

**IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA**

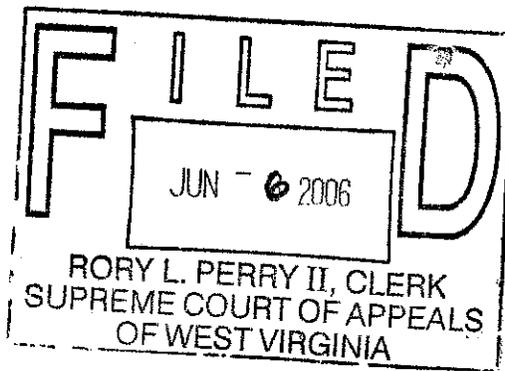
STATE OF WEST VIRGINIA,
Plaintiff Below - Respondent,

VS.

**CIRCUIT COURT OF HAMPSHIRE
COUNTY
CASE No. 04 - F - 33**

JEREMIAH DAVID MONGOLD,
Defendant Below - Petitioner.

PETITION FOR APPEAL



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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
KIND OF PROCEEDING AND NATURE OF RULINGS BELOW	1
STATEMENT OF FACTS	2
ASSIGNMENTS OF ERROR	3
ARGUMENT AND DISCUSSION OF LAW	4
PRAYER FOR RELIEF	13

TABLE OF AUTHORITIES

Cases	Page(s)
<i>State v. Copen</i> , 211 W.Va. 501, 566 S.E.2d 638 (2002)	11
<i>State v. Derr</i> , 192 W.Va. 165, 451 S.E.2d 731 (1994)	5, 10, 11
<i>State v. Grimm</i> , 165 W.Va. 547, 270 S.E.2d 173 (1980)	5, 6
<i>State v. LaRock</i> , 196 W.Va. 294, 470 S.E.2d 613 (1996)	5, 7
<i>State v. McGinnis</i> , 193 W.Va.147, 455 S.E.2d 516 (1994)	9, 10
<i>State v. Miller</i> , 178 W.Va. 618, 363 S.E.2d 504 (1987)	6
<i>State v. Scott</i> , __ W.Va. __, __ S.E.2d __ (1999)	8
<i>State v. Taylor</i> , 215 W.Va. 74, 593 S.E.2d 645 (2004)	7
<i>State v. Waldron</i> , __ W.Va. __, 624 S.E.2d 887 (2005)	11
<i>State v. Young</i> , 173 W.Va. 1, 311 S.E.2d 118 (1983)	11
 Statutes	
West Virginia Code 61- 8D-2a(a)	2
 Rules of Evidence	
Rule 403	5, 10
Rule 404	4, 6, 9
Rule 609	6, 7
Rule 611	8
 Secondary Source	
Imwinkelreid, <i>Uncharged Misconduct Evidence</i> (Rev. Ed. 2003)	7

PETITION FOR APPEAL

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

On November 23, 2005, the Defendant Jeremiah David Mongold was sentenced by the Honorable Donald H. Cookman of the Circuit Court of Hampshire County to serve a definite term of imprisonment of forty years. Defendant was found guilty on March 23, 2005 following a jury trial in the Circuit Court of Hampshire County, for which the Defendant stood accused of violating West Virginia Code 61-8D-2a, death of a child by a parent, guardian or custodian or other person by child abuse, in which he was charged with maliciously and intentionally inflicting upon Hannah Williams, a child under his care, custody and control, substantial impairment of physical condition by other than accidental means resulting in the death of Hannah Williams.

STATEMENT OF FACTS

On May 16, 2004, a 911 call was made by the defendant for assistance as his step daughter was unresponsive and barely breathing. The Augusta Volunteer and Rescue Squad was dispatched to the Defendant's residence where they found the child, Hannah Williams lying on her back on the floor face up in the kitchen area. She was barely breathing and exhibited two small bruises above her right eye below her hairline.

The child was transported by ambulance to the Augusta Fire Department where a helicopter transported her to Cumberland Memorial Hospital. After assessment at Cumberland Memorial Hospital, it was determined that her condition was such that she needed to be treated in a facility with a pediatric intensive care capability, and she was then transported by helicopter to Johns Hopkins Hospital in Baltimore where she died on May 18, 2004.

The West Virginia State police were notified of the child's death on May 18, 2004, and after investigation defendant Jeremiah David Mongold was charged with one (1) count of child abuse resulting in death and indicted by a Grand Jury on September 7, 2004 of one felony count of ADeath of a Child by a Custodian by Child Abuse@ in violation of West Virginia Code 61- 8D-2a(a).

Trial began in the Circuit Court of Hampshire County on March 21, 2005 and on March 23, 2005, the jury returned a guilty verdict. Post-trial motions were filed and denied and on November 23, 2005, the court sentenced defendant to the maximum term of forty years.

ASSIGNMENTS OF ERROR

1. The trial court abused its discretion and erred in over-ruling defendant's objection to cross-examination of defendant regarding a prior child abuse incident as probative evidence of a prior bad act which outweighed any prejudice to defendant pursuant to Rule 404(b) when at a pre-trial hearing on March 17, 2005 the State specifically indicated there were no Rule 404(b) issues and defendant's only notice of the introduction of such evidence was during the trial, which hampered and prejudiced defendant's preparation and presentation of his case.

2. The trial court abused its discretion and erred in allowing cross-examination of Shiloh Aumock regarding an incident occurring in December, 2004 which led to defendant losing his job.

3. The trial court abused its discretion and erred in admitting into evidence gruesome autopsy photographs of Hannah Williams depicting her with her scalp and face peeled away from her skull finding that their probative value would outweigh any prejudice to the defendant.

ARGUMENT AND DISCUSSION OF LAW

The trial court erred in allowing the state to cross-examine defendant on a prior child abuse incident

On March 17, 2005 the trial court conducted a pre-trial hearing in the within case to resolve various evidentiary matters which were expected to arise during trial and to review the proposed jury instructions. During that hearing the court remarked "...so suffice to say then that there are no 404(b) issues" The prosecuting attorney replied: "None known to me, your Honor."

At the conclusion of the direct testimony from the defendant at trial, the State informed the Court it intended to cross-examine the defendant concerning an incident that occurred on May 8, 2002, in which Mr. Mongold pled guilty to the charge of Domestic Battery which the State initially sought to introduce as rebuttal to defendant's character testimony. (Tr. March 22, 2005 pp.271 - 274). The State then indicated that the evidence was offered not pursuant to Rule 404 (b), but rather under Rule 404 (a)(1). (Tr. March 23, 2005 p.5).

When the Court responded that since the State did not cross -examine any of the Defendant's character witnesses about the incident, they would be limited to adducing reputation or opinion evidence, and that rebuttal testimony pertaining to specific acts would not be allowed. (Tr. March 23, 2005 pp. 10-11). The State then returned to an argument under Rule 404(b) thereafter contending that such evidence of a prior act would establish identity, intent, state of mind and absence of accidental conduct. (Tr. March 23,

2005 p.15).

The Court thereafter found that cross-examination of the Defendant regarding this incident would be permitted pursuant to rule 404(b) to show a lack of accident and the intent of the defendant. (Tr. March 23, 2005 pp 67-71).

The standard for review of a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First the trial court's factual determination that the other acts occurred is reviewed for clear error. Second, the trial court's finding that the evidence was admissible for a legitimate purpose is reviewed *de novo*. The trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403 is reviewed to determine whether the court abused its discretion in admitting the evidence. *State v. LaRock*, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996). A The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse." Syl. Pt. 10, in part, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

The trial court in allowing the state to cross-examine the defendant herein on the prior incident clearly abused its discretion. As indicated, at the pre-trial hearing, the state indicated that it had no Rule 404(b) evidence which it intended to use at trial. No notice was provided defendant and the state even remarked that: AI think there was a prior incident, but its been a number of years ago....@ (Tr. March 17, 2005 p.65). The trial court then found it could overlook a lack of notice because the State did not know what the defense would be until trial. (Tr. March 23, 2005 pp. 67- 68).

In *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980) , this Court held

that non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case. *Id.* Syl. Pt.2.

In *State v. Miller*, 178 W.Va. 618, 624, 363 S.E.2d 504, 510 (1987), this Court outlined the two prong inquiry of *State v. Grimm*, supra as follows:

(1) [D]id the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case.

This case clearly evidences the dilemma faced by the defendant due to the state's failure to provide notice of its intent to use Rule 404 (b) evidence, and how that non-disclosure surprised the defendant on a material fact and hampered the preparation and presentation of his case.

The trial court at the pre-trial hearing specifically "pulled the files" in the clerk's office regarding the defendant's past record and noted : "Two counts of battery, domestic assault, DUI, but I assumed this involved someone else and wouldn't be relevant to this case." The state's attorney responded: "That's correct, your Honor." (Tr. March 17, 2005 p. 66).

Defense counsel clearly articulated to the trial court that the failure to provide notice (perhaps deliberately by the state, given their clear assertion of the irrelevance of this prior act at the pre-trial) hampered and prejudiced the presentation of its case. Counsel stated to the court : I would say that if the State would have given us notice under 404 and that they intended to use this evidence, we would have not went

(sic) down that route with character evidence....But, I think you can hurt the defendant's case if you don't provide them notice and then later you seek to use that prior bad act. (Tr. March 23, 2005 p. 17).

W.V.R.E. Rule 609(a) provides:..For the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing.

The state herein did not seek to introduce any evidence of the defendant's prior conviction during its case in chief, and because of the proscription of Rule 609(a) could not seek to impeach him through cross-examination about that prior conviction.

Instead the ruling by the trial court to allow cross-examination of the specific act as substantive evidence to establish lack of accident or intent under Rule 404(b) totally eviscerates the prohibition set forth in Rule 609(a). The jury didn't hear that defendant had a conviction for Domestic Battery, it heard that this defendant had lost his temper and that the child of his former girlfriend had sustained bruises around his neck, on his shoulder and injury to his eye. (Tr. March 23, 2005 pp.106-107). This evidence clearly put before the jury the notion that defendant on trial charged with causing the death of a child by child abuse was a child abuser.

This Court has stated that under Rule 403 "[u]nfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. LaRock*, 196 W.Va. 294, 312, 470 S.E.2d 613, 631 (1996). The advisory committee's note to Federal Rule of Evidence 403 explains that A>[u]nfair prejudice

within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one.” *State v. Taylor*, 215 W.Va. 74, 593 S.E.2d 645 (2004).

Courts and commentators have stated that certain categories of crimes can create severe prejudice. By their very nature, these crimes can be highly and unusually inflammatory. Child abuse would fit into that category. See Imwinkelreid, *Uncharged Misconduct Evidence* Section 8:24 at 108 (Rev. Ed. 2003).

The jury herein sworn to determine the guilt of the defendant in causing the death of a child by child abuse had before it evidence adduced on cross-examination that defendant was a child abuser. Further, they were instructed that this evidence of past child abuse was before them as evidence of defendant’s motive and lack of accident in causing the death of the child involved in this case. “Despite the limited reasons for which the evidence is purportedly offered, and despite the cautionary instructions given to the jury, both when the evidence is adduced, and in the court’s general charge B the result is the same: all doubts are resolved against the defendant, because he is a proven bad actor.” *State v. Scott*, 206 W.Va. 158, 522 S.E.2d 626 (1999) Dissenting opinion of Starcher, CJ.

The trial court erred in permitting cross examination of Shiloh Aumock regarding the incident of December, 2004.

As a part of the defendant’s case, he called his father Garson R. Mongold who testified that A... Jeremiah was employed with me.” (Tr. March 22, 2005 p. 177). On

cross-examination, the state asked: A...Does Jeremiah still work with you at Lantz?" (Tr. March 22, 2005 p. 191. On objection as to relevancy by counsel, the state indicated to the trial court that the witness testified on direct that he worked with him at Lantz Construction every day, to which the court overruled the objection. The state's representation was plainly false as the witness had not testified that he and defendant worked together every day.

Rule 611(b)(2), W.Va.R.E. provides *inter-alia* that cross-examination of a non-party witness should be limited to the subject matter of the direct examination and matters affecting the credibility of the non-party witness. By allowing the state to ask Mr. Mongold about the defendant's employment status, the court opened a door that put before the jury irrelevant and prejudicial evidence of defendant's termination of employment.

The error was further compounded when the court permitted the state to question Shiloh Aumock regarding the defendant's termination. The state at first asked her why she and defendant separated, and at sidebar indicated to the court that there was an incident at the Christmas party and the court thereafter allowed the state to "...cross-examine her about any incident at the party that was brought out by the father....@" (Tr. March 22, 2005 pp. 224-225).

The jury was thereafter provided with testimony that Shiloh and Jeremiah had an argument at a company dinner and that he thereafter got into a fight with his co-workers during which Jeremiah punched a hole in a wall. The jury further heard that he got fired rather than having criminal charges filed against him. (Tr. March 22, 2005 pp.

231-234).

This evidence, as the evidence of the prior incident of child abuse is subject to the provisions of Rule 404(b), W.Va.R.E.. However, the jury was not given any instruction as to the purpose of this prejudicial testimony of defendant's "bad character" and no finding was made by the trial court as to this evidence having any probative value that would out-weigh any prejudice hearing that defendant had been violent with his wife and ended up in a fight. "Evidence of other vices and crimes is excluded not because of its inherent lack of probative value, but rather as a precaution against inciting undue prejudice and permitting the introduction of pointless collateral issues....@ *State v. McGinnis*, 193 W.Va.147, 153 , n.5, 455 S.E.2d 516, 522 n.5 (1994).

In the instant case, the potential for prejudice from such evidence is manifest. The trial court in initially allowing the state to introduce on cross-examination that the defendant was a wife abuser and then to allow the state to further introduce evidence that defendant was a child abuser abdicated its role A...as the trial barrier between legitimate use of Rule 404(b) evidence and its abuse." *State v. McGinnis*, 193 W.Va. At 155, 455 S.E.2d at 524.

The trial court erred in admitting into evidence autopsy photographs of the deceased.

During the direct examination of Dr. Patricia Aronica-Pollak, five autopsy photographs were admitted into evidence over objection by the defendant. At the Pre-trial Hearing of March 17, 2005, the court reviewed the photographs and held that their probative value outweighed any prejudicial effect. (Tr. March 17, 2005 pp.42-44). Those

photographs depict the deceased on a morgue table, face down, with the back of her head shaved,(Exhibit B), face up,(Exhibit C), and three photographs of the exposed skull after her scalp had been peeled back from an incision that was made from ear to ear with the scalp then reflected forward and backward exposing the skull. (Tr. March 22, 2005 p. 30).

Admission of the photographs into evidence is governed by the provisions of Rule W.V. R.E. Rule 403 which provides in part that :[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice....@ The Rule 403 analysis begins with a finding whether a photograph is relevant, and then if relevant its probative value is weighed against its prejudicial nature.

In *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994), this Court found that the admissibility of photographs, over an objection because of their gruesomeness must be determined on an case-by-case basis, pursuant to rules 401- 403 of the West Virginia Rules of Evidence. Further as indicated in Syllabus Point 10 of *State v. Derr, id.*, a trial court's exercise of discretion in ruling on the admission of potentially gruesome photographs should not be overturned absent a showing of clear abuse.

This Court in recently ruling on admission of photographs at trial in *State v. Waldron*, __W.Va.__, 624 S.E.2d 887 (2005) found that the photographs admitted therein were neither gruesome or inflammatory to the extent that they would bring about unfair prejudice to the jury, and specifically noted in its analysis of the challenged photographs that none of the pictures depicted the victim after having undergone autopsy procedures. Herein Exhibits D, E, and F depict the deceased child's head after autopsy procedures, revealing her skull with the scalp of her head folded away.

In *State v. Young*, 173 W.Va. 1, 311 S.E.2d 118 (1983), this Court held that the body of a victim after autopsy procedures may be gruesome, and that where the body has not undergone such procedures, the picture is not gruesome. Even though photographs may be considered to be gruesome, they are to be excluded only if the prejudicial effect outweighs the probative value of the photographs. *State v. Derr*, supra.

The trial court in ruling that the autopsy photographs depicting the decedent's bare skull with her scalp peeled away were admissible stated: A...[T]he Court initially thought that since these are post-autopsy that they probably shouldn't be allowed, but then in further looking, I see that those cases predate the *Derr* case and so I don't know that there's any specific restriction to post-autopsy photographs...." (Tr. March 17, 2005 p.43). The court concluded that the probative value of the photographs outweighed any prejudicial effect finding that they would assist the medical examiner in her testimony.

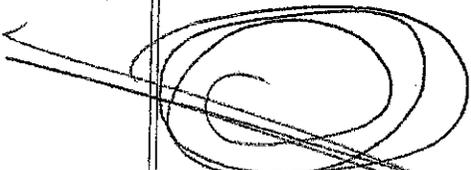
This Court in finding no abuse of discretion in the admission of various photographs in *State v. Copen*, 211 W.Va. 501, 566S.E.2d 638 (2002), noted that none of the photographs showed plainly revealed internal body parts. Here the jury saw photographs of the skull of a two year old child with her scalp pulled over the top of her head and a photograph of her lying naked on her stomach with the back of her head shaved. Any or all of these photographs would elicit sympathy and create prejudice against the defendant, and should have been excluded.

RELIEF REQUESTED

For the reasons set forth herein, Defendant prays the Court grant him a
new trial.

Respectfully submitted,

Jeremiah David Mongold,
By Counsel



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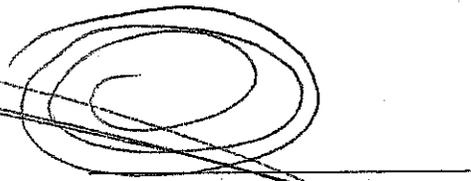
CERTIFICATE OF SERVICE

I, Lawrence E. Sherman, Jr. hereby certify that on the 5th day of May, 2006

I served a copy of this PETITION FOR APPEAL on the following persons in the manner indicated below:

Stephen W. Moreland
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IN THE CIRCUIT COURT OF HAMPSHIRE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

VS.

CRIMINAL ACTION NO. 04-F-33
Donald H. Cookman, JUDGE

JEREMIAH DAVID MONGOLD,

Defendant.

DESIGNATION OF THE RECORD FOR APPEAL

Comes now the Defendant, Jeremiah David Mongold, by and through his counsel, Lawrence E. Sherman, and pursuant to Rule 4(c) of the West Virginia Rules of Appellant Procedure, does hereby designate the following pleadings, orders, and exhibits to accompany the Petition for Appeal to the West Virginia Supreme Court of Appeals:

All pleadings, exhibits, orders, and transcripts contained in the court files

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