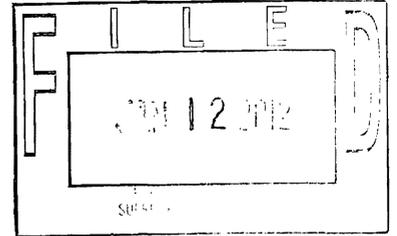


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0915



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

GARY RICHARD BAKER,

*Defendant Below,
Petitioner.*

BRIEF OF THE STATE OF WEST VIRGINIA

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IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0915

STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

**Appeal from a final order of
the Circuit Court of Greenbrier
County (09-F-100)**

GARY RICHARD BAKER,

*Defendant Below,
Petitioner.*

BRIEF OF THE STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

This case involves the attempted robbery of the Fairlea, Greenbrier County, West Virginia Subway restaurant and the robbery of one of its employees (jointly “the robbery”). The Defendant (Petitioner herein) asserts two grounds for appeal. First, he asserts that it was error for the Circuit Court of Greenbrier County to admit evidence that the Defendant was on parole and needed money at the time of the robbery as evidence of motive for the robbery. Second, the State introduced evidence that in 1999 the Defendant was fired from his job at the Fairlea Subway and had argued with the owner over the termination, thus creating a revenge motive to rob the Subway. Shortly thereafter, the Defendant was incarcerated for crimes that were unrelated to the Subway. The

Defendant asserts that it was error for the circuit court to have admitted into evidence the fact that the Defendant was incarcerated between 1999 and 2009 prison as evidence explaining why the revenge motive took so long to accomplish.

A. The Robbery Itself

On March 15, 2009, Gary Baker arrived at Jon and Lisa Arbogast's (Mr. Baker and Ms. Arbogast are second cousins, App. vol. I at 371), home in Lewisburg at 7:30 p.m. *Id.* at 372. While there, Mr. Baker repeatedly looked at the clock, *Id.* at 374, 381, leaving around 10:30 p.m. *Id.* at 372.

Between 10:30 and 10:45 p.m., Kristin Smith observed a green-teal colored sporty car, with little scoops in the hood, *Id.* at 355, parked near the Subway in a place where cars are not usually parked. *Id.* at 352. Next to the car, a man "larger in size . . . kind of husky,"¹ taller than the car, appeared as if he was either putting on or taking off something bulky, like a sweat shirt. *Id.* at 354.

Around 11:30 p.m., Whitney Smith, a Fairlea Subway restaurant (located in Greenbrier County, *id.* at 338) employee was closing up. *Id.* at 332. After locking the front door, she went to the back of the store. *Id.* A man wearing a ski mask and a red hoody, and pointing a gun, approached her and forced her to take him into the store. *Id.* at 332, 335. Ms. Smith identified an air gun that was seized from Mr. Baker's car as the one that the robber used. *Id.* at 346. The robber was six feet tall and heavysset. *Id.* at 333. The robber appeared to know the store's layout. *Id.* at 336. The robber ordered Ms. Smith to open the safe, which she was unable to do since the safe had a time lock. *Id.* at 335. The length of time the robber was in the store was 19 minutes, *id.* at 432,

¹Admittedly while not evidence, *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 532 n.56, 694 S.E.2d 815, 865 n.56 (2010), defense counsel in his closing characterized Mr. Baker as "heavysset[.]" App. vol. II at 526.

an unusually long period of time for a robber to remain at the scene of a robbery according to West Virginia State Police First Sergeant (1SG) Jay Cahill², a co-investigator in this robbery. *Id.* at 432. Based upon his involvement in some fashion in as many as 50 robbery investigations, *id.* at 430, and his academy training, 1SG Cahill testified that the normal length of time for a robber to remain is “usually pretty quick, two minutes or less.” *Id.* at 433. The robber took Ms. Smith out of the store, fleeing after he took all the money from Ms. Smith’s wallet. *Id.* at 337.

B. The Investigation leads to Gary Baker

Greenbrier County Deputy Rick Honaker was made aware of the description of the robber, and told Greenbrier County Sheriff’s Deputy Brandon Hunt (the investigating officer in the robbery, *id.* at 276, that he (Honaker, who knew Mr. Baker, *id.* at 405, had seen a car stopped on Interstate 64 around 3 or 4 a.m. driven by Mr. Baker. *Id.* at 404.³ Based on this, Deputy Hunt learned that Mr. Baker lived in Huntington, *id.* at 244, and spoke with Parole Officer Judy Fitzgerald, Mr. Baker being on parole at this time. *Id.* at 409. After talking to Ms. Fitzgerald, she searched Mr. Baker’s car finding a police scanner and a black, revolver type pellet pistol. *Id.* at 246, 412.

On March 24, Deputy Hunt enlisted the aid of West Virginia State Police First Sergeant Jay Cahill to drive to Huntington to speak to Mr. Baker. *Id.* at 250, 431. They obtained a search warrant for his residence and car and seized a police scanner, a cellular telephone, and several other sundry items. *Id.* at 251. The police scanner was on Mr. Baker’s belt, *id.* at 252 and, although he was in Huntington, in Cabell County, the scanner was tuned to the Greenbrier County radio frequency. *Id.*

²At various places in the appendix this witness’s last name is spelled “Cahill” or “Cayhill.” This brief will be Cahill.

³March 15 and 16th, 2009 were a Sunday and a Monday respectively. App. vol. I at 278.

at 251. The scanner was so small that at first neither Deputy Hunt nor 1SG Cahill saw it. *Id.* at 434. Mr. Baker also had a set of ear plugs that fit into the scanner. *Id.* at 434.

During a voluntary interview with 1SG Cahill, Mr. Baker told him that on the 15th at about midnight he was on the road between Charleston and Huntington and that he had called to tell his mother this. *Id.* at 440. When 1SG Cahill informed him that the police could determine within five miles of what relay tower a certain cell phone call went to, Mr. Baker appeared, “surprised or shocked[.]” *Id.* at 441. And, indeed, the cell phone records show that a call was made from the cell phone seized by the police from Mr. Baker on the late evening of the 15th to the early morning of the 16th from the Lewisburg area. *Id.* at 449-55.

C. Mr. Baker’s history with the Fairlea Subway, his parole status, and the State’s Theory of the case.

At the time of the robbery Mr. Baker was a parolee. *Id.* at 409. Ms. Fitzgerald had spoken with Mr. Baker and had told him that “he had to pay his rent, or there would be consequences.” *Id.* at 416. Mr. Baker was approximately three weeks in arrears on his rent to the amount of \$225.00. *Id.* at 415-16. On March 19, Mr. Baker paid extra on his rent. *Id.*

Further, Mr. Baker had previously been employed at the Fairlea Subway in 1999. *Id.* at 304. Mr. Baker, according to Donald Smith, the Fairlea Subway owner from 1989 to 2000 and the one who hired Mr. Baker, testified that he fired Mr. Baker because Mr. Baker was not meeting the standards of a Subway employee. *Id.* at 304-05. Mr. Baker, according to Mr. Smith, “wasn’t to happy” about being fired. *Id.* at 305. A day or two after being fired, Mr. Baker went to see Mr. Smith and the two “had words[.]” with Mr. Baker being agitated and accusing Mr. Smith of being prejudiced against him. *Id.* Mr. Smith sold the Fairlea Subway in 2000, but testified that the new

owners told him that, other than changes in decor, the Fairlea Subway was the same as when Mr. Baker worked there, including the location of the safe. *Id.* at 307.

The State believed this discharge provided a motive for the robbery of this particular Subway (revenge), *see id.* at 514, (arguing in closing to the jury that Mr. Baker was “ticked off [and] angry.”), and Mr. Baker’s status as a parolee in need of money to pay his rent -- or face consequences related to his parole -- provided a more general motive for robbery. *Id.* at 513-14.

D. The Pretrial Motions and Rulings

Pretrial, the State filed a “Motion to Admit the Testimony of Judy G. Fitzgerald.” *Id.* at 4. The State asserted (1) Ms. Fitzgerald’s role as Mr. Baker’s parole officer, such as searching his car and questioning him, was necessary to put her testimony in proper context; and, (2) such testimony passed the Rule 403 balancing test. *Id.* The circuit court’s pretrial order allowed Ms. Fitzgerald to testify, but refused to allow her to be identified as a parole officer. *Id.* at 798.

Subsequently, the State filed a “Motion for Permission to Introduce Evidence of Defendant’s Other Crimes, Wrongs, or Acts.” *Id.* at 93-94. The State offered the evidence of the defendant’s prior felony convictions for Wanton Endangerment with a Firearm (occurring shortly after his discharge from Subway -- but unconnected to his discharge), *inter alia*, to explain to the jury the ten year gap between the firing and the robbery. *Id.* at 94. The circuit court excluded the testimony finding the probative value of the ten year gap to substantially outweighed by the danger of unfair prejudice. *Id.* at 167. The trial court specifically noted the State was free to introduce evidence of the firing and Mr. Baker’s previous employment at Subway to show motive. *Id.* at 168.

E. The Trial Testimony

During the trial, the State called Donald Smith, the owner of the Fairlea Subway in 1999.

Id. at 303. During his examination, the following exchange took place:

Q. How are you familiar with Gary Richard Baker?

A. He was an employee of mine for a little over a week, in December of '99.

Q. You hired him in the summer of '99.

A. Yes, I did.

Q. And, at some point, you dismissed his employment, in the summer of '99. Is that correct?

A. That's correct.

Id. at 304.

In cross-examining Mr. Smith, the following exchange occurred:

Q. And summer of '99, is when the confrontation between you and Gary Baker took place?

A. That's when the incident occurred, yes.

Q. 10 years ago, this past summer?

A. That's correct.

Id. at 307.

The cross-examination continued:

Q. And this was a part time job?

A. Yes, it was.

Q. With no benefits?

A. No benefits.

Q. Minimum wage, I'm sure?

A. That's correct, to start.

Q. And he was only there for a week?

A. Week to 10 days.

Q. So it's not like he lost his pipeline to the goldmine, right?

A. I don't know what his opinion was.

Q. Again, you're paying minimum wage, hiring part time without benefits, correct?

A. That's correct.

Id. at 307-08.

The day after this testimony, the State raised with the court the court's prior ruling. Specifically, the State asserted the defense not only referenced the ten year gap between the firing and the robbery, but also then tied that period of time in with other factors to try to demonstrate the revenge motive for being fired was not plausible. *Id.* at 315-17. Indeed, counsel for Mr. Baker specifically argued to the judge that he was "entitled to challenge [the State's] motive, which is what they are getting him up there for." *Id.* at 318. As defense counsel continued, "So I'm entitled to ask the man the circumstances of the employment, which he testified to; how it ended; which he testified to; when it ended, which he testified to, all of those things." *Id.* Based on this, the circuit court granted the State's request:

Alright, I understand. What we're talking about here is a fair trial. I think the State is now at a disadvantage, as a result of the emphasis placed on this 10-year span, and I'm going to permit them to admit evidence through judicial notice that the defendant was convicted of a felony 10 years ago and that he was on parole. And the sole purpose of permitting this evidence is to explain the passage of time.

Id. at 321. Subsequently, Mr. Baker asserted the use of parole status did not have anything to do with the passage of time. *Id.* at 395. The court ruled:

I think we're going to let the fact that he's a convicted felon in and the fact that we're going to have testimony from an officer, as far as I'm concerned, that all goes to show the passage of time. It's all part of his imprisonment, the terms of his imprisonment. So I'm going to let that in for the sole purpose of showing the passage of time.

Id. at 396.

Prior to Ms. Fitzgerald testifying, the court instructed the jury with an instruction agreed to by the parties, *id.* at 400-01:

There will be some evidence admitted during Ms. Fitzgerald's testimony that you may consider only for a limited purpose. So I'm going to read that instruction now.

The Court instructs the members of the jury that evidence of collateral acts of misconduct is not to be considered in establishing the guilt of the crime with which the defendant is charged, and you may consider that evidence for a very limited purpose, only. You may not consider it as proof of the charges contained in the indictment. You may consider it to show the passage of time.

You may not use this evidence in consideration of whether the State has established the crime charged in the indictment. In addition, such evidence is not relevant to any other matters, such as the character of the defendant, whether the defendant is a bad person, or whether the defendant had the propensity or the disposition to commit the crime charged. This evidence may not be considered in that regard, since the defendant's character is not an issue.

In addition, it is not proper for the State to prove a criminal case by evidence that a defendant may have committed other criminal acts or may be a bad person.

Id. at 407-08. The court repeated the instruction before 1SG Cayhill's testimony. *Id.* at 428-29. Because both Ms. Fitzgerald and 1SG Cayhill testified, the court then gave another limiting instruction during the course of 1SG Cayhill's testimony. *Id.* at 460-61. The court gave the instruction again in its jury charge. *Id.* at 499-500.

II.

STATEMENT REGARDING ORAL ARGUMENT

There is no need for oral argument in this case. The matters arising in this case are fully set forth in the briefs and the decision of the circuit court is well within the mainstream of this Court's jurisprudence. Summary disposition is appropriate.

III.

ARGUMENT

A. Standard of Review

"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). "Where [however] a trial court's determination involves a construction of the *West Virginia Rules of Evidence* and rulings of law, . . . review is plenary." *State v. Lowery*, 222 W. Va. 284, 287, 664 S.E.2d 169, 172 (2008) (per curiam).

Specifically,

The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence 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.

Syl. Pt. 2, *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010).

Further, this "Court has consistently held that, on appeal, it may '[a]ffirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its

judgment.”” *Humphries v. Detch*, 712 S.E.2d 795, 803 n.10 (W. Va. 2011) (quoting Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965)). See also *Doe v. Anrig*, 728 F.2d 30, 32 (1st Cir. 1984) (quoting *Brown v. St. Louis Police Dep’t*, 691 F.2d 393, 396 (8th Cir.1982)) (“We are, of course, free to affirm a district court’s decision ‘on any ground supported by the record even if the issue was not pleaded, tried, or otherwise referred to in the proceedings below.’”) (Breyer, J.) Thus, if a trial court admits admissible evidence, albeit for the wrong reason, there is no abuse of discretion. *United States v. US Infrastructure, Inc.*, 576 F.3d 1195, 1208 (11th Cir. 2009) (citations omitted) (“A district court’s evidentiary rulings are reviewed only for ‘a clear abuse of discretion,’ and this Court ‘will not hold that the district court abused its discretion where it reached the correct result even if it did so for the wrong reason.’”); *Hawthorne v. Guenther*, 917 S.W.2d 924, 931 (Tex. Ct. App. 1996) (“A trial court cannot abuse its discretion if it reaches the right result, even for the wrong reasons.”).

B. A trial court always has power to revisit an interlocutory ruling and that power is especially appropriate where, as here, the trial court revisits a pretrial ruling in light of developments at trial.

Any argument that the trial court changed its mind during the trial after entering its pretrial ruling cannot be construed in and of itself as error. A trial judge is always free to change the judge’s mind in reference to a pre-trial ruling. “[A]n *in limine* ruling is not written in stone.” 1 Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual* 34 (7th ed. 1998). Indeed “even if nothing unexpected happens” at trial, a trial court may “alter a previous *in limine* ruling.” *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 113, 459 S.E.2d 374, 390 (1995) (quoting *Luce v. United States*, 469 U.S. 38, 41-42 (1984)). “A new look at the issue may be necessary because often the decision to admit evidence must be made by balancing probative value and prejudicial

effect. Ordinarily, such a balancing process cannot be conducted with certainty until the evidence is proffered at trial.” 1 Saltzburg, *supra*, at 35. Indeed, as this Court has repeatedly recognized, a “court has the very broad inherent procedural power discretion “to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient[.]” Syl. Pt. 4, in part, *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 584 S.E.2d 176 (2003), and that “[i]n an ongoing action, in which no final order has been entered, a trial judge has the authority to reconsider his or her previous rulings[.]” Syl. Pt. 2, in part, *Taylor v. Elkins Home Show, Inc.*, 210 W. Va. 612, 558 S.E.2d 611 (2001), and that “[a trial] court has plenary power to reconsider, revise, alter, or amend an interlocutory order[.]” *Coleman v. Sopher*, 201 W. Va. 588, 605, 499 S.E.2d 592, 609 (1997). As this Court has observed, “[w]e welcome the efforts of trial courts to correct errors they perceive before judgment is entered and while the adverse effects can be mitigated or abrogated.” *State v. Jarvis*, 199 W. Va. 38, 45, 483 S.E.2d 38, 45 (1996). *Accord State ex rel. Crafton v. Burnside*, 207 W. Va. 74, 77 n.3, 528 S.E.2d 768, 771 n.3 (2000).

Indeed, here, neither the State nor the Defendant “opened the door” to the ten year issue. It was Mr. Smith who offered the timeframe of his hiring and firing Mr. Baker in response to a question from the State that specifically did not ask him about any timeframe.

Q. How are you familiar with Gary Richard Baker?

A. He was an employee of mine for a little over a week, in December of ‘99.

App. at 304. Further, Mr. Smith apparently even mis-spoke, for Mr. Smith did not hire and fire Mr. Baker in the winter of 1999, but in the summer of 1999. *Id.*⁴

⁴While not explicit on the record, one fair reading of the State’s questions is that the State did not want Mr. Smith to have given erroneous testimony under oath, that the hiring and firing was (continued...)

Thus, neither the State nor the defendant opened the door, the door was opened by Mr. Smith. Once Mr. Smith testified, however, the jury was aware he was fired in 1999 and the robbery *sub judice* occurred in 2009. Further, defense counsel did place the ten years in the context of other reasons to for the jury to disregard the plausibility of the revenge motive.

A judge “in a criminal case not only has the responsibility of protecting the rights of one accused of crime but also an equal responsibility to the people of the State to the end that justice is not thwarted by mistake or inadvertence.” *State v. Burbank*, 163 A.2d 639, 643-44 (Me.1960). “Effective administration of justice means not only a fair trial for a defendant, but also a fair trial for the State.” *Matzner v. Brown*, 288 F. Supp. 608, 612 (D.N.J. 1968).⁵ “A trial judge has authority to assure protection of public interests including assuring fairness to the prosecution.” *Schoels v.*

⁴(...continued)

in December of 1999, when it was in fact in the summer of 1999. *Cf. W. Va. R. Prof. Conduct (a)(4)* (“A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.”).

⁵This point is neither novel nor neoteric; it spans time and place in the judicial universe. *See, e.g., United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969) (“The concept of a fair trial applies both to the prosecution and the defense.”); *United States v. Pridgeon*, 462 F.2d 1094, 1095 (5th Cir. 1972) (“It goes without saying that the prosecution, just as the defense, is entitled to a fair trial.”); *United States v. Jones*, 608 F.2d 386, 390 (9th Cir. 1979) (“the government, . . . is itself entitled to a fair trial in a criminal case”); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 254 (7th Cir. 1975) (“the Government is entitled to a fair trial “); *United States v. McDade*, 827 F. Supp. 1153, 1191 (E.D. Pa. 1993) (“It must be remembered that it is not just the defendant, but also the government, that is entitled to a fair trial.”); *Commonwealth v. Lowder*, 731 N.E.2d 510, 519 (Mass. 2000) (“The Commonwealth, as well as a criminal defendant, has the right to a fair trial.”); *State v. Melson*, 638 S.W.2d 342, 362 (Tenn. 1982) (“not only the defendant, but also the State, is entitled to a fair and impartial trial.”); *People v. Dikeman*, 555 P.2d 519, 521 (Colo. 1976) (“It is a rudimentary proposition of law that a criminal trial must be a fair trial not only for a defendant but also for the People.”); *State v. Webster*, 102 N.E.2d 736, 739 (Ohio Ct. App. 1951) (“Giving the defendant the benefit of the presumptions to which he is entitled in a criminal case, we are constrained to keep in mind the admonition that while a trial must be fair to the defendant in a criminal case, it must also be fair to the people of the State whose welfare is similarly involved.”).

State, 966 P.2d 735, 737 (Nev. 1998). “Not only the defendant, but also the State . . . has a direct interest in an accurate, just and informed verdict based upon all available relevant and material evidence bearing on the question.” *State v. Carter*, 641 S.W.2d 54, 58 (Mo. 1982). What “[m]any defendants and their attorneys and some Courts forget that Justice is not a one-way street, and that in the interest of Justice every Court has a duty to protect the law-abiding community, as well as the basic rights of an accused to a fair trial.” *Commonwealth v. Gockley*, 192 A.2d 693, 699 (Pa. 1963) (emphasis deleted). Here, that was not lost on the trial judge who (being “charged with responsibility to see that the trial is fair to the government as well as to the defendant[.]” *Bernal-Zazueta v. United States*, 225 F.2d 60, 62 (9th Cir. 1955)), found the State had the right to deal with this ten year evidence. App. at 321. “[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.” *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). Here, the trial judge did precisely that. The circuit court should be affirmed.

C. Mr. Baker’s reliance on *State v. Ricketts*, 219 W. Va. 97, 632 S.E.2d 37 (2006) (per curiam) offers him no relief as *Ricketts* is plainly distinguishable and inapplicable here.

Mr. Baker relies on *State v. Ricketts*, 219 W. Va. 97, 632 S.E.2d 37 (2006) (per curiam). Pet’r’s Br. 20-21. *Ricketts* has no applicability here.

In *Ricketts*, the State relied on Rule 404(b) in an attempt to introduce a defendant’s prior conviction for felony delivery of a controlled substance in a case where malicious assault was charged. *Id.* at 99, 632 S.E.2d at 39. The State offered it would use conviction to show “motive and intent.” *Id.*, 632 S.E.2d at 39. The trial court ruled ““that’s not going to come in in any event

as 404(b) evidence. Certainly, if the defendant should choose to testify, I think Rule 60 -- something covers that, and as long as it fits within that rule, its useful for impeachment.” *Id.*, 632 S.E.2d at 39. “Notwithstanding the court’s ruling, the prosecuting attorney asked Ricketts about his prior conviction during the State’s cross-examination of Ricketts. Defense counsel objected, but the court overruled the objection[.]” *Id.* at 99-100, 632 S.E.2d at 39-40. Apparently, at closing, the trial court found the evidence was not admissible as 404(b) evidence so the State attempted to introduce it as impeachment evidence. *Id.* at 100, 632 S.E.2d at 40 (“The 404(b) evidentiary issue was raised again in closing arguments when the defense attempted to mitigate the damage of the testimony. Because of this, the State questioned Ricketts’ credibility in light of his answers to its questions. The prosecutor advised the jurors that she had to offer to show Ricketts the conviction for him to admit it was for delivery of a controlled substance. She asked the jurors, ‘How honest do you think he’s been with you here today?’”). *Rickett’s* is distinguishable from the instant case on at least four grounds.

First, the State in *Rickett’s* never attempted on appeal to justify the admission of the prior convictions under Rule 404(b) and never contested that the proper standard was under Rule 404(b), *see* www.courts.wv.gov/supreme-court/calendar/2006/briefs/may06/32896Appellee.pdf–arguments which the State does make here. *See infra* Part _____. *Cf. Waters v. Churchill*, 511 U.S. 661, 678 (1994) (“cases cannot be read as foreclosing an argument that they never dealt with.”).

Second, *Rickett’s* was not really a 404(b) case at all. The evidence in *Rickett’s* was argued by the State before the jury solely to assert the defendant was not credible. But, the only convictions which the State may employ to undermine a criminal defendant’s credibility are for perjury or false swearing. W. Va. R. Evid. 609(a)(1). *State v. Young*, 185 W. Va. 327, 347, 406 S.E.2d 758, 778

(1991) (“Under Rule 609(a)(1) of the *West Virginia Rules of Evidence*, the credibility of an accused may be impeached by evidence of a prior crime but only if the prior crime involved perjury or false swearing.”). Therefore, the evidence as inadmissible regardless of Rule 404(b).

Third, the trial court in *Rickett’s* did not perform a Rule 403 balancing test, 219 W. Va. at 100, 632 S.E.2d at 40,⁶ while the circuit court here did make such a finding (albeit changing its mind from its pretrial ruling) before allowing admission of the parole evidence and prior incarceration. App. vol. I at 323.

Finally, in *Ricketts*, the trial court never found the prior drug conviction admissible and this Court found an abuse of discretion in not sustaining the objection when the State elicited the evidence. 219 W. Va. at 101, 632 S.E.2d at 41. Here, though, the circuit court did find the evidence. App. vol. I at 321.

D. The admission of Mr. Baker’s parole status and his period of incarceration were proper.

The State’s theory was in tandem theory: (1) as a parolee, Mr. Baker needed money because he was behind in his rent and there would be consequences to his parole if he did not pay; and, (2) Mr. Baker sought revenge for being fired from the Subway restaurant, which revenge was necessarily delayed because of his incarceration.⁷ The evidence relating to both Mr. Baker’s parole status and his period of incarceration between his discharge from Subway and the robbery are admissible.

⁶Actually, there was no reason for the trial court in *Rickett’s* to conduct the Rule 403 balancing test, if the defendant’s prior conviction is not for perjury or false swearing it cannot be used under Rule 609. And if a conviction was for perjury or false swearing it is automatically admissible. Compare W. Va. R. Evid. 609(a)(1) with 609(a)(2)(A). Rule 609(b) specifically references Rule 403, but Rule 609(a) does not contain such a reference).

⁷It may be demonstrated that a defendant had multiple motives for committing a crime. *Moore v. United States*, 150 U.S. 57, 61 (1893).

1. **Mr. Baker's parole status was admissible under Rule 404(b) because it provided motive for his robbery in light of the arrearages in his rent and the negative consequences to his parole which that entailed.**

Rule 404(b) is an inclusionary rule, "making evidence of prior crimes, wrongs, or acts potentially admissible, subject to other limitations such as Rule 403 where they may be offered for *any* relevant purpose that does not compel an inference from character to conduct." *State v. McGinnis*, 193 W. Va. 147, 154, 455 S.E.2d 516, 523 (1994). "The most striking aspect of the rule is its inclusive rather than exclusionary nature: should the evidence prove relevant in any other way it is admissible, subject only to the rarely invoked limitations of Rule 403." *United States v. Zeuli*, 725 F.2d 813, 816 (1st Cir. 1984). Under Rule 404(b):

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. 3, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). These criteria are met here.

The State asserted Mr. Baker's need for money to pay his rent, and the consequences to his parole status⁸ if he did not pay his rent, provided him a motive to commit the crime. App. at vol. II 514-15. Under Rule 404(b), motive is explicitly listed as a proper purpose for admission of other bad acts evidence. Motive evidence is admitted to demonstrate "that the defendant had a reason to commit the act charged, and from this motive it may be inferred that the defendant did commit the act." 2 Joseph McLaughlin, Ed., *Weinstein's Federal Evidence*, § 404.22[3] (2d ed.2009). "[C]ourts often admit evidence of other crimes, . . . to show, inter alia, motive" *United States v. Libby*,

⁸There is no dispute that Mr. Baker was on parole on 15th/16th March, 2009.

453 F. Supp.2d 35, 39 n.6 (D.D.C. 2006). Indeed, “[i]t is well settled that evidence of motive is always relevant in the proof of a crime.” *Cadiz v. State*, 683 N.E.2d 597, 599 (Ind. Ct. App. 1997). Here, Mr. Baker’s parole status demonstrates motive to commit robbery.

Evidence of parole status is relevant to motive because one may engage in criminal activity in order to avoid adverse consequences related to parole. As the Ninth Circuit Court of Appeals has recognized, “we think it obvious that evidence of a defendant’s parole status should be considered evidence of other crimes for purposes of Rule 404(b).” *United States v. Manarite*, 44 F.3d 1407, 1418 (9th Cir. 1995). *See also State v. Hampton*, 855 P.2d 621, 625 (Or. 1993) (“From the evidence of defendant’s parole status, the jury might reasonably infer that defendant had a special reason (motive) for engaging in the assaultive conduct charged and for engaging in it with the requisite mental state (knowingly), *i.e.*, to avoid apprehension and revocation of his parole.”); *State v. Erazo*, 594 A.2d 232, 241-42 (N.J. 1991)(State permitted to introduce evidence of a prior eleven-year old murder to establish motive, *i.e.*, the defendant killed the victim to prevent her from causing parole revocation on the earlier conviction); *People v. Powell*, 115 Cal. Rptr. 109, 140 (Ct. App.1974) (“The circumstance of Powell’s parole status could reasonably tend to prove that he killed Campbell to avoid revocation of his parole and return to prison.”). *See also Harris v. State*, 641 S.E.2d 619, 623 (Ga. Ct. App. 2007) (“The testimony supported the state’s theory that Harris’ fear of returning to prison motivated him to rape the victim in order to intimidate her and ‘get back at [her]’ for the report made to the police.”). Without money, Mr. Baker’s parole status would be adversely affected. Thus, the jury could reasonably conclude his need for money was a motivation for his offense. Mr. Baker’s parole status was admitted for a legitimate purpose other than to prove his propensity to commit crimes.

If Mr. Baker is to prevail he must carry his burden under Rule 403 to show the probative value of the evidence was substantially outweighed by its prejudicial effect. *See, e.g., Comfort v. United States*, 947 A.2d 1181, 1189 n31 (D.C. 2008) (“With respect to a Rule 403 objection, however, the burden of persuasion was on the movant, *i.e.*, appellant.”); *State v. D’Amelio*, 808 A.2d 91, 94 (N.H. 2002) (“A party objecting to the admission of evidence under Rule 403 bears the burden of showing unfair prejudice.”); *United States v. Liffiton*, 681 F. Supp. 150, 150 (W.D.N.Y. 1988) (“[defendant] cites Fed. R. Evid. rule 403 . . . but offers generalities and speculation to satisfy his burden under the rule to show that the probative value of the tapes would be “substantially outweighed” by such factors as confusion or prejudice.”). Rule 403, though, “has not proven an especially fertile source of assistance to criminal defendants.” *United States v. Zeuli*, 725 F.2d 813, 917 (1st Cir. 1984).

The wording under Rule 403 shows the balancing test under the Rule does not start in equilibrium -- it is weighted in favor of admissibility. “[T]he court’s discretion to exclude evidence under Rule 403 is narrowly circumscribed.” *United States v. Johnson*, 415 Fed. App. at 495, 504 (4th Cir. 2011) (quoting *United States v. Norton*, 867 F.2d 1354, 1361 (11th Cir. 1989)). To justify exclusion, the proffered evidence’s “probative value is *substantially* outweighed by the danger of unfair prejudice.” W. Va. R. Evid. 403 (emphasis added). Thus, “[c]onsistent with the requirement that the overbalance must be substantial . . .” “[i]n weighing the probative value of evidence against the dangers and considerations enumerated in Rule 403, the general rule is that the balance should be struck in favor of admission.”” *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1244 (8th Cir. 1983) (quoting *United States v. Dennis*, 625 F.2d 782, 797 (8th Cir.1980) (quoting *United States v. Day*, 591 F.2d 861, 878 (D.C. Cir.1978)). “Rule 403 exclusion should be invoked rarely[.]” *United States v. Cooper*, 482 F.3d 658, 663 (4th Cir. 2007).

“Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance. It is not designed to permit the court to ‘even out’ the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none.”

United States v. Bates, No. 88-5053, 1988 WL 131834, at *6 (4th Cir. Nov. 28, 1988) (quoting *United States v. Meester*, 762 F.2d 867, 875 (11th Cir.1985) (quoting *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.1979)). In sum “Rule 403 favors the admissibility of relevant evidence[.]” 2 Michael H. Graham, *Handbook of Federal Evidence* § 403:1 (7th ed.), and “courts are obligated to use the power conferred by Rule 403 sparingly, and to remember that the Federal Rules favor placing even the nastier side of human nature before the jury if to do so would aid its search for truth.” *Mullen v. Princess Anne Vol. Fire Co.*, 853 F.2d 1130, 1135 (4th Cir. 1988).

Further, this was a circumstantial evidence case, and a “[a] circumstantial case favors admitting motive evidence since motive evidence ‘is of great probative force in determining guilt, especially in cases of circumstantial evidence[.]’” *State v. Taylor*, 215 W. Va. 74, 85, 593 S.E.2d 645, 656 (2004) (per curiam) (Davis, J., dissenting) (quoting 22 C.J.S. *Criminal Law* § 34 at 40 (1989)).⁹ And, “[s]ignificantly, there is a higher tolerance for the risk of prejudice in cases where

⁹See also *State v. Vasquez*, 194 P.3d 563, 574 (Kan. 2008) (evidence of motive in circumstantial evidence case is “highly persuasive”); *State v. Rose*, 949 So.2d 1236, 1245 (La. 2007) (evidence of motive in circumstantial evidence case is “extremely probative”); *Downs v. State*, 581 P.2d 610, 616-17 (Wyo. 1978) (“Though motive is not an element of a crime and proof of motive is not essential to sustain a conviction, it has great probative force in determining guilt, especially in cases that depend on circumstantial evidence.”); *State v. Taylor*, 205 S.W.2d 734, 737 (Mo. 1947) (“Proof of motive does have great probative force in determining guilt, especially in cases of circumstantial evidence.”); *People v. Mercereau*, 875 N.Y.S.2d 857, 859 (Sup. Ct. 2009) (“particularly in a circumstantial case, evidence of . . . [is] highly probative”). See also Elain M. (continued...)

the evidence is “particularly probative[.]” *id.*, 593 S.E.2d at 656 (quoting *United States v. Rivera*, 6 F.3d 431, 443 (7th Cir.1993)), that is, “when evidence is highly probative, even a large risk of unfair prejudice may be tolerable.” *United States v. Cross*, 308 F.3d 308, 323 (3d Cir. 2002). *See also United States v. Krenzelok*, 874 F.2d 480, 482 -83 (7th Cir. 1989) (noting that the evidence’s “probative value was therefore great. Its prejudicial effect may well have been great too. But when the trial judge is in doubt, Rule 403 requires admission (this is the force of “*substantially outweighed*”). And, consequently, “[i]n criminal cases, wherever motive is important and material, a wider range of evidence is permitted to prove motive than is allowed in support of other issues.” *State v. Bailey*, 151 W. Va. 796, 803, 155 S.E.2d 850, 855 (1967). Thus, parole status to prove motive to maintain parole generally survives the Rule 403 balancing test. *See, e.g., Commonwealth v. Mollett*, 5 A.3d 291, 307 (Pa. Super. Ct. 2010) (“We agree with the Commonwealth that evidence of Appellant’s state parole status provided probative evidence of Appellant’s motive and outweighed its prejudicial impact . . . the evidence of Appellant’s parole status was admissible to prove motive[.]”); *Powell v. State*, 151 S.W.3d 646, 650 -51 (Tex. App. 2004) (evidence of parole status admissible to show motive to evade police, revocation of parole for felon in possession of a handgun), *rev’d on other grounds*, 189 S.W.3d 285 (Tex. Ct. Crim App. 2006) (reversing intermediate appellate court and finding Rule 403 did not bar admission of parole status). *See also State v. Martinez*, 999 P.2d 795, 803 (Ariz. 2000) (“This evidence was extremely probative and clearly appropriate under Rule 403. These statements explained why Martinez acted as he did, and showed Martinez’ motive for murdering Officer Martin. Martinez did not want to return to prison.

⁹(...continued)

Chiu, *The Challenge of Motive in the Criminal Law*, 8 Buff. Crim. L. Rev 653, 729 n.40 (2005) (“motive is also highly regarded as powerful circumstantial evidence of overall guilt[.]”).

He had a warrant out for his arrest and knew that if he were caught, he would be sent back to prison. Without his statements to Fryer, a jury could only speculate as to why Martinez shot Officer Martin.”).

Finally, the circuit court gave repeated instructions that:

collateral acts of misconduct is not to be considered in establishing the guilt of the crime . . . [y]ou may not consider it as proof of the charges contained in the indictment. You may consider it to show the passage of time.

You may not use this evidence in consideration of whether the State has established the crime charged in the indictment. In addition, such evidence is not relevant to any other matters, such as the character of the defendant, whether the defendant is a bad person, or whether the defendant had the propensity or the disposition to commit the crime charged. This evidence may not be considered in that regard, since the defendant’s character is not an issue.

In addition, it is not proper for the State to prove a criminal case by evidence that a defendant may have committed other criminal acts or may be a bad person.

App. vol. II at 407-08; 428-29, 499-500.¹⁰ These instructions mitigated any prejudice inuring here.

¹⁰Concededly, none of these instructions listed motive, simply referring to explaining the passage of time between Mr. Baker being fired in 1999 and the robbery in 2009. In closing, when the State argued Mr. Baker's parole status gave him motive, Mr. Baker did not object. App. vol. II at 513-14. As such review is limited to plain error. W. Va. R. Evid. 103(a)(1), (d). *See United States v. Basham*, 561 F.3d 302, 329 (4th Cir. 2009) (assertion that government's closing argument impermissibly used 404(b) evidence was not raised at trial, so plain error review applied). *See also Starks v. State*, 956 N.E.2d 1211 (Ind. Ct. App. 2011) (Table,) (Text available at 2011 WL 4942916, at *):

We find that Starks has waived his objection to the admission of 404(b) evidence by failing to object to the State's reference to such evidence during its closing argument, and thus deem his challenge to the State's comments during closing argument as waived. Starks maintains that the State's comments during closing argument show that the 2006 domestic battery conviction was admitted for a reason different than those enumerated by the trial court, i.e. . . . Yet, Starks' counsel did not object to the State's comments. Starks cannot now use his waived objection to the State's closing argument to collaterally attack the trial court's admission of Starks' prior conviction into evidence.

Because motive was, in any event, a proper use of Mr. Baker's parole status, *see People v. Dawson*, No.289931, 2010 WL 2629784, at *3 (Mich. Ct. App. July 1, 2010) ("Viewing the challenged remarks in context, the record discloses that the prosecutor was arguing from the evidence, and reasonable inferences arising from the evidence, that defendant had a motive and intent to kill the victim . . ."), and at no point did the state argue that the parole status was substantive evidence of guilt, *People v. Bailey*, No. 265803, 2007 WL 2141362, at *2 (Mich. Ct. App. July 26, 2007) ("at no point during closing argument did the prosecutor impermissibly suggest that the jury could consider the other acts evidence as substantive evidence of defendant's guilt."), there is no plain error.

Further, in *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 762 n.6, 601 S.E.2d 75, 82 n.6 (2004), this Court noted that "a failure [by a proponent of evidence or the trial court] to expressly articulate how 404(b) evidence is probative does not mandate *automatic* reversal. If the basis for the admission of the evidence is otherwise clear from the record, we can affirm the circuit court." *Caton* went on and noted that the United States Tenth Circuit Court of Appeals has specifically held that "the court's failure . . . is harmless so long as there is no substantial uncertainty about the correctness of the ruling and the purpose for admitting the evidence is readily apparent from the record." *Id.*, 601 S.E.2d at 82 n.6 (quoting *United States v. Youts*, 229 F.3d 1312, 1318-19 (10th Cir.2000) (citation omitted)). Applying this reasoning, the Tenth Circuit had previously held:

while Mr. Wilson's counsel did request that a limiting instruction be given to the jury,
(continued...)

Finally none of the cases Mr. Baker cites in his brief give him any solace. For example, he cites *People v. Allen*, 77 Cal. App.3d 924 (Ct. App. 1978). *Allen* did not deal with parole status to show motive, but to impeach the witness -- and such a conviction was not admissible for that purpose. *Id.* at 934, (footnote omitted.) (“Evidence that a witness, including a testifying defendant in a criminal case, has been convicted of a felony may be admissible, under limited circumstances, when offered to attack the witness' credibility. The Respondent was not offering evidence of appellant's parole status in order to impeach him as the parole was the result of a prior juvenile adjudication which cannot be deemed a conviction of a crime for any purpose.”). (A more appropriate case here from California is *People v. Powell*, 115 Cal. Rptr. 109, 154 (Ct. App. 1974) where the court held that parole status was relevant and not overly prejudicial to show that the circumstances of parole gave the defendant a reason for his crime -- to avoid parole revocation.).

Further, while *United States v. Hines*, did state that “[w]hile in the ordinary course of most criminal trials revelations of the defendant's parole status might provoke a mistrial because it would inform the jury that the defendant had a prior criminal history[,]” 943 F.2d 348, 353 (4th Cir. 1991), *Hines* did *not* reverse the conviction and found that not only parole status (necessary to prove the

¹⁰(...continued)

the district court did not specifically instruct the jury to consider extrinsic evidence of prior acts only for identity purposes. In its jury instructions, the court instructed the jury that it should limit its consideration of evidence “of other crimes, wrongs, or acts . . . as proof of knowledge or intent.” However, we have held that even if the district court fails to identify the purpose for which it admits possible Rule 404(b) evidence, such error is harmless if its purpose is apparent from the record and it was properly admitted.

United States v. Wilson, 107 F.3d 774, 783 (10th Cir. 1997). Therefore, if there is any error here, it is harmless since the purpose for the parole status was otherwise admissible to prove motive and was apparent from the record.

offense) was admissible, but proof that the defendant violated his parole was admissible under Rule 404(b). *Id.* at 353-54.

Additionally, while *State v. Ingram*, did acknowledge “evidence from a parole agent is inherently prejudicial,” 554 N.W.2d 833, 837 (Wis. Ct. App. 1996), the court went on to also acknowledge that “this conclusion does not settle the matter of admissibility. It simply begs the question of whether the prejudicial character of the testimony *substantially outweighs* its probative value.” *Id.* The court in *Ingram* actually found the parole status relevant and not substantially outweighed by prejudice. *Id.* at 838 (“In this case, the State used the parole agent's testimony to prove Ingram's motive and intent. Assuming that this testimony passed an inference to the jury that Ingram had a prior conviction, and therefore the State was required to show how this testimony fit into § 904.04(2), Stats., the trial court correctly determined that this evidence was admissible because the agent's testimony revealed Ingram's motive and it was not unfairly prejudicial.”).

And, in *United States v. Calhoun*, 544 F.2d 291 (6th Cir. 1976), the prosecution called the defendant's parole officer “solely as that of a lay witness whose close familiarity with Calhoun at the time of the robbery enabled him to make an ordinary identification of Calhoun, as he then appeared, from the surveillance photograph which had been offered and received in evidence.” *Id.* at 295. Thus, the defendant's parole status had no independent relevance to the case.

Here the 404(b) evidence in this case was properly introduced. There was no reversible error.

- 2. The fact that Mr. Baker was incarcerated for the ten years prior to the robbery is not Rule 404(b) evidence; it is intrinsic evidence to which Rule 404(b) does not apply. Alternatively, if Rule 404(b) applied to this evidence of incarceration, it would still be admissible.**

Before determining that Rule 404(b) applies, the court must determine if the other bad acts are intrinsic evidence and extrinsic evidence. The evidence here was intrinsic evidence and, thus, was admissible without reference to Rule 404(b).

It appears that there was at trial some confusion about the usage of the ten year period. The trial court' pretrial order seemed to imply that the prior convictions were to be used themselves to show a motive for the robbery. App. vol. I at 167-68. *See also* Pet'r's Br. at 11-12. This is incorrect. The prior convictions had nothing to do with crimes against Subway. The relevance of the ten year period of incarceration was to explain that while Mr. Baker had a motive to rob the Subway (for revenge due to his firing), such a plan could not come to fruition until nearly ten years later because Mr. Baker was in prison during these years. This evidence is intrinsic to the robbery (in that it explains the crimes context and background) and it, therefore, not even governed by Rule 404(b). Consistent with the 1991 advisory committee note to Federal Rule of Evidence 404(b) that the rule extends only to extrinsic evidence, a majority of federal circuits have held that "Rule 404(b) applies only to limits on the admission of other acts extrinsic to the one charged [so] acts intrinsic to the alleged crime do not fall under Rule 404(b)'s limitations on admissible evidence[.]" *United States v. Chin*, 83 F.3d 83, 87-88 (4th Cir. 1996). West Virginia is consistent with the majority for "[i]n *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), this Court explained that evidence which is 'intrinsic' to the indicted charge is not governed by Rule 404(b)." *State v. Cyrus*, 222 W. Va. 214, 218, 664 S.E.2d 99, 103 (2008) (*per curiam*). *See also State ex rel. Kitchen v. Painter*, 226 W. Va. 278, 293, 700 S.E.2d 489, 504 (2010) (*per curiam*) (treating as separate evidentiary basis for admission Rule 404(b) and intrinsic evidence); *State v. Biehl*, 224 W. Va. 584, 589, 687 S.E.2d 367, 372 (2009) (*per curiam*) ("Under our jurisprudence, there is a clear distinction between evidence

offered as *res gestae* [sic] of the offense charged and Rule 404(b) evidence.”); *State v. Slaton*, 212 W. Va. 113, 119, 569 S.E.2d 189, 195 (2002) (*per curiam*) (“After considering the testimony at issue, we agree with the circuit court that the evidence was ‘intrinsic’ to the indicted charge and, therefore, not governed by Rule 404(b).”).

In determining whether the admissibility of evidence of “other bad acts” is governed by Rule 404(b), we first must determine if the evidence is “intrinsic” or “extrinsic.” See *United States v. Williams*, 900 F.2d 823, 825 (5th Cir.1990): “‘Other act’ evidence is ‘intrinsic’ when the evidence of the other act and the evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to the crime charged.” (Citations omitted). If the proffer fits in to the “intrinsic” category, evidence of other crimes should not be suppressed when those facts come in as *res gestae* -- as part and parcel of the proof charged in the indictment. See *United States v. Masters*, 622 F.2d 83, 86 (4th Cir.1980) (stating evidence is admissible when it provides the context of the crime, “is necessary to a ‘full presentation’ of the case, or is . . . appropriate in order ‘to complete the story of the crime on trial by proving its immediate context or the “res gestae” ’ ”). (Citations omitted).

LaRock, 196 W. Va. at 313 n.29, 470 S.E.2d at 632 n.29 (quoted in *Cyrus*, 222 W. Va. at 218, 664 S.E.2d at 103). See also Thomas M. DiBiagio, *Intrinsic and Extrinsic Evidence in Federal Criminal Trials: Is the Admission of Collateral Other-Crimes Evidence Disconnected to the Fundamental Right to a Fair Trial*, 47 Syracuse L. Rev. 1229, 1231 (1997) (“[i]ntrinsic evidence is directly connected to the factual circumstances of the crime and provides contextual or background information to the jury.”); Jennifer Y. Schuster, Note, *Uncharged Misconduct under Rule 404(b): the Admissibility of Inextricably Intertwined Evidence*, 42 U. Miami L. Rev. 947, 951 (1988) (““After a consideration of the historical development and underlying policies of the general rule excluding evidence of other crimes for the purpose of establishing a defendant’s propensity to commit the crime charged, this Comment suggests that evidence of criminal activity committed by the defendant . . . explaining the context of the crime charged, is not the type of evidence

contemplated by Rule 404(b), and should therefore be admissible without regard to the limitations of the more stringent admission standards attached to Rule 404(b) evidence.”).

As the United States Supreme Court has observed, jurors’ have certain expectations concerning a party’s case and “[i]f [jurors’] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party.” *Old Chief v. United States*, 519 U.S. 172, 188-89 (1997) (quoting Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 Calif. L. Rev. 1011, 1019 (1978) (footnotes omitted)).

People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

Id. at 189. Thus, because “the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story[,]” *id.* at 190, “[r]es gestae evidence is vitally important in many trials. It enables the fact finder to see the full picture so that the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwarranted speculation.” *United States v. Metz*, 34 M.J. 349, 351 (C.M.A. 1992) (footnote and citation omitted). “[A]dmission of evidence of a criminal defendant’s prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, has been approved in many other jurisdictions following adoption of the Rules of Evidence.” *State v. Agee*, 391 S.E.2d 171, 174 (N.C. 1990).¹¹

¹¹Defense counsel did offer not to reference the ten year gap in his closing. App. vol. I at 320-21. This would not have mitigated the problem, the jury would still have been left with the fact that the dismissal was ten years ago, which would have resulted in the jury artificially down playing (continued...)

“[H]istorical evidence of uncharged prior acts which is inextricably intertwined with the charged crime is admissible over a Rule 403 objection.” *LaRock*, 196 W. Va. at 313, 470 S.E.2d at 632. *See also United States v. McNair*, 605 F.3d 1152, 1206 (11th Cir. 2010) (“Because the other acts evidence was inextricably intertwined with the charged crimes, it was not excludable under Rule 403.”). Or, as this Court has said more directly, “Rule 403 was not intended to prohibit a prosecutor from presenting a full picture of a crime especially where the prior acts have relevance independent of simply proving the factors listed in Rule 404(b).” *Id.*, 470 S.E.2d at 632.¹²

Here, a jury would ask the very obvious question, “well, when was Mr. Baker fired and when did he rob the Subway?” If the State did not provide a timeframe, the jury would be left to speculate about the timing of the discharge vis-a-vis the robbery, and, once the jury know that the period of time was 10 years, the State was then hamstrung because the jury would have reasonably asked, “well, then, why did Mr. Baker wait so long?” *See Syl. Pt. 6, State v. Gwinn*, 169 W. Va. 456, 457, 288 S.E.2d 533, 535 (1982) (“As a general rule remoteness goes to the weight to be accorded the

¹¹(...continued)

the value of the firing as motive. *Compare Syl. Pt. 6, State v. Gwinn*, 169 W. Va. 456, 457, 288 S.E.2d 533, 535 (1982) (“As a general rule remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility.”) *with State v. Badgett*, 644 S.E.2d 206, 212 (N.C. 2007) (“As to the temporal proximity requirement, the trial court may properly exclude prison time resulting from the previous conviction in its determination of whether that conviction is too remote in time to the present crime.”). And, in any event, it is a “familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice” not controlled by the defendant. *Old Chief*, 519 U.S. at 186.

¹²“[I]n reviewing a decision under Rule 403, the court must ‘look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.’” *Mullen v. Princess Anne Vol. Fire Co.*, 853 F.2d 1130, 1135 (4th Cir. 1988) (quoting *Koloda v. General Motors Parts Div.*, 716 F.2d 373, 377 (6th Cir.1983)). Intrinsic evidence is itself highly probative. *United States v. Simmons*, 380 Fed. App. 323, 331 (4th Cir. 2010) (“In addition, such testimony does not run afoul of Rule 403 because, as intrinsic evidence, it was highly probative.”).

evidence by the jury, rather than to admissibility.”) with *State v. Badgett*, 644 S.E.2d 206, 212 (N.C. 2007) (“As to the temporal proximity requirement, the trial court may properly exclude prison time resulting from the previous conviction in its determination of whether that conviction is too remote in time to the present crime.”).

Where evidence is necessary to prevent the jury from speculating or to avoid creating a gap in the jury’s understanding of the evidence, the evidence is intrinsic. “Failure to supply the[] explanations might have created a gap in the jury’s understanding . . . perhaps allowing speculation . . . Accordingly, the notices were material and intrinsic to the government’s case-in-chief, and Rule 404(b) is not implicated.” *United States v. Holmes*, 822 F.2d 802, 806 (8th Cir. 1987). *See also Muhammad v. United States*, No. 4:08CV1709, 2010 WL 3001757, at * 8 (E.D. Mo. July 28, 2010) (“Without this evidence, the jury would have been left to speculate about why the operation suddenly began traveling to other cities. For these reasons, Zinselmeier’s testimony was relevant background information that was an integral part of the complete story of the charged conspiracy. As such, it was properly admitted into evidence as intrinsic act evidence, and no 404(b) limiting instruction was required.”). The explanation of the reason for the ten year gap (i.e., the incarceration), completed the story for the jury filling in a “‘chronological and conceptual void’ in the government’s case[.]” *United States v. Lashmett*, 965 F.2d 179, 185 (7th Cir. 1992). The evidence was intrinsic and was admissible.

Moreover, even if Rule 404(b) did govern this case, the evidence would still be admissible. First, Mr. Baker’s Brief asserts that this is not a recognized purpose for other bad acts evidence, Pet’r’s Br. at 10-11, but the purposes listed in rule 404(b) for which other bad acts evidence may be admitted are illustrative, not exhaustive. *See W. Va. R. Evid. 404(b)* (emphasis added) (“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.”). “[T]he circumstances under which such evidence may be found relevant and admissible under the Rule have been described as ‘infinite.’ Some of such circumstances are set forth in the Rule itself, but the cataloguing therein is merely illustrative and not exclusionary.” *State v. Edward Charles L.*, 183 W. Va. 641, 647, 398 S.E.2d 123, 129 (1990) (quoting *United States v. Masters*, 622 F.2d 83, 86 (4th Cir.1980)). *See also State v. McDaniel*, 211 W. Va. 9, 13, 560 S.E.2d 484, 488 (2001) (although not listed in the Rule, modus operandi is a legitimate use of other acts evidence).

Here, the bad acts (i.e., the incarceration) demonstrated that the plan for revenge against Subway was in limbo because of the incarceration. Thus, the evidence of his incarceration was not admitted to prove a propensity to criminal activity, it was admitted—and the jury was so instructed repeatedly—that it could only use the period of incarceration to understand the period between Mr. Baker’s discharge and the robbery of the Subway. Further, the State never raised before the jury the nature of the 1999 convictions (beyond the fact it was a felony). *See, e.g., United States v. Smith*, No. CR-06-224-T, 2007 WL1072200, at *3 (W.D. Okl. Apr. 6, 2007) (“To the extent Defendant’s prior convictions are extrinsic evidence to which Rule 404(b) applies, the Court understands the government’s current position to be that it will not reveal the nature or number of those convictions, except to the extent stated in Defendant’s own words in the letters he wrote or telephone conversations he had concerning the alleged offense. The Court finds this evidence to be admissible under Rule 404(b).”).

There was no error in the admission of the fact that the defendant was in prison between 1999 and 2009 as this was intrinsic evidence not governed by Rule 404(b) or, if governed by Rule 404(b), was admissible. The circuit court should be affirmed.

C. The error in the recidivist information by not including the sentences was not objected to pretrial and, as such, it is harmless error.

The Petitioner in this case was tried, convicted, and sentenced as a recidivist on the Robbery conviction. App. vol. II at 551-53, 766-67, 800. While the information lists that the Mr. Baker pled guilty to felony grand larceny in both 1988 and 1989 in Greenbrier County, and also to felony Wanton Endangerment with a Firearm in Greenbrier County in 2002. App. vol. II at 551. As Mr. Baker correctly observes, there are no sentences accompanying these counts, Pet'r's Br. at 23, as required by West Virginia Code § 61-11-19 (a recidivist sentence proceeding is instituted "upon an information filed by the prosecuting attorney, setting forth the records of conviction and sentence, or convictions and sentences, as the case may be[.]") This error is, however, harmless.

In *State v. McMannis*, 161 W. Va. 437, 438 n.2, 242 S.E.2d 571, 573 n.2 (1978), this Court "note[d] that the amended information filed in the proceeding below does not set out the sentences of imprisonment previously imposed on the defendant, and therefore does not comport with requirements of the statute." While such may be required under the statute, given the procedural posture of when the issue was raised below, any error in the information is harmless.

Mr. Baker did not object to the information below before trial, but only after the State rested. App. at 666. See W. Va. R. Crim. P. 12(b)(2).¹³ This Court has held that even where an indictment on its face is defective, but was not objected to below, harmless will nonetheless apply. In *State ex*

¹³The State did not attempt to amend the information as permitted by West Virginia Rule of Criminal Procedure 8(e).

rel. Thompson v. Watkins, 200 W. Va. 214, 488 S.E.2d 894 (1997) (*per curiam*), an indictment for burglary did not contain the word burglary, which was at that time required for the indictment to be good. *Id.* at 218, 488 S.E.2d at 898 (quoting Syl. Pt. 2, *State v. Meadows*, 22 W. Va. 766 (1883) (“[a]n indictment for burglary must charge, that the offence was ‘burglariously’ committed; otherwise it is bad.”)). Nevertheless, because the defendant did not object to the indictment, this Court found that the defendant had suffered no deprivation of a constitutional right, nor any prejudice from the omission and concluded the error to be harmless. *Id.*, 488 S.E.2d at 898. Here, Mr. Baker does not argue that he was prejudiced in anyway by the omission of the sentences. Moreover, the evidence adduced at the recidivist proceeding was patently conclusive, including fingerprint evidence, App. vol. II at 753-55, an expert report testimony, *id.* at 758-59, and testimony from Judge Jolliffe who presided over the cases that led to the predicate felonies used by the State in the recidivist proceedings, *id.* at 600-01, 605. There was no harm to Mr. Baker.

IV.

CONCLUSION

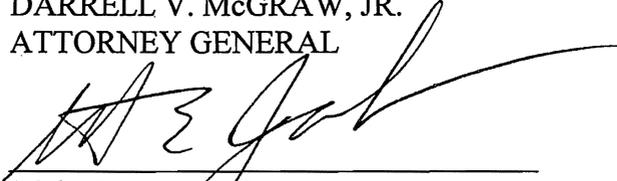
The circuit court should be affirmed.

Respectfully submitted,

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By counsel

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CERTIFICATE OF SERVICE

I, SCOTTE E. JOHNSON, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "*BRIEF OF THE STATE OF WEST VIRGINIA*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 4 day of January, 2012, addressed as follows:

To: Jason D. Parmer, Esq.
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330



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