

STATE OF LOUISIANA

NO. 18-K-421

VERSUS

FIFTH CIRCUIT

WAYNE TERRIO

COURT OF APPEAL

STATE OF LOUISIANA

August 07, 2018

Susan Buchholz

First Deputy Clerk

****CONFIDENTIAL****
LSA-RS 46:1844(W)
ATTORNEYS OF RECORD
ONLY

IN RE WAYNE TERRIO

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE SCOTT U. SCHLEGEL, DIVISION "D", NUMBER 17-4949

Panel composed of Judges Marc E. Johnson,
Hans J. Liljeberg, and Ellen Shirer Kovach, Pro Tempore

WRIT GRANTED

Relator seeks review of the trial court's July 12, 2018 ruling granting the State's motion in limine to exclude evidence of the victim's alleged alcoholism. Relator argues that such evidence is necessary in order for him to present a defense – namely to explain the intent of his actions which led to the criminal charge against him for stalking.

On August 2, 2017, Relator was charged with stalking in violation of La. R.S. 14:40.2. Relator subsequently filed a notice of intent to use other wrongs, acts and crimes evidence under La. C.E. art. 404(B), indicating his intent to present evidence of the victim's alleged alcoholism, consisting of photographs, text messages and the victim's employment records. The State responded by filing a motion in limine to exclude evidence of the victim's alleged alcoholism. The State specifically sought to limit cross-examination of the victim and to exclude evidence of the victim's employment records and Relator's handwritten notes, emails, text messages, audio and video recordings and photographs provided to the State by Relator during discovery.

A hearing on the motion in limine was held on July 12, 2018. During the hearing, general references were made to photographs and text messages reportedly alluding to the victim's drinking, but no specific photographs or text messages were identified or offered into evidence.¹ At the conclusion of the hearing, the trial court summarized the State's motion in limine as a general request "to prohibit any and all

¹ Relator attached several photographs to his writ application (Exhibit 2) as a "small sample" of the 200 photographs he seeks to introduce into evidence to corroborate his claim of the victim's alcoholism. He also attached the victim's employment records (Exhibit 4), which he seeks to rely upon to show she was terminated from her job due to alcoholism. However, we cannot consider any exhibits filed into the record as attachments to a writ application because such attachments are not evidence and, thus, are not properly part of the record. *See Walker v. Super 8 Motels, Inc.*, 04-2206 (La. App. 4 Cir. 12/7/05); 921 So.2d 983, 987.

allegations of alcoholism and any and all supporting evidence regarding said alcoholism as to the victim on behalf of the defendant.” The trial court then granted the State’s motion in limine, finding that said evidence was prohibited character evidence under La. C.E. art. 404(A).

A trial court’s ruling on the admissibility of evidence will not be disturbed absent a clear abuse of the trial court’s discretion. *State v. Sandoval*, 02-230 (La. App. 5 Cir. 2/25/03); 841 So.2d 977, 985, *writ denied*, 03-853 (La. 10/3/03); 855 So.2d 308. Upon review, we find the trial court abused its discretion in its ruling.

Under La. C.E. art. 404(A), evidence of a person’s character or a trait of his character, such as a moral quality, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. La. C.E. art. 404(B) further provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. However, there is an exception under Article 404(B) that evidence of other crimes, wrongs, or acts **may** be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

This court has previously determined that a defendant may utilize La. C.E. art. 404(B) in the same manner that the State may seek to introduce evidence under the article, sometimes referred to as “reverse 404(B)” evidence. *See State v. Beal*, 15-806 (La. 4/11/16) (unpublished writ disposition). Nevertheless, a defendant seeking to introduce evidence of a State’s witness’ other acts under the article must still show that the evidence is relevant to show his motive, opportunity, intent, etc. and that the probative value of the evidence outweighs any prejudicial effect, confusion of the issues, misleading of the jury, or undue delay. *See* La. C.E. art. 403; *State v. Miller*, 98-301 (La. 9/9/98); 718 So.2d 960, 962.

Upon considering Relator’s writ application, we find the trial court erred in generally excluding any and all references to the victim’s alleged alcoholism and failing to consider the admissibility of that evidence under La. C.E. art. 404(B) – specifically whether said evidence is relevant to show Relator’s motive, opportunity, intent, etc. – and, if relevant, to conduct the balancing test provided in La. C.E. art. 403 as to each specific piece of evidence sought to be introduced by Relator, including consideration of the reliability of each piece of evidence as well as its cumulative effect. While we find the trial court erred in generally excluding the evidence *in toto* on the basis that it was prohibited character evidence, this Court expresses no opinion of whether the evidence sought to be introduced by Relator would ultimately be admissible.

Accordingly, we grant Relator’s writ application, vacate the trial court’s July 12, 2018 ruling granting the State’s motion in limine, and remand the matter to the trial court for further proceedings.

Gretna, Louisiana, this 7th day of August, 2018.

MEJ
HJL
ESK

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
ROBERT M. MURPHY
STEPHEN J. WINDHORST
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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **08/07/2018** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY

CHERYL Q. LANDRIEU
CLERK OF COURT

18-K-421

E-NOTIFIED

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