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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

vs.

SUPREME COURT NO.: 34708

RAY RASH,

Appellant,

FROM THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

APPELLEE'S RESPONSE TO APPEAL BRIEF

Deborah K. Garton, Esq.
WV Bar #4752
Hensley, Muth, Garton & Hayes
P. O. Box 1375
Bluefield, WV 24701

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KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

The State does not dispute the nature of the proceedings set forth by the Appellant in his Brief (pp. 2-4).

STATEMENT OF FACTS

The State does not dispute actual facts, excerpts of testimony or the nature and ruling of various hearings and/or trials offered by the Appellant in his Brief (pp.4-10). However, the State does not adopt Appellant's reasoning, explanations, or arguments.

APPELLANT'S ASSIGNMENT OF ERRORS

1. Appellant contends the trial court erred in denying his motion to sever those

counts involving EHW¹ and AL.

2. Appellant contends that the trial court erred in permitting the State to elicit the testimony of EL pursuant to Rule 404(b) of the West Virginia Rules of Evidence.

3. Appellant contends that his due process rights were violated by trying him for the sexual abuse of EHW in 1989.

4. Appellant contends that his rights to confrontation were violated by EHW's testimony that she received post-abuse treatment at Southern Highlands Community Mental Health Center.

5. Appellant contends that the trial court erred in allowing EHW to testify as to certain effects of the sexual abuse.

6. Appellant contends that the trial court erred when it refused to strike the testimony of EHW with respect to certain effects of his abuse because it somehow violated his right to confrontation.

POINTS AND AUTHORITIES RELIED UPON

Constitution:

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|---|---|
| Fifth Amendment to the United States Constitution | 8 |
| Article III, Section 10, of the West Virginia Constitution. | 8 |

Cases:

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| <u>State v. Ludwick</u> , 475 S.E.2d 70, 72 (1996) | 6 |
|--|---|

¹EHW are the victim's current, married initials and represent her name as used at trial. However, the indictment refers to her as ECH which were her maiden initials.

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| <u>State v. Hatfield</u> , 380 S.E.2d 670 (1988) | 4 |
| <u>State v. Drennen</u> , 408 S.E.2d 24 (1991) | 4 |
| <u>State v. Edward Charles L.</u> , 398 S.E.2d 123 (1990) | 5 |
| <u>State v. McGinnis</u> , 455 S.E.2d 516 (1994) | 5 |
| <u>Knotts v. Facemire</u> , ____ S.E.2d ____, WL 1578720 (2000), | 6 |

Rules of Procedures and Evidence

| | |
|---|---------|
| Rule 14(a) of the West Virginia Rules of Criminal Procedure | 4,6 |
| Rule 404(b) of the West Virginia Rules of Evidence | 3,4,5,6 |

ARGUMENT

1. Appellant contends the trial court erred in denying his motion to sever those counts involving EHW and AL.

EHW was born December 17, 1979. (MHT, p.6). She alleged that the Appellant sexually abused her in November and December, 1989, which was immediately before and after her 10th birthday (Id., p.7). EHW was best friends with the Appellant's daughter, and on each occasion she was spending the night with her girlfriend.

AL was born April 2, 1992 (TT, Vol. II, p.7). She alleged that the Appellant sexually abused her between November, 2001, and February, 2002, when she and her sister EL were temporarily residing with their grandmother and the Appellant, her longtime boyfriend (Id., pp.7-12).

EL recalls living with her grandmother and the Appellant on two separate occasions (Id., p.35). Once, when she was four and residing in his home, the Appellate rubbed her

inner thigh² and told her not to tell her grandmother because she would not approve (Id., p.36). On the second occasion, EL was alone with the Appellant and he started rubbing her "backside" (Id., p.37)³. It was EL who insisted that AL disclose the abuse to her grandmother because Appellant had touched both of them.

The offenses involving EHW and AL were joined in a single indictment. Appellant moved to sever and a hearing was held March 6, 2006. At the outset, the court announced that, in this particular case, "severance" and "other bad acts" were inextricably interwoven. If the testimony of EHW was admissible at a trial where AL was the victim or the testimony of AL was admissible at a trial where EHW was the victim, severance would not be appropriate. However, if the testimony of either child would not be admissible as evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence, then obviously the charges should be severed (MHT, pp.3&71-73). The court denied the motion and found that EHW, AL and her sister, EL, were physically similar (Id., p.73); EHW and EL looked like sisters (Id.); the ages of all three girls were similar at the time of the offenses (Id., pp. 74&75); all three were prepubescent females when abused (Id.); Appellant's girlfriend was absent during all of the assaults (Id.); in three out of five instances involving EHW and AL, they were asleep or feigning sleep (Id., p.75); and with two of the three girls, he told them not to tell (Id., p.76). The court determined that the testimony of all three girls would show an absence of mistake, and their testimony would have been admissible in separate trials if

²EL specifically remembered that AL disclosed her abuse within a week of this incident.

³Appellant's touching of EL did not rise to the level of a crime, but was certainly an inappropriate, wrongful act which was admissible as 404(b) evidence.

the counts were severed (Id., p.76).

In State v. Ludwick, 475 S.E.2d 70, 72 (1996) relying on State v. Hatfield, 380 S.E.2d 670 (1988), and State v. Drennen, 408 S.E.2d 24 (1991), this Court found that a Motion for Severance pursuant to Rule 14(a) of the West Virginia Rules of Criminal Procedure rests in the sound discretion of the trial court, and said ruling would not be reversed unless it appeared that the court's determination was clearly wrong. In the instant case, the Appellant's main argument is that the crimes were separated by over eleven years (Brief, p.13). Appellant argues that the unfair prejudice far outweighed the probative value of joinder (Id., p.14). However, he presents no cogent argument as to the mechanics of the prejudice other than a guilty verdict. If that were the test, a guilty verdict would always be indicative of unfair prejudice. Again, it is not the number of years between offenses, but whether the victims would have been permitted to testify at separate trials as 404(b) witnesses.

2. Appellant contends that the trial court erred in permitting the State to elicit the testimony of EL pursuant to Rule 404(b) of the West Virginia Rules of Evidence.

The State moved for admission of the testimony of EL pursuant to Rule 404(b) of the West Virginia Rules of Evidence which provides that while evidence of other wrongdoings is not admissible at trial to prove a defendant's character so as to show that he or she acted in conformity therewith, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This list of exceptions is not exclusive. Indeed, in State v. Edward Charles L., 398 S.E.2d 123 (1990), this court delineated another exception, i.e. tending to show that a defendant had a lustful disposition toward the victim,

children generally, or specific other children.

The State's motion for admission of 404(b) evidence automatically triggered an analysis pursuant to State v. McGinnis, 455 S.E.2d 516 (1994). This was accomplished at the hearing on March 6, 2006. The court found by a preponderance of the evidence that the other bad acts or conduct actually occurred and that said acts were relevant (MHT, p.77). Having done that, the court completed the McGinnis analysis by finding that the 404(b) evidence was relevant and revealed the Appellant's intent to commit the act (Id.). The prejudicial impact did not outweigh the probative value (Id.).

Appellant argues that the acts involving each witness were vastly dissimilar. Of course, they are not going to be mirror images. The fact remains, as most clearly expressed by the trial court, that there were many similarities between the victims and the manner in which the abuse occurred (MHT, pp. 73-76).

Appellant argues that the court identified the exceptions contained in Rule 404(b) without specifically identifying a particular purpose for the admission of the testimony of EL (Id., p.16), and this alleged error continued through the cautionary instruction (Id., p.18). However, as conceded by the Appellant, the trial court did identify with specificity the reason why it was admitting the 404(b) testimony - - - absence of mistake, opportunity, intent and lustful disposition (MHT, p.76). As for the cautionary instruction, Appellant apparently believes that the court should have identified a specific purpose as to why the evidence was originally admitted. The State submits that the evidence was allowed to show all these purposes; therefore, the court was not limited to one.

3. Appellant contends that his due process rights were violated by trying him for the sexual abuse of EHW in 1989.

In late 1989 or early 1990, EHW's two sisters were sexually assaulted in a totally unrelated incident (MHT, pp.13&14). The West Virginia Department of Health and Human Resources investigated, the perpetrator was identified and prosecuted (TT, Vol. I, p.132&133). However, when the department routinely interviewed EHW, she identified the Appellant as having abused her some months before. Not only was there no corroboration for EHW's accusation, she did not tell until she was questioned in regard to an unrelated assault on her sisters. Most importantly, one of her accusations involved a sleep-over when she was in bed with the Appellant's daughter. Of course, the Appellant's daughter long denied that anything occurred (TT, Vol. II, pp.125-129).

After the allegations of AL and EL were investigated, the Appellant was indicted. Shortly thereafter, EHW contacted the State to remind it of her abuse (MHT, pp.5&6). The first indictment was dismissed and a second indictment was issued to include EHW.

Citing Knotts v. Facemire, ___ S.E.2d ___, WL 1578720 (2009), Appellant contends that the delay in charging him with EHW's abuse violated his rights to due process. As explained in Knotts, the Due Process Clause of the Fifth Amendment to the United States Constitution and Article III, Section 10, of the West Virginia Constitution, require the dismissal of an indictment, even when brought within the statute of limitations, if the delay was a deliberate device by the State to gain an advantage over the defendant, and it caused him actual prejudice in presenting his defense. Obviously, the State's determination not to proceed with EHW's initial allegation was not a deliberate device to gain an advantage over the Appellant. In point of fact, the State never attempted to prosecute the Appellant for that crime until such time as he had assaulted his girlfriend's granddaughter and EHW reminded the State of the similarities in the cases.

As to the Appellant's being actually prejudiced by the delay, that is spurious. His only argument is that EHW sought treatment for the abuse from Southern Highlands Community Mental Health Center, and those records were no longer available (Brief, p.20). There is absolutely no reason to suppose that those records would have been helpful to the Appellant. In point of fact, had he been charged with this offense in 1989, his primary witness would have been the same person he called to the trial in 2007 - - - his daughter who was sleeping in the same bed as EHW when she was assaulted.

4. Appellant contends that his rights to confrontation were violated by EHW's testimony that she received post-abuse treatment at Southern Highlands Community Mental Health Center.

As noted hereinabove, EHW sought counseling at Southern Highlands Community Mental Health Center subsequent to Appellant's sexual abuse. On the first day of trial, the court was notified that Southern Highlands had no treatment records for EHW, despite the fact that she intended to testify that she was seen at the facility (TT, Vol. I, pp.103-108). The court was unclear as to why the defense mentioned this; the State believed the defense wanted to prevent such testimony from EHW because it could "prove" she was intending to lie⁴. The court properly found that this was an issue of credibility, and EHW would not be restricted in her testimony.

During the examination of EHW, it was learned that subpoenas had been issued for her records at Southern Highlands but there were none (TT, Vol. I, p. 154). Of course,

⁴Apparently the State's understanding of this motion was correct. Appellant admits in his Brief that he objected to EHW testifying concerning treatment even before she testified (Brief, p.23).

EHW learned about this, and she was able to located three pages confirming that she had been treated at Southern Highlands (TT Vol. I, pp.145-151&154). When she provided these three pages to the State, they were then given to the defense which marked them as "Defendant's Exhibit No. 1" (Id., p.149).

Appellant now maintains that allowing EHW to testify concerning her treatment at Southern Highlands violated his right to confront his accusers and cross-examine witnesses because the Southern Highlands treatment notes were not available. This argument is specious.

Firstly, a witness is allowed to testify that she obtained treatment at some facility, whether a hospital, a counseling agency, etc., even if there are no treatment notes. In point of fact, the Appellant intended to attack EHW's credibility for this very reason, but luckily she was able to locate some few documents confirming treatment. This in no way prejudiced the Appellant.

Secondly, he argues that it was "clearly inappropriate" for records to be provided by an accuser as opposed to the mental health facility (Brief, p.22). Obviously, everyone would have preferred to have the records from Southern Highlands, but there were no records. The only point in having EHW produce a few papers from the facility was to corroborate her testimony that she had been treated there, particularly when the Appellant was going to try and attack her credibility on this very issue.

Thirdly, Appellant argues that he had to limit his cross-examination of EHW because he had no treatment notes (Brief, p.23). If anything, he could have broadened his cross-examination because there were no treatment notes.

Finally, the Appellant argues that EHW should not have been allowed to testify

concerning her treatment at Southern Highlands Community Mental Health Center because she was not an expert. This argument is baseless.

5. Appellant contends that the trial court erred in allowing EHW to testify as to certain effects caused by his abuse.

EHW testified that before she was molested, she did well in school and was on the honor role (TT Vol. I, p.135). Following the abuse, her grades dropped, she failed one grade and almost failed another. She ended up quitting school but later obtained a GED, and at the time of trial she was enrolled in college with a grade point average of 3.5 (Id., 135&136). The Appellant suggests that this testimony should have been excluded because EHW was not an expert and could not testify as to the extent and permanency of her injuries (Brief, p.24). The State disagrees. EHW is the only person who can testify as to the extent and severity of the emotional scars caused by molestation.

6. Appellant contends that the trial court erred when it refused to strike the testimony of EHW with respect to certain effects of his abuse because it somehow violated his right to confrontation.

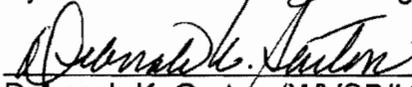
Appellant argues that there was no proof as to what caused EHW's emotional problems following the sexual abuse because there were no treatment records or expert testimony (Brief, p.25). The State believes this argument has been repeatedly addressed.

RELIEF REQUESTED

Wherefore, the State respectfully requests that this Court deny Appellant's appeal and affirm the verdict of the Circuit Court of Mercer County, West Virginia.

STATE OF WEST VIRGINIA

By: Its Assistant Prosecuting Attorney



Deborah K. Garton (WVSB#4752)
Mercer County Annex
120 Scott Street - Suite 200
Princeton, WV 24740
(304) 487-8355

CERTIFICATE OF SERVICE

I, Deborah K. Garton, do hereby certify that I have on this 14th day of August, 2009, served a true and correct copy of the foregoing Appellee's Response to Appeal Brief, postage prepaid, upon:

Alvin E. Gurganus, II, Esquire
Williamson, Magann & Gurganus
600 Rogers Street, Suite 101
Princeton, WV 24740



Deborah K. Garton