

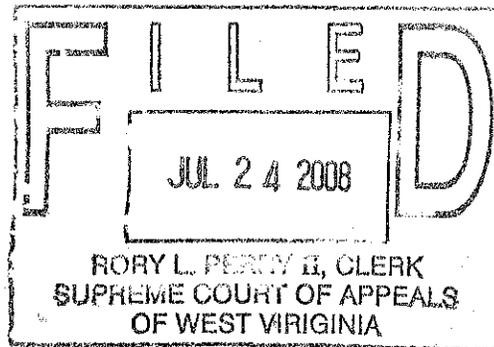
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

vs.)

No. 33804

**Charles Cowley, Defendant Below,
Appellant**



REPLY BRIEF OF APPELLANT CHARLES E. COWLEY

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Appellant offers this reply to the Brief presented by the State. Despite the assertions set forth in the State's brief, it remains clear that the lower court committed reversible error and that Mr. Cowley did not receive a fair trial.

As stated in the Appellant's brief, the lower court erred when it required defense counsel to represent Mr. Cowley, even though defense counsel had previously represented the alleged victim; it erred again when it 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; it erred again in when it allowed two other jurors to serve: 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; the court erred again when it allowed the introduction of evidence of a second crime, which had been mis-characterized a sexual crime, in violation of rule 404b.

While most of the facts in the State's brief are accurate, the Appellant objects to the sensationalized version of the facts set forth in the State's brief, and urges the Court to rely upon Appellants recitation of the facts. The focus placed upon the victim's version of the facts sheds no light on the lower court's errors, which are the subject of this appeal. Appellant will now address the State's argument, within the framework of Appellants original Brief.

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

Appellant's counsel had previously represented the victim in a juvenile matter. Counsel made the court aware of this conflict, but the court took no action until two days before the end of the trial, when counsel brought it up again. Because of the prior representation of the victim, defense counsel was aware of her past conduct that might have been helpful in Appellant's defense. 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).

Appellant does not dispute that the Court required defense counsel to speak with the victim in the hallway outside the courtroom and have her sign a hastily prepared consent. However, Appellant respectfully suggests that the lower court's actions put form before substance, and failed to protect counsel, the victim, or the Appellant from a conflict of interest. As Appellant noted previously, this Court's opinion in *McClanahan* shows the Court's understanding 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). While appellate

counsel is unaware of the extent of the information trial counsel possessed, one could imagine any number of troubling hypothetical conflicts. For example, imagine in this case that the victim told defense counsel she had embezzled money or forged checks, but the police never discovered these crimes. In this case, counsel would have knowledge of crimes for which the victim could still be prosecuted, which were also crimes that could be used to attack her credibility as a witness under Rule 609 (2) (B).

In this hypothetical, defense counsel would have conflicting duties - first, to not release the information that might result in the prosecution of his former client and second, to use this same evidence to impeach her testimony in the zealous defense of the Appellant. The lower court's eleventh hour attempt to remove this conflict was too little, too late, and it should have granted Appellant's motion for a mistrial.

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.

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 notions 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).

The State argues that, based upon the totality of the circumstances, that Melinda T. was qualified, and that the lower court committed no error when it failed to strike her for cause. This argument relies upon this Court's recent opinion in another juror case.:

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). The State quotes the second line, but runs from the application of the Court's admonition to "resolve any doubts in favor of excusing the juror."¹

¹As Appellant noted in his earlier brief, 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

This juror's statements speak for themselves. She stated she might have "flashbacks" of her own sexual assault. The best efforts of the court and defense counsel to rehabilitate her brought only the tepid replies of "I think I can do it" and "I'll try."

As Appellant has previously stated, he is entitled to an unbiased jury - not a jury that will try to be unbiased:

"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*). The law requires a juror "wholly free from bias or prejudice" not a juror who thinks she can be free from bias or prejudice, or one who will "try." Clearly, the lower court committed reversible error

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.

when it failed to strike this juror for cause.

The court erred when it failed to strike juror Barbara Sebok who indicated she would believe police officers more than other witnesses, and juror Catherine Ball, who had worked for years in the same lab with a material state witness, which was the same lab that examined the defendant's "sexual assault kit."

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. Even after attempts to rehabilitate her affirmed her bias for police officers at 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).²

² 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)

Juror 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. Appellant stands by the arguments made in his Brief that the lower court committed plain error in allow these jurors to serve.

As the Court is aware, 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.

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.

The second incident in Appellant's case, while regrettable, should never have been admitted into evidence. 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*. 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

It is important to note that none of the ways in which such evidence *may* be admissible countermands the specific prohibition against using other acts to show that the defendant “acted in conformity therewith.” The State, like the lower court takes far too broad a view and allows the exceptions to swallow the rule. The State argues that the lower court was right to allow the evidence of the second incident because it showed a “common plan.” As Appellant has already argued, the second incident is not similar enough to the first to qualify as a common plan, and the story of the witness changed over time to make the events appear similar.

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. By the time Misty H. testified at trial, her story had changed 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). As Appellant argued previously, 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. If this sort of evidence is allowed, a prosecutor would face the temptation of tailoring 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.

Moreover, the State and the lower 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*. 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). *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. The evidence that Mr. Cowley 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.

In Conclusion, Appellant stands by the other assignments of error and arguments set forth in his Appellate Brief and prays that this Court reverse his conviction and grant him a new trial.

Respectfully Submitted,
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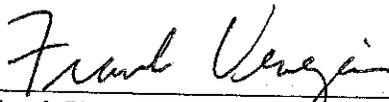
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Certificate of Service

I, Frank Venezia, hereby certify that the foregoing "Reply Brief of Appellant Charles E. Cowley" were served upon counsel of record on this the 23rd day of July, by depositing a true and correct copy in the United States mail, postage prepaid, in an envelope addressed as follows:

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