Coleman v. Sopher, No. 23943

McHugh, J. Concurring:

It is unfortunate that the dissenting opinion distorts the majority's holding and legal analysis. I fully support the legal analysis and conclusion of the majority opinion in this case. I write this concurring opinion to emphasize the necessity for properly preserving evidentiary objections for appeal.

In this appeal counsel for Dr. Sopher has asked this Court to modify the requirements for preserving evidentiary objections. Dr. Sopher proposes, by his arguments, that the standard be relaxed as it relates to one particular issue: admission of testimony that Dr. Sopher previously donated brain tissue from deceased individuals without notifying the relatives of the decedents. Counsel for Dr. Sopher did not comply with the traditional standards to which all trial attorneys must adhere in order to preserve a Rule 404(b) objection for appellate review. The majority opinion correctly refused to deviate from the standards which are necessary to preserve an evidentiary assignment of error. See State v. Boyd, 166 W.Va. 690, 698, 276 S.E.2d 829, 834 (1980) ("It is clear under our law, that as to evidentiary errors, an attorney must preserve them on the record or be foreclosed from raising them on appeal".). (Citations omitted).

In his appeal, Dr. Sopher contends that the trial court should have excluded testimony relating to his removal of brain tissue from other deceased individuals. Dr.

Sopher argued that such evidence was inadmissible under Rule 404(b). In his brief, Dr. Sopher argued that he made a motion in limine asking the trial court to exclude testimony of his prior conduct under Rule 404(b), and that the motion was denied. Dr. Sopher also argues that during the trial he again raised the Rule 404(b) argument and the trial court overruled his objection. The motion in limine and the trial objection should be separately addressed.

The Motion In Limine

To support his contention that he made a motion in limine raising the Rule 404(b) issue, Dr. Sopher's brief references pages 4-12 of a pretrial hearing. The record discloses no written motion. Moreover, a careful reading of the referenced pages fails to disclose any mention of Dr. Sopher's counsel requesting the trial court exclude the evidence under Rule 404(b). See Syl. Pt. 1, Estep v. Brewer, 192 W.Va. 511, 453 S.E.2d 345 (1994). ("Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal".). However, in piecing together particular words scattered throughout the above-referenced pages, one can discern that an objection was made to the brain tissue testimony. The meaningful legal language which was articulated on the record were the words "routine" and "habit". Those words define an objection pursuant to Rule 406, not Rule 404(b).

It may very well be that Dr. Sopher's counsel in fact discussed Rule 404(b) with the trial court as was argued in his brief. Assuming this occurred, the critical mistake made by Dr. Sopher's counsel was having the Rule 404(b) discussion and argument off the record. The pages to which Dr. Sopher referenced reveal that the parties went off the record when making such argument, if it was made.[1]

Dr. Sopher's Argument: Off the Record

Dr. Sopher could have properly presented the unrecorded alleged Rule 404(b) argument before this Court if such an argument was made and the argument was omitted from the transcript. Pursuant to Rule 9(f) of this Court's Rules of Appellate Procedure, "[a]ny omission, misstatement, or error, either clerical or otherwise, in the record may be corrected at any time by stipulation filed with the Supreme Court". Under this provision of our appellate rules, Dr. Sopher was required to obtain and file with this

[1]At the point in the transcript when the parties came on record, the transcript describes a possible Rule 406 discussion, based upon the use of the words "routine" and "habit". Rule 406 states:

Rule 406. Habit; routine practice.

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Court a stipulation, agreed to by the opposing party (and trial judge had he not passed away), which outlined the substance of any omitted Rule 404(b) discussion. See Dupre v. Fru-Con Engineering Inc., 112 F.3d 329 (8th Cir. 1997) (noting that under federal appellate rules counsel is required to file a motion to modify content of record to disclose what counsel alleged actually transpired off the record in district court). See also Federal Rules of Appellate Procedure, Rule 10(e).

The stipulation requirement of Rule 9(f) establishes a standard that is applicable to all attorneys who seek to have this Court consider an objection not appearing on the record. Counsel for Dr. Sopher, in the final analysis, would have this Court deviate from its long established standard and permit the averments in his brief to be accepted as accurately depicting what occurred. "Lacking this documentation, counsel's [allegations] amounted to nothing more than an attorney's argument lacking evidentiary support". Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W.Va. 692, 707, 474 S.E.2d 872, 887 (1996). "[S]elf-serving assertions without factual support in the record will not [suffice]". Williams v. Precision Coil, Inc., 194 W.Va. 52, 61 n.14, 459 S.E.2d 329, 338 n.14 (1995). The majority has correctly held counsel for Dr. Sopher to the well-reasoned standard of Rule 9(f) with which all attorneys must comply.

Motion in Limine: No Definitive Ruling During the Pretrial Hearing

The next issue concerns the ruling by the trial court on Dr. Sopher's motion in limine. The record of the pretrial proceeding clearly reveals that the trial court did not make a definitive ruling on the motion during the pretrial hearing. The transcript clearly illustrates that once trial counsel and the court were again on the record, the trial judge indicated he was prepared to rule against Dr. Sopher's motion. Dr. Sopher's counsel specifically asked the court to defer a definitive ruling until he was allowed to submit case law that would support his motion. The trial court agreed to defer a definitive ruling on the motion until the morning of the trial, which was the next day.[2] A

[2]The following exchange occurred between the trial court and counsel for Dr. Sopher:

> THE COURT: ... I believe that probably this evidence would be admissible. At least, I don't think I ought to sustain the motion in limine.
>
> MR. JOHNS: Can I submit further cases on this in the morning, Your Honor?
>
> THE COURT: Oh, gosh. Why didn't you do it already? I thought you were ready for me to rule.
>
> ...
>
> MR. JOHNS: Your Honor, I didn't mean to argue with you after your ruling. I was just asking you if I could submit other cases.
>
> THE COURT: If you want me to reconsider this, I'll do it first thing in the morning....

careful review of the next morning's transcript discloses no discussion or renewal of the in limine motion. See Waldron v. Waldron, 73 W.Va. 311, 317, 80 S.E. 811, 814 (1913) ("If a party who has made an objection permits it to be forgotten, a waiver should be chargeable to the party".); Syl. Pt. 1, Maples v. West Virginia Dept. of Commerce, 197 W.Va. 318, 475 S.E.2d 410 (1996) ("A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal".); In Interest of S.C., 168 W.Va. 366, 374, 284 S.E.2d 867, 880 (1981). Ultimately, then, the trial court never entered a definitive ruling on the motion in limine. See Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 114, 459 S.E.2d 374, 391 (1995) ("It is not the role of the trial judge to present evidence .... [T]he party complaining on appeal of the admission of evidence bears sole responsibility for adequately preserving the record on meaningful appellate review".); Voelker v. Frederick Business Properties Co., 195 W.Va. 246, 256, 465 S.E.2d 246, 256 (1995) ("[S]imply raising the issue before the trial judge is insufficient. Attorneys have an obligation to protect the record in relation to rulings by trial judges on specific issues".).

...

MR. COMETTI: If Mr. Johns is going to re-argue this thing in the morning, I'd like to do it before the jury gets in here at 9:30.

THE COURT: My 9:00 just cancelled. So the jury will be here at 9:30. I told them, didn't I? We can come in here at 9:00....

This Court held in syllabus point 1 of Wimer v. Hinkle, 180 W.Va. 660, 379 S.E.2d 383 (1989) that:

> An objection to an adverse ruling on a motion in limine to bar evidence at trial will preserve the point, even though no objection was made at the time the evidence was offered, unless there has been a significant change in the basis for admitting the evidence.

Accord, Syl. Pt. 6, Bennett v. 3 C Coal Co., 180 W.Va. 665, 379 S.E.2d 388 (1989). Wimer holds that as a general matter, an attorney does not have to raise at trial an objection that was properly preserved through a motion in limine. However, the Wimer rule is inapplicable when the motion in limine ruling was not properly preserved. See State v. Parsons, 181 W.Va. 56, 63, 380 S.E.2d 223, 230 (1989) (where trial court has not ruled on motion in limine, party must object to introduction of evidence at trial in order to preserve right to appeal admission of evidence); Pandit v. American Honda Motor Co., Inc., 82 F.3d 376 (10th Cir. 1996) (utilizing a three-part test to determine whether party must renew motion in limine at trial to preserve issue for appeal; reviewing court must be satisfied that matter was adequately presented to district court, that issue was of type that can be finally decided prior to trial, and that court's ruling was definitive).

The legal consequence of failing to address the issue the next morning

meant that the trial court's prior tentative motion in limine ruling was insufficient, standing alone, to preserve the matter for appeal. Dr. Sopher had to renew his alleged Rule 404(b) motion at trial in order to have the issue preserved for appeal. The Wimer rule does not apply. See Green Const. Co. v. Kansas Power & Light Co., 1 F.3d 1005 (10th Cir. 1993) (party waived objection to denial of motion in limine to exclude evidence where party failed to renew objection during trial, after district court had indicated that ruling would be subject to reconsideration at trial); Dow v. United Broth. of Carpenters and Joiners of America, 1 F.3d 56 (1st Cir. 1993) (holding that when court defers ruling on request and proponent thereafter fails to resurrect issue in timely fashion, proponent is deemed to have abandoned point and cannot later complain on appeal); Gill v. Thomas, 83 F.3d 537 (1st Cir. 1996) (when in limine motion to exclude evidence is denied counsel must renew objection at trial to preserve right to appeal admission of the contested evidence); Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263 (8th Cir. 1993) (alleged error was not preserved for appellate review where plaintiffs failed to renew objections made in connection with their motion in limine); McEwen v. City of Norman, 926 F.2d 1539 (10th Cir. 1991) (objection raised at hearing on motion to exclude testimony was insufficient to preserve issue absent contemporaneous objection at trial); Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985) (party whose motion in limine is overruled must renew objection at trial); State v. Merrill, 252 Neb. 736, 566 N.W.2d 742 (1997) (when court overrules motion in limine, movant must object when particular evidence, previously sought to be excluded by motion, is offered).

Dr. Sopher failed to make a Rule 404(b) objection at trial. Therefore, even if the majority opinion had modified the standard for preserving a motion in limine objection, by a determination that Dr. Sopher had in fact raised a Rule 404(b) argument at the pretrial hearing, the issue was not preserved for appeal purposes absent a renewal of the objection at trial. See Clausen v. Sea-3, Inc., 21 F.3d 1181 (1st Cir. 1994) (denial of motion in limine did not preserve issue for review absent timely objection at trial to admission of such evidence).

The Trial Objection: No Reasonable Specificity

Dr. Sopher contends in his brief that he sought to exclude evidence of his prior conduct pursuant to Rule 404(b). The brief of Dr. Sopher referred this Court to the point of trial when the alleged Rule 404(b) objection was raised. In reviewing the trial transcript pages referred to in the brief, I find that counsel for Dr. Sopher initially objected by simply stating the matter was irrelevant. Two other objections were made. Both objections related to the form of the questions and not the substance of the question.

Dr. Sopher asks this Court to allow an objection of relevancy to be considered as a Rule 404(b) objection. The majority opinion refused to adopt such a rule. See United States v. Wilson, 31 F.3d 510 (7th Cir. 1994) (in absence of Rule 404(b)

objection defendant waived objection to the drug dealer's testimony that he had seen defendant in possession of cocaine on at least ten occasions); Hollenback v. United States, 987 F.2d 1272 (7th Cir. 1993) (by failing to raise Rule 404(b) as possible bar to drug use testimony, defendant waived objection); United States v. Dunn, 758 F.2d 30 (1st Cir. 1985) (failure to object to certain extensive testimony under Rule 404(b) constituted a waiver of objection); State v. Burton, 486 S.E.2d 762 (S.C.App. 1997) (failure to raise proper objection when evidence is offered constitutes waiver of right to object); Asberry v. State, 813 S.W.2d 526 (Tex.App.Dallas 1991) (in absence of appropriate Rule 404(b) objection in trial court nothing is preserved for appellate review). An objection as to relevance cannot automatically trigger a 404(b) objection. No court in the country has such a relaxed standard. To comply with the traditional standard, trial counsel must make the objection with reasonable specificity. This Court addressed that precise issue in In re Tiffany Marie S., 196 W.Va. 223, 234, 470 S.E.2d 177, 188 (1996):

> The West Virginia Rules of Evidence declare that parties must object to the wrongful offer of evidence at a particular time and with reasonable specificity. The failure to object at the time and in the manner designated by Rule 103(a) of the West Virginia Rules of Evidence is treated as a procedural default, with the result that the evidence, even if erroneous, becomes the facts of the case.

In re Tiffany Marie S. articulated a standard of "reasonable specificity" for

making an objection. Common sense dictates that the mere objection of "irrelevant" is not reasonably specific to alert a trial court or this Court that a Rule 404(b) objection is being

made.

Essentially, the dissenting opinion seeks a "Sopher exception" simply because the writer does not like the result in this case. A more solid legal argument would have resulted in a more solid dissent.