

Starcher, J., concurring:

FILED
June 29, 2007
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I concur with the majority opinion. I write separately to address the issue of the admissibility of Rule 404(b) evidence.

In *State v. Scott*, 206 W.Va. 158, 168, 522 S.E.2d 626, 636 (1999), I stated in my dissent that Rule 404(b) evidence has “become a runaway train in criminal cases.” I continue to adhere to this opinion. In far too many cases, prosecutors gain an unfair advantage by telling the jury about a defendant’s “other bad acts,” thereby tainting the jury’s consideration of the evidence relating to the actual offense being tried. For example, once a jury hears that a defendant has been convicted of a similar crime in the past, the jury is far more likely to believe that the defendant is guilty of the charged offense. *State v. Fox*, 207 W.Va. 239, 241, 531 S.E.2d 64, 66 (1998) (Starcher, J. dissenting opinion). Such prejudice is almost inherent in “other bad acts” evidence, and this Court has, far too often, allowed the prosecutors to get away with this unfair practice.

However, the instant case provides a good example of the rare instance when Rule 404(b) “other bad acts” evidence should properly be admitted.¹

¹The text of *West Virginia Rules of Evidence*, Rule 404(b), follows:
(b) *Other Crimes, Wrongs, or acts.*— 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,

In the instant case, the appellant argued that the court erred in admitting testimony about a previous domestic abuse incident involving the appellant, and in admitting testimony about a violent incident at a Christmas party.

However, the evidence of the prior domestic abuse incident involving a child rebutted the appellant's claim of accident or mistake. The appellant claimed that any injury to the child victim in the instant case was accidental and inadvertent. Yet, in the previous incident, the appellant had injured another child, either intentionally or due to a reckless disregard for the child's safety.

Moreover, the appellant offered evidence tending to show that he was a person with a good reputation and a good character. The appellant called neighbors who testified that they were comfortable with leaving the appellant alone with their children. The appellant's counsel specifically asked one witness: "Do you feel comfortable with [the appellant] Jeremiah being around your children?" The prosecutor, therefore, quite reasonably presented evidence of the previous incident to show that the appellant was not, in fact, a man who could be trusted around children.

West Virginia Rules of Evidence, Rule 405(a), states that once the defense has presented evidence of the defendant's character, the prosecution is allowed to inquire into

knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide pretrial 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.

specific incidents of conduct.² Since the appellant “opened the door” to such evidence, the trial court properly admitted the evidence of the prior domestic abuse incident.

The trial court also did not err in admitting evidence about an incident that occurred at a Christmas party, because the appellant again “opened the door” to this evidence.

The appellant’s counsel asked the appellant’s father about the appellant’s employment, in an effort to show that the appellant had a stable living situation. On cross-examination, the prosecutor asked the appellant’s father whether the appellant still maintained the employment in question. Learning that the appellant no longer had this employment, the prosecutor asked why. The appellant’s father said that there had been an incident, but that he did not know the details. During the subsequent testimony of the appellant’s wife, the appellant’s counsel again brought up the issue of his employment – again to show the stability of the appellant’s living situation. On cross-examination, the prosecutor asked about the incident at the Christmas party that led to the appellant’s losing his job.

Normally, the evidence about the incident at the Christmas party would have been inadmissible. However, because the appellant opened the door to this testimony on

²*West Virginia Rules of Evidence*, Rule 405(a), states:

(a) *Reputation or opinion.*— In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

direct examination by asking his own witnesses about the appellant's employment, the evidence about the Christmas party incident, which refuted the appellant's evidence of his stability, was admissible.

Rule 404(b) evidence is subject to the "probative-versus-prejudicial" balancing test. *See* Syllabus Point 9, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).³ Of course, the Rule 404(b) evidence in the instant case was highly prejudicial. However, the defendant invited the admission of such evidence when he tried to portray himself as a peaceful person who could be trusted around children.

I believe that the trial court properly weighed the prejudicial versus probative factors, and came to the correct decision to admit the evidence.

For these reasons, I concur with the Court's judgment and decision in affirming the appellant's conviction.⁴

³Although Rules 401 and 402 of the *West Virginia Rules of Evidence* strongly encourage the admission of as much evidence as possible, Rule 403 of the *West Virginia Rules of Evidence* restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.

⁴I also agree that the trial court did not err in admitting the autopsy photographs. The medical examiner used the photographs to aid her in her testimony. The photographs were taken in black and white, to avoid some of their gruesome nature. The trial court made a special effort to ensure that the photographs were cropped to reduce any prejudicial effect that they may have had on the jury. The court even excluded one of the photographs, finding that it would be too prejudicial. The court did not err in concluding that the photographs were necessary to the medical examiner's testimony, and showed the victim's injuries in a way that a diagram or a mere description could not.

