No. 33835 – *State of West Virginia v. Gloria Jean Willett*

Ketchum, J., concurring:

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OF WEST VIRGINIA

I concur with the majority's opinion. Reading the record in the light most favorable to the prosecution, the trial judge did not abuse his discretion in allowing the jury to hear evidence of the defendant's uncharged "bad acts" admitted under Rule 404(b) of the *West Virginia Rules of Evidence*.

I feel compelled to write separately because I believe that the use of "bad acts" evidence under Rule 404(b) in criminal trials is now routinely used to convince the jury that they should convict the defendant because he or she is not a nice person.

A.

Modification of Rule 404(b) is Needed to Protect the Innocent

We all know the axiom that "[i]n the trial of a criminal offense, the presumption of innocence existing in favor of a defendant continues through every stage of the trial until a finding of guilty by the jury." Syllabus Point 11, *State v. Pietranton*, 140 W.Va. 444, 84 S.E.2d 774 (1954). But the real world truth is that, when a jury hears evidence that a defendant has committed some bad acts beyond those in the indictment, the jury dispenses with any notions that the defendant is innocent and reviews the evidence from the perspective that the defendant is a "bad person." It is undeniable that a jury will be more

inclined to convict once they hear that a defendant may have engaged in other "bad acts" – even if the defendant was never charged or convicted for that other conduct. "The niceties of a *McGinnis* analysis do little to remove the overwhelming prejudicial effect that is heaped upon a defendant in a criminal case, once a jury learns of the defendant's previous bad acts." *State v. Scott*, 206 W.Va. 158, 168, 522 S.E.2d 626, 636 (1999) (Starcher, C.J., dissenting) (citing *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994)).

Rule 404(b) was originally designed to keep such fundamentally unfair evidence of uncharged misconduct away from the jury, allowing the jury to focus on the proper question: does the evidence show the defendant committed the crime with which he or she is currently charged? However, since I took the bench two months ago, "bad acts" evidence has been raised as an error in virtually every criminal appeal presented to our Court. It is obvious that prosecutors are using "bad acts" evidence to prejudice defendants and to divert jurors' attention from the evidence surrounding the charged crime. This abusive use of uncharged "bad acts" evidence by prosecutors will, in the future, lead to the conviction of an innocent person. Of this, I am convinced. I therefore propose a change to Rule 404(b) in criminal cases.

B.
The Correct Rule: State v. Miller (1915)

As early as 1872, this Court said that evidence of misconduct other than that for which a defendant was being tried could not be used at a trial. We held in Syllabus Point 1 of *Watts v. State*, 5 W.Va. 532 (1872):

> Evidence of a distinct, substantive offense cannot be admitted in support of another offense.

This absolute prohibition later softened slightly, and the Court permitted such evidence to be used in rebuttal – but only if the defendant first attempted to show he did not commit the crime because he was a person of good character. As we said in Syllabus Point 2 of *State v. Miller,* 75 W.Va. 591, 84 S.E. 383 (1915):

> It is error to admit evidence, in such a case, tending to prove bad character or degradation on the part of the accused, over his objection and in the absence of evidence adduced by him to establish good character on his part.

See also, Syllabus Point 1, *State v. Graham*, 119 W.Va. 85, 191 S.E. 884 (1937) ("In a criminal trial, the state cannot introduce evidence, not connected with the crime for which the accused is being tried, for the purpose of showing his bad character, until the accused has first put his own character in issue by attempting to prove a previous good character.")

C.
The Shift Away from the Correct Rule

When I first started practicing law in 1967, prosecutors rarely if ever tried to convict a defendant using evidence of "uncharged misconduct" and "other bad acts." Courts were exceptionally restrictive, and rarely allowed the use of collateral crimes to be admitted.

The defendant was tried for the crime charged in the warrant or the indictment. The common-law rule of evidence on "other bad acts" in West Virginia was a clear rule of exclusion: the evidence could not be admitted, except for a few narrow exceptions.

It was axiomatic that when a person was placed on trial for the commission of a particular crime, if the person was going to be convicted, then the person was going to be convicted based upon evidence showing the person's guilt of the specific offense charged in the indictment. Nothing more, nothing less.

The reason that West Virginia – and, for that matter, most other jurisdictions – opted to generally exclude evidence of other collateral bad acts was stated this way in 1961:

> Evidence of the accused's past criminal history – prior convictions at trial, pleas of guilty, acquittals for technical reasons, arrests, and police or private suspicions – have traditionally been viewed with distrust in Anglo-American law. Probably the principal reason for limiting the use of "other crimes" evidence at trial has been the fear that such evidence will prejudice the jury against the accused. The notion of prejudice encompasses two distinct tendencies of jurors. The first is the tendency to convict a man of the crime charged, not because he is guilty of that offense, but because evidence introduced indicates that he had committed another unpunished crime or that he is a "bad man" who should be incarcerated regardless of his present guilt. A conviction for this reason would violate the principle that a man may be punished only for those acts with which he has been charged. The second is the tendency to infer that because the accused committed one crime, he committed the crime charged. In many instances this inference rests on no greater foundation than the belief that commission of one crime indicates a propensity to commit others. Convictions based on this equation are disapproved because of the limited probity of propensity evidence. Whatever

> statistical data may demonstrate about the likelihood of repeated crimes in a given group of offenders, it says little about the guilt of an individual defendant. Recognizing both these jury tendencies, American courts have generally excluded other crimes evidence which proves no more than "criminal disposition" or "criminal character," reasoning that the possibility of inflaming jury sentiments outweighs the limited relevance of such evidence.

Note, 70 Yale L.J. 763-64 (April, 1961). *See also*, *McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993) (*quoting Harrison's Trial*, 12 How.St.Tr. 834 (Old Bailey 1692)) ("Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter.").

My recollection of the rare use of bad acts evidence in criminal cases is supported by Syllabus Point 11 of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), where the Court said:

> Subject to exceptions, it is a well-established common-law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, unless such other offenses are an element of or are legally connected with the offense for which the accused is on trial.

The Court in *Thomas* went on, in Syllabus Point 12, to list the five exceptional cases where "other bad acts" evidence could be admitted:

> The exceptions permitting evidence of collateral crimes and charges to be admissible against an accused are recognized as follows: the evidence is admissible if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a

> common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial.

The *Thomas* Court expressed the obvious concern that prosecutors might still try a defendant for one crime by using evidence that the defendant committed other crimes, and raise the inference with the jury that because the defendant had previously committed other crimes, then the defendant was more liable to have committed the crime for which he or she is presently indicted and being tried.[1]

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[1]One commentator, in a treatise on uncharged misconduct, gave the following summary of research on the effect of bad acts evidence in criminal cases:

> . . . Studies by the London School of Economics (LSE) indicate that the admission of a defendant's uncharged misconduct significantly increases the likelihood of a jury finding of liability or guilt. The Chicago Jury Project reached the same conclusion. The Chicago researchers concluded that as a practical matter, the presumption of innocence operates only for defendants without prior criminal records. Evidence of uncharged misconduct strips the defendant of the presumption of innocence. If the judge admits a defendant's uncharged misconduct and the jury thereby learns of the record, the jury will probably use a "different . . . calculus of probabilities" in deciding whether to convict. The uncharged misconduct stigmatizes the defendant and predisposes the jury to find him liable or guilty.
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> The National Science Foundation Law and Social Science Program sponsored research into the prejudicial impact of various types of evidence. That research confirms the conclusions reached earlier by the LSE and University of Chicago studies. The researchers discovered that laypersons often differ from attorneys in their estimation of the prejudicial effect of evidence and that within each group, laypersons and attorneys frequently disagree among themselves. However, "the

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But an even greater concern expressed by the *Thomas* Court was not with "the arguable admissibility of the evidence of collateral crimes and charges under one of the recognized exceptions, but rather, whether the prosecutor prejudiced the accused by the excessive employment or 'shotgunning' of such evidence against the accused." *Thomas*, 157 W.Va. 640, 656, 203 S.E.2d 445, 456. The Court was concerned that prosecutors would poison a jury's attitude toward a defendant through nothing more than piling on massive and wide-ranging volumes of "other bad acts" evidence. The mere quantity of this evidence would also prejudice a defendant by confusing the defendant's ability to present a defense to the indictment by compelling the defendant to defend against unrelated, uncharged offenses.[2]

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[1](...continued)

> greatest agreement . . . is found in connection with evidence suggesting immoral conduct by the defendant. . . ." In another research project supported by the National Science Foundation, Edith Greene and Elizabeth Loftus found that "jurors' ratings of a defendant's guilt are higher when crimes are joined than when the offenses are tried separately."

Edward Imwinkelried, 1 *Uncharged Misconduct Evidence* § 1:2 [2008] (footnotes omitted).

[2]As the Court said in *Thomas*:

> Certainly, the indiscriminate receipt of such evidence in volume and scope can predispose the minds of the jurors to believe the accused guilty of the specific crime by showing him guilty or charged with other crimes. Moreover, the admissibility of the collateral crimes raises collateral issues which compel the defendant to meet charges of which the indictment gives him no information; which confuse his strategy of defense; and which raise such a variety of issues that the jury's attention is diverted from the charge immediately before it. This result, obviously

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The Court therefore gave the following admonition to circuit courts in criminal cases:

> In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried.

Syllabus Point 16, *Thomas*, *supra*.[3]

D.
The Academics Take Over

In 1975, Congress adopted the *Federal Rules of Evidence.* "The philosophy of the Federal Rules, and it qualifies as revolutionary, is that any relevant evidence, by which it is meant anything that gives promise of being helpful to the trier of facts, is admissible if it is not rendered incompetent, for policy-based reasons, by a dwindling number of

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> prejudicial, is to be avoided by prompt objection on the part of the defense and close attention and control by the trial court to insure that an accused receives a fair trial when he is being subjected to zealous prosecution.

Thomas, 157 W.Va. at 656, 203 S.E.2d at 456.

[3]*See also*, Syllabus Point 8, *State v. Ramey*, 158 W.Va. 541, 212 S.E.2d 737 (1975) ("It is the policy of the law that matters which are collateral to material issues of a criminal trial shall not obfuscate the main issues of the case or be introduced for the purpose of prejudicing the defendant by making him respond to a separate criminal charge; accordingly, absent a proper foundation for the introduction of an otherwise collateral matter, the court, in the exercise of sound discretion, should refuse such proffer.").

exclusionary rules[.]" Jon R. Waltz, "Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence," 79 N.W.U.L.Rev. 1097, 1120 (1984).

Rule 404(b) of the *Federal Rules of Evidence* codified the "uncharged misconduct" doctrine in two sentences, but it shifted the doctrine from being exclusionary to being inclusionary. That is to say, under Rule 404(b), it became easier to admit evidence of other bad acts.[4] The 1975 Rule 404(b) stated:

> (b) 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 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.

With a few variations, this Court adopted the most of the *Federal Rules* into the *West Virginia Rules of Evidence* in 1985.[5]

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[4]"Despite the common law's exclusionary approach, the drafters of the Federal Rules also endorsed the inclusionary notion that the more evidence presented at trial, the more likely the fact finder will learn the 'truth.' This latter policy encourages the admission of even marginally relevant evidence." Stephanie Yost, "Reversals of Fortune: How the Ninth Circuit Reviews Erroneously Admitted "Other Acts" Evidence Under Federal Rule of Evidence 404(b)," 23 S.W.U.L.Rev. 661, 667 (1994)

[5]Our Rule 404(b) was amended in 1994, and now reads:

> (b) *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

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Because of the potentially decisive impact of uncharged misconduct, and its countervailing prejudicial character, defense attorneys vigorously contest the use of uncharged misconduct evidence. Consequently, Rule 404(b) disputes are *the most frequently litigated evidentiary issue in appellate courts*.[6] In an unscientific search of West Virginia

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> 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.

[6]As Professor Imwinkelried states:

> Because of the potentially decisive impact of uncharged misconduct, plaintiffs and prosecutors frequently offer such evidence. Because of the evidence's prejudicial character, defense attorneys vigorously resist the offers. The result is that there is a massive body of case law on uncharged misconduct. The admissibility of uncharged misconduct is the most frequently litigated evidentiary issue on appeal. In the mid-1980's a WESTLAW search of key numbers 369 (Other offenses as evidence of offense charged in general), 370 (Acts showing knowledge), and 371 (Acts showing intent or malice or motive) revealed 11,607 state cases . . . and 1,894 federal cases. Virtually every regional reporter advance sheet contains a new uncharged misconduct opinion, and the federal advance sheets ordinarily contain two or three new decisions on the topic.

Edward Imwinkelried, 1 *Uncharged Misconduct Evidence* § 1:4 [2008] (footnotes omitted). *See also*, Stephanie Yost, "Reversals of Fortune: How the Ninth Circuit Reviews Erroneously Admitted "Other Acts" Evidence Under Federal Rule of Evidence 404(b)," 23 S.W.U.L.Rev. 661 (1994) ("The substantive impact of the Federal Rules of Evidence is especially dramatic in the case of Rule 404(b), which has generated more reported decisions than any other subsection of the Federal Rules."); Kenneth J. Melilli, "The Character Evidence Rule Revisited," 1998 B.Y.U.L.Rev. 1547, 1556 (1998) (The practical impact of Rule 404(b) must be understood not only in the proportion of cases in which these issues are resolved, but also in the quantity of such cases in which these issues materialize. Rule 404(b) accounts for a greater number of published judicial opinions than any other provision in the Federal Rules of Evidence, and the introduction of evidence of uncharged criminal conduct under Rule (continued...)

cases, I found at least 78 published criminal cases in the last 20 years where the admission of other bad acts under *W.Va.R.E.* Rule 404(b) was disputed on appeal.[7]

In many cases, I believe that Rule 404(b) is being applied inconsistently. It appears that prosecutors and trial courts often search for a convenient "pigeonhole" to admit proof of other bad acts, then perform a perfunctory balance of the probative value against its prejudicial effect before admitting the other bad acts evidence.[8] *See* Syllabus Point 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). Because a trial court's review of questions under Rule 404(b) are discretionary, on appeal this Court has rarely found that the trial court abused its discretion in admitting the other bad acts evidence. *See State v. LaRock*, 196 W.Va. 294, 312, 470 S.E.2d 613, 631 (1996). If the Court does find the trial court abused its discretion, then this Court will often then hold that the admission of the other bad acts evidence in a criminal case was "harmless error." *LaRock*, 196 W.Va. at 312 n. 28, 470 S.E.2d at 631 n. 28. *See also*, Rule 52(a), *W.Va. Rules of Criminal Procedure* [1981]

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[6](...continued)
404(b) has apparently increased substantially since 1975, when the Federal Rules of Evidence were enacted.").

[7]To put this number in context, the *2007 Statistical Report* issued by the Court indicates we reviewed 25 criminal cases in 2007. This suggest that about 1 in 6 criminal cases on appeal involves other bad acts evidence admitted under Rule 404(b).

[8]"It is time to admit that in the real world of criminal prosecutions, the prosecutor will be able to prove relevant specific instances of the accused's uncharged misconduct by employing the 'magic words' vocabulary of Rule 404(b) to frame some intermediate issue in the case, unless the trial judge believes that the probative value of other uncharged misconduct is substantially outweighed by prejudice to the accused, waste of time, or confusion of the jury." Thomas J. Reed, "Admitting the Accused's Criminal History: The Trouble with Rule 404(b)," 78 Temp.L.Rev. 201, 250-51 (2005).

("Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.").

E.
An Equitable Solution

I am in agreement with the following commentator who says that, in the context of criminal prosecutions, there is nothing "harmless" about the admission of other bad acts evidence.

> Despite its name, the harmless error doctrine, at least in the context of Rule 404(b) errors, is not "harmless" to anyone.
>
> First, the harmless error doctrine wastes judicial resources. The purported justification of this doctrine is that it conserves judicial resources by preserving convictions infected by Rule 404(b) errors in cases in which the other, admissible evidence of the defendant's guilt is "overwhelming." This justification is dubious at best. If the remaining evidence indicating the defendant's guilt is otherwise so "overwhelming," then why admit "other acts" evidence in the first place? The alleged "need" for the other acts evidence should be evaluated in light of the issues and other evidence available to the prosecution. If overwhelming proof is truly available, then there is no need for admission of the erroneous "other acts" evidence. This unnecessary evidence serves to distract and mislead the jury. In fact, inadmissible "other acts" evidence ensures there will be an ultimately futile appeal, which merely wastes the resources of the appellate courts, if not those of the litigants and their advocates.
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> Moreover, in the case of clearly erroneous admissions of "other acts" evidence, the "overwhelming evidence" argument is circular. It places an inexorable temptation before the prosecution to offer, and the district judge to admit, all evidence, even that of questionable value, to create an "overwhelming"

> case against the defendant. This, in turn, encourages the admission of additional weak evidence because the more overwhelming the indication (or implication) of guilt, the greater the available protection under the harmless error doctrine.
>
> Second, the harmless error doctrine . . . is intellectually indefensible. The harmless error cases were frequently factually indistinguishable from those cases in which Rule 404(b) errors required reversal. But reversals must be grounded on discernible law, not luck. When Rule 404(b) error is clear, no meaningful distinction between "abusive" and "harmless error" is possible. . . .
>
> Third, application of the harmless error doctrine to Rule 404(b) errors is unfair to the defendant. The broad discretion and the great deference granted to trial judges in the admission of Rule 404(b) evidence, together with the long list of acceptable purposes under which "other acts" evidence may be admitted, already tilts the Rule 404(b) playing field sharply in the government's favor. The Rule is applied in such an inclusionary manner that propensity is the only purpose for which the evidence may not be admitted. Without a countervailing policy of reversing clear Rule 404(b) errors, the defendant's right not to be convicted for being a "bad" person, rather than for the crime charged, is meaningless. It is not too much to require both that district judges exercise greater care in excluding clearly erroneous "other acts" evidence. . .
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> Moreover, in the interest of fairness to the accused, what little territory these Rules still protect should be carefully guarded. An individual's personal freedom is at stake in the criminal setting; thus greater, not lesser, adherence by district courts to the Federal Rules should be required.

Stephanie Yost, *supra*, 23 S.W.U.L.Rev. at 684-86.

I realize that I will never convince our Court to revert back to the correct rule set out in *State v. Miller, supra,* in 1915. I therefore propose that Rule 404(b) be amended, either directly or through this Court's jurisprudence, to eliminate the "harmless error" safety

net that prosecutors, trial courts, and this Court have relied upon to uphold convictions based upon the admission of uncharged misconduct. I am not advocating for the abrogation of the harmless error rule, only its elimination from our Rule 404(b) jurisprudence.

When a trial court has abused its discretion and admitted irrelevant or prejudicial bad acts evidence, I would hold that reversal and remand for a proper trial should be automatic, no matter how much evidence is otherwise presented. Removing Rule 404(b) errors from the protection of the harmless error rule would force prosecutors and trial judges to limit the evidence to relevant evidence pertaining to the specific charge in the indictment. It would force prosecutors and trial judges to make more careful, consistent and hopefully more equitable decisions about the admission of uncharged misconduct in criminal trials.

I otherwise respectfully concur with the majority's decision.