

FILED

June 7, 2010

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS

Ketchum, J., dissenting:

The trial court allowed the joinder of two alleged illegal sexual encounters that occurred 11 years apart. The trial court found that these alleged illegal sexual acts, involving different accusers, were of “similar character” and that joinder was permissible under Rule 8(a) of the *West Virginia Rules of Criminal Procedure*.

The purpose of Rule 8(a) is to promote judicial efficiency and to avoid costly and duplicative trials. However, the rule is not completely elastic. It may not be stretched so far that it prejudices a defendant’s right to a fair trial. In other words, a jury should not convict a defendant because he is a bad person after hearing evidence of alleged offenses that occurred years apart with no overlapping evidence. It is generally recognized that under Rule 8(a)’s “same or similar character” joinder standard that joinder is permitted when two counts refer to the same type of offense occurring over a relatively short period of time and the evidence as to each count overlaps. *See* 9 Fed.Proc., L.Ed. § 22:1051.

In the case *sub judice*, the prejudice to the defendant is demonstrated by the jury finding that he did not commit the alleged sexual acts occurring between November 2001 and February 2002. Nevertheless, the alleged victim told the jury about these terrible acts that occurred during this time period. The jury heard this evidence about a “bad man” and were allowed to consider it in deciding that the defendant was guilty of acts that occurred 11 years earlier in 1989.

Prosecutors should be required to prosecute a defendant for crimes committed but not allowed to throw in “kitchen sink” charges which are not temporally related in order to show bad character. I submit that we (judges) have become blind to the probability that a jury will become hostile and misuse evidence to convict based on bad character evidence, particularly in a trial involving sexual misconduct. The defendant should be allowed to defend against an accuser’s accusations and not be required to defend against ancient history.

For the foregoing reasons, I respectfully dissent.