IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2004 Term

No. 31405

STATE OF WEST VIRGINIA,
Plaintiff below, Appellee,

V.

EDWIN MACK TAYLOR,
Defendant below, Appellant.

Appeal from the Circuit Court of Mineral County
Honorable Phil Jordan
Case No. 02-F-35
REVERSED

Submitted: January 14, 2004
Filed: February 3, 2004

Amanda H. See
Moorefield, WV
Counsel for Appellant

Dennis V. DiBenedetto
Grant County Prosecuting Attorney
Petersburg, WV
Counsel for Appellee

The opinion of the Court was delivered Per Curiam.

CHIEF JUSTICE MAYNARD and JUSTICE DAVIS dissent and reserve the right to file dissenting opinions.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin,* 176 W. Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence." Syllabus point 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

2. "As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial

court's discretion will not be overturned absent a showing of clear abuse." Syllabus point 10, in part, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994)

Per Curiam:

Edwin Mack Taylor (hereinafter "Mr. Taylor") appeals his convictions for two counts of breaking and entering, one count of grand larceny, and one count of petit larceny[1] in the Circuit Court of Mineral County.[2] After having read the briefs, reviewed the record, and heard oral argument, we find that the circuit court violated W. Va. R. Evid. 404(b) by allowing evidence whose prejudicial effect substantially outweighed its probative value. Thus, we reverse Mr. Taylor's conviction and remand this case for a new trial.

I.

FACTUAL AND PROCEDURAL HISTORY

Mr. Taylor was indicted for the breaking and entering of a building owned by Grant County Mulch, Inc. and for committing the grand larceny of a number of power tools stored therein. In this same indictment he was also indicted for the breaking and entering of a building owned by Schell Farms, Inc. as well as for the grand larceny of a number of power tools stored therein. These crimes occurred in December of 2000.

---

[1]Although charged with grand larceny in Count II of the indictment, at some point in the proceedings below this Count was reduced to petit larceny and the jury was only instructed on petit larceny under Count II.

[2]The State originally brought this case in Grant County. The trial judge granted Mr. Taylor's motion for a change of venue to Mineral County.

On December 5, 2001, the State filed a notice of intent to use Rule 404(b)[3] evidence (hereinafter "the 404(b) notice"). In the 404(b) notice, the State explained that

> the Defendant was a user of various controlled substances, particularly methamphetamine, during the time frame that encompassed the commission of these crimes. The Defendant purchased controlled substances from Jamie W. Sites and often paid for same by selling to Mr. Sites stolen property or using cash which he acquired by selling stolen property to others.

The 404(b) notice further provided that "[s]everal of the State's witnesses were aware of the Defendant's drug habit and were also aware that the Defendant's habit of stealing property for the purpose of funding his drug habit." The notice finished that "[t]his evidence would be used to show intent, motive, scheme and complete story."

On February 15, 2002, the circuit court conducted a hearing on the State's

---

[3]W. Va. R. Evid. 404(b) provides:

> **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

intent to use 404(b) evidence. At the hearing, Wesley Rohrbaugh testified that Mr. Taylor was his roommate and that Mr. Taylor had admitted to using drugs such as "[c]rystal meth, crank, maybe, marijuana." Mr. Rohrbaugh also testified that his personal observations of Mr. Taylor indicated that he was suffering from a change in behavior that Mr. Rorhrbaugh believed illustrated Mr. Taylor's problem with drugs.[4] This testimony of drug use was confirmed by Greg Fortner, whose trial and *in camera* testimony was that he consumed methamphetamine and other drugs with Mr. Taylor. The State also elicited testimony from Cowan H. Pennington that he knew Mr. Taylor and that he smoked marijuana with Mr. Taylor and observed Mr. Taylor a "couple of times" with a "crushed up . . . white, powdery substance" that Mr. Taylor "stuck . . . on a piece of aluminum foil, and . . . burnt the bottom of the aluminum foil, [and] sucked in the smoke with the pen." Although he testified he was not sure, Mr. Pennington stated that he believed Mr. Taylor told him that the drug he was smoking was "crystal meth." Mr. Pennington also testified that Mr. Taylor tried to sell a water pump that was identical to one that Mr. Pennington's uncle reported missing and that Mr. Taylor unsuccessfully sought Mr. Pennington's help in stealing a snowblower and lawnmower for a friend. Mr. Pennington finally testified that during this period, Mr. Taylor did not have a job. At trial, Mr. Pennington's testimony was generally consistent with his

[4]At trial, Mr. Rohrbaugh testified that he had discussed drug use with Mr. Taylor. Mr. Rohrbaugh did not testify as to Mr. Taylor's admission of drug use nor did Mr. Rohrbaugh testify as to his opinion that Mr. Taylor had a drug problem.

in camera testimony.

The final witness the State presented was Jamie W. Sites who testified, both at the *in camera* hearing and trial that he was a methamphetamine dealer and that he would trade methamphetamine to Mr. Taylor in exchange for money and property, either directly or through Greg Fortner, including property that had been taken from Grant County Mulch and Schell Poultry.

After the presentation of this testimony, the circuit court found that

> by a preponderance of the evidence . . . the Defendant did have a problem with the use of controlled substances, especially methamphetamine before, during and after the time frame of the crimes with which he is charged. The Defendant's drug problem and his habits of stealing to fund said drug habit are relevant to the charges in this Case under the Rules of Evidence. Upon balancing the evidence the Court would find that the probative value does outweigh its prejudicial effect. Said evidence will be useable by the State in its case in chief for the limited purposes of establishing motive, intent, scheme or plan and complete story.

At trial, over Mr. Taylor's renewed objections, the witnesses from the 404(b) hearing testified in substantial conformity with their 404(b) hearing testimony.

II.

STANDARD OF REVIEW

In this appeal, we are asked to examine whether the trial court properly admitted evidence of Mr. Taylor's history of drug use under Rule 404(b). In applying Rule 404(b), we have held:

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

We have further said that

> The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for

> a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. LaRock, 196 W. Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996) (footnote omitted). We have also held that "[a]s to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse." Syl. pt. 10, in part, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994). With this standard in mind, we turn to the parties' contentions.

III.

DISCUSSION

Mr. Taylor makes two assignments of error. He first contends the circuit court erred in finding that there was a proper purpose supporting introduction of Mr. Taylor's drug use. He alternately posits that Mr. Taylor's drug use violated W. Va. R. Evid. 403 since its prejudicial effect substantially outweighed its probative value. The State responds that the circuit court correctly found that Mr. Taylor's drug use was legitimately offered to show his motive, scheme, plan or intent and that this evidence did not unfairly prejudice Mr. Taylor. We find that the State's 404(b) evidence was improperly admitted because its prejudicial effect substantially outweighed its probative value under Rule 403.

Mr. Taylor contends that the introduction of his habitual drug use unfairly prejudiced him under W. Va. R. Evid. 403. Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." While we have held that we review a trial court's decision that the probative value of evidence is not substantially outweighed by its prejudicial effect is reviewed only for abuse of discretion, *e.g.*, syl. pt. 10, *Derr; Gable v. Kroger Co.*, 186 W. Va. 62, 66, 410 S.E.2d 701, 705 (1991) ("Rules 402 and 403 of the *West Virginia Rules of Evidence* [1985] direct the trial judge to admit relevant evidence, but to exclude any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice to the defendant. Such decisions are left to the sound discretion of the trial judge . . . ."); *In re Interest of Carlita B.*, 185 W. Va. 613, 630, 408 S.E.2d 365, 382 (1991) ("While we recognize that the probative value of such evidence may, at some point, be substantially outweighed by its unfair prejudicial impact, that balancing is within the sound discretion of the trial court, and its decision will be reversed only upon a clear abuse of discretion."), "[w]e have also cautioned, however, that we will not simply rubber stamp the trial court's decision when reviewing for an abuse of discretion." *State v. Hedrick*, 204 W. Va. 547, 553, 514 S.E.2d 397, 403 (1999). *See also State ex rel. Leung v. Sanders*, ___ W. Va. ___, ___, 584 S.E.2d 203, 209 (2003) (per curiam) (quoting *Hedrick*).

Under Rule 403 "[u]nfair prejudice does not mean damage to a defendant's

case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggests decision on an improper basis." *State v. LaRock*, 196 W. Va. 294, 312, 470 S.E.2d 613, 631 (1996). The advisory committee's note to Federal Rule of Evidence 403 explains that "'[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." We think that test is met here.

"On occasion, the courts have commented that certain categories of crimes can create severe prejudice; by their very nature, these crimes can be highly and unusually inflammatory. The courts have included the following crimes in that category . . . narcotics offenses . . . ." 2 Edward J. Imwinkelreid, *Uncharged Misconduct Evidence* § 8:24 at 108 (Rev. Ed. 2003) (footnotes omitted). Thus, "even if some justification is presumed from the record before us for such evidence, its highly prejudicial effect would far outweigh any probative value [under] Rule 403, W. Va. R. Evid." *State v. Wyatt*, 198 W. Va. 530, 544, 482 S.E.2d 147, 161 (1996). In more specific terms, "[e]ven were we to conclude that proof of defendant's addiction constituted evidence of 'motive' within the meaning of [Rule] 404(b), we are satisfied that the prejudicial effect of such evidence far outweighs any probative value it might have and thus it should be barred on that basis." *State v. Mazowski*, 337 N.J. Super. 275, 285, 766 A.2d 1176, 1182 (App. Div. 2001).

We concur with the recognition of the California Supreme Court that "[t]he

impact of narcotics addiction evidence 'upon a jury of laymen [is] catastrophic . . . . It cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem . . . and has been taught to loathe those who have anything to do with illegal narcotics in any form or to any extent.'" *People v. Cardenas*, 31 Cal.3d 897, 907, 184 Cal. Rptr. 165, 170 (1982) (quoting *People v. Davis*, 233 Cal. App. 2d 156, 161, 43 Cal. Rptr. 357, 360 (1965)). We are not alone in agreeing with this view for the New Jersey Appellate Division has said that "the prejudicial nature of the evidence [of drug use] is particularly self-evident and overwhelming. It is difficult to conceive of anything more prejudicial to a defendant than presenting him to the jury as a drug addict[.]" *Mazowski*, 337 N.J. Super. at 287, 766 A.2d at 1183. *See also People v. Jones*, 119 Mich. App. 164, 168, 326 N.W.2d 411, 412-13 (1982) ("Evidence of heroin use, however, has a strong prejudicial effect."); *State v. Renneberg*, 83 Wash. 2d 735, 737, 522 P.2d 835, 836 (1974) (En Banc) ("In view of society's deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds of the average juror.") Thus, "[i]n cases where the object of the offense was to obtain money for drugs, as the prosecution alleges in this case, evidence of the accused's drug use has been found to be inadmissible." *People v. Holt*, 37 Cal.3d 436, 450, 690 P.2d 1207, 1214 (1984) (In Bank).

In this case, the State introduced considerable evidence of Mr. Taylor's habitual drug use. While the State points us to *State v. Johnson*, 179 W. Va. 619, 371

S.E.2d 340 (1988), where we approved the introduction of a defendant's past drug use to show motive to commit breaking and entering and concomitant larceny, we do not believe that *Johnson* disposes of the case here. In *Johnson*, for example, much of the evidence of drug use and the property crimes used to sustain the habit related not to the defendant, but to the defendant's co-conspirators. Here, though, the State's 404(b) evidence showed that Mr. Taylor himself was not only a regular user of marijuana but also of such hard drugs as regular and crystal methamphetamine and that he himself stole things in order to support his habit. Indeed, in *Johnson*, the evidence of the defendant's drug use was limited to testimony that the defendant "partied" with his co-conspirators–which we found was apparently a reference to the recreational use of drugs. *Id*. at 623, 371 S.E.2d at 344. Here, though, the State introduced considerable evidence of Mr. Taylor's drug use, including a vivid description by Mr. Pennington to the jury of how Mr. Taylor "st[uck] [crank] on tin foil and use[d] a straw and a lighter and smoke[d] it." Finally, the State's evidence relating directly to Mr. Taylor reached back over four months before the robbery. We also find that the prejudice here was enhanced because the State's evidence related to acts that were four months old at the time of the break-ins. *See State v. Walker*, 188 W. Va. 661, 669, 425 S.E.2d 616, 624 (1992) (threatening statement that defendant would burn down anyone who angered him inadmissible because it was made at least four months before charged arson).

Furthermore, while we recognize the circuit court gave limiting instructions

in this case (both at the time the evidence was offered at trial and then again when the court was instructing the jury before deliberations), given the "catastrophic" impact of Mr. Taylor's drug use, we have to conclude that this case presents an instance where limiting instructions simply could not have reduced the unfair prejudice to Mr. Taylor to a point where he could receive a trial based upon what was really at issue in this case--whether he broke and entered and committed larceny and not whether he should be convicted because of his habitual drug use. *See, e.g.*, 1 Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual* § 105.02[4] at 105-4 (8th ed. 2002) (footnote omitted) ("It is well recognized that in some cases a limiting instruction will be insufficient, and proffered evidence must be all together excluded under Rule 403.")

We find that the State's use of Mr. Taylor's drug habit went too far. Consequently, we must conclude that the circuit court abused its discretion.

IV.

CONCLUSION

The decision of the Circuit Court of Mineral County is reversed.

Reversed.