

Starcher, Chief Justice, dissenting:

While I have no illusions as to what likely occurred in the Monongalia County woods on October 19, 1997, I respectfully dissent to register my protest on the direction our Court continues to take with respect to what we now regularly refer to as “Rule 404(b) evidence.” I fear that Rule 404(b) has become a runaway train in criminal cases.

The niceties of a *McGinnis*<sup>1</sup> analysis do little to remove the overwhelming prejudicial effect that is heaped upon a defendant in a criminal case, once a jury learns of the defendant’s previous bad acts. Despite the limited reasons for which the evidence is purportedly offered, and despite cautionary instructions given to the jury -- both when the evidence is adduced and in the court’s general charge -- the result is the same: all doubts are resolved against the defendant, because he is a proven bad actor.

I would hope that we could limit the trial of criminal cases -- where there is the prospect of losing one’s freedom -- to the facts that are known about the incident on trial, rather than regularly relying on other incidents of bad conduct to bolster and help insure successful prosecutions.

Tossing aside the safeguards of our Constitution to promote and insure convictions is a much greater threat to democracy than risking an occasional offender not being convicted. In this case, the defendant would just as likely have been convicted of

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<sup>1</sup>*State v. McGinnis*, 193 W.VA. 147, 455 S.E.2d 516 (1994).

the charged offense without all of the Rule 404(b) evidence enumerated in Footnote 9 of the majority opinion.

Trial by innuendo and inference is not the American way.<sup>2</sup>

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<sup>2</sup>It is worth noting that criminal trials from time to time convict innocent people. For example, in Illinois, since that state reinstated the death penalty, 12 people have been released from death row because they were exonerated. DNA evidence has exonerated several convicted people in West Virginia. One major factor that can help convict innocent people -- that is tilt the balance in a close case -- is so-called "404(b)" evidence.