

15-0641

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

v.

Case No. 14-F-41

SUMMER MCDANIEL,

Defendant.

SENTENCING ORDER

On this the 9th day of June, 2015, came the State of West Virginia by its Prosecuting Attorney, Lucas J. See, and the Defendant in person and by counsel, John G. Ours. This matter came before the Court for the purpose of sentencing.

Whereupon, the Court noted the filing of a Combined Motion for Directed Verdicts of Acquittal Not Withstanding the Jury Verdict and/or For a New Trial.

Whereupon, the Court heard argument from both parties in regards to this Motion.

After due consideration, the Court FOUND that:

- 1) The 404B evidence was properly considered and balanced by the Court.
- 2) That the State was not required to prove the cause of death in the trial of this matter.
- 3) That any and all other grounds contained in said Motion are without merit.

Whereupon, the Court reviewed and considered the results of the Defendant's sixty (60) day evaluation and the pre-sentence investigation prepared by the Probation Officer without objection from either party.

Whereupon, the Court found no legal cause known to the Court or counsel why sentencing should not be imposed, the Court proceeded with sentencing.

Whereupon, the Court informed the Defendant of her right of allocution. The Court then heard statements from the Defendant, the State and Counsel for the Defendant. Thereafter, the

Court gave all parties and other interested persons the opportunity to present evidence and argument.

Whereupon, the Court FOUND that the Defendant had previously been found guilty by a trial by jury of first count of the indictment, namely, "Involuntary Manslaughter" a misdemeanor in violation of W.V. Code § 61-2-5. Said crime is a misdemeanor which carries a potential penalty of confinement in jail not to exceed one year, or a fine of not more than one thousand dollars, or in its discretion of the Court, both.

Whereupon, the Court FOUND that the Defendant had previously been found guilty by a trial by jury to the second count of the indictment, namely, "Child Neglect Resulting in Death" a felony in violation of W.V. Code § 61-8D-4a(a). Said crime is a felony which carries a potential penalty of confinement in a correctional facility for not less than three years nor more than fifteen years, and a fine of not less than one thousand dollars nor more than five thousand dollars.

Whereupon, the Court FOUND that the Defendant had previously been found guilty by a trial by jury to the fourth count of the indictment, namely, "Concealment of a Deceased Human Body" a felony in violation of W.V. Code § 61-2-5a. Said crime is a felony which carries a potential penalty of confinement in a correctional facility for not less than one year nor more than five years, and a fine of not less than one thousand dollars nor more than five thousand dollars.

Whereupon, the Court FOUND that the Defendant had previously been found guilty by a trial by jury to the fifth count of the indictment, namely, "Conspiracy to Commit an Offense Against the State of West Virginia" a felony in violation of W.V. Code § 61-10-31. Said crime is a felony which carries a potential penalty of imprisonment in the penitentiary for not less than

one (1) nor more than (5) five years, and the court may, in its discretion, impose a fine of not more than ten thousand dollars or, both.

Whereupon, the Court FOUND that the Defendant had previously been found guilty by a trial by jury to the sixth count of the indictment, namely, "Child Neglect Creating a Substantial Risk of Death" a felony in violation of W.V. Code § 61-8D-4(c). Said crime is a felony which carries a potential penalty of imprisonment in the penitentiary for not less than one (1) nor more than (5) five years, and a fine of not less than one thousand dollars nor more than three thousand dollars.

For the "Involuntary Manslaughter" conviction, the Court ORDERED and ADJUDICATED that the Defendant shall be imprisoned in the regional jail for one year. No fine was imposed by the Court.

For the "Child Neglect Resulting in Death" conviction, the Court ORDERED and ADJUDICATED that the Defendant shall be imprisoned in the penitentiary for a period of not less than three (3) nor more than fifteen (15) years. No fine was imposed by the Court.

For the "Concealment of a Deceased Human Body" conviction, the Court ORDERED and ADJUDICATED that the Defendant shall be imprisoned in the penitentiary for a period of not less than one (1) nor more than five (5) years. No fine was imposed by the Court.

For the "Conspiracy to Commit an Offense Against the State of West Virginia" conviction, the Court ORDERED and ADJUDICATED that the Defendant shall be imprisoned in the penitentiary for a period of not less than one (1) nor more than five (5) years. No fine was imposed by the Court.

For the "Child Neglect Creating a Substantial Risk of Death" conviction, the Court ORDERED and ADJUDICATED that the Defendant shall be imprisoned in the penitentiary for a period of not less than one (1) nor more than five (5) years. No fine was imposed by the Court.

Whereupon, the Court ORDERED that all the felony sentences imposed by the Court shall run CONSECUTIVE for a cumulative sentence of not less than six (6) nor more than thirty (30) year sentence. However, the Court did ORDER the one year in the regional jail sentence to run CONCURRENT with the felony sentences.

Thereafter, the Court GRANTED judgment against the Defendant for any and all costs of this action including his Court appointed attorney fees.

Whereupon, the Court DENIED the Defendant's request for Probation.

Whereupon, after due consideration, the Court ORDERED the Defendant forthwith remanded to the custody of the West Virginia Department of Corrections to begin serving the balance of his sentence. Counsel for the Defendant's objections were noted and saved.

CONVICTION DATE: January 28, 2015

SENTENCE DATE: January 28, 2015

EFFECTIVE SENTENCE DATE: January 28, 2015

CREDIT FOR TIME SERVED: 339 days

Whereupon, the Defendant was informed of her right to appeal and the deadlines associated with said right.

Counsel for the Defendant's objections to any and all adverse ruling were noted and saved by the Court.

* No further action needed, this matter is to be removed from the docket of this Court as a matter that has ended.

* The Clerk is directed to provide counsel of record with a copy of this order.

ENTERED on this the 23rd day of June, 2015.

ENTER *Richard M. Frye*
JUDGE

FILED

JAN 21 2015

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

CLERK

DEPUTY

STATE OF WEST VIRGINIA,

Plaintiff,

v.

Case No. 14-F-41

SUMMER MCDANIEL,

Defendant.

JURY TRIAL ORDER

On this the 27th and 28th day of January, 2015, appeared the State of West Virginia by its Prosecuting Attorney, Lucas J. See and the Assistant Prosecuting Attorney, April Mallow the Defendant was present in person and by counsel, John G. Ours. This matter came before the Court for the purpose of trial by jury.

[Handwritten signature]

Whereupon, the Court determined that all parties were ready to proceed to trial, and then directed the Circuit Clerk to seat 20 potential jurors.

[Handwritten initials]

Whereupon, the Court, after the potential jurors were given the voir dire oath, questioned the jurors, and eventually obtained a panel of 20 free from cause.

Whereupon, the State was permitted voir dire examination.

Whereupon, the Defendant, through counsel, was permitted voir dire examination.

Whereupon, the Court directed the State, and the Defendant, to exercise their peremptory strikes, reducing the panel from 20 to the actual 12 that would try the case.

Whereupon, the State, and the Defendant, stipulated that it was unnecessary to empanel an alternate juror, and stipulated and agreed that if for any reason any one, or two, of the jurors were unable to serve, the State, and the Defendant, would accept the unanimous verdict of at least 10.

Whereupon, the Clerk administered the oath to the jury for the purpose of trying the case.

Whereupon, Counsel for both parties made their respective opening statements.

Whereupon, the State presented its evidence and advised the Court that the Deputy Medical Examiner was in route and was not expected to arrive before 11:30 a.m. The Court made inquiry of the Defense and learned that the Defense had two witnesses other than the Defendant that were present. The Court directed the Defense to present its two witnesses out of turn. The State announced that the Deputy Medical Examiner had arrived. The State then presented the testimony of the Deputy Medical Examiner and rested.

Whereupon, outside of the presence of the jury, Counsel for the Defendant made a Motion for Judgment of Acquittal with regard to all offenses, which the Court denied; Counsel for the Defendant's objection thereto was noted and saved.

Whereupon, the Defense Counsel advised the Court that his client made a decision and had elected not to testify and rested her case.

Whereupon, outside of the presence of the jury, Counsel for the Defendant renewed its Motion for Judgment of Acquittal, which the Court denied; Counsel for the Defendant's objection thereto was noted and saved.

Whereupon, outside of the presence of the jury, Counsel and the Court reviewed instructions and the instructions pertaining to the law in this matter were prepared, any objections of Counsel to such instructions appearing more fully within the official taped recording of this proceeding.

Whereupon, the jury returned to the Courtroom and was instructed in regard to the law as set forth in the Court's instructions.

Whereupon, Counsel made their respective closing arguments and thereafter, the jury adjourned to the jury room to deliberate.

Whereupon, after deliberating, the jury informed the Court that it had reached a unanimous verdict and the jury returned to the Courtroom. The following verdicts were then announced to the Court:

"We, the Jury, find, beyond a reasonable doubt, that the Defendant, Summer McDaniel, is Guilty of Involuntary Manslaughter.

/s/ Kristen Fisher
Foreperson

We, the Jury, find, beyond a reasonable doubt, that the Defendant, Summer McDaniel, is Guilty of the offense of Child Neglect Resulting in Death.

/s/ Kristen Fisher
Foreperson

We, the Jury, find, beyond a reasonable doubt, that the Defendant, Summer McDaniel, is Guilty of Concealment of a Deceased Human Body.

/s/ Kristen Fisher
Foreperson

We, the Jury, find, beyond a reasonable doubt, that the Defendant, Summer McDaniel, is Guilty of Conspiracy to Commit an Offense Against the State of West Virginia.

/s/ Kristen Fisher
Foreperson

We, the Jury, find, beyond a reasonable doubt, that the Defendant, Summer McDaniel, is Guilty of Child Neglect Creating a Substantial Risk of Death.

/s/ Kristen Fisher
Foreperson

Based upon the juror's verdicts, it was thereby ADJUDGED and ORDERED that the Defendant was found guilty and convicted of the following crimes: "Involuntary Manslaughter," "Child Neglect Resulting in Death," "Concealment of a Deceased Human Body," "Conspiracy to Commit an Offense Against the State of West Virginia," and "Child Neglect Creating a Substantial Risk of Death."

Whereupon, the Court announced that the Court was preliminarily sentencing the Defendant to shift the costs of her confinement from Hardy County to the Department of Corrections.

Whereupon, Defense Counsel questioned the Court with regard to the Defense Motion for a Directed Verdict of Acquittal notwithstanding the verdict, and her Motion for a New Trial and the time constraints indicated in the Rules of Criminal Procedure, also the State's Motion for a Sixty Day Evaluation.

The Court advised and ruled that Defendant's Motion for Judgment of Acquittal and Motion for a New Trial can be delayed being filed until ten (10) days after the next hearing in this matter and that the beginning of the time for filing an appeal shall be the date of the final sentencing hearing after the Defendant returns from her sixty (60) day evaluation.

Whereupon, the Court proceeded with sentencing.

Whereupon, for the "Child Neglect Resulting in Death" conviction, the Court ORDERED that the Defendant be sentenced to not less than three (3) nor more than fifteen (15) years in the penitentiary of this State.

Whereupon, for the "Concealment of a Deceased Human Body" conviction, the Court ORDERED that the Defendant be sentenced to not less than one (1) nor more than five (5) years in the penitentiary of this State.

Whereupon, for the "Conspiracy to Commit an Offense Against the State of West Virginia" conviction, the Court ORDERED that the Defendant be sentenced to not less than one (1) nor more than five (5) years in the penitentiary of this State.

Whereupon, for the "Child Neglect Creating a Substantial Risk of Death" conviction, the Court ORDERED that the Defendant be sentenced to not less than one (1) nor more than five (5) years in the penitentiary of this State.

Whereupon, the Court delayed a ruling on whether these sentences shall run concurrent or consecutive pending the Defendant's sixty (60) day evaluation.

Whereupon, the Court ORDERED the Defendant forthwith remanded to the custody of the West Virginia Department of Corrections to begin serving the balance of the sentence herein imposed.

CONVICTION DATE: January 28, 2015

SENTENCE DATE: January 28, 2015

EFFECTIVE SENTENCE DATE: January 28, 2015

Whereupon, the Court ORDERED that the Defendant shall undergo a sixty (60) day evaluation and that the Probation Officer shall complete a pre-sentence investigation and an LSCMI.

Whereupon, the Court ORDERED the Defendant remanded to the custody of the personnel at the Potomac Highlands Regional Jail for placement with the West Virginia Department of Corrections to await transport to her evaluation.

Whereupon, the Court ORDERED and ADJUDICATED that the personnel at the Potomac Highlands Regional Jail shall transport the Defendant to and from Lakin Correctional Center for her sixty (60) day evaluation when directed to by the Probation Officer or the personnel at Lakin Correctional Center. Upon completion of said evaluation, the Defendant shall be returned to the regional jail to await a sentencing hearing.

Whereupon, the Court ORDERED this matter is continued pending the results of the Defendant's sixty day evaluation.

Counsel for the Defendant objected to any and all rulings adverse to his client's interest.

* This matter stands continued as set forth herein.

* The Clerk is directed to provide counsel of record and the Probation Officer with a copy of this Order.

ENTERED on this the 5th day of February, 2015.

ENTER. Andrew M. Frye
JUDGE

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

FILED
DATE 1-13-15

VS

CASE NO. 14-F-41

SUMMER LYNN MCDANIEL,
Defendant.

CLERK
RS
DEPUTY

ORDER

On this 13th day of January, 2015, came forward the above styled matter for pretrial conference, the same having been continued from the previous day due to inclement weather. The State was present by its Prosecuting Attorney, Lucas See. The Defendant, Summer McDaniel, was present, in person, and by her Court appointed counsel, John G. Ours.

Thereupon, the State advised the Court, and moved the Court for a continuance of the case, presently scheduled for trial for January 25th, and 28th, advising the Court that the State had been diligent in an effort to try to secure the attendance of the multiple witnesses from the State of Colorado, but had been unsuccessful to date in obtaining the attendance of the Colorado witnesses for trial. The State requested a continuance of at least 30 days to secure the attendance of the out of State witnesses.

Counsel for the Defendant objected to the continuance, advising the Court that the Defendant had been held in jail, unable to make bond, since July 5th, 2014; that the State had been given six weeks to secure the attendance of the witnesses, at the time the trial was scheduled; that it was through no fault of the Defendant that the State was having difficulty; and that the Defendant had the right to a speedy trial.

The Court examined the arraignment order, and determined that the Defendant had not waived the right to a speedy trial, and as such, the Court denies the State's motion for a

Defendant, charging the Defendant with conspiring to commit the crime of child neglect resulting in death, is dismissed, with prejudice.

Thereupon, Defendant moved the Court to dismiss Counts 4 and 5 of the indictment, charging the Defendant with concealment of a deceased human body, and conspiring to conceal a deceased human body.

Defendant argued that the code section defining concealment of a deceased human body, Code 61-2-5(a), sets forth in Section 5(b) that: "It shall be a complete defense in a prosecution pursuant to Subsection a, of this Section, that the Defendant affirmatively brought to the attention of law enforcement, within 48 hours of concealing the body, and prior to being contacted regarding the death, by law enforcement of the existence and location of the concealed, deceased human body."

Defendant further argued that the police report from Morgantown, shows without question, that the law enforcement officers, in Monongalia County, had no knowledge of the death of the infant child; that the death was affirmatively brought to the attention of the Monongalia County law enforcement officer, less than 48 hours after the burial of the child; before any inquiring regarding the death of the child; and as such, makes the concealment charged, noncriminal activity. Defendant further argued that after disclosing the burial, sooner than 48 hours, the actions of the Defendant do not constitute a criminal act. Count 5 should also be dismissed because it is impossible to conspire to commit a noncriminal act.

The State argued that the disclosure by the Defendants was only after they were arrested in Monongalia County for child neglect of the other children, and as such, the charges should not be dismissed.

The Court, upon consideration, determines that the actions of the Defendant, in telling law enforcement officers about the burial of the child, less than 48 hours after the burial, does not constitute affirmative action on the part of the Defendants, and as such, the Defendants' motion is denied. Objection by the Defendant is saved.

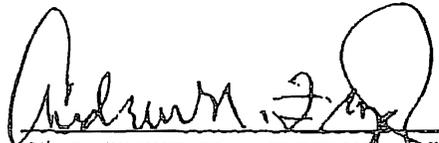
Thereupon, the Defendant orally moved the Court to dismiss Count 6 of the indictment charging the Defendant with child neglect, creating a substantial risk of death. Counsel argued that under Count 2, the Defendant was charged with child neglect resulting in death; that the infant child died; that the death of the infant child merges Count 6, charging child neglect creating a substantial risk of death, into Count 2, charging the Defendant with child neglect resulting in death.

The State argued that there were different elements to the offenses and that both offenses could be separately charged.

The Court, upon consideration, advises that the Court will take under advisement its ruling with regard to Count 2, and after hearing the evidence, at trial, will entertain the motion and make the Court's ruling at the close of the State's evidence.

This matter stands continued for the purpose of trial until January 27th, at the hour of 9:00 a.m.

Entered this 15 day of January, 2015.



 CIRCUIT JUDGE ANDREW N. FRYE, JR.

FILED
DATE 12-31-14

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

CLERK
KS

STATE OF WEST VIRGINIA,
PLAINTIFF

DEPUTY

vs.

CASE NO. 14-F-40
14-F-41

JOSEPH CHRISTY and
SUMMER McDANIEL,
DEFENDANT

ORDER

On this 15th day of December, 2014, this matter came on for the Court's consideration upon the State's Notice of Intent to Use 404(b) Evidence filed on November 10, 2014; upon the appearance of the State of West Virginia by its Prosecuting Attorney, Lucas J. See; and upon the appearance of the Defendant, Joseph Christy, in person, and by his attorney, Brian J. Vance, and the Defendant, Summer McDaniel, in person, and by her attorney, John G. Ours.

The Court has carefully considered the State's Notice, the entire record in this case, and pertinent legal authority. In support of its decision, the Court makes the following findings of fact and conclusions of law:

1. On October 6, 2014, a grand jury returned an indictment against the Defendants, charging them with one count of involuntary manslaughter, one count of child neglect resulting in death, one count of concealment of a deceased human body, one count of child neglect creating a substantial risk of death, and two counts of conspiracy.
2. The State filed a Notice of Intent to Use 404(b) Evidence on November 10, 2014. An in-camera hearing was held in this matter during which the State provided evidence that the Defendant mother gave birth on June 9, 2014, and that the Defendant mother and her infant

child, the alleged victim, both tested positive for amphetamines immediately after the birth of the child. The Defendant mother had agreed but failed to comply with the Family Treatment Drug Court services offered to her. The State now moves the Court to allow it to introduce this alleged “bad act” committed by Defendant mother at the trial in this matter.

3. The State asserts that this evidence is not being offered to attack the character of the Defendant mother or to show that the Defendant mother is a bad person. Rather, the State intends to use the evidence to tell the complete story of the alleged offenses of involuntary manslaughter, child neglect resulting in death, concealment of a deceased human body, and child neglect creating a substantial risk of death, which are the subject of the indictment.

4. Rule 404(b) of the West Virginia Rules of Evidence states:

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

5. The West Virginia Supreme Court has held that:

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.

State v McGinnis, syl. Pt. 2, 193 W.Va. 147, 151, 455 S.E.2d 516, 520 (1994). In *McGinnis*, the Supreme Court delineated the pertinent considerations at each and every stage of proceeding in which the introduction of Rule 404(b) evidence is sought. Before evidence is introduced under Rule 404(b), the following summarized four-part analysis must be conducted by the trial court:

- (1) Is the "other crime" evidence probative of a material issue other than character?
- (2) Is the evidence relevant under Rules 401 and 402, as enforced by Rule 104?
- (3) Under the Rule 403 balancing test, is the probative value of the evidence outweighed by a substantial risk of prejudice if the evidence is admitted?
- (4) Should a limiting instruction be given?

See McGinnis, 193 W.Va. at 155-56, 455 S.E.2d at 524-25. The Court must, when conducting a balancing test required by the third prong of the Rule 404(b) analyses, consider a list of relevant factors to be examined: (a) the need for the evidence, (b) the reliability and probative force of the evidence, (c) the likelihood that the evidence will be misused because of its inflammatory effect, (d) the effectiveness of limiting instructions, (e) the availability of other forms of proof, (f) the extent to which admission of evidence will require trial within trial, and (g) the remoteness and similarity of the proffered evidence to the charged crime. *McGinnis*, 193 W.Va. at 156, n. 11, 455 S.E.2d at 525, n. 11. In addressing the competing considerations at play during the trial court's hearing of a Rule 404(b) motion, Justice Cleckley elucidated that:

- (a) The balancing necessary under Rule 403 must affirmatively appear on the record.
- (b) Evidence of prior crimes, wrongs or acts may be offered for *any* relevant purpose that does not compel an inference from character to conduct.
- (c) 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).
- (d) The specific and precise purpose for which the evidence is offered must clearly be shown from the record.

McGinnis, 193 W.Va. at 154, 156, 455 S.E.2d at 523, 525.

6. The West Virginia Supreme Court has recognized that “the decision on remoteness as precluding the admissibility of evidence is generally for the trial court to determine in the exercise of its sound discretion.” *McIntosh*, 207 W.Va. at 574, 534 S.E.2d at 770 [quoting *State v Gwinn*, 169 W.Va. 456, 472, 288 S.E.2d 533, 542 (1982)]. The Supreme Court further stated in *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E. 2d 410 (1945): [A]n abuse of discretion is more likely to result from excluding, rather than admitting, evidence that is relevant but which is remote in point of time, place and circumstances, and that the better practice is to admit whatever matters are relevant and leave the question of their weight to the jury, unless the court can clearly see that they are too removed to be material. *Id.* At 311-12, 36 S.E. 2d at 416 [citing *State v Yates*, 21 W. Va. 761 (1883)]. “As a general rule remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility.” Syl. Pt. 6, *Gwinn*, 169 W.Va. at 457, 288 S.E.2d at 535.

7. In this instance, both the Defendant mother and the alleged victim tested positive for amphetamines immediately after the birth of the child. This is intrinsic evidence, which is inextricably intertwined with the events as they allegedly occurred as to be part and parcel of the *res gestae* of the offense. *State v Dennis* 607 S.E.2d 437 (W.Va. 204).

8. Alternatively, the Court shall consider this matter under Section 404(b) of the West Virginia Rules of Evidence.

9. Based on the testimony at the in camera hearings, the Court, by a preponderance of the evidence, makes the following findings of fact: First, the Court finds that the 404(b) prior “bad act” occurred and that the Defendant mother committed the act. The Court further finds that the act occurred reasonably close in time to the incidents giving rise to the indictment. The Court

concludes that the 404(b) evidence is relevant because it provides the context of the crime and is necessary to a full presentation of the case.

10. Second, the Court finds that the probative value of the 404(b) evidence outweighs the risk of unfair prejudice. The Court finds the State's need for the evidence to be high. To gain a conviction, the State has the burden of proving beyond a reasonable doubt that Defendant mother committed the acts in the indictment. W.Va. Code §61-8B-1(a). The Court recognizes that it would be necessary for the jury to consider this "bad act" in order to complete the story. Therefore, the Court finds that the first factor weighs in favor of admitting the 404(b) evidence.

11. Third, the Court finds the reliability and probative force of the evidence to be high. The Court finds that the hospital records and the toxicology report to be credible and believable. Therefore, the Court finds that this second factor weighs in favor of admitting the 404(b) evidence.

12. Fourth, the Court finds the likelihood that the evidence will be misused because of its inflammatory effect is slight. The 404(b) evidence of the use of amphetamines could be inflammatory. However, with a limiting instruction and given this evidence proper weight in context, the Court believes that any inflammatory effect is diminished. Therefore, the Court finds that this third factor weighs in favor of admitting the 404(b) evidence.

13. Fifth, the Court finds that a limiting instruction will be effective in instructing the jury that the prior "bad act" may only be considered for the purposes set forth in this Order. Therefore, the Court finds that this fourth factor weighs in favor of admitting the 404(b) evidence.

14. Sixth, the Court finds that other forms of proof are insufficient to tell the complete story. Therefore, the Court finds that this fifth factor weighs in favor of admitting the 404(b) evidence.

15. Seventh, the Court finds that given the nature of the prior "bad act" the admission of such evidence may require a trial within a trial. However, the Court believes this would be true in all instances in which evidence of a prior "bad act" committed by a defendant would be admitted. Nonetheless, the Court finds that this sixth factor weights in favor of not admitting the 404(b) evidence.

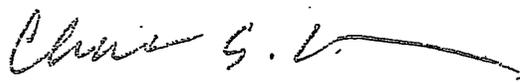
16. Eighth, the Court finds that the prior "bad act" is so close in time to the alleged offense that it constitutes a preliminary to the offenses charged. The Court further believes that the remoteness issue is best left to the jury to consider the weight to be accorded the 404(b) evidence.

WHEREFORE, in consideration of the foregoing, the Court concludes that the 404(b) evidence is admissible and does hereby ADJUDGE and ORDER that the evidence set forth in the State's Notice of Intent to Use 404(b) Evidence may be utilized by the State in its case in chief for the purposes set forth in this Order. The Court will provide a limiting instruction to the jury at the time the evidence is offered and will repeat the instruction in the Court's general charge to the jury at the conclusion of the evidence.

* The Circuit Clerk shall mail true copies of this Order to all counsel of record.

* The objection of the parties to any and all adverse rulings is noted.

ENTERED this 23rd day of December, 2014.



CHARLES E. PARSONS, JUDGE

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS

CASE NO. 14-F-41

SUMMER LYNN MCDANIEL,
Defendant.

FILED
DATE 6/9/15
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DEPUTY

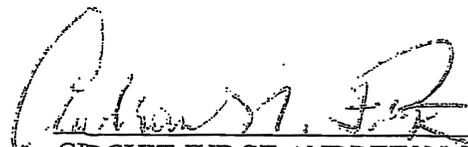
ORDER

On this date came forward John G. Ours, the Court appointed trial counsel for the Defendant, and advised the Court that he did not desire to be the appellate counsel for the Defendant; that he had discussed not being the appellate counsel with the Defendant, and the Defendant had no opposition to the appointment of other counsel for the purpose of any appeal. Counsel further advised the Court that counsel had contacted Attorney Jonie Nelson, from Petersburg, with regard to her willingness to be appointed appellate counsel and indicated that she was willing to accept the appointment for the purpose of appeal.

Based upon the aforementioned, it is Adjudged and Ordered, that the responsibility of John G. Ours, Court appointed counsel for the Defendant, shall end on the 9th day of ^{June} ~~May~~, 2015, at the final sentencing of the Defendant, and that effective the same day, Attorney Jonie Nelson is appointed for the purpose of any appeal that the Defendant may desire.

A copy of this order shall be sent to Attorney Jonie Nelson at her address of P.O. Box 458, Petersburg, WV 26847.

Entered this 9th day of May, 2015.


CIRCUIT JUDGE ANDREW N. FRYE