
NO. 33804

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

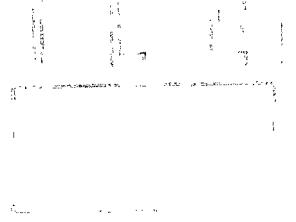
STATE OF WEST VIRGINIA,

Appellee,

v.

CHARLES COWLEY,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7370
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

	<u>Page</u>
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
II. STATEMENT OF FACTS	4
III. ARGUMENT	16
A. THE APPELLANT WITHDREW HIS MOTION FOR A MISTRIAL	16
1. The Standard of Review	16
2. After Consultation with His Present and Former Clients Appellant’s Counsel Withdrew His Motion for a Mistrial	17
3. The Matters Were Not Substantially Related, and There Was No Danger That Defense Counsel Would Use Confidential Information Against His Former Client	21
4. The Appellant Failed to Prove an Actual Conflict of Interest	25
B. THE APPELLANT RECEIVED A FAIR TRIAL BEFORE AN UNBIASED JURY	26
1. The Standard of Review	26
2. The Appellant Waived Any Potential Objections to Jurors Seebok and Ball	26
3. Based upon the Totality of the Circumstances, Juror T. Was Qualified	28
C. THE TRIAL COURT’S DECISION TO ADMIT EVIDENCE OF A SUBSEQUENT ATTACK WAS NOT AN ABUSE OF DISCRETION	31
1. The Standard of Review	31

2.	The Trial Court’s Determination That the Evidence Was Admissible Was Reasonable	31
D.	SINCE THE APPELLANT FAILED TO PROVE INDIVIDUAL ERROR THERE IS NO CUMULATIVE ERROR	40
1.	The Standard of Review	40
2.	Since the Appellant Received a Full and Fair Trial, Cumulative Error Review Is Inappropriate in this Case	40
IV.	CONCLUSION	41

TABLE OF AUTHORITIES

Page

CASES:

<i>Accounting Principal's Inc. v. Manpower, Inc.</i> , No. 07-CV-636-TCL-PJC, 2008 WL 2221772 (N.D. Okla. May 23, 2008)	22
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978)	37
<i>Byrom v. State</i> , 863 So. 2d 836 (Miss. 2003)	40
<i>Huddleston v. United States</i> , 485 U.S. 681 (1988)	38
<i>Lawyer Disciplinary Board v. Printz</i> , 192 W. Va. 404, 452 S.E.2d 720 (1994)	22
<i>Nicholas v. Sammons</i> , 178 W. Va. 631, 363 S.E.2d 516 (1987)	24
<i>O'Dell v. Miller</i> , 211 W. Va. 285, 565 S.E.2d 407 (2002)	28
<i>Pearce v. State</i> , 513 S.W.2d 539 (Tex. Crim. App. 1974)	27
<i>People v. Rath</i> , 44 P.3d 1033 (Colo. 2002)	37-38
<i>People v. Schmidt</i> , 885 P.2d 312 (Colo. App. 1994)	30
<i>Ross v. Oklahoma</i> , 487 U.S. 81 (1988)	4
<i>State ex. rel. Caton v. Sanders</i> , 215 W. Va. 755, 601 S.E.2d 75 (2004)	32, 38
<i>State ex. rel. Keenan v. Hatcher</i> , 210 W. Va. 307, 557 S.E.2d 361 (2001)	22
<i>State ex. rel. McClanahan v. Hamilton</i> , 189 W. Va. 290, 430 S.E.2d 569 (1993)	22, 23, 24, 25
<i>State ex. rel. Michael A.P. v. Miller</i> , 207 W. Va. 114, 529 S.E.2d 354 (2000)	2
<i>State v. Beck</i> , 167 W. Va. 830, 286 S.E.2d 234 (1981)	30
<i>State v. Blake</i> , 197 W. Va. 700, 478 S.E.2d 550 (1996)	37

<i>State v. Donley</i> , 216 W. Va. 368, 607 S.E.2d 474 (2004)	4
<i>State v. Ebeirus</i> , 184 S.W.3d 582 (Mo. 2006)	27
<i>State v. Gillespie</i> , 710 N.W.2d 289 (Minn. App. 2006)	27
<i>State v. Hadley</i> , 815 S.W.2d 422 (Mo. 1991)	28
<i>State v. Knotts</i> , 187 W. Va. 795, 421 S.E.2d 917 (1992)	27
<i>State v. Larock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996)	21, 31
<i>State v. McDaniel</i> , 211 W. Va. 9, 560 S.E.2d 484 (2001)	37
<i>State v. McGinnis</i> , 193 W. Va. 147, 455 S.E.2d 516 (1994)	38
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	4, 28
<i>State v. Miller</i> , 197 W. Va. 588, 476 S.E.2d 535 (1996)	2
<i>State v. Mills</i> , 221 W. Va. 283, 654 S.E.2d 605 (2007)	26
<i>State v. Mundy</i> , 650 N.E.2d 502 (Ohio Ct. App. 1994)	30
<i>State v. Ricketts</i> , 219 W. Va. 97, 632 S.E.2d 37 (2006)	2
<i>State v. Smith</i> , 156 W. Va. 385, 193 S.E.2d 550 (1972)	40
<i>State v. Wade</i> , 200 W. Va. 637, 490 S.E.2d 724 (1997)	2, 26
<i>United States v. Carroll</i> , 207 F.3d 465 (8th Cir. 2000)	38
<i>United States v. Casiano</i> , 929 F.2d 1046 (5th Cir. 1991)	25
<i>United States v. Dolin</i> , 570 F.2d 1177 (3d Cir. 1978)	25
<i>United States v. Ruiz</i> , 178 F.3d 877 (7th Cir. 1999)	38
<i>United States v. Sliker</i> , 751 F.2d 477 (2d Cir. 1984)	38
<i>United States v. Smith</i> , 103 F.3d 600 (7th Cir. 1996)	38
<i>Wayte v. United States</i> , 470 U.S. 598 (1985)	37

Wheat v. United States, 486 U.S. 153 (1988) 21

STATUTES:

W. Va. Code § 49-5-17 22

W. Va. Code § 49-7-1 22

W. Va. Code § 62-3-3 4

OTHER:

W. Va. R. Crim. P. 24(b) 4

W. Va. R. Evid. 403 39

W. Va. R. Evid. 404(b) 16

W. Va. R. Prof. Conduct, Rule 1.9(a) 18, 20, 31

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

CHARLES EMORY COWLEY,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

The Appellant appeals the November 16, 2006, order of the Boone County Circuit Court (Schlaegel, J.), sentencing him to no less than ten nor more than twenty-five years in the penitentiary upon conviction for Second Degree Sexual Assault.¹ (R. at 486-87.)

¹The Appellant was originally indicted on one count of Burglary (Count 1), four counts of Second Degree Sexual Assault (Counts 2-5), and one count of First Degree Sexual Abuse (Count 6). He was convicted of Count 5 of the indictment which reads:

That on or about 23, March 2003, in Boone County, West Virginia, CHARLES EMORY COWLEY, committed the offense of "Second Degree Sexual Assault" by unlawfully and feloniously engaging in sexual intercourse to wit: coitus, with [S.H.] and the lack of consent resulting from forcible compulsion, she, the said [S.H.], not being the wife of the said Charles Emory Cowley, against the peace and dignity of the State.

Appellant asserts four assignments of error: (C) Since defense counsel Scott Brisco had previously represented the victim in a juvenile incorrigibility matter he operated under a conflict of interest; (A) The trial court failed to strike two biased jurors, although defense counsel did not move to strike them for cause, or use his peremptory strikes to remove them, and that the trial court failed to strike, upon motion by defense counsel, a juror who had been sexually molested as a child and stated that it would be difficult to sit through the trial; (B) that the trial court abused its discretion by admitting evidence of a subsequent attack on another woman committed by the Appellant while on bond for this offense; and, (D) cumulative error.

This Court has consistently ruled that these decisions are committed to the sound discretion of the trial court, and will only be reversed upon proof of an abuse discretion; the most demanding standard of appellate review. *See State v. Wade*, 200 W. Va. 637, 654, 490 S.E.2d 724, 741 (1997) (standard of review motions to strike juror for cause is abuse of discretion); Syl. Pt. 6, in part, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996) (appellate court must be left with a clear and definite impression that prospective juror is unable to perform duty before will address juror's qualifications); *State v. Ricketts*, 219 W. Va. 97, 100, 632 S.E.2d 37, 40 (2006) (trial court abuses its discretion in admitting 404(b) evidence when acts in an arbitrary or irrational matter); *State ex. rel. Michael A.P. v. Miller*, 207 W. Va. 114, 119, 529 S.E.2d 354, 359 (2000) (decision to disqualify lawyer due to conflict of interest is left to trial court's discretion).

The Appellant asked the jury to believe that the victim was a promiscuous and vindictive woman, and that he, an admitted liar, and drug abuser, was an innocent victim. He also asked the jury to ignore scientific evidence proving that he had lied to the investigating officers the morning

of the incident. The jury judged the witnesses' credibility, reviewed the evidence, and rendered an eminently reasonable verdict.

At trial, the Appellant also relied on the fallacious theory that all rape victims behave the same way, and that any person not acting accordingly consented to sex.² The Appellant is not only asking this Court to substitute its judgment for that of the judge and the jury, he is asking this Court to second-guess the decisions of a 19-year-old rape victim: Something the jury rightfully refused to do.³

²The Appellant introduced the expert testimony of gynecologist Betty Goad. This expert witness spoke, not from medical experience, but from assumptions about a rape victim's "normal conduct" based on her "common sense."

Dr. Goad, a Board Certified obstetrician and gynecologist with no formal training in sexual assault evaluations, who did not keep up with the literature on this issue, had never published in this area, and never been recognized for her work on sexual assault evaluations. Her testimony was irrelevant, unhelpful to the jury, and unfairly prejudicial. She testified that, although it would have required catheterizing a rape victim a few hours after the rape, a urine sample was essential; not because it is useful in providing medical treatment to the victim, but because it should be done whenever there are potential legal consequences. She could not explain why potential legal consequences mandated a urine sample. (Tr. 90-91, Dec. 14, 2005.)

She did not know that Women's and Children's rape examination protocol did not call for toxicological screens. The SANE nurses routinely request a urine sample to test for urinary tract infection, and the presence of sperm. (Tr. 23-24, Dec. 8, 2005; Tr. 103, Dec. 14, 2005.) She also faulted the victim for failing to fill prescriptions given to her after the rape exam. When asked how she knew that the victim had not filled these prescriptions, she testified that defense counsel had told her. (Tr. 99, Dec. 14, 2005.) She also pointed to the lack of trauma as a sign that the sex was consensual. Had this been a rape, she opined, the Appellant should have suffered penile abrasions. The victim should have far more serious injuries. She did not base his opinion on her medical training; she believed it to be a matter of common sense. (*Id.* at 104-10.)

³To rebut Dr. Goad's testimony, the State presented Dr. Linda Ledray. (*Id.* at 116.) Unlike Dr. Goad, Dr. Ledray, is not an M.D. She is a Registered Nurse with a Masters and Ph.D. in clinical psychology, who conducted thousands of post-rape exams since 1977. Dr. Ledray testified that, in her experience, most rape victims do not resist, especially after they are restrained. (*Id.* at 139.) Indeed, less than one in three rape victims show signs of serious physical trauma after the rape. (*Id.* at 140.) The defense had pointed out that the treating nurse noted that the victim did not appear to

The Appellant is also asking this Court to address questions which the defense never raised at trial. The Appellant never challenged Jurors Seebok or Bell for cause, nor did he strike them peremptorily. Although West Virginia statutory law requires a panel of qualified jurors⁴, Appellant's failure to strike these two jurors for cause, or by peremptory strikes affirmatively waived any exceptions he had. Therefore, plain error analysis would be inappropriate. *See State v. Donley*, 216 W. Va. 368, 374, 607 S.E.2d 474, 480 (2004): Syl. pt. 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

II.

STATEMENT OF FACTS

The Appellant raped the 19-year-old victim, S.H., early Sunday morning, March 23, 2003, on a mattress in her living room⁵ at the Williams Trailer Park on Maplewood Drive, Turtle Creek, Boone County, West Virginia. (Tr. 62, Dec. 2, 2005.) S.H. moved to the Williams Trailer Park in

be anxious or afraid. The exam took place over four hours after the rape. (Tr. 133, Dec. 14, 2005.) By this time the victim had spoken to the police, and was with her mother and father.

At trial the treating nurse described the victim's demeanor during the exam as guarded, and tearful at times. (Tr. 19-20, Dec. 8, 2005.) Dr. Ledray testified that the nurse should have marked these things on the victim's chart. (Tr. 148, Dec. 14, 2005.) The defense also pointed to the lack of penile trauma as a sign of consent.

Dr. Ledray testified that, in the thirty years she had conducted these exams, she had never heard of a victim biting down on a rapist's penis. (Tr. 141, Dec. 14, 2005.) She attributed this to the victims vulnerable position during the act. (*Id.*)

⁴The procedure is statutory. *See* W. Va. Code § 62-3-3. *See also* W. Va. R. Crim. P. 24(b). Peremptory strikes are not a fundamental rights guaranteed by the United States Constitution. *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). Nor do they implicate the Sixth Amendment right to an unbiased jury. (*Id.*)

⁵Consistent with the Appellant's citations the Appellant's victims will be cited by their initials.

2002. (Tr. 10, Dec. 6, 2005.) Both she and her live-in boyfriend, Brett Albright, soon became friends with their neighbors Jeff and Shannon Bowling. (Tr. 25-26, 79-80, Dec. 6, 2005.)

On Friday, March 21, 2003, the Appellant arrived at the Bowling's trailer for a weekend visit.⁶ The Appellant and Mr. Bowling had been close friends in junior high and high school.⁷ (S. Bowling Evid. Dep. at 9, 15; J. Bowling Evid. Dep. at 6; Tr. 68, Dec. 13, 2005.) Mr. Bowling's younger sister was one the Appellant's best friends. (Tr. 163, Dec. 13, 2005.) This was not the first time the Appellant had stayed with the Bowlings. The year before he had stayed with them for a weekend. (*Id.*) Although she met him briefly that weekend, S.H. only knew the Appellant as Jeff and Shannon's friend.⁸ (Tr. 21, 82-83, Dec. 6, 2005.) In his statement to the investigating officers the Appellant claimed that "he would not know [S.H.] if he [saw] her." (Cowley Statement at 1.)

Early Saturday morning Brett Albright left for a birthday party.⁹ (Tr. 12, Dec. 2, 2005; Tr. 13, Dec. 6, 2005.) He didn't return until the following morning. (Tr. 98, Dec. 6, 2005.) S.H. and

⁶The Appellant claimed that he needed a change of scenery, and was tired of his friends calling and wanting to run around. (Tr. 162, Dec. 13, 2005.)

⁷Shannon Bowling called the Appellant and Jeff Bowling "best friends in high school." (S. Bowling Evid. Dep. at 10.)

⁸Although the evidence suggests that S.H. was close friends with Ms. Bowling at the time of the rape, they were not close when Ms. Bowling gave her evidentiary deposition. (Appellant's Brief at 6.) By that time, S. Bowling had moved to North Carolina, and had not seen S.H. for over a year. (S. Bowling Evid. Dep. at 14.) She had not seen the Appellant since the rape. (*Id.*)

According to S.H. the rape caused a rift in her relationship with the Bowlings: They did not part on good terms. (Tr. 81, 135-136, Dec. 6, 2005.) At her evidentiary deposition, Ms. Bowling testified that she did not believe the Appellant from the time she first heard about the rape. When she first heard about S.H.'s allegations against the Appellant, she called her "friend" S.H. a bitch. (S. Bowling Evid. Dep. Tr. at 34.)

her three-year old daughter, Hannah, did not go with him.¹⁰ At trial both S.H and Brett Albright repeatedly denied arguing or fighting over his decision to go to the party.¹¹ (Tr. 14, 94-95, 176, Dec. 6, 2005¹²; Tr. 38, 43, 45, Dec. 13, 2005.) Mr. Albright testified that S.H. did not go to social functions where alcohol was served because consumption caused her blood sugar to fluctuate.¹³ (Tr. 39, 45, Dec. 13, 2005.) Shannon Bowling claimed that S.H. came to her trailer at 10:00 Saturday night as mad as a “hornet” at her boyfriend. Yet the next day she saw S.H. “carrying on with him [Brett] just like normal¹⁴” (S. Bowling Evid. Dep. at 43.) On cross-examination S.H. testified that she had gone to the Bowling’s trailer at about 10:00. (Tr. 95, Dec. 6, 2005.) She could not remember why, but denied talking to them about her boyfriend’s absence. (*Id.*) The Appellant was not present.¹⁵

¹⁰During the 911 call, the dispatcher asked S.H. if her daughter had witnessed the rape. S.H. responded, “No she got up as he was leaving and” The dispatcher cut her off at that point. (Tr. 3, Mar. 23, 2003.) At trial S.H. testified that Hannah was awake and crying throughout the rape. (*Id.* at 2.) When she asked the Appellant if she could check on her, he refused. (Tr. 42, Dec. 6, 2005.)

¹¹Nor did S.H. demonstrate any hostility towards her boyfriend during the 911 call or in her statements to the police. S.H. did tell the 911 dispatcher that her boyfriend had never left her home alone before. (Tr. 56, Mar. 23, 2003.) She did not express anger or blame him for the rape

¹²Between pages 94-96 defense counsel managed to ask the same question four times without objection from the State. (Tr. 94-96, Dec. 6, 2005.)

¹³This testimony was un rebutted.

¹⁴The victim’s mother testified that S.H.’s behavior changed after this incident. She became more withdrawn, and unwilling to leave her parent’s home. (Tr. 65-66, Dec. 8, 2005.)

¹⁵Ms. Bowling testified that the Appellant left their trailer at about 5:00 or 6:00 that night. She did not see him again until the following morning. (S. Bowling Evid. Dep. at 19-20.)

The Appellant spent all-day Saturday getting high and wandering around. Early Saturday afternoon he and Jeff Bowling bought paint. (S. Bowling Evid. Dep. at 16; Tr. 75, Dec. 13, 2005.) During their ride home, Jeff and the Appellant huffed it. (Tr. 78, Dec. 13, 2005.) Once they got home, Jeff went to sleep and the Appellant “went walking” to huff more paint. (S. Bowling Evid. Dep. at 19; Tr. 78, Dec. 13, 2005.) Late Saturday evening S.H. heard a noise coming from outside her back window.¹⁶ (Tr. 17-18, Dec. 6, 2005.) She saw someone moving in the darkness, but could

¹⁶S.H. put her daughter to sleep between 8:00 and 9:00 p.m. (Tr. 17, Dec. 6, 2005.) S.H. recalled putting her in bed, but could not recall whether she was asleep or not. (*Id.*)

The Appellant claims that he began walking back to the Bowling’s trailer sometime between 8:00 and 9:00 p.m. (Tr. 82, Dec. 13, 2005.) The Bowling’s caller ID noted a call coming from the victim’s trailer at about 11:47 p.m. (S. Bowling Evid. Dep. at 20.) While walking back his shoe fell off. (*Id.*) S.H. demanded that the person behind the trailer identify himself. After discovering that he was Jeff and Shannon’s friend S.H. spoke with him for about 15 minutes. The Appellant described it as cordial. (Tr. 83, Dec. 13, 2005.)

At some point S.H. asked him to call the Bowlings and request some cigarettes. (Tr. 84-85, Dec. 13, 2005.) As stated above according to the Bowling’s caller I.D. the Appellant placed this call at 11:47 p.m. After returning with the cigarettes, the Appellant claimed that he stayed at S.H.’s trailer until midnight. (Tr. 91, Dec. 13, 2005.)

He does not claim that S.H. put the moves on him during their time together. When he left, he promised to come back later. (Tr. 92, Dec. 13, 2005.) S.H., not knowing when her boyfriend was coming home, did not encourage him. (Tr. 93, Dec. 13, 2005.) Indeed, Ms. Bowling testified that she overheard her husband telling the Appellant that S.H.’s boyfriend could come home at any time, and to be careful. (S. Bowling Evid. Dep. at 22-23.)

Twenty minutes after he returned to the Bowling’s trailer, he called S.H., asking for some additional cigarettes. He walked over to her house and found them on her front bannister. (Tr. 96, Dec. 13, 2005.)

Shannon Bowling testified that S.H. came to her trailer at about 10:00 p.m. According to the Appellant, he was either speaking with S.H. at her trailer at 10:00, or had come back to the Bowling’s trailer to pick up the cigarettes. (Tr. 82-86, Dec. 13, 2005.) Shannon claimed that she received a phone call from Jeff and S.H. at about 11:47 p.m. (S. Bowling Evid. Dep. at 20.) This call would have been after S.H. had visited her trailer at 10:00 p.m.

not make out who it was. (Tr. 18, Dec. 5, 2005.) S.H. asked this person to identify himself.¹⁷ (Tr. 83, Dec. 13, 2005.) When she did not get an answer she threatened to call the police. (Tr. 18-19, 90, Dec. 6, 2005.) This threat caused the Appellant to yell out from the darkness that he was looking for his shoe.¹⁸ (Tr. 83, Dec. 13, 2005.) To get a closer look, S.H. came to her back door. (Tr. 20, Dec. 6, 2005.) As she looked out she recognized the Appellant, calling him “Jeff’s friend.”¹⁹ (Tr. 21, Dec. 6, 2005.) After speaking with him through her back door, S.H. let the Appellant inside to call Jeff Bowling. (Tr. 20, Dec. 6, 2005; Tr. 83, Dec. 13, 2005.) She told him to ask Mr. Bowling if he had any extra cigarettes. If so, she asked the Appellant to pick them up and drop them off at her house. (Tr. 23, Dec. 6, 2005.) While using S.H.’s phone the Appellant remained in her back hallway. They did not talk. (*Id.* at 24.) S.H. testified that the entire visit lasted “maybe minutes.”²⁰ (*Id.* at 26.) The Appellant claimed he was there for about 15 minutes. (Tr. 83, Dec. 13, 2005.) S.H. would not have let the Appellant into her home if he were not friends with the Bowlings. (Appellant’s Brief at 6.)

Shannon Bowling testified that the Appellant called her house at about 11:47 p.m. (S. Bowling Evid. Dep. at 20.) The call originated from S.H.’s house. (*Id.*) Ms. Bowling handed the phone to her husband who briefly spoke with the Appellant when S.H.’s call-waiting clicked on. At

¹⁷During her 911 call, S.H. told the dispatcher that the Appellant had been prowling around, acting like he lost his shoe. (Tr. 4, March 23, 2003.)

¹⁸During trial the Appellant conceded that he had been huffing paint throughout the course of the day. (Tr. 78-82, Dec. 13, 2005.)

¹⁹She had seen the Appellant once before, walking from the trailer park with Jeff Bowling. (Tr. 21, Dec. 2, 2005.) She did not know his first name. (Tr. 23, Dec. 2, 2005.)

²⁰On cross-examination she estimated that he was in her home for about five minutes. (Tr. 89, Dec. 6, 2005.)

that point he handed the phone back to his wife, asking her to tell him when the Appellant came back to the phone. (*Id.* at 20-21.) Although she was only on the phone for “a brief minute” Ms. Bowling claimed that she heard S.H. talking and laughing with the Appellant. (*Id.* at 21-22.)

S.H. could not recall anything significant happening between the phone call and receipt of the cigarettes. (Tr. 26-27, Dec. 6, 2005.) Either the Appellant picked up the cigarettes from the Bowling’s trailer and brought them back to her, or she went to the Bowling’s trailer to pick them up at 10:00 p.m. (*Id.* at 26-27, 95.) She spent the rest of the evening alone with her daughter.²¹ (*Id.* at 27.)

Both Mr. and Mrs. Bowling claimed that the Appellant picked up the cigarettes at about 11:45 p.m., and went back to S.H.’s house where he stayed. He had not returned when they went to sleep at about 1:00 a.m. (J. Bowling Evid. Dep. at 39.) The Appellant claimed that he stayed at S.H.’s home until 12:00. When he returned, he found the Bowlings asleep.

Sometime after midnight, S.H. received a call from the Appellant, asking her to return some of the cigarettes Jeff Bowling had given her. (Tr. 98, Dec. 2, 2005; Tr. 29, 30-31, Dec. 6, 2005; Tr.

²¹The Appellant claims that, “Both parties agree that they smoked for a time and [the Appellant] retired to the Bowlings, leaving the pack of cigarettes for Sherry. (Appellant’s Brief at 7.) It is not clear from this quote who the “parties” are. The Appellee assumes the Appellant is referring to the Appellant and his friend Jeff Bowling. Nor is there any way for this Court to corroborate this statement because counsel has chosen to omit a citation to the record.

If one of these parties is S.H., the Appellant’s statement is not corroborated by the record. When originally asked how she got the cigarettes, S.H. could not recall. (Tr. 27, Dec. 6, 2005.) After getting the cigarettes, she sat at home watching T.V. (Tr. 27, Dec. 6, 2005.) S.H. testified that she might have gone to the Bowlings at 10:00 p.m. to retrieve Jeff Bowling’s cigarettes. (Tr. 95, Dec. 6, 2005. S.H. never claimed that she “smoked for a time” with the Appellant and denied that there were laughing when the Appellant called Jeff Bowling to ask for the cigarettes. (Tr. 88, Dec. 6, 2005.) Indeed there is no evidence that, after the initial call, she was ever alone with the Appellant until he forced his way into her home.

20, Dec. 8, 2005.) The call was noted on the victim's caller I.D. (Tr. 31, Dec. 6, 2005.) She told the Appellant that he could not come in, but that she would leave some extra cigarettes on her front bannister. (Tr. 176, Dec. 2, 2005; Tr. 31, Dec. 6, 2005; 911 Tr. 2, Mar. 23, 2003.) The Appellant does not deny that he found them where the victim said they would be. (Tr. 96, Dec. 13, 2005.) An investigating officer also found the cigarettes on the victim's front bannister. (Tr. 135, Dec. 2, 2005.)

Sometime after she left the cigarettes outside, S.H. heard the Appellant hollering her name. (Tr. 32-33, Dec. 6, 2005.) She testified that his voice was not overly loud, just loud enough for her to hear. (*Id.* at 33.) When S.H. opened her door just enough to poke her head out, the Appellant told her he wanted to talk. She stated that she couldn't because she had to get up early the next morning. (Tr. 34, Dec. 6, 2005.)

After she told him no, the Appellant forced his way into her house. (Tr. 92, Dec. 2, 2005; Tr. 20, Dec. 8, 2005.) While trying to push the door closed, S.H. told the Appellant to get the "fuck out of [her] house." (Tr. 34-35, Dec. 6, 2005.) Once he had overpowered her, she ran towards her daughter's room in the back of the trailer. (Tr. 35, Dec. 6, 2005.)

Before she reached her daughter's room the Appellant grabbed her, covering her mouth with one hand and placing the other hand under one of her breasts. (Tr. 99, Dec. 2, 2005; Tr. 35, Dec. 6, 2005.) After subduing her, the Appellant dragged her back to the mattress in her living room. (Tr. 36, Dec. 6, 2005.) She testified that she was scared, both for her own safety, and her daughter's

safety. (*Id.*) The Appellant was 5'11", and weighed 180 pounds.²² The victim was 5'9" and weighed 140 pounds. (R. at 238, 239.)

Once he pulled her to the mattress, the Appellant removed his pants, then pulled her pants off, and ordered her to suck his penis. (Tr. 101, Dec. 2, 2005; Tr. 40, Dec. 6, 2005.) This continued for approximately five minutes. (Tr. 41, Dec. 6, 2005.) She repeatedly told him that she was menstruating, and that she was a diabetic. When she asked to check on her daughter, the Appellant refused. (Tr. 42, Dec. 6, 2005.)

After he was finished he took his penis from her mouth, and told her he wanted to stick it inside of her vagina. She told him no. (Tr. 43, Dec. 6, 2005.) The Appellant pried her legs apart and forced his penis inside of her vagina. (Tr. 45, Dec. 6, 2005.) The Appellant's conduct worsened S.H.'s menstrual flow, leaving blood stains on the mattress, the sheets covering the mattress, and the crotch of the Appellant's pants.²³ (911 Tr. 2, Mar. 23, 2003; Tr. 62, Dec. 6, 2005.)

After he was finished, he pulled his penis, covered with the victim's menses, and ordered her to suck it again. (Tr. 47-48, Dec. 6, 2005.) The blood covering his penis made the victim gag. (*Id.*)

²²The Appellant also played high school football, and was invited as a walk-on at West Virginia State. Instead of accepting the invitation, he joined the Navy. (Tr. 56, 59, Dec. 13, 2005.)

²³The investigating officers recovered the bloody sheet and quilt, (Tr. 122, Dec. 2, 2005), along with several other items including the pants the Appellant was wearing at the time of the attack. (Tr. 138-39, Dec. 2, 2005.) The investigating officers submitted this evidence to the State Serology Lab, along with the materials taken from both the victim and the Appellant during their medical exams.

Lieutenant H.B. Myers of the State serology lab testified that he found the victim's blood on penile swabs taken from the Appellant. Seminal fluid on the crotch of the victim's pants was identified as belonging to Brett Albright. (Tr. 64, 73, Dec. 7, 2005.) Blood found on the Appellant's underwear was consistent with S.H. (Tr. 75, Dec. 7, 2005.)

After she could not stand it anymore she stopped and began to manually stimulate him. (Tr. 47-49, Dec. 6, 2005.)

After he had enough manual stimulation, the Appellant forced his penis back inside the victim's vagina. (Tr. 49-51, Dec. 6, 2005.) While raping her, he told her that he loved her, and that she was being unfaithful to her husband. (Tr. 50-51, Dec. 6, 2005; 911 Tr. 5, Mar. 23, 2003.) As he raped her, S.H. could smell paint coming from his hands. (Tr. 51, Dec. 6, 2005.)

While on top of her the second time, the Appellant told S.H. that he was sorry. (Tr. 52, Dec. 6, 2005.) Although she thought that would make him stop, it didn't. (*Id.*) After he was finished, the victim could not say whether he had ejaculated or not, he pulled up his pants. S.H. told him that she heard a car coming, which could be her boyfriend. On his way out the Appellant told her that if she ever mentioned this rape he would have one of his friends hurt her.²⁴ (Tr. 53, Dec. 6, 2005; 911 Tr. 1, 4, Mar. 23, 2003.)

The Appellant claimed that he picked up the cigarettes from the victim's front bannister. S.H. opened her front door and began talking to him about her boyfriend. During this conversation the Appellant leaned in and kissed her. (Tr. 98, Dec. 13, 2005.) Although she pulled away initially, telling the Appellant not to kiss her, she grabbed him by his shirt and pulled him inside. Once inside she undressed, and undressed him. (Tr. 99, Dec. 13, 2005.)

²⁴During her 911 call she requested that the police hurry because the Appellant was next door, and had said he would kill her. (Tr. 2, Mar. 23, 2003.) She also said that she *tried* to scream and bang on her windows, but that he had hit her in her mouth. (*Id.*)

Although the Appellant claims that his post-rape behavior was consistent with his innocence, it was also consistent with his intoxication, and his subjective belief that his threats would work.

At first, the Appellant could not maintain an erection. (Tr. 99, Dec. 13, 2005.) S.H. refused to fellate him, but used her hand to stimulate his penis. Afterwards they had sexual intercourse for about five minutes. (Tr. 100, Dec. 13, 2005.) S.H. stopped when she heard a car driving past. (*Id.*) After the car left they continued having sexual intercourse for another ten minutes. (Tr. 101, 12/13/05.) At some point the Petitioner ejaculated into S.H.'s hand. After this S.H. became angry, telling the Appellant that her boyfriend would be home any time. (Tr. 102, Dec. 13, 2005.) The Appellant left S.H.'s house, went back to the Bowling's trailer, huffed some more paint, and fell asleep. (Tr. 105, Dec. 13, 2005.)

Both sides agree that after the Appellant left, S.H. called her boyfriend's brother looking for her boyfriend. When he was of no help, she called her mother and her father. (Tr. 55, Dec. 6, 2005.) Her mother instructed her to call 911. (*Id.*)

At approximately 3:00 Sunday morning, Madison County 911 operator Johnnie Massey received S.H.'s 911 call. S.H. reported that she had been raped by a person visiting next door. A recorded copy of the call was played for the jury and entered into evidence. (Tr. 62-63, 66, Dec. 2, 2005.) She identified her attacker as "Charles Bowles." (911 Tr. at 1, Mar. 23, 2003.)

S.H. did not tell 911 the full extent of her injuries, only saying that she was bleeding from her vagina. (Tr. 70-71, Dec. 2, 2005.) She stated that the Appellant had hit her in the mouth, that she was not hurt, that there were no marks on her, and that she did not require an ambulance.²⁵ (Tr.

²⁵Once again, the Appellant claimed that S.H.'s behavior was not consistent with the typical rape victim. In fact the 911 dispatcher asked S.H. if she needed an ambulance to go to the hospital for the rape exam. S.H. responded that she had someone who could drive her there. (Tr. 3, Mar. 23, 2003.) The dispatcher did not say that the ambulance was medically necessary. (*Id.*)

When asked whether she could go to the hospital, S.H. said, "No, that is OK. I don't need to go to the hospital." At the time she did not know that she needed to submit to a rape examination.

71, 72, 73, 74, Dec. 2, 2005.) She also told the operator that he daughter did not witness the rape.²⁶
(Tr. 72, Dec. 2, 2005.)

Throughout the call S.H. repeatedly expressed her fear of the Appellant. She pleaded with the dispatcher to hurry (911 Tr. 1, 2, Mar. 23, 2003), told her that she was afraid to go outside, that she was afraid that he could hear everything she was saying on the phone (*Id.* at 3.), that she was afraid he would hurt her daughter²⁷ (*Id.*), that he had threatened to hurt her if she told anyone else (911 Tr. 6, Mar. 23, 2003.) The transcript also suggests that S.H. was overcome with emotion on several occasions. (*Id.* at 4, 5.)

Once she found this out, she had no objections.

²⁶The Appellant distorts the importance of this evidence. Any inconsistencies between the victim's 911 call, and her subsequent testimony were brought out at trial and rejected by the jury. A reasonable juror, indeed a reasonable person, might not expect a rape victim to recite the entire story of a recently traumatic experience. It should be noted that the 911 call was made a couple of minutes after the Appellant left S.H.'s trailer. (Tr. 1, Mar. 23, 2003.)

The primary issue in this case was consent. By trial, the Appellant had admitted that intercourse had taken place. There is no evidence that S.H. attempted to embellish her story as time went on, or to hide any relevant evidence. When asked, S.H. readily agreed to accompany the officers to Women's and Children's Hospital in order to undergo an examination. Pictures taken by one of the investigating officer's revealed bruising around her collarbone, and the backs of her arms. The jury saw these pictures and decided what they depicted. Although she did not agree to provide a urine sample, this was because she did not wish to have a catheter stuck inside her urethra shortly after she had been raped. Indeed, several witnesses testified that such a screen was not part of the rape examination protocol. (Tr. 24, Dec. 18, 2005.)

²⁷In fact, S.H.'s statement that her girl "got up as he was leaving" was meant to clarify the fact that her daughter did not witness the rape. After she said she was afraid that the Appellant would hurt her daughter, the dispatcher asked her if her daughter had witnessed the rape, not whether she had been awake during the rape. S.H. said that her daughter was in the back bedroom during the rape, and did not get up out of her crib until the Appellant left. (911 Tr. 3, Mar. 23, 2003; Tr. 130-31, Dec. 6, 2005.)

The first investigating officer, Deputy Jeremy Thompson, arrived at S.H.'s trailer at about 3:15 a.m. (Tr. 88, Dec. 2, 2005.) The first time he saw S.H. she was sitting in a chair crying and shaking. (Tr. 88, 89-90, 92, Dec. 2, 2005.) He noticed bruises on S.H.'s left collarbone, bruising on the back of her arms, and redness around her neck.²⁸ (Tr. 116, Dec. 2, 2005.) After interviewing S.H., for approximately two minutes, he walked to the Bowling's trailer and knocked on the door. (Tr. 171, Dec. 6, 2005.) The Appellant answered wearing a t-shirt, and a pair of blue shorts. (*Id.*) The officer also noticed traces of paint in the Appellant's moustache.²⁹ (Tr. 93, Dec. 2, 2005.)

Deputy Thompson told the Appellant he was investigating a crime which had occurred next door, but did not tell him what sort of crime. (Tr. 95, Dec. 2, 2005.) For the officer's protection he handcuffed the Appellant, placing him in the back seat of his locked cruiser. (*Id.*) The Appellant remained in Deputy Thompson's cruiser for approximately three hours. But, as early as 3:29 a.m. the Appellant first denied having sex with S.H. (Tr. 159, Dec. 14, 2005.) His formal statement was taken at approximately 6:00 a.m.

After putting the Appellant in his cruiser, Deputy Thompson went back to S.H.'s trailer to question her further. She recounted the same events she had told the 911 operator. (Tr. 97-99, Dec. 2, 2005.) She repeated this statement to another investigating officer that same evening, to the nurse at Women's and Children's Hospital, to the Bowlings the next day, and to the jury during the Appellant's trial. Apart from some minor discrepancies, her descriptions of the events of that evening were consistent.

²⁸These injuries were photographed by the investigating officers. These photos were admitted into evidence and submitted to the jury. (Tr. 117-20, Dec. 2, 2005.)

²⁹Deputy Thompson found a bag filled with paint near the front door of the Bowling's trailer. (Hr'g Tr. 112, 128, April 6, 2004.)

The same cannot be said for the Appellant. He chose to lie to the police at a time when he had no reason to. He repeatedly denied having sex with S.H., even after the investigating officers told him that S.H. had accused him of raping her. (Tr. 110-11, 128-29, 133, 194-95, Dec. 2, 2005.)

Upon Appellant's arrest he appeared before Boone County Magistrate Snodgrass who set his bond at \$80,000.00 surety. (R. at 15.) On April 8, 2003, the Appellant was released from custody after posting \$8,000.00. (R. at 23.)

On October 27, 2003, while on bail for the pending charges, the Appellant was arrested again. He was initially charged by criminal complaint with burglary. (R. at 50.) During the January 2004 term of court a Boone County Grand Jury returned an indictment charging the Appellant with one count of Burglary, one count of Attempted First Degree Sexual Assault, Malicious Assault, Assault During the Commission of or Attempt to Commit a Felony, and Battery. (Case No. 04-F-16.) (R. at 68.)³⁰

The Appellant's trial began on November 30, 2005. The jury returned its verdict on December 16, 2005.

III.

ARGUMENT

A. THE APPELLANT WITHDREW HIS MOTION FOR A MISTRIAL.

1. The Standard of Review.

A mistrial is an extraordinary remedy which should only be resorted to when there is an obvious failure of justice. The decision is left to the sound discretion of

³⁰It is the Appellant's position that the State included sexually related offenses in the indictment to ensure that evidence of this second offense would be introduced during the first trial under W. Va. R. Evid. 404(b). His claim lacks any evidentiary support and discounts the role of the Grand Jury who were free to indict the Appellant upon any charge supported by probable cause.

the trial court. *See State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983) (“A trial court is empowered to exercise this discretion only where there is a ‘manifest necessity’ for discharging the jury before it has rendered a verdict.”) (citations omitted). “The manifest necessity in a criminal case . . . may arise from various circumstances. Whatever the circumstances they must be forceful to meet the statutory prescription.” Syl. Pt. 2, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938).

2. After Consultation with His Present and Former Clients Appellant’s Counsel Withdrew His Motion for a Mistrial.

As Assignment of Error C is the only assignment accepted for review by the entire Court, the Appellee will respond to it first. The Appellant claims that the trial court should have declared a mistrial after defense attorney, Scott Brisco, revealed that he had represented the victim in an incorrigibility proceeding in 2001. (Tr. 22, Dec. 13, 2005.) The court appointed Mr. Brisco on May 1, 2003. (R. at 29.) At trial, Mr. Brisco claimed that he had notified the court about this alleged conflict sometime shortly after his appointment. (Tr. 8, 11, Dec. 13, 2005.) There is nothing in the record corroborating this claim.

The record does reflect that Mr. Brisco stood in the same courtroom with both his former and present clients, cross-examined his former client, and then moved for a mistrial because of his alleged ethical violations. At that point any potential conflicts with his former client were moot. There is no evidence that he used confidential information while cross-examining the victim or any other witness. Nor is there any evidence that he failed to vigorously cross-examine any witnesses because of his duty of loyalty to his former client.

In fact Mr. Brisco used this alleged conflict of interest as a sword. First, he used it to keep evidence from the jury; Then, in an attempt to pry a mistrial from the court he claimed his

representation violated the Rules of Professional Conduct. Mr. Brisco manipulated his situation, and sandbagged the trial court. He was only conflicted when it suited him to be conflicted.

Mr. Brisco first raises this issue during the State's redirect of the victim's mother. Counsel for the State sought to question her about her daughter's education. (Tr. 164-65, Dec.7, 2005.) Mr. Brisco objected:

MR. BRISCO: Here's the problem, is once you go down that road, I was [S.H.'s] juvenile defense lawyer, and I'm specifically aware of stuff that was happening to [S.H.] at that time that I want to bring out that you're putting me in an awkward spot, because I was her lawyer.

MR. BAZZLE: I want to bring out that she completed the tenth grade.

THE COURT: It's outside the scope of cross . I don't think you can ask her, so you can't.

MR. BRISCO: I move to be withdrawn as counsel immediately. I'll put that one the record. I was her juvenile counsel, and that was denied.

THE COURT: I didn't deny that. You're in. Lets go.

(Tr. 165-66, Dec. 7, 2005.)

Defense counsel raised the issue again two days before the end of trial. (Tr. 4-16, Dec. 13, 2005.) He claimed he was in violation of Rule 1.9(a) of the Rules of Professional Conduct.³¹ (Tr. 4, Dec. 13, 2005.)

³¹RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

A lawyer who has formally represented a client in a matter shall not thereafter;

(a) represent another person in the same or substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client consents after consultation;

The trial court responded:

THE COURT: At this stage, it seems to me like if [S.H.] knowingly consent to this representation, it seems like – even though it wasn't done before, it might be better to do it now, because [S.H.] knows everything that – I don't guess she's going to be called back by anybody, maybe she would be.

I think that would unring any bells that have been rung, and if she would say its okay, then I would say I could probably rule that you could go ahead and represent him.

(Tr. 14-15, Dec. 13, 2005.)

Mr. Brisco spoke to [S.H.] off the record. Upon his return he told the court:

Your Honor, I had time to meet with [S.H.], just the two of us, we discussed my prior representation. She says that she does recall me representing her. She says she does recall me having her sent to Florence Crittenton, and she does remember that.

I explained to her the situation. I explained to her Rule 1.9, and I really couldn't proceed without her permission. We have a document here that she did sign and date December 13, 2005, "I, [S.H.], have consulted with my former attorney, L. Scott Brisco, regarding his representation of Charles Cowley in Boon County Circuit Court, Case No. 03-F-57.

"Mr. Brisco has explained to me Rule 1.9 of the West Virginia Rules of Professional Conduct, and that I must consent to his representation of Mr. Cowley. I understand that I have the right to refuse to give my consent; however, after consulting with Mr. Brisco, I have freely, voluntarily and intelligently consented to his representation of Mr. Cowley.

I further state that at this time I am not under the influence of any mind - or mood-altering substances that would impair my ability to make this decision.

Signed [S.H.] in her handwriting and also dated in her handwriting, 12/13/05."

As soon as I walked in, she said, "I remember it, and you got me sent to Florence Crittenton."

(Tr. 21-22, Dec. 13, 2005.)

The Appellant claims that the trial court “directed” Mr. Brisco to speak with his former client. The record demonstrates that Mr. Brisco voluntarily spoke to S.H who knowingly and voluntarily agreed to waive any potential conflicts. (Tr. 14-15, 21-23, Dec. 13, 2005.) Counsel for the State added:

MR. BAZZLE: I’ll just put on the record Judge, because Mr. Brisco inquired about what I said to her or gave any advice. I did not. I told her this was all about her, I didn’t know if she didn’t give this consent what would happen with this trial, It’s possible we would have to try it again, but that’s something we were willing and able to do.

It was a decision for her to make. It was all about her. I think I told her two or three times that it was totally her decision, and she understood that and was willing to meet with Mr. Brisco in private. . . .

THE COURT: Well, I think that this – *are you withdrawing your motion* [for a mistrial] in lieu of all of this?

MR. BRISCO: *Yes, Your Honor.*

MR. HATFIELD: And, Judge, I think it important too that Mr. Cowley, he has some rights here also, and I don’t think it’s a problem with you, Charles, is it a problem Scott’s prior representation of Sherry Holton?

THE DEFENDANT: *No.*

(Tr. 22-23, Dec. 13, 2005; emphasis added.)

As there is no evidence that Mr. Brisco had, up to that point, used any confidential information obtained during his representation of the victim, or failed to vigorously represent the Appellant up to that point, the timing of the consent was irrelevant. Such consent satisfies the plain language of West Virginia Rules of Professional Conduct, Rule 1.9(a), along with the Appellant’s

constitutional right to the counsel of his choice. See *Wheat v. United States*, 486 U.S. 153, 159 (1988).

This matter brings to mind a principle announced by Justice Cleckley in *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996):

There is also an equally salutary justification for the raise or waive rule: It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result). In the end the contemporaneous objection requirement serves an important purpose in promoting the balanced and orderly function of our adversarial system of justice.

See also Syl .pt. 8, *State v. Miller*, 459 S.E.2d 114, 118 (1995) (“Where there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error, and the inquiry as to the effect of a deviation from the rule of law need not be determined.”)

3. **The Matters Were Not Substantially Related, and There Was No Danger That Defense Counsel Would Use Confidential Information Against His Former Client.**

Even the Appellant admits, “[D]efense 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.” (Appellant’s Brief at 20; emphasis added.)

These potentialities, argues the Appellant, were enough. Taken to its logical extreme, most attorneys would be prohibited from representing clients in wholly unrelated matters if their former client’s interests are adverse to their present client’s. The mere appearance of impropriety would be enough. Rule 1.9(a) is not as broad as the Appellant would have this Court believe.

In a case involving Rule 1.9(a), a court could potentially make a finding, based purely on the *substantial relatedness* of the two matters, that an attorney had knowledge of material and confidential information without knowing precisely what that information is. A court could certainly make a finding, *based purely on the*

relatedness of the two matters, that real harm to the integrity of the judicial system is likely to result if the attorney is not disqualified.

Accounting Principal's Inc. v. Manpower, Inc., No. 07-CV-636-TCL-PJC, 2008 WL 2221772, *6 (N.D. Okla. May 23, 2008).

There must be a showing of *substantial relatedness*, not simply an appearance of impropriety. Matters are substantially related when they involve the same transaction or legal dispute, or if there otherwise is a substantial risk that confidential factual information as would normally be obtained in the prior representation would materially advance the client's position in the subsequent matter. *Accounting Principal's*, 2008 WL 2221772 at * 7 (citations omitted).

The Appellant has not presented a scrap of evidence suggesting that there was a *substantial risk* that defense counsel could use confidential factual information against his former client. Clearly Mr. Brisco didn't think so: he did not raise the issue until after he had cross-examined the victim.

There was no factual overlap, or similarities between the claims advanced at Appellant's trial, and the elements of S.H.'s incorrigibility proceeding. The records of S.H.'s juvenile proceeding were sealed by statute. W. Va. Code § 49-7-1; § 49-5-17. S.H.'s adjudication, if there was one, was not a criminal conviction, nor did it demonstrate any sort of bias against the Appellant.

The Appellant cites this Court to *Lawyer Disciplinary Board v. Printz*, 192 W. Va. 404, 452 S.E.2d 720 (1994), *State ex. rel. Keenan v. Hatcher*, 210 W. Va. 307, 557 S.E.2d 361 (2001), and *State ex. rel. McClanahan v. Hamilton*, 189 W. Va. 290, 430 S.E.2d 569 (1993). None of these cases are dispositive.

Printz focused on whether counsel's prior representation of one party was so closely related to the issues involved in his representation of another party as to violate Rule 1.9(a). The trial had

not started, nor was anyone using this alleged violation as grounds for a mistrial. The Office of Disciplinary Counsel argued that the underlying facts of counsel's prior representation--a divorce proceeding where he represented the wife - triggered his present representation--a partition action in which he represented the husband. *Printz*, 192 W. Va. at 408, 452 S.E.2d at 724.

This Court rejected this tenuous connection:

Rule 1.9 is very concise and unambiguous. A determination of violation is not based upon prejudice to any party, upon the effects of the attorney to avoid unethical representation, upon the timely action of the State Bar, or upon simple appearance of impropriety. Instead, the rule unequivocally states that if the two representations involve the same or substantially related matter, and the interests of the clients are materially adverse, an ethical violation will occur, absent former client consent following consultation.

Printz, 192 W. Va. at 408, 452 S.E.2d at 724.

The Appellant also relies upon this Court's decision in *State ex rel. McClanahan v. Hamilton*, *supra*. However, the factual circumstances and legal issues involved in *McClanahan* were significantly different than those presented here.

Angela McClanahan was indicted by a Pendleton County grand jury for the malicious assault of her husband, Steven McClanahan. The Prosecuting Attorney, Jerry Moore, undertook the prosecution of the case, but Mrs. McClanahan filed a motion to disqualify him because of a conflict of interest. She stated that she had retained Mr. Moore to represent her in a divorce proceeding, which was subsequently dismissed due to the couple's reconciliation. Mrs. McClanahan alleged that during the course of the divorce representation, she revealed confidential information to Mr. Moore regarding her husband's abusive conduct. She argued that the prior representation by Mr. Moore would adversely affect her ability to argue self-defense and "battered wife syndrome" defenses. Mr.

Moore argued that he should not be disqualified, and the Circuit Court of Pendleton County agreed following a hearing on the issue. However, this Court disagreed and granted a writ of prohibition to Mrs. McClanahan.

The Court, in a well-reasoned opinion, relied in part on its decision in *Nicholas v. Sammons*, 178 W. Va. 631, 363 S.E.2d 516 (1987), which held, in Syllabus Point 1:

Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.

The present case does not fit into either of these categories. However, the Court in *McClanahan* expanded the *Nicholas* decision because of the adoption of Rule 1.9 of the Rules of Professional Conduct. In order to disqualify a prosecuting attorney due to a prior representation of a criminal defendant, a court must engage in a two-part analysis. The first prong of this analysis is the substantial relationship test, which requires the court to compare the facts, circumstances and legal issues of the two representations and determine whether they are related in some substantial way. *McClanahan*, 189 W. Va. at 293, 430 S.E.2d at 572. The next prong of the analysis is to determine 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. *Id.* at 294, 430 S.E.2d at 573.

As stated above, there is simply no evidence before this Court that Mr. Brisco's prior representation of the victim by Mr. Brisco was substantially related to the issues presented at the Appellant's rape trial.

Should this Court nevertheless find that these matters are substantially related, the *McClanahan* inquiry does not end there. The Court must then consider whether Mr. Brisco's loyalty to the victim might harm the Appellant or whether zealous representation of the Appellant would induce Mr. Brisco to use confidential information that could adversely affect the victim.

It must be remembered that defense counsel did not ask to be removed; he asked for a mistrial. Absent concrete evidence suggesting that he was prevented from zealously representing his present client without hurting his former client, such drastic action was not justified.

4. The Appellant Failed to Prove an Actual Conflict of Interest.

Although the Appellant claims that counsel operated under a potential conflict of interest, he has never proven that an actual conflict of interest existed. An actual conflict of interest exists when defendant's counsel, "could not effectively cross-examine his former client . . . now an important prosecution witness without intruding into matters protected by the attorney-client privilege." *United States v. Dolin*, 570 F.2d 1177, 1184 (3d Cir. 1978).

The Appellant has fallen far short of his burden of proof. Indeed, Mr. Brisco's own conduct belies Appellant's claim. Obviously, he saw no need to raise the issue with the trial court before cross-examining his former client. Additionally, Appellant's co-counsel, Mr. Hatfield, loyalties were not actually or potentially divided. See *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991) (co-counsel not suffering from conflict of interest one factor court should consider when deciding whether defendant received effective assistance of counsel).

B. THE APPELLANT RECEIVED A FAIR TRIAL BEFORE AN UNBIASED JURY.

1. The Standard of Review.

This Court reviews the trial court's decision on striking a juror for cause under an abuse of discretion standard. *See State v. Mills*, 221 W. Va. 283, 285, 654 S.E.2d 605, 607 (2007); *State v. Wade*, 200 W. Va. 637, 490 S.E.2d 724, 741 (1997).

2. The Appellant Waived Any Potential Objections to Jurors Seebok and Ball.

Not only did counsel accept these jurors for the panel, he did not strike them peremptorily. Notwithstanding Appellant's waiver of this issue below, he claims that this Court should address it under a plain error standard of review.

In an attempt to maintain this assignment of error, the Appellant attempts to pin the results of his contemporaneous, tactical decisions on the trial court. "The lower court never revisited the issue, perhaps in the hast 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." (Appellant's Brief at 31.) The record demonstrates the opposite.

After examining Juror Seebok individually, counsel for the defense stated that he needed to speak with his client and *may* have a motion for cause. (Tr. 144, Nov. 30, 2005.) Counsel also questioned Juror Ball, both before the panel and individually. (Tr. 31-35, 97-101, Nov. 30, 2005.) Later that day the trial court judge told defense counsel that, if it had any strikes for cause, he should exercise them now. (Tr. 169, Nov. 30, 2005.) Counsel then requested, and was granted, a private conference with his client. He advised the court that *he had no challenges for cause*. (Tr. 169-70, Nov. 30, 2005.) Counsel's decision was tactical, made after consultation with his client.

The trial court did not force the Appellant to use his peremptory strikes to remove jurors Seebok and Ball, Indeed, their presence did not cost the Appellant a single strike. (R. at 451.) The Appellant received a panel free from exception. *See State v. Mills*, 211 W. Va. at, 537, 566 S.E.2d at 896 (“Nevertheless, W. Va. Code § 62-3-3 requires a panel of twenty jurors free from exception. This Court has previously found, *If proper objection is raised at the time of the impaneling of the jury*, it is reversible error for the court to fail to discharge a juror who is *obviously objectionable*.”). The Appellant has proven neither.

The Appellant skirts this issue by claiming that it was the trial court’s obligation to strike these two jurors, without motion by defense or prosecutor. Whether to strike a juror is a tactical decision. The Appellant urges this Court to adopt a standard which requires the trial court to interfere with these decisions. Given the tactical nature of the decision, and the many factors counsel may find relevant, such a gross interference in counsel’s duties would be unwise.

“Neither the case law nor the rules of criminal procedure impose on the district court a duty to strike prospective jurors *sua sponte*. ” *State v. Gillespie*, 710 N.W.2d 289, 296 (Minn. App. 2006). *See also State v. Knotts*, 187 W. Va. 795, 805, 421 S.E.2d 917, 927 (1992); *Pearce v. State*, 513 S.W.2d 539, 541 (Tex. Crim. App. 1974) (absent motion trial court should not strike juror *sua sponte*); *State v. Ebeirus*, 184 S.W.3d 582 (Mo. 2006) (“Missouri courts have consistently held that a trial court is under no duty to remove an *venire* member *sua sponte*.”).

This Court has never reversed a jury verdict because the trial court did not, *sua sponte*, strike a juror for cause. This can only be because the contemporaneous objection rule applies to decisions affecting the jury panel. “[Such a policy] serves to minimize the incentive to sandbag in the hope

of an acquittal, and if unsuccessful mount a post-conviction attack on the jury selection process.”
State v. Hadley, 815 S.W.2d 422, 423 (Mo. 1991).

By accepting the panel as constituted, after consultation with counsel, the Appellant knowingly and intelligently waived any objections he may have had. Syl. Pt. 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). As there has been no error, there can be no plain error.

3. **Based upon the Totality of the Circumstances, Juror T. Was Qualified.**

In Syl. Pt. 3, *O’Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002), this Court held:

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 and to resolve any doubts in favor of excusing the juror.

During individual *voir dire* Juror T. testified that she had been sexually abused as a child. (Tr. 93, Nov. 30, 2005.) When defense counsel asked her whether her prior experience would cause her to credit the victim’s testimony over the defendant’s she replied:

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 of 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.

Q: Will you explain to me – if you think – I need to know for sure, you know, by the fact that you had something happen to you when you were a child, would that make you want to give any preference, or would that make you any more biased towards [S.H.], the complaining witness.

A: No.

Q: You won’t want to believe her testimony any more than anyone else’s?

A: There's two sides to every story; you know what I mean? It's just hard going through it all again; you know what I mean?

Q: Was there ever any criminal charges brought out against the person that did that to you?

A: Yes.

Q: What was the result of that?

A: Just a small sentence, and that was it.

Q: Was it a family member that did it to you?

A: Yes.

Q: And you were a small child?

A: Yes.

Q: And was the family member significantly older?

A: Yes.

MR. HATFIELD: Scott, was there anything else you wanted to ask her?

MR. BRISCO: No questions.

THE COURT: Mr. Hall?

MR. HALL: No, No. I have no questions.

THE COURT: Can you do it?

MS. TREADWAY: I'll try.

MR. HALL: I think she said she could.

(Tr. 93-95, Nov. 30, 2005.)

Defense counsel moved to strike Juror Treadway for cause. (*Id.* at 95.) The State objected.

Id. at 95-96.) Defense counsel focused in on Juror Treadway's assertion that her service might cause

her to flashback to her previous experience. (*Id.* at 96.) Without comment or explanation, the trial court denied the Appellant's motion. (*Id.*)

This is not a case of explicit bias. Juror Treadway told defense counsel that she could remain impartial. (Tr. 94, Nov. 30, 2005.) Nor did her history render her disqualified *per se*. See *State v. Beck*, 167 W. Va. 830, 836, 286 S.E.2d 234, 240 (1981); *State v. Mundy*, 650 N.E.2d 502 (Ohio Ct. App. 1994) (prior victims of sexual abuse not disqualified as jurors in gross sexual imposition trial); *People v. Schmidt*, 885 P.2d 312, 314 (Colo. App. 1994) (trial court did not abuse its discretion in denying defense motion to strike for cause potential juror who had been victim of sexual assault 40 years earlier, "Even if a potential juror expresses some prejudice other than bias against the accused, a disqualification for cause is not necessary if the trial court is reasonably satisfied that he or she is willing to be fair and to follow instructions.").

Appellant claims that Juror T. statement that she would "try" to be impartial, and that she "thought" she could do it, demonstrated disqualifying bias. (Appellant's Brief at 20-21.) Taken within the context of *voir dire* Juror T.'s statements were far from conclusive. "If a prospective juror makes a 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*, *supra*. Indeed, it was defense counsel who followed up on her answer, not the trial court. (Tr. 93-94, Nov. 30, 2005.) Thus, there was no rehabilitation. Upon subsequent questioning Juror T. said that she could listen to the evidence without bias.

C. THE TRIAL COURT'S DECISION TO ADMIT EVIDENCE OF A SUBSEQUENT ATTACK WAS NOT AN ABUSE OF DISCRETION.

1. The Standard of Review.

The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) 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 legitimate purposes. 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. LaRock, 196 W. Va. 294, 310, 470 S.E.2d 613, 629-630 (1996).

2. The Trial Court's Determination That the Evidence Was Admissible Was Reasonable.

The Appellant next objects to the trial court's decision admitting evidence that the Appellant attacked another woman, M.H., while out on bond for the present charge. Appellant claims that the State's only purpose in introducing this evidence was to establish Appellant's "lustful disposition" towards adult women.

This argument is nothing but a straw-man, set up by the Appellant to be knocked down by him. The State's reasons for offering this evidence are clearly set-forth on the record. There is no mention of the Appellant's "lustful disposition." (Tr. 88, Dec. 8, 2005.)

MR. BAZZLE: The reason we have announced, and we've argued before, is that it is to be used to show a common plan, the *modus operandi*, if you will, of the crime.

(Tr. 74-78, Dec. 8, 2005.)

Later the court asked the State whether the Appellant's raped M.H.:

THE COURT: Was [M.H.] raped?

MR. BAZZLE: She was not. She fought off the defendant. Her testimony was that he was on top of her, he ripped, grabbed or pulled at her shirt, that he was strangling her, that she got to the point of almost unconsciousness, and again, we have the common presence of a small child. . . .

(Tr. 79-80, Dec. 8, 2005.)

This Court has ruled that evidence of a similar method may be admissible under 404(b). “‘Modus operandi.’ in that in addition to the similarity of the offered rides and secluded locations where the assaults took place within a discreet proximity of time, the defendant used force to sexually assault each of the victims, apologized to each thereafter and then offered rides from the scenes of his crime.³²” *State ex. rel. Caton v. Sanders*, 215 W. Va. 755, 762-763, 601 S.E.2d 75, 82-83 (2004).

The Court accepted the State’s position:

Motive is closely aligned to intent, and this evidence demonstrates the defendant’s impulse or desire to engage in sexual acts with defenseless young women. The evidence also belies the defendant’s assertion at to at least one victim, that the sex was consensual, or accidental or the product of a mistake. . .

Id.

In his concurrence, Justice Starcher stated:

Thus, in a sexual abuse case, if a defendant admits to touching a person intimately but denies any criminal or sexual intent - where such intent is an element of the crime - other instances of sexual touching *may* be admissible to refute the defendant’s protestations of no illicit motive. However, in a sexual abuse case, the mere fact that the prosecution had the general burden of proof in a criminal case does not itself open the door to any available 404(b) evidence on every element of the crime.

Caton, 215 W. Va. at 764, 601 S.E.2d at 84 (Starcher, J., concurring).

³²In fact, under *Caton* this evidence was relevant to several other issues including opportunity, intent, motive, lack of accident or mistake.

As in the S.H. case, the Appellant denied any wrongdoing or criminal intent in the M.H. case: Because of the stress associated with the S.H. case the Appellant admitted that he huffed paint as often as he could.³³ (Tr. 124, 130, Dec. 13, 2005.) The night of October 27, the Appellant stayed at trailer next-door to M.H.'s. (*Id.* at 126-27.) Earlier that evening M.H. told the Appellant that her boyfriend was out hunting, and that she was alone with her children. (*Id.* at 125-26.) The Appellant arrived at the trailer next-door sometime after dark. (*Id.* at 127.) He began huffing paint soon thereafter. (*Id.*)

Since the trailer had no electric lights, the Appellant allegedly lost the bag he was using to huff paint. (*Id.* at 128-29.) At 2:00 a.m. he went to M.H.'s home allegedly looking for a new bag. (*Id.* at 129, 147.) M.H. agreed to get him a bag, and an extra blanket. (*Id.*) She told the Appellant that he could not come in because her boyfriend was not present. (*Id.* at 130.)

While M.H. was retrieving the goods, the Appellant allegedly blacked out. (*Id.* at 131.) He awoke to find somebody shaking him, stating "Charles don't do this." (*Id.*) The Appellant, not knowing where he was, or what was going on, began swinging his fists in the direction of the noise. After several swings he recalled falling onto the floor with someone. (*Id.*) At that point, M.H. began hitting him back out of fear for her own safety and the safety of her five-year old son. (Tr. 132-33, Dec. 13, 2005.) Even the Appellant conceded that her conduct was reasonable. (*Id.* at 133.) The Appellant denied that his actions were sexually motivated. (*Id.* at 134.)

During the Appellant's November 3, 2003, preliminary hearing Deputy Eric McClung testified that he was dispatched to M.H.'s house upon receipt of a 911 call. (Tr. 7-8, Dec. 13, 2005.)

³³The Appellant was aware of the effects of huffing paint such as poor impulse control, and impaired judgment. (Tr. 149-49 Dec. 13, 2005.)

Upon his arrival Deputy McClung took a statement from M.H. in which she alleged that the Appellant had entered her house and attacked her. M.H. had some abrasions on her face and legs, and red marks around her neck consistent with choking. (*Id.* at 9, 16.) M.H. told him that the Appellant had come to her trailer searching for bread for a sandwich. When she returned from the kitchen the Appellant was passed out on her front doorway. She began to call his name. After the third time, he stood up and attacked her. (Tr. 10, Dec. 13, 2003.) When her five-year old son ran to his mother the Appellant hit him in the face and tried to choke him. Deputy McClung observed a cut above one of her son's eyes. (Tr. 11, Nov. 13, 2003.) M.H. identified the Appellant as the one who attacked her and her son. (*Id.* at 17.)

Before Deputy McClung arrived, the Appellant left the scene, calling his father. (Tr. 18, Dec. 13, 2003.) As he was leaving the scene Deputy McClung received a phone call from the Appellant's father, telling him that he could pick up the Appellant at his house. (*Id.* at 19.) The Appellant was later arrested and taken to jail.

On his decision to charge the Appellant with burglary, Deputy McClung testified:

A: [The] Appellant entered the residence to commit a crime, was my basis for charging burglary.

Q: The crime being that assault on the –

A: The assault on the victim and her son.

(Preliminary Hr'g Tr. 21, Dec. 13, 2003.)

At trial, M.H. testified that the Appellant called her home during the early evening hours of October 26, 2003, looking for her fiancée C.H. (Tr. 98-99, Dec. 8, 2005.) M.H. told him that her fiancée had gone hunting. (*Id.* at 99.)

M.H., her son, and her fifteen month old daughter went to bed at 1:00 the following morning. (Tr. 101, Dec. 8, 2005.) M.H. later heard some banging coming from outside of her trailer. Because she couldn't see anybody she cracked her front door open to get a better view. The Appellant pushed the door open and forced his way inside. (*Id.*)

Once inside he asked M.H. for a piece of bread. M.H. got him something to eat, but told him he could not stay because she was home alone. (*Id.* at 102.) While she was fetching a loaf of bread and a blanket, the Appellant sat on her floor. (*Id.*) S.H. told him to leave three times. After the third time, the Appellant jumped up and hit her with his fist. (*Id.* at 103.) M.H. recalled the Appellant knocking her from one room to another, ripping her shirt, then lying on top of her with his hands around her neck. (Preliminary Hr'g Tr. 47, Dec. 13, 2003; Tr. 103, Dec. 8, 2005.) The Appellant used his feet to pry her legs apart. (Tr. 104, Dec. 8, 2005.)

As the struggle continued M.H. managed to get up on her feet. (*Id.*) The Appellant was behind her with his arm around her throat. (*Id.*) When she managed to push him away, he landed near her son. The Appellant tripped her son as he tried to run away; then hit the child and choked him. (*Id.* at 105.)

After seeing this attack, S.H. got on top of the Appellant and began punching him with her fists. (*Id.*) She was wearing her father's ring on one of her fingers. (*Id.*) She continued to hit him until he let her son go. (*Id.* at 106.) She told the Appellant to leave the trailer, and shut the door behind him. After he left, the Appellant beat on her door and her windows, causing her to hide both her son and daughter. (*Id.* at 107.)

The Appellant called S.H.'s house twice after the incident. The first time he apologized for his conduct. The second time, he call he asked her why she had attacked him.³⁴ (*Id.* at 108.)

After M.H.'s testimony, the trial court instructed the jury:

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 a method of operation of the defendant. It must not be considered by you for any other purpose. Specifically, you may not consider it as establishing that the defendant was a person of bad character, and that he acted in conformity with that bad character, and therefore he forcibly raped or attempted to rape the victim named in this indictment. It is only the so-called common plan, which means the method of operation of the defendant.

(*Id.* at 109-10.)

Appellant's counsel asked S.H. five questions on cross-examination. (*Id.* at 110-11.) None involved the nature of her allegations, or any alleged inconsistencies between her trial testimony and preliminary hearing testimony.

The Appellant states that he reviewed all of the documentation, including the arrest report, the 911 tape, and the preliminary hearing transcript. He claims that none of these documents support a finding of attempted rape. The county prosecutor decided to charge the Appellant with additional offenses including Attempted First Degree Sexual Assault. The Sate presented supporting evidence to the Grand Jury which returned a true bill of indictment against the Appellant. (R. at 98-102.) Appellant does not claim that he reviewed, or even requested, the Grand Jury Minutes, nor are these minutes part of the record.

³⁴M.H. was 5'5" and weighed 130 pounds. (Tr. 108-09, Dec. 8, 2005.) She was 26 on the day of the attack.

A county prosecutor's charging decisions are subject to the prosecutor's broad discretion. *Wayte v. United States*, 470 U.S. 598, 607 (1985). "So long as the prosecutor has probable cause to believe that the accused committed an offense, the decision whether or not to prosecute, *and what charge to file or bring before a grand jury*, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). There is no evidence that the prosecutor's decision to present additional charges to the Grand Jury was anything but a sound exercise in prosecutorial discretion. In the future, the Appellant should not level such charges unless there is evidence to support them. He would rightfully accept nothing else from the State.

The Appellant also claims that both Deputy McClung and M.H. explicitly denied the existence of any sexual component to the Appellant's behavior. The record does not bear this out. Since Deputy McClung initially charged the Appellant with burglary the only relevant areas of inquiry centered on the burglary charge.³⁵ Whether the Appellant intended to rape M.H. was not at issue at that point.

Appellant also argues that the trial court applied the common plan exception too broadly. (Appellant's Brief at 36.) Several courts, both State and Federal, have admitted extrinsic evidence of prior, or subsequent, bad acts, as evidence of a common scheme or plan, or to prove a common method of operation. *See State v. McDaniel*, 211 W. Va. 9, 13, 560 S.E.2d 484, 488 (2001); *People*

³⁵The Appellant also claims that the trial court abused its discretion by denying his request to call Deputy McClung. He speculates that the officer would have testified that the Appellant's conduct was not sexually motivated. The trial court found that the Appellant, who waited until the middle of trial to attempt to subpoena the Deputy, forfeited his right to call him as a witness.

This Court has held that it is obliged to reverse when the refusal to admit evidence places the fundamental fairness of the entire trial in doubt. *State v. Blake*, 197 W. Va. 700, 709, 478 S.E.2d 550, 559 (1996). Despite the trial court's decision, the Appellant was free to cross examine M.H., as well as his client.

v. Rath, 44 P.3d 1033 (Colo. 2002); *United States v. Smith*, 103 F.3d 600, 603 (7th Cir. 1996) (*modus operandi* evidence must bear a singular strong resemblance to the pattern of the offense charged.); *United States v. Carroll*, 207 F.3d 465, 469 (8th Cir. 2000) (“In sum, in order to admit Rule 404(b) identity evidence, the District Court must make a threshold determination that, based solely on the evidence comparing the past acts and the charged offense, a reasonable juror could conclude that the same person committed both crimes.”); *State v. McGinnis*, 193 W. Va. 147, 155-156, 455 S.E.2d 516, 524-525 (1994).

The use of evidence of a common method is not limited to the issue of identity. *See State ex. rel. Caton v. Sanders*, 215 W. Va. 755, 601 S.E.2d 75 (2004); *United States v. Ruiz*, 178 F.3d 877, 880 (7th Cir. 1999)(common method evidence used to establish intent and knowledge); *United States v. Sliker*, 751 F.2d 477, 486-487 (2d Cir. 1984) (although objective of two schemes was different, evidence was sufficiently idiosyncratic to permit a fair inference of common pattern).

“Indeed, Rule 404(b) is an inclusive rule in which all relevant evidence involving other crimes or acts is admitted at trial unless the sole purpose for the admission is to show criminal disposition.” *Caton*, 601 W. Va. at 761, 601 S.E.2d at 81 (quotations omitted).

The lynchpin is logical relevance. “Under the inclusionary approach. . . evidence of other crimes is admissible under Fed.R.Evid. 404(b) and 403 if it is relevant to any issue at trial other than the defendant’s character, and its probative value is not substantially outweighed by the risk of unfair prejudice.” *Huddleston v. United States*, 485 U.S. 681, 687-688 (1988).

In the case at bar, the Appellant claimed that S.H. allowed him to enter her house during the early morning hours and consented to intercourse. The victim testified that the Appellant forced his

way into her home and raped her. One need only review M.H.'s trial testimony to see the striking similarities between the Appellant's attack on M.H. and his attack on S.H.

In the M.H. case, the Appellant also knew that the victim was home alone with her children. Again, he appeared at her home in the early morning hours, using artifice to gain entry. He ignored M.H.'s request that he stay out of her house. He came into her house, sat down, and allegedly blacked out. When she tried to rouse him, he attacked her, getting her down on the ground and placing his hands around her throat. He then tried to pry her legs apart. M.H. testified that she smelled that strong odor of either paint or gasoline. The Appellant admitted that he had been huffing paint that evening, something he had done immediately before raping S.H. Unlike S.H., M.H. was able to defend both herself and her children.

The trial court found, by a preponderance of the evidence, that a reasonable juror could find that the Appellant employed a similar method in both cases. Nor was this evidence more prejudicial than probative. *See* W. Va. R. Evid. 403 (relevant evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice). This State's 404(b) evidence demonstrated that, on two occasions, the Appellant, knowing his victims were alone, waited until the middle of the night, ignored both victim's requests to stay outside, entered their homes without their consent, and brutally attacked them. It also demonstrated that the Appellant is prone to this sort of behavior when he is high. This fact is particularly important because the Appellant admitted he had been huffing paint immediately before both incidents. The trial court's decision did not constitute an abuse of discretion.

D. SINCE THE APPELLANT FAILED TO PROVE INDIVIDUAL ERROR THERE IS NO CUMULATIVE ERROR.

1. The Standard of Review.

The Mississippi Court of Appeals has eloquently set forth the proper standard of review:

[U]pon appellate review of cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case by case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect.

Byrom v. State, 863 So.2d 836, 8467 (Miss. 2003). *See also* Syl. Pt. 5, *State v. Smith*, 156 W. Va. 385, 387, 193 S.E.2d 550, 552 (1972).

2. Since the Appellant Received a Full and Fair Trial, Cumulative Error Review Is Inappropriate in this Case.

Appellant next claims that the effect of the errors made at his trial exceeds the sum of their parts. In order to prove cumulative error, the Appellant must prove error. He has failed to do so. Thus, his claim has no merit.

IV.

CONCLUSION

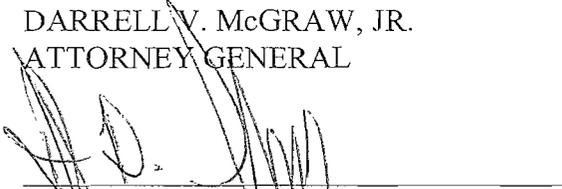
For all of the reasons set forth in this brief, the judgment of the Circuit Court of Boone County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By Counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

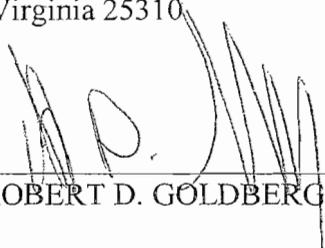


ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7370
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing "*Brief of Appellee State of West Virginia*" was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 7th day of July, 2008, addressed as follows:

To: Frank Venezia
P.O. Box 38
Madison, West Virginia 25310



ROBERT D. GOLDBERG