



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
Respondent,

Vs.

No. 101413

LARRY MCFARLAND,
Petitioner,

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
HONORABLE DAVID H. SANDERS, JUDGE
CASE NO. 09-F-59/10-F-40

REDACTED SUPPLEMENTAL BRIEF OF PETITIONER

Christopher J. Prezioso, Esq. #9384
Luttrell & Prezioso, PLLC
206 West Burke Street
Martinsburg, West Virginia 25401
(304) 267-3050

Counsel for Petitioner
Larry A. McFarland

TABLE OF CONTENTS

I. Table of Authorities.....2

II. Assignments of Error.....3

III. Statement of the Case.....4

IV. Statement of the Facts.....7

V. Summary of Argument.....9

VI. Statement Regarding Oral Argument.....11

VII. Argument.....12

VIII. Conclusion.....33

TABLE OF AUTHORITIES

SUPREME COURT OF APPEALS OF WEST VIRGINIA

<i>State v. Dolin</i> , 176 W.Va. 688, 347 S.E.2d 208 (1986)	19
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995).....	12
<i>State v. LaRock</i> , 196 W.Va. 294, 470 S.E.2d 613 (1996).....	9, 20, 27
<i>State v. Lively</i> , 697 S.E.2d 117, (2010).....	9, 10, 19, 20, 27
<i>State v. Miller</i> , 197 W.Va. 588, 476 S.E.2d 535 (1996).....	29
<i>State v. Mills</i> , 219 W.Va. 28, 631 S.E.2d 586 (2005).....	29
<i>State v. McGinnis</i> , 193 W.Va. 147, 455 S.E.2d 516 (1994).	19, 20
<i>See State v. Poore</i> , 704 S.E.2d 727, 735 (2010).....	20
<i>State v. Starkey</i> , 161 W.Va. 517, 244 S.E.2d 219 (1979).	13

WEST VIRGINIA STATUTES

West Virginia Code § 61-11-18	8, 10, 30
West Virginia Code § 61-8B-4.....	17
West Virginia Code § 61-8B-12.....	18

WEST VIRGINIA RULES

Rule 19 of the West Virginia Revised Rules of Appellate Procedure	6, 11
Rule 404 of the West Virginia Rules of Evidence.....	(throughout)
Rule 403 of the West Virginia Rules of Evidence.....	(throughout)

ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGMENT OF AQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE
2. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED IMPROPER 404(b) EVIDENCE TO BE ADMITTED AT TRIAL OVER THE OBJECTION OF PETITIONER
3. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO MAKE A SUFFICIENT ON-THE-RECORD DETERMINATION UNDER RULE 403 OF THE WEST VIRGINIA RULES OF EVIDENCE REGARDING WHETHER THE PROBATIVE VALUE OF THE PROPOSED 404(b) EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE
4. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED IMPROPER CONDUCT AT TRIAL THAT UNDULY PREJUDICED PETITIONER
5. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT MADE CERTAIN RULINGS CONCERNING POTENTIAL JUROR BIAS DURING VOIR DIRE
6. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED PETITIONER TO BE FOUND TO BE A RECIDIVIST PURSUANT TO WEST VIRGINIA CODE § 61-11-18

STATEMENT OF THE CASE

This is a Petition for Appeal from a Sentencing Order entered by the Circuit Court of Jefferson County on April 14, 2010, which wrongfully denied Petitioner's post-trial motions and sentenced the Petitioner to the penitentiary. Petitioner was indicted by a Jefferson County Grand Jury in the April, 2009 term for the following offense: one (1) Count of Sexual Assault in the Second Degree in violation of West Virginia Code § 61-8B-4; pursuant to the indictment, the State sought to convict Petitioner of said crime by proceeding under a theory that the alleged victim was "physically helpless."

On September 14, 2009, the State did first file a Notice of State's Intent to Present 404(b) evidence immediately before the previously scheduled pretrial hearing in this matter. As such, an impromptu *McGinnis* hearing was held on said date. Another hearing on the issue of 404(B) evidence was then held on November 23, 2009 with a ruling being made on the issue at a November 30, 2009 hearing. Over the objection of Petitioner, the State was improperly allowed to enter said evidence at trial.

Petitioner was convicted in the Circuit Court of Jefferson County of the singular count of the indictment after a trial by jury that was held from January 26, 2010 until January 28, 2010.

On March 11, 2010, within the same term of Court, the State filed an Information by Prosecuting Attorney, Jefferson County Case No. 10-F-40, seeking to sentence Petitioner to an enhanced sentence as a recidivist pursuant to West Virginia Code § 61-11-18 based on his most recent conviction in Jefferson County case No. 09-F-59. On March 25, 2010, Petitioner was arraigned on said recidivist information and improperly

admitted that he was the same person who was previously convicted of a crime in 1999 in Orange County, California and that he was sentenced to the penitentiary for such crime.

On April 12, 2010, a sentencing hearing was held in the Circuit Court of Jefferson County, West Virginia. At said October 27, 2008 sentencing hearing, Petitioner's post-trial motions were denied and the Court found that, based on Petitioner's March 25, 2010 admission, that Petitioner should be sentenced to twice the minimum term of imprisonment for his conviction of sexual assault in the second degree as required by West Virginia's recidivist statute. As such, Petitioner was sentenced to the indeterminate sentence of 20 to 25 years in the custody of the Commissioner of the Department of Corrections upon his conviction for said crime charged in the singular count of the indictment.

It is from this Sentencing Order that the Petitioner now appeals. Petitioner's trial counsel, James T. Kratovil, Esq., counsel did timely file a written notice of appeal and was appointed to perform same. Petitioner's original appellate counsel filed a motion to extend the period in which to file an appeal by sixty (60) days based on counsel's request for transcripts of the relevant proceedings. On July 15, 2010, an Order was entered extending Petitioner's deadline to file an appeal to October 12, 2010. On August 25, 2010, an Order was entered allowing for Petitioner's original appellate counsel to withdraw from representation. Said Order first appointed Petitioner's current counsel, Christopher J. Prezioso, Esq. to represent Petitioner's interest in bringing an appeal of his conviction and sentence.

On October 12, 2010, Petitioner timely filed a Petition for Appeal.

On December 13, 2010, Respondent filed a Response to Petition for Appeal and did file a Motion to Supplement Record. Attached to said Motion to Supplement the Record were two (2) previous transcripts that had not yet been made available setting forth the certain pre-trial hearings addressing the issue of admission of 404(b) evidence.

On February 10, 2011 the Supreme Court of Appeals of West Virginia did enter an Order finding the matter appropriate to be scheduled for oral argument pursuant to Rule 19 of the Revised Rules of Appellate Procedure. Further, pursuant to said Order, Petitioner was given leave to file a supplemental brief within thirty (30) days of the entry of said Order.

On February 17, 2011, the State did file a motion to deem Petitioner a sexually violent predator in the Circuit Court of Jefferson County, West Virginia after the Supreme Court of Appeals of West Virginia did set the matter for oral argument.

STATEMENT OF FACTS

The singular charge set forth in the Petitioner's indictment stems from an alleged sexual assault that allegedly occurred between the evening hours of May 4, 2008 and the morning hours of May 5, 2008 at a residential home located in Jefferson County, West Virginia. A sexual assault that Petitioner vehemently claims never occurred. When reviewing the record in this case, it is clear that the State of West Virginia did not meet its burden of proof when convicting Petitioner Larry A. McFarland of the singular charge brought against him.

The facts the State relied upon to convict are set forth as follows: Petitioner Larry A. McFarland befriended the alleged female victim, E.B., and her husband, G.B., at a bar and then, with permission, did visit their home at a later date on May 4, 2008. On said date, Petitioner Larry A. McFarland, E.B., and G.B. voluntarily ingested intoxicants and talked about sex while the B's children were present in the home. Around 10:30 p.m., G.B. went to sleep and Petitioner and the victim stayed up and voluntarily ingested more intoxicants. These facts offered by the State were uncontested.

The State then offered improper speculation evidence by alleging that, at some point, the victim in this case lost consciousness and was sexually assaulted by the Petitioner while the victim's husband and children slept. Further, the State claimed the victim did not know that she was sexually assaulted until sometime after she woke up the next morning beside her husband in bed. The State failed to produce any credible evidence, scientific or otherwise, which proved Petitioner sexually assaulted the victim.

At trial, the State primarily and improperly relied upon 404(b) evidence of Petitioner Larry McFarland's previous criminal convictions to improperly find Petitioner

guilty of the singular offense contained in Petitioner's indictment. This case is a shocking example of a how an improper conviction can be wrongfully obtained through the State's use of 404(b) evidence as no other credible evidence of actual guilt was offered at trial.

After trial, the Circuit Court of Jefferson County found Petitioner to be a recidivist pursuant to West Virginia Code § 61-11-18 without holding a jury trial on the issue and improperly adopting an alleged admission by Petitioner at the March 25, 2010 arraignment hearing upon the State's previously filed March 11, 2010 Information.

SUMMARY OF THE ARGUMENT

First, Petitioner's motion for judgment of acquittal should have been granted as the State clearly lacked sufficient evidence to convict Petitioner of the singular count of the indictment.

Second, as noted throughout, the State primarily and improperly relied on improper 404(b) evidence that should not have been admitted at trial. Specifically, the State was allowed to enter evidence of unrelated and irrelevant incidents that occurred in 1995 in Orange County, California by simply admitting certain, unverified documents from the state of California and not requiring any corroborating or substantive evidence of the same. As such, clearly no evidence was presented to prove by a preponderance of the evidence that Petitioner actually committed the alleged prior bad acts. Even if the State met its burden in proving the Petitioner committed the alleged prior bad acts, the trial court should have required more evidence to be presented at trial to substantiate said claims rather than simply allowing the State to offer scant, alleged written records of the same. Further, the evidence should have been excluded because the evidence was not relevant and the probative value of the evidence was substantially outweighed by its potential unfair prejudice.

Third, no evidence exists in the record to prove that a sufficient on-the-record determination was made pursuant to Rule 403 of the West Virginia Rules of Evidence setting forth the reasons why the probative value of the proposed 404(b) evidence was not substantially outweighed by unfair prejudice. Syl. Pt. 2, *State v. Lively*, 697 S.E.2d 117, (2010) quoting, Syl. Pt. 3, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

Fourth, the Circuit Court committed reversible error when it failed to strike Juror Desarno for cause upon trial counsel's motion as said juror clearly was unduly biased toward the State as her son was a member of the Charles Town Police Department. Further, the Circuit Court committed reversible error when the State's motion to disqualify Juror Wynn for cause was granted after the State claimed that that said juror could not be rehabilitated after said juror stated that he would hold the State to a high standard of proof.

Fifth, the Circuit Court committed reversible error when it allowed Petitioner to be found to be a recidivist pursuant to West Virginia Code § 61-11-18. On March 25, 2010, Petitioner was arraigned on a recidivist information and on the same date admitted that he was the person previously convicted a felony offense in 1999 in Orange County, California and that he was sentenced to the penitentiary for said sentence. Allowing Petitioner to admit to said allegation amounted in Petitioner facing an enhanced sentence of 20 to 25 years.

Sixth, all of the combined error and the State's improper focus on the alleged 404(b) evidence created reversible error as Petitioner was clearly convicted by the use of the "toxic" 404(b) doctrine instead of the singular criminal act for which he was actually tried. *See State v. Lively*, 226 W.Va. 81, 697 S.E.2d 117, 137 (2010)(dissent).

STATEMENT REGARDING ORAL ARGUMENT

- I. Petitioner Larry A. McFarland affirmatively states that the issues set forth in this petition have already been accepted for oral argument pursuant to Rule 19 of the West Virginia Revised Rules of Appellate Procedure argument. *See* February 10, 2011 Order of the Supreme Court of Appeals of West Virginia, *State v. Larry A. McFarland*, No. 101413.

ARGUMENT

I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGMENT OF AQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE

That State simply did not present sufficient evidence to meet its burden of proof in convicting Petitioner Larry A. McFarland on the singular count contained the indictment. The Circuit Court wrongfully denied Petitioner's properly made Motions for Judgment of Acquittal after the close of the State's evidence and again at the conclusion of all evidence.

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 Petitioner'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."

Syl. Pt. 1. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

A criminal Petitioner 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 reducibility 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 weighted, from which a jury could find guilty beyond a reasonable doubt.

Syl. Pt. 3. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

In a criminal case, a verdict of guilty 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 guilt of the Petitioner 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 guilty 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.

Syl. Pt. 1 *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1979).

Petitioner recognizes the heavy burden associated with contesting sufficiency of evidence at trial, but Petitioner believes that his burden has been met. The State was improperly allowed to convict Petitioner by its improper and unduly prejudicial use of 404(b) evidence as the record clearly reflects that the State did not put on any credible evidence that Petitioner had actually committed the crime for which he was tried.

Beyond the improper 404(b) evidence offered at trial, the State secondarily relied upon speculative evidence from witnesses G.B. and E.B.. As further proof that Petitioner was improperly convicted through admission of 404(b) evidence, a majority of evidence presented at trial from these witnesses actually established the *innocence* of Petitioner and the testimony presented from both witnesses will be reviewed in detail for this Honorable Court's convenience.

G.B.'S TESTIMONY

The victim's husband, G.B., testified to the following facts at trial: That G.B. befriended Petitioner Larry McFarland in a bar while drinking with his wife. (Tr. 288-289, January 26, 2010). On May 4, 2008, Petitioner Larry McFarland visited the B's residence during the day and the B's asked that he come back later in the evening. (Tr. 290, January 26, 2010). Petitioner Larry McFarland lived in close proximity to the B's. (Tr. 8, January 27, 2010). Upon returning to the B's home, the parties ingested

intoxicants and watched country music videos on the B's computer. (Tr. 288-289, January 26, 2010). Petitioner Larry McFarland and E.B. voluntarily smoked marijuana in the B's home while their children were home. (Tr. 296, January 26, 2010). As the parties were commiserating during the evening, the parties talked about sex; further, Petitioner and G.B. viewed naked pictures and talked about the physical attributes of the lead singer of the country music band Sugarland. (Tr. 17-18, January 27, 2010).

While at the B's home, Petitioner Larry McFarland called his wife. (Tr. 297, January 26, 2010). Further, Petitioner Larry McFarland voluntarily offered evidence regarding his criminal history. (Tr. 298-299, January 26, 2010).

G.B. had been drinking Jagermeister liquor earlier in the evening and had been drinking some beer that Mr. B brought to his house. (Tr. 301, January 26, 2010). G.B. went to bed around 11:00 p.m.; before going to bed Mr. B gave Petitioner Larry McFarland express permission to stay at his home and continue to party with E.B.. (Tr. 304, January 26, 2010).

E.B.'S TESTIMONY

Victim E.B., testified to the following facts at trial: E.B., G.B., and Petitioner Larry McFarland all agreed that they should hang out together on the night they spoke at the bar. (Tr. 34, January 27, 2010). The B's specifically invited Petitioner to come back to their home on May 4, 2008. (Tr. 35, January 27, 2010). E.B. "welcomed" Petitioner Larry McFarland into her home when he returned on the evening of May 4, 2008. (Tr. 36, January 27, 2010). E.B. was already drinking a Vodka and juice drink she prepared for herself before Petitioner arrived and while her children were awake. (Tr. 36, January 27, 2010). The B's children were in the home while the parties' drank and

did drugs. (Tr. 36, January 27, 2010). The parties drank excessive amounts of alcohol. (Tr. 61, January 27, 2010). Every time E.B. has used cocaine, it has acted as a stimulant and kept her awake. (Tr. 70, January 27, 2010).

E.B. was the individual who wanted to show Petitioner the country music video on her computer. (Tr. 38, January 27, 2010). E.B. admitted that she talked to Petitioner about doing cocaine and that she had “a more liberal view” of using cocaine than her husband. (Tr. 41, January 27, 2010). Further, E.B. admitted that it did not distress her at all that Petitioner had asked if he could do some cocaine at the house and had offered her the same. (Tr. 44, January 27, 2010). E.B. never asked Petitioner to leave the home even after he started talking about Ms. B’s level of attractiveness. (Tr. 47, January 27, 2010). After refusing to answer Petitioner’s question about how attractive E.B. thought he was, said victim does not remember anything else except waking up the next morning with her pants inside out. (Tr. 48, January 27, 2010). Said victim did not go to the hospital until 5:05 p.m. on May 5, 2008. (Tr. 79, January 27, 2010).

TESTIMONY FROM REMAINING WITNESSES

As clearly set forth above, the primary fact witnesses called by the State offered a great deal of exculpatory testimony and absolutely no testimony which proved beyond a reasonable doubt that Petitioner committed the crime of sexual assault in the second degree. Further, the State failed to present any additional witness testimony to support its case while the Petitioner provided evidence that was clearly exculpatory and credible.

Forensic Nurse Sivero performed the rape test kit of E.B. and testified as an expert for the State. According to said witness, E.B. lied regarding her drug use on May 4, 2008 during her rape test kit interview. (Tr. 113, January 27, 2010). Said forensic

nurse testified that the vaginal trauma suffered by E.B. could have been caused by her husband having sex with her three days before. (Tr. 114, January 27, 2010). Further, the forensic nurse's testimony at trial was inexplicably offered for purposes of proving forcible compulsion, not incapacity, and any adverse inferences drawn from said testimony should have been disregarded as the theory by which the State sought to convict Petitioner was based on a lack of capacity to give consent by the victim.

Lieutenant T. G. White provided expert DNA testimony on behalf of the State and did testify that he did not find any DNA evidence from Petitioner Larry McFarland after testing the vaginal swab at issue; but to the contrary, found DNA evidence consistent with G.B. on said vaginal swab and on the crotch area of Ms. B's panties. (Tr. 144, January 27, 2010). Specifically, Lieutenant T.G. White testified that he did not find any trace of Petitioner Larry McFarland's sperm inside E.B.. (Tr. 145, January 27, 2010). Said witness further testified that he found some low level traces of other individuals DNA on Ms. B's jeans. (Tr. 151-152, January 27, 2010). In fact, according to said witness, the only area where Petitioner Larry McFarland's sperm was found in relation to E.B. was on a small area of her jeans. (Tr. 154, January 27, 2010).

Petitioner Larry McFarland testified that he smoked marijuana with E.B. and that she provided it to him. (Tr. 172, January 27, 2010). Petitioner testified that E.B. did several lines of cocaine after her husband went to bed. (Tr. 177, January 27, 2010). Petitioner Larry McFarland testified that, after her husband went to bed, the parties engaged in consensual sex acts; specifically, Petitioner performed oral sex on E.B. and she performed oral sex on him. (Tr. 177, January 27, 2010). She then passed out in the

bathroom for a while, but awoke before Petitioner left, and kissed and hugged him goodbye. (Tr. 233-235, January 27, 2010).

Lastly, Petitioner provided expert testimony from Peter Callahan which proved that persons suffering from alcoholic blackouts, similar to that suffered by E.B. on the night in question, can do perform several tasks while not remembering the same when they come out of said blackouts.

Even when looking at all of the evidence in the light most favorable to the State, it is clear that the State did not present sufficient evidence to prove that Petitioner Larry A. McFarland was guilty of the crime for which he was convicted. The only sexual intrusion that could have conceivably occurred based on the evidence offered at trial was the consensual intrusion by E.B. and G.B..

A simple review of the record makes it abundantly clear the State was only able to sustain a conviction based upon the improper use of 404(b) evidence. One of the elements necessary to be proven in order to sustain a conviction at trial was whether the victim was “physically helpless at the time of the sexual intercourse or intrusion.” West Virginia Code § 61-8B-4. The State failed to present any evidence of the same and simply relied upon the premise that because the alleged victim did not remember having sex with Petitioner that the Petitioner must be guilty. No evidence was entered at trial to establish that the victim in this matter was actually “physically helpless.” As set forth in West Virginia Code § 61-8B-12, West Virginia law provides for a statutory affirmative defense which is tailored specifically for cases involving victims who are “physically helpless.” Pursuant to said code section, if it is alleged that a victim in a sexual assault case is “physically helpless” a defendant must be acquitted if a defendant did “not know

of the facts or conditions responsible” for said victim becoming physically helpless unless the defendant was “reckless in failing to know such facts or conditions.” The Circuit Court did properly instruct the jury on said affirmative defense, and Petitioner respectfully contends that the existence of said affirmative defense lends great support to Petitioner’s argument that the State simply failed to present sufficient evidence to sustain a conviction. If in fact the victim in this case truly was “physically helpless” the record is replete with evidence that both Petitioner and the victim in this case were voluntarily ingesting intoxicants throughout the night. Under the State’s elected theory of physical helplessness, how can Petitioner be considered reckless in learning of the facts which lead to said alleged physical helplessness when the victim became voluntarily intoxicated in her own home, became voluntarily intoxicated in the company of Petitioner and while Petitioner also became intoxicated, and became voluntarily intoxicated with her children and husband in the same residence in very close proximity. Assuming she was actually “physically helpless”, the simple answer is that there is no conceivable way that Petitioner could ever be considered reckless in learning of the facts which lead to Petitioner’s condition and therefore Petitioner’s conviction must be reversed.

This case is a frightening example of the injustices that occur to defendants when the State is allowed to use improper 404(b) evidence in a criminal trial. A simple review of the record in this case proves that the State had absolutely no evidence to prove that Petitioner sexually assaulted the alleged victim in this case while she was “physically helpless” but yet a unsupported conviction was obtained.

Based on the foregoing, the evidence presented at trial should have been deemed insufficient to sustain a conviction against Petitioner Larry A. McFarland and the same should be reversed.

II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED IMPROPER 404(b) EVIDENCE TO BE ADMITTED AT TRIAL OVER THE OBJECTION OF PETITIONER

The Circuit Court of Jefferson County committed reversible error when it allowed certain evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence to be admitted at trial over the objection of Petitioner.

Before 404(b) evidence can be admitted at trial, the following requirements and standards must be evaluated pursuant to West Virginia Law:

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." Syl. Pt. 2, *State v. Lively*, 697 S.E.2d 117 (2010), quoting, Syl. Pt. 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." Syl. Pt. 2, *State v. Lively*, 697 S.E.2d 117, quoting, Syl. Pt. 2, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

It is presumed 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 determination under Rule 403 of the West Virginia Rules of Evidence that 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." Syl. Pt. 2, *State v. Lively*, 697 S.E.2d 117, quoting, Syl. Pt. 3, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

The State was improperly allowed to use irrelevant and unfairly prejudicial evidence to convict Petitioner Larry McFarland of the singular count in the indictment. From the evidence offered at trial, the State could not have convicted Petitioner without the admission of said irrelevant and unduly prejudicial 404(b) evidence.

This Honorable Court has recently opined that it was concerned with improper amounts of 404(b) evidence being admitted at trial as well as trial court failure to make proper findings regarding 404(b) evidence before its admission. *See State v. Poore*, 704 S.E.2d 727, 735 (2010).¹

On September 14, 2009 at 9:15 a.m., the date of the original pretrial hearing, the State first served Petitioner with its Notice of State's Intent to Present Evidence Under Rule 404(b). (Tr. 5, September 14, 2009 Pre-Trial Hearing). Pursuant to said notice, the State sought to enter evidence of a conviction for crimes Petitioner alleged to have

¹ *Quoting*, "...This Court is concerned with the potential prejudicial impact of the copious Rule 404(b) evidence admitted at appellant's trial. We are also troubled that the circuit court may not have made the necessary findings prior to admitting the Rule 404(b) evidence."

committed in 1995 in the state of California for “the purpose of showing the “similarity of the assaults” and that the “documentary evidence” of “conviction and charging will be presented to demonstrate the defendant’s motive and plan in sexually assaulting E.B.”; further, the evidence was also sought to be entered because it was claimed to be “consistent with and relevant to the defendant’s assertion that if he were to take a polygraph, the examiner could ask only one question, if he had sex with the victim.” See *State’s Notice of Intent to Present Evidence Under Rule 404(b)*, September 14, 2009. In total, the State sought to enter a few pages of a cold, uncertified record which showed past convictions and nothing more. After being handed said notice, trial counsel did strenuously object to the entry of said evidence based on the fact the notice was untimely, incomplete, were not certified, and came from a far away jurisdiction. Appellate counsel respectfully asserts after receiving the State’s Notice of Intent to Present Evidence Under Rule 404(b), an impromptu *McGinnis* hearing was held at the previously scheduled pretrial hearing date. (Tr. 5, September 14, 2009).

In said impromptu *McGinnis* hearing the State called investigating officer Detective Edwards. (Tr. 25, September 14, 2009). At said hearing, Detective Edwards did testify that she only had the written documents from the 1995 crimes as proof Petitioner had committed said prior bad acts and that she had not made contact with the investigating officer from said outside jurisdiction to discuss the case. (Tr. 30, September 14, 2009).

Trial counsel properly argued that there was no certified and trustworthy copy of the records available and that the information sought to be entered was only based on hearsay without further attestation. (Tr. 32, September 14, 2009). In response to said

argument, the State argued against having to bring actual evidence of the prior bad acts to trial and asserted that although the State did not have certified copies in their possession at the time of the *McGinnis* hearing that the State believed the State Police did and that the same could be brought to trial. (Tr. 34, September 14, 2009). In full, the State made the following record of its position regarding the sufficiency of the 404(b) evidence sought to be entered:

Well, Judge, I think we are all well aware that certified copies of public records or records regularly conducted are an exception to the hearsay rule Rule 803. Provided we have certified copies, which I brought to the Court's attention that we believe we have them but I don't have them here, I believe the State Police has them, I think that is sufficient. The fact that the State has brought in the past substantial witnesses to support documents that are properly attested does not prevent or prohibit the State from going forward and simply having the documents at a later time. We don't raise the bar that is expected of us by doing an excellent job in one case and only doing a job that meets the statute in the next case. That is not the way the law works. I think that the State, if we have this, which I believe we do, we should be permitted to go forward on it for all the reasons I have previously argued.

(Tr. 34-35, September 14, 2009).

By its own admission, the State could not even confirm on the date of the Petitioner's original pretrial hearing and on the same day it first served notice of intent to use 404(b) evidence whether it actually had certified copies of the evidence it sought to admit. (Tr. 34-35, September 14, 2009). If the State could not do it and did not know where the certified copies were located how was the Petitioner expected to travel to California in one afternoon to verify the same? One of the documents sought to be admitted stated that it could not be considered valid without "page two" and page two was not attached to the copy of the same presented. (Tr. 34-35, September 14, 2009). After the impromptu and unnoticed September 14, 2009 *McGinnis* hearing, the trial court

chose to defer ruling on the matter and to ensure that the documents were certified and provided to counsel. (Tr. 11, November 23, 2009). At no time at the first impromptu *McGinnis* hearing did the trial court make an on-the-record finding pursuant to Rule 403 of the West Virginia Rules of Evidence as to whether the probative value of the evidence was substantially outweighed by unfair prejudice.

At the second *McGinnis* hearing on November 23, 2009, trial counsel again objected because the documents sought to be entered were not certified and that the Notice of Intent to Use 404(b) evidence only noticed evidence sought to be introduced at trial regarding a plea taken in the Superior Court of Orange County in case number 97WF1290 and that certain documents were incomplete because pages were missing; specifically, a page was missing which made the document valid. (Tr. 15-16, November 23, 2009). In further support, trial counsel stated as follows:

It's not sufficient. You know, what does page two say? Well, I don't know. Maybe it says that this case was reversed on appeal. Maybe it talks about the entire history of this case. Was it appealed? Did it go to the California Court of Appeals? Did it go to the California Supreme Court? Did it go to the United States Supreme Court? Well, I don't know but that document that's been introduced is an incomplete document. Second, once you look at this document not certified, no page two, we don't have a witness here to sponsor this document to its authenticity, to prove identity, to say this is one and the same Larry McFarland. All I see here today is people from Jefferson County. Detective Edwards I think is the person who's going to sponsor this document and she doesn't have the knowledge of the identity of the people to say these are the same folks.

(Tr. 17, November 23, 2009).

The state intends to introduce at trial evidence of defendant's prior conviction by plea in this Superior Court case number and we got these documents recently but it's just a stack of documents. We see no witness here to sponsor these documents, no witness here to say that in fact this is the same guy, no witness to say Larry McFarland actually said this, no witness to say the victim actually said this. You know, if you take a look at the abstract of judgment it's got a stamp at the top which appears to me to be an attempted certification and it's by the

Orange County Superior Court Allen Slater Executive Officer. I mean this is the document that's put forward by the Court that meets the notice given to the defendant. This document on its face is incomplete. It's untrustworthy. It doesn't who that my client in fact has been convicted in the Court. It's just - - it's an incomplete document and on its face it says "not valid without completed page two."

(Tr. 24-25, November 23, 2009).

Again the trial court took the same under advisement at the November 23, 2009 *McGinnis* hearing, and again made no on-the-record finding pursuant to Rule 403 of the West Virginia Rules of Evidence as to whether the probative value of the evidence was substantially outweighed by unfair prejudice. (Tr. 27, November 23, 2009).

On November 30, 2009, the Court reconvened to make a ruling on the 404(b) issue. At said hearing, the Court stated the following regarding its decision to allow the 404(b) evidence to be admitted:

THE COURT: ...So basically, the only thing that we have that the Court hasn't issued a ruling on was 404(b). Since that time the Court has had a chance to review the particulars of the allegations in this case, the particulars of the allegations and the conviction, the police report, and all of the factors underlying the California conviction from, I believe, 1999, I think that is the approximate date of the California conviction, based upon Mr. Kratovil has attacked the use of that as 404(b) primarily upon the defect of the charging sheet docket sheet which either lacks a triple seal or lacks a second page. I believe central to the argument that Mr. Kratovil made was the statement on the one sheet saying that this is - - I can't remember the exact words - - but is not to be taken as a meaningful document absent a page two, it exceeded page two in order to be considered a complete and lawful record in the context of whatever that sheet exactly was. The State supplemented with a good deal of information in the form of official charging documents some of them in the form of police reports apparently from the California file.

Upon looking that over, upon looking at the rules regarding 404(b), we have had the *McGinnis* hearing, we do find that we are satisfied by a preponderance of the evidence that the act or conduct occurred and that the Defendant is the person who did commit those acts in California, and we have found based upon that and based upon what the Court does now see as relevance as urged by the State, the Court would permit the State

the use of 404(b). We find that the balancing test, the Rule 403 balancing test, is satisfied based upon the nature of the offense, the finding that the Defendant is the person by a preponderance of the evidence who did commit the earlier offense.

(Tr. 3-4, November 30, 2009).

As noted above, this is the sum total of the findings of fact and conclusions of law regarding the Court's decision to admit the contested 404(b) evidence. Beyond a single conclusive statement, the Court did fail to make any on-the-record findings pursuant to Rule 403 of the West Virginia Rules of Evidence as to whether the probative value of the evidence was substantially outweighed by unfair prejudice. (Tr. 3-4, November 30, 2009).

The circuit court was wrong to admit this evidence as it was not proven by a preponderance of the evidence that Petitioner was the actor who committed the previous bad acts. Syl. Pt. 2, *State v. Lively*, 697 S.E.2d 117, quoting, Syl. Pt. 2, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). Further, the State failed to prove by a preponderance of the evidence that the prior bad acts actually occurred. No evidence at all beyond the insufficient documents placed before the Court was entered at any of the *McGinnis* hearings in this matter and the same did not establish by a preponderance of the evidence the necessary prerequisites for admission.

At trial, the State, without proper foundation, was allowed to enter improper 404(b) evidence regarding acts allegedly committed by the Petitioner over fifteen (15) years ago and had no probative value to the singular act for which Petitioner was being tried. The alleged prior bad acts were completely irrelevant to the singular charge before the Court and were only entered to inflame the jury and improperly convict the Petitioner. E.B. consensually performed oral sex on Petitioner on the night in question; said act is

not a crime. The State, improperly alleged that Petitioner had previously performed improper sex acts with certain victims over fifteen (15) years ago and the same proves “motive or plan” on the night in question. Allowing this evidence was highly improper as the 404(b) evidence did not establish that the alleged previous acts occurred as recited by the State. Said evidence certainly was not used to prove plan or motive but was simply used to improperly influence the jury into making a wrongful finding of guilt.

The method by which the State was allowed to enter this evidence is highly prejudicial in itself. Over the objection of Petitioner, the State was allowed to simply hand the jury copies of Petitioner’s convictions without proper certification or any testimony regarding the same from a qualified, knowledgeable witness. The jury was simply allowed to read the convictions on paper and reach their own conclusions. The Petitioner was never given a chance to cross examine any witness or rehabilitate himself after entry of the same. Essentially, this paper 404(b) evidence was entered and the jury was left to speculate while being told that the Petitioner had committed certain acts in the past.

This case is 404(b) evidence at its worst. The Circuit Court should not have allowed the evidence to be entered at trial. This case presents the perfect opportunity for further guidelines and mandates to be implemented by this Honorable Court so that defendants are not further prejudiced by this toxic doctrine. Trial Courts must be prohibited from further “rubber stamping” 404(b) evidence as admissible simply because defendants have committed crimes in the past. Although counsel is making no comment on Petitioner’s moral character in this brief, counsel respectfully asserts for the sake of argument that even the most despicable of persons are entitled to a fair trial. The State

needs to stop being allowed to convict persons strictly on prior bad acts. The dangers are too great.

Admission of the contested 404(b) evidence at trial was unduly prejudicial to Petitioner and the admittance of said evidence constituted reversible error on the part of the Circuit Court of Jefferson County, West Virginia.

III. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO MAKE A SUFFICIENT ON-THE-RECORD DETERMINATION UNDER RULE 403 OF THE WEST VIRGINIA RULES OF EVIDENCE REGARDING WHETHER THE PROBATIVE VALUE OF THE PROPOSED 404(b) EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE

At trial, the Circuit Court committed reversible error when it failed to make a sufficient on-the-record determination under Rule 403 of the West Virginia Rules of Evidence regarding whether the probative value of the proposed 404(b) evidence was substantially outweighed by unfair prejudice.

It is presumed 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 determination under Rule 403 of the West Virginia Rules of Evidence that 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.” Syl. Pt. 2, *State v. Lively*, 697 S.E.2d 117, (2010) quoting, Syl. Pt. 3, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

As noted above, beyond a single, conclusive statement at the November 30, 2009 hearing, the trial court failed to make any on-the-record findings of fact or conclusions of law regarding why it determined that the 404(b) evidence at issue was admissible. (Tr. 3-4, November 30, 2009).

In its November 30, 2009 pre-trial hearing order, the Circuit Court failed to interlineate any additional findings of fact or conclusions or law and stated the following regarding the admission of the contested 404(b) evidence:

Whereupon the Court ruled on the admissibility of the State's proposed 404(b) evidence, and stated that following the previously-held *McGinnis* hearing, the Court did find that by a preponderance of the evidence that the prior act in California did occur and that the defendant committed the same, and that the Rule 403 balancing test was satisfied. According, the Court found that the noticed 404(b) evidence is admissible at trial.

Order From November 30, 2009 Pre-Trial Hearing and Setting New Trial Dates.

By requiring that trial courts make an "on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice" a simple, conclusive statement regarding the same without making particular findings of fact and conclusions of law as to how they reached said determination cannot be considered sufficient.

As such, it should be considered reversible error for trial courts ruling on issues of 404(b) evidence admissibility to fail to make sufficient findings of fact and conclusions of law when making the required "on-the-record determination" as to whether the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice

IV. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT MADE CERTAIN RULINGS CONCERNING POTENTIAL JUROR BIAS DURING VOIR DIRE

Upon the motion of the State and upon no objection by Petitioner's trial counsel, the parties were allowed to conduct private, individual voir dire during the jury selection process. The Circuit Court of Jefferson County committed reversible error when it made certain rulings when striking jurors for cause.

The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for caused [sic]. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law.

Syl. Pt. 1. *State v. Mills*, 219 W.Va. 28, 631 S.E.2d 586 (2005) *quoting* Syl. Pt. 6, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

The following juror should have been stricken for cause upon defense trial counsel's motion:

1. Juror Desarno. Petitioner McFarland moved to disqualify Juror Desarno after she informed the Court that she had a son who was a member of the Charles Town Police Department; an agency that maintains a close, professional relationship with the law enforcement agency that investigated this case. (Tr. 58, January 26, 2010). As such, it is clear that said prospective juror held a bias which should have disqualified her from the jury panel. By denying Petitioner McFarland's motion to strike said juror for cause, the Circuit Court of Jefferson County unduly prejudiced Petitioner.

The following juror should not have been stricken for cause upon the State's motion:

1. Juror Wynn. The State moved to disqualify Juror Wynn after he informed the Court he would hold the state to a high standard of proof and would listen to the Court's instructions. (Tr. 77-78, January 26, 2010). The State moved to disqualify by claiming that said juror could not be rehabilitated by the Court or the Petitioner's questions after he stated that he would hold the state to a high standard. (Tr. 78, January 26, 2010). The Court deferred immediately ruling on the motion, but ultimately struck said juror out of an "abundance of

caution.” (Tr. 146, January 26, 2010). Clearly, beyond a reasonable doubt is a high standard and said juror did not exhibit bias but a candid and proper understanding of the law.

V. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED PETITIONER TO BE FOUND TO BE A RECIDIVIST PURSUANT TO WEST VIRGINIA CODE § 61-11-18

On March 11, 2010, within the same term of Court as Petitioner’s conviction, the State filed an Information by Prosecuting Attorney, Jefferson County Case No. 10-F-40, seeking to sentence Petitioner to life in prison as a recidivist pursuant to West Virginia Code § 61-11-18. On March 25, 2010, Petitioner was arraigned on said recidivist information and improperly admitted that he was the same person who was previously convicted of a crime in 1999 in Orange County, California and that he was sentenced to the penitentiary for such crime.

The record provided does not establish that Petitioner was ever informed of his right or duly cautioned that he would be entitled to a separate jury trial on the issue of whether Petitioner had previously been convicted of a prior felony offense pursuant to West Virginia Code § 61-11-19. Instead, the Court apparently accepted Petitioner’s admission at his arraignment for the State’s information on March 25, 2010. As noted on several occasions at the Court’s sentencing hearing, upon making said admission and being determined to be a recidivist, the Court was forced to sentence Petitioner to 20 to 25 years for his conviction of second degree sexual assault.

As such, the Court’s finding that Petitioner was a recidivist without conducting a proper proceeding was reversible error.

VI. IMPROPER CONDUCT AT TRIAL UNDULY PREJUDICED PETITIONER

All of the combined error and improper conduct at trial unduly prejudiced Petitioner and requires that his conviction be reversed. From the instant the State filed its Notice of Intent to use 404(b) evidence, the State made this trial about acts that occurred fifteen (15) years prior to trial and not the singular act for which Petitioner was indicted. A simple review the record shows the inexplicable magnitude of time spent during opening and closing statements concerning the alleged 404(b) evidence. Petitioner was on trial for acts he allegedly committed long ago, not for the singular act for which he was actually tried.

The victim in this case voluntarily became intoxicated and committed a sex act with Petitioner that she may or may not remember. Upon learning that he was a sex offender, a fact he freely offered, the victim either intentionally or subconsciously reached the improper conclusion that she had been sexually assaulted. Although no evidence was ever offered of the same, the State was allowed to improperly paint the Petitioner as a monster who somehow sexually intruded the victim and masturbated on her although absolutely no proof of either act was offered at trial.

As such, the combined improper acts that occurred during the trial require that Petitioner's conviction be reversed.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Petitioner respectfully requests that this Petition be granted; that the judgment of the Circuit Court of Jefferson County be reversed and that Petitioner be immediately released from incarceration.

Respectfully submitted,
Larry A. McFarland,



Christopher J. Prezioso, Esq. 9384
Luttrell & Prezioso, PLLC
206 West Burke Street
Martinsburg, West Virginia 25401
(304) 267-3050

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
Respondent,

Vs.

No. 101413

LARRY MCFARLAND,
Petitioner

CERTIFICATE OF SERVICE

I, Christopher J. Prezioso, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing Redacted Supplemental Brief of Petitioner upon the following persons, by courier, on this 13th day of April, 2012:

Brandon C.H. Sims
Jefferson County Prosecuting Attorney
P.O. Box 729
Charles Town, West Virginia 25414



Christopher J. Prezioso, Esq. #9384