No. 31661 – State of West Virginia ex rel. Jason Caton v. The Honorable David A. Sanders, Judge of the Circuit Court of Berkeley County, West Virginia

FILED
July 14, 2004
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I concur in the Court's opinion. The logical analysis in the Court's opinion is the beginning of a welcome refinement of the 404(b) jurisprudence of this Court. *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994) and this Court's better 404(b) cases emphasize that the only legitimate use of "other bad acts" evidence occurs when certain *specific* and *directly relevant factual issues* are clearly present in a case, and the "other bad acts" evidence is *necessary* – that is, no other evidence or inference is available – to present proof on those factual issues.

Thus, in a sexual abuse case, if a defendant admits to touching a person intimately but denies any intentional criminal or sexual intent – where such intent is an element of the crime – other instances of intentional sexual touching *may* be admissible to refute the defendant's protestations of no illicit motive. However, in a sexual abuse case, the mere fact that the prosecution has the general burden of proof in a criminal case does not itself open the door to any available 404(b) evidence on every element of the crime.

If a defendant in such a case does not take the stand, or otherwise specifically contest the intent element while admitting the touching, the prosecution ordinarily could not put on evidence of other sexual offenses – because intent is not a fact specifically put in

issue. And in most cases the inference of an illicit motive may be fairly drawn from proof of the act itself – if the defendant does not admit the touching. Put another way, if a defendant entirely denies being present, or denies any contact with a defendant, the denial does not "open the door" to 404(b) evidence of other wrongful sexual touching incidents to show the intent or motive.[1] To hold otherwise would be the same as authorizing the introduction of a defendant's "rap sheet" as Exhibit No. 1 in every criminal prosecution.

The majority opinion's focusing on the specificity requirement of 404(b) is a positive step toward assuring that criminal convictions are based upon the direct evidence of a specific offense, and not upon the principle that "this is the kind of person who does these things."

Consider a bank robbery case. It is axiomatic that to prove criminal intent (that the defendant acted "feloniously"), one may not, in the trial of a bank robbery charge, automatically introduce evidence of other instances where the defendant robbed a bank. But if the defendant claims to have been pretending to rob the bank as a joke, then the other instances may be relevant. Or if the charge is conspiracy to rob, other instances of joint endeavor may be admissible to refute claims of no collusion between the actors.

Hundreds of years of Anglo-American jurisprudence cannot be cast aside in the zeal to convict and punish offenders. On a wall in my chambers are photographs of

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[1]The majority, I believe, is taking a step in the direction urged by former Justice Thomas Miller in his thoughtful dissent in *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990). *See also State v. Graham*, 208 W.Va. 463, 541 S.E.2d 341 (2000) (Starcher, J., dissenting.).

several dozen American citizens who were convicted of murder after 1970 or so, sentenced to die, and later were exonerated and released. One of the lessons of this photograph is that juries can be persuaded of a defendant's guilt when in fact the defendant is not guilty. Perhaps nothing is more persuasive of guilt than evidence of other similar offenses – that is the way people think. It is precisely for this reason that our law allows such evidence only for very narrow purposes and in exceptional circumstances. We must not stray from this principle.

In the instant case, it will not be until the actual trial of the case that the judge will have the final basis for deciding whether to admit the 404(b) evidence in question. That evidence's admissibility is not a given, under this Court's opinion. And the trial court must be very careful to require the prosecution to establish that the 404(b) evidence is not only relevant and probative – but necessary – with respect to a factual matter that has been put at specific issue in the case. Otherwise, admitting the evidence will be erroneous.

Accordingly, I concur, and I am authorized to state that Justice Albright joins in this separate opinion.