

FINAL ORDER

13-0574 UD

**IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I**

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BARBARA J. ...
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STATE OF WEST VIRGINIA,

Plaintiff,

v.

Case Nos.: 09-F-83 & 11-F-171

CARLOS ANGLE,

Defendant.

SENTENCING ORDER

On the 19th day of March, 2013, came the State of West Virginia, by L. Elizabeth Shaw, its Assistant Prosecuting Attorney, came the Defendant, CARLOS ANGLE, in person and by his counsel, Scott Shough, and came the Adult Probation Office, by Heather Campbell, all for the purpose of a sentencing hearing in the above-styled case, following the completion and return of the pre-sentence investigation and report previously ordered.

Whereupon, the Court, having received and reviewed the pre-sentence report, heard the arguments and representations of counsel for both Defendant and the State, as well as the statements of Defendant, himself, regarding sentencing.

In consideration of same, and of all matters of record, herein, and Defendant having been convicted of and found guilty of SEXUAL ABUSE IN THE FIRST DEGREE in Case No. 09-F-83 and subsequently found guilty of THIRD OR SUBSEQUENT OFFENSE FELONY in Case No. 11-F-171, the Court ORDERED that Defendant be, and hereby is, sentenced to imprisonment in the penitentiary for life, with credit for time served from the 30th day of October, 2008, to the 10th day of November, 2008, in the amount of eleven (11) days and from the 17th day of June, 2009, to the this 19th day of March, 2013, in the amount of one thousand

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three hundred seventy-one (1,371) days for a total of one thousand three hundred eighty-two (1,382) days previously served.

CONVICTION DATE: January 30, 2013

SENTENCE DATE: March 19, 2013

EFFECTIVE SENTENCE DATE: June 6, 2009

Whereupon, the Court ORDERS defendant to pay the court costs of these proceedings in the amount of \$ 2910.⁰⁰ and attorney fees in the amount of \$ 8027.⁹⁹, to be paid within two (2) years of Defendant's release from incarceration, to and through the Marion County Circuit Clerk's Office, Marion County Courthouse, Fairmont, WV 26554.

Defendant is hereby advised of the following rights concerning his conviction and sentence:

(1) Within sixty (60) days from the date of your sentence, you may petition the presiding judge of the Circuit Court of Marion County, pursuant to West Virginia Code § 62-12-3, for suspension of the execution of our sentence and release on probation.

(2) Within one hundred twenty (120) days from the date of your sentence, you may petition the judge of the Circuit Court of Marion County, pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure, for correction or reduction of your sentence.

(3) Pursuant to rule 32 of the West Virginia Rules of Criminal Procedure, you can appeal your conviction and/or sentence to the West Virginia Supreme Court of Appeals in Charleston, West Virginia. In order to protect and keep this right of appeal you must:

A. Within thirty (30) days from the date of your sentence, file with the Clerk of the West Virginia Supreme Court of Appeals in Charleston, West Virginia, your notice of intent to appeal, and;

B. Within four (4) months from the date of your sentence, file your petition for writ of

error with the West Virginia Supreme Court of Appeals in Charleston, West Virginia.

(4) If you are an indigent and cannot afford an attorney, then this Court will appoint an attorney to represent you to protect you appellate rights as set out in paragraph three (3) above.

A. You must notify the Court in writing of your request to have an attorney for you to exercise these rights.

(5) You are further notified that failure to pay court imposed assessments, including, but not limited to, fines, costs, restitution, et cetera, shall result in the suspension of your license or privilege to operate a motor vehicle in the State of West Virginia and that such suspension could result in the cancellation of, the failure to renew, or the failure to issue an automobile insurance policy providing coverage for yourself or your family.

The foregoing notice was read in open court, and a blue copy of same will be given to Defendant on the 19th day of March, 2013.

It is further ORDERED that the Clerk of the Court tender certified copies of this Order to **Prosecuting Attorney**, 213 Jackson Street, Fairmont, WV 26554; **Scott Shough**, Attorney at Law, 208 ½ Adams Street, Suite A, Fairmont, WV 26554; **Marion County Adult Probation Office**, 314 Monroe Street, Fairmont, WV 26554; **North Central Regional Jail**, 1 Lois Lane, Greenwood, WV; and the **West Virginia Division of Corrections**, 112 California Avenue, Building 4, Room 300, Charleston, West Virginia 25305.

ENTER

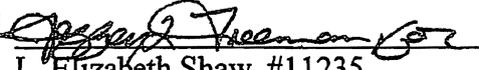
JUDGE

A COPY

TESTE

Barbara A. Cole
CLERK OF THE CIRCUIT COURT
MARION COUNTY, WEST VIRGINIA

ORDER PREPARED BY:


L. Elizabeth Shaw, #11235
Assistant Prosecuting Attorney

ORDER APPROVED BY:

Scott Shough,
Counsel for Defendant

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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I

STATE OF WEST VIRGINIA,

Plaintiff,

vs.

Case No. 09-F-83

CARLOS ANGLE,

Defendant.

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**ORDER DENYING DEFENDANT'S MOTION FOR POST-JUDGMENT
ORDER OF ACQUITTAL AND MOTION FOR NEW TRIAL**

On the 03 May 2012, came the State of West Virginia, by Patrick N. Wilson, its Prosecuting Attorney for Marion County, and came the Defendant, Carlos Angle, in person and by his attorney, Kevin T. Tipton, Esquire, for a hearing on the Defendant's Motion for Post-Judgment Order of Acquittal and the Defendant's Motion for New Trial.

Having heard the arguments of counsel and having reviewed the entire case file, the Court is of the opinion that the Defendant's Motion for Post-Judgment Order of Acquittal and Motion for New Trial should be denied. In support of this opinion, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. The Defendant, Carlos Angle, was convicted by jury trial of the offense of First Degree Sexual Abuse (A Lesser-Included Offense to that Charged in Count II of the Indictment) on 28 July 2011.
2. The Defendant timely filed his Motion for Post-Judgment Order of Acquittal and Motion for New Trial on 04 August 2011, alleging that the Court

improperly admitted 404(b) evidence leading to his conviction. This argument also served as the basis for the Defendant's Motion for New Trial. The State filed its response to the Defendant's motions on 23 September 2011. The Court heard arguments on the motions on 3 May 2012.

Conclusions of Law

1. Rule 404(b) of the West Virginia Rules of Evidence provides,

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

2. "When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syl. Pt. 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

3. In *State v. McGinnis*, the West Virginia Supreme Court of Appeals spelled out the process by which 404(b) evidence may be introduced:

“Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing test required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and [the West Virginia Supreme Court of Appeals] recommend[s] that it be repeated in the trial court’s general charge to the jury at the conclusion of the evidence.”

Id. at Syl. Pt. 2.

4. “It is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that

the probative value of the evidence is not substantially outweighed by its potential unfair prejudice; and (4) the trial court gave a limiting instruction.” Syl. Pt. 3, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

5. The basis for the Defendant’s motions is the Court’s allowance of evidence under Rule 404(b) of the *West Virginia Rules of Evidence* regarding other allegations of sexual misconduct involving said Defendant. In his “Motion for Post-Judgment Verdict of Acquittal,” the Defendant argues that the State improperly argued at the *in camera* hearing that the evidence to be introduced showed the Defendant’s “mode of operation” or “common scheme or plan,” while in it’s written “Notice of Intent to Use 404(b) Evidence,” the State indicated its desire to use said evidence to show motive, intent and absence of mistake. Specifically, the Defendant argues that the State’s notice of intent violates the rule set forth by the West Virginia Supreme Court of Appeals in *State v. McIntosh*, 207 W.Va. 561, 534 S.E.2d 757 (2000), which requires the State to identify the specific purpose for which the evidence is being introduced. Further, the *McIntosh* decision, citing the Supreme Court’s decision in *State v. McGinnis*, states that “[i]t is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b).” *State v. McIntosh*, 207 W.Va. at 569-70, 534 S.E.2d at 766-67. The Defendant objects to the State offering 404(b) evidence for four distinct reasons and the Court instructing the jury on those reasons.

6. The State, in its “Response to Defendant’s Post Trial Motions,”

argues that the Court admitted the proposed 404(b) evidence for a proper purpose following an *in camera* hearing, and while prejudicial, such prejudice was outweighed by the probative value of said evidence. The State further argues that the Court took every step necessary to protect the Defendant regarding the manner in which said evidence would be used, and further inquiry by the Court would merely be an attempt to invade the mind of the jury, an exercise which is beyond the province of the Court.

7. The Court finds that the 404(b) evidence introduced at trial was properly vetted by the *in camera* hearing prior to trial. Although the State's written "Notice of Intent to Use 404(b) Evidence" mentioned only motive, intent and absence of mistake as its reasons for introducing said evidence, the State is not forbidden from raising the issues of "mode of operation" or "common scheme or plan" at the *in camera* proceeding. The State, through its written "Notice of Intent to Use 404(b) Evidence" and its argument at the *in camera* hearing, adequately put the Defendant on notice of the nature of the evidence and the State's reasons for introducing said evidence.

8. Additionally, while the State is not permitted to provide a laundry list of potential uses of the evidence under Rule 404(b), the Court finds that this did not occur in the instant case. Although the State offered more than one reason for admitting the subject evidence, the jury was properly instructed after the introduction of the evidence of the specific purposes for its introduction. The Court also instructed the jury in its Charge to the Jury that the "evidence was

admitted for the limited purpose of explaining whether the Defendant had motive, explain lack of mistake, an apparent mode of operation or whether the Defendant exhibited a lustful disposition toward the alleged victim in this incident for which the Defendant is on trial and you may only consider it with respect to these limited purposes." For this reason and the reasons stated above, the Court finds that the State's 404(b) evidence was properly introduced and the jury was properly instructed on how to consider said evidence.

Accordingly, it is **ORDERED** that the Defendant's "Motion for Post-Judgment Order of Acquittal" and "Motion for New Trial" be, and the same are, hereby, **DENIED**.

The Circuit Clerk of Marion County is hereby directed to provide certified copies of this Order to Kevin T. Tipton, Esquire, at 1001 Northpointe Plaza, Morgantown, West Virginia 26505-3280; and to Patrick N. Wilson, Prosecuting Attorney.

ENTER:

05 JULY 2012
FRED L. FOX, II

FRED L. FOX, II, SENIOR STATUS JUDGE

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Barbara A. Core
CLERK OF THE CIRCUIT COURT
MARION COUNTY, WEST VIRGINIA

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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF,

V.

CASE NOS. 09-F-83 & 11-F-171

CARLOS ANGLE,

DEFENDANT.

ORDER APPOINTING COUNSEL

The above named defendant has filed, with this Court, an affidavit reciting financial inability to employ counsel in connection with certain proceedings before this Court. After reviewing the affidavit and considering the matter, the Court is of the opinion that the eligibility requirements of West Virginia Code 29-21-1, et seq, are satisfied. Accordingly, the Court ORDERS that:

ROBYN DANFORD, ESQUIRE, a licensed lawyer practicing before the Bar of this Court, is hereby appointed to represent the defendant in an appeal and is instructed to contact the defendant forthwith.

The Circuit Clerk of Marion County shall provide a certified copy of this Order to the Prosecuting Attorney of Marion County; to Scott A. Shough, Esquire; to Robyn Danford, Esquire; and to Carlos Angle c/o North Central Regional Jail, #1 Lois Lane, Greenwood, West Virginia 26415.

RECEIVED & FILED
IN
CIRCUIT CLERKS OFFICE
APR 17 11 11 AM '13
BARBARA A. COLE
CIRCUIT CLERK

ENTER: 04/16/13
[Signature]
FRED L. FOX, II, SENIOR STATUS JUDGE

A COPY TESTE
Barbara A. Cole
CLERK OF THE CIRCUIT COURT
MARION COUNTY, WEST VIRGINIA

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