

11/2

REDACTED -
child victims.

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,

Appellee,

vs.

SUPREME COURT NO.: 34708

RAY RASH

Appellant,

FROM THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

APPEAL

Alvin E. Gurganus, II, Esq.
WV BAR #5783
Williamson, Magann & Gurganus
600 Rogers Street, Suite 101
Princeton, WV 24740

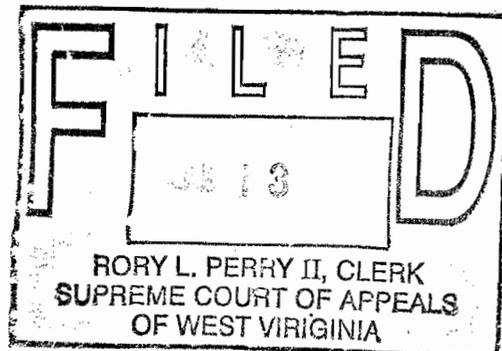


TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
Kind of Proceeding and Nature of Ruling in the lower tribunal	3-4
Statement of Facts	4-9
Assignment of Errors Relied Upon on Appeal	9
Points and Authorities Relied Upon	9-10
Argument	10-12
Relief Requested	12-13

KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

The Appellant was indicted on six felony counts by the Mercer County Grand Jury on October 13, 2005 containing allegations that the Appellant had illegal sexual encounters with two minor females under the age of eleven years old. (See copy of the indictment attached to the record on appeal at pages 1-2).

Count 1 of the indictment charged Appellant with “the offense of Sexual Abuse - First Degree by unlawfully and feloniously engaging in sexual contact with E.C.H., the said Appellant being fourteen years old or more, and the said E.C.H. being incapable of consent because she was eleven years old or less” occurring in November 1989.¹

Count 2 of the indictment charged Appellant with “the offense of Sexual Abuse by a Custodian, by unlawfully and feloniously engaging in sexual intrusion with E.C.H., a child under

¹ E.C.H. is now an adult being 27 years old. She has been married and her present name is [REDACTED]. In the portions of the appeal that follow she will be referred to as “[REDACTED]”

his care, custody and control” occurring in November 1989.

Count 3 of the indictment charged Appellant with “the offense of Sexual Abuse - First Degree by unlawfully and feloniously engaging in sexual contact with E.C.H., the said Appellant being fourteen years old or more, and the said E.C.H. being incapable of consent because she was eleven years old or less” occurring in December 1989.

Count 4 of the indictment charged Appellant with “the offense of Sexual Abuse by a Custodian, by unlawfully and feloniously engaging in sexual intrusion with E.C.H., a child under his care, custody and control” occurring in December 1989.

Count 5 of the indictment charged Appellant with “the offense of Sexual Abuse - First Degree by unlawfully and feloniously engaging in sexual contact with A.L., the said Appellant being fourteen years old or more, and the said A.L. being incapable of consent because she was eleven years old or less” occurring between November 2001 and February 2002.²

Count 6 of the indictment charged Appellant with “the offense of Sexual Abuse by a Custodian, by unlawfully and feloniously engaging in sexual contact with A.L., a child under his care, custody and control” occurring between November 2001 and February 2002.

A hearing was held on March 6, 2006 concerning Appellee’s introduction of 404(b) evidence and Appellant’s Motion for Severance of the charges. As a result of the hearing, the Court allowed the Appellee to introduce 404(b) evidence at the trial and denied Appellant’s Motion for Severance of the charges.

² A.L. is now 15 years old and A.L. stands for [REDACTED]. In the portions of the appeal that follow she will be referred to [REDACTED]. She has a sister who is now 17 years and her name is [REDACTED]. In the portions of the appeal that follow she will be referred to as [REDACTED].

AL
EL

The Appellant was tried on April 3, 2007 by a jury in the Mercer County Circuit Court before the Honorable Derek Swope, Judge. After lengthy deliberations the jury was hopelessly deadlocked and a mistrial was declared. A new trial was held on May 30, 2007. After hearing all the evidence, listening to the Court's jury instructions and listening to arguments of counsel, Appellant was found guilty of Counts 1 (Sexual Abuse -First Degree), 3 (Sexual Assault-First), and 4 (Sexual Abuse by a Custodian) and not guilty of Counts 5 (Sexual Abuse-First Degree) and 6 (Sexual Abuse by a Custodian) of the indictment. During the trial, Appellee dismissed Count 2 of the indictment. (T., Vol. I, p. 68, lines 9-22).

Appellant moved for a new trial which was denied at a hearing on June 29, 2007. On August 13, 2007, Appellant was sentenced to an active prison term of 10 to 20 years on the charge of Sexual Abuse by a Custodian as found in Count 4 with the other guilty Counts being suspended and Appellant is to be placed on Probation for those charges after serving the time for Count 4. Appellant is requesting the guilty verdicts for Counts 1, 3 and 4 be overturned and dismissed against him or in the alternative that he be allowed a new trial on Counts 1, 3, and 4. (See copy of order dated September 5, 2007 signed by Judge Swope in the record on appeal on pages 397-399).³

STATEMENT OF FACTS

Appellant is a 77-year-old man who can barely see and has serious hearing problems. He has never been accused, charged or found guilty of any criminal activity in his entire life until he was indicted on the charges contained herein.

Prior to the trial, Appellant filed a Motion to Sever the charges against him based on

³ Appellant filed numerous motions to extend the deadline for filing the petition for appeal which were granted because the transcript of the trial did not come into the possession of Appellant's counsel until July 21, 2008.

ECH
allegations made by [REDACTED] which allegedly occurred in November and December 1989 from the charges based on allegations made by **AL** [REDACTED] and **FL** [REDACTED] which allegedly occurred between November 2001 and February 2002. (See copy of Appellant's Motion for Severance of Offenses in the record on appeal at pages 22-23). Additionally, Appellee informed the Appellant and the Court that Appellee sought to use evidence based on Rule 404(b) of the West Virginia Rules of Evidence. (See Notice of Intent to Move the Court for the Admission of Rule 404(b) Evidence in the record on appeal at pages 30-32).

A hearing was held on both motions on March 6, 2006.⁴ At the beginning of the hearing the Court noted that if the evidence presented at the hearing was admissible as 404(b) evidence then the Motion to Sever should be denied. (MH-T, p. 3, lines 17-20). Moreover, the Court noted that a previous motion to sever had been granted in another case because some of the allegations concerned a minor who was eleven years old while the other allegations were being brought by alleged victims who were adults at the time of the trial. (MH-T, p. 4, lines 1-9).

The first witness to testify was **ECH** [REDACTED] who alleged she had been abused twice by the Appellant in late 1989. At the time of the motions' hearing **ECH** [REDACTED] was twenty-six years old. (MH-T, p. 4, lines 10-19).

ECH [REDACTED] testified her best friend was Taffany who was the daughter of the Appellant. (MH-T, p. 7, lines 8-13). Often she would spend the night with Taffany at the house where the Appellant lived. On the first alleged occasion, **ECH** [REDACTED] was sleeping in the same bed with Taffany. (MH-T, p. 8, lines 5-10). **ECH** [REDACTED] claimed that Taffany "rolled away from [her] with her back to her" and that

⁴ See the transcript of the Motions Hearing which will be designated at MH-T to distinguish it from the trial transcript.

Taffany was pretending to be asleep. (MH-T, p. 8, lines 13-17). According to ^{ECH} [REDACTED] she was asleep and she was awakened when the Appellant came into the bedroom and touched her in her pubic area. (MH-T, p. 9, lines 8-17). As soon as the Appellant left the bedroom, ^{ECH} [REDACTED] testified Taffany "rolled over to see what I was doing" but ^{ECH} [REDACTED] did not tell Taffany what had happened. (MH-T, p. 19, lines 11 through p. 20, line 1).

On another occasion ^{ECH} [REDACTED] returned to Taffany's house to spend the night. (MH-T, p. 20, lines 12-19). ^{ECH} [REDACTED] had a plan to protect herself. This time Taffany and ^{ECH} [REDACTED] were going to sleep on a waterbed so ^{ECH} [REDACTED] planned to keep the sheet on her side of the bed tucked in and she was going to tap Taffany during the night to make sure Taffany would awaken if anything happened. (MH-T, p. 23, line 5 through p. 24, line 13). In the early morning Taffany and ^{ELH} [REDACTED] were playing dolls and making noise. Appellant came into the bedroom and made Taffany go to the bedroom where Appellant and his girlfriend, Linda, slept and left ^{ECH} [REDACTED] alone in Taffany's bedroom. Appellant left his home to take Linda to work and ^{ECH} [REDACTED] went to sleep in Taffany's bed by herself despite the fact that the second part of her plan, tapping Taffany to wake her up, could not be accomplished. (MH-T, p. 11, lines 7-20). ^{ECH} [REDACTED] was awakened by Appellant returning to Taffany's room and Appellant allegedly inserted his finger into her vagina.

^{ECH} [REDACTED] did not tell anyone about these two alleged events until her sisters made allegations that they were molested by someone other than the Appellant. She reported this to the Appellee in 1990, however the Appellee "felt that it was too old, it looked like she came out with some tale, we couldn't confirm it and she just didn't feel there was sufficient evidence" to prosecute the Appellant. (MH-T, p. 14, lines 1-8).

The next person to testify was ^{EL} [REDACTED]. She testified that on one occasion, Appellant

touched on her upper thigh and on a separate occasion he rubbed her backside. Appellant was not charged for either alleged event. (MH-T, p. 36, line 14 through p. 37, line 17).

^{EL} [REDACTED]'s sister, ^{AL} [REDACTED] who was two years younger, testified that she was touched in her pubic area once when she was laying on the couch with the Appellant sitting at the other end of the couch. This allegedly occurred between November 2001 and February 2002, more than eleven years after the alleged abuse to ^{ECH} [REDACTED] ^{AL} [REDACTED] told ^{EL} [REDACTED] and they informed Linda of this alleged event. The Appellant was confronted by the three of them and he denied this allegation. (MH-T, p. 58, line 12 through p. 62, line 7). Absolutely no evidence was offered that Appellant had committed any similar acts from late 1989 to November 2001.

At the close of evidence, the Appellee argued that she was offering this evidence as 404(b) evidence "for the absence of mistake or inadvertence, . . . lustful disposition for children, common mode, plan, scheme or design." (MH-T, p. 71, lines 1-7). The Appellee did not offer any specific purpose for the admission of this evidence at Appellant's trial.

The Court denied Appellant's Motion to Sever and found that the evidence was admissible as 404(b) evidence to show "absence of mistake, opportunity, intent, lustful disposition [sic]." (MH-T, p. 76, lines 12 through 22; also see Order granting the Motion to use 404(b) evidence at the trial and denying the motion to sever in the record on appeal at pages 49-50). Again, the Court did not offer any specific purpose for the admission of the evidence. Instead, like the Appellee, the Court stated the whole list of possible reasons for the admission of 404(b) evidence. However, the Appellee admitted "this is an unusual case in that the two crimes that are charged, the two sets of crimes, are so far apart" during opening statement to the jury. (T., Vol. I, p. 111, lines 5-6).

At the trial on May 27, 2007, Appellant filed and argued a motion in limine to prevent ^{ECH} [REDACTED]

from testifying that she was treated for several years at Southern Highlands for sex abuse because the Appellant had not been provided any treatment records from Southern Highlands and allowing such evidence would violate Appellant's Due Process rights and Sixth Amendment rights to confront his accusers and effectively cross examine the witnesses against him. (See a copy of the Motion in Limine attached hereto as "Exhibit A" as well as T., Vol. I, p.97, line 13 through p. 109, line 8). Previously, Appellant asked for the treatment records in discovery and only received three pages of records which did not contain any treatment notes. These records from Southern Highlands were given to the Appellant by **ECH** and did not contain any reference or information about treatment sessions. (T., Vol. I, p. 149, lines 9-15). Moreover, the Appellee was not going to offer evidence from an expert to testify to the treatment or why the records could not be found. (T., Vol. I, p. 103, line 15 through p. 108, line 13). In fact, the only mention of treatment in the records provided to the Appellant was the fact that Erica's alleged treatment was discontinued because she did not keep her appointments. (T., Vol. I, p.167, line 22 through p. 168, line 8). However, the Court denied Appellant's motion in limine. Additionally, an Order was entered on May 17, 2007, allowing Appellant's counsel to review records from Southern Highlands Community Mental Health Center. (See Order dated May 17, 2007 attached to the record on appeal at pages 161-162). Unfortunately, Appellant's counsel was told there were only three pages of records available which were the same three pages of records provide to Appellant by his accuser, **ECH** through Appellee.⁵

The first witness to testify for the Appellee at trial was **ECH** Appellant, based on the same grounds as contained in his motion in limine, renewed his motion to exclude her from testifying to

⁵ Indeed the Appellee admits that the records from Southern Highlands were not available. (See Footnote 1 of State's Response to Petitioner's Petition for Appeal found in the record of this appeal).

any evidence of treatment at Southern Highlands because he had not been provided with any treatment records and could not obtain these records. (T., Vol. I, p. 134, lines 2-7). The Court again denied this objection and ordered the Appellant to "impeach her with it" although Appellant did not have any records of treatment.

Additionally, ^{ECH} [REDACTED] was asked questions by the prosecutor concerning the alleged effect on her as a result of the alleged encounters with Appellant. In that regard the following exchange

between the prosecutor and ^{ECH} [REDACTED] occurred:

Q. Before you were molested, how were you doing in school, things like that?

A. I was on the honor roll, and my conduct was A, or okay.

Q. How were they after this?

A. I was supposed to have failed the fifth grade but they passed me on, due to the circumstances. The school was aware because I was pulled out a lot for therapy. And then I did fail the sixth grade.

Q. Okay. So your grades dropped.

A. Uh-huh.

Q. You failed one grade, almost failed another, or you should have.

A. Yeah.

Q. Do you know what your grades were like when you graduated from high school?

A. I didn't graduate. I received my GED.

Q. What are you doing now?

A. I attend Bluefield State College.

Q. What's your grade point average?

A. It's a 3.5.

Mr. Gurganus: I'm going to object to that line of questioning and move to strike. I mean, that's irrelevant.

The Court: Overruled.

It is obvious that the only purpose for this line of questioning by the prosecutor was to unfairly convey to the jury that ^{ECH} [REDACTED]'s problems in school were caused by the alleged acts of the Appellant. (T., Vol. I, p.135, line7 through p. 136, line 6).

Other than the above, the three girls testified at trial about the same as they did at the motions' hearing. A cautionary instruction was given after the testimony. However, the cautionary instruction did not state the specific purpose for which the 404(b) evidence was being offered. The Court stated "such evidence was admitted and should be considered by you only so far as in your opinion it may go to show the absence of mistake or inadvertence, common scheme, plans and design and the lustful disposition of the Appellant." (T., Vol. I, p. 195, lines16-20). This exact same instruction was given at the end of the case with the other jury instructions and it did not give the jury a specific purpose for the admission of the evidence.

In closing argument, the Appellee told the jury, "I do not think in 1990 that I could take a 9-year-old and put her on the stand without any corroborating evidence. I didn't think I could do that. I just didn't think I could get a conviction." (T., Vol. III, p. 10, line 20 through p. 11, line 2). However, the Appellee did not provide the jury with any corroborating evidence because none had been introduced at trial

ASSIGNMENT OF ERROR RELIED UPON ON APPEAL

1. The Court erred in denying Appellant's Motion to Sever the trials for charges brought by ^{ECH} [REDACTED] and from the charges brought by ^{AL} [REDACTED]

2. The Court erred in allowing the Appellee to present 404(b) evidence at the trial of this case.

3. The Court erred by allowing Appellee to violate Appellant's Due Process rights found in the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution by substantially delaying the pre-indictment allegations made by Erica Harvey Woods concerning illegal sexual activities which allegedly occurred in 1989.

4. The Court erred in allowing the Appellee to present evidence ^{ECH} [REDACTED] was treated for sexual abuse at Southern Highlands based on allegations she made against Appellant because the Appellee did not present any expert to testify to the alleged treatment, the Appellee did not provide Appellant with any treatment records from Southern Highlands and Appellant could not find the records violating Appellant's Sixth Amendment Constitutional rights to confront his accusers and cross-examine witnesses.

5. The Court erred in not striking the testimony of ^{ECH} [REDACTED] concerning the effects of the alleged encounters with the Appellant because this testimony was irrelevant.

6. The Court erred in not striking the testimony of ^{ECH} [REDACTED] concerning the effects of the alleged encounters with the Appellant because this violates Appellant's Sixth Amendment Constitutional rights to confront his accusers and cross-examine witnesses.

POINTS AND AUTHORITIES RELIED UPON

Constitution:

West Virginia Constitution, ART. 3, §14.

CASES:

Frampton v. Consolidated Bus Lines, Inc., 134 W.Va. 62 S.E.2d 126 (1950)

Graham v. Wallace, D.D.S., M.S., 214 W.Va. 178, 588 S.E.2d 167 (2003)

Knotts v. Richard Facemire, Judge, et al. ---S.E.2d---, 2009, W.L. 1578720 (2009)

State vs. Dolin, 176 W. Va. 688, 347 S.E.2d 208 (1986)

State v. Eye, 177 W. Va. 671, 355 S.E.2d 921 (1987)

State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995)

State v. Hatfield, 181 W. Va. 106, 380 S.E.2d 670 (1988)

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

State v. Parsons, 214 W. Va. 342, 4589 S.E.2d 226 (2003)

State v. Simmons, 175 W. Va. 656, 337 S.E.2d 314 (1985)

RULES OF PROCEDURES

Rule 402 of the West Virginia Rules of Evidence

Rule 403 of the West Virginia Rules of Evidence

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

ARGUMENT

1. The Court erred in denying Appellant's Motion to Sever the trials for charges brought by ECH from the charges brought by AL.

It is error to join different charges in the absence of evidence that the actions were connected

together or constituted a common scheme or plan. *State v. Eye*, 177 W.Va. 671, 355 S.E.2d 921 (1987).

Clearly, the alleged sexual abuse of ^{ECH} [REDACTED] and ^{AL} [REDACTED] are not connected. The allegations concerning ^{ECH} [REDACTED] occurred in 1989 while the allegations concerning ^{AL} [REDACTED] occurred in late 2001 or early 2002. These alleged crimes are separated by more than 11 years. Even the Appellee recognized that this was unusual when the Appellee admitted "this is an unusual case in that the two crimes that are charged, the two sets of crimes, are so far apart" during opening statement to the jury. (T., Vol. I, p. 111, lines 5-6). There is absolutely no evidence to show that Appellant committed any similar acts in the eleven (11) years between the alleged offenses. Thus, there is absolutely no evidence of common scheme or plan.

Moreover, the Appellee originally did not prosecute the alleged offenses against ^{ECH} [REDACTED] because she believed "I do not think in 1990 that I could take a 9-year-old and put her on the stand without any corroborating evidence. I didn't think I could do that. I just didn't think I could get a conviction." (T., Vol. III, p. 10, line 20 through p. 11, line 2). This begs the question: what changed during the eleven (11) years to make a conviction more likely? The Appellee did not offer any corroborating evidence during Appellant's trial to bolster the charges based on ^{ECH} [REDACTED]'s allegations. The only additional evidence presented by the Appellee at the trial were the allegations made by ^{EL} [REDACTED] and ^{AL} [REDACTED]. None of these allegations and evidence presented by these two girls added anything to ^{ECH} [REDACTED]'s allegations except to add other charges that occurred eleven (11) years later.

It is obvious that the only purpose for bringing the separate charges in one indictment and one trial was to unduly influence the jury into convicting the Appellant of something. It is the old cliché, "throw it against the wall and see what sticks." This certainly is not the purpose of justice and

cannot be the grounds for refusing a motion to sever.

Moreover, even where joinder or consolidation of offenses is proper, the trial court may order separate trials on the ground that such joinder or consolidation is prejudicial. *State v. Hatfield*, 181 W.Va. 106, 380 S.E.2d 670 (1988). Assuming arguendo that the joinder of the offenses was proper, the motion to sever should have been granted because the joinder was unduly prejudicial.

Rule 403 of the West Virginia Rules of Evidence proclaims, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Evidence is unfairly prejudicial if it has an undue tendency to suggest decision on improper basis, commonly though not necessarily an emotional one, or where the evidence appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause the jury to base its decision on something other than the propositions of the case." *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Neither the Appellee nor the Court ever provided an explicit purpose for the offering of the 404(b) evidence resulting from the joinder of the charges. The only manner in which to attempt to understand the purpose for the evidence is to guess as to what was the motive of the Appellee. In that regard, it is reasonable to believe that the Appellee wanted to join the charges to create an emotional impact on the jury, to appeal to the jury's sympathies, arouse the juries' sense of horror or to provoke the juries' instinct to punish. This is particularly true with child sexual abuse cases in today's climate when the media is constantly reporting cases of child sexual abuse. Such exposure to the media results in jurors being very sensitive to these types of cases. As one lawyer noted, "it takes more evidence to convict someone of a DUI than of child sexual abuse."

Thus, joining separate charges alleged by two victims which are at least eleven (11) years

apart with no other connection must be carefully considered in order to prevent a conviction based on improper grounds.

In the case sub-judice, it is obvious that the joinder of the charges was substantially prejudicial against Appellant because the jury is allowed to guess the purpose of offering such evidence and to consider it in any manner the jury decided resulting in improper grounds for conviction. Additionally, it could be reasonably argued that the jury in this matter reached a compromise verdict with some jurors wanting to acquit Appellant on all charges while others wanting to find Appellant guilty on all charges. Due to the inability to reach a consensus regarding Appellant's guilt, the jury compromised and found Appellant not guilty of some charges and guilty of others. That is one of many reasons why joining charges which are so far apart in time and varying substantially in the manner in which the charges allegedly occurred should be very carefully considered to avoid any appearance of prejudice.

2. The Court erred in allowing the Appellee to present 404(b) evidence at the trial of this case.

When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence regarding admissibility of other crimes, wrong or acts evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered, and the jury must be instructed to limit its consideration of evidence to only that purpose. *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). Under rule 404(b), it is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in the rule. *Id.*

The admissible purposes for evidence of other crimes, wrongs or acts in rule 404(b) are motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.

Rule 404(b) of the West Virginia Rules of Evidence. At the motion hearing, the Appellee argued that she was presenting the evidence for the purposes of “absence of mistake or inadvertence, . . . lustful disposition for children, common mode, plan, scheme or design.” (MH-T, p. 71, lines 1-7). The Court, in granting the motion to allow 404(b) evidence at trial, determined that the purposes of this evidence were to show “absence of mistake, opportunity, intent, lustful disposition [sic]. (MH-T, p. 76, lines 12 through 22).

These purposes are just a litany of many reasons for admission of the evidence; they do not specifically identify the specific purpose for which the evidence is being offered. During the trial there was no issue of mistake. Neither the Appellant nor the Appellee presented evidence of mistake or argued that there was a possible mistake. This is also true for inadvertence. Thus, mistake or inadvertence is obviously not a purpose for admission of 404(b) evidence in this case.

Opportunity was not an issue at trial. Both alleged victims were very specific about how the alleged acts occurred. Erica testified that she was abused while sleeping in the same bed with Taffany and while Taffany was sleeping in another bedroom. The only common element in ^{ECH} [REDACTED]'s testimony was that Linda, Appellant's girlfriend, was not present in the house.

^{AL} [REDACTED] and ^{EL} [REDACTED] testified that Linda was present at the house when the alleged acts were allegedly performed by the Appellant. ^{AL} [REDACTED] stated she was on a couch with the Appellant in the living room when she was allegedly abused and ^{EL} [REDACTED] was unclear as to whether Linda was present on one occasion and was at the house on the other alleged occasion. More important, neither the Appellant nor the Appellee contended that the Appellant did not have the opportunity to perform the alleged criminal acts.

Equally as irrelevant and immaterial is the claim that the purposes of the 404(b) evidence are

common mode, scheme, or plan. In order for these purposes to be admissible, there must be no variance as to time and manner of the acts committed. *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). Clearly, there is a significant time variance between the alleged acts and the manner in which the acts were committed, particularly considering the allegations made by Elizabeth which do not even rise to any level of criminal activity.

Lustful disposition for children can be a reason for admission of 404(b) evidence provided such evidence relates to incidents reasonably close in time to the incidents giving rise to the indictment. *State v. Parsons*, 214 W.Va. 342, 589 S.E.2d 226 (2003). Due to the fact that alleged acts are eleven (11) years apart and there is no showing of a pattern or sequence of such behavior by the Appellant, lustful disposition for children cannot be an appropriate purpose for admission of such evidence.

Moreover this comports with *State v. Simmons* which proclaimed proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are the same nature as the one charged, are incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, unless such other crimes are an element of or are legally connected with the offense for which the accused is on trial. *State v. Simmons*, 175 W.Va. 656, 337 S.E.2d 314 (1985). In *Simmons*, the court explained prior acts which were not a part of the sequence of events resulting in the charges against the defendant are not admissible. As in *Simmons*, the proffered 404(b) evidence is not an element of any of the charges against the Appellant.

Similarly, intent and motive cannot be purposes for admitting 404(b) evidence in this case. Evidence of collateral crimes is not admissible to show intent, in first-degree sexual assault

prosecution for sex acts with a victim who is less than eleven (11) years old because intent is not an element of the charged crime. In the case sub-judice, all alleged criminal acts occurred when the alleged victims were less than eleven (11) years old. (See *Dolin*, supra). Due to the fact that victims less than eleven (11) years old cannot consent to sexual acts, intent or motive is not an element of Appellant's alleged crimes.

Finally, the Court's cautionary instruction to the jury was clearly inadequate because it just listed possible purposes as those shown above and did not state a specific reason for the admission of 404(b) evidence. At trial, the Court stated "such evidence was admitted and should be considered by you only so far as in your opinion it may go to show the absence of mistake or inadvertence, common scheme, plans and design and the lustful disposition of the defendant." (T., Vol. I, p. 195, lines 16-20). Again this is just a list of possible purposes, not a statement of a specific purpose.

The clear harm and prejudice of not stating a specific purpose(s) for the admission of 404(b) evidence is that the jury was given a list from which to choose the purpose for the admission of the evidence. Without specific guidance, the jury is easily confused resulting in the evidence being unduly prejudicial to the Appellant.

3. The Court erred by allowing Appellee to violate Appellant's Due Process rights found in the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution by substantially delaying the pre-indictment allegations made by Erica Harvey Woods concerning illegal sexual activities which allegedly occurred in 1989.

"To maintain a claim that pre-indictment delay violates the Due Process rights found in the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution the defendant must show actual prejudice." Syl. pt. 2, *Knotts v. Richard Facemire*,

Judge, et al., ---S.E.2d---, 2009, W.L. 1578720 (2009). “In determining whether pre-indictment delay violates the Due Process rights found in the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution, the initial burden is on the defendant to show that actual prejudice has resulted from the delay. Once that showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay. In balancing these competing interests, the core inquiry is whether the government’s decision to prosecute after substantial delay violates fundamental notions of justice or the community’s sense of fair play.” *Knotts*, Syl. pt. 2. Finally, “[t]o demonstrate that pre-indictment delay violates Due Process rights found in the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution, a defendant must introduce substantial evidence of actual prejudice which proves he was meaningfully impaired in his ability to defend against the state’s charges to such an extent that the disposition of the criminal proceeding was or will be likely affected.” *Knotts*, at Syl. pt. 4.

“One facet of a citizen’s due process protections is the right to have the government accuse him of a crime within a reasonable time from discovery of its commission and determination reasonable reached that he or she did the criminal act. It is the government’s duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial. If it fails to do so after discovering sufficient facts to justify indictment and trial, it violates this due process right. Of course, the right itself arises from the substantial prejudice that is presumed to affect a defendant’s ability to respond to charges against him when the charges are timeworn and stale.” *State ex rel. Leonard v. Hey*, 269 S.E.2d 394, 397-98, (W.Va. 1980).

Clearly, the delayed prosecution of the Appellant based on ^{ECH} [REDACTED]’s allegations from 1989

ECH

substantially prejudiced the Appellant. The records from Southern Highlands of [REDACTED]'s alleged treatment for sexual abuse were no longer available to the Appellant. The Appellee and Appellant both made every attempt to obtain the records but were told only three (3) pages of records existed and none of these pages contained any notes of any treatment, much less treatment for sex abuse. Ironically, the three (3) pages of records were provided to Appellee and Appellant by [REDACTED] herself. ECH Without the records, Appellant was prevented from adequately preparing his defense. He could not have the records reviewed by a psychologist, could not use them for cross examination and could not show that Erica was really attempting to gain attention because her sisters had made sex abuse allegations against someone else and were getting special attention. Additionally, such records would likely demonstrate the relationship between [REDACTED] and her sisters as well as her relationship with Taffany, Appellant's daughter. ECH [REDACTED]'s motive for these allegations possibly was due to some anger toward Taffany. Particularly important is the fact that the records actually obtained stated the treatment was terminated for not keeping appointments, yet her mother was allowed to testify to numerous treatment appearances. Simply stated, Appellant essentially had one arm tied behind his back in preparing his defense.

Although standing alone, loss of memory and inability to recall events is not grounds for substantial prejudice, but when this occurs along with the missing records, a defendant is substantially prejudiced.

The Appellee's reason for delay violates fundamental notions of justice. The Appellee clearly indicated that the reason for delay is she didn't believe she could have obtained a conviction based only on the allegations made by [REDACTED] and she thought she needed corroborative evidence in order to gain a conviction based only on [REDACTED]'s allegations. However, the evidence presented by the ECH

testimony of ^{EL} [REDACTED] and ^{AL} [REDACTED] did not corroborate the allegations made by ^{ECH} [REDACTED] against the Appellant. More important, the evidence presented to support ^{ECH} [REDACTED]'s allegations did not contain any corroborating evidence. It is obvious that once ^{EL} [REDACTED] and ^{AL} [REDACTED] brought the unsupported and unbelievable allegations to the Appellee's attention, Appellee determined the best way to convict the Appellant was to add ^{ECH} [REDACTED]'s allegations to the charges. Thus, the real purpose for the delay and adding ^{ECH} [REDACTED]'s charges was to obtain a conviction of the Appellee on something. Unquestionably, this violates the fundamental notice of justice.

As in *Knotts* supra, Appellant was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected. The Appellant was convicted only on the charges brought by ^{ECH} [REDACTED]. ^{ECH} [REDACTED]'s allegations posed the biggest problem for the defense. Treatment records were not available despite Appellant's efforts to obtain them and memories had faded. More likely than not the criminal proceeding based on ^{ECH} [REDACTED]'s allegations was affected to Appellant's detriment.

4. The Court erred in allowing the Appellee to present evidence ^{ECH} [REDACTED] was treated for sexual abuse at Southern Highlands based on allegations she made against Appellant because the Appellee did not present any expert to testify to the alleged treatment, the Appellee did not provide Appellant with any treatment records from Southern Highlands and Appellant could not find any additional records form Southern Highlands violating Appellant's Constitutional rights to confront his accusers and cross-examine witnesses.

"In all criminal trials, the accused shall be fully informed of the character and cause of the accusation, and be confronted with the witness against him." *West Virginia Constitution, Art. 3, § 14*. This Constitutional right is referred to as the "confrontational clause." More important, a

defendant's fundamental right to confront accusers contemplates the opportunity of meaningful cross examination. *State v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975). (Emphasis and underlining added). Finally, when a defendant challenges evidence under the confrontation clause, the burden is squarely upon the prosecution to establish that the challenged evidence is so trustworthy that adversarial testing would add little to its reliability. *State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820, (2001).

In the case sub-judice, the Appellee offered evidence that ^{ECH} [REDACTED] had received numerous psychological treatments at Southern Highlands. ⁶ This evidence was introduced through Erica's testimony only. The Appellee did not bring any psychological or psychiatric expert to testify at trial concerning ^{ECH} [REDACTED]'s psychological treatment, did not provide Appellant with any psychological treatment records despite Appellant's discovery requests, and did not bring anyone from Southern Highlands to testify. In fact, the Appellee and Appellant tried to obtain the treatment records from Southern Highlands but were told the records were not available. Appellant was eventually provided 3 pages of records from Southern Highlands which only mentioned that Erica's treatment was terminated because she failed to keep her appointments. More important, the 3 pages of records provided to Appellant by the Appellee originally came from ^{ECH} [REDACTED], Appellant's accuser, and not from Southern Highlands. This is clearly inappropriate.

Appellant, in anticipation the Appellee was going to introduce evidence of ^{ECH} [REDACTED]'s psychological treatments at Southern Highlands exclusively through her testimony and without providing Appellant with treatment records, filed a motion in limine to prevent the introduction of

⁶ Southern Highlands is a psychological and psychiatric facility located in Princeton, West Virginia.

this evidence at trial. (See Appellant's Motion in Limine attached hereto as "Exhibit B). The Court denied Appellant's motion. Additionally, Appellant objected to ^{ECH} [REDACTED]'s testimony concerning her treatments before she testified at the trial. The Court overruled the objection and ordered Appellant's attorney to use the three pages obtained from Southern Highlands which contained no treatment records in cross examination of ^{ECH} [REDACTED]. However, without the benefit of treatment records, Appellant's counsel had no opportunity to meaningfully cross-examine ^{ECH} [REDACTED] because the only evidence the jury heard concerning alleged treatments for sex abuse came from ^{ECH} [REDACTED] herself. This is especially egregious because ^{ECH} [REDACTED] was one of the main accusers against the Appellant and the jury only found Appellant guilty of charges based on ^{ECH} [REDACTED]'s allegations.

Obviously, Appellant was placed in a very difficult position and was substantially prejudiced by allowing the jury to only hear ^{ECH} [REDACTED]'s testimony because of her obvious bias against the Appellant. Also, Appellant had to limit his cross examination of ^{ECH} [REDACTED] because he had no knowledge of the treatments she received, specifically whether treatments were actually for sex abuse or some other psychological problems she was experiencing at that time.

This is particularly important because Appellant's defense theory was that ^{ECH} [REDACTED] made up these allegations because her two sisters were getting all the attention when they accused someone else of abusing them. Even the prosecutor agrees with this theory because the prosecutor would not originally bring charges based solely on ^{ECH} [REDACTED]'s allegations. The Appellee admitted that she originally thought that ^{ECH} [REDACTED] was making up the allegations and was "just piling on" due to the attention her sisters were receiving.

Moreover, this evidence could only be admitted if the Appellee proved it was so trustworthy that adversarial testing would add little to its reliability. Unfortunately, the Court did not make the

Appellee prove this. The reason being is that due to ^{ECH} [REDACTED]'s bias and enthusiasm to convict the Appellant, it was not possible to prove that this evidence was so trustworthy that adversarial testing would add little to its reliability. Undoubtedly, the Appellant armed with treatment records could perform a more meaningful cross examination and promote his theory of the case.⁷

Finally, ^{ECH} [REDACTED] or anyone else, was not presented as an expert with regards to the alleged treatment ^{ECH} [REDACTED] received at Southern Highlands. Accordingly, ^{ECH} [REDACTED] should not have been allowed to testify about the alleged treatment because her psychological problem was not an obvious medical problem. When the medical/psychological problem is not obvious only an expert familiar with such treatments should be allowed to testify.

5. ^{ECH} *The Court erred in not striking the testimony of [REDACTED] concerning the effects of the alleged sexual encounters with the Appellant because this testimony was irrelevant.*

“Evidence which is irrelevant or immaterial and has no probative value in determining any material issue is inadmissible and should be excluded.” Syl. pt. 2, *Graham v. Wallace, D.D.S., M.S.*, 214 W.Va. 178, 588 S.E.2d 167 (2003). Additionally, a lay person may testify as to matters concerning the alleged injuries within the witness’s personal knowledge, provided the witness does not give expert testimony bearing on the cause, the extent and the permanency of the injuries. Syl. pt. 3, *Frampton v. Consolidated Bus Lines, Inc.*, 134 W.Va. 815, 62 S.E.2d 126 (1950).

In the present case, the prosecutor elicited answers from ^{ECH} [REDACTED] concerning her emotional and psychological injuries as a result of the alleged sexual abuse of the Appellant. These questions and

⁷ Note that Tonya McFadden, a local psychologist, testified that she treated ^{ECH} [REDACTED] in 1997 but not for any symptoms or problems related to sex abuse. (T., Vol. I, p.163, line7 through p. 168, line 7).

answers clearly attempted to establish causation of ^{ECH} [REDACTED]'s injuries. (T., Vol. I, p.135, line7 through p. 136, line 6). However, a lay person cannot testify to the causation of his or her injuries. Causation can only be established through expert testimony. Due to the fact that the prosecution did not establish causation of ^{ECH} [REDACTED]'s injuries through expert testimony, the material issue of causation was not properly before the jury. Therefore, ^{ECH} [REDACTED]'s testimony concerning her grades and related matters was irrelevant and immaterial because the testimony was not probative of any material issue before the jury.

6. ^{ECH} *The Court erred in not striking the testimony of [REDACTED] concerning the effects of the alleged encounters with the Appellant because this violates Appellant's Sixth Amendment Constitutional rights to confront his accusers and cross-examine witnesses.*

^{ECH} [REDACTED] testified the alleged illegal acts of the Appellant caused her medical/psychological problems resulting poor school grades just after the alleged acts occurred. As shown above, there was no expert testimony regarding the causation of ^{ECH} [REDACTED]'s alleged condition and there were no treatment records available to the Appellant concerning ^{ECH} [REDACTED]'s alleged condition. Thus, the Appellant did not know what the actually caused ^{ECH} [REDACTED]'s alleged condition. Clearly without the treatment records and expert testimony, the Appellant could not adequately confront his accusers, ^{ECH} [REDACTED] and could not effectively cross-examine her resulting in a violation of the Appellant's Sixth Amendment rights.

7. *Plain Error Rule.*

Under the plain error rule, the failure to meet the requirements of Rule 103(a) of the West Virginia Rules of Evidence and Rule 52(b) of the West Virginia Rules of Criminal Procedure may not be a forfeiture on appeal where the error is obvious or involves substantial and fundamental rights. *State v. Wilson*, 190 W.Va. 583, 439 S.E.2d 488 (1993). Plain error is usually defined as

error that is so obvious that failure to notice it would seriously affect the fairness, integrity, or public reputation of the judicial proceedings and result in a miscarriage of justice. *U.S. v. Lewis*, 10 F.3d 1086 (4th Cir. 1993). In West Virginia, “[t]o 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.” *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

In the case sub-judice, Appellant has noted several significant errors in his trial which substantially affected his Constitutional rights and clearly tainted the jury verdict. It would be a miscarriage of justice affecting the fairness, integrity and public reputation of this judicial proceeding if Appellant’s counsel did not properly preserve any of the errors listed or errors not listed allowing this Honorable Court to deny this appeal.

Unquestionably, this was a highly contested case and a very close case. The first trial resulted in a hopelessly deadlocked jury and the second trial resulted in arguably a compromise guilty verdict on some of the charges against the Appellant. Thus, Appellant should be allowed a new trial despite any shortcomings of his counsel.

Finally, Appellant’s counsel on his first day taking criminal law in law school was told by his professor that the premise for our criminal justice system was that it was better to let ten (10) guilty persons go free rather than convict one innocent person. Unfortunately, in today’s climate with the media coverage and tainted opinions of potential jurors concerning child sex abuse, this premise has been reversed resulting in the false premise that it is better to convict ten (10) not guilty persons rather than let one guilty person go free. Additionally politics plays a very important part in decisions in these cases because of tainted beliefs of the general public which lead many, if not most, people

to determine that once a person is charged with such a crime, the person is automatically guilty. In other words, no elected official wants to be painted as soft on child sex abuse crimes. Thus, just making an accusation that one has committed child sex abuse is tantamount to a determination of guilt.

Appellant's case is like most child sex abuse cases which are mainly she said, he said. Usually there is very little evidence other than the testimony of the victim and the accused. Accordingly, convictions which are very close, like Appellant's case, should be carefully scrutinized in an attempt to make sure the verdict is fair and promotes the notions of justice and fair play.

RELIEF REQUESTED

Wherefore, Appellant, respectfully requests this Honorable Court to dismiss the convictions of the Appellant completely or, in the alternative, reject the guilty verdicts and order a new trial on Appellant's convictions.

**RESPECTFULLY SUBMITTED,
APPELLANT, RAY RASH**



COUNSEL FOR APPELLANT

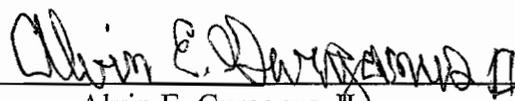
Alvin E. Gurganus, II, Esq.
WV BAR #5783
Williamson, Magann & Gurganus
600 Rogers Street, Suite 101
Princeton, WV 24740
(304) 487-5400

CERTIFICATE OF SERVICE

I, Alvin E. Gurganus, attorney for the Appellant does hereby certify that the foregoing
“*Appeal*” was duly served upon counsel for the State:

Deborah Garton, Esquire
Prosecuting Attorney of Mercer County
120 Scott Street, Suite 200
Princeton, WV 24740

This the 10th day of July, 2009.



Alvin E. Gurganus, II

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff

vs.

Indictment No. 05-F-348-S

RAY RASH,
Defendant.

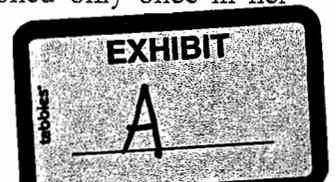
MOTION IN LIMINE

On this date came the Defendant, RAY RASH, by his Counsel, Alvin E. Gurganus, II, and moved the Honorable Court, pursuant to Rule 103(c) of the West Virginia Rules of Evidence, to prohibit the state, either through its representatives or its witnesses, from disclosing the following inadmissible evidence in the presence of the jury:

1. That ^{ECH} [REDACTED] was treated for sexual abuse at Southern Highlands based on allegations she has made against the Defendant;
2. That ^{ECH} [REDACTED] was treated for sexual abuse by Tonya McFadden based on the allegations she has made against the Defendant.

In support of said Motion, the Defendant asserts the following:

1. Attached as "Exhibit A" are the medical records received from Southern Highlands. None of the records indicate there was any treatment rendered to Ms. [REDACTED] for sexual abuse resulting from her allegations against the Defendant. In fact, the records indicate that no psychiatric, psychological or physical examinations were every performed on Ms. [REDACTED] and that there were no medications prescribed for Ms. [REDACTED]. The only mention of treatment is that there was case management. Moreover, Southern Highlands does not destroy medical records. After a certain period of time, the records are put on microfiche. (See copy of affidavit of Meda Martin attached hereto as "Exhibit B"). Therefore, any testimony or other evidence concerning treatment at Southern Highlands would be untruthful, violate the Defendant's due process rights and violate the Defendant's right to confront and cross exam witnesses who testify against him.
2. Tonya McFadden testified that sexual abuse was mentioned only once in her



treatment records related to Ms. [REDACTED] and that her diagnosis did not mention sexual abuse focus of treatment. Moreover, she stated that her primary was her diagnosis of major depressive disorder, dysimic (phonetic) disorder, anxiety and an eating disorder which were related to conflicts Ms. [REDACTED] was having with her mother and problems associated with her boyfriend. In other words, Tonya McFadden provided no treatment to Ms. [REDACTED] for sexual abuse, Thus any testimony by Ms. [REDACTED] related to treatment by Tonya McFadden is completely irrelevant to the issues in this case. (See pages 41 and 44 of Tonya McFadden's trial testimony attached hereto as "Exhibit C")

Therefore, the Defendant requests that the Court conduct a hearing on this Motion and, at the conclusion of said hearing, grant the relief requested in the Motion herein.

RAY RASH,

By Counsel:



Alvin E. Gurganus, II,
W.Va. State Bar: 5783
WILLIAMSON, MAGANN & GURGANUS, PLLC
600 Rogers Street, Suite 101
Princeton, WV 24740

CERTIFICATE OF SERVICE

I, Alvin E. Gurganus, attorney for Defendant, do hereby certify that the foregoing "MOTION IN LIMINE" was duly served upon counsel for the State by via fax and by United States Mail, postage prepaid, addressed to:

Debra Garton, Esquire
Prosecuting Attorney of Mercer County
1501 W. Main Street
Princeton, WV 24740

This the 29th day of August, 2008.



Alvin E. Gurganus, II

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff

vs.

Indictment No. 05-F-348-S

RAY RASH,
Defendant.

MOTION IN LIMINE

On this date came the Defendant, RAY RASH, by his Counsel, Alvin E. Gurganus, II, and moved the Honorable Court, pursuant to Rule 103(c) of the West Virginia Rules of Evidence, to prohibit the state, either through its representatives or its witnesses, from disclosing the following inadmissible evidence in the presence of the jury:

AL EL
That Ellen Farmer not be allowed to testify to diagnosis of any condition and the symptoms in support of the diagnosis relating to the treatment received by [REDACTED] and [REDACTED] at KVC because Ms. Farmer is not qualified to make diagnosis. (See copy of Ellen Farmer's trial testimony found on pages 30 and 34 of Volume II attached hereto as "Exhibit A"). Her testimony should be limited to the treatment she provided to [REDACTED] and [REDACTED] specifically to the stated conditions or problems contained in the medical records from KVC. Any deviation from the records should be deemed inadmissible. AL EL

Therefore, the Defendant requests that the Court conduct a hearing on this Motion and, at the conclusion of said hearing, grant the relief requested in the Motion herein.

RAY RASH,

By Counsel:

Alvin E. Gurganus II

Alvin E. Gurganus, II,
W.Va. State Bar: 5783
WILLIAMSON, MAGANN & GURGANUS, PLLC
600 Rogers Street, Suite 101
Princeton, WV 24740

CERTIFICATE OF SERVICE

I, Alvin E. Gurganus, attorney for Defendant, do hereby certify that the foregoing "*MOTION IN LIMINE*" was duly served upon counsel for the State by via fax and by United States Mail, postage prepaid, addressed to:

Debra Garton, Esquire
Prosecuting Attorney of Mercer County
1501 W. Main Street
Princeton, WV 24740

This the 29th day of August, 2008.

Alvin E. Gurganus II

Alvin E. Gurganus, II