
**FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA**

FORT PECK TRIBES,
Plaintiff/Appellee

vs.

APPEAL NO. 237

Marvin Youpee,
Defendant/Appellant

OPINION

FACTS AND PROCEDURAL HISTORY

The facts in this case indicate that the defendant was charged with criminal mischief and criminal trespass, a jury trial was held and the defendant was found guilty on both charges. The facts further indicate that the victim in this case Shannon Hopkins testified that she and the defendant were in a relationship. She testified that on March 3, 1995 while she was staying at her mother's home, she heard noises and upon her investigation found the defendant, Marvin Youpee inside the home. She later discovered damage to two doors leading into the home. Shannon testified that after entering the home Mr. Youpee physically pushed her and an argument ensued and during the course of the argument the defendant ended up trying to choke Shannon Hopkins.

Two days prior to trial the appellant/defendant's attorney received the prosecutors' motion in limini, proposing to allow prior acts of the defendant to be introduced at trial. A hearing on the motion in limini was held prior to but on the date of the trial. The prosecutors motion in limini was granted.

At trial Shannon Hopkins testified as to prior confrontations with the defendant, including an incident where he attempted to choke her.

ISSUE I

WHETHER THE PROSECUTION GAVE THE DEFENDANT ADEQUATE NOTICE OF THE

PROSECUTION'S MOTION IN LIMINI?

The appellant argues that **Rule 404(b)** of the Federal Rules of Evidence (F.R.E.) requires that:

"at the request of the defendant the prosecution in a criminal case shall provide reasonable notice in advance of trial...of any such evidence it intends to introduce at trial" F.R.E. 404 (b).

Appellant's counsel contends he did not receive adequate notice of the motion in limini and was surprised by the introduction of evidence showing prior wrongful acts of the defendant. The appellant further argues that no notice was given to the appellant of what incidents, reports, witnesses or exhibits would be presented as evidence under the proffered motion in limini. Appellant argues that there was not sufficient time to complete discovery. In addition to the Federal Rule of Evidence 404(b) the appellant argues State v. Keefe, 759 P2d 128, 134 (Mont. 1988). In State v. Keefe the Montana Supreme Court relied on the rule of law known as the Just test extrapolated from the State v. Just, 602 P2d 957, 184 Mont. 262 (1979) which requires that when the state intends to use evidence of other crimes or prior wrongful acts of the defendant the state must first notify the defendant prior to trial that evidence of other crimes or wrongful acts will be introduced as evidence against the defendant and indicate the purpose for the use of such evidence.

In order to introduce evidence of other crimes or wrongful acts, the state must demonstrate four substantive factors:

- (1) That the other crimes or wrongful acts are similar;
- (2) That the other crimes or wrongful acts are not remote in time;
- (3) That the other crimes or wrongful acts tend to establish a common scheme, plan or system;
- (4) That the probative value of the other crimes or wrongful acts is not substantially outweighed by their prejudice to the defendant.

See Just v. Keefe at P2d 133.

In response to the appellant's argument and cited authority, the prosecution states in its brief and at oral argument that the prosecution went to the trouble of personally contacting the defense counsel to apprise him of his discovery of the prior wrongful acts and prosecution's intent to file a motion in limini. The prosecution's difficulty in giving any more notice lies in the fact that the Tribe relied on an outside prosecutor in which to litigate the case. The outside prosecutor traveled to the Fort Peck Indian

Reservation and conducted discovery the day before the trial. Upon communicating with the victim in the matter, prosecutor discovered evidence of two previous incidents, occurring in January and February of 1995. It is alleged that the two incidents involved physical confrontations between the victim and the defendant. The prosecution argues that the prosecution made all attempts to file a notice with the defense as soon there after as his knowledge of the information became available. The prosecution notes that Rule 404(b) does not specify any time limits. The prosecution in its brief reminds the Court that Rule 404(b) does not prescribe specific deadlines in order for the parties or the court to determine what constitutes timely notice.

Prosecution states that the defendant was not surprised by any new witnesses or new police reports at trial. Prosecution states that it did not expect to call any new witnesses and any introduction of the evidence would be through the criminal investigator, Nelson Heart and the victim, Shannon Hopkins, both who were already on the witness list. Additionally, prosecution notes that at the motion hearing the defense counsel had a "passing familiarity" with the January and February incidences. It is argued by the prosecution that the defense counsel had all the information necessary concerning the incident prior to trial, specifically noting that the defendant himself had knowledge of the incidents.

This court does not adopt the State v. Just test as authoritative rules for the Fort Peck Tribal Courts however this court is influenced by the Just test as being persuasive. The Just test appears to be helpful in determining whether or not the federal rules of evidence have been followed. The lower court record demonstrated to this court that the prior wrongful acts of Mr. Youpee and the act for which he is charged are similar in nature; the prior wrongful acts of Mr. Youpee along with the act for which he is charged with in this case are not remote in time and the prior wrongful acts when viewed in light of the crimes for which he was charged tend to establish a common scheme. Additionally, the prior wrongful acts have probative value which is not substantially outweighed by any prejudicial effect.

On the issue of granting of the Motion in Limini to allow the evidence of prior crimes, wrongs or acts, we hold that the Court properly granted the motion. There are no specific time limits other than "reasonable notice in advance of trial" to guide either counsel or the court in determining what constitutes reasonable notice. The circumstances of this case show that the prosecutor brought the matter to the attention of the Defense Counsel by personal contact as reasonably soon as the information was available to the prosecutor. We find that the prosecutor acted properly and made reasonable effort to advise the Defense counsel of his intentions to introduce evidence of the prior wrongful acts. The Defense counsel could not have been surprised as to the pro offered evidence of the prior wrongful acts. The Defense counsel had a "passing familiarity" with the prior incidences.

For all these reasons we hold that the prosecution gave the defendant adequate notice of the prosecution's pro offered evidence of the prior wrongful acts.

ISSUE II

WHETHER THE INTRODUCTION OF EVIDENCE OF THE PRIOR WRONGFUL ACTS WOULD BE RELEVANT AND HAVE A PERMISSIVE PURPOSE OUTWEIGHING ANY PERCEIVED PREJUDICIAL EFFECT?

The appellant also argues that the evidence sought to be introduced was not relevant Under

Rule 404(b) of the Federal Rules of Evidence the appellant argues that:

1. The other crimes, wrongs or acts must be similar.
2. The other crimes, wrongs or acts must not be remote in time.
3. The 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 with such character; but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or absence.
4. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, considerations of undue delay, waste of time or needless presentation of cumulative evidence. *State vs. Matt*, 814 P 2nd 52, 56 (1991).

The appellant argues that the alleged prior wrongful acts are incidences of domestic violence and are not remotely similar to the charges of criminal trespass and criminal mischief. Additionally, the appellant argues that, the probative value of these prior incidences is substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury.

The prosecution notes that the evidence introduced through the motion hearing and presented at trial was relevant as to proof of motive and to show the entire background of the relationship between the defendant and Shannon Hopkins and to show the absence of mistake to his unlawful entry into the house and to further show the entry was for the purpose of confronting his estranged girlfriend.

The prosecution argues that the probative value of these prior incidences is not substantially outweighed by the unfair prejudice. The probative value in this case is that the jury gained knowledge of the history of the relationship between the defendant and Shannon Hopkins to show that, in fact, Shannon Hopkins had left the defendant more than once and moved in with her mother, that the defendant had the motive to do the act of trespass. The prosecution further argues that the defendant was not prejudice by the jury knowing of the prior incidents.

The appellant argues that in order to cure the problem of any undue prejudice outweighing the probative value of the evidence, three procedural requirements must be met, (according to Rule 404(b).

1. The State must notify the defendant prior to trial that evidence of other crimes or wrongful acts will be introduced and indicate the purpose for the use of such evidence;
2. The Court must admonish the jury as to the limited purposes of the prior crimes and acts in evidence;
3. The Court must offer a final instruction stating in unequivocal

terms that the evidence of other crimes or acts has limited purposes and that the defendant is not on trial for those crimes or acts. See *State vs. Keefe*, 759 P2d 128, 134 (Mont. 1988).

The appellant argues that the prosecution was allowed to plant a seed in the jurors minds that the appellant was a bad person. Appellant's argument is that the prior wrongful acts of the defendant were introduced by prosecution to prove character. Finally, we find and hold that the evidence in issue was relevant for the purpose of showing motive. A review of the trial transcript shows that the evidence in question went to show the reason of motive of Defendant as to the act of trespass; i.e. where Shannon Hopkins would be living. From the facts in this case it is easily seen that the defendant had an ongoing relationship with the victim Shannon Hopkins. The prior wrongful act proffered by the motion in limini established that relationship. The relationship resulted in activities of the defendant resulting in the criminal prosecution for "criminal mischief" and "criminal trespass". Had it not been for the relationship between the parties it is unforeseeable that the criminal charges would have been brought. There is a nexus here between the relationship and the activities of the defendant. The establishment of the relationship goes to prove motive. We find that the requirements of Rule 404(b) were substantially complied with by the Tribal Court in admitting the pro-offered evidence over objection of defendant. Therefore we hold that the evidence of the defendant's prior wrongful acts is relevant and demonstrates Mr. Youpee had a motive to continue the relationship. He wrongfully continued that relationship by criminal means of "criminal mischief" and "criminal trespass".

CONCLUSION AND ORDER AFFIRMING CONVICTION

The Lower court did not err in allowing the Motion in Limini. The evidence was relevant and the probative value did not outweigh the danger of unfair prejudice to the Defendant.

The conviction of the Defendant/Appellant is affirmed.

Dated this _____ day of _____ 1998.

BY THE COURT OF APPEALS:

Gary M. Beaudry, Chief Justice

Gerald Schuster, Associate Justice

Gary P. Sullivan, Associate Justice