

WRITING SAMPLE FOR JUDGE DAVID LEE VINCENT, III - 8 PAGES

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

STATE OF MISSOURI,)	
)	
Plaintiff,)	Cause No. 07CR-00532
)	
vs.)	Division No. 9
)	Date: April 22, 2009
GREGORY BOWMAN,)	
)	
Defendant.)	

PEREMPTORY JUDGMENT AND ORDER

Memorandum Opinion

This matter is before the Court on Defendant Gregory Bowman’s (Bowman), Motion to Reconsider Court’s Ruling Denying To Bar Admission Of Alleged Bad Acts (Motion to Reconsider), as filed with the Court on April 3, 2009. A court hearing was held on April 3, 2009 on Bowman’s Motion to Reconsider, with Assistant Prosecuting Attorney Joseph Dueker appearing on behalf of the State of Missouri and Attorney Stephen B. Evans appearing on behalf of Bowman. During the hearing, the Court granted Bowman’s Motion to Reconsider and issued a preliminary order not to become final until a written memorandum is filed within 30 days. After reconsideration, the Court, being advised in the premises, now issues its written memorandum opinion as a final peremptory judgment sustaining in part and denying in part Bowman’s First Motion In Limine (Alleged Bad Acts) (First Motion In Limine), as filed on January 28, 2009.

History

On April 18, 2007, Bowman was charged by Indictment with capital murder, a class A felony, for allegedly willfully, knowingly, with premeditation, deliberately and unlawfully killing V.R. by strangling her and causing her to die. Also, the criminal complaint in this matter disclosed the allegation that seminal fluid found on the victim's under pants matched Bowman's DNA. On October 10, 2007, the State filed its Notice of Aggravating Circumstances pursuant to Chapter 565, R.S.Mo. and is seeking the death penalty.

On January 28, 2009, Bowman filed his First Motion in Limine, seeking a court order to prohibit the State from introducing during the course of trial in this matter any evidence of Bad Acts alleged to have been committed by Bowman either before or after the homicide being prosecuted in this case. Bowman's Motion further stated that evidence of other crimes or Bad Acts would have the improper purpose of showing his propensity to commit such crimes, which are inadmissible under Missouri law. Additionally, the Motion states that admission of Bad Acts would be greatly prejudicial to Bowman and outweigh any probative value of such evidence. Bowman also cited Article 1, §§ 17 and 18(a) of the Missouri Constitution as reasons why the Bad Acts should be excluded at trial.

Subsequently, on February 4, 2009, the State filed its Motion to Introduce Evidence of Defendant's Identity and Response to Defendant's First Motion In Limine (Bad Acts) (Motion to Introduce). In this Motion, the State revealed that the victim, under the facts in this case, was a 16 year old female whose body was found on June 6, 1977 in a secluded, wooded area near a gravel road less than a mile south of Highway 100 in St. Louis County. A light blue bra was stuffed in the victim's mouth with a shoe string type cord wrapped around her neck. The victim also had a large 4-inch open wound on her neck. Bowman was identified by DNA evidence

found at the scene of the crime.

Also in its Motion to Introduce, the State disclosed its intent “to offer evidence of criminal offenses involving five (5) separate young women to *bolster* the DNA evidence in proving the Defendant’s identity in committing the murder in the case at bar.” (emphasis added). The State described the criminal offenses, hereinafter referred to as Bad Acts, as follows: (1) Bowman’s 1973 Illinois conviction for armed robbery, aggravated robbery and unlawful restraint for the abduction of 18 year old Cynthia Allhands by force to a secluded area in Danville, Illinois where the defendant tied her hands with adhesive tape, disrobed her, kissed her breasts, and robbed her with a toy gun and a small pocket knife; (2) a 1972 incident where Bowman abducted 15 year old Pam Pourchot in Flora, Illinois and took her to a secluded area while holding a small knife to her throat; (3) evidence of and Bowman’s confession that he abducted and killed 15 year old Elizabeth West in 1978 in Belleville, Illinois by holding a pocket knife to her throat, taking her to a secluded wooded area, raping her, and strangling her with a ligature;¹ (4) evidence of and Bowman’s confession that he abducted and killed 21 year old Ruth Ann Jany in 1978 in Belleville, Illinois by holding a pocket knife to her throat, driving her to an isolated wooded area, raping her, and strangling her with a ligature; and (5) Bowman’s 1979 Illinois conviction for kidnapping and unlawful restraint of 30 year old Jeanne Taylor in 1978 in Belleville, Illinois for holding a pocket knife to her neck, choking her and threatening to kill her.²

The State also listed the above Bad Acts in its Notice of Aggravating Circumstances as aggravating and non-statutory aggravating circumstances for use in the penalty phase of the trial of this matter.

¹ Although sperm was found in West’s vaginal vault, apparently there was no laboratory analysis performed to compare it with defendant’s DNA.

On February 10, 2009, Bowman filed his Response to State's Memorandum to Admit Alleged Bad Acts, continuing his objections to the admission of the aforementioned Bad Acts.

Missouri Law

In a trial where murder in the first degree is charged and the death penalty is not waived, such as in this case, the matter is tried in two stages. In the first stage, known as the guilt phase, the jury shall decide only whether a defendant is guilty or not guilty of the submitted offense. In the second stage, known as the penalty phase, only the issue of punishment shall be submitted to the jury. See §565.030 R.S.Mo. In its Motion to Introduce, the State seeks to introduce evidence of Bad Acts during the first stage (guilt phase) of the trial of this matter. In his First Motion in Limine, Bowman has objected to the Bad Acts being introduced “during the trial of this matter.”

In Missouri, bad acts are generally not admissible at trial “unless such proof has some legitimate tendency to directly establish the defendant’s guilt of the charge for which he is on trial.” *State vs. Vorhees*, 248 S.W.3d 585, 587 (Mo.banc 2008) (citing *State vs. Reese*, 364 Mo. 1221, 274 S.W.2d 304, 307 (Mo. 1954)). Under Missouri law, a defendant has the right to be tried only on the offense charged. *Id.*, (citing article I, §§ 17 and 18(a) of the Missouri Constitution). Evidence of other crimes not properly related to the underlying facts of the case “violates a defendant’s right to be tried for the offense for which he is indicted.” *Id.*, citing *State vs. Sladek*, 835 S.W.2d 308, 311 (Mo.banc 1992). Specifically, “Article I, § 17 provides that ‘no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information.’ Article I, § 18(a) states ‘[t]hat in criminal prosecutions the accused shall have the

² Defendant is currently awaiting trial in Illinois for the Jany and West murders.

right . . . to demand the nature and cause of the accusation” *Vorhees*, at 588.

There are “well established” exceptions to the general ban on bad acts. These exceptions include: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; and (5) identity of the person charged with the commission of the crime on trial. *Sladek*, 835 S.W.2d at 311. Additionally, there is a lesser known *signature modus operandi* exception to the general ban on the use of bad acts at trial that can be separated into two sub-exceptions. The first one, the *signature modus operandi identity* exception, is a more specific form of the well established identity exception and allows bad acts to be offered at trial to *establish* the identity of the offender. The second one, the *signature modus operandi corroboration* exception, allows evidence of bad acts to *corroborate* the victim’s identification testimony, i.e., identification evidence. See *Vorhees*, *supra*.

In *State v. Vorhees*, however, the Missouri Supreme Court invalidated the *signature modus operandi corroboration* exception in using evidence of uncharged crimes (bad acts) to corroborate identification evidence. In the underlying facts of that case, Vorhees was charged with first degree statutory rape and first degree statutory sodomy of a thirteen year old female victim (first victim) who testified that Vorhees used his saliva as sexual lubricant, placed his penis in her anus and vagina, and urinated in her mouth. At trial, the prosecution was permitted to present evidence that Vorhees had committed virtually identical sexual offenses on another female victim under fourteen years of age (second victim). The second victim’s testimony was used as uncharged “prior bad acts” under the *signature modus operandi* exception to corroborate the first victim’s identification of Vorhees.

In invalidating the *signature modus operandi corroboration* exception, the Missouri Supreme Court in *Vorhees* reversed the trial court’s decision in permitting prior bad acts and

ruled that the *signature modus operandi corroboration* exception unconstitutionally allowed admission of evidence of prior crimes to show the defendant's propensity to commit a particular crime, citing *Ellison*. The Supreme Court further ruled that "[e]vidence of prior bad acts, regardless of the degree of their similarity to the acts in the charged case, may not be admitted to corroborate [identification evidence.]" See *Vorhees* at 591. (emphasis added).³

Bad Acts In Guilt Phase of Trial

During the Guilt Phase of the trial of this matter, the State cannot use the Bad Acts to corroborate, i.e. *bolster*, the DNA evidence in proving Bowman's identification in the criminal offense charged. It appears that the State, in its Motion to Introduce, is attempting to use alleged similar crimes or conduct by Bowman as Bad Acts under the *signature modus operandi corroboration* exception to prove that Bowman committed the crime charged. The State claims that these other acts are sufficiently similar to the crime charged. These Bad Acts, as previously described, however, would be improper evidence of Bowman's propensity to commit a particular type of crime and, as such, are precisely the type of unconstitutional propensity evidence prohibited by the Missouri Supreme Court in *Vorhees* and *Ellison*. Moreover, the Missouri Supreme Court specifically prohibited the use of this exception at trial. *Vorhees*, supra.⁴ Thus, the State is prohibited from admitting evidence of Bad Acts under the *signature modus operandi*

³The Missouri Supreme Court also stated in *Vorhees* (248 S.W.3d 585, 591): "The criteria of logical and legal relevance are not intended as a loophole for evading the general ban on propensity evidence...Because signature *modus operandi* evidence is actually just propensity evidence by another name, the legal or logical relevance of such evidence is irrelevant to its admissibility." *Id*

⁴In its Motion to Introduce, the State cited and heavily relied upon the Missouri Supreme Court's rulings in *State vs. Bernard*, 849 S.W.2d 10 (Mo.banc 1993) and *State vs. Gilyard*, 979 S.W.2d 138 Mo.banc 1998) to support its position. However, in *Vorhees*, the Missouri Supreme Court invalidated the *signature modus operandi corroboration* exception and specifically overruled *Bernard* and *Gilyard*. See also dissenting opinion by Judge Price. *Vorhees*, at 592.

corroboration exception during the guilt phase, “*regardless of the degree of their similarity to the acts in the charged case.*” See *Vorhees*, *supra*.

Further, the State’s Bad Acts evidence is also not appropriate under the *signature modus operandi identity* exception to *bolster* Bowman’s DNA identification. This exception is only appropriate in cases to permit bad acts to *establish* a perpetrator’s identity. See *Vorhees*, at 588-589. In this case, the State’s intended purpose in using the Bad Acts, as indicated in its Motion to Introduce, is not to *establish* Bowman’s identification, but rather to *corroborate* or *bolster* the identification evidence. This particular purpose is not proper under this exception.

Additionally, the *signature modus operandi identity* exception is inappropriate in this matter because Bowman’s identification is already established by the DNA evidence, which is recognized in Missouri as sufficient evidence for identification of the defendant as the perpetrator. See *State vs. Freeman*, 269 S.W.3d 422 (Mo. 2008).⁵ Therefore, the State is prohibited in admitting evidence of Bad Acts during the guilt phase under this exception as well.

⁵ *State v. Freeman*, 269 S.W.3d 422 (Mo. 2008). In *Freeman*, the Missouri Supreme Court stated that the DNA analysis was “reliable, scientific, and untainted” and that because DNA found on a piece of toilet paper in the victim’s apartment had the “same distinct pattern” as Defendant’s DNA, an inference arose that the Defendant had been present where the piece of toilet paper was found. *Id.* at 425. See also *People v. Clark*, 2009 WL 706884 at 2 (Colo.App. 2009) where the Colorado Court of Appeals cited to *Freeman* as a case where a jurisdiction found that “DNA evidence alone may support a criminal conviction without further corroborative proof.”

Bad Acts In Penalty Phase of Trial

The State is permitted to use evidence of Bad Acts in the penalty phase of the trial. As previously stated, Bowman is charged with capital murder and the State is seeking the death penalty. In the second stage of the trial of this matter, i.e. the penalty phase, the State may use the Bad Acts as character evidence. In a death penalty trial, a defendant's character and prior record are central issues of the penalty phase. *State vs. Williams*, 97 S.W.3d 462, 470 (Mo.banc 2003), citing *State v. Whitfield*, 837 S.W.2d 503, 511 (Mo. banc 1992). In this stage of the trial, the use of the Bad Acts would not only be permissible, but also consistent with the State's request in its Notice of Aggravating Circumstances.

Judgment and Order

ACCORDINGLY, Bowman's First Motion In Limine, is granted in part and denied in part. The State is prohibited in offering the Bad Acts in the Guilt Phase and may offer the Bad Acts in the Penalty Phase during the trial of this matter. The February 11, 2009 judgment and order filed in this matter is vacated, set aside, and held for naught to the extent that it is inconsistent with this judgment and order.

SO ORDERED,

Date: April 22, 2009

Hon. David Lee Vincent, III
Circuit Judge, Division 9

cc: Attorneys of Record.