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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0189

STATE OF WEST VIRGINIA,

Plaintiff Below,
Respondent,

v.

CHARLES EDWARD BRUFFEY,

Defendant Below,
Petitioner.

SUMMARY RESPONSE

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SUMMARY RESPONSE

I.

STATEMENTS OF FACTS, STATE OF THE CASE, SUMMARY OF ARGUMENT

On September 27, 2011, a Mineral County, West Virginia jury found that the Petitioner Charles Edward Bruffey ("Bruffey") robbed the Fort Ashby, West Virginia branch office of the M&T Bank -- on December 23, 2009. (App. vol. I at 73, Jury Trial Order). Along with substantial evidence about the December 2009 robbery, the jury also heard limited-purpose 404(b) evidence showing that two months later -- on February 26, 2010 -- Bruffey again robbed the same bank, in a similar fashion.[1] (*See, e.g.*, App. vol. II, at 90-91, Prosecutor's Closing Argument.)

It appears that Bruffey requested and was granted separate trials for the two robberies. (App. vol. III, Sept. 26, 2011 Trial Tr. at 39-40.) In Bruffey's trial for the first robbery, the instant case

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[1]In the first robbery, Bruffey left a cigarette butt containing his DNA near where he parked his car. (App. vol. III, Sept. 27, 2011 Trial Tr. at 98-101, 147.) In the second robbery, Bruffey gave a note to the teller that was identified by an expert as being in Bruffey's handwriting. (*Id.* at 155.)

before this Court, the prosecution was granted permission by the circuit court to use certain evidence regarding the second robbery as 404(b) evidence to show a common scheme/*modus operandi* and identity. (App. vol. II, June 28, 2011 hearing).

Bruffey challenges that ruling in the instant appeal, and alleges other reversible error. However, the circuit court did not err in admitting the 404(b) evidence, or otherwise. The jury's verdict should be upheld.

II.

RESPONSES TO BRUFFEY'S ASSIGNMENTS OF ERROR.

A. Response to First Assignment of Error.

Bruffey erroneously claims that the "prosecution improperly commented and solicited testimony on Bruffey's pre-trial silence after he [Bruffey] was advised of his Miranda warning." (Pet'r's Br. at 12.) The record does not support this claim. Quite to the contrary, the brief references -- by the prosecutor in his argument to the jury and by a police officer witness -- to the Petitioner's being "Mirandized" and to his subsequent conduct -- occurred in laying the foundation for the admission of testimony regarding Bruffey's post-Miranda **inculpatory statements** -- and not to call attention to his subsequent silence, after making those inculpatory statements.

Specifically, the prosecutor explained to the jury, and the testimony at trial was, that after being Mirandized, Bruffey told the police that he "had been unemployed and out of work for a number of months." (App. vol. III, Sept. 26, 2011 Trial Tr. at 210.) This admission was relevant to the prosecution's case because when Bruffey confronted the bank teller at the first robbery, Bruffey told the teller that he was robbing the bank because of his unemployment. (*Id.* at 64.)

Additionally, after being Mirandized Bruffey also said to a police officer, "**I'm going to jail for a long time**. You're a nice guy, but I think I should wait to talk to you about this." (*Id.* at 59, 218-19.) This statement was relevant at Bruffey's trial as a tacit admission of guilt.

It was proper for the prosecution to show that Bruffey was apprised of his right to remain silent before he made the inculpatory statements, in order to show the statements' voluntariness. None of the prosecution's testimony or statements amounted in any fashion to an improper reference to or comment on Bruffey's silence after making the inculpatory statements. The prosecution did not in any fashion comment on or suggest any adverse to guilty motive behind Bruffey's decision not to make any further statements after making these inculpatory remarks. The officer witness affirmatively acknowledged that it was Bruffey's absolute right not to answer questions. (*Id.* at 210.)

Additionally and importantly, there was no objection by Bruffey's counsel to the foregoing -- quoted remarks and testimony -- so Bruffey's claim of error in their admission must be evaluated under "plain error" review. *See State v. Mann*, 205 W. Va. 303, 314 n.15, 518 S.E.2d 60, 71n.15 (1999) ("The plain error doctrine of W. Va. R. Crim. P. 52(b), whereby the court may take notice of plain errors or defects affecting substantial rights although they were not brought to the attention of the court, is to be used sparingly and only in those circumstances in which a miscarriage of justice would otherwise result.") Bruffey has not demonstrated that these brief remarks and testimony resulted in a miscarriage of justice.

For the foregoing reasons, Bruffey's First Assignment of Error is without merit.

B. Response to Second Assignment of Error.

Bruffey claims that the trial court committed reversible error by admitting evidence of the second bank robbery under Rule 404(b). However, the trial court carefully considered the

prosecution's request to admit the evidence about the second robbery, and properly found it to be relevant and admissible. (App. vol. II, June 28, 2011 hearing). Bruffey states that the prosecution "failed to produce any evidence that Bruffey committed the second bank robbery[,]" (Pet'r's Br. at 17), but this statement is inaccurate. While eyewitnesses at the second robbery could not identify Bruffey with certainty, a FBI handwriting analyst testified that Bruffey wrote the note that the robber gave to the teller at the second robbery. (*See* footnote 1 *supra*).

The circuit court found that the similarity of the two robberies was sufficient to show a common scheme/*modus operandi* and identity. (App. vol. II, June 28, 2011 hearing at 7.) The similarities begin, of course, with the robbery of the same small bank twice, within a short period of time, by an apparently unarmed white man with blue eyes who used his clothing to cover his face. (App. vol. III, Sept. 26, 2011 Trial Tr. at 64-68; Sept. 27, 2011 Trial Tr. at 11-12.) In both robberies as well, the robber told the bank teller not to use any dye money or bait packs -- which the circuit judge found to be a notable similarity. (App. vol. III, Sept. 26, 2011 Trial Tr. at 64; Sept. 27, 2011 Trial Tr. at 12-13; App. vol. II, June 28, 2011 hearing at 7.) And in both robberies there was substantial forensic evidence linking the robbery to Bruffey. (*See, e.g.,* footnote 1 *supra*). The jury in the instant case, of course, was repeatedly instructed about the limited purpose for which the evidence of the second robbery was admitted. (*See, e.g.*, App. vol. III, Sept. 27, 2011 Trial Tr. at 8, 81.)

In *State v. Johnson*, 105 W. Va. 598, 143 S.E. 352, 353 (1928), this Court stated that "evidence of other robberies near . . . in time and of similar character" was admissible. In *State v. Bunda*, 187 W. Va. 389, 395, 419 S.E.2d 457, 463 (1992), this Court held that the trial court did not err in admitting evidence of other crimes that "were of such a similar nature, and so related in time,

to establish motive, intent, common scheme, plan, and identity." Courts in other jurisdictions have frequently considered whether and when evidence of similar robberies is admissible in a robbery prosecution. *See generally*, "Admissibility, In Robbery, of Evidence of Other Robberies." 42 A.L.R. 2d 854. The great weight of those decisions is to the effect that a trial court has substantial discretion to admit such evidence, if the court determines that the robberies are sufficiently similar to show a common scheme and *modus operandi.* (*Id.*) In *U.S. v. Young*, 644 F.3d 757, 760-61 (8th Cir. 2011), the use of similar words in different robberies was recognized as a proper factor in holding evidence of other robberies admissible. In *U.S. v. Perry*, 438 F.3d 642, 648 (6th Cir. 2006), the court held that two bank robberies, one month apart, were similar in *modus operandi* – and that "it is not . . . necessary that the crimes be identical in every detail (citation omitted)" for evidence of uncharged robberies to be admissible under 404(b). In *U.S. v. McGuire*, 27 F.3d 456, 460-61 (10th Cir. 1994), the trial court properly admitted evidence of seven similar bank robberies to show identity and a common scheme or plan. *See also*, *U.S. v. Carlton*, 534 F.3d 97, 102 (2nd Cir. 2008) (robbery similarities "taken together" establish a pattern and show identity).

In discussing the standard of review to be applied to Rule 404(b) issues, this Court has stated:

> 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). In *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), we explained that this Court will "review the trial court's decision to admit evidence pursuant to Rule 404(b)

under an abuse of discretion standard." *McGinnis*, 193 W. Va. at 159, 455 S.E.2d at 528. *McGinnis* further held:

> Our function on ... appeal is limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion. In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect.

McGinnis, 193 W. Va. at 159, 455 S.E.2d at 528.

State v. Willett, 223 W. Va. 394, 397, 674 S.E.2d 602, 605 (2009).

Applying the foregoing standards, there was sufficient evidence to show that the second robbery occurred and that Bruffey was the robber; and the circuit court had ample grounds to conclude that the facts of the two robberies were sufficiently similar to show a common *modus operandi* and identity; therefore, the circuit court did not abuse its discretion in concluding that the substantial probative value outweighed any improper prejudicial effect. For this reason, Bruffey's Second Assignment of Error is without merit.

C. Response to Third Assignment of Error.

Bruffey claims that the circuit court erred in allowing a police officer to testify about what a third party had told the officer about Bruffey's ownership of a car of a distinctive type that was seen near the first robbery. (Pet'r's Br. at 20.) An examination of the relevant portions of the transcript of Bruffey's trial shows that the third party's statements were not introduced to inculpate Bruffey, but to explain how the officer came to identify Bruffey as a suspect.

The officer was looking for a distinctive car that had been seen by a witness parked at the same location where a tracking dog had followed the robber, and where the cigarette butt with Bruffey's DNA was found. (App. vol. III, Sept. 26, 2011 Trial Tr. at 198.) A third party told the

officer that he had seen such a distinctive car in Fort Ashby, and that the party knew that Bruffey was the person who owned the car. (*Id.*) The third party's statement to the officer was presented to the jury to explain how the officer came to identify and locate Bruffey. Bruffey never denied owning the car in question -- it was photographed at his house and a photo introduced into evidence. (App. vol. I at 90.)

There was no violation of *Crawford v. Washington,* 541 U.S. 36 (2004) in the circuit court's allowing the police officer to testify about the third party's statements, because the third party's statements were not testimonial statements directed at establishing the facts of a past crime, *State v. Mechling*, 219 W. Va. 366, 375, 633 S.E.2d 311, 320 (2006); and the third party was therefore not a testimonial "witness against" Bruffey whom Bruffey had a right to confront. The third party's hearsay statements about the car were simply part of the *res gestae* of the officer's investigation, explaining how the officer located the car. An entirely separate witness had placed the distinctive car near the scene of the first robbery, and there was no objection to that testimony. (App. vol. III, Sept. 26, 2011 Trial Tr. at 121-22.)

Moreover, even assuming *arguendo* that the third party's statement to the officer was in any fashion testimonial, the statement was about an ancillary and uncontested fact, and in light of all of the evidence, the statement could not have made any difference to the jury, and for that reason was at best harmless error. *Cf. Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2719 n.11 (2011).

For the foregoing reasons, Bruffey's Third Assignment of Error is without merit.

D. Response to Fourth Assignment of Error.

Bruffey argues that the information submitted by a police officer in order to obtain a search warrant for Bruffey's residence did not show probable cause but was based on "just a hunch."

(Pet'r's Br. at 24.) However, a review of that affidavit, (App. vol. I at 20), shows that this characterization of the affidavit is inaccurate. The affidavit is detailed and sets forth ample grounds that established probable cause. For this reason, Bruffey's Fourth Assignment of Error is without merit.

III.

CONCLUSION

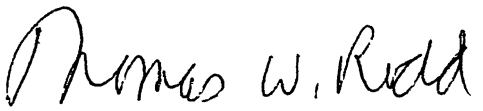
The jury's verdict convicting Bruffey of robbery should be upheld.

Respectfully submitted,

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

By counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent herein, do hereby certify that I have served a true copy of the *SUMMARY RESPONSE* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 12th day of June, 2012, addressed as follows:

To: Nicholas T. James, Esq.
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Thomas W. Rodd
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