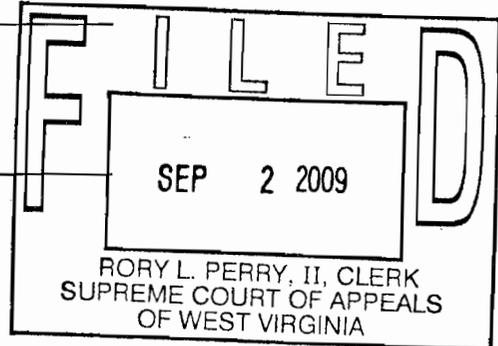


SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA,

Appellee,

vs.

SUPREME COURT NO.: 34708

RAY RASH

Appellant,

FROM THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

APPELLANT'S REPLY TO APPELLEE'S RESPONSE

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KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

Appellant incorporates the proceedings as stated in Appellant's Appeal Brief which the Appellee does not dispute.

STATEMENT OF FACTS

Appellant incorporates the Statement of Facts as stated in Appellant's Brief which are not disputed by Appellee.

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 **ECH** [REDACTED] 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** 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** 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. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995)

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 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

^{ECH}
by [REDACTED] from the charges brought by Angela Lawson.

Appellee contends that Appellant's "main argument is that the crimes were separated by over eleven years" and he "presents no cogent argument as to the mechanics of the prejudice other than a guilty verdict." (Response, p. 6). These are not accurate statements of Appellant's argument.

Appellant argued on several grounds that the denial of his Motion to Sever was prejudicial to him. First, the alleged sexual abuse of ^{ECH} [REDACTED] and ^{AL} [REDACTED] are not connected. The allegations concerning Erica 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.

Second, the Appellant argued that combining the allegations of ^{ECH} [REDACTED] with the allegations of Angela did not bolster or add anything to the allegations of ^{ECH} [REDACTED]. 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 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.

Obviously the 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.

Third, the Appellant argued assuming *arguendo* that the joinder of the offenses was proper, the motion to sever should have been granted because the joinder was unduly prejudicial because joinder had an undue tendency to suggest to the jury to make a decision on an 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).

Finally, Appellant demonstrated that 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.”

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.

Appellee provided no law, facts or argument to contradict or rebut Appellant's arguments on this issue.

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

The Appellee's argument on this issue completely disregards the law and the facts. 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. ^{ECH} 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}'s testimony was that Linda, Appellant's girlfriend, was not present in the house.

^{AL} and ^{EL} testified that Linda was present at the house when the alleged acts were allegedly performed by the Appellant. Angela stated she was on a couch with the Appellant in the living room when she was allegedly abused and ^{EL} 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.

Again, Appellee provided no law, facts or argument to contradict or rebut Appellant's arguments on this issue. As shown above, this evidence should not have been admitted for absence of mistake, opportunity, intent and lustful disposition because none of these grounds for admitting 404(b) evidence were issues at the trial.

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 [REDACTED] ECH

██████████ concerning illegal sexual activities which allegedly occurred in 1989.

Appellee makes two assumptions that are not valid in an attempt to rebut Appellant's claim that his Due Process rights were violated by the substantial delay in prosecuting him for the allegations made by ^{ECH} ██████████. First, Appellee assumes the treatment records from Southern Highlands Community Mental Health Center would not have been helpful to the defense. This is clearly a baseless assumption because the Appellee only makes the assumption without pointing to any facts to support this conclusory assumption.

The records from Southern Highlands of ^{ECH} ██████████'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 ^{ECH} ██████████ herself. 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 ^{ECH} ██████████ and her sisters as well as her relationship with Taffany, Appellant's ^{ECH} daughter. ██████████'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.

Second, Appellee assumes that the only witness Appellant would have called at a trial, if he was indicted closer to 1989, would have been his daughter, Taffany. Again, the assumption is groundless because Appellee does not offer any facts to support it.

Indictment of the Appellant much nearer to 1989 would have been beneficial to the Appellant because the memory of witnesses would have been more accurate and a witness's ability to recall events would have been much clear. Thus, Appellant would have been able to get accurate information from many witnesses who had a better recall of the events or who were no longer available. For example, ^{ECH} [REDACTED]'s two sisters were not available to the Appellant. Statements from them certainly could have been helpful to the defense. The person from Southern Highlands who interviewed ^{ECH} [REDACTED] would have been available as well as the people from Southern Highlands who treated ^{ECH} [REDACTED]. Each of these people could have been called as a witness for the defense. Instead, the jury only got to hear the evidence from one perspective, that of ^{ECH} [REDACTED] and the defense was prohibited by the delay from calling other witnesses.

Finally, the evidence presented by the 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 unbelieved 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.

^{ECH} [REDACTED]
4. The Court erred in allowing the Appellee to present evidence [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 from Southern Highlands violating Appellant's Constitutional rights to confront his accusers and cross-examine witnesses.

Appellee essentially admits that treatment records from Southern Highland were necessary for the trial by stating “[i]n point of fact, Appellant intended to attack EHW’s credibility [because there were no treatment records], but *luckily* she was able to locate some few documents confirming treatment.” (emphasis added). Appellee argues that “[t]he only point in having EHW *produce a few papers* from the facility was to corroborate her testimony that she had been treated there, particularly when the Appellant was going to attack her credibility on this very issue.” (emphasis added).

However, ^{ECH} [REDACTED] never brought forth any documents demonstrating she was treated at Southern Highlands. The three pages of documents she brought only stated treatments were stopped because of no shows. If the three pages of documents corroborated ^{ECH} [REDACTED]’s and her mother’s testimony concerning the many treatments ^{ECH} [REDACTED] alleged she received, then it is imperative that Appellant have the treatment records to test ^{ECH} [REDACTED]’s credibility on this issue. Moreover, it is curious that Erica only brought forth three pages which did not include any treatment records, particularly due to the fact Appellee had ^{ECH} [REDACTED] produce a few papers from the facility.

Appellee’s argument that Appellant could have broadened his cross-examination of ^{ECH} [REDACTED] because the treatment records were not produced. This is not sound advice. One of the main rules of cross-examinations is not to ask questions to which the lawyer doesn’t know the answer. Otherwise, a lawyer is going on a fishing expedition without knowing whether he or she will find

edible fish or a huge shark ready to devour the lawyer.

ECH

5. *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.*

ECH

It is quite clear that [REDACTED] could not testify to the cause of her dropping grades after the alleged incidents. "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).

ECH

In the present case, the prosecutor elicited answers from [REDACTED] concerning her emotional and psychological injuries as a result of the alleged sexual abuse of the Appellant. These questions and answers clearly attempted to establish causation of [REDACTED]'s injuries. (T., Vol. I, p.135, line 7 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 [REDACTED]'s injuries through expert testimony, the material issue of causation was not properly before the jury. Therefore, [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.

ECH

6. *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**'s alleged condition and there were no treatment records available to the Appellant concerning **ECH**'s alleged condition. Thus, the Appellant did not know what was the actual cause of **ECH**'s alleged condition. Clearly without the treatment records and expert testimony, the Appellant could not adequately confront his accuser, and could not effectively cross-examine her resulting in a violation of the Appellant's Sixth Amendment rights.

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**



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CERTIFICATE OF SERVICE

I, Alvin E. Gurganus, attorney for the Appellant does hereby certify that the foregoing
“Appellant’s Reply To Appellee’s Response” was duly served upon counsel for the State:

Deborah Garton, Esquire
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This the 1st day of September, 2009.



Alvin E. Gurganus, II