. 1999) 1218. "Unfair prejudice" is prejudice that is more than merely "adverse to a litigant's case." *Crotts* at ¶ 24.
[45] *Williams* at ¶ 24.

at issue are of "a vague or remote character," such as to prevent the state from presenting such evidence.[46]

In the instant case, the defendant has been charged with one count of gross sexual imposition under R.C. 2907.05(A)(4), which is a third degree felony. R.C. 2907.05(A)(4) requires that the state prove the following:

> "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: * * *
>
> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."[47]

R.C. 2907.01(B) defines "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."[48] The statutory requirements for proving gross sexual imposition bear upon the relevance of the other acts evidence at issue in the present case.

In the case at bar, the state has submitted multiple reasons justifying the need for the other acts evidence. The state maintains that the evidence serves to "show the defendant's motive, intent, plan, and absence of mistake in the pending matter."[49]

The first analysis under the *Williams* test questions whether the other acts are relevant under Evid.R. 401.[50] Relevant evidence is that which has "any tendency to

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[46] *Bromagen*, 2006-Ohio-4429 at ¶ 14, citing *Carter*, 26 Ohio St.2d at 82.
[47] R.C. 2907.05(A)(4).
[48] R.C. 2907.01(B).
[49] Pls. Mem., pg. 2.
[50] *Williams*, 2012-Ohio-5695 at ¶ 19.

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[51]

As discussed, a defendant's motive and plan are always material and relevant because they tend to show why "one version of events should be believed over another."[52] For motive in particular, it is part of "the narrative of the state's theory of its case against the accused seeking to prove his criminal liability."[53] In this particular case, evidence of the defendant's absence of mistake or accident in touching T.E.'s vagina is also relevant. In his interview with detectives the defendant stated that T.E. placed his hand between her legs. He claimed that if he touched her vagina it was by accident or mistake, caused by T.E.

The defendant claims that there is no relevance of evidence submitted to show the defendant's absence of mistake or accident in touching T.E.'s vagina. The defendant maintained in oral argument that such evidence is irrelevant because the defendant's theory of the case for trial is that he did not touch T.E.'s vagina at all, as opposed to accidentally or mistakenly touching it.

The state responds that the defendant's interview with investigators places the defendant's absence of mistake or accident at issue. Other acts "become a fact in issue when stated or suggested by counsel's argument, or by evidence that's been introduced."[54] Because the evidence in this case will include the interview in which the defendant averred he possibly touched T.E.'s vagina by mistake or accident, whether the alleged touching was an accident or mistake is now at issue and is therefore relevant. Having found the issues of motive, plan, and absence of mistake or accident

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[51] Evid.R. 401.
[52] *Crotts*, 2004-Ohio-6550 at ¶ 18.
[53] *State v. Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289, 966 N.E.2d 958, ¶ 83 (12th Dist.), citing *State v. Williams*, 2d Dist. 24149, 2011-Ohio-4276.
[54] *State v. Arnold*, 2d Dist. Clark No. 02CA0002, 2002-Ohio-4977, ¶ 15.

generally relevant, the issue thus becomes whether the other acts evidence that the state intends to present are in fact probative of the defendant's motive, plan, and absence of accident or mistake.

Upon applying the *Williams* test, the court finds that the defendant's 1996 convictions for importuning are irrelevant to the defendant's plan, motive, or lack of accident or mistake in sexually abusing T.E. The 1996 convictions are therefore inadmissible. As to the convictions for possession of child pornography from 2005, the court finds that this evidence is relevant, but for reasons discussed below, its probative value is substantially outweighed by its risk of unfair prejudice. Accordingly, the 2005 convictions are inadmissible. However, evidence regarding the defendant's alleged sexual abuse of Lindsay and Jessica in 2005, as well as evidence showing the defendant made prior advances on T.E., are relevant and admissible to show the defendant's plan, motive, or absence of accident or mistake.

To begin by examining the relevance of the convictions in *State v. John R. Witzel, II*, 1996 CR 005209, the defendant argues, and the court agrees, that the 1996 convictions are too attenuated to be relevant to the instant case. The 1996 convictions are separated from the present charge involving T.E. by approximately twenty years, and the incident that took place in the 1996 case is substantially different from the underlying actions alleged in this case. The state correctly notes that *Williams* involved sexual abuse incidents separated by eleven years, yet other acts evidence involving a prior sex abuse victim was admissible in that case. Although eleven years is a significant amount of time, in finding that the other acts evidence was probative of the defendant's plan and motive, the *Williams* Court described the many similarities

between the two strings of sexual abuse. The 1996 case does not exhibit the same strong similarities to the case at bar.[55]

In the 1996 case, the defendant, along with another adult male, took two minors to a hotel and forced the minors to shower in front of them. In this case, however, the defendant is alleged to have acted alone and there is only one minor victim, T.E. Additionally, the defendant isolated the victims from their families in the 1996 case by taking them to a hotel, whereas here the defendant is alleged to have touched T.E. in the presence of multiple family members in a vehicle. Moreover, the very acts that are alleged are different. Although T.E. claims that, prior to the December 2015 incident, the defendant had her shower in a bathing suit while he watched, that incident is not the basis of the defendant's current charge. He is charged with having touched T.E.'s vagina, whereas the 1996 convictions involved the defendant watching two minor girls shower.

The 1996 case is distinguishable enough from this case such that the 1996 case does not illuminate the defendant's plan to target T.E., and in turn does not show how the defendant's conduct with her on December 25th was part of a plan to sexually abuse her, as opposed to an accident or mistake. Likewise, "for other acts to be admissible to show motive, the other acts must be 'of a character so related to the offense for which the defendant is on trial that they have a logical connection therewith and may reasonably disclose a motive or purpose for the commission of such offense."[56] As discussed, there simply is not a significant relation in character between the 1996 incident to this case so as to be probative of the defendant's motive.

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[55] *Cf. State v. Herrington*, 8th Dist. Cuyahoga No. 101322, 2015-Ohio-1820, ¶ 33 (finding a 20 year gap between the other acts evidence and the acts at issue permissible due to the strong similarities between the cases, where immediately before the sexual abuse of minor girls occurred, the defendant would take the girls for driving lessons).
[56] *Blankenburg*, 2012-Ohio-1289 at ¶ 83.

Ultimately, all that the 1996 evidence would show is the forbidden inference that the defendant is a longstanding pedophile, and that he acted in conformity with that trait on December 25, 2015 when he was with T.E. Accordingly, the court finds that the defendant's 1996 importuning charges, and evidence related to those charges, should be excluded.

As to the 2005 convictions for possession of child pornography in *State v. John R. Witzel, II*, 2005 CR 002085, the court finds that these convictions are marginally relevant to the defendant's motive. It is probative of whether the defendant is attracted to children. As the state highlighted, it must show that the defendant received sexual gratification from touching T.E. in order to succeed on its gross sexual imposition charge. However, the court finds that the relevance of the 2005 convictions is not substantial because there is a distinction between receiving sexual gratification from viewing child pornography and receiving sexual gratification from actually sexually abusing a child. Despite the limited relevance of the 2005 convictions, as will be discussed below, the risk of unfair prejudice renders them inadmissible.

The evidence of the defendant sexually abusing two minor girls from 2005 is relevant to show the defendant's motive, plan, and absence of mistake or accident. The abuse of Lindsay and Jessica speaks to the defendant's plan and motive in grooming pre-teen and early teenaged girls for later sexual contact.[57] Grooming a child for sexual abuse "describes the process of cultivating trust with a victim and gradually introducing

[57] *See Williams*, 2012-Ohio-5695 at ¶ 22 (finding other acts evidence relevant because it tended to show the defendant's motive, as well as his preparation and plan to target and groom teenage boys so that he could sexually abuse them); *Ward*, 2014-Ohio-990 at ¶ 35 (finding that evidence showing that the defendant had a history of targeting for sexual abuse his daughter's teenage friends while they were under his supervision was relevant to the defendant's motive or intent, whether he had a plan in engaging in the alleged conduct, as well as to prove the absence of mistake or accident).

behaviors until reaching the point of intercourse."[58] Both Lindsay and Jessica will testify at trial how the defendant gained the trust of their families and then gradually increased sexual behaviors towards them. Furthermore, showing that the defendant had a plan to target T.E. for sexual abuse by introducing evidence concerning Lindsay and Jessica's sexual grooming and abuse refutes the defendant's interview statements that his hand could have only touched T.E.'s vagina by mistake or accident.

Unlike the 1996 convictions, the sexual abuse of two minors from 2005 occurs within a reasonable time frame.[59] Moreover, there exist multiple parallels between the 2005 incidents of abuse and the alleged 2015 abuse: the alleged minor victims were all within three years of age, the defendant had befriended and cultivated relationships with the victims' families to gain trust, the defendant gradually increased the types of sexual behaviors aimed at the girls through grooming, the sexual abuse occurred in or near the presence of the victims' adult family members, and in all cases the defendant abused the victims by touching their vaginas.

The court also finds relevant evidence that the defendant had previously kissed T.E. on the cheeks and mouth and watched her shower. First, such evidence is relevant because these other acts involving T.E. help explain the circumstances and background of the December 25th incident.[60] Second, the prior incidents with T.E. are probative as

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[58] *Williams*, 2012-Ohio-5695 at ¶ 21, quoting *United States v. Johnson*, 132 F.3d 1279, 1283, fn. 2 (9th Cir. 1997).

[59] *See e.g. Powers*, 2006-Ohio-6547 at ¶ 12 (finding testimony that the defendant instructed his young daughter to fondle his penis some 12 years earlier not too remote in time to be inadmissible as other acts evidence); *State v. Murray*, 8th Dist. Cuyahoga No. 91368, 2009-Ohio-2580, ¶ 24 (finding 17 years between two incidents did not render the other acts evidence inadmissible due to the 'strong similarities between the incidents.'").

[60] *See State v. Walker*, 8th Dist. Cuyahoga No. 79767, 2002 WL 538761, *3 (Apr. 11, 2002) ("Evidence regarding prior acts of molestation upon the same victim, even if not included in the indictment, has been permitted in numerous Ohio jurisdictions.").

to the defendant's plan and motive in grooming and abusing T.E.[61] Third, the similarities between the grooming of T.E., Lindsay, and Jessica helps to corroborate T.E.'s version of events.[62]

The second step of *Williams* determines whether the other acts evidence is permissible under Evid.R. 404(B).[63] In other words, the court must determine whether the defendant's abuse of two other minor victims in 2005, as well as evidence of the defendant's prior other acts with T.E., are being presented for a legitimate purpose (e.g. plan, motive, lack of accident or mistake, etc.) and not to show that the defendant acted in conformity with his bad character.[64]

As discussed, the evidence that the defendant had previously kissed T.E. on the cheeks and mouth and watched her shower is permissible under Evid.R. 404(B) because the other acts involving T.E. explain (1) the defendant's motive for touching her on December 25th, (2) the defendant's plan in grooming her for sexual contact, and (3) it tends to disprove the defendant's statements in his interview that any possible touching of T.E.'s vagina was a mistake or accident. Furthermore, "[e]vidence of other crimes may be presented when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends to logically prove any element of the crime charged."[65] In this case, evidence of the defendant's prior conduct with T.E. explains the circumstances of

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[61] *See Blankenburg*, 2012-Ohio-1289 at ¶ 88 (finding relevant evidence of the defendant's prior sexual abuse of minor boys to establish "the background necessary to give a complete picture of the alleged crimes * * *.").
[62] *See In re. T.P.*, 3d Dist. Marion No. 9-15-36, 2016-Ohio-5774, ¶ 74 (finding relevant other acts evidence where the defendant attempted sexual contact with another minor because, if believed, the other acts evidence corroborated the victim's testimony that the defendant initiated sexual contact with her).
[63] *Williams*, 2012-Ohio-5695 at ¶ 19.
[64] Id.
[65] (Internal quotations omitted.) *State v. Kinsworthy*, 12th Dist. Warren No. CA2013-06-053, 2014-Ohio-1584, ¶ 17, quoting *State v. Waters*, 12th Dist. Butler No. CA2002-11-266, 2003-Ohio-5871, ¶ 15.

December 25th, thereby demonstrating the defendant's motive, plan, and lack of accident or mistake.[66]

As to the evidence that the defendant sexually abused two minor girls in 2005, as explained above, that evidence is permissible under Evid.R. 404(B) to show the defendant's motive, plan, and absence of mistake or accident.[67] This evidence speaks to whether the defendant was motivated by sexual gratification when he touched T.E., or whether he touched T.E.'s vagina accidentally or mistakenly after she moved his hand between her legs. Similarly, the prior incidents from 2005 tend to show that the defendant had a plan in grooming pre-teen and early teenaged girls for sexual contact, namely so that he could touch their vaginas.[68]

The final step under *Williams* questions whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice under Evid.R. 403.[69] Evid.R. 403(A) provides that "[a]lthough relevant, evidence is not

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[66] *See State v. Pleyvak*, 11th Dist. Trumbull No. 2013-T-0051, 2014-Ohio-2889, ¶ 29 (allowing testimony from a sex abuse victim that related to previous sexual abuse by the defendant outside of the crimes charged because the testimony "explains the sequence of events leading up to the crimes charged as well as provides evidence regarding one of the elements of the offense [for gross sexual imposition]: that [the defendant] committed these acts for the purpose of sexual gratification.").

[67] *See State v. Goldblum*, 2nd Dist. Montgomery No. 25841, 2014-Ohio-5068, ¶ 34 (finding that evidence that the defendant had previously sexually abused minor girls while they were at sleepovers in his house by removing their underwear and either gazing at or touching their vaginas was relevant to the defendant's purpose or intent in abusing the victim, and also to rebut the defendant's contention that "there were innocent, nonsexual explanations" for him to have removed blankets from the girls when they suddenly awoke).

[68] *See State v. Shank*, 9th Dist. Medina No. 14CA0090-M, 2016-Ohio-7819, ¶40 (finding admissible for the purpose of demonstrating a common plan evidence showing multiple similarities between the sexual abuse of the present victim and an earlier abused teenaged girl, near the same age as the victim, where the earlier minor girl was similarly given alcohol in the defendant's home, and the incident of sexual abuse occurred after the previously abused girl became very intoxicated).

[69] *Williams*, 2012-Ohio-5695 at ¶ 19.

admissible if its probative value is substantially outweighed by the danger of unfair prejudice * * *."[70]

In determining whether there is unfair prejudice, courts place emphasis on the word "unfair," since all relevant evidence is prejudicial.[71] Rather, unfairly prejudicial evidence is evidence that "might result in an improper basis for a jury decision."[72] Prejudicial evidence "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish * * *."[73] Furthermore, because determining fairness is a subjective question, "whether evidence is unfairly prejudicial is left to the sound discretion of the trial court."[74] Once given an instruction, the jury is presumed to have followed it.[75]

To return to the case of *State v. John R. Witzel, II*, 2005 CR 002085, in which the defendant was convicted of multiple counts of child pornography possession, the court finds this evidence marginally relevant, but its risk of unfair prejudice to the defendant substantially outweighs its limited probativity. As discussed, the child pornography convictions are somewhat relevant to the defendant's sexual gratification because it shows that he is attracted to children. However, the substantial stigma associated with a child pornography possession conviction, no less multiple convictions, will likely evoke a sense of horror and disgust from the jury that is much greater than its relevance to this case. As such, the court finds that the convictions in *State v. John R. Witzel, II*, 2005 CR 002085 are inadmissible.

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[70] Evid.R. 403(A).
[71] *Crotts*, 2004-Ohio-6550 at ¶¶ 23-24.
[72] *Mills*, 2016-Ohio-6985 at ¶ 18, citing *State v. Bowman*, 144 Ohio App.3d 179, 186, 759 N.E.2d 856 (12th Dist. 2001).
[73] *Crotts*, 2004-Ohio-6550 at ¶ 24, quoting *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001).
[74] *Crotts*, 2004-Ohio-6550 at ¶ 25, citing *State v. Robb*, 88 Ohio St.3d 59, 68, 723 N.E.2d 1019 (2000).
[75] *Mills*, 2016-Ohio-6985 at ¶ 17, quoting *Jones*, 2012-Ohio-5677 at ¶ 194.

Although prejudicial due to its relevance to this matter, the remaining other acts evidence is not unfairly prejudicial to the defendant, these other acts being the defendant's prior conduct with T.E. and his alleged sexual abuse of Jessica and Lindsay in 2005. To further prevent the risk of unfair prejudice, the court will issue a limiting instruction to the jury, at multiple points in the trial, instructing the jury to only consider the other acts evidence for the purpose of establishing the defendant's motive, plan, and absence of mistake or accident.

Likewise, to additionally ensure no unfair prejudice results, as the proponent of the other acts evidence, the state may only use this evidence to prove the defendant's motive, plan, and absence of mistake or accident. The state is precluded from arguing or suggesting that the jury consider the other acts evidence for <u>any</u> other purpose. As the court advised the parties at oral argument on this matter, if the state argues or suggests that the jury consider the evidence for any other purpose, aside from motive, plan, and absence of mistake or accident, a mistrial may result. Moreover, a mistrial almost certainly will result if the prosecution in any way tries to argue or suggest, directly or indirectly, that the evidence of the other acts demonstrates the defendant's character for the purpose of showing that he acted in conformity with that character in this case.

For these reasons, the court finds admissible (1) evidence regarding the defendant's prior conduct with T.E., and (2) evidence regarding the defendant's sexual abuse of Lindsay McCrory and Jessica Emery to establish the defendant's motive, plan, and absence of mistake or accident.

CONCLUSION

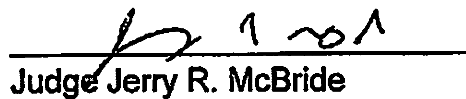
For the foregoing reasons, the court hereby denies in part and grants in part the defendant's motion in limine.

The state may not introduce evidence concerning the defendant's convictions in *State v. John R. Witzel, II*, 1996 CR 005209 and *State v. John R. Witzel, II*, 2005 CR 002085.

The state may introduce evidence concerning the defendant's prior conduct with T.E. and his alleged prior sexual abuse of Lindsay McCrory and Jessica Emery to prove the defendant's motive, plan, and absence of mistake or accident.

IT IS SO ORDERED.

DATED: 3-27-17



Judge Jerry R. McBride