#2017-011

Carolyn A. Koegler

From: Hon. William Delker
Sent: Thursday, September 14, 2017 9:03 AM
To: Justice Robert J Lynn; Carolyn A. Koegler
Subject: David Peck's Proposed changes to Rule 404(b)

Dear Justice Lynn and Carolyn-

I don't know it is too late to submit the following analysis of David Peck's proposed changes to Rule 404(b). In a nutshell, I agree with his proposal. On the other hand, Judge Nadeau expressed some reservations of his proposed changes. I believe this represents a philosophical dispute about the purposes of Rule 404(b) and the trial judge's role in that process. Because there is unclarity in the rule, I do think that Peck's suggestion to clarify the issue has merit. To be clear, my analysis and opinions on this issue are my own and I do not speak for other superior court judges.

Here are some observations from my perspective based on a recent case I had:

I presided in a domestic violence trial of State v. Walton Valentin. The parties filed motions in limine about whether certain past acts of domestic violence by the defendant against the victim, which occurred in Massachusetts, should be admitted at trial. I ruled that the State was not required to submit "clear proof" that the past acts of domestic violence occurred. I ruled that the clear proof prong only deals with the issue of whether the defendant (as opposed to someone else) committed the prior acts. The NH S.Ct. dealt with this in a few different contexts in past cases. In State v. Michaud, 135 N.H. 723, 726 (1992), the defendant was charged with child abuse. The S.Ct. analyzed whether evidence of a prior leg fracture was admissible under Rule 404(b). The Court stated: "We have previously affirmed 'clear proof' determinations where the State provided the trial court with evidence firmly establishing that the defendant, and not some other person, committed the prior act." Id. at 727 (emphasis added). The issue in Michaud was whether the defendant was responsible for the prior injuries or they were inflicted by someone else. In that case, the court held that the State had to prove that the defendant inflicted the prior bruises by clear and convincing evidence. In State v. Lesnick, 141 N.H. 121, 124 (1996), the defendant was charged with murdering her husband. The State sought to introduce evidence of a prior threat. There was no eye witness to that prior threat because the victim was dead. In other words, there was a question about there was sufficient admissible evidence that the prior incident occurred. Because the victim was dead, the question was whether the other evidence was sufficient to establish "clear proof" that the prior threat even occurred. Id. at 126-27. The Court found that there was.

In my case, the victim testified that the defendant committed certain uncharged acts of violence in the past against her. The defense argued that the victim was not credible on these prior acts by clear and convincing evidence. I ruled that if there is a dispute about the credibility of a witness who testified that the defendant committed the prior acts then that is a question for the jury not for the trial judge. In other words, I interpreted Rule 404(b) to mean that trial judge was not required to find by clear and convincing evidence that the victim's testimony about the 404(b) evidence was credible.

In an unpublished decision, the S.Ct. ruled that I should have addressed the clear proof prong. State v. Valentin, No. 2016-0209, at 4 (N.H. June 30, 2017). They did not reverse, however. They ruled that because the victim testified that the acts occurred that was sufficient to meet the clear proof prong. They did not analyze the issue in any more detail. They did not explain why the victim in my case was sufficiently credible. The Court also did not further take up my analysis of the prior case law in this state. Because this case is unpublished it has no precedential value. N.H. R. S.Ct. 20(2). More importantly, because Valentin was based on the interpretation of Rule 404(b) and is not founded on statutory or constitutional principles, I do think that it is within the purview of the Rules Committee to examine the issue and propose changes to the rule.

The term "clear proof" appears nowhere in the text of the rule. It was a creation of case law. In State v. Barker, 117 N.H. 543, 546 (1977), the Court, without citation to any case law or other authority, held that in order to admit prior bad act evidence the trial judge had to find that "the proof that the acts in question were committed by the defendant is clear." Barker was decided before the Rules of Evidence were adopted in NH. The common law test established in Barker was carried forward to Rule 404(b), again without analysis of the text of the rule or citation to other authority. State v. Hickey, 129 N.H. 53, 60 (1986). As Peck's memo points out, the United States Supreme Court in Huddleston ruled that the trial court was not allowed to make a threshold determination of credibility before admitting Rule 404(b) evidence. While NH certainly can take a different tact on this issue, I think Peck's proposal is worth exploring further.

I think it is also worth noting without extensive analysis that NH case law is far from clear about satisfies the "clear proof" prong. The Court has ruled that hearsay, offers of proof, and the testimony of a witness is enough. Indeed, as Valentin illustrates, as a trial judge I did not make any findings on the victim's credibility. Yet the Court found there was "clear proof" of the prior bad acts based on the transcript of her testimony alone, even though she was extensively and vigorously cross-examined at trial. In fact, in that case, she recanted substantial portions of her accusations against the defendant. The State offered a domestic violence expert to explain to the jury the discrepencies in her testimony. Ultimately, obviously, the jury found her credible. But this case illustrates why I think that a jury trial is the proper way to evaluate this credibility issue and not a pretrial ruling by the trial judge.

Sorry for the long-winded and late submission. I wanted to get this in because I may be late to the meeting tomorrow and it is more helpful to digest these issues in writing than on the fly at the hearing.

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