IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2009 Term

No. 33835

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee,

V.

GLORIA JEAN WILLETT,
Defendant Below, Appellant.

Appeal from the Circuit Court of Raleigh County
Honorable John A. Hutchison, Judge
Civil Action No. 06-F-70
AFFIRMED

Submitted: January 13, 2009
Filed: January 30, 2009

Paul S. Detch
Lewisburg, West Virginia
Attorney for the Appellant

Tom Truman
Assistant Prosecuting Attorney
Beckley, West Virginia
Attorney for Appellee

The Opinion of the Court was delivered PER CURIAM.

JUSTICE KETCHUM concurs and reserves the right to file a concurring opinion.

JUSTICE ALBRIGHT not participating.

SENIOR STATUS JUSTICE McHUGH sitting by temporary assignment.

SYLLABUS BY THE COURT

"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." Syllabus point 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

Per Curiam:[1]

Gloria Jean Willett, defendant below and appellant herein (hereinafter referred to as "Mrs. Willett"), appeals from an order of the Circuit Court of Raleigh County denying her motion for a new trial. Mrs. Willett was sentenced to prison after being convicted by a jury on four counts of drug possession with intent to deliver. She was also convicted of one count of conspiracy to commit a felony.[2] In this Court, Mrs. Willett assigns error to the trial court's ruling that permitted the jury to hear evidence of collateral crimes under Rule 404(b) of the West Virginia Rules of Evidence.[3] After a careful review of the briefs and the record submitted on appeal, and having listened to the oral arguments of the parties, we affirm.

I.

FACTUAL AND PROCEDURAL HISTORY

In 2001 or 2002, Mrs. Willett and her husband, Richard Willett, purchased a

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[1]Pursuant to an administrative order entered on January 1, 2009, the Honorable Thomas E. McHugh, Senior Status Justice, was assigned to sit as a member of the Supreme Court of Appeals of West Virginia commencing September 12, 2008, and continuing until the Chief Justice determines that assistance is no longer necessary, in light of the illness of Justice Joseph P. Albright.

[2]The circuit court sentenced Mrs. Willett to one to fifteen years imprisonment on one count of drug possession with intent to deliver. Sentences were imposed for the remaining counts but were suspended. Mrs. Willett is now out of prison and on parole.

[3]Mrs. Willett's petition for appeal also assigned a second ground for appeal. However, this Court limited the appeal to the collateral crimes issue.

modest house in Beckley, West Virginia.[4] At the time of the purchase, the couple resided in Tampa, Florida. The house purchased in Beckley was in poor condition and required a lot of structural work. Consequently, for several years after the house was purchased, the Willetts continued to reside in Tampa. However, the couple frequently drove to Beckley to have work done on the house.

At some point in 2004, the Beckley City Police Department received a telephone call from an inmate at the Southern Regional Jail. The inmate, Alan Reed, informed the police that drugs were being sold from the house purchased by the Willetts. Subsequent to this call, in August of 2004, a Beckley police detective received additional information from another source that indicated a white female was coming from the Tampa, Florida, area to a house at 201 Quarry Street, the Willetts' home, and she would bring large amounts of Oxycontin to the home, possibly to sell. On a third occasion in 2004, the Beckley police received an anonymous call regarding drug activity at the Willetts' home:

> The caller went into detail that they had personally observed cars coming to the house, but parking away from the house as not to draw attention to themselves, going to the house for four or five minutes and then leaving, and they — in their opinion, they thought that some drug activity was going on.

In May 2005, the Beckley police received a fourth anonymous tip about drug activity at the Willetts' home. The anonymous informer named Mrs. Willett as the person selling drugs

[4]Mrs. Willett had family members living in the Beckley area.

from the home.

On May 13, 2005, the Beckley police executed a search warrant for the Willetts' home. During the search, the police discovered over 3,000 pills, a handgun, and over $1,000 in cash. The pills included the narcotic drugs Oxycontin, Percocet, Roxycodone, and Xanax. Subsequent to the search, the police arrested Mrs. Willett.[5]

Mrs. Willett was indicted by a grand jury on four counts of drug possession with intent to deliver, and one count of conspiracy to commit a felony. In 2006, the case went to trial. During the trial, the prosecutor called five witnesses. Four of the witnesses were law enforcement officials who testified regarding evidence obtained during the search. They also provided testimony about information obtained during the investigation of the case. The fifth witness, Alan Reed, was the only witness to provide direct testimony of having purchased drugs from Mrs. Willett.[6] Mr. Reed testified that he was a drug addict and that during the period 2003 to 2005, he visited Mrs. Willett's home "about 50 to 100 times" to obtain narcotic pills from Mrs. Willett. Mr. Reed also testified that he brought other individuals to Mrs. Willett for the purpose of buying narcotic drugs. On those occasions,

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[5]The police also arrested Mr. Willett. However, charges against him were eventually dropped.

[6]Prior to trial, Mrs. Willett filed a motion to preclude testimony by Mr. Reed. The trial court, after a hearing, denied the motion and allowed the testimony under W. Va. Rules of Evidence 404(b).

Mrs. Willett would give him drugs as a gratuity for bringing customers to her. There was further testimony by Mr. Reed that, on a few occasions, Mr. Willett was present when he obtained drugs from Mrs. Willett.

During Mrs. Willett's case-in-chief, she called her husband and adult daughter to testify on her behalf. Mr. Willett testified that his wife did not sell drugs. Their daughter testified that Mrs. Willett had a habit of hoarding all types of drugs for her personal use. Mrs. Willett took the stand. She testified that the narcotic drugs were legally obtained from prescriptions written by a Florida physician and a West Virginia physician.[7] Mrs. Willett admitted that neither doctor knew the other was prescribing the same narcotic drugs for her. She further testified that she needed the drugs to relieve pain from a back operation that she had in 2000. Mrs. Willett further stated that because she feared having problems obtaining the drugs, she began hoarding them.

At the conclusion of all the evidence, the jury returned a verdict convicting Mrs. Willett on each count of the indictment. The trial court subsequently imposed a sentence of imprisonment on one count that was to be served, but suspended the sentences imposed on the remaining counts. After the trial court denied Mrs. Willett's post-trial motion for a new trial, she filed this appeal.

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[7]The drug Roxycodone was actually prescribed for Mr. Willett.

II.

STANDARD OF REVIEW

This case requires the Court to determine whether the circuit court properly admitted Mr. Reed's testimony pursuant to Rule 404(b) of the W. Va. Rules of Evidence. In discussing the standard of review to be applied to Rule 404(b) issues, this Court has stated:

> 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, 310-11, 470 S.E.2d 613, 629-30 (1996). In *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), we explained that this Court will "review the trial court's decision to admit evidence pursuant to Rule 404(b) under an abuse of discretion standard." *McGinnis*, 193 W. Va. at 159, 455 S.E.2d at 528. *McGinnis* further held:

> Our function on . . . appeal is limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion. In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect.

McGinnis, 193 W. Va. at 159, 455 S.E.2d at 528. Guided by these standards, we now consider the substantive issues herein raised.

III.

DISCUSSION

The sole issue presented for resolution is whether the circuit court properly admitted testimony presented by Mr. Reed under Rule 404(b).[8] As previously discussed, Mr. Reed's testimony involved prior criminal drug sales by Mrs. Willett. Insofar as Mrs. Willett was charged with possession of drugs with intent to deliver, Mr. Reed's testimony involved "other crimes" by Mrs. Willett. Rule 404(b) states, in part, that "[e]vidence 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." However, Rule 404(b) provides an exception to its general prohibition against the introduction of "other crimes" evidence. Under this

[8]"Rule 404(b) only applies to limit the admissibility of evidence of extrinsic acts. Intrinsic evidence, on the other hand, is generally admissible so that the jury may evaluate all the circumstances under which the defendant acted." *United States v. Sumlin*, 489 F. 3d 683, 689 (5th Cir. 2007) (internal quotations and citation omitted). *See State v. LaRock*, 196 W. Va. 294, 312 n.29, 470 S.E.2d 613, 631. n.29 (1996) ("In determining whether the admissibility of evidence of other bad acts is governed by Rule 404(b), we first must determine if the evidence is intrinsic or extrinsic. Other act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged. If the proffer fits in to the intrinsic category, evidence of other crimes should not be suppressed when those facts come in as *res gestae* – as part and parcel of the proof charged in the indictment.") (internal quotations and citation omitted). Insofar as the parties and trial court treated Mr. Reed's testimony as being governed by Rule 404(b), we limit our analysis of the admissibility of Mr. Reed's testimony to that rule. Further, it has been correctly noted that "the use of the evidence by the jury under a 404(b) theory or an 'inextricably intertwined' theory is not materially different." *United States v. McLean*, 138 F. 3d 1398, 1404 (11th Cir. 1998).

exception, "other crimes" evidence may "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 . . . of the general nature of any such evidence it intends to introduce at trial[.]" Rule 404(b).

In syllabus point 2 of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), this Court established the procedure for trial courts to follow in ruling upon the admissibility of Rule 404(b) evidence:

> 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.

The prosecution filed notice of its intention to introduce Rule 404(b) evidence through Mr. Reed at the trial.[9] In its notice, the prosecution declared the purpose for which the evidence was to be offered was that of motive, planning, and intent. Mrs. Willett filed a motion to exclude the testimony of Mr. Reed. The trial court then conducted an evidentiary hearing with respect to the prosecutor's notice and Mrs. Willett's motion. During the hearing, the trial court heard testimony from Mr. Reed, Mrs. Willett, and Mr. Willett. Ultimately, the trial court found that the prosecutor satisfied the requirements for admitting Mr. Reed's testimony under Rule 404(b).[10]

Mrs. Willett's brief appears to challenge the trial court's Rule 404(b) ruling on the basis that the evidence was insufficient to establish that Mr. Reed's testimony was reliable. She also asserts that the probative value of the evidence was outweighed by its

[9]The notice also named another witness, Gary Lilly, but that witness was not called at trial.

[10]After the hearing, the trial court took the issue under advisement. No formal ruling was made on the issue. The trial court's office informally notified the prosecutor that Mr. Reed would be allowed to testify. We caution trial judges that, when making Rule 404(b) determinations, the record should expressly reflect the reasoning employed by the court in reaching its ruling. In the instant case, the trial court's failure to state its reasoning on the record does not require reversal. *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.").

prejudicial effect.[11] We address those two matters separately.

As to the reliability issue, Mrs. Willett argues that Mr. Reed was unable to provide any specific date on which the drug transactions occurred, and there was no evidence to corroborate his testimony. We reject these arguments as a basis for reversal. The record is clear. The prosecutor established by a preponderance of the evidence that the acts occurred and that Mrs. Willett took part in them.

At the suppression hearing, Mr. Reed testified that he was involved in 50 to 100 drug transactions with Mrs. Willett over a two-year period. Mr. Reed testified that he was introduced to Mrs. Willett by her brother, Gary Lilly. Mr. Reed stated that he went to see Mr. Lilly to buy drugs. Mr. Lilly had no drugs. However, Mr. Lilly informed Mr. Reed that he could buy drugs from his sister, Mrs. Willett. The following testimony was given by Mr. Reed during direct and cross examination at the hearing:

> Q. How did you find out Mrs. Willett had pills to sell?
>
> A. Her brother introduced me to her.
>
> Q. What's her brother's name?

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[11]Mrs. Willett's brief is, at best, inartfully drafted. The brief is divided into terse sections that appear to raise issues. However, it falls short of presenting legally sufficient arguments. *See State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) ("Although we liberally construe briefs in determining issues presented for review, issues which are . . . mentioned only in passing but are not supported with pertinent authority . . . are not considered[.]" (citation omitted)).

A. Gary Lilly.

. . . . .

Q. And I take it that Gary would be a person who would be available to confirm or deny that particular statement?

A. Yeah.

Q. Now — and where did that particular transaction take place?

A. I went down to Gary's and Gary said he didn't have any, so we went to his sister's house.

Q. And both of you went?

A. Yes.

Q. And that would have been, to your best recollection, two years ago?

A. Yes.

The prosecutor had intended to have Mr. Lilly testify at the hearing, but he was not available. Mrs. Willett acknowledged at the hearing that Mr. Lilly was in Florida. More importantly, Mrs. Willett's testimony revealed that Mr. Lilly gave a statement to the police that corroborated Mr. Reed's testimony. Mrs. Willett stated that she had read the statement by Mr. Lilly. Mrs. Willett asserted that the statement was not true. According to Mrs. Willett, Mr. Lilly made up the accusations because he thought that she was going to inform the police that he had previously broken into her home. However, at no time did Mrs. Willett inform the police about the alleged break-in. After extensive questioning about the matter,

Mrs. Willett testified as follows:

> Q. I guess I'm wondering if nothing happened to your brother at that — as a result of the break-in and that was in November of '04, why did he give a police statement in May of '05?
>
> A. Because I had quit talking to him because of this incident of him breaking into my house, and I had told him I was going to call the police.

There was further testimony by Mr. Reed. He testified that, on at least two occasions, he cut Mrs. Willett's lawn, and she paid him with drugs. Mrs. Willett acknowledged that Mr. Reed had cut her lawn. She stated, however, that she had paid him cash for his services. Mr. Reed also testified that, while he was incarcerated, he called the police to inform them that Mrs. Willett was a drug dealer in order to make a deal to get out of jail. The record reflects that the prosecutor refused to offer any deal to Mr. Reed.

When looking at the evidence in its totality, we are satisfied that the trial court properly admitted Mr. Reed's testimony under Rule 404(b). Even though Mr. Reed was unable to give any specific dates regarding his drug transactions with Mrs. Willett, that matter is tempered by the fact that there was testimony by Mrs. Willett that her brother gave the police a statement that corroborated Mr. Reed's accusations against her.[12] Consequently,

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[12]We should note that Professor Cleckley has correctly observed that Rule 404(b) evidence may be admitted without corroboration:

(continued...)

we find no clear error in the trial court's determination that there was sufficient evidence to show that the other bad acts actually transpired. We further find that the trial court properly deemed the evidence admissible for a legitimate purpose under the Rule 404(b) analysis. It was used to demonstrate Mrs. Willett's motive, planning, and intent.

Likewise, we find the circuit court properly concluded that the prejudicial effect of Mr. Reed's testimony did not outweigh the probative value of that evidence. This Court has previously stated that "[m]ost, if not all, [evidence] which one party to an action offers in evidence [is] calculated to be prejudicial to the opposing party; therefore, it is only 'unfair prejudice' with which . . . [Rule 404(b) is] concerned." *State v. McIntosh*, 207 W. Va. 561, 573, 534 S.E.2d 757, 769 (2000) (internal quotations and citations omitted). We have also made clear that "[u]nfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which

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[12](...continued)

> [F]or Rule 404(b) evidence to be admissible it must be reliable. Reliability is not synonymous with "credibility" and testimony is therefore not unreliable simply because it is in conflict or contradicted by other testimony. Thus, this evidence can be admitted even though it is not corroborated.

1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 4-5(B)(3)(c) (4th ed. 2000). *See State v. Zacks*, 204 W. Va. 504, 509, 513 S.E.2d 911, 916 (1998) ("'Courts have held that corroboration of 404(b) evidence of other crimes is not required.'") (quoting *United States v. Bailey*, 990 F. 2d 119, 123 (4th Cir.1993)).

tends to suggest [a] decision on an improper basis." *LaRock*, 196 W. Va. at 312, 470 S.E.2d at 631. Applying this standard, the trial court reasonably could have concluded that Mr. Reed's testimony was probative of a fact and was not unduly prejudicial.

Mr. Reed's testimony about the uncharged drug transactions was integrally connected to the criminal activity charged in the indictment. Evidence of the prior drug sales was necessary to place Mrs. Willett's possession of such a large amount of narcotic prescription pills in context and to complete the story of the charged crimes. Mr. Reed's "testimony was so highly probative that any possible prejudice evaporated in comparison to it. Discerning no error, we hold the trial court acted within the realm of discretion in permitting the jury to hear and consider the contested testimony." *LaRock*, 196 W.Va. at 313, 470 S.E.2d at 632.

IV.

CONCLUSION

The circuit court's order denying Mrs. Willett's motion for a new trial is affirmed.

Affirmed.