No. 26849 -- State of West Virginia v. Donald McIntosh

Starcher, J., dissenting:

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DEBORAH L. McHENRY, CLERK
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Based on the record before us, I have no doubt that the appellant is factually guilty of the very serious crime with which he was charged -- but based on that same record, he clearly did not get a fair trial. I dissent to show my displeasure with the direction the majority of this Court continues to take in applying *W.V.R.E.* 404(b).

Where a defendant *admits* touching a child on their sexual areas, but *denies* that the touching was for a sexual purpose, other instances of clearly non-accidental sexual touching might be admissible under 404(b) -- to show the defendant's actual plan and motive. That appears to be the case in the *Yager* case cited by the majority, where the court held that such evidence was admissible "to establish that it was no accident that [the defendant] touched the victim's penis." But in the instant case, the defendant *denied* all touching, so his motive was not a separate issue. Under these circumstances "other crimes" evidence should not be admissible under 404(b).

The appellant makes telling legal points in his brief on appeal about *Edward Charles L.* that I cannot improve upon, so I quote them *verbatim*:

> [T]he exception adopted by this Court in *Edward Charles L.* is premised upon the notion that a *child victim's credibility* needs enhancement. Specifically, this Court stated:
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> > We find this rationale to be particularly applicable in cases involving child victims. This is evident since these cases generally pit the child's credibility against an adult's

> credibility and often times an adult family member's credibility. Since sexual abuse committed against children is such an aberrant behavior, most people find it easier to dismiss the child's testimony as being coached or made up or concluded that any touching of a child's private parts by an adult must have been by accident. In addition, children often have greater difficulty than adults in establishing precise dates of sexual abuse, not only because small children don't possess the same grasp of time as adults, but because they obviously may not report acts of sexual abuse promptly, either because they are abused by a primary care-taker and authority figure and are therefore unaware such conduct is wrong, or because of threats of physical harm by one in almost total control of their life. In most cases of sexual abuse against children by a care-taker or relative, the acts of sexual abuse transpire over a substantial period of time, often several years. Consequently, under the existing collateral acts rule, a child victim is unable to present the complete record of events forming the context of the crime. Lastly, there is a common misconception that children have a greater propensity than adults to imagine or fabricate stories of sexual abuse. Research indicates, however, that absent coaching, children are far less likely to lie about matters in the sexual ream than adults, and that absent sexual experience there is little means by which children can imagine sexual transactions. In consideration of all these factors, the probative value of such testimony far outweighs the potential for unfair prejudice.

[In Mr. McIntosh's case] the victim was an adult at the time of trial. She suffered from only those infirmities possessed by the ordinary witness under similar circumstances. *The justification advanced in Edward Charles L. for the adoption of the "lustful disposition" exception simply does not apply to this case.* Inherent probativeness and inherent prejudice weighs in favor of limiting the scope and range of *Edward Charles L.* to the narrow facts of the case. Even if relevant, third party misconduct evidence has only marginal probative value. By contrast the danger of misuse and unfair prejudice from such testimony is substantial. Clearly, alleged sexual misconduct with children is inherently inflammatory. Even if the acts never took place or it was

> shown to be merely a joke, most jurors would condemn the defendant merely for putting himself in a position for such an allegation to be made. Undoubtedly, this type of evidence would enhance the case of the prosecution because of it persuasive quality. Nonetheless, it should be excluded when offered for this credibility purpose because it may unduly influence the jury and deny the accused a fair opportunity to defend against the particular charge.

(Emphasis added.)

One could write a dissertation on how Rule 404(b), *McGinnis*, and now *Edward Charles L.* have become a "runaway train" in some of our courts, when judges are tempted to abandon their proper gatekeeper role by over-zealous prosecutors. We have moved far away from the original purpose for permitting such evidence. The standard now seems to be: Will it help the prosecutor?

Finally, apparently the majority also thinks it was permissible to bring in the proverbial "kitchen sink" to show that Mr. McIntosh is a pervert who acted in a perverted way. Yet when Mr. McIntosh wanted to show that one of the complainants was also a troubled person, he had big problems doing so. I see a double standard here.

I repeat -- this appeal is not about whether the defendant is factually guilty or innocent. Nor is it about whether he should be allowed to be a teacher -- clearly, he should not. It is about the narrow issues of whether he had a fair criminal trial and how this Court continues to misapply *W.V.R.E.* 404(b). I believe the defendant clearly did not have a fair trial, and consequently, I dissent.[1]

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[1]I must comment that the majority opinion seems to have lapsed into an archaic 17th Century Puritan moral vocabulary, condemning "lustful advances and carnal pleasure," ___ W.Va. at ___, ___ S.E.2d at ___, Slip. Op. at 19-20. Today we know that power and its abuse, fixations, fear, compulsion, and insecurity are at the core of most sexual misconduct -- not the unchecked pursuit of sexual "pleasure" that the majority opinion implies to be at the root of the appellant's behavior.