

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-KA-01078 COA**

**ROY LEE FORD**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	10/16/95
TRIAL JUDGE:	HON. GEORGE C. CARLSON JR.
COURT FROM WHICH APPEALED:	PANOLA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAVID CLAY VANDERBURG
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS, JR.
DISTRICT ATTORNEY:	JOHN CHAMPION
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT 2 SALE OF COCAINE; CT 3 POSSESSION OF COCAINE WITH INTENT TO SELL, BARTER, TRANSFER, DISTRIBUTE, OR DISPENSE; CT 2 20 YRS; CT 3 20 YRS SUSPENDED; CONSECUTIVE CT 2; EA CT: \$1,000 FINE SUSPENDED; PAY \$125 CRIME LAB FEE & \$50 MS CRIME VICTIM
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

EN BANC:

McMILLIN, P.J., FOR THE COURT:

Roy Lee Ford has appealed his conviction by a Panola County Circuit Court jury of one count of sale of cocaine and one count of possession of cocaine with intent to distribute. The only issue on appeal is Ford's claim that the trial court erred in admitting evidence of a prior incident where Ford was alleged to have sold cocaine. We conclude that the trial court did not err in its ruling. Therefore, we affirm the conviction.

Ford was indicted on a three count indictment. The first count charged him with sale of cocaine on July 18, 1994, the second count charged him with a sale occurring eleven days later on July 29, and the third count was for possession with intent to distribute on that same day. This final count involved a quantity of drugs discovered on Ford's person when he was arrested shortly after the July 29 sale. Count one was severed from counts two and three and Ford was tried and convicted in one proceeding on the second and third counts. It is from that conviction that this appeal arose.

At trial, the State was permitted to offer into evidence, over Ford's objection, testimony about Ford's alleged involvement in the July 18 sale -- the basis of the severed first count. Ford claimed that the evidence was inadmissible under Mississippi Rule of Evidence 404(b). This rule would have prohibited the introduction of this evidence of other bad acts if offered solely to prove Ford's character as a person having a propensity to engage in the illicit drug trade. **Miss. R. Evid. 404(b)**. Alternatively, Ford urged the trial court that, if the court concluded that the evidence did not violate Rule 404(b), it should nevertheless be excluded under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice arising out of its admission. **Miss. R. Evid. 403**.

The trial court admitted the evidence for the limited purpose of establishing Ford's intent to distribute the drugs found in his possession, such intent being an essential element of the third count of the indictment. The admissibility of prior acts of sale for the limited purpose of demonstrating the intent of a possessor of illegal drugs has been sanctioned by the Mississippi Supreme Court in *Smith v. State*, **656 So. 2d 95 (Miss. 1995)**.

We hold that evidence of prior acts offered to show intent to distribute is not barred by M.R.E. 404 and is properly admissible if it passes muster under M.R.E. 403 and is accompanied by a proper limiting instruction.

***Id.* at 99.**

The trial court, prior to admitting the evidence, conducted an inquiry outside the jury's presence. The court found that the ruling in *Smith* disposed of Ford's Rule 404(b) objection. The court then turned its attention to his Rule 403 objection. Defense counsel offered no case-specific reasons for why evidence of this prior sale was unfairly prejudicial to the defense. In the absence of anything beyond defense counsel's argument that the State only wanted to demonstrate Ford's propensity to engage in drug trafficking, the trial court found that the probative value of the evidence was not substantially outweighed by its prejudicial impact.

The trial court is vested with substantial discretion regarding the admission of evidence and this Court may overturn a conviction based on an erroneous evidentiary ruling only if we are convinced that the court has abused that discretion. *See Johnson v. State*, **567 So. 2d 237, 238**(Miss. 1990). Because Ford was unable to demonstrate any particular unfair prejudice to his defense arising out of the unique facts of his case, we can find no basis to conclude that the trial court abused its discretion in admitting this evidence over his Rule 403 objection.

In keeping with the requirement of *Smith*, the trial court asked the defense if it wanted a jury instruction explaining the limited purpose for which this evidence was admitted. *Smith*, **656 So. 2d**

**at 100.** Upon being informed that Ford did want an instruction, the trial court formally instructed the jury to give the prior sale evidence:

such weight and credit as you deem proper under the circumstances *relating to proof of intent on the part of Roy Lee Ford concerning the charge of possession of cocaine on July 29, 1994, with intent to sell, barter, transfer, distribute or dispense said cocaine to others.* However, you are cautioned that you cannot and must not consider this evidence of the alleged sale of cocaine on July 18, 1994, in any way as substantive evidence on the issue of whether or not Roy Lee Ford is guilty or not guilty of the charges for which he is presently on trial . . . . (emphasis supplied).

As a part of his argument, Ford suggests that *Smith* has been superseded by *Walls v. State*, 672 So. 2d 1227 (Miss. 1996). Specifically, he claims that, under *Walls*, evidence of prior bad acts is only admissible to show predisposition in response to an entrapment defense. *Walls* dealt with the issue of whether evidence of prior bad acts was admissible to show a predisposition to commit the crime charged when the defendant claimed entrapment, but the trial court found that the evidence was not sufficient to permit the defendant an entrapment instruction. *Id.* at 1231-32. This case does not remotely suggest that proof of prior bad acts to show predisposition is the *only* purpose for which evidence of prior bad acts may be admitted in a drug-related case. The final sentence of Rule 404(b) provides a number of instances where the ban on evidence of prior bad acts to prove character has no application. This portion of the rule contemplates the admission of such evidence for "other purposes" that include, but are not limited to, "proof of motive, opportunity, *intent*, preparation, plan, knowledge, identity, or absence of mistake or accident." Miss. R. Evid. 404(b) (emphasis supplied). Nothing in the *Walls* decision suggests that this portion of Rule 404(b) is to be disregarded in cases involving drug trafficking.

The trial court properly resolved this evidentiary dispute under the holding of *Smith v. State*. That being the case, this verdict must be affirmed.

**THE JUDGMENT OF THE CIRCUIT COURT OF PANOLA COUNTY OF CONVICTION ON COUNT II OF SALE OF A CONTROLLED SUBSTANCE AND SENTENCE OF TWENTY (20) YEARS AND SUSPENDED FINE OF \$1,000; COUNT III OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE AND SENTENCE OF TWENTY (20) YEARS AND SUSPENDED FINE OF \$1,000, THE TWENTY (20) YEARS FOR COUNT III SUSPENDED AND THE SENTENCES TO RUN CONSECUTIVELY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. THE COSTS OF THIS APPEAL ARE ASSESSED TO PANOLA COUNTY.**

**BRIDGES, C.J., HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. DIAZ, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J., COLEMAN, AND KING, JJ.**

DIAZ, J., DISSENTING:

I respectfully dissent from the majority opinion. While "the relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused," the trial judge must exercise his discretion within the boundaries of the Mississippi Rules of Evidence. *Johnson v. State*, 567 So. 2d 237, 238 (Miss. 1990). The admissibility of evidence regarding prior acts is subject to Rule 404(b) which provides:

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 therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rule is aimed at precluding the State from implying to the jury that if the accused has committed other crimes, then he is more likely to have committed the offense for which he is charged. *Smith v. State*, 656 So. 2d 95, 98-99 (Miss. 1995). The jury is never allowed to consider evidence of a prior act as proof that a similar act was done at another time. *Ford v. State*, 555 So. 2d 691, 695 (Miss. 1989). Yet, this is precisely what the trial court allowed the jury to do in the case at bar.

Even when evidence of prior bad acts is admissible under Rule 404(b), that evidence must still pass through the "ultimate filter" of Rule 403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." **M.R.E. 403.** By permitting the State to introduce evidence of Ford's prior drug sale, for which he had been neither tried nor convicted, the trial court allowed the jury to infer that because Ford had committed a prior bad act, that he was predisposed to have committed the offenses for which he was being tried. This is clearly an improper inference, which our Rules of Evidence forbid. Consequently, the trial judge abused his discretion in permitting the State to introduce such prejudicial evidence. Therefore, the judgment of the Panola County Circuit Court should be reversed.

**THOMAS, P.J., COLEMAN AND KING, JJ., JOIN THIS SEPARATE OPINION.**