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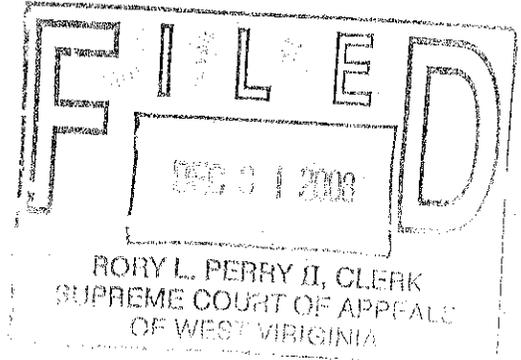
In the Supreme Court of Appeals
of the State of West Virginia

Docket No: 08-34219

STATE OF WEST VIRGINIA,
Appellee,

V.

JOSEPH FRITACHE WHITE,
Appellant.



FROM THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA
CASE NO.: 07-F-49

APPELLANT'S BRIEF

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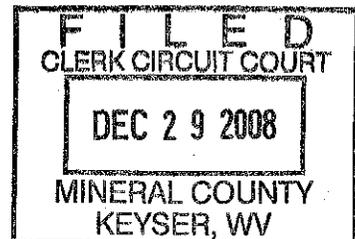


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APPELLANT'S BRIEF ON BEHALF OF
JOSEPH FRITZCHE WHITE

The Appellant seeks review of the Court's verdict of guilty by order of the Mineral County Circuit Court entered September 27, 2007, and the Court's sentencing of the Appellant to not less than ten nor more than 25 years for each of his three felony convictions of Sexual Assault by order of the Mineral County Circuit Court entered December 13, 2007.

I. JURISDICTION

This petition is presented as a matter within the original jurisdiction of the Court as provided by the Constitution of the State of West Virginia and Rule 3 of the West Virginia Rules of Appellate Procedure.

II. STATEMENT OF THE CASE

The Appellant was indicted by the grand jury in Mineral County and demanded a trial by jury, which was held on September 25, 2007, in the Mineral County Circuit Court. During jury deliberations the jury sent a note to the Court asking if they were allowed to consider the fact the Appellant was a registered sex offender.

After investigation by the Court it appeared the statement of the victim contained a question by a police officer in which he asked the victim if she knew the Appellant was a registered sex offender.

No 404(b) or limine motions were filed. The prosecuting attorney had indicated verbally to defense counsel that the prosecuting attorney did not intend to offer any evidence of previous or collateral crimes or wrongful acts. When the prosecuting attorney offered the victim's statement into evidence the defense did not object.

The fact is that both the prosecuting attorney and defense counsel had many times reviewed the statement but both failed to notice the statement regarding the Appellant being registered as a sex offender. The prosecuting attorney will verify this fact that he did not know the statement contained such information. Defense counsel as well will attest that he likewise reviewed the statement but failed to notice the information about the Appellant's registration as a sex offender.

Defense counsel moved for a mistrial, which was denied. The Court did communicate to the jury a limiting instruction directing the jurors to disregard the information. However, after having deliberated for several hours prior to discovering the sex offender statement, the jury quickly found the Appellant guilty. The sex offender information obviously affected the jurors' deliberation and verdict. The jury found the Appellant guilty of first degree sexual assault and from this conviction he appeals.

III. SUMMARY OF FACTS

The Appellant was charged with sexual assault. He allegedly met the victim at a party and offered to drive her home. The victim alleged on the trip home the Appellant pulled the car into an isolated area and forced her to engage in sexual intercourse and later oral sex. The Appellant admits engaging in these sexual acts but contends the victim consented. There were no other witnesses to the alleged crime.

IV. ASSIGNMENT OF ERRORS

1. EVIDENCE INADVERTENTLY ADMITTED
2. EVIDENCE NOT PROPERLY ADMITTED

3. EVIDENCE MORE PREJUDICIAL THAN PROBATIVE

V. PRESENTATION OF ARGUMENT

1. Evidence Inadvertently Admitted

The first argument is factual rather than legal. It is most succinctly stated by “then” prosecutor (now) Judge Nelson at page 218 of the trial transcript, line 21, where the prosecutor says “I apologize. I didn’t know it was there.”

Mr. Nelson is an honest man whom I respect. While adversaries professionally, we are friends outside of the courthouse. There is no doubt in my mind that he did not know the evidence had been introduced, just as I did not realize it had been introduced and admitted. No 404(b) motion was filed because he had assured me he had no intention of using such evidence and I did not doubt his word.

The answer to the mystery is obvious and the culprit is a well meaning person who, at some point, did not copy the last page of the victim’s statement which was introduced and admitted as evidence. I did not object to the statement as the victim had testified consistently with the statement. The damage remarks about the Appellant’s prior sex offender registration are on the last page of the statement and the copy handed to the jury included the last page.

The copy in my file did not include the final page. The prosecutor had never seen the final page either, or the state, or at least had no recollection of seeing it. I would obviously have vehemently objected to its admission if I had been aware of the sex offender information. To punish the Appellant for what appears to be a clerical mistake is not justice.

It could have happened at the state police barracks, the prosecutor’s office, or the Clerk’s office. The point is the evidence was not knowingly introduced.

II. Evidence Not Properly Admitted

Evidence Admissible Under Rule 404(b) Must Not Be Unfairly Prejudicial. Rule 404(b) is simply a specialized rule under the relevancy section. Accordingly, as with any relevancy determination under Rule 401, counsel offering extrinsic offense evidence must be prepared to (1) identify the consequential fact to which the proffered extrinsic evidence is directed, e.g., identity, motive, etc.; (2) establish the extrinsic offense and the party's connection with it; and (3) articulate the evidentiary hypothesis by which the consequential fact may be inferred from the proffered evidence. It is not enough under Rule 404(b) that another purpose be identified. The evidence must also be relevant under Rule 401. *United States v. Snowden*, 770 F.2d 393, 396-97 (4th Cir. 1985). In *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974), the court suggested that such evidence will be considered strictly upon the ground of its relevancy to the purpose for which it is sought to be introduced. Once the proffered evidence is shown to be relevant and that it is not offered to demonstrate the prohibited area of character, Rule 403 must still be considered. It is clear that under Rule 404(b) evidence of misconduct is not admissible unless it is relevant to one of the exceptions. See *United States v. Poore*, 594 F.2d 39 (4th Cir. 1979). In *United States v. Johnson*, 610 F.2d 194 (4th Cir. 1979), evidence that a defendant participated in another bank robbery was held not admissible because it did not meet any recognized exception. If the evidence is introduced merely to show propensity or disposition to commit a crime, the admission is reversible error. *United States v. Masters*, 622 F.2d 83 (4th Cir. 1980).

As stated above by Professor Cleckley, the prosecution must "attach" a purpose to introduction of the evidence. This was definitely not so in our case as the prosecutor did not

know the evidence was introduced for any purpose it was inadvertently introduced as explained earlier. Prosecutor Nelson will verify this at any time.

Therefore, it cannot be admissible since it was introduced for no particular purpose. The jury therefore had no other choice but to assume it was introduced to demonstrate the Appellant's propensity to commit crimes.

III. Evidence More Prejudicial than Probative

"Establishment of past criminal conduct by a Defendant is not allowed when its only object or effect is to show an accused's propensity toward crime." *United States v. Tibbetts*, 565 F2d 867 (4th cir. W.Va. 1977). Again, in our case, the evidence was not admitted for any particular purpose, and in fact for no purpose at all, but inadvertently. Therefore, the only possible effect of its admission would be to inform the jury the Appellant had a propensity to commit sex crimes.

Although such evidence of other crimes is admissible to prove intent, scheme, opportunity or a business enterprise, no such application exists in our case. *United States v. Gallo*, 782 F2d 1191 (4th Cir. W.Va. 1986). In the instant case the information viewed by the jury regarding Appellant's previous sex crime conviction could not prove specific intent for the instant crime, and therefore is not admissible. Similarly, the fact of his previous sex crime conviction does not prove scheme, opportunity, or the existence of a business enterprise. Therefore, 404(b) does not permit admission of the evidence.

At no time did the Appellant attempt to introduce any evidence of his good character or reputation. The door was never opened so there can be no application of 404(a).

Even if 404(b) evidence is admitted in error, the Court will not reverse if it finds the error harmless beyond a reasonable doubt. *See, e.g., Weaver*, 282 F.3d at 314-15; *United States v. Kenny*, 973 F.2d 339, 344 (4th Cir. 1992); *United States v. Morison*, 844 F.2d 1057, 1078 (4th Cir. 1988); and *United States v. Davis*, 657 F.2d 637, 640 (4th Cir. 1981).

Nevertheless, there are occasions when the admission of 404(b) evidence would be sufficiently harmful to warrant reversal. *See, e.g., United States v. Madden*, 38 F.3d 747, 751-52 (4th Cir. 1994) (reversing bank robbery conviction due to evidence of Appellant's occasional drug use); *United States v. Hernandez*, 975 F.2d 1035 (4th Cir. 1992) (reversing cocaine conspiracy conviction due to admission of evidence of Appellant's "recipe" for crack cocaine and prior sales of crack in another jurisdiction); and *United States v. Sanders*, 964 F.2d 295 (4th Cir. 1992) (admission of prior conviction reversible error in regard to one conviction, harmless as to another).

Finally, evidence of "other crimes" should be distinguished from "evidence of uncharged conduct [arising] out of the same series of transactions as the charged offense, or [evidence that] is necessary to complete the story of the crime on trial." *United States v. Kennedy*, 32 F.3d 876, 886 (4th Cir. 1994) (approving evidence of criminal conduct involving uncharged individuals which took place a year before the charged conspiracy period, without recourse to Rule 404(b)). Accord *United States v. Lipford*, 203 F.3d 259, 268-69 (4th Cir. 2000) (shooting at police executing search warrant, hitting one, were "acts intrinsic to the crime charged" not governed by Rule 404(b)); *United States v. Loayza*, 107 F.3d 257, 263 (4th Cir. 1997) (evidence of similar conduct after last overt act in indictment held "direct evidence of scheme to defraud, not Rule 404(b) evidence"); *United States v. Chin*, 83 F.3d 83 (4th Cir. 1996) (approving evidence of uncharged murder and threats to murder in prosecution of heroin distribution and other drug-

related crimes as “acts intrinsic to the alleged crime”); *Powers*, 59 F.3d at 1464-68 (evidence of beatings, cruelty, and threats to kill family part of “res gestae” in prosecution of Appellant for repeatedly raping his minor daughter); *Mark*, 943 f.2d at 448 (evidence of uncharged criminal activity admissible “where it furnishes part of the contest of the crime”); and *Masters*, 622 F. 2d at 87 (evidence of uncharged criminal conduct admissible if it “served to complete the story of the crime on trial”).

In our case none of these apply. Again, the evidence was introduced for no particular purpose and, in fact, was not knowingly introduced.

Although both the Fourth Circuit and this Court have tended to allow broad discretion to trial courts and tend to admit as much relevant evidence as possible, there are limits. The discretion of the trial court can be advised. In fact, it has been held that even if the trial court does not correctly balance the probative value and prejudice, this is not fatal as long as the appellate court can find the probative value was high and no possible unfairness would result.

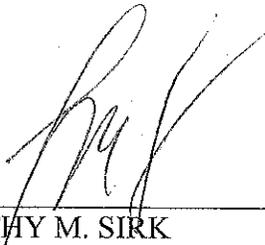
This is a heavy burden to bear. How can a trial court determine no possible unfairness resulted from admission of the evidence. It is obviously very possible and probable that a jury is more likely to convict a sex offender if they know he has previously been convicted as a sex offender. While jurists like to think such evidence can truly be “disregarded” by a jury, human nature dictates otherwise.

VI. CONCLUSION

The evidence should never have been admitted. The curative instruction was insufficient. The evidence was more prejudicial than probative. Justice would not allow such a tainted conviction.

Respectfully submitted

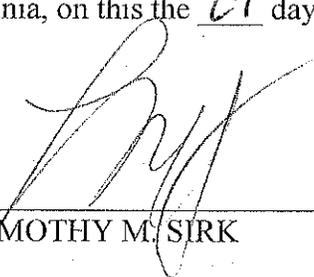
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CERTIFICATE OF SERVICE

I, Timothy M. Sirk, a practicing attorney, do hereby certify that I served a true copy of the foregoing *Appellant's Brief* upon the Plaintiff by hand delivering a true copy thereof to Lynn A. Nelson, Mineral County Prosecuting Attorney, at his office address of Mineral County Courthouse, 150 Armstrong Street, Keyser, West Virginia, on this the 29 day of December, 2008.



TIMOTHY M. SIRK

