No. 34856 – *State of West Virginia v. Charles J. Lively*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, J., dissenting:

I dissent because the defendant did not receive a fair trial. The State has again convicted a defendant by proving that he had a "bad character" unrelated to the alleged crime. In almost every criminal appeal I review the State prosecutes the defendant's "bad character." Most prosecutors apparently lack the confidence to prosecute only the defendant's guilt or innocence. I pine for the days when prosecutors had the skills to prosecute the defendant on the issue of his/her guilt. Since the academics convinced courts to adopt the toxic evidentiary rule known as 404(b), defendants are no longer tried solely for their guilt or innocence. *See State v. Willett*, 223 W.Va. 394, 400, 674 S.E.2d 602, 608 (2009) (Ketchum. J., concurring).

Outrageous and Non-Probative 404(b) Evidence.

The circuit court erred by admitting voluminous 404(b) evidence that had no probative value. The State only called two witnesses who had knowledge of defendant Jason Lively's (hereinafter "Lively") alleged involvement in the murder, one of whom recanted his story on the stand, the other, a jailhouse "snitch" whose story was riddled with inconsistencies. For example, the jailhouse snitch testified that Lively told him that he and

his alleged co-conspirator, Tommy Owens[1] beat Dr. Whitley and killed him before setting the house on fire. There were no signs of trauma or bruises on Dr. Whitley and the expert testimony at trial was that Dr. Whitley died as a result of smoke inhalation. The jailhouse snitch also said that Lively bragged about taking a large safe from the house, as well as a computer and a gun. There was no safe, gun or computer missing from the decedent's residence. Another inmate, Harry Caskey, who was housed with both Lively and the jailhouse snitch testified that the jailhouse snitch told him, "All you have to do is say the Lively boy killed the Doc and they'll let you out of here."

By contrast to these two witnesses with supposed direct knowledge of the charged crime, the State put on 14 witnesses who testified as to 404(b) evidence. This 404(b) evidence fell into three categories: (1) evidence about an October 6, 2002, fistfight at a Friendly Mart Store; (2) evidence relating to an alleged arson attempt of Stacy's Variety Store by Tommy Owens, in exchange for money and/or drugs; and (3) evidence relating to the theft of a laptop computer from the home of the decedent's estranged wife.

[1]In a separate trial, Owens was acquitted of the charges brought against him in relation to Dr. Whitley's alleged murder. While the record from his trial is not before us, one wonders if the non-probative 404(b) evidence that should have been excluded from Lively's trial was properly excluded from Owens' trial.

Fist Fight - Three Years Before the Alleged Crime

The fistfight at the Friendly Mart started when Owens sucker punched a man named Elzie Branham. Branham and Owens had previously been involved in an altercation. Lively was not present during their first altercation. There was no evidence or suggestion that Owens and Lively were actively looking for Branham and intending to assault him. Rather, the evidence was that Owens and Lively came into this store, Branham happened to be there, and Owens instigated a fight with him. Lively did not join in the fight between Branham and Owens; instead, he tackled a man who was with Branham, Randy Birchfield, so that Birchfield would not join in the fight between Branham and Owens. While Lively was not familiar with Birchfield prior to this altercation, the testimony at trial revealed that Birchfield was a disabled coal miner. Additionally, when Birchfield and Lively began fighting, Birchfield's wife attempted to break them up and Lively inadvertently hit her. The State was therefore able to paint Lively as a despicable person who beat up a disabled coal miner and punched the man's wife. The circuit court admitted this evidence finding it demonstrated a common scheme and plan between Lively and Owens to "act together to carry out crimes and violence."

It is beyond imagination that a bar fight that took place three years before the charged crime has probative value demonstrating that Lively and Owens acted together to set a fire that killed Dr. Whitley.

Stolen Computer Far Away From the Fire Site

In the early afternoon after the fire that killed Dr. Whitley, Lively and Mike Stafford (not a defendant) drove up to Dr. Whitley's Coon Branch residence, ostensibly to tell his estranged wife about the fire. Dr. Whitley's wife was not home when Lively and Stafford arrived and they waited for her to return. When she returned she invited them in, made them coffee and asked Lively if he would clean up the house. (There were many animals at the Coon Branch home and there was dog poop throughout the house which had not been cleaned). Lively got a garbage bag, went from room to room cleaning and allegedly stole a laptop computer that he hid in the garbage bag. Later that day, Lively attempted to pawn the laptop computer.

This theft bears little resemblance to Dr. Whitley's alleged murder. The State's theory of the murder was that Lively and Owens broke into Dr. Whitley's house, threatened and burned him to death because they were after money and drugs that they believed Dr. Whitley had at his residence. It is noteworthy that Lively would allegedly break into a house and burn a man to death in the morning in order to carry out a robbery, but by the early afternoon, he chose not to break into an empty house, instead he waited on the front step for Dr. Whitley's wife to return. Once she returned, Lively did not threaten, burn or murder Dr. Whitley's wife to carry out a robbery, instead he allegedly stole a laptop by sneaking it out in a garbage bag.

Furthermore, the alleged co-conspirator, Owens, was not with Lively when the laptop was allegedly stolen. How in the world does this theft show that Lively and Owens "acted together to carry out crimes and violence" as contended by the State? It does not. The prosecutor had a weak case and convicted the defendant because he was a "bad guy."

The State's Excuse for Bad Character Evidence

The indictment alleged a conspiracy between Owens and Lively. It alleged in count five that Lively and Owens did "intentionally conspire to commit offenses against the State of West Virginia." The State convinced the judge to allow the introduction of the prior bad acts to show a conspiracy. Then, as soon as the State was done introducing the prejudicial bad-act evidence to the jury, the State dismissed the conspiracy count. Nevertheless, the jury was erroneously allowed to consider and hear arguments about the prior bad acts, supposedly introduced to show a common plan or scheme (conspiracy).

Improper 404(b) Instruction

The prior bad acts evidence was tendered by the State and admitted by the court to show a common plan or scheme. Surprisingly, the court instructed the jury that this evidence could be considered in determining motive, opportunity, and intent. No evidence was submitted by the prosecutor or admitted by the judge to show motive, opportunity or intent.

The Anonymous Witness and The Confrontation Clause Standard of Review

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), the Supreme Court held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54, *see also U.S. v. Ayala* 601 F.3d 256 (4th Cir. 2010). The majority relied on Syllabus Points 6 and 8 of *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006), in deciding the Confrontation Clause issue.[2]

Under Syllabus Point 8 of *Mechling*, *supra*, almost any hearsay statement is testimonial, even if it is not tendered for the truth of the matter asserted. The United States Supreme Court has refused to give trial courts a definition for testimonial and non-testimonial statements and Syllabus Point 8 of *Mechling* is too expansive. We should adopt a rule that correctly deals with the purpose of the Confrontation Clause, *i.e.*, a defendant has the right to face his accusers. I suggest the correct rule is:

> Testimonial hearsay statements are all accusatory hearsay statements which help prove any element of the crime charged in the indictment or identifies the defendant.

See, Michael D. Cicchini and Vincent Rust, "*Confrontation after Crawford v. Washington: Defining 'Testimonial'*," 10 Lewis & Clark L. Rev. 531 (Fall 2006); Thomas J. Reed,

[2] The full text of Syllabus Points 6 and 8 of *Mechling* are set forth in the majority opinion.

"*Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*," 56 S.C.L. Rev. 185 (2004).

Do Our Hearsay Rules Apply to Testimonial Hearsay Statements?

If the out-of-court statements are determined to be non-testimonial then the Confrontation Clause is not applied and our hearsay rules determine the admissibility of the out-of-court statements.

If an out-of-court statement is held to be testimonial the court must first determine if it is admissible under our hearsay rules because courts should not decide constitutional issues if the matter can be decided under evidentiary rules. *See, Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 104 S.Ct. 2267 (1984).

If the out-of-court testimonial statement is held to be inadmissible under our hearsay rules then the inquiry ends. However, if the out-of-court testimonial statement is held to be admissible hearsay then the court must determine if the statement is barred under the Confrontation Clause.

Although our hearsay rules and the constitutional right of confrontation are similar we have "carefully guarded their distinct functions." *In Re: Anthony Ray Mc.*, 200 W.Va. 312, 489 S.E.2d 289 (1997).

Conclusion

A complete review of the trial transcript and my years of trial experience tell me that this defendant did not receive a fair trial. It isn't even close! Even people with "bad character" are entitled to a fair trial. With all due respect to my colleagues, I dissent.