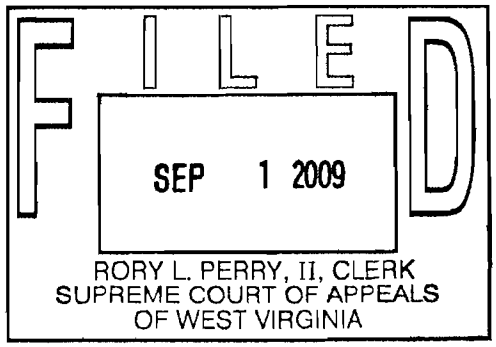
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 34856

STATE OF WEST VIRGINIA,
Plaintiff-Below/ Appellee,

v.

CHARLES JASON LIVELY
Defendant-Below/ Appellant.



BRIEF OF APPELLANT CHARLES JASON LIVELY

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

The Proceeding Below And The Nature Of The Ruling In The Circuit Court

On October 18, 2005, a McDowell County grand jury returned a five count indictment against Charles Jason Lively and co-defendant Tommy Owens. Lively and Owens were jointly charged with murder, first degree arson and conspiracy to commit murder and arson, all related to the death of Dr. Ebb K. ("Doc") Whitley in a suspicious fire at his home in Iaeger, West Virginia on March 15, 2005. Mr. Lively was also charged with one count of burglary and one count of grand larceny related to the theft of a laptop computer from a different home owned by Doc Whitley on Coon Branch Mountain in McDowell County. Mr. Lively eventually entered a guilty plea to a single count of petit larceny relating to the theft of the laptop and the burglary and grand larceny counts were dismissed; that conviction is not subject of this appeal.

The trials for Lively and Owens on the counts relating to the alleged murder and arson were severed and each defendant was granted a change of venue due to pretrial publicity. Lively's trial was conducted in Putnam County from November 14th to November 21st, 2006. Owens' trial was later held in Wyoming County and Mr. Owens was acquitted. Mr. Lively was, however, not acquitted. He was convicted of first degree murder with a recommendation of mercy and of first degree arson. The conspiracy count was dismissed.

Mr. Lively was initially sentenced by order entered July 31, 2007, to a term of life imprisonment with mercy for the first degree murder conviction and a consecutive one year sentence for the petit larceny conviction. No sentence was imposed for the arson because the first degree murder conviction was predicated on the felony murder theory presented by the State. A timely notice of appeal was filed but due to delays in assembling the record for appeal, Mr. Lively was resentenced by order entered August 11, 2008, to allow timely perfection of his appeal. Mr. Lively now appeals his convictions to this Court.

Standards of Review

Sufficiency of Evidence Assignments

This Court reviews assignments of error attacking denial of a motion for new trial or judgment of acquittal based on insufficiency of the evidence *de novo*. *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996). This Court explained the standard of review for a denial of a motion for judgment of acquittal based on insufficiency of evidence in Syllabus Point 1 of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), wherein it held:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syllabus Point 3 of *Guthrie* explains:

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Where this Court is determining whether a new trial is required, as opposed to judgment of acquittal, this court can consider the credibility of evidence and allow a new trial where the verdict is so against the weight of the evidence as to constitute manifest injustice.

> In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

Syllabus Point 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978), *overruled on other*

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

Errors Instructing Jury

This Court reviews an assignment of error alleging an improper jury instruction depends on the nature of the assignment of error. Where, as here, the appellant asserts an instruction was not supported by the facts in evidence, this Court conducts a *de novo* review. Further, this court has held:

> The court's instructions to the jury must be a correct statement of the law **and supported by the evidence**. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to the [trial] court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

State v. Bradshaw, 193 W.Va. 519, 543, 457 S.E.2d 456, 480 (1995) (emphasis supplied).

Erroneous Admission of Evidence

The standard of review for assignments of error alleging improper admission of evidence is generally an abuse of discretion standard. Where, however, the question is improper admission of evidence pursuant to Rule 404 (b) of the West Virginia Rules of Evidence, this Court conducts a three prong inquiry.

This Court has previously held that as a general rule "[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis,* 204 W.Va. 58, 511 S.E.2d 469 (1998); *see also State v. Guthrie,* 194 W.Va. 657, 680, 461 S.E.2d 163, 186 (1995) ("[M]ost rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard. . . . [A]n appellate court reviews *de novo* the legal analysis underlying a

trial court's decision."). Where the issue involves the admissibility of evidence under Rule 404(b) of the West Virginia Rules of Evidence, however, this court conducts a three prong inquiry:

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

State v. LaRock, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996).

Additionally, where an assignment of error pertaining to improper admission of evidence implicates rights of a defendant protected by the state and federal constitutions, the review is plenary and *de novo.* Thus, the admission of evidence adducing the statements of a person who does not testify at trial and is not subject to cross examination in violation of the confrontation clause is "[f]ailure to observe a constitutional right and constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt. Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

Violation of State's Duty to Disclose Evidence

Where a defendant alleges that the State failed to perform its duty to disclose exculpatory evidence or evidence material to the preparation of the defense, this Court applies the harmless error standard. The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: "(1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." Syllabus Point 2, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994). Questions of law are subject to a de novo review. Syllabus Point 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000). The failure to disclose the evidence concerning the anonymous declarant also

implicates due process, fair trial, and effective assistance of counsel rights and requires reversal unless it is shown the error was harmless beyond a reasonable doubt. Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

Cumulative Error Doctrine

Under the "cumulative error doctrine: "[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error. Syllabus Point 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

Statement Of Facts

Dr. Ebb K. ("Doc") Whitley died on March 15, 2005, in a fire at his residence in Iaeger, West Virginia. Trial, 179.[1] Police and fire marshal officers quickly adopted the theory that the fire had been set deliberately. Trial, 187. Although the physical and forensic evidence supporting the arson theory was scant, the investigation immediately became focused on identifying who was responsible for what was viewed as the murder of a prominent and powerful man. Trial, 257-59.

Immediately, suspicion was focused on Kathy Lively (now known as Kathy Hamilton but referred to herein as Kathy Lively) and her son Charles Jason Lively (commonly known and referred to herein as Jason). Trial 1077-80. From the record, it appears the reasons for this immediate and seemingly exclusive targeting of suspicion were the knowledge that Kathy had a tempestuous personal and professional relationship with Doc Whitley and that Jason had

[1] References to the Trial transcripts will be cited as "Trial, [page] #" using the pagination of the trial transcript. References to other materials in the record will cite the page of the record on which a document begins, as set forth in the index to the record filed with this court. References to transcripts of other hearings during the proceeding below will cite the page of the record on which a transcript is found and then the specific page within that transcript.

previously had trouble with the law. Three days after the fire Jason was arrested and charged with burglary and grand larceny based upon the allegation of Doc Whitley's wife, Wilma Sue Whitley that-- after the fire-- he had taken a laptop computer belonging to Doc from her place of residence on Coon Branch Mountain.[2] Trial, 1079. The questioning of Jason Lively, as shown from the written statement of Jason on March 18, 2005, focused extensively on the fire in Iaeger as opposed to the laptop taken from Coon Branch Mountain and it is evident police were seeking to elicit a confession. Jason, however denied any involvement in the fire and informed police he was at the house of a friend, Mike Stafford, at the time of the fire. Record, 290.

On April 8, 2005, a criminal complaint was issued charging Jason with first degree arson and murder of Doc Whitley. Jason's friend Tommy Owens was also charged with these offenses. Record, 28. Ultimately, in separate trial in different venues, Lively was convicted of first degree arson and felony murder and Owens was acquitted of all charges.

At trial, the evidence against Lively was almost exclusively of these varieties: evidence that his mother had argued with Doc Whitley the day before his death after Whitley had stripped her of some duties and responsibilities at his clinic where she was employed; other bad acts he had allegedly committed and the uncorroborated testimony of a jailhouse snitch who claimed Jason had inexplicably confessed to him. Even assuming that the State carried its burden of proving that the fire was incendiary in nature, the evidence that Jason participated included no physical or forensic evidence and no direct evidence other than the testimony of the jailhouse snitch, Jason Ritchie. Trial, 1102. Ritchie's testimony was direct evidence only in the sense that he claimed to have heard Jason Lively admit his role and not in the sense that he had any personal knowledge of the alleged offenses. Trial, 722-42.

As a result, a key piece of evidence was actually evidence which served to impeach

[2] Doc Whitley owned two homes, the residence in Iaeger next to his medical clinic and scene of the fire and the home on Coon Branch Mountain. He had been living on Coon Branch with his wife until several days prior to the fire when he moved out- first to Kathy Lively's residence and then to his Iaeger residence.

the trial testimony of one of the State's witnesses, Brian Salyers. Trial, 792-854. At trial, Salyers testified that he did not see Lively the morning of the fire until after the fire. Trial, 813, 825. He testified had no knowledge concerning either the fire or the whereabouts of Jason Lively near the time the fire started and that he had given a statement claiming he had dropped off Jason Lively and Tommy Owens near the scene on the morning of the fire only because he had been badgered and intimidated by the police and feared being charged and jailed if he did not tell the police what they wanted to hear which was obviously that Lively and Owens were there. Trial, 810, 826-27, 837. Salyers also testified to contacts from the circuit clerk and former sheriff of McDowell which he interpreted as pressure for him to implicate Jason at trial. Trial 839-41.

To counter this inability to provide evidence placing Jason at the scene, the State impeached Salyers' with his prior inconsistent statement in which he had implicated Lively and Owens by claiming he gave them a ride and dropped them off near Doc Whitley's house shortly before the fire. Trial, 807-30. (The 14 page transcript of the recorded interview played for the jury is at page 292 in the record) Even in this prior statement, however, Salyers denied any knowledge of the fire and stated that neither Lively nor Owens ever said anything to him, before or after the fire, suggesting their involvement. Salyers statement said only that he met Lively and Owens that morning at a gas station/convenience store, that Lively and Owens appeared high on drugs and that he gave them a ride into Iaeger and dropped them off near the Whitley clinic.

Use of Salyers' prior statement was proper impeachment, in a legal sense, and admissible as substantive evidence as to the issue. Likely worried, however, that a case where the only "proof" of a necessary fact would require the jury to accept the favorable statement of an admitted liar and criminal and ignore the trial testimony recanting the statement favorable to the prosecution-- and also to accept the testimony of another criminal, the jailhouse snitch, Mr. Ritchie, whose claims were not only uncorroborated but challenged by other witnesses--

the State did not rest on the impeachment of Salyers to establish Jason's whereabouts the morning of the fire.

Instead, the state elicited testimony from a police officer claiming that a person the State never identified for the jury or for the defense had given a statement allegedly claiming this unknown person had seen Lively and Owens with Salyers in a pickup truck the morning of the fire near Whitley's house. Trial, 1083. The State refused to identify this anonymous declarant because this alleged person "didn't want to testify." Trial, 1108. So, the State withheld his identity and failed to produce him at trial but used his alleged statement to establish the most important and necessary alleged fact in the case. The defendant cited the State's failure to disclose in post-trial motions arguing that the State had a duty to disclose the identity of the alleged anonymous declarant. Record, 216A (at page 6 of the hearing transcript). The State argued it did not have to disclose the identity of the anonymous source because "... persons sometimes speak to the police with the guarantee that they will remain anonymous. That's a common practice and they have the right to have their identity protected...." (At page 10 of the hearing). The trial court never addressed this issue in making its findings or denying the post-trial motions for a judgment of acquittal or new trial.

So, not only was Jason prevented from confronting his accuser, he was left without any means of establishing, among other things, that this alleged person: did not actually exist; did not make the statement attributed to him; no longer stood by his previous statement; or, was a person whose credibility was suspect for any number of possible reasons including the possibility that he might actually be guilty of this offense.

Additionally, to counter this phantom testimony, the defense presented alibi evidence from Mike Stafford (Trial, 1153-96) and his mother Calos Stafford (Trial, 1197-1208) stating that on the morning of March 15th, 2005, Jason was at Mike's house and the immediately adjacent house of Mike's parents, miles from the scene of the fire, and that Jason did not leave until after he was informed by telephone that the Whitley house was on fire. The prosecution

went to great lengths on cross examination to attempt to undermine this testimony placing Jason elsewhere. Trial, 1175-88, 1194, 1204-05, 1207. This was an opportunity Jason did not enjoy with respect to the alleged statement of the anonymous declarant.

Importantly, there was no other evidence, direct or circumstantial, placing Jason at or near Doc Whitley's house at any time close to the fire. No forensic evidence obtained from the scene showed that Jason had been in or at the house. No forensic evidence such as examinations of Jason's body, clothing or other items once in his possession showed Jason had been in the Whitley home, at or near a fire or handled flammable materials. No one testified they saw Jason enter or leave the house. No one testified that Jason's appearance or condition the morning of the fire was suggestive of having recently set a fire or been in close proximity to accelerants.[3]

The remainder of the relevant trial testimony will now be summarized.

Timothy Butler testified that a few minutes after 8:00 AM on March 15, 2005, he passed Doc Whitley's house and noticed the door was open and he saw a human being. He could provide no description whatsoever, even concerning the sex, race or approximate size of the person. Trial, 159-61. This is the only testimony that any person was seen at the Whitley house on March 15th prior to the fire.

Kayla Foley testified that she worked at the Whitley clinic beginning in October of 2004. She offered no testimony relevant to the fire or Jason Lively. Her testimony was limited to describing procedures at the clinic, Kathy Lively's position and duties and that Kathy did not come to work at 9:00 AM that morning.

James Gianato, the McDowell County 911 Director, testified that the fire was first reported at 10:17 AM, over two hours after Butler passed the residence, and that he then reported to the scene. Gianato described what he observed in the house following the fire and

[3] Intriguingly, the testimony admitted under Rule 404 (b) (which will be discussed in more detail *infra*) concerning an unrelated arson attempt with which Jason was allegedly involved included testimony that on that occasion Jason reeked of fuel.

was allowed to testify he considered the fire suspicious because he thought two separate fires were involved, one starting in the first floor living room and another in the upstairs bedroom. No portion of his testimony involved any involvement of Jason Lively or Tommy Owens. Trial, 176-213.

Jason Schrader of the Iaeger Volunteer Fire Department also testified concerning his observations at the scene of the fire. He also provided no testimony related to Jason Lively or Tommy Owens. Mr. Schrader did testify that to him it appeared as if hole in the bedroom floor was directly over the couch in the living room and that the fire in the bedroom had "come up from the couch" that had burnt in the living room. Trial, 227, 240. This, of course, conflicted with other testimony from State's witnesses. Schrader also offered no testimony relevant to the question of who set the fire.

Jack Whitley, one of Doc Whitley's sons, testified about family background, his father's career and his personal relationship with his faster. Jack also described his father's physical condition including the fact he was confined to a wheelchair due to having fell down stairs several years earlier.[4] Trial, 250-269. None of this testimony had any relevance to the crimes charged.

Jack Whitley also testified about his father being mistreated by his wife (who is not Jack's mother) when Doc Whitley was living with his wife on Coon Branch Mountain. Trial, 268-70, 297-300, 303-07. Jack testified that as a result, his father moved in with Kathy Lively and that he came to Lively's home and helped move his father to the house in Iaeger. Trial, 270-71 Jack also testified that he felt there was tension between Kathy Lively and Doc Whitley. Trial, 271. Then Jack was permitted to testify to hearsay claiming both that Kathy Lively told him Jason and Doc had "got into it," and that Doc told him he was "glad to get out of that" [alluding to Kathy Lively's home] and that Doc had expressed fear of Jason and said

[4] Throughout the record, Doc is sometimes described as a "paraplegic" but there was no medical testimony and it appears that he had feeling in and some use of his legs. Trial, 292-93.

he "thought he was going to hit me." Trial 337-339. The defense did not object to these prejudicial hearsay statements.

Jack Whitley, as is true of nearly every witness for the State offered no testimony relevant to the issue of who set the fire. Interestingly, Jack testified that when he brought Doc to the Iaeger home the safe was open with nothing of value in it. This, and the fact the safe was located in the house by investigators of course, contradicts the later testimony from the jailhouse snitch, Jason Ritchie that Jason Lively told him the safe had been taken.

Jeff Whitley, another of Doc's sons testified next, Trial 340-414. He also testified as to background and about moving Doc from Kathy lively's home to the elder Whitley's home in Iaeger. Trial 340-343. Jeff also stated that Doc Whitley and Wilma Sue Whitley had a very strained relationship and that Doc was not getting fed properly by her. Trial, 343-44, 384-85. Jeff also related a conversation in which Doc told him that his wife had written bad checks on his account and run up a $30,000.00 credit card bill. Trial, 346.

On Monday, March 14th, Jeff ran some personal and business errands for Doc in Bluefield and Welch. Jeff testified that he was present when Kathy and Doc argued about Doc's decision to place Louise Christian in charge at the clinic. and that Kathy screamed, "I'll kill you, you SOB." Jeff testified, however, he was not alarmed because he knew of the tempestuous relationship and considered it "just talk." Despite that admission, the vast majority of the direct examination of Jeff Whitley was devoted to portraying Kathy Lively as an angry, violent tempered woman who threatened and scared Doc Whitley and had nefarious desires for access to drugs. Trial 344, 358-359, 360-63, 365-68, 410-413. None of Jeff Whitley's testimony had relevance to Jason Lively and its purpose was to allege bad character and other bad acts of Kathy Lively who was not on trial or ever charged, or even named as an unindicted co-conspirator in the death of Doc Whitley.

Later on Monday the 14th, Jeff testified that he bathed his father and that his father asked him to have Louise Christian and Shirley Cline come over from the clinic next door. Jeff

testified that he then gave his father's keys to his father and his father gave the keys to Louise Christian. Trial, 362-63. Then, Jeff stated he went back to the clinic with Louise and Shirley and that Kathy was still upset and said "that SOB, I'll kill that SOB." Trial, 367. Jeff said he tried to calm down Kathy and told her it will "blow over in a couple of weeks." Trial, 368. Jeff testified he then left Iaeger about 3:30 PM on the 14th, ran a couple of more errands for his father and then drove home to North Carolina without returning to Iaeger. Trial 370-71.

Louise Christian (Trial, 415-70) and Jim Sizemore (Trial, 771-92) also both testified concerning the argument between Kathy Lively and Doc and that Doc had placed Louise in charge of the clinic after getting upset with Kathy. Trial, 432, 778-79. They both testified this was not out of the ordinary. Trial, 436, 452-53, 788-90. Christian also testified that Doc Whitley gave her all the keys to both the clinic and the house. Trial, 417. Sizemore and Christian each also testified that they visited Doc the early evening of Monday, March 14th, and made arrangements for Doc to be brought breakfast early the next morning when Louise came to work. Trial, 428, 435. They testified that when they left Louise used the keys she had been given to lock the house so no one could get in. Trial, 433, 782. At this point it bears emphasizing that no sign of forced entry was found when the house was examined following the fire.

Louise testified she didn't have a chance to get breakfast to Doc or to check on him that morning because the clinic was busy. Trial, 437. Thus, it was mere happenstance that no one went to check on Doc Whitley early on the 15th prior to the fire being discovered. No explanation as to how Jason could possibly have known no one would check on Doc that morning was ever offered at trial.

Wilma Sue Whitley's direct examination (Trial, 577-612) consisted mostly of her relating Doc Whitley's health and relating that Jason and his friend Mike Stafford were waiting at her home on the morning of Tuesday March 15th, to tell her about the fire and Doc's death, but she testified she already knew. Trial, 596. She was not specifically asked where she

had been that morning. She was also not asked whether she had keys to the Iaeger home. Instead her testimony centered on the fact Jason and Mike came in her house to talk over coffee and that Jason was walking through her home. She testified that after Jason and Mike left she noticed that a laptop computer was missing that she knew had been there prior to their visit. Trial 597-602. She also testified concerning her relationship with her husband but portrayed the relationship in a less unfavorable light than other witnesses.

The remainder of the States's witnesses other than Jason Ritchie, Brian Salyers and the fourteen (14) exclusively Rule 404(b) witnesses whose testimony will be discussed in detail in the argument section below, were fire and police officials testifying to the fire scene and subsequent investigation, the medical examiner who testified Doc Whitley died of asphyxiation due to smoke inhalation and had no other injuries other than thermal burns (reddened skin) from the heat of the fire and a State Police lab chemist who testified that one of the twelve samples of evidence from the fire scene he was asked to analyze contained trace amounts of toluene, a common household chemical that is flammable. This testimony did not make it clear precisely where the sample with the trace amount of toluene was located. It was only stated that the positive sample was #12 taken from the upstairs bedroom. Trial, 1064. No physical evidence was collected at the scene that in any way connected Jason Lively or Tommy Owens to the fire or even that tended to show either had ever been in the Whitley home.

In addition to whatever slight probative value presence of a trace amount of a common household chemical found in cleaning and finishing products used on floors may have, the conclusion that the fire was an arson was based on: the failure to discover any other cause for the fire; belief of the investigators that the fire had two points of origin (a couch in the downstairs living room and the upstairs bedroom directly above it where Doc Whitley stayed); and that a television set on the floor of the bedroom was face down and the back of the set was burned. Trial, 973-1011. Although this evidence is far from overwhelming and an independent fire investigator retained by the company providing homeowner's insurance on the Whitley

house concluded that the cause of the fire could not be determined (Trial, 1209-29) the appellant does not herein argue that the evidence, viewed most favorably to the prosecution, could not support an inference the fire was arson. Mr. Lively does emphatically argue the evidence is wholly insufficient to show he had any involvement in the fire and asserts that the relative lack of evidence conclusively showing the fire was arson is a factor the court should consider in assessing whether the evidence was sufficient to sustain the verdicts.

ASSIGNMENTS OF ERROR

1. **The trial court erred by allowing admission of testimony relating the alleged statement of an anonymous declarant, and of another non-testifying witness, under both Confrontation Clause and hearsay analysis.**

2. The trial court further erred by not ordering the State to disclose to the defendant the identity of this alleged witness and any exculpatory evidence, information relevant to credibility or for impeachment, or otherwise material to preparation of the defense.

3. **The trial court erred in allowing the State to admit evidence under Rule 404 (b) that created extreme unfair prejudice against the defendant which had no probative value or such slight probative value as to have been substantially outweighed by the danger of unfair prejudice, misleading the jury, confusion of the issues and constituted needless presentation of cumulative evidence.**

A. Evidence pertaining to a theft of a laptop computer.

B. Evidence relating to a fistfight involving persons not connected to the victim.

C. Evidence pertaining to a prior arson allegation.

D. Evidence pertained to alleged illegal drug activity.

E. The errors admitting the 404 (b) evidence were compounded by the failure to give appropriate limiting instructions.

3. **The trial court erred by giving State's Instruction"C" regarding the concerted action principle because the evidence did not support the theory because no facts were presented showing a principal in the first degree set the fire and that the appellant was present and in some manner aided, encouraged, assisted or incited the first degree principal.**

4. The evidence adduced at trial was insufficient to convince any rational trier of fact beyond a reasonable doubt that Lively was guilty of arson, and if the conviction for arson fails the murder conviction must also fail because the State proceeded on a felony-murder theory with arson as the predicate underlying felony.

5. The trial court erred by permitting the State to publish a statement of Brian Salyers that, even if portions of it were properly admissible, included irrelevant and improper opinion testimony and discussions of unfairly prejudicial alleged bad acts and character evidence concerning Mr. Lively, Mr. Owens and others.

6. The cumulative or aggregated impact of the errors below resulted in an unfair trial requiring reversal under the "cumulative error doctrine" even if this Court should find none of the errors viewed separately and individually mandate reversal.

POINTS AND AUTHORITIES

Appellant, Charles Jason Lively, was denied a fair trial. The State was permitted to introduce evidence supposedly from a person with first hand personal knowledge of relating to a critical question of fact-- whether Lively and Owens were near the scene of the crime when it was committed-- without disclosing the identity of this person to the defense during discovery, or even more unfathomably, to the jury at the trial. The State was also permitted to elicit testimony from a jailhouse snitch that a different jailhouse snitch who did not testify at trial had told police the same story he told. Lively was completely deprived of any opportunity to confront and cross examine theses alleged witnesses and was convicted largely on the basis of what can be accurately called phantom testimony. This alone would mandate reversal, but the errors were compounded by the trial court's ruling allowing the prosecution to introduce a veritable mountain of evidence related only to other alleged bad acts of Mr. Lively which lacked probative value as to the offenses being tried and were used to convince the jury Jason was a man of bad character with a propensity to violent crime. Mr. Lively suffered extreme unfair prejudice from the admission of this bad acts evidence and its admission at trial also makes reversal and a vacating of his convictions the proper remedy.

Additionally, the trial court failed to give proper limiting instructions when 404 (b) evidence was introduced, instructed the jury as to a prosecution theory- "concerted action" which was not supported by the evidence admitted at trial and generally failed to ensure that Jason Lively received a fair trial as guaranteed by the constitutions of the United States of America and the State of West Virginia.

Mr. Lively also asserts that the evidence at trial, even including the vast quantity of evidence that should not have been admitted, was insufficient to convince any rational trier of fact of his guilt beyond a reasonable doubt. This was a fundamentally unfair trial the result of which cannot be considered reliable and justice demands that his convictions be vacated.

The trial court erred by allowing admission of testimony relating the alleged statement of an anonymous declarant under both Confrontation Clause and hearsay analysis and further erred by not ordering the State to disclose to the defendant the identity of this alleged witness and any information relevant to credibility or for impeachment to the defense.

The statement of the anonymous declarant asserting that Jason was seen being dropped off by Brian Salyers on the morning of the fire falls clearly within the rule of *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* stands for the proposition that "where testimonial statements are at issue, the **only** indicium of reliability sufficient to satisfy constitutional demands is confrontation." *Id at* 541 U.S. 68-69.

The assertion that the anonymous declarant had seen Lively and Owens in Salyers' vehicle was testimonial and it was offered for the truth of the matter asserted. It was testimonial because it was a statement given to a police officer investigating a crime clearly by a person who was aware that the police officer was investigating the crime. Any reasonable person would understand the prosecutorial significance of the statement under such circumstances. *See, Crawford at* 52; *State v. Mechling*, Syllabus Pts. 8 and 9, 219 W.Va. 366, (2006). Moreover, were the anonymous declarant's actual appreciation of the prosecutorial significance open to debate, the fact the anonymous declarant specifically stated that he did not wish to become involved and requested that his identity be concealed eliminates any possible question.

On the second prong, the statement had no value except for the probative value as to truth of the matter asserted-- that Salyers did give Lively and Owens a ride to the crime scene. Its value for that purpose was, of course, dramatically increased because Salyers denied doing so in his trial testimony. The anonymous declarant's statement was introduced as substantive evidence Salyers gave Lively and Owens a ride to Iaeger tending to prove they were at or near the scene of the crime. Correctly viewed, it was not impeachment evidence but merely

evidence stating a fact contrary to the factual testimony of a witness. That two witnesses testify differently about a fact is not "impeaching" of either one of them. Even, however, if the statement was viewed as one introduced to impeach Salyers' trial testimony the anonymous statement would have no value or relevance unless introduced to prove the truth of the factual matter asserted. At trial, the anonymous declarant's statement did not help to explain the actions of anyone or any other matter unrelated to the truth of the statement. The anonymous statement could only contradict or impeach Salyers if it was true.

The gross unfairness of this violation of Lively's right to confront his accuser is amply demonstrated by the fact the prosecution had opportunity to and did impeach Salyers' trial testimony with his inconsistent prior statement and other evidence suggesting bias in favor of Lively and his general character for untrustworthiness. Lively was denied any ability to impeach the anonymous declarant or to cross examine him in any manner. The statement of the anonymous declarant was crucial to undermining Lively's alibi witnesses (whom the State also had opportunity to and did cross examine) and convincing the jury that Lively was at the scene of the crime when it occurred.

This case presents a textbook example of precisely the fundamental wrong the Confrontation Clause prohibits. Additionally, even if the Confrontation Clause did not bar the admission of such evidence, it was also clearly prejudicial hearsay and inadmissible on that ground. This was an available witness (for the State, obviously not for the defense because of discovery violation which prevented the defense from knowing the identity); not wanting to testify does not make a person unavailable to testify. As previously explained, this was testimony relating the words of a non-testifying declarant and the words constitute a statement because they were offered for the truth of the matter asserted. None of the hearsay exceptions set forth in Rule 803 apply. In fact, none of the exceptions found in Rule 804 where unavailability of the witness has been established apply either. This was blatant hearsay introduced to establish a highly contested factual assertion that was crucial to question of guilt

or innocence. Indeed, this statement would not have been admissible even under the more lenient standard of *Ohio v. Roberts,* 448 U.S. 56 (1980), because even *Roberts* held that statements from non-testifying witnesses are only admissible where there is both a showing that the witness is unavailable and the statement shows "particularized guarantees of trustworthiness" such as can be shown when the statement falls within a firmly rooted hearsay exception. *Roberts at* 448 U.S. 66. This witness was not unavailable and a statement purportedly from a person about whom the court, the defense and the jury have no knowledge clearly has no indicia let alone guarantees of trustworthiness.

As this court held in *State v. Mechling*, 219 W.Va. 366, (2006): "the Confrontation Clause contained Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify **and** the accused had a prior opportunity to cross examine the witness. *Mechling*, Syllabus Pt. 6 (emphasis supplied). Here neither prong was established because the witness was not unavailable and the defense was prevented from even learning if the person actually existed and if so whom he might be, let alone provided opportunity to cross examine him.

<u>The State also violated its constitutional duty to disclose evidence which has exculpatory potential and was inarguably material to preparation and presentation of the defense</u>.

Compounding the extreme unfairness of permitting the state to introduce anonymous testimony is the fact that the defense was not merely hampered in preparing its defense by withholding of highly material information required to be disclosed by both Rule 16 and the state and federal constitutions. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *State v. Hatfield*, 169 W.Va. 191 (1982) *State v. Youngblood,* 221 W.Va. 20, 650 S.E.2d 119 (2007). The defense was entirely prevented from investigating this key aspect of the case. So, not only was Jason prevented from confronting an

accuser, he was left without any means of establishing, among other things, that this alleged person: did not actually exist; did not make the statement attributed to him; no longer stood by his previous statement; or, was a person whose credibility was suspect. How do we know, for example, that the reason the State refused to disclose the identity of the person is not that the State knew he had changed his story or was expressing less confidence in its accuracy than the admitted hearsay tends to suggest? Indeed, how do we know the anonymous declarant, if he or she exists, is not the person responsible for the crime (or protecting a third party) and essentially planted false evidence to implicate others?

Finally, it was never made clear precisely what this purported anonymous declarant actually told police. The testimony relating the "tip" was vague and ambiguous but it remains quite possible that the evidence was exculpatory insofar as Jason Lively is concerned. Ronald Blevins at one point during his testimony stated the tip was that this purported anonymous source told him he had seen **Tommy Owens** in a pickup truck near the clinic the morning of the fire. Trial, 1083. If this anonymous person did indeed state he saw Owen but either did not mention Lively or stated he did not see him such evidence would have been of great exculpatory value to Lively. Because, the State withheld the identity of this anonymous witness from the defense the defense was wholly prevented from investigating a matter which could have produced highly compelling exculpatory evidence.

Without any question, the identity of this alleged anonymous declarant was material to preparation of Lively's defense and he was denied due process, a fair trial, effective representation by counsel by the State's withholding of his identity and any impeachment or credibility information relating to him. This also rendered the trial fundamentally unfair, but even if the witness's identity had been properly disclosed it would be reversible constitutional error to allow the statement where the defendant had no opportunity to cross examine the declarant under oath.

The prosecution not only should not have been permitted to introduce the testimony of

this alleged anonymous declarant, it should also have been ordered to disclose the identity to the defense so proper investigation could have been undertaken by the defense. The denial of these fundamental constitutional rights demands reversal and vacation of the convictions.

The trial court erred in allowing the State to admit evidence under Rule 404 (b) that created extreme unfair prejudice against the defendant which had no probative value or such slight probative value as to have been substantially outweighed by the danger of unfair prejudice, misleading the jury, confusion of the issues and constituted needless presentation of cumulative evidence.

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

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

W.Va.R. Evid, 404 (b) 2009.

This court explained when evidence of other acts may be admissible under Rule 404 (b) in *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). In *McGinnis* this court set forth the procedure and tests a trial court should apply with regard to evidence offered under this rule. This Court held:

> When offering evidence under Rule 404(b) of the West Virginia Rules of 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 the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

Syllabus Point 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the

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

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

Rule 403 provides: "Although relevant, 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." W.Va.R. Evid, 403 (2009).

The vast volume of evidence introduced at trial under Rule 404 (b) in this case was irrelevant in that it had no tendency to make the existence of any fact of consequence to the determination of the action more or less probable. W.Va.R. Evid, 401 (2009). Therefore the evidence should have been excluded under Rule 402. To the extent some small portion of the 404 (b) evidence had probative value it should have been excluded pursuant to the Rule 403 balancing test. Viewed *in toto*, the presentation of witness after witness who testified concerning events unrelated to the instant charges rendered Lively's trial fundamentally unfair as the verdict was premised on evidence which unfairly prejudiced him, confused the issues and amounted to unjust presentation of cumulative evidence about acts for which he was not being tried.

The Rule 404 (b) evidence admitted at trial falls into these categories: evidence relating to a fistfight several years prior to the charged fire between Owens and Lively and two other men; evidence relating to alleged arson attempt several years prior to the Whitley fire;

evidence that Jason stole a laptop computer which belonged to Doc Whitley after the fire at Whitley's home but from a different location; and, evidence of illegal drug activity.

The State filed a pretrial notice of intent to use Rule 404 (b) evidence. Record, 143-46. The State's filing provide notice that the State sought to introduce evidence relating to: the laptop computer stolen from the Coon Branch Mountain home; a fight which occurred on October 6, 2002 between Owens and Lively and Randy Birchfield and Elzie Branham, Jr.; the fire, which occurred January 23, 2001, at Stacy's Variety store; and an alleged robbery of a man named Johnny Mullins (this incident did not involve Jason Lively and no evidence pertaining to it was admitted at Lively's trial). The State did not give notice that it intended to introduce any evidence purported to show Jason Lively was involved with drug activity. A hearing on this matter was held November 6, 2006. Record, 194. (references to the transcript of this hearing will cite the page as numbered in the hearing transcript which begins at page 194 of the record).

The reliance on the 404 (b) evidence began with the State's opening statement. Trial, 128-29, 133-37. This reliance on evidence pertaining to other bad acts became far more pronounced as the trial proceeded.

With regard to the stolen laptop, the state sought and received permission to introduce testimony from four different witnesses (Jonathan Walker, Trial, 471-77; Jamie Stafford, Trial, 477-83; Jeremy Lester, Trial, 483-89; and Anthony Iafolla, Trial, 489-94) that related entirely to the stolen laptop. In addition much of the direct testimony of Wilma Sue Whitley related to the laptop. Trial, 576-621, 662-69. Also law enforcement witnesses mentioned the laptop, and the other 404 (b) evidence during their testimony describing the investigation. The State never relented in its mission to use evidence of other bad acts to portray Jason as a bad person with a propensity to commit criminal and violent acts.

When queried by the trial court as to the purpose for which the State sought to introduce the evidence regarding the laptop the State replied, "motive, plan and intent."

Record, 194, Transcript, 9. The State, however never articulated any reason why the stolen laptop was relevant to this laundry list beyond this tautology: "We believe all of that evidence tends to prove Mr. Lively's motive, his plan and his intent on that day because he- the evidence we have in the murder and arson would be that he and Tommy Owens entered Dr. Whitley's house at Iaeger intending to rob him or steal from him, and when they completed that, what they were doing in the house they set the house on fire and left. All of that we believe is admissible Under Rule 404 (b)." Transcript, 28-29. Obviously, this statement suggests the State's argument was that stealing the laptop helped make the State's other evidence of intent to take property from the Iaeger house where the fire was set more likely to be true. In addition to failing to articulate a reason **why** the laptop evidence tended to show intent to commit arson, an obvious problem with this argument is that the State had absolutely no evidence that there was a plan to take any property from the Iaeger house. The facts belie the argument that the setting of the fire had anything to do with an intent to take property because no property was in fact taken and there was no evidence that any person had looked for property or attempted to take it from the Iaeger home. Thus, the state merely cited three potential grounds for admission set forth in Rule 404 (b) and claimed this evidence made them more likely to be true without any evidentiary or logical support.

Moreover, the evidence was undisputed that at the time Jason and Mike Stafford visited Wilma Sue Whitley at the Coon Branch Mountain home both Jason and Mrs. Whitley had heard about the fire from other people. Therefore, taking the laptop would tend to prove nothing beyond the fact that Jason is a bad person who would take the property of a dead person shortly after his death. In fact, none of Jason's actions with regard to taking the computer, attempting to sell the computer and erase information showing it belonged to Doc Whitley would necessarily have been any less likely to occur if Whitley was still alive. Living people have their property stolen all the time; people sell or attempt to sell such property and also attempt to conceal rightful ownership. Even if Jason would have been less likely to take

the laptop had Whitley been alive that would do nothing to establish that taking the laptop was not an impulsive act based on presentation of an opportunity and was somehow evidence that he was involved with the fire.

The State essentially just tossed out robbery as a potential motive for the fire because it lacked plausible evidence of its other, contradictory, motive argument-- that the fire was set to kill Doc Lively because Kathy Lively was angry about the changes at the clinic. Beyond the general idea that robbery could always be a motive for a murder or arson there was absolutely nothing in this case to suggest the fire at the Whitley house was motivated by an intent to steal and Jason's involvement with the laptop did nothing to make that assertion more likely to be true.

Indeed both the assertion that the motive was robbery and the other assertion that the motive was Kathy Lively's anger served only as a premise for the State to introduce irrelevant evidence that both Jason Lively and his mother were bad people. None of this evidence had probative value with regard to proving the essential element that Jason was involved in the house being set on fire, but it was highly prejudicial, and the State introduced no other evidence whatsoever relevant to that ultimate question beyond the procured testimony of the jailhouse snitch Jason Ritchie who claimed Lively gave him a confession that did not match the facts of the case.

The stolen laptop had as its only connection the fact that it belonged to the victim of the offenses being tried and temporal proximity to the time of the fire. The evidence relating to the fight in which Jason became involved on October 6, 2002, lacked even that slight connection to the crime. The state was permitted to introduce testimony from four separate witnesses regarding this fight. (Amy Branham, Trial 529-40; Elzie Branham, Jr., Trial, 541-50; Rita Birchfield, Trial 550-57; and Randy Birchfield, Trial, 557-566) In a nutshell, and in the light most favorable to the State, that evidence showed that Jason and Tommy Owens entered the Friendly Mart and by coincidence Elzie Branham, Jr., a man with whom Owens had

previously fought was there and Mr. Owens rushed Branham and attacked him without provocation. Then, while Mr. Owens was fighting Branham, Jason assaulted Mr. Branham's friend Randy Birchfield. In support of allowing admission of evidence concerning this altercation, the state argued only that it "proves a common scheme or plan of the Defendants to act together to carry out crimes and violence." Record 194, Transcript, 72.

Of course, there was no evidence that this fight was planned either together between Owens or Lively or even by Owens alone. The evidence showed nothing more than men who had a dispute coincidentally met and that one took the opportunity to exact revenge and the colleagues of those two men also became involved in the fight. Even if the facts tended to show any slight evidence of a plan to start a fight with Branham and Birchfield that would have no probative value as to showing a plan or common scheme to commit an act of a totally different character and nature two and half years later. Perhaps, if Lively had denied any association with Owens prior to the fire at Whitley's some small quantum of this evidence would have been relevant to rebut the denial of association. There was, however, never any dispute concerning Lively and Owens being friends and this evidence was used entirely to portray Jason as a violent and even sadistic person because Mr, Birchfield was disabled and not capable of putting up much of a fight. The idea that because two people got in a fistfight together, it is more likely that two and a half years they later planned and committed an arson and murder involving a person with absolutely no connection to the people involved in the fight is ludicrous.

Even if the argument this fistfight incident had any probative value regarding a fact material to the murder and arson was accepted, that the probative value was extraordinarily slight and more than substantially outweighed by unfair prejudice to Lively and should have been excluded under the Rule 403 balancing test is irresistible. Given the lack of evidence the State presented with any tendency to show Jason committed these crimes it cannot be said the jury would have convicted Jason but for the wrongful admission of this evidence. Standing

alone, admission of the evidence about the fistfight should be considered reversible error. Viewed in conjunction with not only the other 404(b) evidence but the other errors in the court below the unfairness of this trial is manifest.

We have not yet come close to exhausting the list of the 404 (b) witnesses permitted to testify at trial. The State also was permitted to introduce testimony from six witnesses (Burb Blankenship, Trial, 494-503; Harold Coleman, Trial, 503-08; Roger Kirk, Trial 508-17; Woodrow Kirk, Trial, 517-529; Jeff Lambert, Trial 743-51; and Jackie Justice, Trial, 751-63) whose testimony related entirely to the fire of January 2001 at Stacy's Variety store.

On the surface, this incident had more in common with the crimes for which Jason stood trial than the other 404 (b) evidence, but the only real similarity to the State's allegations regarding the Whitley case is that this incident involved Tommy Owens and fire. The allegations concerning the Stacy's Variety fire were that two men, Roger Burgess Kirk and Jackie Justice got onto a fight in late 2000 or early 2001. Trial, 753. During the fight two other men, Woodrow Kirk, the father of Roger Burgess Kirk, and Roger Justice (no relation to Jackie Justice, but the father-in-law of Tommy Owens according to testimony) arrived and got into an argument about the fight. Roger Justice was allegedly upset and and brandishing a gun. The fight was broken up but according to testimony Roger Justice remained angry and sought to get back at Woodrow Kirk. Sometime shortly thereafter, Stacy's Variety, a store owned by Woodrow Kirk suffered superficial damage when bottles containing fuel, commonly called "Molotov cocktails" were thrown at the door. The State's evidence tended to show that Roger Justice had offered Tommy Owens money to do this deed and that Jason Lively participated as well. The appellant does not contest the lower court's finding that the State established by a preponderance of the evidence that Jason participated in this event. That, however, is just one of the necessary findings to permit introduction of this evidence and the State failed to establish how the participation in throwing Molotov cocktails at Stacy's Variety was relevant to determination of who set fire to the Whitley home over four years later.

Both events involve allegations of arson, but are otherwise very different. The Stacy's Variety incident involved undertaking an act for payment. No claim that the Whitley fire was an arson for hire was ever presented. The Stacy's Variety fire involved throwing incendiary devices against the door of an unoccupied business building on a quiet rural road late at night. The Whitley fire did not involve Molotov cocktails and was alleged to have been perpetrated by someone who unlawfully entered an occupied residence in broad daylight at approximately 8:00 AM on a major highway in the center of town. The State never settled on a motive for the Whitley fire but vacillated between robbery and personal animosity. The Stacy's Variety fire was allegedly motivated simply by payment from a third-party with no motive to steal or personal animosity between the owner of the building and the perpetrators.

Given these very different circumstances, the probative value of the Stacy's Variety fire was quite slight. To the extent showing that Owens and Lively had previously collaborated in a crime involving fire had probative value such probative value was slight and substantially outweighed by the unfair prejudice, confusion of the issues and misleading of the jury. Additionally, allowing six different witnesses to testify (and testify about allegations beyond those concerning the fire at Stacy's Variety that were highly prejudicial including drug activity) was error even if it is argued the state should have been allowed to introduce some evidence to show Lively and Owens were involved in the Stacy's Variety fire. Moreover, it is not merely the remoteness in time and dissimilarity of the two incidents that produced substantial prejudice. The State used this evidence to highlight a relationship between Lively, Owens and Roger Justice who was portrayed as a violent criminal heavily involved in drugs. This guilt by association effect combined with the State's efforts through the other means described herein to portray Jason as a bad person, involved with illegal drug activity who had a propensity to commit violent criminal acts. Jackie Justice was directly asked whether Roger Justice offered him drugs if Jackie would commit the arson; Jackie answered affirmatively. Trial, 754. Jackie Justice was also permitted to testify that Tommy Owens confessed to him while Jackie and

Tommy Owens were "out doing drugs one evening." Trial, 755-56.

Finally, although, this specific ground was not presented in the petition for appeal and timely objections may not have been made at trial to the testimony, it was error for the trial court to permit the prosecution to elicit responses related to illegal drug activity and otherwise insinuate Jason's alleged involvement with such activity throughout the trial. No notice was provide the defense that the state intended to introduce evidence related to drug activity and such allegations were not relevant and clearly unfairly prejudicial to Lively. This evidence related to alleged illegal drug activity by Lively and friends or associates was irrelevant and unfairly prejudicial. The court is asked to apply the plain error standard to this evidence and find its admission constitutes an independent ground for reversal. Mr. Lively also requests this court consider admission of this prejudicial evidence when conducting the cumulative error analysis.

Failure to give limiting instructions

Compounding the error and prejudice resulting from the admission of the vast amount of 404 (b) testimony is that on only one occasion did the court give a proper limiting instruction when or immediately after the evidence was presented. The court did give the limiting instruction when the State's first witness testified about the stolen laptop. Trial, 470. The Court though never again gave the jury a limiting instruction explaining the limited purposes for which it was allowed to consider the 404 (b) evidence. It may well be the case that giving the single limiting instruction caused the jury to assume that all of the other bad acts evidence was admissible generally and relevant for any purpose including the direct question of guilt or innocence. The trial court did give a generic instruction about other bad acts evidence in the charge to the jury prior to deliberations. Trial, 1427. This generic instruction cannot though be said to cure the error of failing to give such instructions during the testimony because the instruction in the charge made no attempt to explain to the jury what

evidence during the testimony constituted other bad acts evidence admissible only for limited purposes.

Jason Lively was tried for first degree arson and felony murder based upon allegations he and Tommy Owens set a fire at Doc Whitley's house which caused his death. A review of the trial shows that very little of the evidence introduced by the State has any relevance concerning who was in fact responsible for setting the fire and focused inordinately on presenting evidence of bad character and other bad acts. Parsing through the witness list reveals that the State presented only the jailhouse snitch, Jason Ritchie, and Brian Salyers to testify to facts in any way related to the question of who set the fire. The remainder of the witnesses did not mention Jason Lively with connection to any facts relevant to the fire.

A large number of the State's witnesses testified almost exclusively with regard to facts of no relevance to the question of who set the fire and to the extent any of their testimony was relevant it pertained to establishing that Kathy Lively and Doc Whitley had argued and Doc Whitley had relieved Kathy of duties concerning bookkeeping and prescriptions at the clinic. Arguably, this is evidence of a motive for Jason, however weak it may be and divergent from the state's claim that robbery was motive for the crimes, but it provides no support at all for the State's claim it could prove who did in fact commit the crimes. Moreover, the State presented no evidence tending to show that Jason learned of the argument between Kathy Lively and Doc Whitley prior to the fire. Rather, the State attempted to portray the fact of the fire as circumstantial evidence Jason must have known because the fire occurred and the State was blaming Jason for it. That is putting the proverbial cart before the horse.

Numerous fire and police officials testified but their testimony included no evidence involving personal knowledge of who set the fire or even circumstantial evidence tending to show Jason Lively was involved. These witnesses detailed reasons to believe the fire was arson. The only law enforcement officers whose testimony addressed Jason Lively were William T. Jones of the Bluefield Police Department and McDowell County Deputy Sheriff

R.L. (Ronald) Blevins. Jones' testimony concerned only a written statement given by Lively in which he denied any involvement and the bulk of Jones' testimony was laying a foundation the statement was voluntary. Jones was also permitted to testify that at the time of the questioning on March 18th, Jason "...was dirty. He had an attitude about everything." Trial, 710. In Jason's statement, Jason admitted taking the laptop computer and trying to sell it but asserted it was given to him by Doc Whitley. Trial, 716-17. Accounting for his whereabout the morning of the fire, Jason stated he was at the home of his friend Mike Stafford and the adjacent home of Stafford's parents and learned of the fire from a phone conversation with Shirley Cline

the receptionist at the clinic. Trial, 714-715.

The other law enforcement witness whose testimony had any relevance to Jason Lively was McDowell County Deputy Sheriff Ronald L. Blevins. Trial, 1069-1146. Much of Blevins' testimony though had nothing to do with Jason Lively. Blevins was asked about an investigation of "how the clinic was being run or operated" and the investigation was "still ongoing." Trial, 1073-74. Blevins was also asked whether he had heard about Whitley making changes with regard to prescriptions and access to narcotics. Trial, 1077. This testimony was quite vague and premised on hearsay contained in leading questions, but its purpose was clearly to imply that Kathy Lively was involved in misappropriation of drugs from the clinic and to insinuate that Jason was somehow involved as well. This was another prong of the prosecutions strategy to portray Jason as a violent drug abuser and thus the kind of person who would commit murder and arson. Yet, there was no evidence whatsoever that drugs were related in any way to the fire. Blevins then testified as to Wilma Sue Whitley's complaint about the laptop taken from the Coon Branch home after the fire. Trial, 1078-80. Blevins then segued into being present for the questioning of Jason on March 18th, and he too was permitted to testify that Jason was "unkempt" and "had a little bit of an attitude about him...." Trial, 1080.

Then, the prosecution asked Blevins whether he received a "tip or confidential report" concerning whether Owens and Lively had been seen in Brian Salyers' pickup truck near the Whitley Clinic the morning of the fire. Trial, 1083. Later in his testimony, Blevins was also asked about whether Salyers said anything about the fire four years earlier at Stacy's Variety and allowed to testify Salyers had said Lively and Owens had told him they tried to set fire to the store. Trial, 1091. This further highlighted this 404 (b) evidence to jury.

The centrality of the testimony relating to other alleged bad acts, the alleged bad character of Jason Lively and insinuations about Kathy Lively's alleged wrongdoing concerning drugs to the State's trial strategy and presentation to the jury is further illustrated by the State's closing argument, Trial, 1433-57, 1495-1508. The prosecutor began his argument as to "why he is guilty beyond a reasonable doubt" with, "[f]irst of all we know Dr, Whitley was fed up with the way the defendant's mother was operating the clinic." The prosecutor then immediately focused on the alleged activities of Kathy Lively regarding drugs: "[Doc Whitley] was not dispensing narcotics. He was not giving people injections. The defendant's mother was doing that." Trial, 1440.

The prosecutor later, attempting to persuade the jury to believe that Brian Salyers had given Lively and Owens a ride and dropped them off near the clinic, described Owens and Lively as "these men who had tried to set fire to a store building over at Mohawk." Trial, 1444. The prosecutor continued, [t]hey're the ones who were paid to go over there and threw beer bottles filled with fuel...."Trial 1446-47. Continuing to pound on the 404(b) evidence, the prosecutor reminded the jury, "They went into the Friendly Mart in the daytime... and just attack these people.... Mr. Birchfield's a disabled coal miner who has difficulty even walking around. That's the one Jason Lively picked out and beat up, jumped on and beat up, for no reason whatsoever. And Tommy Owens his partner goes and sucker punches Mr. Branham and starts a brawl there in the middle of the day at the Friendly Mart.... and you add to that the events of the day of Dr. Whitley's death." Trial, 1447

The prosecutor then used the laptop computer to attack Jason's character: "That very day, the defendant goes up there and goes into his house up on Coon Branch Mountain, and while Mrs. Whitley is setting there trying to come to grip with the fact her husband of 29 years has just been found dead under those circumstances, he finds a way to sneak around and steal Dr. Whitley's laptop computer, and takes it that same day– like an hour or so after Dr. Whitley is found dead." Trial, 1448.

Then, the prosecutor immediately returned to portraying the defendant's mother as being responsible for illegal drug distribution: "she had pads and pads of prescriptions already stamped with the doctor's name, she had access to the narcotics cabinet, she had access to the injectables, the Nubain pain reliever...." Trial, 1449.

The prosecutor then alleged that Kathy Lively communicated her demotion to Jason Lively. Trial, 1451-53. The defense objected because there had been no such evidence, but the objection was overruled. Trial, 1452-53.

The prosecution then twisted the evidence again to insinuate Jason Lively was involved with large scale drug activity. "Owens goes on later with Brian Salyers selling stolen copper to buy drugs. Jason Lively goes the other way, ends up at Dr. Whitley's Coon Branch Mountain house, steals his laptop... and is in a mad rush to go out and sell it that day. We asked why are you in such a rush to get money? Why did you need money that day? He had no answer to that.... Well, we suggest you can draw inferences from the evidence as to what he wanted the money for that day." Trial, 1454-55.

That the State relied heavily on evidence of not only alleged other bad acts of Jason Lively but also bad acts and bad character evidence related to the defendant's mother cannot be disputed. The State had no direct evidence connecting Jason Lively to any act charged in the murder or arson counts and only highly suspect evidence even placing him near the scene. The State had absolutely no forensic evidence that could be used circumstantially to support a rational inference Jason or Tommy Owens entered the Whitley house let alone set fire to it.

The State premised its case almost entirely on the theory that Jason was a bad person whose mother, also a bad person, had argued with Doc Whitley and therefore he committed the crimes.

In this trial, extremely prejudicial evidence of other bad acts probative only of character and having no logical relationship to the crimes charged was admitted- and in a manifestly cumulative manner-- which also exposed the jury to insinuations well beyond the other alleged bad acts themselves because it showed Mr. Lively had relationships with other persons of disreputable or violent character. This evidence should have been excluded. It had no probative value tending to make any fact relevant to determination of the elements of the charges more likely. Even if this court should view that some portion of the 404 (b) evidence had some slight probative value, clearly not all of it did and any other acts evidence that had slight probative value should still have been excluded because the unfair prejudice, cumulative evidence, and confusion and misleading of the jury substantially outweighed any such slight probative value.

Mr. Lively asks this court to find that admission of this evidence was reversible error and, if this case is to be tried again, that the lower court be instructed not to allow the State to introduce such evidence at the trial.

The trial court erred by giving State's Instruction"C" regarding the concerted action principle because no facts were presented showing a principal in the first degree set the fire and that the appellant was present and in some manner aided, encouraged, assisted or incited the first degree principal.

Over objection by the defense, the trial court instructed the jury:

> The court instructs the jury that under our law each and every person who is actually present at the scene of a criminal felony act and who participates in the commission of such acts in any way-- whether it be by directly doing the act or it be by encouraging, inciting, lending countenance to or otherwise aiding the commission of the crime in any manner— can be found guilty of the criminal offense and punished for it. The law calls this the "concerted action principle." Under the "concerted action principle"a defendant who was present at the scene of a crime and who, by acting with one or more other persons, contributed in

> any way to the commission of such criminal act is criminally liable for the crime the same as if he/she were the sole perpetrator.

Trial, 1431.

This instruction, although an accurate statement of law was not supported by the facts of this case and should not have given by the trial court. No trial witness testified that he or she saw Jason Lively and Tommy Owens together the morning of the fire or that he had personal knowledge the two men acted in concert to enter and set fire to Doc Whitley's home. Other than the hearsay from the anonymous declarant related to the jury by Deputy Sheriff R.L. Blevins in violation of Lively's right to confront the witnesses against him, the only relevant evidence arguably supporting the instruction came from the purported confession that jailhouse snitch Jason Ritchie claimed that Jason Lively made to him and from the prior inconsistent statement made by Brian Salyers during a prolonged and lengthy interrogation– a statement Salyers disavowed on the witness stand.

The testimony of Jason Ritchie is not only highly suspect because it is totally uncorroborated and its source is a criminal with a lengthy record who was seeking and received favorable treatment from the prosecution and court in exchange for testimony. It is also unworthy of belief because the substance of Ritchie's testimony concerning the alleged confession by Lively is directly contradicted by corroborated facts. Ritchie claimed that he befriended Lively while both were at the Southwestern Regional Jail and that Lively related his involvement to him. Another inmate, Harry Caskey, testified however that Ritchie was a "troublemaker" who did not get along with other inmates including Jason Lively. Trial, 1234.

Caskey also testified that Ritchie tried to get Caskey to join him in claiming that Lively had confessed. Caskey testified that Ritchie told him another inmate had received a bond reduction and been released for making up a story about Tommy Owens so they should do the same with Lively. Trial, 1233. Caskey said he refused because he had only sixteen days to go on his sentence. Trial, 1235. Ritchie who was afraid to tell the police his story alone,

responded by telling Caskey, " all you've got to do is act like he told you that." Caskey still refused Ritchie's entreaty. Trial, 1235.

Ritchie, however, went ahead with telling the police that Lively had confessed to him and ultimately received a very favorable plea agreement dropping a felony burglary count and allowing him to plead to two counts of petit larceny in exchange for his testimony against Lively. Caskey testified that one day after making a phone call, Ritchie boasted, "Hell, all you've got to do to get out of here is tell them the Lively boy said he killed that doc... I'm getting out of here." Trial, 1233.

Ritchie testified that Lively told him that Lively and Owens went to Whitley's home to steal money and drugs. Trial, 726. Every other witness with knowledge testified that Whitley did not keep large sums of money or drugs in his Iaeger home and it is clearly established that the house had been unoccupied for at least many months prior to Doc Whitley's return to the home the day before the fire. No witness testified that Whitley brought either money or drugs to his home when brought there by his son. Ritchie also testified Lively told him Whitley and h was dead before the fire. Trial, 738-40. The evidence proved that was all untrue because Whitley died of smoke inhalation and had no traumatic injuries.

Ritchie claimed that Jason told him that Jason's mother Kathy said Whitley "kept a large amount of money in a safe and some pills." Trial, 722. So, according to Ritchie, Lively and Owens took the safe, a gun and a computer from the Iaeger house. Trial, 727. Other testimony, however established that Doc Whitley did not keep large sums of money or drugs in the safe, but that the safe was not taken and was in fact found in the house by investigators. It was also established that no one stole a computer from the Iaeger house and that in fact the laptop had been kept at and taken from the Coon Branch home Whitley had fled several days prior to the fire.

This uncorroborated testimony from a criminal, testifying in exchange for a favorable plea deal relating allegations inconsistent with the facts of the cases must be viewed with

extreme caution and skepticism. Where, as here, the testimony is used by the state to provide support for a theory that has no other support in the record it should be discounted. In the absence of any other evidence that Doc Whitley was beaten or that anything was taken from his home, Ritchie's testimony did not support an instruction that Owens and Lively acted in concert to commit a burglary and then set a fire to conceal the burglary. Even given full, unquestioning credit to Ritchie's testimony, Ritchie only claimed that Jason said that as he was leaving he looked back and saw Owens setting a fire. Trial, 728 . Even believing Ritchie that would not suffice to show Jason Lively contributed in any way to setting the fire– even if it were believed that it sufficed to establish he entered the home with intent to steal. Robbery, burglary and breaking and entering may be predicate crimes which can form the basis of a felony-murder conviction, but they were not the predicate crimes presented by the State in this case. Here, the State alleged that arson was the underlying offense to support a felony-murder conviction. Moreover, the State would still have the same lack of evidence with regard to those crimes if it had relied upon any of them.

Ritchie's testimony also presents yet another example of hearsay testimony being introduced in violation of Lively's right to confront his accusers. Ritchie was directly asked by the Stare about another inmate, Michael Cline, who did not testify at trial and permitted to testify that Cline had also gone to the police with allegations Lively had confessed. Trial 728-30. This testimony raises the same issues as previously discussed in the first assignment of error and is yet another ground for reversal.

The testimony of Brian Salyers is equally problematic. Called as a witness for the State, Salyers denied any knowledge or involvement concerning the crime. He expressly denied ever being with Jason Lively at any time the day of the fire. He stated that he met up with Tommy Owens alone that day but the purpose was to sell some stolen scrap copper to obtain money to buy drugs. Testimony from Shirley Auville, owner of the junkyard, established that Salyers did sell copper to him and was at the junk dealer's business alone around 7:45 AM and then

again later, around 11:00 AM, with Tommy Owens but not with Jason Lively. Trial, 766-69.

Salyers was then impeached with a prior inconsistent statement he had made to the police, including Deputy Blevins, on April 7. 2005. Record, 292. In that statement, Salyers had told police that he had run into Owens and Lively at the Super Stop gas station between 7:00 and 8:00 AM on March 15th, and was asked to give them a ride into Iaeger. Salyers told the police in the statement he agreed and dropped the men off near the Whitley Clinic. At trial, Salyers admitted making this statement but testified that he made up the story about giving Owens and Lively a ride to near the Iaeger clinic (and Doc Whitley's house next door) because the police had subjected him to hours of interrogation including threats to send him to jail both for involvement in the Whitley fire and in related charges from Virginia.

Despite having cross examined and impeached Salyers with the relevant portions of the prior statement, the State requested, and received, over objection from the defense, permission to play an unredacted recording of Salyers' statement. This was also error and related to the assignments regarding the 404 (b) evidence because the questions and answers in the statement included reference to numerous highly prejudicial allegations concerning the alleged arson attempt at Stacy's variety store, in addition to discussions of theft, receiving and transferring stolen property, guns, drug use and drug trafficking and other alleged acts with absolutely no relevance to the issues being tried which could serve only to inflame the jury. Record, 292. Even Salyers' prior recorded statement contained no suggestion he had personal knowledge that Owens and Lively went to the Whitley house or that they were involved in the arson. Salyers also made clear that neither Owens nor Lively ever admitted any involvement.

This section of the brief is relevant to the instructional error and the 5th assignment of error that the trial court should not have permitted Salyers' unredacted statement to be played for the jury. Salyers' statement also included Salyers being asked if he had an **opinion** about whether Lively and Owens committed the crimes and Salyers' response that he believed that "they was the one that burnt the house." (See page 12 of the statement which begins at p. 292

of the record). The playing of this statement including the irrelevant statements pertaining to the bad acts, including drug allegations, involving Lively and Owens and numerous other associates was another obvious error; allowing the jury to hear Salyers' opinion about the crime just made it worse. The defense did object to the statement being played for the jury, and this objection should serve to preserve the errors as to each specific portion which should not have been published to the jury. To the extent the objection to the entire statement was not specific enough to be applied to the portions that should have been redacted, Mr. Lively asks this Court to apply plain error analysis and find publication of these highly prejudicial inadmissible statements requires reversal as an independent ground, and also to consider this prejudicial effect in conducting cumulative error analysis.

Thus, the testimony of the jailhouse snitch and the impeachment of Salyers provided the only evidence in this case that Owens and Lively were together the morning of the fire and near the Whitley house prior the fire. Salyers' prior statement and his trial testimony, however, included no allegations that he saw Owens and Lively approach or enter the Whitley home or that either of them ever made any inculpatory statements to him concerning the Whitley fire. Such weak evidence all attributable to known criminals of highly dubious credibility and with extreme motivation to fabricate does not support the State's "concerted action principle" instruction because there was no evidence that Jason Lively was present when a fire was set by a first degree principal and that he aided, assisted, encouraged or assisted the first degree principal.

The evidence adduced at trial was insufficient to convince any rational trier of fact beyond a reasonable doubt that Lively was guilty of arson, and if the conviction for arson fails the murder conviction must also fail because the State proceeded on a felony-murder theory with arson as the predicate underlying felony.

First, it must be stated that even though the evidence that the fire at Doc Whitley's

home was caused by arson is far from overwhelming, the defendant will concede that viewed in the light most favorable to the prosecution, sufficient evidence to support an inference an arson was committed was presented at trial. Sufficient evidence does not exist, however, to convince any rational trier of fact that Jason Lively individually or in concert with Tommy Owens in any way participated in entering the Whitley home and setting or aiding the setting of a fire. This brief has discussed above in the arguments relating to other assignments of error several of the evidentiary weaknesses of the State's case. Further argument setting forth the insufficiency of the evidence now follows.

The State's only evidence that Lively was at or near the scene at the time of the crime was based on an anonymous statement that should not have been admitted, the highly dubious testimony of a jailhouse snitch and a statement from Brian Salyers which Salyers disavowed and explained was based on fear engendered by police intimidation, coercion and threats.

The vast majority of the State's case had nothing to do with the question of whether or not Jason Lively was involved in the alleged arson and murder. Of the State's thirty-three witnesses no less than fourteen testified solely with regard to facts that had no direct probative value concerning who set the fire but were highly and unfairly prejudicial because they were used to establish Jason was a bad person with a propensity for crime and violence. Four witnesses (Amy Branham, Elzie Branham, Rita Birchfield and Randy Birchfield) testified only about a fistfight that occurred in October of 2002 between Elzie and Randy and Lively and Owens. This evidence had no probative value whatsoever other than establishing the uncontested fact Lively and Owens knew each other prior to the Whitley fire and was obviously unfairly prejudicial to an extreme degree. This testimony was of no value in determining who, if anyone, set a fire on March 15, 2005.

Six additional witnesses (Burb Blankenship, Harold Coleman, Roger Kirk and Woodrow Kirk, Jeff Lambert and Jackie Justice) testified solely about an incident involving the throwing of bottles filled with fuel at the door of a store owned by Woodrow Kirk in

January of 2001. Moreover, the testimony from several of the law enforcement officers who testified was in large part directed toward this incident rather than anything relevant to the fire at the Whitley home. The only similarity between this incident from more than four years earlier is that both involved allegations of arson.

Another four witnesses (Jonathan Walker, Jamie Stafford, Jeremy Lester and Deputy Rat Iafolla) testified only in relation to the laptop computer which Jason took from the Coon Branch house where Wilma Sue Whitley was staying alone at the time of the fire. Additionally, the bulk of Wilma Sue Whitley's testimony related to the laptop which she accused Jason of taking after the fire when Jason and Mike Stafford came to the Coon Branch house to relate the news of the fire, and none of her testimony had any relevance to the issue of who set the fire at the Iaeger home. Again, several of the law enforcement officers also testified in part about the laptop which the evidence conclusively demonstrated was not at any time at the Iaeger house where Doc Whitley was living.

The majority of the other evidence in the State's case-in-chief, other than that discussing the investigation of the fire itself and basis for the opinion that it was the result of arson, was directed at Kathy Lively, Jason's mother, and intended to show that Kathy Lively and Doc Whitley had a heated argument the day prior to the fire and that Doc Whitley had relieved Kathy of responsibilities including access to the clinic's checkbook and drug supply.

In addition to Doc Whitley's two sons, Jeff and Jack, and his friend and banker James Sizemore, several employees of the clinic (Louise Christian, Kayla Foley and Frances Hale) were called by the State and gave testimony that essentially had nothing to do with Jason and related the operations of the clinic, the control and dispensation of drugs at the clinic and the argument between Kathy Lively and Doc Whitley. This testimony concerning interactions for which Jason was not present and there is no evidence to show he had knowledge was irrelevant and inadmissible and served only to insinuate guilt by association and bad character. The remainder of the testimony from these six witnesses was essentially nothing more than

testimony intended to provide background and elicit sympathy for the loss of Doc Whitley.

Although the State repeatedly assigned robbery as a motive for the entry of Doc Whitley's house and argued the fire was set to conceal a robbery or attempted robbery, the evidence about Kathy Lively (who has never been charged with any role in the murder or arson) was intended to insinuate that Doc Whitley's treatment of Kathy had angered Jason. But, no evidence was ever introduced showing that Jason ever talked to his mother in the interim between her argument with Doc Whitley and the fire. The State also resorted to eliciting hearsay from several witnesses supposedly recounting statements made by Doc Whitley expressing dislike or fear of Jason.

The State also used every opportunity possible to insinuate that Jason Lively was a drug addict or abuser despite having given no notice of intent to use such evidence. Testimony relating to uncharged drug offenses should have required prior notice of intent and should have been excluded as irrelevant or unfairly prejudicial even if it had any slight probative value. This is just another example of the State endeavoring to portray Jason as a bad person with evidence unrelated to the crimes for which he was being tried. The testimony was justified by suggesting that due to Jason's dependence on drugs he had motive to steal drugs. However, the State's own evidence concerning the Whitley clinic suggests this evidence could only serve as bad character evidence designed to unfairly prejudice the jury against Jason. The State went to great lengths to insinuate that Kathy Lively was upset about losing access to the clinic's drug supply at least in part because she was supplying Jason with drugs. Testimony was introduced concerning both the access to drugs and ability to write prescriptions for narcotics over Doc Whitley's stamped signature. Of course, with Doc Whitley dead no one including Kathy or Jason would have any ability to either obtain drugs at the clinic or have prescriptions bearing Doc Whitley's signature filled at a pharmacy. To the extent access to drugs was an issue it was essential that Doc Whitley be alive for anyone to obtain drugs by virtue of relationship with him. The death of Doc Whitley is the last thing anyone using his office as a source for drugs

would have wanted. Witnesses were encouraged to talk about drugs to buttress the State's efforts to show bad character.

As the robbery motive is undermined by the fact nothing was taken from Doc Whitley's home and the desire for drugs motive makes no sense, the only theory left is that Jason went after Whitley because he was angry over Whitley's treatment of his mother. However, numerous witnesses testified that during the quarter century Kathy Lively worked for Doc Whitley they frequently had heated arguments and became very angry with each other. The testimony also showed that after each eruption of anger the two would reconcile and that it was just the way they interacted with each other. Even assuming, *arguendo*, that the argument of March 14, 2005, was different than the many others it would provide scant motive for Jason Lively to kill Doc Whitley, and, again, there is no evidence that Jason was even aware of the last argument between Kathy Lively and Doc Whitley.

The reason for the State's unrelenting emphasis on alleged other bad acts and bad character and the argument between Kathy Lively and Doc Whitley was the lack of any evidence, direct or circumstantial, tying Jason to the fire. Even the testimony from the anonymous declarant, the jailhouse snitch and the recanted testimony of Brian Salyers did no more than place Jason near the Whitley home approximately two hours before the fire was reported. No evidence was presented that Jason or Tommy Owens actually entered the Whitley house at any time the day of or the day before the fire. No physical evidence was obtained from the home which tended to show Jason or Owens had been in the home. Conversely, Despite the fact that Jason was arrested the very day of the fire (for stealing the laptop from Wilma Sue Whitley's Coon Branch home later in the day of the fire), no evidence was obtained from his person, his clothing or other belongings tending to show he had either been in the Whitley residence or had been in proximity to accelerants or a fire recently.

At most, viewed in the light most favorable to the prosecution, and discrediting the testimony of two defense witnesses (Mike Stafford and his mother Calos Stafford) that Jason

was with them at and before the time the State claims the fire was set and did not leave until after word was received about the fire, the State's evidence did no more than show Jason and Tommy Owens were near the Whitley home some time before 8:00 AM in March 15, 2005. In the absence of any other evidence tending to show it was Jason and Owens who set fire to the home, this evidence does not suffice to establish guilt beyond a reasonable doubt.

A fair analysis of this trial shows that the State relied to an extreme degree on unfairly prejudicial 404 (b) evidence to inflame, mislead and confuse the jury and that the evidence which had any tendency to show Jason Lively committed the crimes was wholly insufficient. Even the circumstantial evidence presented by the State, viewed in the light most favorable to the prosecution, actually allowed only the inference that Jason Lively may have had a motive for the offenses. None of the evidence supported an inference he did commit the offenses. Therefore, Mr. Lively requests that this Court reverse the trial court's denial of his motion for judgment of acquittal or, in the alternative, remand this matter for a new trial.

The cumulative or aggregated impact of the errors below resulted in an unfair trial requiring reversal under the "cumulative error doctrine" even if this Court should find none of the errors viewed separately and individually mandate reversal.

Under the "cumulative error doctrine: "[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error. Syllabus Point 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972). Here, Mr. Lively believes each of the errors below warrant reversal standing alone but, should the court disagree, asserts that the viewed together the effect of the numerous errors deprived him of a fair trial. Given the lack of evidence tending to prove Lively committed these crimes, the admission of an extremely large volume of testimony related solely to other acts with little or no probative value which was unfairly prejudicial to

Mr. Lively combined with not only the admission of a statement from an anonymous declarant violating both the prohibition of hearsay testimony and Mr. Lively's constitutional right to confront his accuser prevented Mr. Lively from receiving a fair trial. That the State not only introduced this anonymous statement against Mr. Lively on a crucial contested fact for which the other evidence of the State was highly dubious and weak, but also failed to disclose to the defense either the identity of this anonymous declarant or any evidence which would serve to call that statement into question either substantively or through impeachment magnified the fundamental unfairness of this trial by preventing Mr. Lively from challenging the evidence before a jury of his peers in violation of his right to due process. Then further considering the instructional errors including the failure to give appropriate limiting instructions relating to the 404 (b) evidence and the instructing the jury on a "concerted action" principle not supported by the evidence it would be manifestly unjust to allow the verdict in this case to stand.

CONCLUSION AND PRAYER

Charles Jason Lively asks this Court to find that the evidence adduced at trial was insufficient to sustain his convictions for 1st degree felony murder and first degree arson because no rational trier of fact could have found proof of guilt beyond a reasonable doubt based solely upon the evidence at trial and to direct that a judgment of acquittal be entered as to each count of conviction. In the alternative, Mr. Lively requests that this Court remand this matter for a new trial because the verdict was so against the weight of the evidence as to constitute manifest injustice.

Charles Jason Lively also asks this court to vacate his convictions and remand this matter to the Circuit Court of McDowell County for further proceedings due to: the admission of the hearsay declarations of the alleged anonymous source in violation of his right to confront his accuser; the erroneous admission of evidence relating to other alleged bad acts; and the instructional errors.

Mr. Lively further requests that this Court instruct the Circuit Court that at a new trial, if any, the testimony relating purported statements by the alleged anonymous source or other non-testifying declarants shall be excluded because such alleged statements constitute inadmissible hearsay, violate Mr. Lively's constitutional right to confront his accusers and the prosecution violated its duty to disclose the identity of this alleged anonymous source knowing such information was material to the preparation of the defense.

Mr. Lively also requests that this Court instruct the Circuit Court that the evidence relating to other alleged bad acts is inadmissible under Rules 404 (b) and 403 of the West Virginia Rules of Evidence because it was merely propensity evidence designed to show the bad character of the alleged, not relevant for any proper purpose, or, if possessing some slight probative value, such value was substantially outweighed by the unfair prejudice.

It is also requested that the Circuit Court be instructed that a "concerted action" instruction may not be given unless the prosecution introduces substantial evidence that a defendant acted together with another person or persons and contributed to the commission of the alleged crime for which he is being tried.

Every defendant deserves a fair trial where he has opportunity to confront his accusers, be tried based only upon properly admissible evidence, not unfairly prejudiced by errors calling the verdict into question and to be convicted only if the evidence is sufficient both to establish guilt beyond a reasonable doubt in the eyes of rational jurors and convince a reviewing court that manifest injustice did not occur. Mr. Lively did not receive such a trial and respectfully requests this Court to vacate his convictions.

Respectfully submitted, this 1st day of September, 2009.

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MEMORANDUM OF PARTIES

AND

CERTIFICATE OF SERVICE

I, David Schles, counsel for the appellant Charles Jason Lively, do hereby certify that the State of West Virginia, by counsel, Sidney H. Bell appeared in this action and that on the 1st day of September 2009, a true and exact copy of the foregoing BRIEF OF THE APPELLANT, CHARLES JASON LIVELY was served, by first class mail upon:

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