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OKLAHOMA COUNTY

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RICK WARREN
COURT CLERK
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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff, vs. LARUE HADID BRATCHER Defendant.	)	Case No. CF-2020-2459

DEFENDANT'S RESPONSE TO STATE'S NOTICE OF INTENT TO USE EVIDENCE OF OTHER CRIMES, WRONG OR ACTS (BURKS EVIDENCE), *OR IN THE ALTERNATIVE, RES GESTAE EVIDENCE*

Counsel moves this Court to prohibit the Prosecutor from mentioning or referencing, throughout the course of this trial, including but not limited to voir dire, opening and closing arguments, or questioning of witnesses, any testimony of an any crimes or bad acts other than those alleged in this case committed by the Defendant, Mr. Larue Bratcher.

I. SUMMARY OF FACTS

On May 28, 2020, in the early morning hours Larue Bratcher was at his place of business playing video games when he noticed a man coming through a hole in the fence onto his property. He had noticed car lights in the alley way behind his business but did not realize the car had stopped until he saw the person coming through the fence. The individual matched the description of a suspect previously broken into a storage container inside the fence but had not attempted to come into the building itself.

Mr. Bratcher is a veteran who served in the army. He kept a gun at his place of business. He retrieved the firearm and watched the suspect on the video monitors momentarily while the intruder made his way around the building and eventually came to a door on the south side of the

building. He could see an unknown object in the intruder's hand. Mr. Bratcher left the video screens and made his way to the door that the burglar was attempting to manipulate.

Unbeknownst to Mr. Bratcher the burglar had crouched down in an attempt to pry the door into the business open. The burglar was seemingly unaware that Mr. Bratcher was on the other side of the door inside the building. Mr. Bratcher could hear the burglar attempting to pry the door open and raised his weapon and fired three warning shots at the door about waist high or at the level of the door handle itself not knowing the burglar was crouched down. One of those shots hit the burglar in the head as his head was turned to the left appearing to try to gain leverage to pry the door open.

Mr. Bratcher waits a few moments and can be seen exiting the door shortly after the shots were fired. He exits the door and goes to the right not realizing the burglar was on the ground to the left of the door. He eventually notices the burglar lying on the ground unresponsively. He calls the police shortly after and was cooperative with the police even waving his Miranda rights and giving multiple interviews and statements to police.

The police did not arrest him that night. Charges were filed more than a week later after detectives staffed the charges with David Prater. The original charge was Felony Murder in the Second Degree in the Commission of Illegal Cultivation of Marijuana. That charge has since been dismissed.

Mr. Bratcher is currently scheduled to start trial on May 24th, 2021 on five counts: Count 1: Murder in the First Degree; Count 2: Murder in the Second Degree; Count 3: Unlawful Cultivation of CDS-Marijuana; Count 4: Possession of CDS with the Intent to Distribute-Marijuana and Count 5: Possession of an Offensive Weapon While Committing a Felony. The state filed this *Burks* notice on Friday May 14th. There is no visible nor articulated connection to

the misdemeanor charge in Texas that they seek to introduce. The case in Vega, Texas was pled to a misdemeanor possession of marijuana less than four ounces.

II. ARGUMENT AND AUTHORITY

When a defendant is put on trial for one offense, "He is to be convicted, if at all, by evidence which proves that he is guilty of that offense alone and evidence of other crimes, either prior or subsequent to the offense for which he is placed on trial, is inadmissible." Hawkins v. State, 1966 OK CR 139, 419 P.2d 281, 283. The Court of Criminal Appeals historically recognized certain *limited* exceptions to this rule, codified in OKLA. STAT. tit. 12 §2404, which states evidence of other bad acts may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

Even so, "Evidence of other crimes should be admitted under the five exceptions with extreme caution, and when there is doubt, it should be resolved in favor of the defendant." Galindo v. State, 1978 OK CR 4, 573 P.2d 1217, 1218. Finally, the probative value of the evidence must outweigh its prejudicial effect. See Welch v. State, 2000 OK CR 8, ¶ 15, 2 P.3d 356, 367; Snodgrass v. State, 1978 OK CR 49, 578 P.2d 381, 382; Wright v. State, 1979 OK CR 111, 617 P.2d 1354, 1356; Miller v. State, 2013 OK CR 11, ¶ 89, 313 P.3d 934 (overruled on other grounds); Tafolla v. State, 2019 OK CR 15, ¶ 11, 446 P.3d 1248, 1256.

Because the Court of Criminal Appeals became "increasingly concerned with the number of cases in which error is committed in introducing evidence of the commission by a defendant of crimes other than the one for which the defendant is on trial," the Court created a procedural framework that governs the admission of other crimes evidence. See Burks v. State, 1979 OK CR 10, 594 P.2d 771, 774 (overruled on other grounds). There, the Court held: (1) There must be a "visible connection" between the crimes or bad acts and the current charges. Id.

at 773; (2) The State shall, within ten days before the trial, or at a pretrial hearing, whichever occurs first, furnish the defendant with a written statement of the other offenses it intends to show, described with the same particularity required of an indictment or information. Id. at 774; (3) The prosecutor shall specify the exception under which the evidence is sought to be admitted. See Id; (4) The evidence must be *necessary* to support the State's burden of proof and not merely cumulative. Id. at 775 (emphasis added); (5) The proffered evidence must not be subterfuge for showing that the Defendant is a bad person. Id; (6) The evidence of the other bad acts must be established by clear and convincing evidence. Id.

Later cases have further required that evidence of uncharged offenses must be probative of a disputed issue of the crime charged. Welch v. State, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365; Eizember v. State, 2007 OK CR 29, ¶ 76, 164 P.3d 208, 230, as corrected (Aug. 10, 2007); Tryon v. State, 2018 OK CR 20, ¶ 7, 423 P.3d 617, 660, cert. denied, 139 S. Ct. 1176, 203 L. Ed. 2d 215 (2019). Finally, when other crimes evidence is so prejudicial it denies a defendant his right to be tried only for the offense charged, or where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity with his true character, the evidence should be suppressed. Welch, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365.

In addition to this framework, Oklahoma Courts have individually analyzed the exceptions to §2404. Here, the State alleges that each of their proffered "other crimes" evidence falls within two exceptions: "absence of mistake or accident" and "intent."

A. Absence of Mistake

For both "absence of mistake or accident" and "intent," exceptions, evidence of other acts must be probative of a *disputed* issue of the crime charged. Welch v. State, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365; Eizember v. State, 2007 OK CR 29, ¶ 76, 164 P.3d 208, 230, as corrected (Aug.

10, 2007); Tryon v. State, 2018 OK CR 20, ¶ 7, 423 P.3d 617, 660, cert. denied, 139 S. Ct. 1176, 203 L. Ed. 2d 215 (2019) (emphasis added).

Drew v. State, 1989 OK CR 1, 771 P.2d 224, illustrates the proper application of the rule that the other acts must be probative of a *disputed* fact to the "absence of mistake or accident" exception to §2404(b). There, the Defendant was tried and convicted of Murder in the First Degree for the death of her fourteen-month-old daughter. Id. at 226. At trial, the Defendant claimed the child was accidentally injured in a fall. Id. at 229. The State then introduced evidence from doctors that the fatal head injury could not have happened accidentally and, more importantly, that the child numerous bruises all over her body, indicated ongoing abuse. Id. The Court of Criminal Appeals held the admission of evidence of previous abuse was proper under the "absence of mistake or accident" exception. Id.

On the other hand, Lowery v. State, 2008 OK CR 26, 192 P.3d 1264, illustrates the *improper* use of the "absence of mistake or accident" exception to §2404(b). There, the Defendant was tried and convicted of multiple counts of Lewd Molestation and related charges. Id. at 1265. On the evening of September 29th, 2005, the Defendant approached five (5) different women at different locations with black shoes, black socks and a black shirt on but: *no pants*. Id. at 1265-1266. When he gained the women's attention, he lifted his shirt and exposed himself. Id. At trial, the State admitted evidence that the Defendant had committed Rape by Instrumentation of a fifteen-year-old girl two months prior. Id. at 1267.

Although the trial court admitted this evidence under the "identity" and "motive" exceptions to §2404(b), the State on appeal argued the evidence was admissible to show "absence of mistake or accident," a theory the trial court rejected. Id. at 1269.The Court of Criminal Appeals agreed, noting:

> "The trial court rejected the State's "absence of mistake" argument at the Burks hearing in this case, noting that there was no suggestion that Lowery's defense at trial would be that somehow his encounters with these five women (or any one of them) were "accidental" or simply misunderstandings. This Court likewise concludes that there is no suggestion in the record that Lowery ever did or would claim that any kind of "mistake" or "accident" was the basis for the crimes alleged against him. Hence the R.P. evidence cannot possibly have been justifiable on this basis." Id. at 1269–70

Here, quite simply, "absence of mistake or accident" is not at issue. Unlike the Defendant in Drew, the Mr. Bratcher has never placed "absence of mistake or accident" in controversy. The Prosecutor argues Mr. Bratcher *did* place "absence of mistake or accident" at issue by admitting to police that his license to grow marijuana had expired due to lack of payment.

First, allowing a license to expire for failure to pay is not a "mistake or accident." For example, it is not as if Mr. Bratcher claimed he *thought* he had sent payment to renew his license but accidentally wrote the wrong address on the envelope. Second, the Defense at trial will never claim that the failure to renew Mr. Bratcher's grow license was a "mistake or accident." For the sake of argument, let us assume that Mr. Bratcher *did* somehow place "lack of mistake or accident" at issue. How would a marijuana arrest in Texas two months prior rebut that? The State *says* it does in their motion, no doubt, but they never explain how or why.

Thus, like the prior abuse in Lowery, Mr. Bratcher possessing Marijuana in Texas two months prior to the present case cannot be justified as proving "lack of mistake or accident" because it does not go to a *disputed* issue, but even if the issue were disputed, the prior marijuana possession has no probative value anyway.

B. Intent

Johnson v. State, 1986 OK CR 187, 731 P.2d 424 illustrates the proper use of the "intent" exception. There, the Defendant was charged with Unlawful Delivery of a Controlled Drug, specifically, of selling "crank" to a police informant. Id. at 425. At trial, the State introduced

evidence the Defendant had sold drugs to a different informant six (6) days prior. Id. at 427. The Court of Criminal Appeals held the admission of this evidence was proper, approving the 10th Circuit's analysis of the equivalent Federal statute. The Court held:

> "The instant case clearly falls within the "intent" exception to rule. In construing the intent exception to rule 404(b) of the Federal Rules of Evidence, from which Oklahoma derived section 2404(B), supra, the Tenth Circuit stated that "the evidence [of other crimes] must have real probative value, not just possible worth, be close in time to the crime charged and be so related to the crime charged that it serves to establish intent."
>
> In the instant case, evidence was introduced at trial that the appellant had sold drugs to a second informant on February 4, 1983, six days prior to the offense for which she was charged. **Such evidence was probative since the appellant testified that she was coerced into selling the drugs by an acquaintance**. The evidence of a prior drug sale, which was so close in time and closely related to the present charge, was clearly admissible to prove intent. Based on the foregoing reasoning, this assignment of error is without merit." Id. at 424 (internal citations omitted)(emphasis added).

Here, just as discussed in the "absence of mistake or accident" section, the Defendant has not and *will* not placed their "intent" at issue and, just as before, the prior marijuana arrest has no probative value anyway.

C. There is No Connection Between Mr. Bratcher's Texas Arrest and His Oklahoma Charges

The Prosecutor concedes they must demonstrate a "visible connection" between Mr. Bratcher's Texas arrest and his Oklahoma charges. How do they demonstrate such a connection? They assert it exists without explanation or analysis. The Prosecutor states:

> "The fact that he was arrested for that significant of an amount of marijuana just months before this case is ***very*** visibly connected to this case…the fact that he was arrested with items related to growing marijuana in a vehicle down in Texas is also visibly connected to the cultivation charge here." (emphasis added).

How is Mr. Bratcher's possession of marijuana in Texas related in any way to the current charges? Does the State believe the marijuana in Texas came from Mr. Bratcher's grow in Oklahoma? How do they intend to prove that? Do they believe it was part of an independent

"drug smuggling" operation? If so, how is that related to the present charges? Does Mr. Bratcher's possession of marijuana in Texas tend to prove he intended to *distribute* drugs in Oklahoma? How? Does Mr. Bratcher's possession of marijuana growing supplies in Texas show he intended to *illegally* grow marijuana in Oklahoma? How? The Defense and the Court are left to guess.

The Prosecutor's bare assertion that possession of marijuana charges in Oklahoma is "visibly connected" to Mr. Bratcher's current charges is woefully inadequate. Had they actually explained *how* the charges are connected the Defense would likely attempt to rebut such an argument. However, absent any explanation the Defense declines to rebut what we think the State *might* mean. Because the Prosecutor has not and *cannot* demonstrate a "visible connection" between possessing marijuana in Texas and Mr. Bratcher's present charges, such evidence is inadmissible.

D. **Evidence of Possession of Marijuana in Texas is Not Necessary to Support the State's Burden of Proof**

Just like their assertion that the Texas marijuana possession is "visibly connected" to the present charge, the Prosecutor alleges without explanation that it is necessary to support their burden of proof. They state:

> "[T]he licensing status of the Defendant's business is a key issue in this case. The Defendant put his licensing status directly at issue by lying about it during the interview. This evidence is also not cumulative, as it is a separate (but visibly connected) incident"

Even assuming everything said here is true, how would that mean evidence of possession of marijuana is *necessary* to the Prosecution's case? Is the Prosecution's position that if they are unable to present evidence the Defendant possessed marijuana in Texas months prior, they will be forced to dismiss? How does possession of marijuana in Texas help prove *any* element of *any*

charge? Again, we are left to guess. The Prosecutor has merely alleged, not demonstrated to this Court, that the Texas marijuana possession is necessary for them to meet their burden of proof. Further, the Prosecution's assertion that Mr. Bratcher lied about his licensing status is less than accurate and at bet open for interpretation. The simple truth is he stated he had a license and it was at the house. When asked if his license expired he stated that it had and he hadn't had the money to renew the license.

CONCLUSION

Evidence Mr. Bratcher possessed marijuana in Texas two months prior to the present case does not fall within either the "absence of mistake or accident" or "intent" exceptions to §2404(B). Further, there is no connection between these events and they are not necessary to support the Prosecutor's burden of proof. For these reasons, the Court should hold such evidence is inadmissible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true, full and correct copy of the foregoing motion was delivered to the District Attorney's office, 5th Floor County Office Building, Oklahoma City, OK 73102 on the date of filing.

Clayburn Curtis Bar no. 30538

AFFIDAVIT

STATE OF OKLAHOMA)
) ss.
OKLAHOMA COUNTY)

I, Benjamin Munda, of lawful age, being first duly sworn on oath, depose and state: That I am attorney for the Defendant above-named; that I have read the within and foregoing Motion, and that on my information and belief the statements contained therein are true and correct.

Clayburn Curtis

Subscribed and sworn to before me this 20th day of May, 2020.

NOTARY PUBLIC

MY COMMISSION NUMBER:
20010399
MY COMMISSION EXPIRES:
25 Aug 2024
(SEAL)

CARLY GWIN SALTHOUSE NOTARY PUBLIC No. 20010399 Expires 25 Aug 2024 STATE OF OKLAHOMA