Circuit Court for Montgomery County
Case # Criminal 74713

IN THE COURT OF APPEALS OF

MARYLAND

No. 90

September Term, 1997

JAMES OTHEL WYNN

v.

STATE OF MARYLAND

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell,

JJ.

Dissenting opinion by Raker, J.

Filed: October 5, 1998

I would affirm the judgment below and accordingly, I dissent. The Court of Special Appeals, in my view, applied the proper analysis. Judge Thieme wrote for the court:

> The evidence in the instant case was substantially relevant to a genuinely contested matter in the case. The issue at trial was whether [Wynn] stole the merchandise from the victim's house. He claimed to have come to possess the merchandise by purchasing it at a flea market. Thus, not only was the issue substantially relevant and contested, it was a central issue of the case. From the determination of the theft issue, the housebreaking issue was decided. If [Wynn] had the stolen items, it can be inferred that he was the person that broke into the house. Thus, the issue was critical to the determination of both counts.

Wynn v. State, 117 Md.App. 133, 148-49, 699 A.2d 512, 519 (1997) (citation omitted).

The majority holds that the evidence of housebreaking and theft by Wynn at the Garrison residence was not admissible under the absence of mistake exception found in Maryland Rule 5-404(b) and reverses the convictions in this case.[1] I agree with both the trial court and the Court of Special Appeals that the admission of the evidence in question is fitted properly under the "absence of mistake or accident" exception to the general rule of exclusion of other crimes evidence set out in Maryland Rule 5-404(b). Wynn's possession of the goods stolen from the Quigley home, explained throughout his trial defense as the

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[1] There is no argument presented in this case that the evidence was improperly admitted in the State's case-in-chief, but more properly admitted as State's rebuttal evidence following the defense case. *See State v. Taylor*, 347 Md. 363, 374, 701 A.2d 389, 395 (1997) ("The fact that Taylor did not testify and thus did not expressly state that the injuries were accidental, that he had no malice, and that he had no intent to injure should not prevent the use of the other crimes evidence.") Notwithstanding the majority's reference to the fact that the State introduced this evidence before the defense presented its case, that is clearly not the *ratio decidendi* of the majority opinion nor was it the basis of any objection below.

result of an innocent and unknowing purchase, might otherwise be characterized as "unintentional," "mistaken" or even "accidental." It was for the purpose of dispelling Wynn's express claim, and its various possible characterizations, that the trial court rightfully permitted the prosecution to present evidence of Wynn's possession of goods stolen from the other residences. His possession was no mistake or accident.

Even if I agreed with the majority that evidence of Wynn's guilt with respect to the break-in at the Garrison home was not admissible under the "absence of mistake" exception to Rule 5-404(b), I would nonetheless conclude that the evidence was admissible because of its strong probative value in rebutting Wynn's claim that he innocently acquired the goods stolen from the Quigley home. I write to express my disagreement with the analysis applied by the majority regarding the admissibility of the other crimes evidence in this case. I also disagree with the majority's conclusion that the theory of relevancy which would justify the admission of the other crimes evidence in this case is not properly before the Court.

I.

In May of 1995, Montgomery County police detective Eugene A. Curtis, along with other officers, executed a search and seizure warrant at Wynn's apartment in Prince George's County, Maryland. The police seized several items, including three watches and a canvas Sierra bag, identified as having been stolen from the Quigley home. In addition, the police recovered a Lucas gym bag and an antique watch, both identified as having been stolen from

the Garrison house. At the Quigley trial, the State introduced the other crimes evidence at issue here: the antique watch and the Lucas bag stolen from the Garrison home.

The majority misunderstands the reason the State offered the other crimes evidence, and applies unsound logic and rationale in concluding that the evidence was inadmissible. The majority states that "examination of the commentators and the case law both in Maryland and in other jurisdictions *that we have discussed* reveals a general prerequisite to the application of the absence of mistake exception." Maj. op. at 24. The prerequisite, as perceived by the majority, is that "[i]n order for the exception to apply, the defendant generally must make some assertion or put on a defense that he or she committed the act for which he or she is on trial, but did so by mistake." *Id.* The majority concludes that the basic prerequisite to the application of the absence of mistake exception has not been satisfied in this case for two reasons: (1) that petitioner never asserted that he committed the housebreaking or that the housebreaking was a mistake and (2) that the crime or bad act allegedly committed by mistake must be the same crime or bad act as that for which the defendant is on trial. Because the State's evidence did not satisfy these "prerequisites"—that Wynn never asserted that he broke into the Quigley house by mistake and that he was not charged with receiving stolen property—the majority holds that the evidence did not qualify as "absence of mistake," and hence was inadmissible.

The majority concludes that the evidence of theft and housebreaking at the Garrison home was not admissible under Maryland Rule 5-404(b). The majority reasons that "[t]he other crimes evidence in this case was introduced by the State in its case in chief, prior to the

presentation of any defense, to show that petitioner must have been the person who committed the housebreaking and theft in question because he was the person who committed another housebreaking and theft. In other words, Petitioner committed the housebreaking and theft because he had a propensity to commit housebreakings and thefts." Maj. op. at 27-28.

The majority misses the State's theory of the case. Throughout the Quigley trial, the State articulated a tenable, non-character, theory of special relevance for the introduction of other crimes evidence. The State introduced property stolen from the Garrison home to rebut the suggestion by the defense, by showing its improbability, that Wynn innocently bought the Quigley goods at a flea market. The majority is simply wrong in asserting that the evidence was introduced to show the criminal propensity of Petitioner.

Contrary to the suggestion of the majority opinion, the State did not offer the other crimes evidence in this case in order to place before the jury the impermissible inference arising from Wynn's criminal predisposition. The majority attributes sinister motives to the State, suggesting that "the State may have been creating a straw person by inferring that petitioner claimed he purchased the property at a flea market and that claim was a 'mistake.'" Maj. op. at 25. I disagree with that characterization. Moreover, the record does not support this accusation.

In his first trial, Wynn was acquitted of the Picard and Smith charges; in his second trial, he was convicted of the Maples and Garrison charges. At the second trial, the trial court admitted evidence related to the Quigley housebreaking. The State contended that this

evidence was necessary because at Wynn's first trial on the Picard and Smith charges, Wynn argued that "it was the bad luck of the defendant that he had such items in his possession" and that the property was innocently acquired. The State also asserted that the other crimes evidence established identity. Although the trial court found that the evidence did not fit within the identity exception, the court ruled the evidence admissible under the "absence of mistake" exception.

There was no surprise in this case, the third of Petitioner's three trials. Wynn had been indicted in a single indictment, charging multiple housebreakings. The Picard and Smith charges were severed and tried first. The Maples and Garrison charges were tried next. The Quigley case now before us followed. The same judge presided at all these trials. The State's theory of admissibility, and the trial judge's rationale for the admission of the evidence, were well known to the parties at the trial level. It is clear from the record in this case that the trial judge was well aware of the facts related to all the housebreakings and the defenses that were to be presented.[2]

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[2] The majority's repeated assertion that the State presented the other crimes evidence before the defense had been presented and "thus there was nothing to rebut" is out of context and unfair. The lawyers and the judge all knew the game plan and, as I have indicated in footnote one, *supra*, Wynn is not challenging the order of proof.

There is sound support for the trial court's consideration of the theory of defense, as manifested before the bench and to the jury, as a factor in determining the admissibility of the defendant's other crimes and bad acts even before his actual presentation of evidence commences. *See United States v. Rhodes*, 779 F.2d 1019, 1031, n.4 (4th Cir. 1985) (In deciding the admissibility of defendant's other crimes, under Federal Rule of Evidence 404(b), "an opening statement . . . may be taken into account by the trial court in ascertaining a theory of defense."); *Id*. at 1031 (Defense counsel's cross-examination of government

(continued...)

The court held a pre-trial hearing on Wynn's motion to suppress evidence seized pursuant to the search warrant executed at Wynn's apartment; the court also heard a motion *in limine* regarding the other crimes evidence. The trial record is replete with references to the earlier trials and the judge was well aware of Wynn's defense in the earlier trials, as well as his intention to present the same defense at the Quigley trial. At no time did Wynn indicate that his line of defense had changed for this, the third consecutive trial despite the State's clearly expressed intention to use the other crimes evidence under the absence of mistake exception. At a bench conference during Mr. Garrison's testimony, the trial judge, in evaluating whether he should give the jury a limiting instruction regarding the other crimes evidence, explained:

> And I want to make clear that this came up in the second trial. It never came up in the first trial in which the defendant was found not guilty. There was never an issue of other crimes evidence.
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> It only came up in the second, at a time that I already knew, because I heard the defense in the first trial, what the defendant's central position was. So that is why I ruled the way

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[2](...continued)
witnesses put in issue the defendant's intent, thereby rendering earlier convictions of the same crime of sufficient probative value to outweigh the prejudicial effect of their admission.); *United States v. Brunson*, 549 F.2d 348, 361 n.20 (5th Cir. 1977) ("'[W]here the government could anticipate the defense testimony because of [a] previous trial which resulted in a hung jury,' it was not error to admit evidence of other crimes to show intent in the government's case in chief." (alteration in original) (quoting *United States v. Adderly*, 529 F.2d 1178, 1182 (5th Cir. 1976)); *State v. Kahey*, 436 So.2d 475, 489 (La. 1983) (The doctrine of chances rendered evidence of child murder defendants' maltreatment of their other children "substantially relevant to prove that the injuries caused to [the decedent child] were not inadvertent, accidental, unintentional, or without guilty knowledge." (citation omitted)).

> I ruled, or that was a factor. I am going to give them the instruction.

Finally, at the conclusion of the State's case, Wynn's counsel told the trial court that if Wynn were to testify, Wynn would state that "he did not steal these items but in fact bought them from the Benning Road market." Wynn elected not to testify, presumably because the court ruled that if he did testify, Wynn's prior convictions for theft and housebreaking would be admissible as impeachment evidence. Contrary to the suggestion of the majority opinion, it is clear that the introduction of the other crimes evidence by the State in this case was not an effort to cloak an illicit character theory of admissibility.

Maryland Rule 5-404(b) governs the admissibility of other crimes evidence. The rule is declarative of the common law principle that evidence of other crimes or bad acts may be admitted if that evidence is substantially relevant to some contested issue in the case, and if that evidence is not offered to prove the criminal character of the defendant. *State v. Taylor*, 347 Md. 363, 368, 701 A.2d 389, 392 (1997). Maryland Rule 5-404(b) provides:

> *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 action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

As the use of the phrase "such as" makes clear, the five "exceptions" identified by the plain language of the rule are not exhaustive:

> [A]dmissibility of evidence of other bad acts is not confined to a finite list of exceptions, even under the exclusionary rule.

> Evidence of other acts that has sufficient relevance, other than merely by showing criminal character, may be admissible. The so-called exceptions are helpful as classifications of those areas where evidence has most often been found admissible even though it discloses other bad conduct, enabling the bar and bench to quickly focus upon the areas most likely to be involved.

Harris v. State, 324 Md. 490, 497-98, 597 A.2d 956, 960 (1991). *See also White v. State*, 717 S.W.2d 784, 789 (Ark. 1986) (holding that the listed exceptions are exemplary only and not exhaustive); *State v. Johns*, 725 P.2d 312, 321 (Or. 1986) ("[T]he proper inquiry is the probative relationship between the evidence and a fact at issue . . ., not the relationship of the evidence to a categorical list of exceptions.") (internal quotation marks and citation omitted).

We look to the three-prong test articulated in *State v. Faulkner*, 314 Md. 630, 552 A.2d 896 (1989), to determine the admissibility of other crimes evidence. First, evidence of other crimes may be admitted if the evidence is substantially relevant to some contested issue in the case and if the evidence is not offered to prove guilt based on the propensity to commit crimes or to show the bad character of the defendant. *Id.* at 634, 552 A.2d at 897-98. This Court has equated the substantially relevant prong of the tripartite test with a required showing of "special relevance." *Taylor*, 347 Md. at 368, 701 A.2d at 392. Next, the court must find that the defendant's involvement in the other crime(s) has been established by clear and convincing evidence. *Faulkner*, 314 Md. at 634, 522 A.2d at 898. Finally, the trial court must then carefully weigh the necessity for and the probative value of the other crimes

evidence against any undue prejudice likely to result from its admission. *Id*. at 635, 522 A.2d at 898.

Special Relevance

Turning to this case, the evidence established that Wynn was in possession of goods stolen from the Quigley home. Absent a reasonable explanation, the exclusive possession of recently stolen property authorizes the trier of fact to infer that the possessor is the thief. *Cross v. State*, 282 Md. 468, 480, 386 A.2d 757, 765 (1978). *See Grant v. State,* 318 Md. 672, 680, 569 A.2d 1237, 1241 (1990). Although, theoretically, Wynn could have argued he was not in "possession" of the stolen goods seized from his home, that was not his defense. Instead, he sought to offer an explanation for his possession of the property and to dispel any inference that, as the possessor of the recently stolen goods, he was the thief. Specifically, Wynn's defense was based on the factual premise that he legitimately purchased the property stolen from the Quigley home at a flea market. Wynn did not contest the act of possession. Nor did he contest the allegation that all the property in question was stolen.

Two suppositions follow implicitly from the theory of defense asserted by Wynn. The first is that he did not steal the property from the Quigley home. The second is that Wynn did not have the culpable state of mind alleged by the State when he came into possession of the Quigley goods.

In order to constitute a crime, there must be a concurrence of an individual's act and his or her guilty state of mind, *Garnett v. State,* 332 Md. 571, 577, 632 A.2d 797, 800

(1993), a "coming together of . . . an *actus reas* [sic] and a *mens rea*." *Oates v. State*, 97 Md.App. 180, 185, 627 A.2d 555, 558 (1993). In order to convict Wynn of daytime housebreaking, the State was required to prove that there was a breaking, that there was an entry, that the breaking and entry were into someone else's dwelling, that it was done with the intent to commit a crime inside, and that Wynn was the person who committed the act. *See* MPJI-Cr 4:06.2. In order to convict Wynn of theft, the State was required to prove, in addition to value of the property, that Wynn took and carried away the property of another and that he did so without authorization and with the intent of depriving the owner of the property. *See* MPJI-Cr.4:32.

In seeking to rebut the State's theory of the case and the inference that he was the thief, Wynn defended against the charges in this case by contesting the *actus reus* and the *mens rea* elements. He presented a defense premised upon (1) his non-commission of the act of theft or housebreaking, and (2) his innocent state of mind at the time he came into possession of the property stolen from the Quigley home. As a practical matter, the evidence presented in this case offered the jury two choices: the jury had to choose between the State's theory of the case and Wynn's contradictory theory of defense.[3]

The State sought to discredit Wynn's status as an innocent purchaser by introducing the other crimes evidence. Although Wynn's possession of the property stolen from the

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[3] Of course, the jury alternatively could have disbelieved Wynn's exculpatory theory of defense yet still concluded that the State failed to prove its case beyond a reasonable doubt.

Garrison home would have tended to highlight his predisposition for committing criminal acts, that evidence was relevant for a second, legitimate purpose: it logically rebutted Wynn's claim that he innocently possessed the property stolen from the Quigley home. The State was entitled to introduce evidence of the Garrison stolen property to rebut Wynn's innocent explanation for his actions. *See United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991) ("When the defendant affirmatively denies having the requisite intent by proffering an innocent explanation for his actions, the government is entitled to rebut that argument. Evidence of another crime which tends to undermine defendant's innocent explanations for his act will be admitted.") (internal quotation marks and citation omitted), *cert. denied*, 502 U.S. 916, 112 S.Ct. 321, 116 L.Ed.2d 262 (1991).

The State properly ascertained that the critical issue in this case was the credibility of Wynn's "explanation" as to how he came into possession of the stolen property. If the jury believed that Wynn came into possession of the property innocently, accidently, or mistakenly, because he bought it at a flea market, the permissible inference that arises from the possession of recently stolen property evaporates, as does the State's case. If the jury disbelieved that Wynn innocently bought the property, his possession of the stolen property would have remained unexplained; the jury could then rely on the inference arising from the possession of stolen property to convict.[4]

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[4] During deliberations the jury sent a note to the court asking whether the jury could acquit Wynn of the theft charge and yet still find him guilty of the housebreaking charge, or vice-versa. Pondering on the record how to answer the jury question, the trial judge focused (continued...)

The theory of relevance underlying the admission of the other crimes evidence in this case is perhaps better, and more intuitively, explained by the doctrine of chances, also known as the "doctrine of objective improbability," a doctrine first articulated by Professor Wigmore, and now recognized generally by courts and commentators. *See, e.g., United States v. Danzey*, 594 F.2d 905, 912 (2nd Cir. 1979), *cert. denied sub nom. Gore v. United States*, 441 U.S. 951, 99 S.Ct. 2179, 60 L.Ed.2d 1056 (1979); *State v. Crawford*, 582 N.W.2d 785, 793-95 (Mich. 1998); *State v. Lough*, 853 P.2d 920, 930-31 (Wash.App. Div. 1 1993), *aff'd*, 889 P.2d 487 (Wash. 1995). In actuality, the doctrine was recognized by the trial judge, although not articulated as such. *See Crawford*, 582 N.W.2d at 794 n.11. ("We infer the prosecution's reliance on the doctrine of chances from his opening and closing

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[4](...continued)
on the inference arising from the unexplained possession of recently stolen goods. He concluded that because this is a circumstantial evidence case, the jury does not start with the housebreaking, but starts with the inference—the inference they can, but are not required, to find. The trial court reasoned:

> In connection with the explanation, whether it is unexplained or explained, that is when they consider the testimony about the Garrison break-in to determine whether or not it is reasonably explained.
>
> If they find that—if they believe that the watch and the bag that was found in his house, they can consider that as to whether there is an explanation. If there is an explanation, then they can't draw the inference. If there is not an explanation, then they can, but are not required to draw the inference that he was the thief, and that is what they have to consider first.
>
> If they find him not guilty of being the thief, then they cannot consider the housebreaking. If they find him guilty of being the thief, then they can, but are not required to find him guilty of the housebreaking. That is the logic of it.

statements," explaining the relevance of the uncharged misconduct evidence.) The doctrine of chances is based on probabilities, and is premised on the proposition that mere coincidence is less probable as the recurrence of similar events increases. *See Westfield Ins. Co. v. Harris*, 134 F.3d 608, 615 (4th Cir. 1998) ("[T]he more often an accidental or infrequent incident occurs, the more likely it is that its subsequent reoccurrence is not accidental or fortuitous."). Professor Wigmore articulated the doctrine as follows:

> The argument here is purely from the point of view of the doctrine of chances—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but that the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.

2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 302, at 241 (Chadbourn rev. ed. 1979).

As Professor Imwinkelried explained, "The fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed. The coincidence becomes telling evidence of mens rea." EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 5:05, at 11 (1995) (footnotes omitted). Professor Imwinkelried also has commented that the doctrine of chances may be used to prove the *actus reus* of a crime. Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct*

to Prove Mens Rea: *The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 586-93 (1990). As Dean Wigmore succinctly observed, "In short, similar results do not usually occur through abnormal causes. . . ." WIGMORE, *supra*, § 302, at 241. *See also* Eric D. Lansverk, Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1225-26 (1986) ("When the evidence reaches such a point, the recurrence of a similar unlawful act tends to negate accident, inadvertence, good faith, or other innocent mental states, and tends to establish by negative inference the presence of criminal intent." (footnote omitted)).

The United States Court of Appeals for the Seventh Circuit applied the doctrine of chances in a more colloquial example: "The man who wins the lottery once is envied; the one who wins it twice is investigated." *York*, 933 F.2d at 1350. In this example, the probative value of the legally permissible inference can be drawn independently of the prohibited inference: the subjective character of the two-time lottery winner. It is the objective implausibility of the occurrence, *sans* nefarious activity, which rebuts the claim of an innocent occurrence. Other courts have similarly applied Wigmore's doctrine of chances in the context of the admissibility of other crimes evidence. *See, e.g., United States v. Queen*, 132 F.3d 991, 996 (4th Cir. 1997), *cert. denied*, U.S. , 118 S.Ct. 1572, 140 L.Ed.2d 805 (1998); *United States v. Robbins*, 340 F.2d 684, 688 (2nd Cir. 1965); *Lee v. Hodge*, 882 P.2d 408, 412 (Ariz. 1994); *People v. Erving*, 63 Cal.App.4th 652, 661-63, 73 Cal.Rptr.2d 815, 821-22 (1998); *State v. Kahey*, 436 So.2d 475, 488 (La. 1983); *People v.*

Vandervliet, 508 N.W.2d 114, 128 n.35 (Mich. 1993); *State v. Sadowski*, 805 P.2d 537, 542-43 (Mont. 1991); *In re Estate of Brandon*, 433 N.E.2d 501, 504 (N.Y. 1982); *Johns*, 725 P.2d at 322-23; *Morgan v. State*, 692 S.W.2d 877, 881 (Tex.Crim.App. 1985).

In this case, the State was required to prove that Wynn was the housebreaker and the thief, and that Wynn wrongfully came into possession of the property. Conversely, Wynn set forth a theory of defense that he did not commit the criminal act, as well as a theory predicated upon an innocent state of mind (that he purchased the property "in good faith" at a flea market). Wynn's possession of the antique watch and the Lucas bag stolen from the Garrison home was offered by the State to prove that Wynn's claim of innocent possession of the goods stolen from the Quigley home was not worthy of belief.

It was in support of this inference of improbability that the State sought to introduce the other crimes evidence in this case. If believed by the jury, this intermediate inference permissibly tended to establish an ultimate fact at issue in this case; *i.e.*, the circumstances by which Wynn came into possession of the goods stolen from the Quigley home. In this regard, Professor Imwinkelried recognized that, in a similar scenario, other crimes evidence is admissible to rebut a defendant's innocent state of mind defense:

> The accused may admit that he performed the *actus reus* but claim that he did so with an innocent state of mind. For example, the accused may concede that he had possession of a contraband drug but deny that he knew that the substance was an illegal drug; he might testify that he thought that the substance was lawful medicine. Or an accused might admit that he received stolen property but defend on the theory that he was unaware that the property was stolen. In this context, when the

> accused characterizes the conduct as "accidental," the accused means that he performed the act without the required *mens rea*.
>
> Just as the government may offer evidence of the accused's other crimes to disprove "accident" in the first sense, the prosecutor may attempt to introduce uncharged misconduct evidence to negate "accident" in the second sense.

Imwinkelried, *supra*, 51 OHIO ST. L.J. 575, 593-94 (1990) (footnotes omitted). Because the State introduced the Garrison break-in evidence for a purpose other than to establish bad character or propensity to commit crimes, the other crimes evidence satisfies the first prong of the three-part test for admissibility under Maryland Rule 5-404(b).

Although the majority opinion states that Wynn had to admit breaking into the Quigley house for the other crimes evidence to be admissible, an exception to Rule 5-404(b) was properly triggered when the defendant went beyond merely denying culpability and actually presented a claim of contrary intent. The defendant need not testify to trigger the exception. The Supreme Court of Indiana, discussing the narrow construction of the intent exception in Indiana Rule of Evidence 404(b), stated:

> When a defendant alleges in trial a particular contrary intent, whether in opening statement, by cross-examination of the State's witnesses, or by presentation of his own case-in-chief, the State may respond by offering evidence of prior crimes, wrongs, or acts to the extent genuinely relevant to prove the defendant's intent at the time of the charged offense.

Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993). In the present case, all parties knew that Wynn's defense was that he was an innocent purchaser of the goods at a flea market. Thus, Wynn's state of mind was a contested issue in the case, and the proper foundation existed for the admission of the other crimes evidence.

Clear and Convincing Evidence

Before the Court of Special Appeals, Wynn did not argue that the trial judge erred in finding by clear and convincing evidence that Wynn had stolen the goods from the Garrison home. Before this Court, however, Wynn argues that the intermediate appellate court's reversal of Wynn's convictions for the break-in at the Garrison home renders erroneous the trial court's initial finding of Wynn's complicity in the Garrison break-in. Specifically, Wynn argues that the trial court's initial finding as to the Garrison crimes "was based, in part, on the jury verdict finding Petitioner guilty of breaking into the Garrison home and taking property from Garrison."

Wynn misinterprets the trial court's ruling. Because the plain language of trial court's ruling on the motion establishes that the judge concluded independently that Wynn's complicity in the Garrison break-in was established by clear and convincing evidence, I set forth that ruling in some detail:

> THE COURT: I have to be satisfied by clear and convincing evidence that this evidence—that [Wynn] really did—that this property . . . he had belonged to somebody else. I am going to tell you that I come down different places on the watch and the bag as opposed to the camera,[5] I think.
>
> Because the watch and the bag, the watch is an unusual watch, a very unusual watch.
>
> [DEFENSE COUNSEL]: You should understand in your analysis that it would appear that the jury rejected [Garrison] as

[5] During the course of the ruling, the court also considered and rejected the State's request to offer evidence of Wynn's alleged theft of a camera, from a third home, as other crimes evidence.

> being the owner of that watch because they found theft under $300.
>
> * * * * * *
>
> THE COURT: Let me say I remember the testimony very clearly about the watch and the bag. The watch is the key instrument for me in this case.
>
> The camera, on the other hand, the way he identified it was it was like his camera and he identified it from the bag, from the camera case. . . .
>
> I have some real difficulties of finding clear and convincing on the camera because the serial number was scratched off. We really don't know what the serial number of it is. It was enough to go to the jury in that case and they found beyond a reasonable doubt, which they can find.
>
> [W]hen you put the watch and the bag together, I think that that watch and the bag came out of the house together.
>
> I know what the jury found. But this is a different test—this is my test. And I don't—by ruling the way I am going to rule now, I don't for a moment say that this puts me in a position of stating in any way that the jury was inappropriate in finding what they found.
>
> There was evidence in which they could find that. It is a different test, a different time and a different standard that I have to find.

As the above quoted passage makes clear, the trial court did not rely on the jury's prior verdict in determining by clear and convincing evidence that Wynn stole the antique watch and the Lucas bag from the Garrison home.[6] Because the trial court's decision on this

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[6] During the trial of this case, the trial judge reiterated his application of the *Faulkner* test for admissibility of the evidence. During a bench conference, he said:

> Because I have previously found in the motions that there is clear and convincing evidence that in fact there was a break-in and that the item, the watch, was in fact taken, the watch that was found in the Lucas bag. But is primarily the watch and the Lucas bag....Let me say, without the watch, I don't know

(continued...)

matter was independent of the prior jury verdict, the subsequent reversal of that verdict does not affect the trial court's decision to admit the other crimes evidence in this case. *See United States v. Beasley*, 809 F.2d 1273, 1276 n.1 (7th Cir. 1987) (suggesting that the reversal of a conviction on appeal does not later preclude evidence of that crime being introduced as similar act evidence showing intent). The trial court did not err in finding that Wynn's participation in the Garrison break-in was established by clear and convincing evidence.

Necessity and Probative Value versus Undue Prejudice

The remaining inquiry is whether the necessity for and probative value of that evidence were outweighed by any undue prejudice to Wynn. The determination whether the probative value of this evidence is sufficient to outweigh its prejudicial effect is within the sound discretion of the trial court. *See Merzbacher v. State*, 346 Md. 391, 405, 697 A.2d 432, 439 (1997). Because Wynn affirmatively placed at issue a theory of the case contesting the *mens rea* and the *actus reus*, the other crimes evidence in this case took on a heightened relevance and necessity which justified admission. I would hold that the trial judge did not

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[6](...continued)

> whether I would allow it, the Lucas bag alone. But I never have to cross that bridge because it was very...distinctive....I want at this juncture to say that there is clear and convincing evidence that this crime did take place; that that watch that was found in the defendant's house was in fact the watch that was taken in this housebreaking; and that the probative value of this on the issue of absence of mistake outweighs the prejudice to the defendant.

abuse his discretion in finding that the necessity for and probative value of the evidence outweighed any unfair prejudice to Wynn.

The majority suggests that "[t]he trial court could not possibly have made a correct balancing of probative value and prejudicial effect based upon the reason given in the dissent as that reason appears there for the first time. Nor could petitioner have argued properly the third step of the *Faulkner* analysis at the trial court level because the reason now relied upon by the dissent had not then been presented." Maj. op. at 17. I believe it patently clear from the record that the trial judge admitted the evidence solely for the jury to consider the improbability of the defense that Petitioner acquired the goods at a flea market. Because he characterized the evidence as "absence of mistake" does not mean that the reasons were never presented below.

Maryland Rule 5-404(b) is based on the premise that it is fundamentally unfair to convict a criminal defendant for being a "bad person." Rule 5-404(b), however, is not a sword which allows the defendant to place before the jury any theory of defense, and then simultaneously keep from the jury evidence which logically rebuts that defense on grounds other than criminal propensity. *See United States v. Beechum*, 582 F.2d 898, 909 (5th Cir. 1978) (*en banc*) ("It is derogative of the search for truth to allow a defendant to tell his story of innocence without facing him with evidence impeaching that story."), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). Although the defendant did not testify in the instant case, the record is nonetheless replete with indications that Wynn predicated his

defense before the jury on the notion that he lacked the culpability prerequisite to his conviction for the offenses charged.

Other courts have recognized that once a defendant puts forth a defense premised on an innocent or non-culpable state of mind, evidence of other criminal acts which tends to logically refute the claim of an innocent state of mind on a basis other than criminal propensity attains heightened probative value, and thus becomes admissible. *United States v. Myerson*, 18 F.3d 153, 166-67 (2nd Cir.), *cert. denied*, 513 U.S. 855, 115 S.Ct. 159, 130 L.Ed.2d 97 (1994); *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), *cert. denied sub nom. Mangano v. United States*, 513 U.S. 1059, 115 S.Ct. 668, 130 L.Ed.2d 602 (1994); *United States v. Clemis*, 11 F.3d 597, 601 (6th Cir. 1993), *cert. denied sub nom. Arnold v. United States*, 511 U.S. 1094, 114 S.Ct. 1858, 128 L.Ed.2d 481 (1994); *United States v. Tylkowski*, 9 F.3d 1255, 1262 (7th Cir. 1993); *United States v. Nickens*, 955 F.2d 112, 123-26 (1st Cir.), *cert. denied*, 506 U.S. 835, 113 S.Ct. 108, 121 L.Ed.2d 66 (1992); *United States v. Gomez*, 927 F.2d 1530, 1534 (11th Cir. 1991); *United States v. Rhodes*, 779 F.2d 1019, 1031 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2916, 91 L.Ed.2d 545 (1986); *United States v. Brunson*, 549 F.2d 348, 361 (5th Cir.), *cert. denied*, 434 U.S. 842, 98 S.Ct. 140, 54 L.Ed.2d 107 (1977); *Garibay v. United States*, 634 A.2d 946, 948 (D.C. 1993); *State v. Wasinger*, 556 P.2d 189, 193 (Kan. 1976); *Kahey*, 436 So.2d at 489; *Vandervliet*, 508 N.W.2d at 132; *Cantrell v. State*, 731 S.W.2d 84, 91 (Tex.Crim.App. 1987); *State v. Sullivan*, 576 N.W.2d 30, 38 (Wis. 1998).

Under the doctrine of chances, the trier of fact need not focus on the defendant's bad character. In his discussion of the use of the doctrine of chances to prove the *actus reus,* in the context of a child abuse case, Professor Imwinkelried has explained the distinction by analogy:

> [U]nder the doctrine of chances, the trier need not focus on the accused's subjective character. Under the doctrine of chances, the initial decision facing the trier is whether the uncharged incidents are so numerous that it is objectively improbable that so many accidents would befall the accused. The decision is akin to the determination the trier must make in a tort case when the plaintiff relies on *res ipsa loquitur*. In the tort setting, the trier must decide whether objectively the most likely cause of the plaintiff's injury is the defendant's negligent act. In the present setting, the trier must determine whether the more likely cause of the victim's injury is the act of another human being.

Imwinkelried, *supra,* 51 OHIO ST. L.J. at 586-87 (footnotes omitted).[7]

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[7] Professor Imwinkelried recounts Dean Wigmore's hypothetical exemplifying the use of the uncharged misconduct evidence:

> [I]f A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim . . . as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (i.e., as a probability, perhaps not as a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i.e., discharge towards the same object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e., a deliberate

(continued...)

In this case, the other crimes evidence was admissible because it was not offered to prove propensity. As I have previously discussed, the evidence of Wynn's complicity in the Garrison break-in also tended to rebut the defense that he innocently purchased the goods stolen from the Quigley home. The trial judge did not abuse his discretion in determining that the probative value of the other crimes evidence in this case was strong. First, as discussed, that evidence enjoyed heightened relevance vis-a-vis Wynn's theory of defense premised upon an innocent state of mind. Second, the need for the evidence was strong: it was the only evidence that the State could introduce which would logically refute Wynn's claim that he innocently purchased the goods stolen from the Quigley home at a flea market. In addition, the trial court gave the jury a proper limiting instruction, stating that the evidence

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[7](...continued)

> discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result . . . tends (increasingly with each instance) to negative . . . inadvertence . . . or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.

Imwinkelried, *supra*, 51 OHIO ST. L.J. at 594 (alteration in original) (citing 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 302, at 241 (1979)). As Professor Imwinkelried points out, the intermediate inference is a conclusion about the objective improbability of the accused's innocent involvement in so many similar incidents. Likewise, in the case before the Court, this focus on the intermediate inference to be drawn from the other crimes evidence—the objective improbability of Wynn's innocent involvement with the watches and the Lucas gym bag—reduces the risk that a jury will render a verdict on an improper basis. *See id.* at 587.

was not to be considered for the purpose of showing that Wynn would have the propensity or disposition to commit the crime charged in the indictment.[8] Thus, the jury's focus was

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[8] The trial judge's limiting instruction was very forceful. He told the jury:

> Let me tell you, ladies and gentlemen, the proffer in this case is that this is going to be evidence that the defendant committed another crime. That is the essence of this.
>
> And he is not charged with that crime. I want you to understand that. He is not charged in this case with stealing anything from Mr. Garrison's house. And that is the crime we are really talking about here, stealing something, going into somebody's house, a housebreaking, and stealing something from that house.
>
> Mr. Garrison is going to testify. You are going to weigh this testimony, as per credibility, as you do any other testimony.
>
> But if you believe that in fact Mr. Garrison's house was burglarized or there was a housebreaking of Mr. Garrison's house, and the items which he is going to testify about were in fact taken, and that those are the same items that were found in the defendant's apartment, the only reason I am allowing this testimony in is it goes to an issue in the case we have, which is the housebreaking that is alleged [at the Quigley house].
>
> And that goes to what we call the absence of mistake rule. And the absence of mistake rule in this case—you kind of look querulous when you talk about absence of mistake—is that the likelihood that somebody would buy at an open-air market something that was stolen from the [Quigley] house and also buy something that was stolen from [the Garrison house], that is the real issue.
>
> That is the only issue this goes to. And you are to limit your—any weight that you give to this evidence to this one issue. It doesn't go to whether or not in fact he committed that other crime because it—or this crime that is not charged.
>
> But it goes to whether or not what the likelihood is that somebody would buy something like that, another stolen item. That is the only issue. If you find this is credible . . . .
>
> And I just want to say one last thing. The reason I am

(continued...)

on the intermediate inference sought to be established by the State—the relative improbability of Wynn's explanation; the trial court properly deflected the focus away from Wynn's prior criminal conduct. As the instruction to the jury makes clear, the jury received the other crimes evidence in this case for the express purpose of rebutting Wynn's claim that he innocently acquired the goods stolen from the Quigley home. The other crimes evidence at issue was properly admitted under this theory of relevance. To ignore the basis of admissibility upon which the jury properly received the other crimes evidence in this case, simply because the trial judge mislabeled the theory of relevance justifying its admission as "absence of mistake," is to improperly elevate form over substance.

Finally, Wynn's possession of the antique watch and the Lucas bag did not just slightly, incrementally rebut Wynn's claim of innocent possession of the Quigley goods; that evidence strongly rebutted Wynn's "defense." If the antique watch had been the only misconduct evidence that the State introduced, Wynn may have had a strong argument that the probative value of that evidence was slight. Wynn could have argued that the same thief stole both the antique watch from the Garrison home and the watches from the Quigley home; then, the thief sold all the watches to the same purchaser. Thereafter, Wynn would have, coincidentally, bought all of the watches at the flea market. That sequence of events has an aura of plausibility. Much less so once the Lucas bag was offered into evidence.

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[8](...continued)

> telling you this now is that I want to make sure that when you hear this testimony you understand the context in which it is coming in to you.

The real thief's nearly contemporaneous theft of watches from several homes, combined with Wynn's affinity for such timepieces, may have produced an unusual but plausible coincidence of events. Yet, it would be highly extraordinary if Wynn innocently purchased the watch stolen from the Garrison residence, the watches stolen from the Quigley home, *and* the Lucas gym bag stolen from the Garrison house. This was recognized clearly by the trial judge, and was his basis for admitting the evidence.

As I have discussed, the doctrine of chances rests on the trial court's assessment of the improbability that someone would be innocently involved in similar activity. In determining whether other crimes evidence is sufficiently probative, even one act may be sufficient. *See* Imwinkelried, *supra,* 51 OHIO ST. L.J. at 597-600 (1990). The proper focus is not necessarily quantitative; instead, the proper focus is the qualitative value of the evidence within the particular context of an individual case. Indeed, Professor Imwinkelried advises that "in analyzing the applicability of the doctrine of chances, it seems wrong-minded to focus on the absolute number of incidents. Rather, the focus should be on relative frequency." IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, *supra*, § 5:06, at 15. Similarly, "[h]ow many similar events are enough depends on the complexity and relative frequency of the event rather than on the total number of occurrences." *Sullivan,* 576 N.W.2d at 39 (footnote omitted). The unlikely coincidence that Wynn purchased the items at a flea market triggered the court's appropriate, albeit unspecified, application of the doctrine of chances. Moreover, the clear and immediate limiting instruction given by the trial

judge further supports the conclusion that the trial court did not abuse its discretion in admitting evidence of Wynn's prior criminal acts.

The majority opinion assumes that to affirm the judgment in this case would lead to the "exceptions" in Maryland Rule 5-404(b) swallowing the general prohibition against other crimes evidence any time allegedly stolen property is found in a defendant's possession and the defendant enters a not guilty plea. I agree that there exists the potential for abuse. For other crimes evidence to be admissible in such a scenario, the evidence must be substantially relevant to a genuinely contested issue in the case. *See Harris*, 324 Md. at 500, 597 A.2d at 961-62. In other words, the *actus reus* or *mens rea* must genuinely be in dispute. In addition, the probative value of that evidence must substantially outweigh any unfair prejudice to the defendant. *See id.*

To guard against the exception swallowing the rule, courts should not admit other crimes evidence under the doctrine of chances whenever offered by the prosecution. Before admitting evidence of the accused's uncharged crimes, in complete faithfulness to the first prong of the *Faulkner* test, the trial judge should require the prosecution to satisfy certain foundational requirements: (1) the uncharged incident must be similar, although not necessarily identical, to the charged crime; (2) an assessment of improbability; (3) a *bona fide* need for the evidence; and (4) a temporal relationship between the uncharged misconduct and the act charged. *See Crawford*, 582 N.W.2d at 811 (dissenting opinion). *See also* Imwinkelried, *supra*, 51 OHIO ST. L.J. at 595-598.

II.

The majority erroneously concludes that in determining the admissibility of the other crimes evidence in this case, it is proper for this Court to consider only the absence of mistake exception to Rule 5-404(b). In support of that conclusion, the majority relies upon Rule 8-131. The majority is in error for several reasons.

First, it should be noted that even were this conclusion accurate, today's reversal of Wynn's conviction is misguided. As discussed above, the Court of Special Appeals did not misconstrue the "absence of mistake" exception in upholding the admission of "other crimes evidence" and for that reason, this Court should address the State's argument that the other crimes evidence was admitted properly. The doctrine of chances could reasonably be viewed either as a separate theory of relevance upon which to base the admissibility of other crimes evidence or as the theoretical underpinning of the absence of mistake or accident exception explicitly relied upon by the trial judge. The doctrine is often catalogued, however, under the intent or absence of mistake or accident exceptions rather than separately. *See, e.g.*, *Lough*, 853 P.2d at 931 ("[T]he doctrine of chances is most often invoked when intent or absence of mistake are in issue."); *Vandervliet*, 508 N.W.2d at 125 n.30 ("The doctrine of probabilities may be used to prove mens rea, or to disprove accident."). As the theoretical underpinning of absence of mistake, it resolves the majority's complaint that the issue is not encompassed within the certiorari petition.

Second, the single issue challenged by this appeal is the admission of specific evidence of other crimes, namely that of the Garrison housebreaking and Wynn's possession

of items stolen from the Garrison home. Consideration of this issue need not be formalistically confined to a single basis for admission under Rule 5-404(b) but rather our review should be directed to whether the trial court's admission of the disputed evidence was proper under this rule. Moreover, should it be perceived that the doctrine of chances embodies a separate theory of relevance under which a court might admit other crimes evidence, such classification should present no bar to the admissibility of the evidence in this case. Any distinctions that might be made as to where in Rule 5-404(b) the doctrine of chances belongs are immaterial. This court has stated before that the list of enumerated exceptions in Rule 5-404(b) is not exclusive. *See Harris*, 324 Md. at 501, 597 A.2d at 962; *Ross v. State*, 276 Md. 664, 669-70, 350 A.2d 680, 684 (1976). The disputed evidence was substantially relevant to this case and it appears plainly on the record that the issue of its admissibility was decided by the trial court and Court of Special Appeals.

Third, even if admissibility of the disputed evidence under the doctrine of chances were a new issue, Rule 8-131(a) affords an appellate court the discretion to consider it. *See Crown Oil v. Glen*, 320 Md. 546, 560-61, 578 A.2d 1184, 1190-91 (1990); *Watson v. Peoples Ins. Co.*, 322 Md. 467, 484, 588 A.2d 760, 768 (1991). There is no prejudice in that the issue was decided, albeit under a different name, in the circuit court and the intermediate appellate court.

Finally, at the very least, the majority itself errs in failing to address the harm of the error it finds the trial court to have committed. Rule 8-131(b) plainly allows this Court to

consider whether the error was harmless or prejudicial even if not specifically raised in the certiorari petition or cross-petition. Rule 8-131(b)(1) states in pertinent part:

> Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial *even though the matter of harm or prejudice was not raised in the petition or in a cross-petition*. (Emphasis added).

As the Supreme Court has held, trial errors, as opposed to structural defects or errors that "transcend the criminal process," do not call for automatic reversal but rather are to be subjected to "harmless error" analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309-11, 111 S.Ct. 1246, 1264-65, 113 L.Ed.2d 302 (1991).

For all the reasons stated above, I respectfully dissent.