



NO. 33222

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee

v.

JEREMIAH DAVID MONGOLD,

Appellant

APPELLANT'S REPLY BRIEF

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ARGUMENT

**THE TRIAL COURT ERRED AND VIOLATED APPELLANT'S RIGHT TO BE
FREE FROM DOUBLE JEOPARDY IN ALLOWING THE STATE TO CROSS-
EXAMINE HIM REGARDING A PRIOR CHILD ABUSE INCIDENT FOR
WHICH HE WAS ACQUITTED.**

Rule 404(b) of the West Virginia Rules of Evidence provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she 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, provided upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Appellant, Jeremiah David Mongold, charged with one felony count of "Death of a Child by Custodian by Child Abuse" testified at trial in his own defense. At the conclusion of his direct examination, the State at *sidebar* advised the Court and counsel that it planned to "offer evidence concerning an incident that occurred with [Appellant] and a five-year-old child on May 8, 2002, where he became involved in an altercation." (R.1941).

On May 8, 2002, appellant was allegedly involved in an incident involving the five-year-old child of his then girlfriend in which it was alleged that he had held the child against a

wall by the throat, causing the child to bleed and lose consciousness for four or five seconds.
(R. 1941).

As a result of this incident, appellant was charged *inter alia* with child abuse in violation of West Virginia Code 61-8d-3, (a) which provides in part that: (a) If any parent, guardian or custodian shall abuse a child and by such abuse cause such child bodily injury... then such parent, guardian or custodian shall be guilty of a felony....

When this matter came before the Magistrate Court, appellant pled guilty to the charge of Domestic Battery against the child's mother and the child and the felony charge of child abuse resulting in bodily injury was dismissed. West Virginia Code 61-2-28 provides:

(a) *Domestic battery* - Any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member or unlawfully causes physical harm to his or her family or household member, is guilty of a misdemeanor....

Appellee argues in support of the trial court's decision to allow the State to cross-examine appellant regarding this incident that the trial court did not commit clear error. The State argues that under the standard of review regarding admission of Rule 404(b) evidence as set forth under *State v. McGinnis*, 193 W.Va.147, 455 S.E.2d 516 (1994) and *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996), the trial court properly found that there was sufficient evidence to show the other acts occurred; it correctly found the evidence was admitted for a legitimate purpose; and there was no abuse of discretion in the court's conclusion that the evidence was more probative than prejudicial under Rule 403.

The trial court specifically noted in support of its decision to allow the cross-examination that "obviously I don't think it can be denied that it was committed, [because] he entered a plea of guilty to the charge." (R. 2035) (Appellee's Brief p.16). In analyzing the argument by the State before this Court, one finds that they have overlooked and completely disregarded the fact that Appellant did not plead guilty to an incident of child abuse, as described to the trial court *in camera*. Appellant pled guilty to Domestic Battery against the child's mother and the child for conduct stemming from the same incident. This Court has held that a finding of guilt of a lesser included offense is essentially an acquittal of any greater offense. *State v. Ricketts*, ___W.Va.____, 632 S.E.2d 37 (2006) In other jurisdictions, this principal has been codified. "...[A] finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense...." 18 Pa. C.S. Section 109. (Pennsylvania).

In *Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed. 2d 708 (1990), the United States Supreme Court held that testimony regarding the facts of a prior robbery where the defendant had been acquitted were admissible in a subsequent trial for robbery under Rule 404 (b), Federal Rules of Evidence. (West Virginia Rules of Evidence and the Federal Rules are essentially identical). Dowling was charged with a bank robbery in which a man wearing a ski mask and armed with a small pistol robbed the First Pennsylvania Bank. At trial, the Government over objection, called one Vena Henry to the stand who testified that a man wearing a knitted ski mask with cutout eyes entered her home carrying a small handgun approximately two weeks after the bank robbery. Mrs. Henry testified that a struggle ensued and that she unmasked the intruder and identified him as Dowling . Dowling was charged

with various offenses stemming from this incident, but had been acquitted in a trial held before his trial for the bank robbery. 493 U.S. at 344 - 345.

Before opening statements in Dowling's trial for bank robbery, the Government disclosed its intention to call Mrs. Henry and explained to the trial court that her testimony was offered to provide evidence of other crimes, wrongs, or acts under Rule 404(b). The District Court characterized the evidence as highly probative and ruled it admissible. After Henry left the stand, the court instructed the jury that **Dowling had been acquitted** of robbing Henry, and emphasized the limited purpose, as the trial court did herein, for which the testimony was offered. (Emphasis added) *Id.*, 493 U.S. at 346.

The Supreme Court found that the acquittal of Dowling of the charges arising out of the incident at Henry's house did not operate to collaterally estop the government from introducing the facts of that incident in his bank robbery trial under Rule 404(b). The Court found that the collateral-estoppel component of the Double Jeopardy Clause does not operate to exclude in all circumstances relevant and probative evidence that is otherwise admissible under the Rules of Evidence because it relates to alleged criminal conduct for which a defendant has been acquitted. *Id.* 493 U.S. at 348.

Significantly, for the facts at issue herein, the trial judge in Dowling in his admonition to the jury specifically informed the jury that Dowling had been found not guilty of any charges stemming from the testimony of Mrs. Henry. In the instant case in question, *State v. Jeremiah Mongold*, the Hampshire County jury had no information regarding the disposition

of any charges relating to the prior incident, and was free to speculate that appellant had been previously convicted of child abuse as a result of that incident .

Had the State attempted to introduce the conviction for Domestic Battery in its case in chief pursuant to Rule 404(b), it would clearly have been irrelevant, as the conviction was unrelated in any aspect to conduct which could be used to prove absence of mistake or accident in the death of Hannah Williams.

The trial court by allowing the State to cross-examine appellant about the facts of the prior child abuse incident in lieu of presenting rebuttal evidence which would have afforded appellant to cross-examine and elicit the actual disposition of the prior case violated appellant's right to due process of law . His guilty plea to the lesser offense of Domestic Battery operated as an acquittal of the greater offense of Child Abuse.

Subsequent to the holding in *Dowling*, supra, the Supreme Court in *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), held that the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. 495 U.S. 521. Herein, the State seeking to prove that the death of Hannah Williams was not the result of accident introduced through cross-examination of the appellant the underlying facts of the May, 2002 incident, an offense for which appellant had already been prosecuted.

In analyzing the effect of the majority holding in *Grady*, Justice O'Connor

reasoned that the decision rendered the holding in *Dowling*, supra, which found identification testimony admissible under Rule 404(b) in a subsequent trial even though a defendant was acquitted of the underlying charge, a nullity. 495 U.S. at 525. (Justice O'Connor dissenting).

Justice O'Connor continued :

If a situation arose after today's decision, a conscientious judge attempting to apply the test enunciated by the Court, ante, at 510, 521, would probably conclude that the witness' testimony was barred by the Double Jeopardy Clause. The record in *Dowling* indicated that the Government was offering the eyewitness testimony to establish the defendant's identity, an "essential element of an offense charged in the [subsequent] prosecution," ante at 521, and that the testimony would likely prove conduct that constitutes an offense for which the defendant has already been prosecuted...As a practical matter, this means that the same evidence ruled admissible in *Dowling* is barred by *Grady*. 495 U.S. at 525-526.

Justice O'Connor further reasoned that the wide sweep of the holding in *Grady* cast doubt on the continued vitality of Rule 404(b), which makes evidence of "other crimes" admissible for proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*, at 526.

The evidence offered by the State to establish absence of mistake or accident in the death of Hannah Williams was evidence that constituted an offense for which appellant had already been prosecuted, and acquitted. Consistent with the holding of the Supreme Court in *Grady*, admission of this evidence violated appellant's Constitutional protection against Double Jeopardy.

CONCLUSION

For the reasons set forth herein and as set forth in Appellant's Brief, appellant requests the Court grant him a new trial.

Respectfully submitted,
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By Counsel

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CERTIFICATE OF SERVICE

I, Lawrence E. Sherman, Jr. hereby certify that on the 26th day of February, 2007

I served a copy of this Appellant's Reply Brief on the following persons First-class mailing, postage prepaid

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The original and nine (9) copies were hand delivered to the Circuit Clerk of Hampshire County, West Virginia to be forwarded to the West Virginia Supreme Court of Appeals on this the 26th day of February, 2007.

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