IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2011 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 101413

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

v.

LARRY ARTHUR MCFARLAND,
Defendant Below, Petitioner

Appeal from the Circuit Court of Jefferson County
The Honorable David H. Sanders, Judge
Criminal Action No. 09-F-59/10-F-40

REVERSED AND REMANDED

Submitted: September 7, 2011
Filed: November 23, 2011

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE DAVIS and JUSTICE MCHUGH dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

2. "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syl. pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

3. "When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syl. pt. 1, *State v. McGinnis,* 193 W. Va. 147, 455 S.E.2d 516 (1994).

4. "Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin,* 176 W. Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b)

evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence." Syl. pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

Per Curiam:

Petitioner Larry McFarland was convicted by a jury of sexual assault in the second degree. Following that conviction, the State filed an information alleging that Petitioner had been convicted of a qualifying offense under the recidivist statute at W. Va. Code § 61-11-18.[1] Petitioner admitted at the arraignment on the recidivist information that he was the same person previously convicted of a qualifying offense in California. Accordingly, the circuit court sentenced Petitioner to not less than 20 nor more than 25 years in the penitentiary. Petitioner now appeals his sexual assault and recidivist convictions to this Court. For the reasons that follow, we reverse Petitioner's convictions and remand to the circuit court for a new trial.

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[1]The pertinent portion of W. Va. Code § 61-11-18 (2000), provides:

> (a) Except as provided by subsection (b) of this section [regarding convictions for first degree or second degree murder], when any person is convicted of an offense and is subject to confinement in the state correctional facility therefor, and it is determined, as provided in section nineteen [§ 61-11-19] of this article, that such person had been before convicted in the United States of a crime punishable by confinement in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, the minimum term shall be twice the term of years otherwise provided for under such sentence.

I.

FACTS

Petitioner Larry McFarland met Grant B. and his wife, Elizabeth B.,[2] the alleged victim in this case, in a bar in the Spring of 2008. At that time, the parties planned to get together the next week. The following Sunday evening, Petitioner visited the home of Elizabeth B. and her husband. When he arrived at the home, Petitioner was drinking vodka and "some sort of pink juice." After Petitioner's arrival, the B.s and Petitioner all "took shots" of Jaegermeister. Subsequently, while Grant B. was talking on the telephone, Petitioner asked Mrs. B. if she and her husband "did" cocaine on a regular basis. Elizabeth B. responded that she and her husband did not, and that mentioning cocaine to her husband would be a bad idea. Elizabeth B. explained during her testimony that while her husband is "pretty adamantly against that sort of thing," she has "a more liberal view."

Later in the evening, the parties drank alcoholic beverages together and Petitioner and Elizabeth B. smoked marijuana supplied by Mrs. B. During her testimony at trial, Mrs. B. testified that she drank beers, vodka "with pink liquid," and Jaegermeister. She characterized the parties' drinking as "excessive." At some point during the evening, the

[2]We adhere to our long-standing practice of using initials in cases involving sensitive facts.

parties looked at pictures of naked women on Petitioner's cell phone. Also, Mr. B. and Petitioner discussed the physical attributes of the lead singer of the country music group Sugarland, agreeing that she was "hot."

Ultimately, Mr. B. went to bed, and Petitioner and Mrs. B. remained up, continuing to drink alcoholic beverages together. At some point, Petitioner offered Mrs. B. cocaine. According to Petitioner, Mrs. B. did "a line of" cocaine. Mrs. B. testified that in order to appease Petitioner she merely dipped her finger in the cocaine and tasted it. During their conversation, Petitioner asked Mrs. B. to rate his physical attractiveness and indicated that he would rate Mrs. B. a "nine." Mrs. B. stated that she did not want to rate Petitioner because she "was crazy" about her husband.

According to Mrs. B., the next thing she remembers is waking up in bed the next morning with her pants on inside out and her underwear on wrong. She felt ill, suffering vomiting, chills and severe vaginal pain. After Mrs. B. awoke, her husband called her from work and asked her why her pants were on inside out, and she replied that she did not know. Mrs. B. finally went to the hospital after 5:00 p.m. that day. A sexual assault exam revealed reddened areas and an ulceration on Mrs. B.'s external genitalia. According to the nurse who performed the exam, these injuries were consistent with a sexual assault. A DNA test

performed by the West Virginia State Police indicated the presence of Petitioner's semen on Mrs. B.'s pants.

Subsequently, Petitioner was indicted for one count of second degree sexual assault. The State proceeded under the theory that Mrs. B. was physically helpless at the time of Petitioner's sexual contact with her. The State gave notice that it intended to offer into evidence prior sex crimes committed by Petitioner in California. After several pre-trial hearings, the circuit court ruled that the prior sex crime evidence was admissible under Rule 404(b) of the West Virginia Rules of Evidence to show motive and plan. Following a two-day trial, Petitioner was convicted of second degree sexual assault.

Thereafter, the State filed a recidivist information seeking to enhance Petitioner's sentence based on the prior sex crime conviction in California. At the arraignment, the circuit court informed Petitioner of his right to contest the allegations and have a jury trial on the issue. Petitioner waived these rights and admitted that he was the same person convicted of the prior crime. The circuit court subsequently sentenced Petitioner to 20 to 25 years in the penitentiary. Petitioner now appeals his convictions and raises several assignments of error.

II.

STANDARD OF REVIEW

In order to decide the case before us, this Court finds it necessary to address two issues raised by Petitioner. The first issue is whether the State's evidence at trial was sufficient to support Petitioner's conviction. This Court's standard of reviewing claims of insufficiency of the evidence is well established.

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syl. pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). In addition, we have made clear that

> [a] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside

> only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. pt. 3, *Guthrie.*

The second issue that this Court will address is whether evidence of Petitioner's prior bad acts or crimes was properly admitted at Petitioner's trial. We have previously indicated:

> The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. LaRock, 196 W. Va. 294, 310-311, 470 S.E.2d 613, 629-630 (1996) (footnote and citations omitted). With these standards to guide us, we will now proceed to consider the issues.

III.

DISCUSSION

A. Sufficiency of the Evidence

This Court will first address Petitioner's claim that the evidence below was insufficient to convict him of second degree sexual assault. Petitioner contends that absent the improper Rule 404(b) evidence, there is insufficient evidence to support his conviction. Petitioner further asserts that the testimony presented at trial was actually exculpatory. Petitioner cites as an example Grant B.'s testimony that he, his wife, and Petitioner smoked marijuana in Mr. and Mrs. B.'s house while the couple's children were at home. In addition, Mr. B. indicated that he, his wife, and Petitioner talked about sex. Finally, Mr. B. testified that Petitioner voluntarily informed him and his wife of Petitioner's criminal history.

As additional examples of exculpatory evidence, Petitioner cites Mrs. B.'s testimony that she was drinking vodka and juice when Petitioner arrived and while her children were at home. Also, Mrs. B. admitted that she drank and did drugs with Petitioner, again, while her children were in the home. In addition, Mrs. B. testified that she had a more liberal view of using cocaine than her husband; she permitted Petitioner to use cocaine at her house; and she did not ask Petitioner to leave after he expressed his opinion concerning Mrs.

B.'s level of attractiveness. Finally, Mrs. B. admitted that she did not go to the hospital until after 5:00 p.m. the day after the alleged sexual assault.

Other testimony that Petitioner asserts points to his innocence includes that of the nurse who performed Mrs. B.'s sexual assault examination. This nurse stated that Mrs. B. lied about her drug use on the night of the alleged sexual assault. The nurse further testified that Mrs. B.'s vaginal trauma could have been caused by having sex with her husband three days earlier. Moreover, Lieutenant T.G. White, who provided expert DNA testimony on behalf of the State, testified that he did not find any trace of Petitioner's sperm inside of Mrs. B. Finally, Petitioner's expert testified that persons suffering from alcoholic blackouts, similar to that suffered by Mrs. B. on the night in question, can perform several tasks but not remember those tasks when they awake from the blackout. Petitioner concludes from this overview of trial testimony that his conviction is based solely on the improper use of 404(b) evidence as the remaining evidence is insufficient to support a conviction.

The State responds that it had to prove beyond a reasonable doubt that: (1) Petitioner, (2) in Jefferson County, West Virginia, (3) on or about a day in May 2008, (4) did engage in sexual intercourse or sexual intrusion, (5) with Elizabeth B., (6) who was physically helpless. According to the State, elements (1) through (5) were uncontested by

Petitioner.[3] Thus, the sole issue was whether Ms. B. was physically helpless at the time of sexual intercourse or sexual intrusion. Proof of this element consisted of Mrs. B.'s testimony that she had no recollection of events after Petitioner attempted to get her to rate his attractiveness on a scale of one to ten. She also indicated that at no time did she give Petitioner permission to have sexual contact with her. Mrs. B. further testified that the morning after the alleged sexual assault she awoke with vaginal pain, and a large bruise neither of which were present the night before. While Petitioner asserted an affirmative defense that he did not know that Mrs. B. was mentally incapacitated to the point of physical helplessness, there was evidence of the substantial amount of intoxicants consumed by Mrs. B. in Petitioner's presence. Considering all of this evidence, the State concludes that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt.

Petitioner was convicted under W. Va. Code § 61-8B-4 (1991), which provides in relevant part:

> (a) A person is guilty of sexual assault in the second degree when . . . .
> (2) Such person engages in sexual intercourse or sexual intrusion with another person who is physically helpless.
> (b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than

[3]Petitioner testified that he and Mrs. B. performed oral sex on each other.

> twenty-five years, or fined not less than one thousand dollars nor more than ten thousand dollars and imprisoned in the penitentiary not less than ten nor more than twenty-five years.

When this Court applies our standard of review to the evidence adduced at trial, we believe there was sufficient evidence to support Petitioner's conviction for second degree sexual assault as defined in W. Va. Code § 61-8B-4. Specifically, Mrs. B. testified that she passed out and awoke the next morning with her pants on inside out. Also, she had injuries on her crotch area, and she experienced vaginal pain. The nurse who performed the sexual assault examination opined that Mrs. B.'s injuries were consistent with sexual assault. In addition, Mrs. B. testified that she never consented to sexual contact with Petitioner. Finally, Petitioner's semen was found on Mrs. B.'s pants. Based on this evidence, this Court concludes that a rational trier of fact could find the essential elements of second degree sexual assault beyond a reasonable doubt.

B. Admissibility of Rule 404(b) Evidence

Next, Petitioner assigns as error the admission at trial of Petitioner's prior conviction of a sexually-based crime in California. During the State's opening statement at trial, the prosecution summarized the State's evidence and declared:

> But even more compelling than all of those things, you are going to hear that the Defendant has previously been convicted in California in 1999 of two counts of sexual

> penetration with a foreign object and one count of forcible rape and another count of sexual battery.
>
> You will hear from the record of those convictions that the Defendant's method of sexual gratification is to penetrate his victim with an object, usually his hand or his finger, while he masturbates on them. Folks, that is what happened here, the victim was unconscious and completely unaware, just as the Defendant planned it, he penetrated her with his fingers and hand or another object and masturbated on her and he left his sperm on her pants. Then he pulled them up, zipped them up, buttoned them up and said, I didn't do anything, nothing happened.

During the State's case-in-chief, the court permitted the prosecution to read to the jury the prior charges filed against Petitioner in California as follows:[4]

> Count 1: On or about September 29, 1995, Larry Arthur McFarland, in violation of Section 289(a) of the Penal Code (anal or genital penetration by foreign object), a felony, did willfully and unlawfully cause penetration of the genital and anal openings of Jennifer R. by a foreign object, substance, instrument and device, to wit: finger, in violation of Penal Code Section 289(a). Said act was for the purpose of sexual arousal, gratification and abuse and was accomplished against the victim's will by means of force, violence, duress, menace and fear of immediate unlawful bodily injury on the victim and on another.
>
> It is further alleged that the above offense is a serious felony within the meaning of Penal Code Section 119.7(c)(25).
>
> Count 2: On or about February 26, 1995, Larry Arthur McFarland, in violation of Section 261(a)(2) of the Penal Code (forcible rape), a felony, did willfully and unlawfully have and accomplish an act of sexual intercourse with Julie M., not his or

[4]After the prosecution read the charging document, the witness who was testifying at the time, Detective Harrison who investigated Mrs. B.'s alleged sexual assault, verified the contents of the document.

> her spouse, against victim's will, by means of force, violence and fear of immediate and unlawful bodily injury on said person and another.
>
> It is further alleged that the above offense is a serious felony within the meaning of Penal Code Section 1192.7(c)(3).
>
> Count 3: On or about February 26, 1995, Larry Arthur McFarland, in violation of Section 289(a) of the Penal Code (anal or genital penetration by foreign object), a felony, did willfully and unlawfully cause the penetration of the genital and anal openings of Julie M. by a foreign object, substance, instrument and device, to wit: finger, in violation of Penal Code Section 289(a). Said act was for the purpose of sexual arousal, gratification and abuse and was accomplished against the victim's will by means of force, violence, duress, menace and fear of immediate and unlawful bodily injury on the victim and on another.

The witness, Detective Harrison, who investigated Mrs. B.'s alleged sexual assault, then read to the jury Petitioner's plea agreement to the California offenses as follows:

> I offer to the Court the following facts as a basis for my plea of guilty to a felony: In [Orange County] on February 26, 1995 I had intercourse with Julie M. [a]gainst her will by means of force or fear of immediate and unlawful bodily injury on Julie M. I also penetrated Julie M. with my fingers against her will by force or fear of immediate bodily injury on her [f]or my sexual gratification. I also touched the intimate part of Julie M.'s body against her will for my sexual gratification while she was restrained. On September 29, 1995 in O.C. I penetrated Jennifer R. with my fingers against her will by means of force or fear of immediate bodily injury for my sexual gratification.

The prosecutor again discussed the evidence of prior offenses at her closing argument:[5]

> Now, the motive for committing the crime. Did the Defendant have a motive? Well, yeah, he has a very specific method of sexual gratification. He likes to masturbate on top of a victim while he penetrates them with his hand or his fingers. That is how he reaches sexual climax. To be crude, that is how he gets off. How do we know this, what turns him on, because he has been convicted of doing the exact same thing twice previously. He has done it before and he did it here to Elizabeth [B.] on May 4th or May 5th of 2008.

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[5]After the admission of the prior bad acts evidence during the State's case-in-chief, the circuit court read the following instruction to the jury:

> Ladies and gentlemen of the jury, the evidence that has just been read to you by the Prosecuting Attorney is what is called under the law evidence of collateral acts or collateral misconduct. It is not to be considered by you as establishing guilt of the crime with which the Defendant is charged in this case. You may consider that evidence for a very limited purpose only. You may not consider it as proof of the charges contained in this indictment. You may consider it to show motive, intent, scheme, plan or design if you feel that it does indeed prove that on the part of the Defendant, but you may not consider it for any other purpose, it is limited.

However, this Court has indicated that once the prosecution identifies the specific purpose for which the Rule 404(b) evidence is being offered, the circuit court should instruct the jury to limit its consideration of the evidence to that purpose only, and we have further cautioned that "[i]t is not sufficient for . . . the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b)." Syl. pt. 1, in part, *McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). Therefore, the circuit court's instruction was in error in that it did not instruct the jury to limit its consideration of the evidence to the purpose for which it was admitted. At the close of the trial, the circuit court did instruct the jury to limit its consideration of the evidence to the showing of motive and plan.

> You will recall State's Exhibit No. 1 he pled guilty to penetrating Julie M. and Jennifer R., two different women, in California the exact same way as Elizabeth [B.] was penetrated. He masturbated on both of them just as he masturbated on Elizabeth [B.].
>
> Now, what kind of person does that? Somebody who gets a sexual thrill out of doing that, somebody who reaches gratification through doing that.
>
> Is that motive? You bet it is. If that is how you get turned on sexually, you are going to try to do it again, and that is exactly what the Defendant did. He wanted to get the same sexual thrill out of Elizabeth [B.] he got out of Julie M. and Jennifer R.
>
> Now, this was a plan that the Defendant had in mind from the git-go. . . .[6] (Footnote added).

On appeal, Petitioner contends that the admission at trial of the prior bad acts evidence was error. First, Petitioner argues that, beyond a single conclusory statement, the circuit court failed to make any on-the-record findings pursuant to Rule 403 of the Rules of Evidence as to whether the probative value of the evidence was substantially outweighed by unfair prejudice. Next, Petitioner asserts that the State failed to prove that the prior bad acts occurred and that he committed the bad acts. Moreover, Petitioner posits that the prior bad acts were completely irrelevant to the current charge against him. Specifically, says Petitioner, the evidence did not establish a motive or plan but was simply used to improperly influence the jury. Finally, Petitioner complains that the method by which the State

[6]The prosecutor also cross-examined Petitioner extensively concerning the California offenses. The purpose of the cross-examination was to impeach Petitioner's testimony that he had been convicted of statutory rape in California.

introduced the evidence was improper. The State was permitted to hand the jury copies of Petitioner's convictions without proper certification or any testimony regarding the same by a qualified, knowledgeable witness.

The State answers that the circuit court correctly permitted the State to use 404(b) evidence at trial following the *McGinnis* hearings, balancing tests and appropriate record findings. The State cites the circuit court's conclusions in the November 23, 2009 hearing to support its claim that the circuit court made proper findings. According to the State, Petitioner's prior sex offenses were strikingly similar to the instant crime. In both the prior cases and this case, Petitioner ejaculated on the victim's clothing rather than in her vagina. As a result, the circuit court properly found that the prior bad act evidence shows Petitioner's motive for the crime against Mrs. B. Finally, the State cites the circuit court's November 30 ruling that "the balancing test, the Rule 403 balancing test, is satisfied" as proof that the court conducted the required balancing test.

With regard to the admission into evidence of prior bad acts evidence, Rule 404(b) of the West Virginia Rules of Evidence provides:

> *Other crimes, wrongs, or acts.* — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided

> that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

This Court has explained Rule 404(b) as follows:

> Rule 404(b) begins by restating the exclusionary principle of Rule 404(a) that evidence of crimes, wrongs, or acts is inadmissible to prove that a person acted in conformity therewith on a particular occasion. The second sentence of Rule 404(b), however, expressly permits the introduction of specific acts in the nature of crimes, wrongs, or acts to prove purposes other than character, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Thus, Rule 404(b) permits the introduction of specific crimes, wrongs, or acts for "other purposes" when character is not, at least overtly, a link in the logical chain of proof.

State v. McGinnis, 193 W. Va. 147, 153-154, 455 S.E.2d 516, 522-523 (1994). Further, we have stated that the purpose of Rule 404(b) is

> to prevent the conviction of a defendant for one crime by use of evidence tending to show that he engaged in other legally unconnected criminal acts and to prevent the inference that because he had engaged in or may have engaged in other crimes previously he was more likely to commit the crime for which he was being charged.

State v. Simmons, 175 W. Va. 656, 657, 337 S.E.2d 314, 315 (1985), *citing State v. Harris,* 166 W. Va. 72, 272 S.E.2d 471 (1980).

The ground rules that a circuit court is to follow when considering the admission of evidence under Rule 404(b) are well established and straightforward:

> When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

Syl. pt. 1, *State v. McGinnis, supra.* In addition,

> [w]here an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. pt. 2, *McGinnis*. Finally, this Court has recognized that

> Rule 404(b) determinations are among the most frequently appealed of all evidentiary rulings, and the erroneous admission of evidence of other acts is one of the largest causes of reversal of criminal convictions. It is equally inescapable that where a trial court erroneously admits Rule 404(b) evidence, prejudicial error is likely to result.

McGinnis, 193 W. Va. at 153, 455 S.E.2d at 522 (citations omitted).

After applying the relevant law regarding the admission of evidence under Rule 404(b) to the instant facts, this Court concludes that the evidence of Petitioner's prior bad acts was not properly admitted at Petitioner's trial. First, we find that the circuit court did not admit the prior bad acts evidence for a legitimate purpose under Rule 404(b). The prosecution argued at the November 23, 2009, pre-trial hearing that the evidence was admissible to show plan and motive. Specifically, the prosecution stated:

> the key facts with the [California] conviction, Judge, are the facts of how the defendant reached sexual gratification, that is he penetrated his victim with his hand or another object while he masturbated on top of the victim's person. That's exactly what happened here, that's the state's allegation. The facts are that the victim had severe vaginal pain consistent with something other than sexual intercourse and her pants –
>
> * * * * *
>
> [The victim] was wearing her own clothing inside out with the pants buttoned up, her underwear on kind of wrong, or something, and Mr. McFarland's semen went on the outside – or actually on the inside of her pants. The pants were on inside out.

> And the state believes that those facts are relevant and that it shows his motive because that is the way he reaches sexual gratification and his plan to do just as he had done previously in California and was convicted of doing.

When the court gave its instructions to the jury at the close of the evidence, it indicated to the jury that it may consider the prior bad acts evidence only for the limited purpose of showing Petitioner's motive and plan.

Authorities have defined motive as "the impetus that supplies the reason for a person to commit a criminal act. Evidence of other crimes may be admitted to show that the defendant had a reason to commit the act charged, and from this motive it may be inferred that the defendant did commit the act." 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, §404.22[3], at 404-115 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2011) (footnotes omitted). In other words, motive explains why the defendant committed the crime. This Court has explained that "[t]his motive exception sometimes arises in cases involving a charged offense that is not sexual in nature, such as kidnapping or murder, where the underlying motive was to obtain some sexual favor. *State v. Dolin*, 176 W. Va. 688, 697, 347 S.E.2d 208, 217 (1986), *overruled in part on other grounds by State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990) (citations omitted). In the instant case, evidence of Petitioner's prior bad acts simply is not relevant to show Petitioner's motive for sexually assaulting Mrs. B. With regard to using the evidence to show a plan, "[o]ther-crime evidence may be admissible if the other act or crime is part of a common

scheme or plan that includes the charged offense." *Weinstein's Federal Evidence,* §404.22[5][a], at 404-125 (footnote omitted). However, there is no evidence that Petitioner's crime in the instant case was part of a common scheme or plan that began several years earlier in California.

Instead, it appears from the record below that the evidence was admitted to show Petitioner's specific method or *modus operandi* in sexually assaulting Mrs. B. This court has recognized "the theory that where a defendant commits a series of crimes which bear a unique pattern such that the *modus operandi* is so unusual it becomes like a signature, then evidence of other crimes may be admissible." *State v. Dolin*, 176 W. Va. at 698 n. 14, 347 S.E.2d at 218 n. 14 (citations omitted). However, this theory is inapplicable in the present case. This is because absent the evidence of prior bad acts, the evidence at trial was insufficient to show the manner in which Petitioner sexually assaulted Mrs. B. The jury was able to infer the Petitioner's method of sexual assault in the instant case only as a result of the evidence of the prior bad acts. In other words, the State used the prior bad acts evidence to establish its theory in the instant case. Therefore, the prior bad acts evidence actually became the State's theory of the case. This is clearly improper under Rule 404(b). Accordingly, we conclude that the circuit court abused its discretion in admitting evidence of Petitioner's prior criminal conduct in California at his trial in the instant case.

Moreover, this Court finds that the admission of the prior bad acts evidence was unfairly prejudicial to Petitioner. The prosecution referred to the evidence as "compelling" in its opening statement. The prosecution presented the evidence in detail during the State's case-in-chief and questioned Petitioner at length about the evidence during its cross examination of Petitioner. Finally, the prosecution again discussed the evidence in its closing argument. Because the prior bad acts evidence played such a prominent rule at Petitioner's trial, coupled with the relative weakness of the State's case, we conclude that the prior bad acts evidence likely affected the outcome of Petitioner's trial.[7]

Finally, we note that even if the prior bad acts evidence had been admitted for a proper purpose, the circuit court failed to conduct the balancing required under Rule of Evidence 403 before admitting the evidence. According to Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The transcript of the November 30, 2009, pre-trial hearing indicates the circuit court's finding "that the balancing test, the Rule 403 balancing test, is satisfied based upon the nature of the offense, the finding that the Defendant is the person by a preponderance of the evidence who did

[7]Petitioner raised other assignments of error in his brief, but in light of this Court's disposition of this case we do not find it necessary to consider these assignments of error.

commit the earlier offense." However, the circuit court's performance of the balancing test does not appear on the face of the record. This is problematic. We previously have made clear that "[t]he balancing necessary under Rule 403 must affirmatively appear on the record." *State v. McGinnis*, 193 W. Va. at 156, 455 S.E.2d at 525. If the factors used by the circuit court in conducting the Rule 403 balancing test do not appear on the record, this Court is unable to effectively review the circuit court's decision to admit the evidence in question. Therefore, this Court concludes that the circuit court's failure to conduct the balancing test required by Rule 403 on the record also constitutes error.

IV.

CONCLUSION

For the reasons set forth above, this Court reverses Petitioner's conviction for sexual assault in the second degree. As a result, we also reverse Petitioner's recidivism conviction. Finally, we remand this case to the circuit court for a new trial consistent with this opinion.

Reversed and remanded.