No. 101413 - State of West Virginia v. Larry Arthur McFarland

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OF WEST VIRGINIA

Davis, J., dissenting:

In this case, the defendant, a serial rapist,[1] was convicted by a jury of sexual assault in the second degree. The majority opinion found that the evidence was sufficient to sustain the conviction. However, the majority opinion has reversed the conviction on the purported grounds that the trial court improperly allowed evidence of the defendant's prior convictions for sexual assault to be introduced into evidence. For the reasons set out below, I dissent.

A. Sufficiency of the Evidence and Harmless Error

The first issue taken up in the majority's opinion involved the defendant's claim "that absent the improper Rule 404(b) evidence, there is insufficient evidence to

[1]I refer to the defendant as a serial rapist because the victim in this case is the third person that the defendant is *known* to have raped. *See* Milli Kanani, *Hansen Testing Justice: Prospects for Constitutional Claims by Victims Whose Rape Kits Remain Untested*, 42 Colum. Hum. Rts. L. Rev. 943, 946 (2011) ("David Lisak, a clinical psychologist who researches the characteristics of 'undetected' rapists, found that of the 120 undetected rapists evaluated in one study, sixty-three percent were serial rapists. Those seventy-six rapists had, on average, attacked fourteen victims and were responsible for 439 rapes and attempted rapes, forty-nine sexual assaults, 277 acts of sexual abuse against children, and 214 acts of battery against intimate partners."). *See also People v. Story*, 45 Cal. 4th 1282, 1297 (2009) ("The evidence showed that defendant is a serial rapist, and that his raping conduct began before he killed Vickers and continued afterwards. The other four sexual assaults were quite similar in a number of respects to each other and to the crime of this case.").

support his conviction." The majority opinion reviewed the evidence, without discussing the Rule 404(b) issue of prior convictions, and concluded "that a rational trier of fact could find the essential elements of second degree sexual assault beyond a reasonable doubt." This conclusion by the majority opinion dictated that, to the extent the Rule 404(b) evidence was introduced improperly, harmless error review was necessary.[2] Because of the majority's utter failure to engage in any analysis of harmless error, the wrong standard of review was applied. In *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996), we enunciated the proper standard of review as follows:

> A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are reviewed for an abuse of discretion. *See McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995). Even when a trial court has abused its discretion by admitting or excluding evidence, the conviction must be affirmed unless a defendant can meet his or her burden of demonstrating that substantial rights were affected by the error. *See State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). In other words, a conviction should not be reversed if we conclude the error was harmless or "unimportant in relation to everything else the jury considered on the issue in question." *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 1893, 114 L. Ed. 2d 432, 449 (1991). Instead, this Court will only overturn a conviction on evidentiary grounds if the error had a substantial influence over the jury. This reasoning suggests that when the evidence of guilt is overwhelming and a defendant is allowed to put on a defense, even if not quite so complete a defense as he or she might reasonably desire, usually this Court will find the error harmless. If, however, the error precludes or impairs the presentation of a defendant's best means of a defense, we will

[2]I wish to make clear that I do not believe that the Rule 404(b) evidence was improperly allowed into evidence.

> usually find the error had a substantial and injurious effect on the jury. When the harmlessness of the error is in grave doubt, relief must be granted. *O'Neal v. McAninch*, 513 U.S. 432, 438, 115 S. Ct. 992, 996, 130 L. Ed. 2d 947, 955 (1995); *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

197 W. Va. at 705, 478 S.E.2d at 555. *See also State v. Barnett*, 226 W. Va. 422, 428-29, 701 S.E.2d 460, 466-67 (2010).

Under *Blake*, the majority opinion was required to review the Rule 404(b) issue for harmless error. However, the majority opinion totally ignored this review standard. A harmless error analysis was avoided because the majority wanted to reach a result that was not supported by the record.

This Court has set forth the harmless error test to determine whether the introduction of improper evidence in some instances constitutes reversible error or was harmless:

> Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

Syl. pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979). *Accord State v. Day*, 225 W. Va. 794, 803, 696 S.E.2d 310, 319 (2010). Under the *Atkins* test, it is clear that, assuming there was error in introducing the Rule 404(b) evidence, such error was harmless.

As previously stated, the majority opinion concluded that the evidence was sufficient to convict the defendant in the absence of the Rule 404(b) evidence. Thus the first two prongs of the *Atkins* test are resolved favorably toward a finding of harmless error, as established by the majority opinion. Clearly, the third prong of the test is also satisfied. During the trial in this case, the State presented overwhelming evidence of the defendant's guilt. The State presented testimony that the defendant "stated to the detective multiple times that he did not touch or have sex with [the victim]." Further evidence established that, prior to his arrest, the defendant "questioned the detective about the status of the case, whether semen had been found, and whether [the victim] had given a urine sample." In addition, the State presented testimony that, when the police went to the defendant's home to arrest him, the defendant stated "the DNA results came back." Finally, the State introduced DNA test results that found the defendant's semen on the crotch of the victim's underwear and also on her jeans. In addition to the overwhelming evidence of guilt set out by the State, it is also notable that the defendant compromised his own defense by changing his story during the trial. Initially, he claimed to be innocent of any sexual contact with the victim; however, he then recounted to the jury that he and the victim had engaged in consensual oral sex.

With the above facts clearly before the jury, it is beyond question that the jury would have convicted the defendant based solely thereon. Thus, the evidence of his prior rape convictions was harmless beyond a reasonable doubt. *See United States v. Courtright*, 632 F.3d 363, 372 (7th Cir. 2011) ("At the end of the day, the only errors Courtright has established are the admission of his prior sexual assault of L. Miller . . . and possibly the jury instructions related to that admission. Even if we assume that these interrelated errors suffice to qualify as two independent errors, reversal is appropriate only if 'the errors, considered together, could not have been harmless.' . . . Again, there was abundant evidence of Courtright's guilt, so L. Miller's testimony and the related jury instructions could not have had any appreciable impact on the jury's verdict. Courtright's claim of cumulative error thus fails."); *United States v. Spence*, 2011 WL 2295053, at *1 (4th Cir. 2011) ("[T]he introduction of inadmissible [Rule] 404(b) evidence may be found harmless when it is clear beyond a reasonable doubt that a guilty verdict would have been returned notwithstanding the evidence's admission."); *United States v. Dennis*, 497 F.3d 765, 769–70 (7th Cir. 2007) ("Error in admitting Rule 404(b) evidence may be deemed harmless if we are convinced that the error did not influence the jury, or had but very slight effect, and can say with fair assurance . . . that the judgment was not substantially swayed by the error." (internal quotations and citation omitted)).

B. Deficiencies in Trial Court's Consideration of Rule 404(b) Evidence

The majority opinion appears to have gone out of its way to find fault with how the trial court handled the Rule 404(b) evidence. The majority found that the trial court "failed to conduct the balancing required under Rule of Evidence 403 before admitting the evidence." Majority Slip Op. at 20, ___ W. Va. at ___, ___ S.E.2d at ___. This conclusion was made after the majority expressly acknowledged that the trial court stated in the record "'that the balancing test, the Rule 403 balancing test, is satisfied based upon the nature of the offense, [and] the finding that the Defendant is the person by a preponderance of the evidence who did commit the earlier offense.'" *Id.* It is clear to me that, while the trial court did not go into details regarding its Rule 403 prejudice analysis, the trial court unquestionably performed such an analysis.

Assuming, for the sake of argument, that the trial court failed to adequately place on the record the findings required in syllabus point 2 of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994),[3] this failure would not in and of itself constitute reversible error.

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[3]Under Syllabus point 2 of *State v. McGinnis,* the following is required:

> 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

(continued...)

In *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), Justice Cleckley addressed the issue of a trial court's failure to fully comply with *McGinnis*:

> Although we believe the trial court failed to articulate precisely the purpose of this evidence under Rule 404(b), this failure is subject to harmless error analysis. [I]f the purpose for admitting the evidence is apparent from the record and its admission is proper, the failure to follow *McGinnis* is harmless error. Our reading of the entire transcript reveals the relevance and apparent purposes for offering this evidence under Rule 404(b).

196 W. Va. at 312 n.28, 470 S.E.2d at 631 n.28. Moreover, the Court in *United States v. Joseph*, 178 Fed. Appx. 162 (3d Cir. 2006), was confronted with the issue of a trial court's failure to instruct the jury on the limited purpose for which Rule 404(b) evidence was admitted. The Court held the following:

> [3](...continued)
> 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.

193 W. Va. 147, 455 S.E.2d 516 (1994).

> We need not consider whether the first three prongs of the four-part test for admission of Rule 404(b) evidence are satisfied, as it is uncontested that the fourth prong of the test was not met: the Court did not charge the jury to consider the evidence only for the limited purposes for which it is admitted. We assume without deciding that the failure to issue such an instruction, and thus the decision to admit the evidence, constituted clear or obvious error. Under the harmless error doctrine, however, a non-constitutional error will not warrant reversal unless we cannot conclude that there is a reasonable possibility that the [error] prejudiced [the defendant's] trial in any meaningful way. . . . . If, however, the error was constitutional, we must reverse the conviction unless the error was harmless beyond a reasonable doubt.
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> Even assuming that the error here was constitutional, in light of the overwhelming evidence supporting Joseph's conviction, we conclude the error was harmless beyond a reasonable doubt. . . .

Joseph, 178 Fed. Appx. at 167 (footnote omitted) (internal quotations and citations omitted). *See also United States v. Trevino*, 2000 WL 1272447, at *2 (5th Cir. 2000) ("Consequently . . . the failure of the court to conduct an on-the-record 404(b) analysis is harmless.").

Justice Cleckley and the authorities cited above clearly indicate that, when a trial judge commits a procedural technical error in admitting Rule 404(b) evidence, such an error is subject to harmless error analysis.[4] Thus, even if the majority was correct in finding

[4]It has been appropriately noted by one commentator that "[a]llowing a serial rapist to remain free on an unlucky technicality . . . seems excessive and ironically novel." (continued...)

the trial court failed to place on the record its analysis of the prejudicial impact of the Rule 404(b) evidence, such an error was harmless in light of the reasons apparent from the record. *See State ex rel. Caton v. Sanders*, 215 W. Va. 755, 762 n.6, 601 S.E.2d 75, 82 n.6 (2004) ("We note that a failure to expressly articulate how 404(b) evidence is probative does not mandate automatic reversal. If the basis for the admission of the evidence is otherwise clear from the record, we can affirm the circuit court.").

C. The Defendant's Prior Rape Convictions Were Properly Admitted

The record in this case is clear. The defendant is a serial rapist. The state sought to inform the jury that the defendant was previously convicted of two rapes in California. The state argued that this evidence was admissible to show motive and plan. The trial court admitted the evidence for such purposes and instructed the jury at the close of the evidence that it could consider such evidence only for motive and plan.[5] The majority

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[4](...continued)
Oliver M. Gold, *Trimming Confrontation's Claws: Navigating the Uncertain Jurisprudential Topography of the Post-Melendez-Diaz Confrontation Clause*, 43 Loy. L.A. L. Rev. 1431, 1443 (2010).

[5]The majority opinion points out that, during the trial, when the Rule 404(b) evidence was admitted, the trial court gave a limiting instruction to the effect that the jury could consider such evidence only to show motive, intent, scheme, plan or design. The majority opinion found that this instruction was erroneous and supported reversal. However, the mere fact that, during the heat of the trial, the court cited all of the grounds listed under Rule 404(b) is of no moment. This is because, upon reflection after the trial, the court properly instructed the jury that the evidence could be considered only for motive and plan. *See United States v. Blauvelt*, 638 F.3d 281, 292 (4th Cir. 2011) ("The district court did not (continued...)

opinion, through a convoluted analysis of legal principles, found that the evidence was not connected to a motive or plan. Based upon the method by which the majority opinion analyzed motive and plan, prosecutors in this state will never again be able to introduce evidence of rapes committed by serial rapists. In other words, the majority's rejection of the admission of the evidence, and its application to future cases, will now allow serial rapists to be paraded in front of juries as All-American boy scouts.

This Court addressed the issue of introducing other sexual misconduct as part of a plan by a defendant under Rule 404(b) in *State v. McIntosh*, 207 W. Va. 561, 534 S.E.2d 757 (2000). In *McIntosh*, the defendant was convicted of three counts of third degree sexual assault. One of the issues raised on appeal was that the lower court erred by permitting the introduction of evidence of sexual misconduct with four other victims. This Court observed that the trial court instructed the jury as follows:

> In this instant [case], the testimony of the other sexual misconduct of the defendant may be considered only as it relates to the issues of the State establishing a common scheme or plan on the part of the defendant or the defendant's lustful disposition towards teenage girls.

McIntosh, 207 W. Va. at 571, 534 S.E.2d at 767. Further, in *McIntosh*, it was found that the

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[5](...continued)
specify the particular basis under Rule 404(b) on which it was admitting the 'bad acts' evidence. Nonetheless, we may sustain the admission of such evidence on any viable theory.").

instruction was proper and that the evidence was properly admitted:

> Upon review of the present matter, we find no clear error in the lower court's determination that there was sufficient evidence to show that the other bad acts actually transpired. We also find that the lower court properly deemed the evidence admissible for a legitimate purpose, under a Rule 404(b) analysis, to demonstrate the defendant's intent, motive, malice, common scheme, plan, and the absence of accident. Employing the principles established in [our precedents], the lower court properly deemed the evidence admissible for the other stated purpose of showing the defendant's lustful disposition toward teenage girls who were his students. Further, we conclude that the lower court did not abuse its discretion in finding that the probative value of the other bad acts evidence was not substantially outweighed by the danger of unfair prejudice to the Appellant.

Id. 207 W. Va. at 574, 534 S.E.2d at 770.

In *State v. Cowley*, 223 W. Va. 183, 672 S.E.2d 319 (2008), the defendant was convicted by a jury of second degree sexual assault. One of the issues raised by the defendant on appeal was that the trial court erred in admitting evidence that he attempted to sexually assault another victim while the charges were pending against him in the instant case. This evidence was admitted under Rule 404(b) as evidence of a common plan. The opinion in *Cowley* set out the instruction given by the trial judge on the issue:

> The Court instructs the jury that the testimony of M.H., which was elicited during this trial, was admitted for a very limited purpose, and you must consider the testimony of M.H. only for the limited purpose for which it was admitted. It was admissible only to prove the so-called common plan, which means the method of operation of the defendant.

> It must not be considered by you for any other purpose. Specifically, you may not consider it in establishing that the defendant was a person of bad character and that he acted in conformity with that bad character, and therefore, he forcibly raped or attempted to rape the victim named in the indictment.
>
> It is only admissible to prove a common plan, which means the method of operation of the defendant.

223 W. Va. at 191, 672 S.E.2d at 327. After reviewing the evidence in *Cowley*, this Court summarily concluded "that the circuit court complied with the requirement for reviewing Rule 404(b) evidence and, therefore, we find no merit in this aspect of the appellant's appeal." *Id.* 223 W. Va. at 191, 672 S.E.2d at 327. *See also State v. Rash*, 226 W. Va. 35, 47, 697 S.E.2d 71, 83 (2010) ("Having reviewed the record before us, we conclude that it was appropriate to admit E.L.'s testimony as 404(b) evidence. While the Appellant's touching of E.L. may not have risen to the level of a crime, it was certainly an inappropriate, wrongful act which was admissible under Rule 404(b)."); *State v. Parsons*, 214 W. Va. 342, 351, 589 S.E.2d 226, 235 (2003) ("Our review of the record shows that the lower court followed the requirements of *McGinnis* in its handling of the 404(b) evidence. Moreover, we believe that the [other sexual conduct] incidents were neither so distant in time, nor so excessively numerous, as to deny Mr. Parsons a fair trial. Thus we must reject this assignment of error."); *State v. Graham*, 208 W. Va. 463, 541 S.E.2d 341 (2000) (allowed introduction of evidence of a prior first degree sexual abuse conviction of defendant during his trial for first degree sexual abuse).

Under *Cowley* and *McIntosh*, this Court determined that, for the purpose of introducing other sexual misconduct pursuant to Rule 404(b), a common plan means the method of operation of the defendant. The prosecutor in the instant proceeding showed that all three of the defendant's victims were penetrated with an object, and that the defendant masturbated on the victim in the instant case and one of the victims in an earlier sexual assault. Following this Court's precedent in *Cowley* and *McIntosh*, this evidence was more than sufficient to be introduced as a plan under Rule 404(b).

The majority opinion also concluded that the trial court erred in admitting the Rule 404(b) evidence to show motive. At trial, the prosecutor contended that the defendant's prior sexual assaults and the sexual assault in the instant case were motivated by sexual gratification. Courts around the country have found that sexual gratification is a valid ground for admitting other acts of sexual misconduct by a defendant to show motive. *See*, *e.g.*, *Lemaster v. State*, 2008 WL 5264997, at *2 (Ark. Ct. App. 2008) ("The State counters appellant's argument by contending that these four individuals' testimony was relevant because it . . . falls within the listed exceptions of Rule 404(b), for example, "motive," showing appellant's desire for sexual gratification by oral sex from a young child. . . . We agree."); *People v. Leonard*, 872 P.2d 1325, 1328 (Colo. App. 1993) ("We also reject defendant's contention that the evidence was not admissible because the motive for the charged act was obvious, namely, sexual gratification. We recognize that evidence of

uncharged conduct indicative of motive is generally admitted for the purpose of establishing identity or intent. However, admission of such evidence . . . has been approved in sexual assault cases on a number of occasions as bearing on defendant's motive even though identity and intent were not at issue."); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) ("[T]he evidence was offered to show a modus operandi for the purpose of proving motive, intent, knowledge, and the absence of mistake or accident, *i.e.*, contrary to his statements to the police, Appellee knew what he was doing (knowledge), he did it on purpose (intent, absence of mistake or accident), and he did it for his own sexual gratification (motive)."); *People v. Bou*, 2011 WL 4949999, at *4 (Mich. Ct. App. 2011) ("The video evidence was offered primarily to show defendant's motive . . .— namely, that he touched the victim for the purpose of gaining pleasure, arousal, or sexual gratification. . . . Because the video recording was relevant to defendant's motive . . . and not merely to defendant's propensity — admission of the video evidence did not violate [Rule] 404(b)."); *People v. Venters*, 2002 WL 31928564, at *6 (Mich. Ct. App. 2002) ("Regardless, those statements were relevant as to intent and motive, which are proper purposes under MRE 404(b), where the prosecutor was required to establish that defendant's actions were for the purpose of sexual arousal and gratification."); *State v. Guenther*, 2006 WL 401309, at* 10 (Ohio Ct. App. 2006) ("Ms. Wilson's testimony was reasonably offered to prove appellant's motive to inappropriately touch a younger woman for the purpose of sexual gratification."); *Marx v. State*, 953 S.W.2d 321, 337 (Tex. Ct. App. 1997) ("The complained-of statements are

probative of the appellant's motive and knowledge in committing the offense charged—showing the motive of sexual gratification and knowledge that B.J. was only a child. Therefore, they were admissible for these purposes.").

The majority opinion sets new precedent by stating that the motive criterion under Rule 404(b) cannot be used to show sexual gratification as a reason for a serial rapist's conduct. I must assume that the majority opinion also overrules Justice Workman's well reasoned opinion in *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990), where it was held in Syllabus point 2 that, "[c]ollateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children[.]"[6]

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[6]The federal rules of evidence have a specific provision dealing with the admission of other sexual crimes by a defendant. Rule 413(a) expressly provides that "[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." *See, e.g., United States v. McGuire*, 627 F.3d 622, 626-27 (7th Cir. 2010) ("The testimony was admissible as evidence of the defendant's modus operandi (and thus not excludable under Rule 404(b) . . .) and it was also admissible under Rules 413 and 414 as evidence of the defendant's previous crimes of sexual assault and child molestation, demonstrating a propensity to commit such crimes."); *United States v. Redlightning*, 624 F.3d 1090, 1120 (9th Cir. 2010) ("Evidence that tends to show that Redlightning committed another sexual assault, namely, his 1990 confession to that sexual assault, was admissible under Rule 413 because it tends to show that Redlightning had the propensity to commit another sexual assault, namely, the Disanjh offense."); *United States v. Batton*, 602 F.3d 1191, 1196 (10th Cir. 2010) ("The (continued...)

Based upon the foregoing, I dissent. I am authorized to state that Justice McHugh joins me in this dissenting opinion.

[6](...continued)
district court properly concluded that both Batton's prior conviction and the crime with which he is charged in this case qualify as sexual assault for Rule 413 purposes.").