

Maynard, Justice, dissenting:

FILED
July 6, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 9, 2001
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I respectfully dissent for several reasons. First, I believe the two assaults share sufficient similarities to establish *modus operandi*. The victim in each event was known to the defendant prior to the attack; the defendant stated that, at different times, he was involved in a sexual relationship with both Terri O. and Brenda D. Both incidents involved nighttime burglaries. Both victims were sexually assaulted. Both victims identified their attacker. Unlike the majority, I do not conclude that the differences of beating one victim during a sexual assault and failing to beat the victim of a second assault or bringing another person along during one incident and failing to do so during a second incident make the attacks so dissimilar as to preclude the admission of otherwise admissible evidence.

The majority finds no fault with “the trial court’s determination that the evidence was sufficient for a jury to conclude that the attack [on Brenda D.] did occur.” They instead conclude that the evidence “did not meet the legitimate purpose test” under West Virginia Rule of Evidence 404(b). But even if this test were met, the majority would nonetheless disallow Brenda D.’s testimony because the evidence would unfairly prejudice the jury. I simply do not agree. I do not believe the probative value of a previous sexual assault is outweighed by the danger of unfair prejudice when the offense before the court is sexual assault. Sex crimes, unlike other classes of crime, are particularly susceptible of repetition. If we know

anything about people who commit violent sexual crimes, we know they do not commit one rape and quit-- they will be compelled to commit the same crime again; possibly again and again.

To take this evidence from the jury undermines the confidence we customarily place in juries. I agree with the circuit court that the testimony is admissible. Whether or not to believe the witness is a job for the jury. The amount of weight to be given the testimony is a job for the jury.

Next, I believe the circuit court did not err by ruling the defendant could not impeach Brenda D. with evidence of her prior conviction. That ruling is correct. “Complicity in Theft” is a misdemeanor. To use a misdemeanor to impeach a witness, the crime *must* involve dishonesty or false statement. West Virginia Rule of Evidence 609(a)(2) clearly states:

(2) All witnesses other than criminal defendants.--For the purpose of attacking the credibility of a witness other than the accused

(A) evidence that the witness has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and

(B) evidence that the witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

This Court has seriously limited the class of misdemeanors which may be used for impeachment purposes. In *State v. Rahman*, 199 W.Va. 144, 483 S.E.2d 273 (1996), the defendant attempted to impeach the State’s witness who had a shoplifting conviction. The circuit court ruled the evidence was inadmissible for impeachment purposes, stating “it is not an offense involving dishonesty or

false statement under West Virginia Rule of Evidence 609(a)(2)(B).” *Id.*, 199 W.Va. at 154, 483 S.E.2d at 283. On appeal, the defendant maintained the court erred. In upholding the circuit court’s ruling, this Court said:

Although there has been some disagreement, “federal courts and most state courts are unwilling to conclude that offenses such as petty larceny, shoplifting, robbery, possession of a weapon, and narcotics violations are per se crimes of ‘dishonesty and false statement.’”

Id. If the crime of shoplifting cannot be used to impeach a witness, which this Court has plainly held, then surely the crime of having someone shoplift for you cannot be used to impeach a witness.

Because I believe the trial court did not err in allowing Brenda D. to testify or by disallowing impeachment with a misdemeanor that does not involve dishonesty, I would affirm the defendant’s conviction. Accordingly, I respectfully dissent.