

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

**State of West Virginia, Plaintiff Below,  
Appellee**

**vs.)**

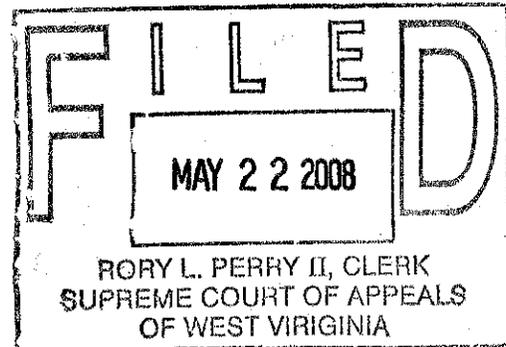
**No. 33804**

**Charles Cowley, Defendant Below,  
Appellant**

**BRIEF OF APPELLANT CHARLES E. COWLEY**

**Prepared by:**

**Frank Venezia  
West Virginia Bar # 4637  
SHAFFER & SHAFFER PLLC  
P.O. Box 38  
Madison, West Virginia 25130  
(304) 369-0511**



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<sup>1</sup>This Court’s Order granting Mr. Cowley’s Petition for Appeal indicated that Justices Maynard and Davis were especially interested in what was Assignment of Error Number 3 (or C) in the Petition, regarding defense counsel’s prior representation of the alleged victim. Accordingly, that issue is now Assignment of Error Number 1 (or A) in this Brief.

2. The court misunderstood the “common plan” exception of Rule 404b, which is most applicable in a sexual assault case where identity is at issue. The use permitted by the court was simply an impermissible effort to show the defendant’s “lustful disposition” in violation of *State v. Dolin*. . . . 39
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## I. Kind of Proceeding and Nature of the Ruling in the Lower Tribunal

This is an appeal of the conviction of Charles E. Cowley for second degree sexual assault in an error-filled proceeding highlighted by the court's failure to excuse defense counsel when he revealed he has previously represented the alleged victim, and failed to strike for cause a juror who was herself a sexual assault victim and claimed she would have "flashbacks" if asked to serve. The lower court then compounded these errors by allowing improper "other acts" evidence in violation of Rule 404b of the West Virginia Rules of Evidence. This is an easy case for this Honorable Court to resolve with a short *per curiam* opinion, as the lower court's errors violate clear and recent precedent of this Court.

Although the lower court committed several reversible errors, a major basis for his appeal is the following exchange between the court, lawyers, and a potential juror:

- Q Have you or anyone in your family or a close friend ever been a victim of any type of sexual abuse or sexual assault?
- A Yes.
- Q Could you tell me about that?
- A It was me as a child. I didn't want to --
- Q And I hate to even have to ask you this?
- A I'm glad you done this in private.
- Q I wasn't going to do it out there for this exact reason. Does that give you any preconceived motions going into this trial? Would you be more biased for the complaining witness, Sherry H., in this case by virtue of the fact that you've had some problems?
- A It just bothers me going through it all again; you know what I mean? Like flashbacks, you know what I mean?

Trial Transcript 11/30/05 pages 93-94. Defense counsel moved to strike this juror for cause, but the court denied the motion.

The jury reached its verdict on December 16, 2005; the lower court entered its "Order

Upon Trial” on January 24, 2006, but did not issue its final sentencing order until November 21, 2006. The defendant and the state entered into an agreed order clarifying that the defendant’s time for filing an appeal would not run until the court had entered its final sentencing order. Because a full transcript was still not available as the March 22<sup>nd</sup> deadline neared, the lower court entered an agreed order extending the appeal time by two months, up to and including May 21, 2007. This Honorable Court granted the Petition for Appeal on January 10, 2008. The defendant/Appellant now submits this brief in the hopes of reversing his conviction.

## II. Statement of the Facts of the Case

Defendant Charles E. Cowley is lifelong resident of Boone County who had no prior record of sexual misconduct before the events giving rise to this appeal (T.T. 12/13/05 p.67 ll. 8-14). Charles had battled a substance abuse problem with inhalants for some time prior to the events in question (T.T. 12/13/05 p.67 ll.8-20). He is currently incarcerated in the Southern Regional jail, where he has resided continuously since at least July 20, 2004.

In the late evening hours of March 23, 2003, defendant Charles E. Cowley, was staying in the home of Jeff and Shannon Boling in Boone County (T.T. 12/13/05 p.68 ll.3-8 to p.69 ll.1-14). The trailer of the alleged victim, Sherry H.,<sup>2</sup> was located adjacent to the Boling home (T.T. 12/06/05 p.8 ll.2-24). The facts recited below are salient in that they demonstrate that Charles was known to the alleged victim, that he had been alone with her before the incident (T.T. 12/06/05 p.92 l.21 to p.93 l.23), and that she had an understandable motive to fabricate her

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<sup>2</sup>Consistent with Court practice in sensitive cases, Appellant shall use the initials of alleged victims in this brief. See *State v. Edward Charles L.*, 183 W. Va. 641, 645 n. 1, 398 S.E.2d 123, 127 n. 1 (1990).

version of the events (T.T. 12/06/05 p.93 l.24 to p.96 l.7; T.T. 12/13/05 p.101 l.20 to p.102 l.17).

As both parties testified at the trial, Charles, then age 21, was behind his friends mobile home when Sherry H., then age 19, heard him and asked who he was (T.T. 12/06/05 p.87 ll.8-23; T.T. 12/13/05 p.82 l.21 to p.83 l.14). Sherry H. came to the side door of her trailer and engaged in a brief conversation with Charles. After the two conversed for some time outside, Sherry H. invited Charles into her home (T.T. 12/06/05 p.88 ll.2-4).

Sherry H. shared the trailer with her boyfriend Brett Albright, who was away on the night in question (T.T. 12/06/05 p.85 ll.11-21). Testimony at the trial indicated that the boyfriend had been spirited away for his birthday by his brothers against the wishes of Sherry H. (T.T. 12/13/05 p.38 ll.4-11). In fact, Jeffery Boling, friend and neighbor of the alleged victim, testified at the trial (via videotape) that Sherry H. was "irate" that her boyfriend chose to celebrate his birthday without her (Transcript of Jeffery Boling Video Deposition p. 25-26). Shannon Boling, who was a good friend of Sherry's, testified via video tape that Sherry was "mad as a hornet" that Brett had left her to go drink with his brothers (Video Deposition of Shannon Boling).<sup>3</sup>

Charles and Sherry decided they wanted some cigarettes, and called next door to the Bolings. Shannon Boling testified via video at trial that Charles visited with Sherry in the trailer for some time and that when the two of them called from Sherry's home they "were laughing and carrying on." (Video Deposition of Shannon Boling). Some time passed, at which point Charles returned to the Boling's trailer to retrieve cigarettes for Sherry H. from Jeff Boling. (T. J. Boling

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<sup>3</sup>Shannon and Jeffery Boling appeared via videotape. Their testimony has not been typed into the trial transcript, but their testimony was submitted to the jury and is part of the lower court record. At the time of filing this brief, counsel did not have a printed transcript of Shannon's testimony available, but these statements were made on the videotape played to the jury.

Video Dep. p. 30 ll. 22-25). Charles' version of events agrees with Jeff Boling (T.T. 12/13/06 p.87 ll.13-16). Sherry H. stated that she had initially retrieved the cigarettes from the Boling residence (T.T. 12/06/05 p.95 ll.3-7). Both parties agree that they smoked for a time and Charles retired to the Bolings, leaving the pack of cigarettes at Sherry's.

After more time passed, Charles discovered he was out of cigarettes and called Sherry H. about retrieving the pack from her home. Both agree that Charles came back over to get the cigarettes in question, meeting Sherry on her porch. At this point, the stories diverge, with Charles stating that the two had consensual sexual intercourse and with Sherry indicating that Charles committed sexual assault (T.T. 12/13/06 p.99 l.4 to p.102 l.10; T.T. 12/06/05 p.100 l.7 to p.102 l.9).

Charles returned to the Boling home, immediately next door to the scene of the alleged crime, and went to sleep. He made no effort to shower, change clothing, or destroy evidence; all his actions were consistent with innocence of the crimes charged. Some time later, police arrived and took Charles into custody, stating that Sherry H. had reported that he had raped her (T.T. 12/13/06 p.104 l.13 to p.111 l.16).

On April 23, 2003, Charles was charged in a six-count indictment with one count of burglary, one count of sexual abuse, and four separate counts of second degree sexual assault for various sexual acts in which he allegedly engaged during that one encounter on the evening in question.

Several months later, in an unrelated event, after this incident but before his trial in the instant case, Charles was arrested for an altercation in the home of another woman, Misty H. This event is important to this appeal because the lower court allowed the prosecutor to present

evidence of this event in the trial, which was a clear violation of Rule 404(b) of the West Virginia Rules of Evidence (T.T. 12/8/05 p.90 l.11 to p.91 l.16). At the time of this brief, Charles has not been tried for the second incident, and is still presumed innocent of those charges.

Charles testified at trial for the first offense that after he was charged with sexual assault he isolated himself from friends, who all had questions about his charges. He testified that his inhalant abuse increased significantly during this time, and that he used it to cope with the stress of being under indictment for a serious felony (T.T. 12/13/05 p.126 l.20 to p.127 l.4).

On the day of the second alleged offense, October 27, 2003, a friend had offered Charles a place to stay in a vacant trailer (*Id.*). Charles wanted to “huff” paint, but had lost the bag into which he would spray his paint, and needed another one<sup>4</sup> (T.T. 12/13/05 p.128 ll.3-4). An acquaintance, Chris Holstein, lived nearby. Chris Holstein lived with his girlfriend Misty H.<sup>5</sup> Charles walked to the home of Chris and Misty H. in search of a new bag to use with his paint (T.T. 12/13/05 p.128 ll.5-9). Chris was not home, and when Misty H. answered the door Charles asked her for a bread bag (T.T. 12/13/05 p.129 ll.11-12). Misty said she would get the bag, and also offered to get Charles a blanket so he would not be cold staying in the nearby vacant trailer (T.T. 12/13/05 p.129 ll.20-22).

As she was getting the bag and a blanket, Charles passed out on her floor from the effects of the paint he had been huffing earlier (T.T. 12/13/05 p.130 ll.19-24). He later awoke to Misty

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<sup>4</sup>There are many forms of inhalant abuse, but often a person addicted to inhalants will spray the contents of a can of spray paint into a plastic bag, such as a shopping bag or bread bag, and then place the bag around the nose and mouth and “huff” the concentrated vapors.

<sup>5</sup>Chris Holstein and Misty H. do not have the same surname.

H. shaking him (T.T. 12/13/05 p.131 ll. 6-9). Charles testified that in his intoxicated state, he mistook her efforts to get him to leave for an outright attack on him. Intoxicated and thinking he was being attacked, Charles fought briefly with Misty H. Misty H. claimed that her young son was also struck during the incident, which Charles denies. (T.T. 12/13/05 pp.131-133).

Misty H. called 911 and Charles was arrested for the offenses of burglary, only. At the time, Misty H. denied that the incident had any sexual component whatsoever. Defense counsel made clear to the judge prior to Misty's testimony that she disavowed any sexual assault attempt in the 911 tape. (T.T. 12/5/05 p.82 ll. 7-19). There were also no allegations of sexual assault made at the preliminary hearing in Magistrate Court on this charge (Magistrate Court hearing transcript 11/13/03, Civ. Act. No. 04-F-16).

Subsequent to his arrest, in the January 2004 grand jury term, Charles was indicted for burglary, attempted first degree sexual assault, malicious assault, battery, and assault during commission of a felony, all for the Misty H. incident. This is despite the fact that neither the arresting officer, Officer McClung, or Misty H. testified in the Preliminary Hearing that Charles attempted to engage in any type of sexual misconduct whatsoever with Misty H. (Magistrate Court hearing transcript 11/13/03, Civ. Act. No. 04-F-16).

Mr. Cowley's trial commenced on November 30, 2005. During the trial the court made several errors giving rise to this appeal. First, the court erred in requiring defense counsel to represent Mr. Cowley, even though defense counsel had previously represented the alleged victim, Sherry H. when she was a defendant in a juvenile proceeding. Defense counsel, who was appointed, brought this to the court's attention on several occasions, but the court required defense counsel to continue his representation.

Second, the court erred when it failed to remove several jurors. The court failed to strike for cause juror Melinda T., who was herself a victim of sexual assault and who suggested in *voir dire* that serving on the jury might cause her to “have flashbacks” and that she would “try” to be impartial. The court also failed to remove juror Barbara Sebok who indicated a bias in favor of the police, and juror Catherine Ball, who had worked for 17 years in the same lab with a prosecution witness - the same lab where the sexual assault kit was processed.

A third area where the court committed grievous error was the admission of evidence related to the second, unrelated, incident. Over the objection of defense counsel, the court allowed the prosecution, which had mis-characterized the second incident as a sexual crime, to introduce the testimony of Misty H., thus violating rule 404b and allowing impermissible character evidence into the case, for the sole purpose of showing conformity therewith, an express violation of the Rules of Evidence. The court compounded this error when it refused to delay the trial to allow the testimony of Deputy McClung, who responded to the Misty H. incident and reported it as a burglary.

Finally, all these errors, the three juror errors, the admission of the improper collateral crimes evidence, and the refusal to appoint new defense counsel, together amount to cumulative error sufficient for this Court to reverse the conviction of the Appellant.

While the defendant has his problems, and has struggled with substance abuse for some time, he is still entitled to all the protections our law provides. Because the lower court's errors stripped the defendant of many of his guaranteed rights, this Honorable Court must reverse the conviction and grant the defendant a new trial.

### III. Assignments of Error

Appellants Assignments of Error are set forth in the Table of Contents, *supra*.

### IV. Points and Authorities Relied Upon

#### A. Syllabus Points Relied Upon By Appellant

1. Under West Virginia Rule of Professional Responsibility 1.9(a), a current matter is deemed to be substantially related to an earlier matter in which a lawyer acted as counsel if (1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

Syl. pt. 1, *State ex rel Keenan v. Hatcher*, 210 W. Va. 307, 557 S.E.2d 361(2001).

2. Rule 1.9(a) of the Rules of Professional Conduct, precludes an attorney who has formerly represented a client in a matter from representing another person in the same or a substantially related matter that is materially adverse to the interests of the former client unless the former client consents after consultation.

Syl. pt. 2, *State ex rel. McClanahan v. Hamilton*, 189 W. Va. 290, 430 S.E.2d 569 (1993).

3. “The object of the law is, in all cases in which juries are impaneled to try the issue, to secure [persons] for that responsible duty whose minds are wholly free from bias or prejudice either for or against the accused[.]” Syllabus Point 1, in part, *State v. Hatfield*, 48 W. Va. 561, 37 S.E. 626 (1900).

Syl. pt. 3, *State v. Mills I*, 211 W. Va. 532, 566 S.E.2d 891 (2003) (*per curiam*); *accord, Black v. CSX Transportation Inc.*, 220 W. Va. 623, 648 S.E.2d 610 (2007)(*per curiam*).

4. When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror.

Syl. Pt. 3, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002); *accord*, syl. pt. 2, *State v. Mills II*, 219 W. Va. 28, 631 S.E.2d 586 (2005) (*per curiam*); *Mikesinovich v. Reynolds Memorial Hospital, Inc.*, 220 W. Va. 210, 640 S.E.2d 560 (2006); *Black v. CSX Transportation Inc.*, 220 W. Va. 623, 648 S.E.2d 610 (2007)(*per curiam*).

5. If a prospective juror makes an inconclusive or vague statement during *voir dire* reflecting or indicating the possibility of a disqualifying bias or prejudice, further probing into the facts and background related to such bias or prejudice is required.

Syl. pt. 4, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002); *accord*, syl. pt. 4, *State v. Mills II*, 219 W. Va. 28, 631 S.E.2d 586 (2005) (*per curiam*); *Black v. CSX Transportation Inc.*, 220 W. Va. 623, 648 S.E.2d 610 (2007)(*per curiam*).

6. Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.

Syl. pt. 5, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002); *accord* syl. pt. 2, *State v. Griffin*, 211 W. Va. 508, 566 S.E.2d 645 (2002) (*per curiam*); *accord*, syl. pt. 4, *State v. Mills II*, 219 W. Va. 28, 631 S.E.2d 586 (2005) (*per curiam*); *Black v. CSX Transportation Inc.*, 220 W. Va. 623, 648 S.E.2d 610 (2007)(*per curiam*).

7. The language of W. Va. Code, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.

Syl. pt. 8, *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995); *accord*, *O'Dell v. Miller*, 211 W. Va. 285, 292, 565 S.E.2d 407, 414 (2002) (Maynard, J., dissenting).

8. The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

Syl. pt. 4, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996); *accord* syl. pt. 1, *State v. Griffin*, 211 W. Va. 508, 566 S.E.2d 645 (2002) (*per curiam*); *Black v. CSX Transportation Inc.*, 220 W. Va. 623, 648 S.E.2d 610 (2007) (*per curiam*); *Davis v. McBride*, 221 W. Va. 240, 654 S.E.2d 364 (2007) (*per curiam*).

9. The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.

Syl. pt. 4, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988); *accord*, syl. pt. 6, *State v. Mayo*, 191 W. VA. 79, 443 S.E.2d 236 (1994); syl. pt. 7, *State v. Hutchinson*, 215 W. Va. 313, 599, S.E.2d 736 (2004) (*per curiam*).

10. To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995); *accord*, syl. pt. 6, *State v. Hutchinson*, 215 W. Va. 313, 599, S.E.2d 736 (2004) (*per curiam*); *State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007).

11. It is impermissible for collateral sexual offenses to be admitted into evidence solely to show a defendant's improper or lustful disposition toward his victim.

Syl. pt. 7. *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986).

12. Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W. VA. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the

Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994); *accord*, *State v. Nelson*, 221 W. Va. 327, 655 S.E.2d 73 (2007) (*per curiam*)

13. Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his [or her] conviction should be set aside, even though any one of such errors standing alone would be harmless error.

Syl. pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972); *accord*, syl. pt. 6, *State v. Schermerhorn*, 211 W. Va. 376, 566 S.E.2d 263 (2002).

### Authorities Relied Upon By Appellant

#### Statutes

W. Va. Code, 62-3-3 (1949) . . . 22

Rule 404(b), West Virginia Rules of Evidence . . . 35

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*Black v. CSX Transp. Inc.*, 220 W. Va. 623, 648 S.E.2d 610 (2007)(*per curiam*) . . . 27, 30, 31

*Davis v. McBride*, 221 W. Va. 240, 654 S.E.2d 364 (2007) (*per curiam*). . . 30

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*Malone v. State of Indiana*, 441 N.E.2d 1339 (Ind. 1982) . . . 41

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*O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002) . . . *passim*

*State ex rel. Canton v. Sanders* 215 W. Va. 755, 601 S.E.2d 75 (2004) . . . 44

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*State v. Mayle*, 178 W. Va. 26, 357 S.E.2d 219 (1987) . . . 17

*State v. Mayo*, 191 W. VA. 79, 443 S.E.2d 236 (1994) . . . 34

*State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994) . . . 43, 44

*State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) . . . 34

*State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996) . . . 30

*State v. Mills I*, 211 W. Va. 532, 566 S.E.2d 891 (2002) (*per curiam*) . . . 23

*State v. Mills II*, 219 W. Va. 28, 631 S.E.2d 586 (2005) (*per curiam*) . . . 24, 25, 30, 33

*State v. Nelson*, 221 W. Va. 327, 655 S.E.2d 73 (2007) (*per curiam*) . . . 44

*State v. Nett*, 207 W. Va. 410, 533 S.E.2d 43 (2000) (*per curiam*) . . . 17

*State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995) . . . 26, 27

*State v. Siers*, 103 W. Va. 30, 136 S.E. 503 (1927) . . . 26

*State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972) . . . 46

*State v. Schermerhorn*, 211 W. Va. 376, 566 S.E.2d 263 (2002) (*per curiam*) . . . 46

*State v. Tommy Y.*, 219 W. Va. 530, 637 S.E.2d 628 (2006) . . . 31

*State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007) . . . 34

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**V. Discussion of the Law**

**A. Standard of Review**

In addition to the issue of defense counsel’s prior representation of the alleged victim, this brief primarily raises issues of juror qualification, and erroneous submission of evidence. With regard to juror qualification, this Court has held:

In reviewing the qualifications of a jury to serve in a criminal case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court.

*State v. Nett*, 207 W. Va. 410, 412, 533 S.E.2d 43, 45 (2000) (*per curiam*) (citing *State v. Wade*, 200 W. Va. 637, 654, 490 S.E.2d 724, 741 (1997); Syl. pt. 2, *State v. Mayle*, 178 W. Va. 26, 357 S.E.2d 219 (1987)). With regard to the admission of 404b evidence, the Court has explained:

The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) [of the West Virginia Rules of Evidence] involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review de novo whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

*State v. Graham*, 208 W. Va. 463, 469, 541 S.E.2d 341, 347 (2000) (citing *State v. LaRock*, 196 W. Va. 294, 310-311, 470 S.E.2d 613, 629-630 (1996) (footnote and citations omitted)).

## B. ARGUMENT

**1. The lower court erred in requiring defense counsel to represent defendant when defense counsel had previously represented the victim in a juvenile matter.**

This Court's Order granting Mr. Cowley's Petition for Appeal indicated that Justices Maynard and Davis were especially interested in what was Assignment of Error Number 3 (or C) in the Petition. Accordingly, that issue is now Assignment of Error Number 1 (or A) in this Brief.

Defense Counsel Briscoe informed the Court on several occasions that he had represented Sherry H. before when she was a defendant in a juvenile delinquency proceeding. Defense counsel, who had been appointed by the court, first brought this to the court's attention more than a year before trial, but the court refused to take him off the case. During the trial, counsel made a

motion for a mistrial. In support of that motion, counsel argued:

Mr. Briscoe: Instead, the rule unequivocally states that if the two representations involve the same or substantially-related matter, and if the interests of the two clients are materially adverse, an ethical violation will occur absent former client consent, following consultation. The rules are black and white. To me it's just very clear that unless I had an opportunity to consult with Sherry about my representing Charles and getting consent from her, it says I shall not represent Charles. She's never consulted, she's never consented to me that I could represent Charles, and, you know, this 1994 case shows that I'm in clear and direct violation of the rules of professional conduct. And based on that, and based on this rule that says I should never be representing Charles since I haven't had the consultation and consent from Sherry, I just feel like I have no choice but to move for a mistrial.

Mr. Hatfield: And you're also moving to be removed as counsel.

Mr. Briscoe: I've made that motion a couple of times now.

The Court: When is the last time you made that motion?

Mr. Briscoe: The last time I brought the issue up is when the State wanted to get into her high school years, and it was in 2001 that I was Sherry's juvenile defense lawyer, so that would have been three or four years ago. And I brought it up again because they wanted to get into her behavior in high school, and I have specific knowledge I could have used against her on those issues. However the State agreed not to open that door, so I didn't do it. But I still think it's a moot point. The rules say I can only represent Charles if I consult with Sherry and she consents to it, and she's refused from day one to consult with me, and she's never consented to me to represent Charles, and now I'm in direct violation of Rule 1.9.

The Court: You're already -- you're in violation right now?

Mr. Briscoe: Yes, sitting here today, I'm in violation of Rule 1.9.

(T.T. 12/13/05 p 4 - 7).

The lower court refused to grant the mistrial and required counsel's continued representation of Appellant. The court directed counsel to meet with Sherry H. in the hallway and have her sign a prepared statement waving the conflict. Decisions of this Court demonstrate that this action was "too little, too late." As the Court explained in a disciplinary matter:

Rule 1.9 is very concise and unambiguous. A determination of violation is not based upon prejudice to any party, upon the efforts of the attorney to avoid unethical representation, upon the timely action of the State Bar, or upon a simple appearance of impropriety.

*Lawyer Discipline Bd. v. Prinz*, 192 W. Va. 404, 408, 452 S.E.2d 720, 724 (1994). There is little question that these matters were closely related enough to cause a conflict:

Under West Virginia Rule of Professional Responsibility 1.9(a), a current matter is deemed to be substantially related to an earlier matter in which a lawyer acted as counsel if (1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

Syl. pt. 1, *State ex rel Keenan v. Hatcher*, 210 W. Va. 307, 557 S.E.2d 361(2001). As noted by counsel, there was a risk that information gained from the earlier representation could have been used in the subsequent representation. As explained by this Court - it matters not that counsel in this case acted ethically and properly and did not use that information - the court still erred by requiring his continued service:

Rule 1.9(a) of the Rules of Professional Conduct, *precludes* an attorney who has formerly represented a client in a matter from representing another person in the same or a substantially related matter that is materially adverse to the interests of the former client unless the former client consents after consultation.

Syl. pt. 2, *State ex rel. McClanahan v. Hamilton*, 189 W. Va. 290, 430 S.E.2d 569 (1993)  
(emphasis added).

In *McClanahan*, Ms. McClanahan was a criminal defendant charged with the malicious assault of her husband. She attempted to disqualify the prosecuting attorney in the case because

the prosecutor had earlier represented her when she had started divorce proceedings against the husband. During that representation Ms. McClanahan disclosed details about her relationship - details that could aid the prosecutor in the criminal proceeding against her. The *McClanahan* Court ordered the disqualification of the prosecutor and explained the logic behind the rule:

The principle underlying Rule 1.9(a) is based not only upon the attorney's duty of fidelity and loyalty to his client, but also upon the attorney-client privilege, which precludes the attorney from disclosing or adversely utilizing information confidentially disclosed by his client.

*McClanahan v. Hamilton*, 189 W. Va. 290, 293, 430 S.E.2d 569, 572 (1993). In the instant case, Defense Counsel Briscoe had previously represented the alleged victim when she was a defendant in a juvenile proceeding. Like the prosecutor in *McClanahan*, defense counsel gained information about the alleged victim - information that he could have potentially used against her as a witness in the instant matter and perhaps aided in Mr. Cowley's defense.

The *McClanahan* Court understood that it is dangerous to allow a lawyer to be placed in this sort of position:

[C]onsideration should be given by the court as to whether the attorney's exercise of individual loyalty to one client might harm the other client or whether his zealous representation will induce him to use confidential information that could adversely affect the former client.

*McClanahan v. Hamilton*, 189 W. Va. 290, 293, 430 S.E.2d 569, 572 (1993). Just as in *McClanahan*, defense counsel in the instant case was placed in an impossible position; because Rule 1.9 should have precluded defense counsel from representing Mr. Cowley, the court erred when it refused to declare a mistrial.

**2. The lower court erred when it failed to remove several biased jurors.**

The court made several reversible errors with respect to the selection of jurors. One juror, Melinda T. had been a victim of sexual abuse as a child. Defendant moved to strike her for cause, but the court refused.

Juror Barbara Sebok should have been removed from the panel because she revealed a bias to believe police officers more than other witnesses, and was cavalier about her ability to remain impartial. It is not entirely clear if defense counsel moved to strike her for cause, but the record suggests that such a motion was made. Even if no motion were made, her presence on the jury constitutes plain error, which this Court may recognize.

Juror Catherine Ball worked in the same lab where defendant's "sexual assault" was examined, and had worked for 17 years with Kimberly Loftus, who was a material state witness who testified against the defendant at trial. While it remains unknown, there is a strong possibility that juror Ball was exposed to evidence against the defendant prior to trial. While defense counsel did not move to strike this juror for cause, her presence on the jury also constitutes plain error by the lower court.

Because the error of not striking juror Melinda T. for cause is so blatant, and because it is absolutely certain that the defense counsel moved to strike for cause, thereby definitely preserving this issue for appeal, Appellant shall focus on this first error in the following discussion of the lower court's flawed juror selection process. Nonetheless, the Brief avers that

the same logic supports reversal in the case of Barbara Sebok and Catherine Ball as well.<sup>6</sup>

- A. The lower court erred when it failed to strike juror Melinda T. for cause after she admitted that she was a victim of sexual abuse as a child, that serving as a juror would cause her to have “flashbacks” of her own abuse, and that she would “try” to be fair and impartial.**

Although the defendant believes that the lower court committed reversible error on several points, this Honorable Court can make quick work of this appeal and reverse the conviction because of the court’s failure to strike a biased juror for cause in clear violation of this Court’s holdings, both recent, and long standing.

There is no question that a criminal defendant charged with a felony in West Virginia is entitled to an impartial jury panel:

*In a case of felony, twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors, free from exception, be completed, from which panel the accused may strike off six jurors and the prosecuting attorney may strike off two jurors. (Emphasis added)*

W. Va. Code, 62-3-3 (1949). Mr. Cowley was denied his right to a panel of twenty jurors free from exception because the court erroneously failed to strike juror Melinda T. for cause. Her

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<sup>6</sup>The Court also erred in allowing juror Billy Griffith to serve. Billy Griffith, was a friend and school class mate of Misty H’s fiancé, Chris Holstein. Chris Holstein was present in the courtroom during Misty H.’s testimony and visible to juror Griffith.

Although the court asked juror Griffith if he knew any of the witnesses, and while juror Griffith admitted he knew of Charles (T.T. 11/29/05 p.79 l.13), he never stated anything about knowing Chris Holstein or Misty H. (T.T. 11/29/05 p.82 l.12 to p.90 l.24).

Because this was a “second degree relationship” the court never asked if juror Griffith knew Chris Holstein and no motion was made on this point. Nonetheless, Appellant feels that it was error to allow juror Griffith to serve.

answers in *voir dire* made clear that, because of her own history of sexual abuse, she could not be a fair and impartial juror.

A juror must go into a trial with a truly open mind, so that he or she may weigh the evidence as our rules and case law require. Melinda T. could not do that. As the Court explained a century ago:

“The object of the law is, in all cases in which juries are impaneled to try the issue, to secure [persons] for that responsible duty whose minds are wholly free from bias or prejudice either for or against the accused[.]” Syllabus Point 1, in part, *State v. Hatfield*, 48 W. Va. 561, 37 S.E. 626 (1900).

Syl. pt. 3, *State v. Mills I*, 211 W. Va. 532, 566 S.E.2d 891 (2003) (*per curiam*). It cannot be said that the mind of juror Melinda T. was “wholly free from bias or prejudice,” and as a result, the court made a reversible error in refusing to strike her for cause.

As stated previously, Melinda T. had the following exchange with the trial judge, out of the presence of the rest of the jury pool:

- Q Have you or anyone in your family or a close friend ever been a victim of any type of sexual abuse or sexual assault?
- A Yes.
- Q Could you tell me about that?
- A It was me as a child. I didn't want to --
- Q And I hate to even have to ask you this?
- A I'm glad you done this in private.
- Q I wasn't going to do it out there for this exact reason. Does that give you any preconceived motions going into this trial? Would you be more biased for the complaining witness, Sherry H., in this case by virtue of the fact that you've had some problems?
- A It just bothers me going through it all again; you know what I mean? Like flashbacks, you know what I mean?
- Q Can you remain unbiased and not be prejudiced one way or the other as a result of what happened to you, or does that make you biased or prejudiced towards one side as you sit

here right now?  
A I think I can do it.

(T.T. 11/30/05 p.93 ll.2-22). The colloquy ended with the judge asking Melinda T. if she could serve on the jury, free from bias or prejudice:

Q Can you do it?  
A I'll try.

(T.T. 11/30/05 p.95 ll.3-4).

Our law absolutely guarantees a criminal defendant the right to an impartial jury; our law demands that the jurors *are* free from exception and bias, not that the jurors *try* to be unbiased. Simply put, *trying* to be fair and impartial is not enough. As this Court recently explained, our law leaves no room for doubt, and a judge must err on the side of caution by striking the juror for cause:

When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to *resolve any doubts in favor of excusing the juror*.

Syl. Pt. 3, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002) (emphasis added); *accord*, syl. pt. 2, *State v. Mills II*, 219 W. Va. 28, 631 S.E.2d 586 (2005) (*per curiam*); *accord*, *Mikesinovich v. Reynolds Memorial Hospital, Inc.*, 220 W. Va. 210, 640 S.E.2d 560 (2006).

In *O'Dell*, a civil case against a doctor for malpractice, one juror stated that he had been a patient of the defendant doctor, and had long been and was still at the time of trial a client of the law firm defending the doctor. The lower court refused to strike this juror for cause, and this Court reversed, concluding:

Once a prospective juror has made a clear statement during *voir*

*dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.

Syl. pt. 5, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002); *accord* syl. pt. 2, *State v. Griffin*, 211 W. Va. 508, 566 S.E.2d 645 (2002) (*per curiam*); *accord*, syl. pt. 4, *State v. Mills II*, 219 W. Va. 28, 631 S.E.2d 586 (2005) (*per curiam*).

The Court's analysis in *O'Dell* is extremely thorough on this point, and makes clear that a Court should consider a juror's past experiences as well as his or her express statements in *voir dire* when deciding if that juror can be impartial and unbiased:

This State's practice of resolving any doubt about a prospective juror in favor of the party moving to strike the prospective juror is supported by sound reasoning. "A fair and impartial trial by jury can only be ensured by removing, for cause, prospective jurors who have experiences or attitudes that indicate a significant potential for prejudice in the matter at trial. Accepting such jurors' statements, that they can set aside their biases and be fair, creates the great risk of seating biased jurors, and a clear appearance of prejudice to a party." Patterson, Arthur H. and Nancy L. Neuffer, *Removing Juror Bias By Applying Psychology To Challenges For Cause*, 7 Cornell J.L. & Pub. Pol'y 97, 106 (1997); *See also*, Daniel J. Sheehan, Jr. and Jill C. Adler, *Voir Dire: Knowledge Is Power*, 61 Tex. B.J. 630 (1998).

*O'Dell v. Miller*, 211 W. Va. 285,288-89, 565 S.E.2d 407, 410-11 (2002). Without question, Melinda T's experience of prior sexual abuse as a child "indicat[ed] a significant potential for prejudice" and "creat[ed] the great risk of seating biased jurors, and a clear appearance of prejudice" to the defendant.

While defendant maintains that Melinda T. actually was biased, through no fault of her own, because of her life experiences, even if she were not, the appearance of prejudice created by

leaving her on the panel undermines confidence in the criminal justice system just as surely as it deprived defendant of his rights. The *O'Dell* majority explained that even apparent prejudice must be avoided by striking questionable jurors from the panel.

[A]s far as is practicable in the selection of jurors, trial courts should endeavor to secure those jurors who are not only free from but who are not even subject to any well-grounded suspicion of any bias or prejudice. *State v. Dephenbaugh*, 106 W. Va. 289, 145 S.E. 634 (1928); *State v. Siers*, 103 W. Va. 30, 136 S.E. 503 (1927). When in doubt, a trial court should exclude a prospective juror.

*O'Dell v. Miller*, 211 W. Va. 285, 289, 565 S.E.2d 407, 411 (2002).

While defendant believes that a comparison of the case *sub judice* and an examination of *O'Dell*, will quickly convince the Court to reverse, it is worthy of note that *O'Dell* was a civil case. As Justice Maynard astutely pointed out in his dissent to *O'Dell*, some of the logical underpinnings of the *O'Dell* majority were borrowed from criminal cases. However, because this *is* a criminal case, those concerns should not affect the outcome of this Appeal. As Justice Maynard noted, criminal defendants are afforded greater protections from juror bias, based on statute, as articulated in this Court's holding in *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995).<sup>7</sup>

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<sup>7</sup>Justice Maynard concluded:

Because of the statute's specific mandate that peremptory strikes not occur until a panel of twenty jurors *free from exception* is completed, this Court has held: The language of W. Va. Code, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.

Syllabus Point 8, *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75

Finally, the holding in *Phillips* makes clear that it matters not that the defendant removed Melinda T. with one of his peremptory challenges. In West Virginia, when a court errs by not striking a biased juror for cause, that error cannot be cured by the defendant's use of a challenge:

The language of W. Va. Code, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.

Syl. pt. 8, *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995); *accord*, *O'Dell v. Miller*, 211 W. Va. 285, 292, 565 S.E.2d 407, 414 (2002) (Maynard, J., dissenting).

The protections enunciated in *Hatfield*, and *O'Dell*, remain a fixture of West Virginia law. The Court cited all three in a recent case considering juror bias, noting that “[a] charge that a juror is not impartial is not a matter to be taken lightly.” *Black v. CSX Transportation Inc.*, 648 S.E.2d 610, 614, 220 W. Va. 623, 627 (2007) (*per curiam*). In *Black*, a potential juror who was a doctor expressed a bias against plaintiffs' attorneys in general, and against asbestos cases in particular. The lower court refused to strike the juror for cause, after attempting to rehabilitate the juror. This Court reversed and remanded, citing extensively from *Hatfield* and *O'Dell*.

Thus it is clear that the lower court committed reversible error when it failed to strike Melinda T. for cause. Accordingly, this Honorable Court should reverse the lower court decision

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(1995). Therefore, this Court's rule in criminal cases that a peremptory strike does not cure the trial court's failure to remove an unqualified juror during voir dire is based on the specific language of W. Va. Code § 62-3-3 which is inapplicable to civil cases.

*O'Dell v. Miller*, 211 W. Va. 285, 292, 565 S.E.2d 407, 414 (2002) (Maynard, J., dissenting).

and grant the defendant a new trial.

**B. The court erred when it failed to strike juror Barbara Sebok after she indicated to the court that she would believe police officers more than other witnesses.**

Through the course of the *voir dire* juror Barbara Sebok indicated a strong bias toward believing the testimony of police officers more than other witnesses. In the following exchange Barbara Sebok unequivocally stated that she would believe police officers more than other witnesses.

Q The fact that your grandson is a Deputy Sheriff in Kanawha County, does that make you believe or disbelieve law enforcement officers more than you would any other witness?

A I would believe them.

Q Pardon me?

A I would believe them.

Q Does it make you more apt to believe a police officer than --

A I think so.

Q -- a lay witness?

A (Indicates yes.)

(T.T. 11/30/05 p.36 ll.8-19)

After this exchange, in chambers, the court further examined the witness and the witness completely reversed herself regarding her propensity to believe police officers more than other witnesses. It is important to note that this was immediately after the court had struck the previous juror, Teresa W. for cause for exactly the reason the Appellant now challenges the jury selection.<sup>8</sup> Even after reversing herself, juror Barbara Sebok once again restated her belief that

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<sup>8</sup>The exchange that resulting in the striking of Teresa W. read as follows:  
(MR. HALL) The standard is whether you can listen to the evidence and judge it under the same criteria as any other witness, and she's answered that question consistently

she would believe police officers over other witnesses.

Q Was I just mistaken that you made that statement. I thought you said that you would believe deputies more. Did you not make that statement?

A Well, you would think you could, wouldn't you? You would really think you could believe a deputy more than you could just someone off the street. They do take an oath, don't they?

(T.T. 11/30/05 p.86 l.5 to p.87 l.5).<sup>9</sup> It is absolutely clear from the record that Barbara Sebok held a bias toward believing police officers over other witnesses, including a lay witness such as

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throughout the whole *voir dire*.

MR. BRISCOE: I don't think she was consistent through the whole *voir dire*.

THE COURT: I don't either. She answered enough of the questions that she would give more credence to a police officer simply because he's a police officer that we don't need to worry about that and don't want the Supreme Court worrying about it. Motion's granted.

(T.T. 11/30/05 p.83 ll.7-18)

<sup>9</sup> The examination continued as follows

Q That's how you feel?

A Well, so --

Q Would you -- and I'm not trying to put words in your mouth, and I'm not trying to trick you?

A I bet.

Q Would -- so you would, like as you sit here right now, not knowing anything about this case, --

A And I live in Seth, and I've never seen the man, and never heard of the man.

Q -- would you be more inclined to believe a policeman as opposed to another witness that was announced to you in there?

A Now, is that three times? You've asked it, he's asked it, and now he's asking it.

Q Well, I've heard different answers.

A I would think you could believe a policeman over someone you could just pick up off the street. I would believe that, but I don't know.

(T.T. 11/30/05 p.86 l.5 to p.87 l.5)

the defendant. As *O'Dell* makes clear:

Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.

Syl. pt. 5, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002); *accord* syl. pt. 2, *State v. Griffin*, 211 W. Va. 508, 566 S.E.2d 645 (2002) (*per curiam*); *accord*, syl. pt. 4, *State v. Mills II*, 219 W. Va. 28, 631 S.E.2d 586 (2005) (*per curiam*). Stated another way, simply promising “to be fair” at the end of series of questions that reveal a bias, does not cure the bias or rehabilitate the juror.

The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror’s protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

Syl. pt. 4, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996); *accord* syl. pt. 1, *State v. Griffin*, 211 W. Va. 508, 566 S.E.2d 645 (2002) (*per curiam*); *Davis v. McBride*, 221 W. Va. 240, 654 S.E.2d 364 (2007) (*per curiam*). This Court’s recent decision in *Black v. CSX Transportation Inc.*, also cites *State v. Miller* for this proposition, and warns against the futility of trying to rehabilitate a hopelessly biased juror:

We previously have cautioned against the use of such “magic questions,” though, when it is clear that a potential juror is partial. Trial judges must resist the temptation to “rehabilitate” prospective jurors simply by asking the “magic question” [FN3] to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror could be reasonably questioned. “A trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased

jurors because, in reality, the judge is the only person in the courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury.

*Black v. CSX Transportation Inc.*, 648 S.E.2d 610, 629-30, 220 W. Va. 623, 616-17 (2007) (*per curiam*)(quoting *Walls v. Kim*, 250 Ga. App. 259, 260, 549 S.E.2d 797, 799 (2001), *aff'd*, 275 Ga. 177, 563 S.E.2d 847 (2002)).

Furthermore, when one considers the lower court's finding on the previous juror just moments before, it is Appellant's contention that this juror Sebok should have been struck as a matter of law.

Additionally, in light of this Court's ruling in *State v. Tommy Y.*, 219 W. Va. 530, 637 S.E.2d 628 (2006), it is also important to note that there was no clear waiver of Appellant's right to strike for cause:

The Court: Any motions? Okay, bring back Curtis Frame.  
Mr. Hatfield: Judge, we may move for cause on her. I want to talk to my client here for a minute.  
The Court: You want just women brought back, or you want everybody brought back?  
Mr. Briscoe: Yes.

(T.T. 11/30/05 p.89 ll.10-15). The lower court never revisited the issue, perhaps in the haste of expediting the proceedings, and it is unclear whether counsel was answering the court's question or affirmatively responding to the request for a motion. Regardless, as there was no clear waiver, as a bias had been affirmatively stated by the juror, and considering the court's findings on the previous juror it is evident from the record that the court permitted a biased juror into the jury panel. Failing these arguments, Ms. Sebok's presence on the jury amounted to plain error, which Appellant discusses in the following section.

For all of reasons articulated above with regard to juror Melinda T., the court also committed reversible error when it failed to strike for cause juror Barbara Sebok. This error was compounded by the fact that Barbara Sebok actually served on the jury, which allowed her bias for police officers to deprive the defendant of a fair trial.

- C. **The court erred when it failed to strike juror Catherine Ball, who was a 17 year co-worker of a material state witness, and both the juror and the state witness worked in the same hospital laboratory where defendant's "sexual assault kit" was examined.**

Appellant also raises the issues regarding juror Catherine Ball. Catherine Ball worked in the same hospital laboratory where evidence regarding this trial was gathered, and may have in fact been present the evening the defendant was examined in the laboratory, possibly exposing her to the defendant, arrested and in police custody. Catherine Ball indicated during *voir dire* that she worked with a material witness for the state. That witness testified about evidence gathered from the defendant on the night of the alleged crime.

MR. HALL: Okay. Do you know anything about the facts of this case?

JURORS: No.

A I know Kimmie, (Catherine Ball).

Q How do you know Kimmie Loftus?

A I work with Kimmie.

Q He's [*sic*] a lab tech at Boone Memorial Hospital?<sup>10</sup>

A Yes.

Q How would you characterize your association or knowledge of Mr.[*sic*] Loftus?

A We're co-workers.

Q You also work in the lab up there?

A Yes.

Q You work the same shift?

A Sometimes.

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<sup>10</sup>Kim Loftus is a woman. The court mistakenly referred to her as a male during this exchange.

- Q How long have you worked together?  
A About 17 years.  
Q Do you work together now?  
A Sometimes. Kim works day shift, I work different shifts.

(T.T. 11/30/05 p.31 l.14 to p.32 l.11). Though not clear in the transcript, it is even possible that Catherine Ball was present that early morning in the hospital and noticed Mr. Cowley in police custody for the purpose of gathering evidence for a sexual assault kit.

Regardless of her presence, it is quite conceivable that Catherine Ball, in the course of her normal duties, handled, witnessed, examined, recorded or was exposed to elements of evidence in this case prior to trial. And even if she had no personal exposure to the evidence, her long standing co-worker relationship with a prosecution witness should have barred her from serving. As indicated, *supra*, the court must “make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror.” Syl. pt. 3 (in part), *O’Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002) (emphasis added); *accord*, syl. pt. 2, *State v. Mills II*, 219 W. Va. 28, 631 S.E.2d 586 (2005) (*per curiam*); *accord*, *Mikesinovich v. Reynolds Memorial Hospital, Inc.*, 220 W. Va. 210, 640 S.E.2d 560 (2006).

### Plain Error

It appears that the Appellant did not move to strike Catherine Ball for cause, and it may be that he did not move to strike Barbara Sebok for cause. Nonetheless, the presence of either woman on the jury constitutes plain error, which the lower court should have avoided, and which this Court may recognize.

The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not

brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.

Syl. pt. 4, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988); *accord*, syl. pt. 6, *State v. Mayo*, 191 W. VA. 79, 443 S.E.2d 236 (1994). Clearly, the error of allowing a juror who may have seen evidence against the defendant prior to trial, and who had a 17 year-long working relationship with a prosecution witness amounts to clear error that would affect substantial rights, impair the truth finding process, and create a miscarriage of justice for the Appellant. The same can be said for permitting a juror biased in favor of the police.

The Court has explained that an important consideration under the plain error doctrine is whether the error has an impact on the public's confidence in the judicial proceeding:

“To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus Point 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 6, *State v. Hutchinson*, 215 W. Va. 313, 599, S.E.2d 736 (2004) (*per curiam*); *accord*, *State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007). In the instant case, the Court's decision to allow either juror Sebok, with her bias for the police, or juror Ball, with her close work relationship with a witness, to serve seriously undermined the “public reputation of the judicial proceedings” and was plain error. Accordingly, the Court should reverse the lower court on the basis of *either* example of plain error.

- 3. The court erred in allowing the admission of highly prejudicial “collateral crimes” evidence for a subsequent, dissimilar event in violation of Rules 404b and 403 of the West Virginia Rules of Evidence.**

While the prosecution may have couched it in different terms, all the prosecution did in this case was to introduce evidence of the second event to show that the defendant has a “lustful disposition” toward women and was therefore more likely to be guilty of the first act, for which he was on trial. The prosecution was successful for precisely the reasons that this Court has declared that such collateral acts evidence must be excluded.

Even more alarming, the evidence suggests that the prosecutor may have tailored, or at the very least had an opportunity to tailor, the indictments for the second event to aid in the trial on the first offense. While defendant does not argue that anything *per se* illegal occurred, the Court should remove the temptation for other prosecutors to tailor future indictments so that evidence of subsequent collateral crimes may be more easily admitted at trial.

West Virginia Rule of Evidence 404(b), our “collateral crime” rule is straightforward and begins (with emphasis added):

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.* . . .<sup>11</sup>

Though the rule goes on to list permissible reasons to introduce evidence of other acts, none of

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<sup>11</sup>The rule in its entirety reads:

**(b) Other Crimes, Wrongs, or Acts.** 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 that 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.

these reasons countermands the specific prohibition against using other acts to show that the defendant "acted in conformity therewith." Unfortunately, this is precisely why the prosecution offered the evidence, to show that the defendant had a "lustful disposition" toward women, and that he acted in conformity therewith on the night in question.<sup>12</sup>

Allowing such evidence is so devastatingly prejudicial that this Court has expressly prohibited the admission of such evidence. Because the lower court allowed this evidence to get to the jury, the lower court's reversible error is obvious, evident, and glaring. As this Court held:

It is impermissible for collateral sexual offenses to be admitted into evidence solely to show a defendant's improper or lustful disposition toward his victim.

Syl. pt. 7. *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986).<sup>13</sup> This Honorable Court could not have been more clear or stated the rule more succinctly.

The State will counter that the second incident was not offered to show a lustful disposition, but was offered to show that the defendant was operating under a "common plan." It was under this theory that the court allowed the testimony.<sup>14</sup> Defendant argues that the incidents

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<sup>12</sup>The fact that the second incident was not initially characterized as a rape attempt is discussed *infra*.

<sup>13</sup>*Dolin* was overruled in part by *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990) to allow evidence of collateral sexual crimes in cases where *children* were the victims of the alleged crime. The issue of sexual crimes against children is not at all present in the instant case, thus the ruling in *Edward Charles L.*, does not affect the application of *Dolin*, to the case at hand.

<sup>14</sup>After Misty H. testified, the court stated:

The jury is instructed that the testimony you just heard is admitted for a very limited purpose, and you must consider it only for the limited purpose for which it was admitted. It is admissible only to prove a common plan, which means the method of operation of the defendant."

in question are not similar enough to amount to a "common plan," that the court misunderstood the nature of a "common plan," which is most applicable when identity is at issue, and that all other arguments notwithstanding, the evidence was far more prejudicial than probative, and thus should have been excluded under Rule 403 of the West Virginia Rules of Evidence.

- A. The second incident is not similar enough to the first to qualify as a common plan. The story of the witness changed over time to make the events appear similar. Allowing the admission of this evidence would tempt prosecutors to tailor charges and would undermine our system of justice.**

At or near the time of the second incident, Misty H. made no allegation of sexual assault. At first, Charles was charged with burglary and assault, not sexual assault. At the preliminary hearing in Magistrate Court on these charges, held on November 13, 2003, neither Misty H., nor Deputy McClung, the arresting officer, made any allegations that the crime had a sexual component. The Deputy testified that he had responded to an assault. Moreover, the crimes occurred 30 miles and 7 months apart. (Magistrate Court hearing transcript 11/13/03, Civ. Act. No. 04-F-16) (Def. Motion for Reconsideration, filed 4/6/2005, pp. 3-5.).

Nonetheless, by the time indictments were handed down by the grand jury, the incident had evolved from a charge of burglary, to a full blown attempted rape. While defendant does not allege illegal action on the part of the prosecutor, a comparison of the original accusations and the indictments handed down is revealing.

Counsel for the Defendant, after reviewing the 911 tape, the arrest report, and the preliminary hearing recited to the court the fact that up to the grand jury proceedings, four

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(TT. 12/8/05 p. 110).

months after the incident, no representation of any sexual event occurred from any party involved in the incident, including the arresting officer and the alleged victim:

MR. HATFIELD: There was absolutely nothing in sexual nature that occurred between Ms. H. and Mr. Cowley. Nor did he attempt to rape her. That's clear from the preliminary transcript, Officer McClung's police report, Ms. H.'s statement, and the 911 call. There is never a story of attempting to be raped. She said she had no idea what his intentions were. He never took her clothes off of her; he never took his clothes off. He never ever tried to rape Misty H.. From her statement, to Officer McClung's deposition, to the 911 call, to the preliminary hearing; no word, no mention, no charge of anything, anything. There was absolutely nothing sexual in nature.

(T.T. 12/05/05 p.82 ll.7-19)

By the time Misty H. testified at trial, her story had evolved into a case of attempted sexual assault, with allegations that the defendant attempted to force her legs apart and pulled on her pants while on top of her (T.T. 12/8/05 pp 103-05). The prosecution relied heavily upon this modified story in closing argument.

[is it ] not possible that during that 20 to 30 seconds that Misty H. is telling you the truth, that he's trying to pull her pants, grab her shirt, and was on top of her trying to grab her legs apart. No, that can't be the truth; . . .

(T.T. 12/15/05 p.81 ll.1-4). The prosecution continued with this theme. This significant change in the details of the story suggest that the prosecution had to strain to find enough similarity to support its theory of a "common plan." The change in this story is consistent with a notion that the charges made in the second indictment were tailored so that they were more likely to be admissible as evidence in the first case.

Allowing a prosecutor to introduce this sort of evidence for a subsequent bad act presents an enormous temptation to all prosecutors to tailor the charges of the second event so that they

can come in as “common plan” evidence in the trial for the first event. A prosecutor stands to gain terrible leverage against the accused, making both cases more damaging and, effectively, putting the defendant on trial for both events at once (indeed, the prosecution moved for a unitary trial for Mr. Cowley, but was denied by the court). A prosecutor who knows he or she can get the second event into evidence by tailoring the charges may even obviate the need for the first trial at all. For many defendants, the mere knowledge that evidence of the second event is likely to be admitted at the first trial will make a plea deal seem the only sane course of action, whether or not that defendant is guilty of the first offense.

It matters not whether the Boone County Prosecutor, who is an honorable person, considered this possibility when preparing the second set of indictments. What matters is that, if this sort of evidence is allowed, a prosecutor *can* tailor an indictment in this fashion. Because the temptation would be so strong for others if the Court allows Misty H.’s testimony to stand, this Court should find that the lower Court committed reversible error when it allowed her to testify. Any other outcome would be unjust for the defendant, and corrosive to our system of justice.

- B. The court misunderstood the “common plan” exception of Rule 404b, which is most applicable in a sexual assault case where identity is at issue. The use permitted by the court was simply an impermissible effort to show the defendant’s “lustful disposition” in violation of *State v. Dolin*.**

The Court stated to the jury that the testimony of Misty H. was introduced “only to prove the so-called common plan, which means the method of operation of the defendant.” (TT. 12/8/05 p. 110). With this explanation, the court indicated its misunderstanding of the purpose for common plan evidence, as is often the case. As one scholar has explained:

Some courts are quite liberal in admitting uncharged misconduct under the rubric of “plan.” If the proponent can show a series of similar acts, these courts admit the evidence on the theory that a pattern or systematic course of conduct is sufficient to establish a plan. This tendency is especially pronounced in sex offense prosecutions. Similarity or likeness between the crimes suffices. In effect, these courts convert the doctrine into a “plan to commit a series of similar crimes” theory.

This application of the plan theory is troublesome. Some commentators refer to these plans as “unlinked act” cases while other commentators use the more pejorative expression, “spurious plans.” For the most part, the commentators have been critical of the doctrine. Their criticism is well-founded. . .

In reality, these courts are arguably permitting the proponent to introduce propensity evidence in violation of the prohibition in the first sentence of Rule 404(b).

Edward Imwinkelried, 1 Uncharged Misconduct Evidence § 3:24 (Westlaw 2006) (footnotes omitted). Or put another way, the “common plan” exception is allowed to swallow the rule that other acts evidence should not be offered to show conformity therewith; to allow it in a case involving a sexual offense is tantamount to creating a “sexual propensity” exception to the rule.

This Court explained this very problem in *State v. Dolin*:

To recognize a sexual propensity exception in addition to the numerous exceptions to the collateral crime rule would provide a convenient path to damage a defendant’s character and would sweep additional sexual offenses into evidence which would obviously prejudice and confuse a jury in its consideration of the crime charged in the indictment. What renders the reasoning of those courts which have adopted a sexual propensity exception so anomalous is their failure to acknowledge that *sexual crime cases are by their very nature likely to be highly offensive to the average jury. Thus, the ability to further prejudice the jury by admitting additional collateral sexual offenses is even more apparent.*

*State v. Dolin*, 176 W. Va. 688, 695, 347 S.E.2d 208, 215 (1986) (emphasis added). Another problem with the lower court’s analysis is that, even if the incidents were similar, and they are

not, the "common plan" theory is least applicable when identity is not an issue. Some courts have gone so far as to declare that, unless identity is at issue, other sexual crimes are simply irrelevant and inadmissible.

Notwithstanding, if the identification of an accused can be proved by other evidence or if an accused's identity is not a material issue, then the admission of evidence of other criminal activity is improper to establish identity. Of course, no evidence is admissible if it is not relevant to some material issue in a case.

*Malone v. State of Indiana*, 441 N.E.2d 1339, 1346 (Ind. 1982). In the instant case, Mr.

Cowley's identity is not at issue. The *Malone* Court went on to explain:

In *Meeks v. State*, (1968) 249 Ind. 659, 234 N.E.2d 629, a witness' testimony that the defendant raped her prior to the rape for which the defendant was prosecuted was found by this Court to be inadmissible where the only issue in the case was whether or not the prosecutrix consented to the sexual intercourse. We held that evidence of the defendant's other criminal activity must be relevant to some point at issue to be admissible. Since consent was the only element at issue once the defendant admitted the intercourse, we specifically held that the other alleged rape was irrelevant and we reversed the rape conviction.

*Id.*. This logic should be even stronger in Mr. Cowley's case, because the second incident was not a rape, and was not even an attempted sexual assault. Finally the *Malone* court concluded

The fact that one woman was raped has no tendency to prove that another woman did not consent. Accordingly, we find the evidence suggesting that Malone raped V.H. inadmissible to prove that P.C. did not consent to Malone's prior intercourse with her.

*Malone*, 441 N.E.2d at 1347. Clearly, in the instant case, the evidence that Charles and Misty H. had an altercation, which falls far short of a rape, should have been inadmissible to prove that Sherry H. did not consent. Allowing Misty H. to testify was reversible error.

- C. **The Court erred when it refused to allow defendant to call Deputy Eric McClung, who investigated the Misty H. complaint and who could have testified that the incident was not a sexual assault.**

During the trial the defendant requested that he be allowed to call Boone County Deputy Eric McClung as a rebuttal witness. Although defendant attempted to subpoena Deputy McClung via service through the Boone County Emergency 911 Center, the Deputy did not appear and could not be located. The trial court then ordered that the trial proceed without Deputy McClung, preventing the defendant from calling Deputy McClung as a rebuttal witness.

Defendant sought to call deputy McClung in order to effectively challenge the prosecution's assertion that there was a "common plan" with regard to the Misty H. incident. Defendant sought to prove, that there was in fact no "sexual attack" on Misty H., nor none alleged by the arresting officer or Misty H. on the night Charles was arrested. Defendant was precluded from doing so.

Defendant asserts that preclusion of this rebuttal witness to challenge the common plan scheme is reversible error, and also important in the fact that it prevented the defendant from defending against the tailoring of the second set of charges as mentioned above. *See, State v. Ward*, 188 W. Va. 380, 424 S.E.2d 725 (1991) (noting that the sixth amendment to the U.S. Constitution guarantees the accused the right of "compulsory process for obtaining witnesses in his [or her] favor," but ultimately affirming the conviction on other grounds). Defendant filed a post trial motion regarding this issue, which was denied by the court. Defendant, in light of the 404b arguments raised, *supra*, now urges this Court to reverse.

- D. Even if the Court finds no error in the above, the evidence of the second incident was far more prejudicial than probative and should have been excluded on that basis alone.**

As the Court is no doubt well aware, the seminal case on the admission of 404b evidence is *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), which held:

Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility . . . If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. . .

Syl. pt. 2 (in part), *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).<sup>15</sup> Rule 403, of

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<sup>15</sup>The full syllabus point reads:

Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W. VA. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

course, commands that a judge consider whether the evidence in question is “more prejudicial than probative” and exclude evidence that is impermissibly prejudicial.

As made clear in the language previously quoted from *Dolin*, admitting evidence of other sexual crimes, is the *most* prejudicial evidence that could be admitted by a court. *Dolin* expressly prohibited a sexual propensity exception to Rule 404b because allowing evidence of “additional sexual offenses . . . would obviously prejudice and confuse a jury in its consideration of the crime charged in the indictment.” *Dolin, supra*. In the instant case, the prosecution highlighted the alleged sexual nature of the second crime (which was inaccurate), to portray Charles as a dangerous, repeat sexual offender. Because the prosecution used this evidence specifically to prejudice the jury, the lower court violated *McGinnis*, and erred in finding the evidence was not more prejudicial than probative.

Finally, the Court has noted the fallibility of 404b evidence, and the danger of liberal introduction of such evidence:

Even in recognizing the inclusive nature of 404(b) evidence, though, we have warned that such evidence should be treated with care, as “[w]e cannot escape the fact that Rule 404(b) determinations are among the most frequently appealed of all evidentiary rulings, and the erroneous admission of evidence of other acts is one of the largest causes of reversal of criminal convictions.” *McGinnis*, 193 W. Va. at 153, 455 S.E.2d at 522 (citing Imwinkelried, *Uncharged Misconduct Evidence* § 1:04 at 8 (1984) (footnote omitted)).

*State ex rel Canton v. Sanders* 215 W. Va. 755, 601 S.E.2d 75 (2004). The Court recently reiterated its commitment to the defendant protections set forth in *McGinnis*. The Court reversed and remanded a murder conviction in *State v. Nelson*, 655 S.E.2d 73, 221 W. Va. 327 (2007)(*per*

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Syl. pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994)

*curiam*), largely because the lower court had denied the defendant the protections demanded by Rule 404 (b).

It should not be lost on the Court that the purpose of excluding other acts evidence, in general, is to ensure that a defendant receive a fair trial, and to prevent the defendant from being “railroaded” because he or she is seen simply as a bad person by the jury. As Justice Starcher recently remarked:

One could write a dissertation on how Rule 404(b), *McGinnis* [193 W. Va. 147, 455 S.E.2d 516 (1994)], and now *Edward Charles L.* [183 W. Va. 641, 398 S.E.2d 123 (1990)] have become a “runaway train” in some of our courts, when judges are tempted to abandon their proper gatekeeper role by over-zealous prosecutors. We have moved far away from the original purpose for permitting such evidence. The standard now seems to be: Will it help the prosecutor?

In most cases, as soon as a jury hears about a defendant’s prior sex offense, a defendant is dead meat. Why even have a trial? I await the day when this Court can stop this runaway train. We can and will apply common sense to this currently confused area of law. When that happens, criminal trials in sex offense cases will be conducted fairly and in accord with the rules of evidence.

*State v. Graham*, 208 W. Va.463, 541 S.E.2d, 341 (2000) (Starcher, J., concurring).

Unfortunately, in the instant case, this train ran over the defendant and he was denied the fair trial that our law requires. Accordingly, the lower court’s decision should be reversed, and the defendant granted a new trial.

**4. These errors together constitute cumulative error, which is an independent basis for the reversal of the Appellant’s conviction.**

The errors made by the lower court in Mr. Cowley’s trial were legion. The lower court erred by: failing to strike Melinda T., allowing jurors Sebok and Ball to serve, allowing Misty H. to testify, misapplying the “common plan” exception to Rule 404b, failing to allow the rebuttal

testimony of Deputy McClung, and forcing defense counsel to serve in spite of a conflict.

Together, these mistakes amount to cumulative error. As this Court has held:

Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his [or her] conviction should be set aside, even though any one of such errors standing alone would be harmless error.

Syl. pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972); *accord*, syl. pt. 6, *State v.*

*Schermerhorn*, 211 W. Va. 376, 566 S.E.2d 263 (2002) (*per curiam*). While Appellant maintains that none of the errors complained of are harmless error, should the Court find otherwise, the “cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial” and his conviction should be set aside.

#### VI. Relief Prayed For

Appellant prays that this Court reverse the defendant’s conviction and grant him a new trial.

Respectfully Submitted,  
Charles E. Cowley  
By Counsel



Jeffrey S. Burgess, Esq. (WVSB# 546) for Frank Venezia (WVSB # 4637)  
SHAFFER & SHAFFER PLLC  
P.O. Box 38  
Madison, West Virginia 25130  
(304) 369-0511

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

**State of West Virginia, Plaintiff Below,  
Appellee**

vs.)

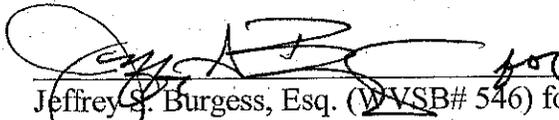
**No. 33804**

**Charles Cowley, Defendant Below,  
Appellant**

**Certificate of Service**

I, Frank Venezia, hereby certify that the foregoing "Brief of Appellant Charles E. Cowley" were served upon counsel of record on this the 22nd day of May, by depositing a true and correct copy in the United States mail, postage prepaid, in an envelope addressed as follows:

Clarence E. Hall, II, Esq.  
J. Parker Bazzle, II, Esq.  
Boone County Prosecutor's Office  
200 State Street  
Madison, WV 25130



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Jeffrey S. Burgess, Esq. (WVSB# 546) for Frank Venezia (WVSB # 4637)  
SHAFFER & SHAFFER PLLC  
P.O. Box 38  
Madison, West Virginia 25130  
(304) 369-0511