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Rule 404(b) and Reversal on Appeal

BY STEPHEN A. SALTZBURG

If hard cases make bad law, strange cases sometimes produce surprising appellate decisions. One strange case that illustrates the point is *United States v. Bell*, 516 F.3d 432 (6th Cir. 2008). The case began with a domestic violence call to the police, led to a consent search of a home and discovery of drugs and guns, and produced a conviction of Brian Bell on drug and weapons charges. Despite the abuse of discretion standard of review and the usual deference appellate courts give to trial judge decisions with respect to the admissibility of uncharged crime evidence, the court of appeals reversed.

The Facts

The case began on February 23, 2004, in Cordova, Tennessee, when Shelby County Deputy Sheriff Walter Blaylock responded to a domestic violence complaint concerning Bell and 14-year-old Amber Williams. Blaycock found Bell and Williams in a fight. Noting that the child was crying and displayed signs of physical injury, Blaylock arrested Bell, searched him, and found a bag of marijuana and \$1,852 in cash. Blaylock secured Bell and escorted Williams inside her house to telephone her mother, April Armstrong, who was at school. Inside the house, Blaylock observed marijuana and drug paraphernalia, including scales, a cutting board, and baggies on a table.

Armstrong arrived home and gave her consent to Blaylock to search the house. Blaylock found more than 11 kilograms of marijuana packaged in small amounts, more than 90 grams of crack cocaine, 11 firearms, assorted ammunition, a large digital scale, bags of cigar “blunts” commonly used to smoke marijuana, and other evidence associated with drug trafficking.

The government charged Bell with three crimes: (1) possession of 11,071.1 grams of marijuana with intent to distribute, (2) possession of 94.6 grams of crack cocaine with intent to distribute, and (3) possession of a firearm by a convicted felon. The case was tried before a jury.



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Conflicting Testimony

Amber Williams testified that she lived with her mother at the house where the drugs and guns were found and Bell stayed there “three or four nights out of the week.” He had his own room, she stated, where he kept personal belongings such as his pit bull dogs, his clothes, his cologne, and his backpack, and he housed his Lexus in the garage. Williams also testified that no one but her, her mother, and Bell had resided in the house in the month during which Blaylock made his search.

Armstrong largely corroborated her daughter’s testimony, stating that while Bell was “in and out” he “lived there most of the time.” He assisted in paying the bills for the residence, she said, and shared her bedroom. Armstrong testified that Bell had access to the entire house and she agreed with her daughter that Bell had his own room where he stored his belongings. Occasionally, she stated, Bell had visitors to the house. Armstrong denied that the drugs and guns Blaylock found were hers.

Bell called a single witness: his fiancé, Deeta Johnson. Johnson testified that Bell lived with her and her seven-year-old son in Memphis, Tennessee, and stayed with her “[b]asically every night” and was only gone about “two nights out of the week.” Johnson added that Bell told her that when he was not with her he would stay at his aunt’s home.

Thus, at the conclusion of the government’s case-in-chief and the defense case, there was conflicting testimony as to whether Bell spent most of his time in Cordova or Memphis, and whether he essentially lived with Armstrong or with Johnson. If the jury were to believe Johnson, the prosecution’s claim that Bell possessed the drugs and firearms would have been weakened, as Bell’s connection with the house in which the evidence was found would have been attenuated.

Bell did not testify on his own behalf, probably because he had prior convictions that might well have been admitted to impeach him and do substantial damage to the defense. Those convictions became the subject of the Rule 404(b) fight that resulted in the reversal on appeal.

Whose Drugs and Guns?

At the conclusion of the defense case, it appears that there are several possible answers to the question of who possessed the drugs and guns:

1. They belonged to Bell, and neither Williams nor Armstrong shared the possession.

2. They belonged to Bell, and either Williams or Armstrong or both shared the possession.
3. They belonged to Bell and other associates of Bell, and neither Williams nor Armstrong shared the possession.
4. They belonged to Bell and other associates of Bell, and either Williams or Armstrong or both shared the possession.
5. They belonged to Williams alone.
6. They belonged to Armstrong alone.
7. Williams and Armstrong shared possession.
8. They belonged to an associate of Williams and neither Williams nor Armstrong shared possession.
9. They belonged to an associate of Williams, and either Williams or Armstrong or both shared possession.
10. They belonged to an associate of Armstrong, and neither Williams nor Armstrong shared possession.
11. They belonged to an associate of Armstrong, and either Williams or Armstrong or both shared possession.
12. None of the above.

Given the fact that the drugs and drug paraphernalia were in plain view, explanation 12 seems unlikely. Bell would be guilty if any of the first four explanations were true, and not guilty if any of the explanations from 5-12 were true. By eliciting from Armstrong a denial that the drugs and guns were hers and relying on Williams's testimony, the government made the strategic decision at trial to rely on explanations 1 or 3 to prove guilt.

The Rule 404(b) Fight

Prior to the trial, the government moved in limine to admit Bell's four prior drug convictions: (1) an October 16, 1997, conviction for possession of marijuana with intent to distribute; (2) an October 16, 1997, conviction for possession of cocaine base with intent to distribute; (3) a June 18, 1999, conviction for possession of marijuana with intent to distribute; and (4) a June 18, 1999, conviction for possession of cocaine base with intent to distribute. The government argued that the evidence tended to prove knowledge, intent, and absence of mistake or accident. The trial judge deferred a ruling, and the government renewed its motion at the conclusion of the defense case.

The trial judge addressed the three issues that arise under Rule 404(b): Is there sufficient evidence that the acts underlying the convictions occurred? Is

the evidence admissible for a permissible purpose? Does the prejudicial effect substantially outweigh the probative value?

After deciding that there was sufficient evidence, the judge turned to the second question and reasoned as follows:

The second issue deals not only with whether or not [the convictions] can be proved, but whether they—whether the government has articulated an appropriate basis under 404(b) for the admission of such type—such evidence, in other words, whether or not they have submitted sufficient argument and proof to the court and based upon the court's review of the record as to whether or not one or more of the permitted admissibility bases is present. . . . I think it's cited in [*United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985)] and [*United States v. Lattner*, 385 F.3d 947 (6th Cir. 2004)] that, when the defendant in such a charge enters a plea of not guilty, basically he is putting every element, including the intent aspect, to the government's proof. And, as well, the court believes that the defendant's position in this case has been that he was not aware, he was—he did not know these drugs were there or they were planted by someone else, put in there by somebody else, you know, that this was simply he just happened to be—he was an innocent person in terms of their being present or it was a mistake or an accident or just happened to be there.

I think under the circumstances of what I've heard from the proof, is that the government's submission of this evidence would go towards the issue of intent and absence of mistake or accident. (516 F.3d at 438.)

The judge struck the Rule 403 balance in favor of the government, admitted the evidence, and gave a limiting instruction to the jury:

Ladies and gentlemen, the court has permitted the introduction of testimony—or evidence, rather, here regarding the defendant, Mr. Bell, about committing—the commission of other crimes other than the ones that are charged in the indictment.

Now if you find that the defendant committed these acts, these crimes, you can consider the evidence only as it relates to the government's claim

on the defendant's intent or absence of mistake or absence of accident. You may not consider it for any other purpose. And I'll give this instruction to you again when I give you the final instruction. But remember and keep this in mind, that the defendant is on trial here only for the offenses that he is charged with in this indictment, which again I will read to you. So the burden still remains on the government to prove its case beyond a reasonable doubt and, again, the defendant is not on trial for any previous act, but only for those that are charged here in this indictment.

(*Id.*)

After the closing arguments, the judge gave a similar instruction before the jury was dismissed:

Now, you heard testimony that the defendant committed crimes other than the ones charged in the indictment. If you find that the defendant did these crimes, you can consider the evidence only as it relates to the government's claim on the defendant's intent, absence of mistake, or absence of accident. You must not consider it for any other purpose. Now, remember that the defendant is on trial here for only those charges in the indictment and not for the other acts. Do not return a guilty verdict unless the government proves the crime charged in the indictment beyond a reasonable doubt.

(*Id.*)

The jury found Bell guilty on all three counts.

The Court of Appeals Majority

The court of appeals reversed Bell's convictions by a 2-1 vote. The majority concluded that "the district court erred in admitting the evidence of Bell's prior drug convictions for the purpose of demonstrating absence of mistake or accident and intent, and abused its discretion in finding that the probative value of this evidence on the issue of intent was not substantially outweighed by its prejudicial impact. Because this error was not harmless, Bell is entitled to a new trial." (*Id.* at 441.)

The court first addressed the issue of absence of mistake or accident. It reasoned as follows:

Absence of mistake or accident is one of the permissible purposes listed in Rule 404(b). However, "the government's purpose in introducing the evidence must be to prove a fact

that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove." [*United States v. Merriweather*, 78 F.3d at [1070] 1076 [(6th Cir. 1996)]. Thus, for other acts evidence to be admissible for the purpose of showing absence of mistake or accident, the defendant must assert a defense based on some type of mistake or accident. See *United States v. Newsom*, 452 F.3d 593, 606 (6th Cir. 2006) (finding absence of mistake not to be a permissible purpose, in a felon in possession case, when the defendant's only defense was that the gun was not his and that he did not know that it was under his seat); *United States v. Ward*, 190 F.3d 483, 489 (6th Cir. 1999) (rejecting absence of mistake as a permissible purpose for the admission of evidence when the defendant's "defense was not that she mistakenly thought she was selling powdered sugar instead of cocaine"); *Merriweather*, 78 F.3d at 1077 (noting that "absence of mistake 'on behalf of the government' is not a legitimate basis to admit other acts evidence").

The district court erred in concluding that the evidence of Bell's prior convictions was admissible for the purpose of demonstrating absence of mistake or accident. This case did not present an issue of mistake or accident. Bell's argument was not that he was mistaken about the narcotic nature of the substances seized by the police, but rather that he never possessed the marijuana and crack cocaine. The district court recognized that there was "no indication from [Bell's] arguments or anything that has been put on that would indicate that Mr. Bell knew something was there, but didn't know it was drugs." On the contrary, the district court believed Bell's position to be that "he did not know these drugs were there or they were planted by someone else, put in there by somebody else, [that] he was an innocent person in terms of their being present or it was a mistake or accident or just happened to be there." In other words, Bell was claiming that it was a mistake for the police to think that the drugs were his, not that he was mistaken about the fact that the substances found were drugs. As Bell "never claimed that he was unknowingly dealing in cocaine or was unwittingly engaging in unlawful activity," the evidence of his

prior drug convictions could not be properly admitted for the purpose of absence of mistake or accident. *Merriweather*, 78 F.3d at 1077. (*Id.* at 442.)

In short, the court found that there was no defense claim, implicit or explicit, that Bell claimed that the drugs and guns were present as a result of his mistake or accident. His defense was that they were not his drugs, he was not living in the house where they were found, and he did not know they were there. Therefore, the government's rebuttal addressed an issue not in the case. The court of appeals deemed this legal error rather than abuse of discretion, since the trial judge has no discretion to admit evidence that is irrelevant.

The court had a different view of the admissibility of the prior convictions to prove intent and wrote as follows: "Proving intent . . . was a potentially legitimate reason for the government to offer evidence of Bell's prior convictions. Rule 404(b) specifically lists demonstrating a defendant's intent as a permissible purpose. Moreover, Bell's intent to possess and distribute was at issue because it is an element that the government must prove to establish possession with intent to distribute. . . . Accordingly, the district court properly found that the evidence was being offered for the admissible purpose of intent and that this purpose was at issue in the case." (*Id.* at 442-43.) Having found that the purpose was limited, the court added that, "whether the evidence of Bell's prior drug convictions was probative on the issue of intent is a closer question." (*Id.* at 443.) The court answered the question as follows:

To determine if evidence of other acts is probative of intent, we look to whether the evidence relates to conduct that is "substantially similar and reasonably near in time" to the specific intent offense at issue. . . . Thus, we have drawn a distinction between the probative value of prior acts of *personal drug use* and prior acts of *drug distribution*, finding the former not to be probative of intent to possess and distribute. . . .

Likewise, while we have repeatedly recognized that prior drug distribution evidence is admissible to show intent to distribute, our cases have only found such evidence probative of present intent to possess and distribute when the prior distributions were part of the same scheme or involved a similar *modus operandi* as the present offense Unless the past and present crime are related

by being part of the same scheme of drug distribution or by having the same *modus operandi*, the fact that a defendant has intended to possess and distribute drugs in the past does not logically compel the conclusion that he presently intends to possess and distribute drugs. . . . Indeed, a person may be a distributor of drugs on one occasion, and a mere user on another. The only way to reach the conclusion that the person currently has the intent to possess and distribute based solely on evidence of *unrelated* prior convictions for drug distribution is by employing the very kind of reasoning—*i.e.*, once a drug dealer, always a drug dealer—which 404(b) excludes. . . . Thus, to be probative of a defendant's present intent to possess and distribute, his prior convictions for drug distribution must be related in some way to the present crime for which the defendant is on trial.

Here, Bell's prior convictions were for unlawful possession of cocaine and marijuana with intent to distribute, the same type of charges at issue in this case. However, the convictions were for offenses that occurred several years previously and were not alleged to be part of the same scheme to distribute drugs or to involve a similar *modus operandi*. Such evidence of prior distribution, unconnected to the present charge, is not probative of whether Bell intended to possess and distribute drugs in the instant case. Accordingly, the district court erred in finding evidence of these prior convictions admissible for the legitimate purpose of proving Bell's intent. (*Id.* at 443-44; citations omitted.)

The court found that not only did the trial judge err in admitting the convictions to prove intent, the judge also abused discretion in the Rule 403 analysis:

Despite the substantial deference that must be afforded a lower court's Rule 403 balancing decision, we find that the district court abused its discretion in the instant case. We have already noted that the evidence of Bell's prior convictions was not probative of his present intent to possess and distribute, the only plausibly legitimate purpose for offering this evidence. However, even assuming that this evidence would have some probative value on the issue of intent, its value would be slight. Bell's prior distribution of drugs several years prior to the instant offense does not necessarily im-

ply that he was intending to possess and distribute drugs on this occasion. The only way that such evidence would be probative is if the jury were permitted to infer that because Bell has distributed drugs in the past, it is likely that he was doing so in the present case. Yet, this is the very kind of propensity reasoning which Rule 404(b) prohibits the jury from using in assessing the probative value of Bell's prior convictions and prevents the judge from considering when engaging in the Rule 403 balancing process.

(*Id.* at 445-46.)

The court also found that the trial judge did not adequately consider the other evidence of intent to distribute that the government possessed, including the amount of drugs found and the drug trafficking paraphernalia, and did not appropriately appreciate the weak additional probative value of the convictions and the much more probable prejudice arising from the fact that "the evidence of Bell's prior crimes painted a picture of Bell as a repeat drug offender, greatly increasing the chance that the jury would punish him not for his involvement in the offense at issue, but rather because he appeared to be a 'bad' guy." (*Id.* at 446.)

The court found that the trial judge's limiting instructions did little to ameliorate the prejudice and may have exacerbated the prejudice:

These instructions did remind the jury that Bell was on trial only for the charged offenses and not for his prior bad acts. However, by directing the jury to consider these acts for the purpose of ascertaining Bell's intent, the court was implicitly approving the kind of reasoning which would suggest that because Bell was a drug distributor in the past, the jury should consider him to have distributed drugs in the present case. Moreover, the court's instruction created the possibility for an even greater prejudicial impact by directing the jury to consider the evidence of Bell's prior convictions for the purpose of absence of mistake, a matter which was not even at issue in the case.

(*Id.* at 446-47.)

The Dissent

Judge Steeh dissented and argued that the government was required to prove Bell's general intent to knowingly and intentionally possess the drugs and

guns and concluded that the prior convictions were admissible to prove that Bell did not possess them by mistake or accident. The dissent also argued that Bell, by pleading not guilty, put specific intent in issue as well as general intent. Since there was evidence that Bell resided at the residence where the drugs and guns were found, the dissent concluded that the evidence was admissible to prove knowledge and intent and to negate the possibility that the drugs and guns were present by accident.

The Lessons

1. The majority highlights the fact that a defendant who claims not to have been present where the drugs and guns were found is not raising a defense of mistake or accident. The dissent urges that, by pleading not guilty, Bell required the government to prove knowledge and intent, so that, if the jury believed Williams and Armstrong, the government still had to prove that Bell knowingly and intentionally possessed the drugs and guns. The majority's response is that, if the jury believed that Bell was the source of the drugs and guns, it surely would conclude in light of the quantity and circumstances that he knowingly and intentionally possessed them and intended to distribute the drugs. In sum, the majority insists on focusing on the actual defense and the need for government proof to respond to that defense.

2. The reality in this case is that the only question the jury really had to decide was "whose drugs and guns were they?" The danger in admission of the prior convictions is that the jury would decide that the drugs belonged to Bell because he was a repeat offender. This is predisposition use and is barred by Rule 404(b).

3. One aspect of the case that makes it strange is that the crucial testimony related to whether Bell actually lived in the home where the guns and drugs were found. It is not possible that Williams and Armstrong were truthful and accurate if Johnson's testimony was crucial and accurate. The converse is also true. If the jury disbelieved Williams and Armstrong or did not find them sufficiently credible, the government's case was indeed weak. If Williams and Armstrong were not truthful, it could have been because they were involved with Bell, were themselves guilty without Bell's involvement, or were involved with others. Bell's prior convictions would have provided no guidance as to which of these possibilities is most likely. The prior convictions simply branded Bell as the kind of man who would deal drugs, and this use of the convictions does seem improper under Rule 404(b). ■