

IN THE SUPREME COURT
OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

APPELLEE,

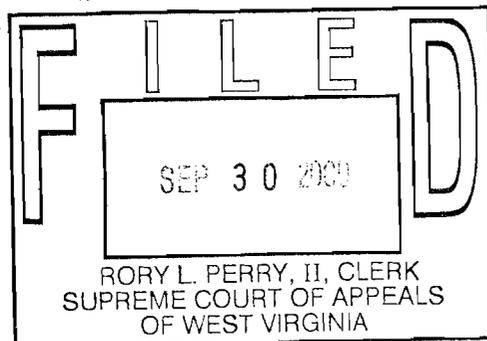
V.

APPEAL NO. 34856

CHARLES JASON LIVELY,

APPELLANT.

BRIEF OF APPELLEE



PRESENTED BY:

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West Virginia Rules of Evidence 404, 613 and 801

RESPONSE TO ASSIGNMENTS OF ERROR AND STATEMENT OF THE CASE

Ebb K. Whitley, Jr., a 70-year-old medical doctor, died on Tuesday, March 15, 2005, from smoke inhalation and thermal burns over 90 percent of his body. Testifying about the forensic autopsy performed by him, Deputy Chief Medical Examiner Hamada Mahmoud said his findings were consistent with an intense fire burning near Dr. Whitley but not directly contacting his body. *(Trial transcript, pages 689 & 690)*

Firefighters found Dr. Whitley's body on the floor of his second-story bedroom in his brick residence next-door to his medical clinic.

Even though he was small in physical stature, the five-foot-four, 144-pound physician was a larger-than-life figure in his hometown of Iaeger, McDowell County, West Virginia, where he had practiced medicine for 40 years. He was a veteran of the United States Air Force and a graduate of the Medical College of Virginia.

Whitley also had a passion for politics. During his long career, the doctor was elected to the West Virginia House of Delegates, the county Board of Education and the McDowell County Commission, on which he served as president. For many years, Whitley was chairperson of the county's Democratic Executive Committee. *(Trial transcript, pages 250-261)*

He was survived by his wife, Sue Whitley, three sons, Ebb K. Whitley, III, Jack Whitley and Jeff Whitley, and one daughter, Jennifer Whitley McReynolds. Jack Whitley and Jennifer Whitley McReynolds are both pharmacists.

Although a fall in his home in the year 2000 several years before his death had left him unable to walk and with little use of his hands, Dr. Whitley remained fiercely independent. The weekend before his death, Whitley told his sons that he was unhappy

living in an isolated farmhouse on Coon Branch Mountain with his wife and did not want to continue to stay with Kathy Lively, a long-time employee of Whitley's and the mother of the appellant. Whitley had spent a few days in Ms. Lively's home at Iaeger after leaving the Coon Branch Mountain residence. *(Trial transcript, pages 270 & 271)*

Whitley insisted that his sons move him back to his house next to the medical clinic. His sons honored his wishes and moved him back into the house after contacting a former caregiver, Sherry Addair, who was willing to move into the home to help take care of him. Ms. Addair was expected to come to the house Tuesday night or Wednesday morning. *(Trial transcript, page 352)*

After spending Sunday night with Dr. Whitley, Jeff Whitley and his young son, Dylan, left late in the afternoon of Monday, March 14, 2005, to return to their home North Carolina. Before he left, the son asked clinic employees Louise Christian and Shirley Cline to bring breakfast and check on his father the morning of March 15, 2005.

Shortly after 9 a.m. on March 15, 2005, Ms. Christian and Ms. Cline were alerted that there was a fire at Dr. Whitley's house. The Iaeger Volunteer Fire Department quickly responded and firefighters found Whitley's body in the floor of upstairs bedroom.

Anthony Domingo, an assistant state fire marshal with 12 years of experience and substantial training as a fire investigator, determined that two fires had been deliberately set inside the victim's residence approximately two hours before the fire was observed at Dr. Whitley's house. One of the fires had burned a hole completely through the hardwood floor of Whitley's bedroom near his bed and another fire downstairs had burned a couch and a section of the living room ceiling below the bedroom. *(Trial transcript, pages 898-934)*

Police soon learned that the evening before the fire the appellant's mother, Ms. Lively, who had worked for many years as a licensed practical nurse at Dr. Whitley's medical clinic, had engaged in a heated argument with the doctor after he took the office keys away from her, removed her name from his bank accounts and stopped her from writing prescriptions for medication.

During the argument, which was witnessed by Whitley's son, Jeff, clinic employee Louise Christian and local bank president Jim Sizemore, Ms. Lively cursed and threatened Dr. Whitley, saying, according to the testimony of Jeff Whitley and Ms. Christian, that the doctor was not going to treat her that way and she would kill him. *(Trial transcript, pages 360-367, 432 & 433)*

The morning of the fire Ms. Lively did not show up for work. Minutes before the fire was reported to the clinic staff, Ms. Lively's son, the appellant, called the clinic, which he had never done before, to ask if anyone had checked on Whitley and if he was needed to sit with him. Shirley Cline, the employee who took the call from the appellant, interrupted the conversation to report that Whitley's house was on fire. *(Trial transcript, pages 865-874)*

Shortly after Whitley's body was found, the appellant and his mother's boyfriend, Mike Stafford, went to Whitley's Coon Branch Mountain home several miles away to inform his wife, Sue Whitley, of his death. While at the home, the appellant stole the Whitleys' laptop computer which he sold or pawned later in the day. After he was indicted for the theft, the appellant entered a plea of guilty to the misdemeanor offense of petit larceny.

A couple of weeks after Whitley's death, McDowell County Deputy Sheriff Ronald L. Blevins learned from an informant who insisted that his name not be disclosed that he had allegedly seen Tommy Owens and Brian Salyers' pickup truck near Whitley's home the morning of the fire. Deputy Blevins then picked up Owens and Salyers for questioning.

Owens admitted to Blevins that he had been with Salyers in his pickup truck the morning of the fire but denied any involvement in the crimes. Salyers, in a tape-recorded interview, told Blevins that he met Owens and Charles Jason Lively at a laeger convenience store before 8 a.m. the day of the fire and was asked to drive them to Dr. Whitley's home.

As the investigation continued, Deputy Blevins learned that Jason Ritchie, an inmate at the regional jail, wanted to talk with him about the Whitley murder. Blevins then interviewed Ritchie who said Lively told him his mother had worked for Dr. Whitley, that he and Tommy Owens went to Whitley's home to rob him and as they were leaving Owens set the house on fire. Ritchie said Lively specifically mentioned that he stole a laptop computer from Whitley.

At trial Salyers admitted that everything in his recorded statement was true except for the statement that he dropped Owens and Lively off at Whitley's home. When he testified that his statement was the product of duress and police coercion, the state impeached him with the tape-recorded statement to allow the jurors to hear the interview in the witness' own voice and words.

Jason Ritchie testified at the trial that the appellant admitted to him while they were in jail together that he and Owens went to Dr. Whitley's home after the appellant

received a call from his mother, that they went to the home to rob Whitley, that Owens set the house on fire as they were leaving and that he stole several items, including a laptop computer, from Whitley's home. (*Trial transcript, pages 726-728*)

Despite a vigorous cross-examination of him by the appellant's attorney, Ritchie was obviously determined to be a credible witness by the jury which convicted the appellant of murder of the first degree with a recommendation of mercy and arson of the first degree.

The state presented its case as felony murder with the underlying offense being arson.

The appellant, by counsel, stated in his Petition for Appeal and during the oral presentation of his appeal that the trial court failed to give the jury a cautionary, limiting instruction concerning Rule 404(b) evidence of other crimes, acts or wrongs. (*Petition for Appeal, p 20*) The appellant's brief, filed by new counsel, abandons that erroneous assertion but continues to allege that the trial court failed to give an "appropriate limiting instructions." (*Appellant's Brief, page 15*)

Even though the appellant never asked the trial court to give a limiting instruction, the trial transcript clearly confirms that court gave an appropriate limiting instruction twice prior to the testimony of the Rule 404(b) witnesses and gave it a third time, at the request of the prosecuting attorney, in the final charge to the jury. (*Trial Transcript, pages 470, 471, 743, 1409, 1427*)

After the state filed a detailed written notice of its intention to present Rule 404(b) evidence, the trial court conducted a two-hour *McGinnis* hearing November 6, 2006, at which the state's witnesses testified and were cross-examined, before ruling that the state

could use some of the evidence for the limited and specific purposes of proving motive, intent and plan. The court granted the appellant's motion to exclude other evidence that the state desired to present.

The trial judge, the Honorable Booker T. Stephens, has been on the bench for 24 years during which he presided in *TXO Production Corp. v. Alliance Resources Corp, et al.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *State v. Winebarger*, 217 W. Va. 117, 617 S.E.2d 467 (2004) and many other civil and criminal trials in which Rule 404(b) evidence was properly admitted. Judge Stephens required the state in this case to file a specific notice not only identifying the alleged acts but also identifying the specific purpose under Rule 404(b).

The appellant also contends that the Confrontation Clause and the rule against hearsay were violated when the state was allowed to elicit testimony from Deputy Blevins concerning the tip that he received from an anonymous informant whose identity has never been disclosed to the defendant.

This evidence was very limited, was not hearsay because it was not offered to prove the truth of the matter asserted and was not "testimonial." Presented without objection by the appellant's counsel, the information received by the officer made no reference whatsoever to the appellant or his alleged conduct and was needed to explain why the officer picked up Tommy Owens and Brian Salyers for questioning. (*Trial transcript, pages 1083 & 1084*)

The questioning of Salyers resulted in a tape-recorded statement in which he said he gave Owens and the appellant a ride to the victim's house the morning of the fire that caused the victim's death. (*Trial transcript, pages 1083 to 1093*)

The appellant further complains that the trial court erred by allowing testimony concerning the statement of another non-testifying witness. This person, Michael Cline, was referred to during the testimony of Jason Ritchie. At no point in Ritchie's testimony or Deputy Blevins' testimony was there any reference to the contents of any statement made by Michael Cline. (*Trial transcript, page 729*)

The testimony of Anthony Domingo that the fire was not accidental, combined with the testimony of Jason Ritchie about the appellant's admissions, supported the trial court's giving of a concerted action instruction to the jury.
credibility.

The state's evidence was more than sufficient for a reasonable trier of fact to conclude beyond a reasonable doubt that Dr. Whitley died as a result of arson and that the appellant was the perpetrator of the arson.

DISCUSSION OF LAW

A. Information Provided By Anonymous Informant Did Not Violate Confrontation Clause And Was Not Hearsay Because It Was Not Offered To Prove The Truth Of The Matter Asserted.

The appellant has greatly exaggerated and mischaracterized the scope and content of "statements" that the appellant contends were "testimonial" in nature and violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. He has also greatly exaggerated the amount and impact of Rule 404(b) evidence that the trial court allowed to be introduced for the limited purposes of proving motive, intent or plan.

The appellant complains specifically about information provided from an anonymous informant to Deputy Sheriff Ronald L. Blevins and a brief reference by state witness Jason Ritchie to another jail inmate, Michael Cline, with whom Ritchie had discussed the appellant's admissions.

Without objection by the appellant's counsel, Deputy Blevins testified that a person who insisted on remaining anonymous told him that he had seen Tommy Owens and Brian Salyers' pickup truck near Dr. Whitley's house the morning of the fire. (*Trial transcript, page 1083*) The appellant's name and alleged conduct were never mentioned by the informant or by Deputy Blevins in his testimony about the informant.

In the appellant's Petition for Appeal and again in the appellant's brief, his counsel asserts that the trial court allowed the introduction of "testimonial" hearsay from the informant who implicated the appellant. "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. 306 (2004)," counsel contends. (*Appellant's Brief, page 18*) "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," the appellant's counsel further argues. (*Appellant's Brief, page 18*)

Despite these misleading and exaggerated claims the officer's testimony on direct examination was as follows:

Q. As you continued to pursue the investigation in the weeks after Dr. Whitley's death, did you receive information that could be characterized as a tip or confidential report that Tommy Owens may have been seen near the Whitley Clinic the morning of the fire?

A. Yes, I did.

Q. In addition to that information and his name, did you also receive information concerning the type of motor vehicle that was seen there at the point where Mr. Owens was at the Whitley Clinic that morning?

A. Yes, sir.

Q. And was Tommy Owens - - without going into any other information, was Tommy Owens someone you were familiar with?

A. Yes.

Q. Based on that information that you received, was Tommy Owens questioned about that possibility?

A. Yes, he was.

Q. Did he represent to you that on the day of the fire, the morning of the fire, that he had been with Brian Salyers?

A. Yes, he did.

Q. Is that what then led to your desire to interview Brian Salyers about the events of the morning of the first at Dr. Whitley's house?

A. Yes. That's what originally led us to talk to Mr. Salyers.

Q. That was because Tommy Owens had said he'd been with him?

A. Yes.

(Trial transcript, pages 1083 & 1084)

Because the evidence was not introduced to prove the truth of the matter asserted, it was not hearsay under Rule 801(c) of the West Virginia Rules of Evidence. In *State v Dennis*, 216 W. Va. 331, 607 S.E.2d 437 (2004), this Court considered an assignment of error based on a police officer's testimony at trial about action taken by him after overhearing a telephone conversation between the victim's grandmother and another person at the Wheeling Police Department.

"As the officer simply testified to what he heard during that conversation and what he did as a result of what he heard, we find no hearsay let alone error," the Court held in *Dennis*. 607 S.E.2d 437, 456.

In her excellent dissent in *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75, (1995), Justice Workman explains why such evidence should be admitted as relevant facts and should not be excluded as hearsay under Rule 801(c) because it is not being offered to prove the truth of the matter asserted.

Justice Workman then cited holdings in *State v. Maynard*, 183 W. Va. 1, 393 S.E.2d 221 (1990) and *State v. Perolis*, 183 W. Va. 686, 398 S.E.2d 512 (1990), in which the Court held that similar testimony was not hearsay if it were not offered to prove the truth of the matter asserted. In *Maynard* the Court held that police officers' testimony concerning an anonymous caller's statement implicating the defendant was offered "to show the motive or reasonableness of the police officers' actions in including the defendant's photograph in a group of photographs shown to the victim." 393 S.E.2d

at 224. The Court held that any error arising from the admission of testimony that an anonymous caller reported that the defendant had robbed a convenience store was "harmless error."

In *Perolis* the Court held that counsel should have been allowed to develop evidence that the victim was angry with the defendant and his wife because they had told her parents that she planned to run away from home.

During the testimony of Jason Ritchie, he was asked to whom he first reported what the appellant allegedly told him about the crimes. Ritchie said he told another inmate, Michael Cline, who then contacted the police. Deputy Blevins contacted Ritchie after receiving information from Cline. At no time did Ritchie, Deputy Blevins or any other witness tell the jury what Michael Cline heard or said. (*Trial transcript, pages 728-730*)

The appellant's reliance on *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), is misplaced because the facts bear no resemblance to the facts of this case. In *Mechling* the Court was reviewing trial testimony concerning various statements the victim in a domestic violence case had made to neighbors and the police about the alleged specific criminal acts committed against her by the defendant. The victim did not testify.

"Under the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Article III of the Section 14 of (the) *West Virginia Constitution*, a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the

statement would be available for use at a later trial," this Court held in *Mechling* (*Syllabus Point 8*).

The information related to Deputy Blevins in this case was certainly not "a testimonial statement" under the Court's definition. The informant talked with the officer only on the promise that his identity would not be disclosed. His report did not name the appellant or give any specific information other than identifying a person and a motor vehicle that he allegedly saw near the crime scene. The evidence was admitted, without objection by the appellant, to explain why the officer picked up Tommy Owens and Brian Salyers for questioning. It was not hearsay under Rule 801(c) of the West Virginia Rules of Evidence because it was not offered to prove the truth of the matter asserted..

B. Trial Court Properly Considered Rule 404(B) Evidence At McGinnis Hearing, Made Required Findings And Gave Adequate Limiting Instructions..

Following the directives of this Court in *State v. McGinnis*, 193 W. Va. 147, 455 S.E2d 516 (1994) and *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), Judge Stephens required the state to file a detailed notice of its intention to introduce Rule 404(b) evidence of other crimes, wrongs or acts.

After conducting a two-hour *in camera* hearing on November 6, 2006, the trial court made findings on the record that the state had proven by a preponderance of the evidence that three other relevant "crimes, wrongs or acts" had occurred, that the state was offering the evidence for the permissible purposes of proving motive, intent or plan, and that the probative value of the evidence outweighed the danger of unfair prejudice to

the defendant. The trial court granted the appellant's motion to exclude evidence of a fourth crime, wrong or act.

Even though counsel for the appellant never asked him to, at trial Judge Stephens instructed the jury twice during the presentation of testimony and again, at the request of the prosecuting attorney, during his charge to the jury prior to closing arguments. (*Trial transcript, pages 470, 471, 743, 1409, 1410, 1427*)

The most significant Rule 404(b) evidence could have been admitted simply as *res gestae* or relevant evidence of the events of the day of the death of Dr. Whitley and the defendant's actions on that day. *See State v. Dennis, 216 W. Va. 331, 607 S.E.2d 437, 457 (2004) and State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613, 632 (1996)*

That evidence concerned the appellant going to Whitley's second home on Coon Branch Mountain the morning of the fatal fire to tell Sue Whitley that her husband was dead. While there, the appellant stole Dr. Whitley's laptop computer which he sold or "pawned" later that day to Jeremy Lester. (*Trial transcript, pages 483-489*)

Contrary to the appellant's testimony, Mrs. Whitley testified that Dr. Whitley and the appellant were not on friendly terms and that the appellant had never been to their Coon Branch Mountain home in the 10 years that she and Dr. Whitley had lived there. (*Trial transcript, pages 592-693*).

The appellee also points out in this connection that Shirley Cline, the clinic employee, testified that the appellant's mother did not report to work the day of the fire but the appellant did call to check on Dr. Whitley, which he had never done before, and asked Ms. Cline not to tell his mother that he had called. (*Trial transcript, pages 865, 866 & 874*)

The state argued successfully to the trial court that evidence of the theft of the computer, coupled with the statement of Jason Ritchie that the appellant went to Dr. Whitley's home to rob him and that he in fact had stolen a computer, all tended to prove motive, intent or plan. The appellant entered a guilty plea to the lesser included charge of petit larceny based on his theft of the computer. A copy of the court order accepting his plea is attached to this brief as "Exhibit A."

The other Rule 404(b) evidence concerned the January, 2001, attempt by the appellant and Tommy Owens to set fire to store building owned by Woodrow and Trudy Kirk. The state's witnesses testified that a man named Roger Justice had been involved in a quarrel with Mr. Kirk and had offered money and/or drugs to have their store building set on fire. (*Trial transcript, pages 742-760*) Both Owens and the appellant have entered guilty pleas to the felony of conspiracy to commit arson in connection with that incident. Attached to this brief as exhibits "B" and "C" are copies of the court orders accepting their guilty pleas.

The final crime, wrong or act that the trial court ruled was admissible under Rule 404(b) was the October, 2002, arose from the violent attack by Owens and the appellant upon two men at the Friendly Mart. The state offered this evidence to show the relationship between Owens and the appellant and the common scheme or plan that they carried out in concert with one another.

In *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), this Court approved the state's introduction of evidence of multiple prior acts of violence by the defendant to show intent and the absence of accident in a case in which the defendant was charged with the murder of his 19-month-old son.

The court explained in *LaRock* a standard of review involving a three-step analysis. "First, we review for clear error the trial court's factual determination that there is sufficient evidence to show that the other acts occurred," the Court said. "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." See *State v. Dillon*, 191 W. Va. 648, 661, 447 S.E.2d 583, 596 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd* 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed.2d 366 (1993); *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986). 470 S.E.2d at 629, 630.

The appellant in the case at bar cannot argue that the evidence was insufficient to show that the other acts occurred because they were all proven convincingly. As stated above, while this prosecution has been pending, the appellant has entered guilty pleas to the theft of the computer and conspiracy to commit arson at Woodrow Kirk's store. The assault and battery at the Friendly Mart was prosecuted in magistrate court and resulted in a conviction of the appellant which he did not appeal.

As the pretrial hearing transcript confirms, Judge Stephens carefully considered the evidence and the arguments of counsel before making on-the-record findings that the evidence was admissible for the limited purposes of proving motive, intent or plan. He also made clear, on-the-record findings that the probative value of the evidence outweighed the danger of unfair prejudice to the defendant.

"In this context, it is presumed that a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a

proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record Rule 403 determination the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction," the Court held in *LaRock, supra*, 470 S.E.2d at 630. *(citations omitted)*

The appellee asserts that the record in this case clearly shows that all of those requirements were met and the experienced trial judge did not abuse his discretion.

C. State Properly Impeached Witness Brian Salyers With Prior Inconsistent Statement After He Alleged It Was The Product Of Duress And Coercion.

During direct examination, witness Brian Salyers began denying the truthfulness of material portions of his tape-recorded interview by police approximately three weeks after the death of Dr. Whitley. Without objection by the appellant, the prosecuting attorney asked the witness to identify a transcript of that interview and began impeaching him with the transcript pursuant to the provisions of Rule 613(b) of the West Virginia Rules of Evidence. *(Trial transcript, pages 805-810)*

At the conclusion of the direct examination, the prosecutor moved the Court for leave to play the audio-taped interview to allow the jury to consider the demeanor of the witness and the answers of the witness in his own voice. Counsel for the appellant, who did not object to detailed impeachment of the witness from the interview transcript, objected to the tape being played on the ground that "he's testifying now." *(Trial transcript, page 830)*

At no time during Salyers' testimony, during the playing of the tape, or at any stage of the trial, did the appellant request that the court give a limiting instruction concerning impeachment of Salyers with the recorded interview.

Although these cases are not cited by the appellant in his appeal petition or brief, the appellee concedes that this assignment of error must be reviewed in light of the holdings in *State v. Schoolcraft*, 183 W. Va. 579, 396 S.E.2d 760 (1990), and *State v. King*, 183 W. Va. 440, 396 S.E.2d 402 (1990).

"Where the witness cannot recall the prior statement or denies making it, then under W. Va. R. Evid. 613(b), extrinsic evidence as to the out-of-court statement may be shown--that is, the out-of-court statement itself may be introduced or, if oral, through the third party to whom it was made. However, the impeached witness must be afforded an opportunity to explain the inconsistency," the Court held in *Schoolcraft, supra (Syllabus Point 4)*

In *Schoolcraft* this Court ruled that the trial court committed reversible error by rejecting the defendant's attempt to impeach a witness by showing the jury a videotaped interview of which the witness claimed to have no recollection. 396 S.E.2d at 765 & 766

In *State v. King, supra*, the Court held that it was not error for the trial court to admit into evidence as a prior inconsistent statement a videotaped interview of a defense witness who admitted making prior inconsistent statements during direct examination. The witness, identified as "B.K.", had told state police in the recorded interview that she and her sisters had sexual intercourse with her father.

"During the trial, however, B.K. was called as a defense witness, and during the appellant's case-in-chief, testified on direct examination that she had previously lied about her father having sex with her, because, among other things, she was afraid of Trooper Morgan and claimed that he coerced her into stating that her father had sex with her," the Court explained. **396 S.E.2d at 404 & 405.**

The state then tried to impeach B.K. with her testimony from a previous trial and an abuse and neglect proceeding. In addition, the state presented the videotaped interview of B.K. as rebuttal evidence to attempt to show that she was not coerced and that she was credible at the time she spoke with the officer.

This Court noted in its opinion that "(t)he circuit court admitted the videotaped interview into evidence, and gave a limiting instruction which was proposed by the appellant." **396 S.E.2d at 405.**

"In this case, the utilization of the videotaped interview between Trooper Morgan and B.K. allowed the jury to observe these two key witnesses in a one-on-one encounter immediately following the unfortunate events in this case, with no distractions which may be common in a courtroom setting or in another formal environment," Justice McHugh wrote in the majority opinion. "At this point in technology, we can perceive no better way for the triers of fact to decide a witness' credibility than watching an unedited videotape with accompanying audio, except observing the witness testify live." **396 S.E.2d at 408.**

In considering an assignment of error similar to one made by the appellant in the case at bar, the Court further rejected in *King, supra*, the appellant's argument that admission of the recorded interview allowed the improper introduction of collateral

crimes evidence. The evidence was not admitted for that purpose, the Court held, but to assist the jury in deciding the credibility of a material witness who was not the victim in the case. **396 S.E.2d 410.**

The Court held in both *King* and *Schoolcraft* that the trial court should instruct the jury that the recorded interview "is to be considered only for purposes of deciding the witness' credibility on the issue of duress and coercion and not as substantive evidence" *State v. King, supra, (Syllabus Point 2)*

The appellee contends in this case that the appellant waived any error by not objecting to impeachment of the witness with a transcript of the interview and by failing to ask the trial court to give a limiting instruction concerning the admission of the recorded interview.

In *State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (1996)*, this Court cautioned that "unpreserved error" should invoke the plain error rule "only to avoid a miscarriage of justice", which could be defined as "conviction of an innocent person", and "only if the reviewing court finds that the lower court skewed the fundamental fairness or basis integrity of the proceedings in some major respect." **470 S.E.2d at 636.**

Justice Cleckley further discussed in *LaRock, supra*, the reasons for the "raise or waive" rule requiring a litigant to object at a time when the error could be corrected "before irreparable harm occurs."

"There is also an equally salutary justification for the raise or waive rule: It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error

and nurturing the seed as a guarantee against a bad result)," Justice Cleckley observed. **470 S.E.2d at 635.**

The appellee asserts that the compelling evidence in this case of motive, opportunity, intentionally set fires and admissions of the appellant should eliminate any belief that the jury convicted "an innocent person."

D. Appellant's Arguments That Evidence Was Insufficient And That Cumulative Error Occurred Are Without Merit.

The standard of review that applies to a claim that the evidence was insufficient to support a conviction was clearly stated by this Court in *State v. Guthrie*, 194 W. Va. 657, 668, 461 S.E.2d 163, 174 (1995):

Our function 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.

The Court further held in *Guthrie* that the jury's verdicts should be respected and affirmed unless there is no evidence upon which verdicts of guilty beyond a reasonable doubt could be based. (*Syllabus Point 2*)

In *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996) (*Syllabus Point 2*), the Court held, "When a criminal defendant undertakes a sufficiency challenge, all the evidence . . . must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or

more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt."

In the case at bar, the state presented clear evidence that Dr. Whitley died of smoke inhalation and thermal burns over 90 percent of his body as a result of two intentionally set fires at his residence. The evidence further clearly proved that during the evening before the fatal fire the appellant's mother had a heated argument with the victim and threatened to kill him because he had taken the office keys from her, removed her name from his bank accounts and ordered that she not write anymore prescriptions for medication.

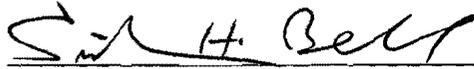
State witness Jason Ritchie testified that the appellant discussed the crimes with him and admitted that after he received a telephone call from his mother he and Tommy Owens went to Dr. Whitley's home to rob him, Owens set fire to the house as they were leaving and the appellant stole items of personal property, including a computer, from the victim. (*Trial transcript, pages 726-728*)

The evidence was clearly sufficient to support the jury's verdicts.

In regard to the appellant's contention that his convictions should be reversed and he should be granted a new trial based on the "cumulative error doctrine", the appellee asserts that the only error that appears in the record is "unpreserved error" that was waived by the appellant's failure to object or failure to request additional limiting instructions. If not waived, such error should be deemed "harmless" based on the totality of the evidence and the trial court's charge to the jury.

CONCLUSION

The appellee requests that this Honorable Court respect and affirm the verdicts of the jury based on substantial evidence of guilt.



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EXHIBITS

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