No. 29325 – *State of West Virginia v. Rickey Carey*

Albright, Justice, dissenting:

I respectfully dissent from the majority opinion because I firmly believe that the defendant was deprived of a fair trial by the introduction into evidence of the photograph depicting him barefoot and in shackles.

When presented with the analogous situation of a criminal defendant appearing at trial before a jury in prison attire, this Court said that such appearance communicates a condition of guilt to the jury and violates a fundamental tenet of our system of criminal justice – that an accused person is innocent until proven guilty. We also have recognized the substantial prejudice created against a criminal defendant by his appearance before a jury in physical restraints, and have concluded that it is only in extreme circumstances, when an accused poses an immediate threat to the security of the court room, that a trial court is justified in allowing such appearance. Notwithstanding these prior decisions, the majority somehow manages to find that these same principles do not apply to the admission of photographs depicting that which we find legally objectionable to occur "live" in the court room. I discern no difference. My belief is that the defendant in this case was robbed of the presumption of innocence by the admission of the photograph in question and thereby was denied a fair trial which constituted reversible error.

Additionally, I believe the majority is mistaken in its reliance on *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994) for its discussion of whether the jury was properly instructed regarding the use of the two prior convictions of the defendant, which were introduced by the State through cross-examination of the defendant's character witness, for the sole purpose of testing the credibility of the witness. I agree that the instruction given by the lower court was correct, but not under the standard set forth in *McGinnis* but under the controlling case of *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987). *McGinnis* governs the jury instruction to be given when evidence is introduced pursuant to Rule 404 (b) of the Rules of Evidence. *Banjoman*, on the other hand, addresses the jury instruction to be given when prior convictions of the defendant are raised during cross-examination of a character witness under Rule 405 (a) of the Rules of Evidence. While both of these rules deal in some fashion with the subject of character evidence, the procedures to be followed under each are not interchangeable either within the language of these rules or in our case law regarding them.

The conviction should have been reversed and new trial ordered.

I am authorized to state that Justice Starcher joins in this dissent.