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Evidentiary Issues

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EVIDENTIARY ISSUES

In the area of evidentiary issues, several significant cases were decided during the survey period. The court covered a wide spectrum of the exceedingly broad area of evidentiary issues. These decisions may have a significant impact on trial courts in West Virginia.

I. Character Evidence


In State v. Gangwer, the defendant appealed his conviction of first degree murder raising as one of the alleged errors the evidentiary issue of the admissibility of certain character evidence. The asserted grounds for reversal were based on the form and scope of the prosecution's cross-examination of the defendant's character witnesses.

The facts indicated that the defendant did not deny shooting the victim, but he interposed the defenses of self-defense and defense of others. In order to buttress these defenses, the defendant produced extensive character testimony. Such testimony consisted of the character witnesses' knowledge of the defendant's reputation in the community for veracity and for being a law-abiding citizen. This questioning was clearly proper. But the defendant's counsel went further and elicited testimony from his character witnesses as to whether they would believe the defendant under oath. The court concluded this question called for the personal opinion of the witness and was improper.

This conclusion is surprising. Prior West Virginia authority had held this type of questioning and testimony proper as a narrow exception to the reputation evidence only rule, as had other jurisdictions and authorities. Furthermore, this tightening of the reputation-only rule goes against the current trend of allowing greater use of opinion evidence. The court seems to have put West Virginia in an absolutist position as to the inadmissibility of opinion character evidence offered by non-expert witnesses.

On cross-examination, the prosecution asked each of the defendant's character witnesses a hypothetical question paralleling the facts in the present case asking if such events took place, whether their opinion of the defendant as

2 State v. Nuckolls, 152 W. Va. 736, 166 S.E.2d 3 (1968); see F. Cleckley, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS 239 (1978) [hereinafter cited as F. Cleckley].
3 286 S.E.2d at 394.
4 State v. Friend, 100 W. Va. 180, 130 S.E. 102 (1925); State v. Henderson, 29 W. Va. 147, 1 S.E. 225 (1886); see F. Cleckley, supra note 2, at 156-57.
6 MCCORMICK ON EVIDENCE § 44, at 90-91 n.3 (1972) [hereinafter cited as MCCORMICK]; Fed. R. Evid. 608(A) (advisory committee note).
7 See, e.g., Fed. R. Evid. 608(A); UNIF. R. EVID. 608(A) (1974 Rev.).
being a law-abiding citizen would be the same. The defendant made a proper and timely objection to this line of questioning, but was overruled by the trial judge.

The supreme court framed the issue as "whether the defendant's counsel in asking each witness their (sic) personal opinion regarding the appellant's believability under oath, opened the door for the prosecution to inquire on cross-examination of the witnesses' personal opinion regarding the appellant's stature as a law-abiding citizen." The court compared the two opinion-eliciting questions and determined that both related directly to the defendant's character, and that any distinction between the two was "too fine a distinction upon which to predicate a claim of reversible error." The court also noted that only two of the eleven character witnesses testified their opinions would change under the circumstances set out by the prosecution's question indicating this question had a de minimus effect.

The defendant also objected to the form of the hypothetical question that the prosecution asked on cross-examination of the character witnesses. This objection was based on the fact that the question referred to specific acts of the defendant. The court noted that, under State v. Nuckolls, character witnesses can have their credibility as to the accused's reputation tested by reference to specific instances of which they should be cognizant. In Gangwer, the court concluded that this rule was also applicable in the instant case, where it is the witnesses' opinion that was being tested. The court stated "[t]hese specific acts admitted by the appellant, would clearly be relevant to a witness's opinion of the appellant's character, just as specific acts of the defendant, which the witness should have heard, may be relevant to the witness's conclusion regarding the defendant's reputation."

The significance of this case is two-fold. First, any opinion testimony concerning veracity or character is improper. Secondly, when defense counsel opens the door by eliciting opinion evidence on direct examination of his character witnesses, the scope of cross-examination will be co-extensive with that opinion eliciting direct examination. A wide range of discretion will be permitted the trial judge in these situations.

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8 It should be noted that the witnesses never directly testified as to their opinion of the defendant as being a law-abiding citizen, but only to his reputation.
9 286 S.E.2d at 394.
10 Id.
11 It could be argued that by changing the opinions of two of the defendant's character witnesses with a hypothetical that contained facts that the jury knew the defendant had admitted, the effect was not as slight as the court portrayed it. This effect is magnified in that the defenses used by the defendant (self-defense and defense of others) would be strongly supported by impeccable character evidence.
12 152 W. Va. 736, 166 S.E.2d 3; F. Cleckley, supra note 2, § 30(C)(2) at 236.
13 286 S.E.2d at 395.
II. EXPERT TESTIMONY


The court dealt with the propriety and the extent of expert testimony in a criminal trial outside the insanity area in *State v. Mitter.* In *Mitter*, the defendant appealed his convictions of sexual abuse in the first degree and the third degree. The defendant claimed it was error for the trial court to allow an expert witness to testify as to the defendant's subjective intent.

The prosecution produced an expert witness, a psychologist, to testify that the defendant's actions were done for the purpose of sexual gratification. Sexual gratification was a requisite element of the crimes charged.

The psychologist did not interview any of the actors in the incident but offered an opinion in response to a hypothetical question based upon the facts of the case. The psychologist testified that the motivation "would be most likely to be both sexual and sadistic in content . . . ."

The court noted that the general rule was that expert testimony is admissible when "the questions presented are of such a technical nature that persons of ordinary intelligence would not possess the expertise to competently pass judgment thereon." But the court also stated that the corollary of this is that when "the subjects being inquired into are within the common knowledge of the jury, expert opinion is ordinarily not admissible." The court analyzed decisions in other jurisdictions and concluded that the overwhelming weight of authority supported a general rule that expert opinion cannot be offered to the subjective intent of the individual. Therefore, it was held to be error to allow a psychologist to testify as to the defendant's subjective intent in this case.

Two related questions are raised by the court's reasoning and holding in this case. First, is determining the motivations of sexual behavior within the ability of the average juror without the aid of expert testimony? The court indicates that it is, but it is surely open to some measure of doubt. The second question is whether the court is correct when it says that "sexual gratification . . . is a subjective state of mind similar to the criminal intent required in other crimes." The court's reasoning in this case is based on the premise that sexual gratification is a subjective state of mind indistinguishable from crimi-

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17 W. Va. Code §§ 61-8B-6 through 8 (1982), which define sexual abuse in the first, second and third degree, using the term "sexual contact" to define the physical activity involved in sexual abuse. W. Va. Code § 61-8B-1(6), defines sexual contact as:
   [A]ny touching of the anus or any part of the sex organs of another person, or of the breast of a female eleven years old or older, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.
18 285 S.E.2d at 378.
19 Id. See F. Cleckley, supra note 2, at 312.
21 285 S.E.2d at 380.
nal intent in other crimes. Thus, it seems clear that the court did not want to open the whole area of subjective criminal intent to expert witnesses, and the fear of the consequences of this action was an overriding factor in its decision. The court, arguably, could have limited its holding to the sexual crimes area. An argument can be made, in this limited area, that psychological evidence may assist the jury without unduly confusing them.22

III. AUTHENTICITY


The issue of the authenticity of evidence was raised in *State v. Beck.*23 There, the defendant objected to the admission into evidence of fingerprint cards by the state to establish the defendant's identification in a recidivist proceeding. The grounds to the objection were the state's failure to fully establish the chain of custody of the cards. The court rejected the defendant's theory, distinguishing between different types of original evidence and the standard of proof required to establish their authenticity. Items that "are of a nature which can be easily interchanged, altered, or confused"24 must have the complete chain of custody established. The court listed narcotics and articles of clothing as examples of original evidence of this kind. The court contrasted that type of evidence with that consisting of "nonfungible items which are unique and identifiable in themselves."25 Such items can be authenticated by less rigorous chain of custody proof. Testimony that the offered item is the one in question and has remained in a similar condition is sufficient.26 The court concluded that the fingerprint cards were sufficiently non-fungible and unique to allow their admittance into evidence with only the minimal standard of proof being met. Therefore, complete chain of custody testimony was not required.

IV. OTHER CRIMES EVIDENCE


In the case of *State v. Underwood,*27 the court dealt with issues involving the introduction of "other-crimes" evidence.

In *Underwood*, the defendant was convicted of attempting to manufacture marijuana. The state's case consisted primarily of the fact that a single mari-

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22 Under the Federal Rules of Evidence, the test for admissibility of expert testimony is whether the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. There is no requirement that the subject be beyond the scope of knowledge of the average lay juror. In the instant case, this change of focus from the scope of the jury's knowledge to the assisting nature of the testimony would arguably allow the admission of the expert testimony.


24 Id. at 243. *See* F. Cleckley, *supra* note 2, at 463-65.

25 Id.


juana plant was found in the defendant’s back yard. No evidence of tending the plant was presented.

The evidence of another crime that was introduced was a small plastic bag containing two grams of marijuana found in a purse located in a closet in the defendant’s house. The state’s position was that this evidence fell within the exceptions to the general rule of inadmissibility of other crimes evidence set out in State v. Thomas. The court rejected this argument because the "marijuana found in the appellant’s wife’s purse can only be remotely viewed as tied to the cultivation of the marijuana plant" and there was a “lack of proof of the husband’s connection to the marijuana in his wife’s purse, for example, that he knew of its presence, or exercised some dominion over it.” Thus, the evidence was found inadmissible because it lacked the directness of connection that was needed to make it probative to assist the jury in their determination of guilt. This lack of connection was found at two levels. First, the act of possession of a small quantity of marijuana in a purse in a closet of a house was not significantly related to the cultivation of marijuana. Second, and more importantly, there was no personal connection between the appellant’s cultivation of the marijuana and the possession of marijuana in the purse in the closet. The court concluded that “there must be some testimony that links the appellant to the other crime.”

The court’s statement that some evidence is necessary to link the defendant and the other crimes evidence should not be read too narrowly. In the context of this case, the usage of the phrase “some testimony” by the court seems justified. Finding the marijuana in the house was a major step toward having substantial evidence of the other crime. But without the linking evidence, it was insufficient. The standard in West Virginia has been called the “directed verdict standard.” While the other crime need not be proven beyond a reasonable doubt, there must be sufficient evidence to avoid a directed verdict if the defendant was on trial for the crime to which the other evidence relates. Other authorities have called this standard the “substantial evidence standard.” It is submitted that this case does not change the existing law on this point. Use of the directed verdict standard of determining when such evidence will be admissible provides that the trial courts will be able to guard against the jury being improperly influenced by evidence that is too remote to have significant probative value.

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28 It should be noted that the defendant was married and lived with his wife at this house. His wife was also tried in this case on the same charge, but was acquitted.
29 281 S.E.2d at 492.
30 Id. at 493.
31 Id.
32 Id.
33 F. Cleckley, supra note 2, at 253-54.
34 McCormick, supra note 6, § 190 at 447-54.