

Appellate Court Decisions - Week of 9/21/20

Note: This is not a comprehensive list of every case released this week.

First Appellate District of Ohio

Nothing to report.

Second Appellate District of Ohio

Nothing to report.

Third Appellate District of Ohio

State v. Orta, 2020-Ohio-4514

Direct contempt

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/3/2020/2020-Ohio-4514.pdf>

Trial court erred in holding spectator/appellant in direct contempt for refusal to submit to a urine drug test; there was no recognized authority which would authorize a trial judge to order a non-defendant to submit to such a test.

Fourth Appellate District of Ohio

Nothing to report.

Fifth Appellate District of Ohio

Nothing to report.

Sixth Appellate District of Ohio

Nothing to report.

Seventh Appellate District of Ohio

Nothing to report.

Eighth Appellate District of Ohio

State v. Elko, 2020-Ohio-4466

Jury instruction; resisting arrest and excessive force

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2020/2020-Ohio-4466.pdf>

Trial court erred in failing to instruct jury that police officer's use of excessive force is a complete defense to the offense of resisting arrest; case remanded for new trial.

State v. Brown, 2020-Ohio-4474

Plea

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2020/2020-Ohio-4474.pdf>

Appellant's guilty plea to rape was invalid where trial court completely failed to comply with Crim.R. 11 as it "did not even mention sex-offender classification until after it accepted Brown's guilty pleas. Even then, however, the trial court simply told Brown that he would be classified as a Tier III sex offender. The trial court did not inform Brown that there would be any consequences as a result of his sex-offender status." Case also remanded for trial court to calculate jail-time credit; to issue a nunc pro tunc sentencing order incorporating all the consecutive sentence findings the court made at the sentencing hearing; and issue a nunc pro tunc correcting two aggravated robbery convictions to robbery convictions.

Ninth Appellate District of Ohio

Nothing to report.

Tenth Appellate District of Ohio

Nothing to report.

Eleventh Appellate District of Ohio

State v. Delgros, 2020-Ohio-4529

Driver's license suspension

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/11/2020/2020-Ohio-4529.pdf>

Trial court erred in imposing a lifetime driver's license suspension for convictions of aggravated vehicular assault and failure to stop after accident; such suspension is contrary to law, as the court exceeded the prescribed range for class four and five suspensions. Such license suspension is vacated and case remanded.

Twelfth Appellate District of Ohio

Nothing to report.

Supreme Court of Ohio

State v. Hartman, 2020-Ohio-4440

Evid.R. 404(B)

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4440.pdf>

State v. Smith, 2020-Ohio-4441

Evid.R. 404(B)

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4441.pdf>

Both of these cases dealt with Evid.R. 404(B). In *Hartman*, the OSC found the evidence that appellant had sexually abused his stepdaughter in 2012 was inadmissible for any of the 404(B) purposes; therefore, the COA's decision reversing the conviction was affirmed.

In *Smith*, the OSC found the evidence that appellant had previously molested his daughter, but was acquitted of that charge 30 years before, was admissible for the 404(B) purpose of accident to negate appellant's claim that he had touched his granddaughter by mistake or accidentally. Also, the OSC holds that double jeopardy does not bar the use of other-acts evidence related to acquitted charges. COA's decision affirming conviction was affirmed.

The results in these cases, although important to each defendant, are not the focus of this summary; the OSC finally appears to signal its intention to carefully scrutinize a trial court's allowance of other-acts evidence; to force trial courts to be more "robust" in their analysis, including an Evid.R. 403(A) analysis of probative vs. prejudicial; and to be clear in their rulings and jury instructions as to the specific 404(B) purpose for which the evidence is permitted, not the laundry list of purposes that has become the custom in trials. I sent out a separate email yesterday which provided an excellent summary of the rulings. I am including it here as well:

On Tuesday, the Supreme Court of Ohio addressed important Evid.R. 404(B) issues in two unanimous decisions written by Justice DeWine. *State v. Hartman*, 2020-Ohio-4440; *State v. Smith*, 2020-Ohio-4441, attached. The Court is clearly signaling its intent to carefully scrutinize Evid.R. 404(B) evidence and warning trial courts that they must be more "robust" in their analysis of whether such evidence is admissible.

Three things to note from the rulings:

FIRST, in both cases, the Court announced a NEW RULE:

Evid.R. 404(B) limiting instructions must be **NARROWLY TAILORED** to the facts of the case and **STATE ONLY THE SPECIFIC 404(B) PURPOSE(s)** for which the other acts evidence is admissible. The trial court may **NOT** simply read the generic laundry-list of permissible purposes in Evid.R. 404(B).

****Our Common Pleas Judges routinely just read the 404(B) list. Be ready to challenge this in every case in order to make a proper record.****

- “To tell a jury that a certain piece of evidence may be considered as evidence of ‘proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,’ Evid.R. 404(B), imparts nothing meaningful and is akin to telling the jurors that the evidence may be considered for any purpose.” *Hartman*, ¶ 69.
- The “boilerplate language” in the OJI is “merely a template” and is “overly broad.”
- **“Rather than recounting to the jury every purpose listed in Evid.R. 404(B),” trial courts must “state the specific purpose for which the other-acts evidence is being admitted in that case. It is important that judges do so.”** *Hartman*, ¶ 70.
- The Supreme Court also suggested that trial courts give additional instructions to clarify the proper use of other-acts evidence:

Rather than simply telling jurors that they may not consider certain evidence ‘to prove the character of the defendant in order to show that he acted in conformity with that character,’ Ohio Jury Instructions, CR Section 401.25, **the court may explain that the reason for this rule is that “it does not follow from the defendant’s past acts that he committed the particular crime charged in this case[.]”** And jurors would be well served by guidance connecting the limiting instruction to the state’s burden of proof: **the government has the burden of proving each element of this particular crime beyond a reasonable**

doubt, and its burden is not satisfied by an inference that the defendant committed this crime because his past acts suggest a propensity to commit crimes. *Hartman*, ¶¶ 69-71.

SECOND, in *Hartman*, the court reversed a rape conviction because of wrongly admitted Evid.R. 404(B) evidence, and generally scolded that trial courts are failing to adequately scrutinize the admissibility of other-acts evidence.

- Hartman was convicted by a jury of the rape of an adult female acquaintance (E.W.) in a hotel room; he claimed the encounter was consensual. The trial court had admitted evidence that Hartman had sexually abused his adolescent step-daughter four years earlier in their home. In both the charged rape and the other-acts sex abuse, Hartman allegedly assaulted the victims while they were sleeping. The trial court found the other-acts evidence was probative for the Evid.R. 404(B) purposes of modus operandi, scheme, intent, plan and absence of mistake.
- The Supreme Court held that the evidence was not probative for *any* 404(B) purpose.
 - It was not evidence of *modus operandi* because the fact that both crimes were committed against sleeping females was “hardly unique to Hartman as a perpetrator” and did not satisfy the *modus operandi* requirement that the charged crime and other-acts evidence share “the same distinctive, one-of-a-kind modus.” Furthermore, ***modus operandi* evidence is only admissible when identity is at issue**; however, Hartman raised a consent defense.
 - It was not probative of a common scheme or plan because Hartman’s “molestation of his stepdaughter four years prior was not linked to any overarching plan to commit rape against” an adult acquaintance in a hotel room.
 - It was not probative to show motive, intent, or absence of mistake because Hartman’s “molestation of his former stepdaughter does not reveal a specific reason for raping E.W.” and did not “provide the degree of similarity to infer intent” to rape his adult acquaintance. *Hartman*, ¶¶ 36-63.
- The Supreme Court noted much “confusion” among trial courts and urged that **trial courts must conduct a more “robust” Evid.R. 404(B) analysis ON THE RECORD (Court of Appeals must have a record-analysis to affirm)**:
 - The evidence must be probative for a 404(B) non-propensity purpose; **AND**
 - It must be probative of a material issue that is ***actually disputed***.
 - There must be “**substantial proof**” that the alleged other act was committed by the defendant.
 - **Evid.R. 403(A) analysis**: the evidence must be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or misleading the jury.
 - In evaluating probative value, a trial court must consider “whether the prosecution is able to prove the same fact through less prejudicial means.” *Hartman*, ¶¶ 24-32.

THIRD, in *Smith*, the Court held that Double Jeopardy protections do not bar the use of other-acts evidence relating to past-criminal charges for which a defendant was acquitted. So, at Smith’s trial charging him with sexual abuse of his granddaughter, Double Jeopardy did not bar

the State's use of 404(B) evidence that Smith had previously sexually abused his daughter, even though he had been acquitted of the sexual abuse of his daughter at a prior trial.

Sixth Circuit Court of Appeals

Nothing to report.

Supreme Court of the United States

Nothing to report.