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RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Maynard, Justice, dissenting:

I would affirm the convictions of the defendant, David Nelson, because I do not believe the trial court nor the prosecutor committed any error. Clearly, the trial was in all respects fair and impartial, and the jury reached the correct verdict.

The facts in this case are brutal and some of the most horrible that I have ever read. The evidence shows that the defendant and the other four perpetrators raped the victim, Wanda Leshner. They beat Ms. Leshner on her torso at least nineteen times with a two-by-four, causing numerous bruises on her body and three broken ribs. The defendant and the other perpetrators also struck Ms. Leshner more than nine times on her head, fracturing every bone in her skull. The evidence shows that Ms. Leshner's upper and lower jaws were broken from being struck with a heavy object. In addition, the defendant and the others hit Ms. Leshner with such force by a two-by-four with nails sticking out of it that her brain went to the front of her skull and caused fractures to the bones. These fractures resulted in lacerations on Ms. Leshner's face. Further, the defendant and the others strangled Ms. Leshner, breaking a bone in the roof of her mouth. Ms. Leshner's lifeless, bloody, bruised and battered body was discovered lying in a shallow grave, covered with sticks and twigs, an ear was

missing and she was naked with the exception of a pair of socks. The Deputy Chief Medical Examiner concluded that Ms. Lesher died as a result of multiple blunt force injuries to the head, back, and anterior torso, with ligature strangulation and drowning as contributory factors in her death. In the midst of this indescribably horrible ordeal, Ms. Lesher begged to be allowed to go home to be with her children. What Ms. Lesher suffered in the final hours of her life is truly unimaginable.

I am simply shocked that the majority reverses the defendant's convictions based on allegedly improper questioning of the defendant by the prosecutor. Contrary to the majority, I believe that the defendant was properly questioned, under Rule of Evidence 404(a)(1), about allegations that he sexually abused his sister. The purpose of this questioning was to rebut testimony of good character offered by the defendant. Under Rule 404(a)(1),

(a) *Character evidence generally.* – Evidence of a person's character or a trait of character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:

(1) Character of accused. – Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

Rule 404(a)(1) is a good rule that serves a laudable purpose. Specifically, it permits the State to effectively challenge claims by a defendant that he or she is a person of high character who is morally incapable of committing the crime charged. Absent such a rule, a

defendant's assertions of high moral character would go unchallenged by the State. The facts of the instant case perfectly demonstrate the need for the rule.

At trial, the defendant's counsel presented a photograph of the defendant with his wife and two daughters and represented to the jury that he is a family man. On direct examination, counsel elicited testimony from the defendant that he is not a cold-blooded killer, a kidnapper, and a rapist. Counsel elicited further testimony that the defendant does not have a general dislike of women, he does not like to beat and rape them, and he loves his wife.

Because the defendant put his own character at issue, the State clearly had a right under our rules to impeach the defendant's character. The State properly sought to do so by asking the defendant about allegations, from a 1987 child services report, that he had sexually abused his sister on numerous occasions from the time she was 13 years of age. These allegations of abuse were certainly relevant to rebut the defendant's claims that he is a family man who holds women in high esteem and who does not believe in beating or raping them. The trial court did not abuse its discretion in allowing the defendant to be asked about these allegations. Once the defendant denied the allegations, the jury possessed all the relevant evidence necessary with regard to the defendant's character to make the necessary credibility determinations.

Because of the majority's error in finding that the allegations at issue were not properly admitted under Rule 404(a)(1), the State is needlessly charged with the time and expense of retrying a defendant who was fairly found guilty of an evil and heinous crime by an impartial jury. Accordingly, I dissent.