FILED
SEP 27 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

At Charleston

STATE OF WEST VIRGINIA,

Plaintiff below, Appellee,

v. No. **35551**

FREDERICK K. FERGUSON, III,

Defendant below, Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

On Appeal from the
Circuit Court of Ohio County, West Virginia,
The Honorable James P. Mazzone presiding
Ohio County Case Number 06-F-90

Stephen L. Vogrin #8018
Joseph E. Barki, III #8510
Assistant Prosecuting Attorneys
Ohio County Prosecutors Office
1500 Chapline Street
Wheeling, WV 26003
(304) 234-3631
Counsel for Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS

POINTS AND AUTHORITIES RELIED UPON I

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW 1

II. STATEMENT OF FACTS 2

III. STATEMENT OF CASE 3

IV. STATEMENT ADDRESSING ALLEGED ERRORS 6

A. Denial of the Right of Cross examination of Detective Keith Brown 7

B. Exclusion of Presence of Methylenedioxymethamphetamine or MDMA commonly referred to as (Ecstasy) 8

C. Exclusion of specific instances of conduct of the victim regarding allegations of domestic violence between victim and two prior girlfriends 9

V. ARGUMENT

A. The Trial Court did not err in restricting cross examination of Detective Keith Brown by the Appellant during the course of the Trial 9

B. The Trial Court did not err by excluding the admission of the MDMA, the related "expert" testimony regarding chronic abuse of MDMA as related to aggression and paranoia, nor testimony regarding drug dealers being more likely to carry firearms 13

1. Standing alone the presence of MDMA had no relevance to the issues present in the underlying trial in this matter 14

2. The represented "side effects" of chronic MDMA abuse could not be established through admissible evidence by the Defendant in the underlying matter, and accordingly no nexus existed to transform the presence of MDMA into relevant evidence 16

a. The opinion sought by the Appellant/Defendant from Dr. Sullivan that "the side effects of ecstasy (MDMA) makes a person paranoid and aggressive" does not qualify as "scientific knowledge" and further does not satisfy the reliability requirement of Gentry v. Magnum 18

b. Even if the disputed scientific evidence meets the requirements for reliability it is of very limited relevance, and any such relevance is far out weighted by its prejudicial effect and propensity to confuse or mislead the jury 23

c. The trial court did not err in its exclusion of the presentation of the defense theory that the subject MDMA equates to the victim probably being a drug dealer, ad thus is more likely to carry a firearm 27

C. The Trial Court did not err by excluding evidence of allegations of domestic violence between Mr. Sears and two prior girlfriends 29

VI. CONCLUSION AND RELIEF REQUESTED 32

POINTS AND AUTHORITIES RELIED UPON

Rules:

West Virginia Rule of Evidence 104 . . . . . 19, 23

West Virginia Rule of Evidence 401 15

West Virginia Rule of Evidence 403. . . . . 9, 23, 25, 27

West Virginia Rule of Evidence 404. 5,6,15,30

West Virginia Rule of Evidence 405. 31

West Virginia Rule of Evidence 702 . . . . . 18, 19

Case Law:

Craddock v. Watson, 197 W.va 62, 475 S.E. 2d 62 (1996). 14, 17, 27

Daubert v. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579 (1993) 17

Dietz v. Legursky, 188 W.Va. 526, 425 S.E.2d 202 (1992). 31

Gentry v. Magnum, 195 W.Va 512, 466 S.E. 171 (1995). 5, 10, 17, 18, 21, 23, 30

McDougal v. McCammon, 193 W. Va. 229, 455 S.E.2d 788 (1995). 10, 30

Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968). 1,3

State v. Bass, 189 W.Va. 416, 432 S.E.2d 86 (1993). 10, 14, 27, 30

State v. Beegle, 188 W.Va. 681, 425 S.E.2d 823 (1992) 31

State v. Carduff, 142 W.Va. 18, 93 S.E.2d 502 (1956) 11

State v. Dillon, 191 W.va 648, 447 S.E. 2d 583 (1994) 14

State v. Farmer, 185 W.Va 232, 406 S.E. 2d 458 (1991). 14

State ex. rel. Jones v. Recht, 221 W.Va 380, 655 S.E. 126 (2007) 19, 22

State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (1996). 10, 30

State v. Potter, 197 W.Va. 734, 478 S.E.2d 742 (1996) 11

State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982). 11

State v Woodson, 181 W.Va. 325, 382 S.E.2d 519 (1989). 31

Wilt v. Buracker, 191 W.Va 39, 443 S.E. 2d 196 (1993) 19

Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884,114 L.Ed.2d 432, (1991).. . . . . 10, 30

IN THE SUPREME COURT OF APPEALS OF THE

STATE OF WEST VIRGINIA

At Charleston

STATE OF WEST VIRGINIA,

Plaintiff below, Appellee,

v. No. **35551**

FREDERICK K. FERGUSON, III,

Defendant below, Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal by Frederick K. Ferguson, III., (hereinafter sometimes referred to as "Appellant") from the September 29, 2008 Order of the Circuit Court of Ohio County, West Virginia (Recht, J.) sentencing him to fifteen (15) years in the West Virginia Penitentiary. The Appellant was convicted after a six day trial of Voluntary Manslaughter.

Appellant filed a motion for a new trial which was denied by the Trial Court. A timely Notice of Intent to Appeal was subsequently filed by the Appellant. After a number of extensions were properly granted, the Appellant filed his Petition for Appeal was filed on January 15, 2010. This Court agreed to hear the Petition for Appeal on May 4, 2010, limiting consideration to the three assignments of error addressed herein.

II.

STATEMENT OF FACTS

On May 17, 2006, the Appellant, Frederick K. Ferguson, III, shot and killed 19 year old Maurice Sears in the heart with a 9mm firearm. The undisputed evidence presented at the trial suggested that this altercation occurred because both the victim and Appellant had a sexual relationship with a woman, Elizabeth Gorayeb. The victim became upset over seeing a picture of the Appellant on the cell phone of Ms. Gorayeb. The Victim called the Appellant and threatened him. Instead of calling the police or ignoring the Victim, the Appellant choose to get a friend, Robert Hodge, and go to confront the Victim. *T.T. at 426-427.*

The Appellant drove his own vehicle to meet the Victim. The Appellant first stopped his vehicle around the corner from where the shooting occurred and a verbal confrontation ensued between the two individuals. *T.T. at 256-257.* After this first short verbal confrontation, the Appellant drove off and found the Victim again in front of Ms. Gorayeb's residence. *T.T. at 258.* At this point the Victim walked up to the vehicle and began punching the Appellant. *T.T. at 431.* The Victim did not have a firearm or any other weapon in his hands at any point. Seven eye witnesses, Claudia Goreyab, Elizabeth Goreyab, Shelia Swiger, Richard Edgell, Justin Gibbons, Michael Callaway, and Melissa Seachrist, confirmed this key point and testified that they did not see the victim, Maurice Sears, either in possession of a firearm that morning, with a firearm in his hand while confronting the defendant, pull a firearm from his pocket or waste band, or with a firearm in his hand or around his person after he fell shot to the ground. *See T.T. at 253/9-16; 314/15-24; 333/21-23; 334/11-24; 342/ 21-23; 362/9-14; 369/12-13; 390/12-22; 403/23-24; 404/1-8; and 407/6-15*. Moreover, the defendant, Frederick Ferguson, who took the stand in his own defense, did

not and could not testify that the victim had, or attempted to pull a firearm during their altercation. *T.T. at 431-432.*

During this time when the Victim is punching the Appellant in the vehicle is when the Victim is shot and killed. The Victim fell into the arms of Justin Gibbons and died on the street. *T.T. at 364.* The Appellant then fled form the crime scene, ditched the vehicle and tried to conceal its location. *T.T. at 656-659,* The Appellant's vehicle was found in a secluded part of Wheeling by law enforcement. *T.T. at 149-151.* No firearm was found at the scene of the shooting nor in the Appellant's vehicle. Although, the police did recover a spent 9m shell casing just outside the drivers side door which was collected. *Id.* After a few hours the Appellant turned himself in to law enforcement authorities.

III.

STATEMENT OF CASE

The Appellant's "Statement of Case" omits or misstates several relevant facts to the determination of the legal issues present in this matter. The Appellant suggests that Detective Brown lied to the Grand Jury because a statement given by Robert Hodge who stated that the victim brought the gun to the confrontation. Mr. Hodge is the friend that the Appellant picked-up and brought with him to the confrontation with the victim. In regard to the Appellant's alleged error relating to the cross examination of Detective Keith Brown, the Appellant is mistaken as to a few important facts. The most important being that the testimony by Detective Brown as the Grand Jury was not false or misleading in any way. He accurately answered a question by a Grand Juror based upon the information he reviewed prior to testifying. Detective Brown has never acknowledged that his testimony was inaccurate as the Appellant contends in his brief. In fact, just the opposite occurred.

Detective Brown indicated to the Trial Court that his testimony was truthful. *T.T. at 908.*

The Appellant has incorrectly changed the substance of the question asked by the Grand Juror. The question was very specific, "was there a witness that he (the Appellant) went and obtained the gun?" Detective Brown's response was accurate in that the State did not have any witness who stated where the Appellant got the gun. The Appellant in his brief is rewording the question to make it something entirely different than what was asked by the Grand Juror. The Grand Juror did not ask whether the police had any "information about the source of the weapon involved in the shooting." *Appellant's brief pg. 13.*

Furthermore, the Appellant claims that his "defense" that the police "rushed to judgement" was limited or affected by not being able to cross examine Detective Brown on this issue. Detective Brown was not involved in getting the arrest warrant for the Appellant that was obtained the same day as the shooting occurred. The police did not interview Mr. Hodge until a week after the arrest warrant was issued. Mr. Hodge chose to flee from the crime scene along with the Appellant and did not make himself available for an interview until after the Appellant was arrested. Therefore, the police could not have had knowledge of Mr. Hodge's version of the events until after the Appellant was arrested.

Next, in regard to the Appellant's alleged errors relating to MDMA, the misstatements by the Appellant are the discrepancy between the represented "opinion" or "scientific evidence" of the defendant's expert, Dr. Carl Ryan Sullivan, III, as put forth by Appellant's counsel in his brief, and further as represented in underlying proceedings, compared to those actually testified to by Dr. Sullivan in a "Gentry Hearing" conducted out of the presence of the jury during the trial of this matter. *T.T. at 596-631.*

The Appellant correctly asserts that the original trial court Judge, Judge James Mazzone, initially, and the Appellant asserts erroneously, ruled that the evidence of the MDMA discovered on the victim's body was admissible under *WVRE 404(b)*, to show his "conduct at or about the time of the alleged incident". *See T.T. At 850-852.* The "conduct" contemplated by the trial court was his "aggressiveness or paranoia," and the decision was clearly predicated upon Defense Counsel's proffer that a known side effect of MDMA use is increased aggression and paranoia, as represented by defense counsel in the motion hearing of July 30th, 2008. *See July 30th, 2008 Motion Transcript at p. 11-15.* Furthermore, at said Motion Hearing Defense Counsel further represented that the Defendant would have an expert to qualify and prove this tendency at trial. *Id at p.14-15.*

Unfortunately, at that hearing the expert was not present, nor was his report provided to the trial court or the State. That report, was not in fact turned over until the evening of July 29th, 2008 with the trial in this matter beginning July 30th, 2008 at 8:30 a.m., and did not make a finding to a "reasonable degree of medical or scientific certainty" or even to a "reasonable degree of medical or scientific probability," but simply stated that it was **"possible"** that **Chronic** use of MDMA could cause increased aggressiveness and paranoia, a much less certain finding than represented to the court at the Motion Hearing.[1] Dr. Sullivan's opinions, and their purely speculative nature, were fully explored at the Gentry hearing conducted in the midst of trial by virtue of the State moving in limine to exclude his testimony entirely pursuant to *Gentry v. Magnum, 195 W.Va 512, 466 S.E. 171 (1995). See T.T. at 11/12-24 and 12/1-24.*

---

[1]Unfortunately, even though the disclosure of Dr. Sullivan's report was done as a defense discovery disclosure, and the Court "lodged it of record" upon defense counsel's request, upon review of the appellate record, the Appellee is unable to locate the report anywhere contained therein.

Specifically, during the subsequent voir dire of defense/appellant expert, Dr. Sullivan, he quite truthfully admitted that his opinions on the possible **chronic** effects were all "just a possibility and not based on a scientific basis for his underlying opinions." *T.T. at 624.* Dr. Sullivan further stated that he could not state to a reasonable degree of medical certainty that chronic MDMA use is related to aggression. *T.T. at 617.* While Dr. Sullivan indicated he believed their was some scientific evidence as to the nexus between chronic use of MDMA and aggressive behavior, to the extent he was willing to rely upon that evidence, his opinion would only be that it was "possible" that it caused aggression. *T.T. at 613/8-23.* In conclusion, neither the expert, nor Defense Counsel could proffer any evidence that the victim, "chronically abused" MDMA that would elevate him to the category of those chronic users who "possibly" become more aggressive.

Finally, in regard to the issue of whether the Appellant should have been able to present evidence of specific instances of conduct of the victim regarding allegations of domestic violence between victim and two prior girlfriends, the Appellant contends that the Trial Court "refused to revisit this issue under Rule of Evidence 404(b)." The Appellant did not at any point request that the Court analyze whether the specific acts would be admissible under Rule 404(b) in his written motion or orally when the motion was argued. The Appellant was not limited in any way by the Trial Court in presenting evidence of reputation and opinion character evidence on Mr. Sears. He in fact did so at the trial through the testimony of Wheeling Police Officer Patricia Boniey and Tracy McWhorter who both testified that Mr. Sears was not a peaceful man.

IV.

STATEMENT ADDRESSING ALLEGED ERRORS

The Appellant sets forth three general categories of alleged errors: 1. Denial of right of

cross-examination of Officer Keith Brown; 2. Denial of right to introduce evidence of MDMA in the victim's rectal cavity with speculation as to relevance of its presence; and 3. Denial of right to present evidence that victim allegedly assaulted two previous girlfriends. Each of the alleged errors contains subparts arguing constitutional and evidentiary prejudice to the Defendant's presentation of a defense. However, the Appellant fails to establish (1) the improper denial of these asserted rights by the court, and (2) the propriety of the admission of the disputed evidence under the West Virginia Rules of Evidence.

A. Denial of the Right of Cross examination of Detective Keith Brown.

The Appellee will establish in its argument, and through the record of the underlying trial and pre-trial proceedings, that the Trial Court did not err in refusing to allow cross examination of Detective Keith Brown on areas not relevant to his trial testimony. The Appellant's assertion that the trial was fundamentally flawed by the Trial Court's refusal to permit cross examination of Detective Brown on his Grand Jury testimony is without merit in fact or law. First and foremost, Detective Brown's disputed Grand Jury testimony was accurate and not false or misleading. The testimony the Appellant sought to impeach Detective Brown was not touched upon in any way on direct examination by the State, as Detective Brown was strictly a chain of custody witness. Detective Brown did not present any material testimony on the contested issues in the case, i.e. who brought the gun and whether the Appellant intended to kill the victim. Furthermore, the Appellant's "defense" that the police "rushed to judgement" was not limited or affected in any way by the limitation of the cross examination of Detective Brown. Detective Brown was not involved in getting the arrest warrant for the Appellant that was obtained the same day as the shooting occurred.

In view of the above, it is clear that the Trial Court did not error in limiting the cross examination of Detective Brown.

B. Exclusion of Presence of Methylenedioxymethamphetamine or MDMA commonly referred to as (Ecstasy).

The Appellee contends that the Appellant's argument regarding the 12.5 MDMA tablets excluded from evidence by the trial court has been incorrectly simplified by the Appellant to an argument regarding its relevance to a "theory of defense." The record will show that whatever slight relevance the MDMA might have had to any theory put forth by the Appellant was, and continues to be, based upon the speculation of defense counsel as to the nature and effect of the controlled substance found upon the body of the victim.

The Appellee will establish in its argument, and through the record of the underlying trial and pre-trial proceedings, that the MDMA had no relevance to the facts and events that lead to the intentional killing of Maurice Sears by Frederic Ferguson. Moreover, while the Appellee wholeheartedly concurs with the Appellant's supposition that the Defendant has a right to present a defense on his own behalf, that right is limited to a presentation within the WV Rules of Evidence.

In as much, whatever relevance the MDMA may have had in this matter, the defendant's speculative theories that the presence of MDMA shows that the victim was suffering from alleged side effects leading to paranoia and increased aggressive behavior, or in the alternative that he was a drug dealer and thus carried a gun, are nonetheless subject to the admissibility standards of the West Virginia Rules of Evidence and the applicable case law in the areas of expert testimony. In this matter, neither theory was supported by admissible evidence and thus not appropriate for presentation to the petit jury. In view of that, it is clear that the presence of MDMA was properly

excluded as not relevant, or as having a value more prejudicial than probative under *WVRE 403.*

C. Exclusion of specific instances of conduct of the victim regarding allegations of domestic violence between victim and two prior girlfriends.

The Appellee will establish in its argument, and through the record of the underlying trial and pre-trial proceedings, that the Trial Court did not error in refusing to admit evidence that Mr. Sears allegedly committed acts of domestic violence on two prior girlfriends. The Appellant's assertion that the trial was fundamentally flawed by the exclusion of this type of evidence is without merit in fact or law. The two separate alleged illegal acts committed by Mr. Sears occurred thirteen months and twenty-three months respectively prior to Mr. Ferguson killing Mr. Sears. Further, the alleged victims of said acts were not involved in any way in the underlying facts of this matter. These types of "specific instances of conduct" are not admissible under the West Virginia Rules of Evidence and existing case law directly on point unless Mr. Ferguson, the Appellant, had knowledge of the specific acts. It is undisputed that the Appellant did not have any such knowledge and, as a result, said specific instances of conduct were not admissible at the trial.

V.

ARGUMENT

A. The Trial Court did not err in restricting cross examination of Detective Keith Brown by the Appellant during the course of the Trial.

The Appellant contends that the Court erred in not permitting the Appellant to cross examination Detective Keith Brown regarding his Grand Jury testimony. The Appellant's argument surrounds one question proposed to Detective Brown by a grand juror and his answer. The exchange between Detective Brown and the grand juror is as follows:

Grand Juror – You said he went and obtained the gun. Was there a witness that he went and obtained the gun?

Detective Brown – No. We don't know where he got the gun. We have no witness to that.

The Grand Jury testimony of Detective Brown was subject of a pre-trial motion to dismiss by the Appellant. The Court in denying the motion found that Detective Brown's testimony was correct. The Court stated: "there was no willful or intentional fraud or misconduct to warrant a dismissal of the subject indictment." *Order Entered July 12, 2007.* The Appellant argues that he should have been permitted to question Detective Brown at the trial regarding his Grand Jury testimony. It's the State's contention that Detective Brown's testimony was 100% accurate and not relevant for cross examination purposes.

A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are reviewed for an abuse of discretion. *See McDougal v. McCammon, 193 W. Va. 229, 455 S.E.2d 788 (1995).* A party challenging a court's evidentiary rulings has an onerous burden because a reviewing court gives special deference to the evidentiary rulings of a circuit court." *Gentry v. Mangum, 195 W.Va. 512, 518, 466 S.E.2d 171, 177 (1995); see Syl. Pt. 6, State v. Bass, 189 W.Va. 416, 432 S.E.2d 86 (1993).* Even when a trial court has abused its discretion by admitting or excluding evidence, the conviction must be affirmed unless a defendant can meet his or her burden of demonstrating that substantial rights were affected by the error. *See State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (1996).* In other words, a conviction should not be reversed if we conclude the error was harmless or "unimportant in relation to everything else the jury considered on the issue in question." *Yates v. Evatt, 500 U.S. 391, 403, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432, 449 (1991).*

Furthermore, this Court has held that, "in determining whether the scope of cross-examination has been violated, broad discretion is given to the trial court, and we will not disturb that ruling absent a clear abuse of discretion." *State v. Potter, 197 W.Va. 734, 749, 478 S.E.2d 742, 757 (1996). See also Syl. pt. 4, State v. Carduff, 142 W.Va. 18, 93 S.E.2d 502 (1956)* ("The extent of the cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in the case of manifest abuse or injustice.").

This Court has recognized that several basic rules exist as to cross-examination of a witness. The rules are as follows:

> The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term "credibility" includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination.

Syl. pt. 4, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982).

In the case at hand, Detective Brown was essentially a chain of custody witness. He certainly did not testify at the trial to the hotly disputed facts in the case, that being who brought the gun to the confrontation and whether Mr. Ferguson intentionally shot the victim. Those critical areas of the case were addressed through various other witnesses where cross examination was not limited. The testimony with which the Appellant sought to impeach Detective Brown pertained to a subject which was not touched upon in any way on direct examination by the State. Therefore, any alleged error in refusing to allow cross examination on Grand Jury issue would have to be analyzed under whether it related to his credibility to those issues for which he did testify.

In addressing whether the cross examination would relate to Detective Brown's credibility

for his testimony, what first needs to be addressed in whether the testimony was accurate or false. The question was very specific, "was there a witness that he (the Appellant) went and obtained the gun?" Detective Browns's response was accurate in that the State did not have any witness where the Appellant got the gun. The Appellant in his brief is rewording the question to make it something entirely different than what was asked by the grand juror. The Appellant is suggesting that Detective Brown lied to the Grand Jury because a statement given by Robert Hodge who stated that the victim brought the gun to the confrontation. Mr. Hodge is the friend that the Appellant picked-up and brought with him to the confrontation with the victim. The Appellant called Mr. Hodge to testify at the trial. An examination of Mr. Hodge's testimony will show that he was thoroughly impeached on cross-examination to the extent that he said he could not identify his own voice a tape recorded phone call with the Appellant, after minutes before identifying his voice in the same phone call, once he realized that the phone call impeached his previous testimony on direct examination. *See T.T. at 635-692.* Moreover, Mr. Hodge admitted on cross examination that other areas of his pretrial statement made to the police were lies. *See T.T. at 690.* The testimony by Mr. Hodge at the trial was so bad that the Court *sua sponte* almost held him in contempt for not being truthful during his testimony. *See T.T. at 686-687.*

The Appellant contends that by not being permitted to cross examine Detective Brown on this issue it somehow impacted his defense that the police "rushed to judgment" in charging the Appellant. Detective Brown was not involved in getting an arrest warrant for the Appellant. Furthermore, the Appellant was charged with murder via criminal complaint on May 17, 2006, the same day as the shooting occurred. Mr. Hodge was not interviewed until May 24, 2006! Logically, anything that happened after the Appellant was arrested had nothing to do with the police "rushing

to judgement."

The Appellant was trying to embarrass, humiliate or disgrace Detective Brown in front of the jury which is not proper for cross examination. *See Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968).* Those areas were already subject to motion to dismiss that was denied by the Court.

Finally, the petit jury was instructed in the beginning of the case and as well during the charge as to what an Indictment means in the case. The Court instructed the jury that, "criminal cases are brought to Court by way of what we call an indictment. The indictment or formal charge against the Defendant is not evidence and is not to be considered by you as having any weight whatsoever as evidence against the Defendant. No juror should permit himself or herself to be influenced against the Defendant because of or on account of the indictment in this case." This type of cross examination would have done nothing but confuse the jury. The Appellant was trying a back door attempt to attack validity of the indictment before jury which was not proper. Accordingly, for all of the arguments presented above, there was no error committed by the Trial Court in limiting the cross examination of Detective Brown to those areas that were actually relevant to his limited testimony at the trial.

B. The Trial Court did not err by excluding the admission of the MDMA, the related "expert" testimony regarding chronic abuse of MDMA as related to "possible" aggression and paranoia, or testimony regarding drug dealers being more likely to carry firearms.

The Appellant sets forth three sub categories of error stemming from the trial court's exclusion of the fact that 12.5 MDMA tablets were found in the rectal cavity of the victim, Maurice

Sears, by the medical examiner during the victim's autopsy. While legally separate arguments, each asserted error is nonetheless interrelated in that standing alone, the presence of the MDMA has no relevance to the events leading to the victims homicide, but only gains some tenuous relevance if the Appellant's speculative assertions regarding MDMA's side effects or that its presence on the victim indicated that the victim was more likely to have a gun are deemed legally admissible. For reasons that will follow hereinafter, the Appellant's speculations as to what should be extrapolated from the presence of MDMA are not legally admissible evidence under the West Virginia Rules of Evidence and applicable case law, and as such the MDMA had no relevance to the trial in this matter and would not only be unfairly prejudicial but would also mislead the jury in an attempt to present improper character evidence.

1. Standing alone the presence of MDMA had no relevance to the issues present in the underlying trial in this matter.

This Court has consistently held that "rulings on the admissibility of evidence are largely within the trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion. *State v. Farmer, 185 W.Va 232, 406 S.E. 2d 458 (1991); State v. Blass, 189 W.Va 416, 432 S.E. 2d 86 (1993); State v. Dillon, 191 W.va 648, 447 S.E. 2d 583 (1994).* Accordingly, the standard of review for considering the exclusion of the presence of MDMA in the victim's rectal cavity at the time he was killed, remains: did the trial court abuse its discretion in excluding those facts from presentation to the jury?

In considering its exclusion, this Court has noted that a circuit court has "considerable latitude in determining whether to admit evidence as relevant. *Craddock v. Watson, 197 W.va 62, 475 S.E. 2d 62 (1996).* However, when first considering the relevance of the presence of the MDMA

standing alone, little latitude is necessary before it becomes eminently clear that the discovery of the MDMA had no relevance to the facts or circumstances leading to the homicide of the victim, Maurice Sears.

Specifically, as noted by both parties the incident predicating the victim being shot was a dispute over a mutual female companion of both the Defendant, Frederick Ferguson, and the victim, Maurice Sears. It has neither been alleged, nor was any evidence ever developed, that the victim was shot by the defendant as a result of on going drug dealing, a drug deal gone bad, or an outstanding drug debt. Accordingly, on its face, the subject drugs located on the victim played no role in the parties coming together on the fateful date in question, nor in their actions. Accordingly there is not "fact of consequence to the determination of the action," pursuant to *WVRE 401* that could be made "more probable or less probable than it would be without the presentation of the evidence." *WVRE 401.*

Appellant essentially concedes that the 12.5 tablets of MDMA found in the rectal cavity of the victim is not relevant at page 27 of his Brief: "{a}lone, that fact (*the location of the ecstasy in the rectal cavity)* may not have been relevant. Accordingly, this fact is first to be reviewed from a determination that it was not initially relevant to trial of this matter, and could thus only become relevant through the proof of other admissible facts creating a nexus between the drugs presence and a fact or facts of consequence.[2] Again, the necessity of these connecting facts to make the MDMA

2

Although the Circuit Court, Judge James Mazzone presiding, initially determined that the discovery and location of the MDMA was admissible as relevant 404(b) evidence to show the victim's conduct at the time of the incident leading to his death. That determination was based upon the representation of another conditioned fact, specifically that it was represented by defense counsel that a side effect of MDMA use was increased aggressiveness and paranoia, and that the defendant had an expert who would "prove" this assertion at trial. However, the proof that never actually came

relevant is a position that appears to be agreed upon by both parties, and is in fact what the Appellant has attempted to do through the submission of his theories regarding (a) side effects of MDMA use, and (b) generalized, over broad application of its presence to drug dealing. As such, without legally admissible evidence to tie the actions of the parties to the drugs, or specific events leading to presence and use of a firearm to kill the victim, there is no basis upon which to admit the evidence in this matter and thus it was properly excluded.

2. The represented "side effects" of chronic MDMA abuse could not be established through admissible evidence by the Defendant in the underlying matter, and accordingly no nexus existed to transform the presence of MDMA into relevant evidence.

In order to establish the relevancy of the presence of MDMA to the homicide trial of the defendant, defense counsel developed a theory of defense that represented that the side effects of ecstasy makes a person inordinately paranoid and aggressive, and that these effects could last for up to a year after an individual stops the use of the drug. While the Appellee wholeheartedly supports the Appellant's well cited assertion that the "the defendant[3] had a constitutional right to present a defense within the rules of evidence." *Appellant's Brief at 26.* That right is nonetheless limited to a defense that is presented **within** the rules of evidence, and as such must meet certain standards of admissibility. In the matter at bar, the defendant was not able to establish his theory concerning the side effects of MDMA with any admissible evidence, and accordingly was unable render the presence of the MDMA at trial.

---

as to be addressed in sub part b section 2 of this argument. Appellant's expert's testimony fell far short of said proffer by defense counsel. See sub part (b) section (2) infra.

[3] The Appellant incorrectly transposes Mr. Sears, for the defendant, in their assertion of a constitutional guarantee to present a defense.

Specifically, the defendant in the underlying matter attempted to establish the side effects of MDMA use as increased aggression and paranoia through the presentation of an expert who was reported to be prepared to offer testimony that the side effects of MDMA (ecstasy) use, even one year after stoppage, **makes a person more paranoid and aggressive.** *See July 10th, 2008 Motion Hearing Transcript at 12/1-19 and 15/1-12; and Appellant's Brief at 27.* However, upon review of the actual record reflecting the testimony of the proffered expert, Dr. Carl Ryan Sullivan, it becomes clear that the defendant's/appellant's theory was not sufficiently supported by Dr. Sullivan's actual opinions so as to make the admission of the MDMA admissible, nor that Dr. Sullivan's opinions or testimony qualifies as "scientific knowledge" or satisfies the reliability standard for admission as scientific evidence.

As is the case involving all potential scientific or medical testimony, the evidence must be both reliable and relevant. *Gentry v. Magnum, 195 W.Va 512, 466 S.E. 171 (1995)*; *Craddock v. Watson, 197 W.Va 62, 475 S.E. 2d 62 (1996).* This Court clearly stated in *Gentry,* the "First and universal requirement for the admissibility of scientific evidence is that evidence must be **both** reliable and relevant." *Id.* As such one requirement without the other is insufficient to predicate the admission of evidence at trial. When examining both the reliability of the proffered scientific evidence, and further its relevance to the underlying trial, it is clear that Dr. Sullivan's testimony is insufficient to satisfy either requirement even under the liberal standards set forth in *Gentry.*

Each of the two requirements for admissibility carries its own standard of review; the "reliability requirement" is a question of law, and accordingly is reviewed *de novo*, while the "relevance requirement" being a strict evidentiary ruling is reviewed under an abuse of discretion standard. As *Gentry* reaffirmed the tenant set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc,*

509 U.S. 579 (1993), that "the question of {relevance} for admissibility.... only arises if it is first established that the testimony deals with "scientific knowledge." The Appellee hereinafter addresses first the position that the Appellant's sought opinions from Dr. Sullivan does not currently qualify as "scientific knowledge," and is inherently unreliable.

a. The opinion sought by the Appellant/Defendant from Dr. Sullivan that "the side effects of ecstasy (MDMA) makes a person paranoid and aggressive" does not qualify as "scientific knowledge" and further does not satisfy the reliability requirement of *Gentry v. Magnum.*

To evaluate whether the trial court erred in refusing to allow the Appellant to attempt to elicit testimony from Dr. Carl Sullivan that the use of MDMA makes a person paranoid and aggressive (thus potentially making the discovery of MDMA in the victim's rectal cavity at the time of his killing by the defendant, Frederick Ferguson, relevant) requires the consideration of a conflux of several rules of evidence and various precedential findings. The first step in the evaluative process of the admissibility of Dr. Sullivan's testimony is to determine if his testimony is based upon "scientific knowledge."

Again, this court reiterated the standard stated in *Daubert,* citing that the question of admissibility of {expert scientific testimony}:

> {O}nly arises if it is first established that the testimony deals with "scientific knowledge." "Scientific" implies a grounding in the methods and procedures of science while "knowledge" connotes more than subjective belief or unsupported speculation. In order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. It is the circuit court's responsibility initially to determine whether the expert's proposed testimony amounts to "scientific knowledge" and, in doing so, to analyze not what the expert says, but the basis they have for saying it. *Gentry v. Magnum, 195 W.Va 512, 466 S.E. 171 (1995).*

This initial analysis invokes the application of WVRE 702 regarding the testimony of experts which provides that:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, training, or education, may testify thereto in the form of opinion or otherwise. *WVRE 702.*

The analytical process for determining the admissibility of expert testimony is further detailed in the recent case of *State ex. Rel. Jones v. Recht,* which citing Syl pt. 2 of *Wilt v. Buracker, 191 W.Va 39, 443 S.E. 2d 196 (1993)* held that:

> In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court's initial inquiry must consider whether the testimony is based upon an assertion or inference derived from scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering the underlying scientific methodology and reasoning. *State ex. Rel. Jones v. Recht, 221 W.Va 380, 655 S.E. 126 (2007).*

Accordingly, it is clear that in order for the expert testimony of Dr. Sullivan, including any opinions he may have derived from "scientific evidence," to be presented to the petit jury in this matter, the trial court would first have to determine that: 1. the proffered "scientific evidence" deals with, and is based upon "scientific knowledge," and 2. that the "scientific evidence' is under a *WVRE 104(a) Gentry* analysis reliable.

The issues of whether Dr. Sullivan's potential scientific/medical expert testimony satisfies the "scientific knowledge", "reliability" and "relevance" requirements for admissibility was thoroughly examined during his in camera testimony during the course of the underlying trial. *See T.T at 596-631.* The initial proffer made by defense counsel, Martin P. Sheehan, during the July 10th, 2008 Motion Hearing, and reiterated in the Appellant's brief, can be appropriately summarized that the side effects of MDMA use causes increased aggression and paranoia, and that the defendant in order to support this theory, was prepared to establish this scientific evidence through the presentation of an expert who was reported to be prepared to offer testimony that the side effects of

MDMA (ecstasy) use, even one year after stoppage, **makes a person more paranoid and aggressive.** *See July 10th, 2008 Motion Hearing Transcript at 12/1-19 and 15/1-12; and Appellant's Brief at 27.* This proffer by the defendant/appellant however, is a misstatement of the limited information Dr. Sulliven had as to the side effects of MDMA, and an exaggeration as to the strength and scientific validity of Dr. Sullivan's opinions as to the causation and as to what he was prepared testify.

First, regarding "scientific knowledge," this was touched upon by Dr. Sullivan as to his basis for his knowledge or understanding of the potential side effects of Chronic MDMA use,[4] which he limited to "case studies," referring to them as "not very scientifically valid because they don't have much merit," and as "really bad science," and finally as being subject to "all sorts of spurious things, that may or may not be associated with drugs." *See T.T. at 607/5-24 and 608/17-18.* Dr. Sullivan further testified that while not ideal, case studies could sometimes be sufficient to draw scientific facts, however, in the case of drawing scientific conclusion as to the nature and potential side effects of chronic MDMA use, that the limited case studies were not yet sufficient quality for conclusions that chronic MDMA use causes paranoia and aggression to be drawn, other than to opine that it was "possible." *See T.T. at 610/13-21, 611/3-20 and 613/18-20.*

When examining whether Dr. Sullivan's opinion is grounded in scientific methods and procedures, it is clear from his own testimony, that in this instance it is not. What's more, any opinion regarding the **possible** cause and effect of chronic MDMA use based on the data gathered

---

4

It is important to note that the proffer of Dr. Sullivan's original opinion was in reference to MDMA 'use' but was limited by Dr. Sullivan's expert report and testimony to "chronic use." Thus simple or infrequent use would not qualify you to suffer from any potential side effect, should those side effects even be scientifically probable.

in this matter would amount to merely unsupported speculation. Specifically, the science in scientific knowledge implies being grounded in the methods and procedures of science. *Gentry v. Magnum, 195 W.Va 512, 466 S.E. 2d 171 (1995).* Moreover, while Dr. Sullivan indicates that in some instances, after a sufficient number of case reports and peer reviews case studies can rise to the level of valid science, it was his position that in the case of the case studies and data reporting the side effects of MDMA do not reach that level, and are "bad science." Dr. Sullivan put it as succinctly as possible when he concluded that "he could not say to a reasonable degree of medical certainty that chronic ecstasy use is related to MDMA," and further that "this is all a possibility, {and} there's no scientific basis underlying for his opinions." *See T.T at 617/7-9 and 624/18-23.*

Next, the reliability requirement is met "only by a finding by the trial court under WVRE 104(a) that the scientific or technical theory which is the basis for the test result is indeed 'scientific, technical or specialized knowledge'." *Gentry, 195 W.Va 512, 466 S.E 2d 171.* Even if the data and methodology considered and utilized by Dr. Sullivan qualifies as "scientific knowledge," it is further not sufficiently reliable for Dr. Sullivan to even establish causation to the extent of a "reasonable degree of medical probability," as the trial court appropriately finds. *See T.T. at 629/16-21.*

Again Dr. Sullivan's testimony is highly illustrative of the lack of linkage or causation between chronic MDMA use and enhanced aggression, when concluding that "causation has not yet been established" regarding MDMA use and enhanced aggression or paranoia and "that continued investigation needs to be conducted in order for experts, like him, to ....link up the use of MDMA with aggression." *T.T. 623/15-24 and 624/1-5* While not an exhaustive check list, and understanding that each prong does not have to be fully satisfied, even a cursory look at some of the areas the court has directed for assessment of reliability shows a complete lack of reliability in the scientific evidence being consider in this matter.

As cited earlier, *State ex. Rel Jones v. Recht,* outlined that determining the expert's scientific reliability includes an assessment of :

> (a) whether the scientific theory and its conclusion can be tested; (b) whether the scientific theory has been subjected to peer review and publication; ©) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community. *State ex. Rel. Jones v. Recht*, 221 W.Va 380, 655 S.E. 126 (2007).

Understanding that the United States Supreme Court meant that these guidelines be applied flexibly, they nonetheless serve as a base line to evaluate the reliability of proffer "scientific evidence," and even the most nimble of applications to the expert testimony sought by the appellant can not justify a finding of reliability.

Specifically, all of the reasons set forth above substantially belie the determination that the sought after opinions were "scientific knowledge" also serve to show the inherent unreliable nature of the disputed testimony. Best summarized by Dr. Sullivan's adoption that Chronic MDMA use leading to increased aggression and paranoia "is all {just} a possibility, {and} there's no scientific basis underlying for his opinions." *See T.T at 624/18-23.* Moreover, by Appellant's own expert's admission the scientific methodology used to evaluate the effect of the chronic use of MDMA is "really bad science," "not very scientifically valid," and subject to all sorts of spurious things that may not be associated to {the} drug use *T.T. at 607/17-24, and 608/17-19.*

As such , it became abundantly clear during the direct and cross-examination of Dr. Sullivan that this proffered scientific evidence, if it even qualifies as "scientific knowledge," (a) can not be nor has been adequately tested; (b) was subject to very little peer review and had publication limited to a few articles, with two articles being mainly relied upon by the proffered expert, ©) has no known actual or potential rate of error, and is subject to numerous extraneous factors which can skew any results or data in numerous was; and (d) at best, is "possibly" accepted in the general scientific

community.

Accordingly, even viewing the admissibility requirements of scientific knowledge and reliability in the most liberal view possible under our current set of legal precedents, and considering the admittedly truthful and apparently unbiased opinion testimony of Dr. Sullivan, it is clear that the Appellant's proffered scientific theorem does not qualify as "scientific knowledge," and certainly does not equate to "reliable" scientific testimonial evidence under *Gentry.* As such, the trial court exercised appropriate discretion ans it's exclusion of this evidence was proper and does not justify a finding of reversible error.

Furthermore, as the detection of the MDMA on the victim is not standing alone relevant, the failure of the Appellant to provide the "proof" promised in the proffer in the July 10th, 2008 motion hearing through admissible evidence, fails to create the requisite nexus to the events leading to the killing of the victim Maurice Sears, and thus fails to establish any relevance of the MDMA in the underlying trial. Notwithstanding this, even should this Court find through a de novo review that the speculative "scientific evidence" regarding the side effects of chronic MDMA use is sufficient to satisfy the requirements for admissible reliable scientific evidence, it is has very limited relevance to this matter for which it is sought to enlighten the jury and its probative weight is far out weighed by its prejudicial effect under WVRE 403.

b. Even if the disputed scientific evidence meets the requirements for reliability, it is of very limited relevance, and any such relevance is far out weighted by its prejudicial effect and propensity to confuse or mislead the jury.

The relevance requirement for the admission of "scientific evidence or a scientific theory" compels the trial judge to "to determine, under rule 104(a), that the scientific evidence will assist the trier of fact to understand the evidence or to determine a fact in issue." *Gentry, 195 W.Va 512, 466 S.E. 2d 171.* The apparent basis stated by the Appellant for necessity of the admission of his

scientific theory was to establish that Mr. Sears was the first aggressor, and that his behavior was unyieldingly aggressive due to his MDMA use. *See Appellant's brief at 27.* However, the issue of Mr. Sear's being the first aggressor was not disputed , and thus not a fact at issue and further the scientific opinion sought would have had very limited relevance to help the jury determine the issue of the victim aggression level.

First and foremost, in order for the scientific evidence of Mr. Sears' alleged MDMA use leading to enhanced aggression, and thus relevance of the located MDMA in his rectal cavity to be admitted to assist the trier of fact, the issue of Mr. Sears being a first aggressor has to be in dispute. However, the fact that Mr. Sears was the first aggressor, had threatened the defendant prior to the defendant's arrival at the scene of the killing, cursed at him, ran at the defendant's car, was aggressive with the defendant, kicked the defendant's car, and in fact acted first and punched the defendant at least two times before being shot was not disputed by the state, and those facts were drawn out by the state during its direct examination of the eye witnesses.

Specifically, state's witness Claudia Sue Gorayeb confirmed that the victim punched the defendant, cursed at him, and approached the defendant's vehicle. *See T.T. at 312/6-10.* State's witness Elizabeth Gorayeb confirmed that the victim threatened the defendant prior to his arrival and once he arrived on scene. *See T.T. at 256/24 and 257/1-7.* State's witness Sheila Swiger, unfamiliar with either party, confirmed the victim's arguing with the defendant, approaching the vehicle, kicking the vehicle and punching into the car. *T.T. at 332/13-24, 333/1-14.* State's witness Richard Edgell, again confirmed the victim's similar aggressive acts. *T.T. at 341/24, 342/1-14.* State's witness, and the victim's friend, Justin Gibbons, confirmed the victim's aggression, arguing with the defendant, approaching of the defendant's car, and the punching of the defendant while the defendant was still in his vehicle. *T.T. at 360/1-24, 361/01-19.* And finally, state's witness, Melissa Seachrist,

the closest person to the shooting, verifies all of the above aggressive act, threats, and punching the victim. *T.T. at 403/23-24,404/1-8 and 407/6-15.* No witness in this trial, whether presented by the State or the defendant, testified that the Defendant, threw **any** punches, let alone the first punch.

Moreover, the State admits and re-confirmed in its closing argument that the victim was the aggressor, acted badly, threatening, and throwing punches. *See T.T. at 989/9-12; 992/16-18; 993/7-24; and 996/1-3.* Accordingly, the basis for the sought admission of the MDMA evidence, reportedly to show that he was the first aggressor, was not a fact at issue and any assistance to that issue that the MDMA, and speculative scientific opinions, could have added would have been far outweighed by it's prejudicial effect pursuant to WVRE 403.

In the same light, the apparent additional basis for the admission of the MDMA and testimony on its side effects, was to show the extent of the victim aggressive behavior. Assuming for argument's sake that the aggressive behavior is evidence of an act of conformity is even a proper purpose for the admission of the evidence, the probative value to that fact and any assistance it would add to the jury, is far outweighed by its prejudicial effect. WVRE 403 provides that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury...." *WVRE 403.*

Under a best case scenario for the Appellant, the MDMA would have been admitted and Dr. Sullivan would have been allowed to opine that the **chronic** use MDMA possibly could have an effect on a general person's levels of aggression and paranoia, presumably to show that the victim was acting extremely aggressive at the time he was shot, a fact which is again undisputed. However, what actual relevance does that have to the victim and his actions in this matter?

Dr. Sullivan defined "chronic use," again a very subjective term even by his own definition, as consistent use of beyond "at least three (3) months, some people would say six (6) months;

{concluding that} obviously it's a little arbitrary." *T.T. at 626/11-24 and 627/1-3.* The important distinction being that any opinions he would have, no matter how tenuous, would only be in reference to chronic use, which, as detailed herein above, is not the proffer initially made which merely referenced MDMA use would lead to such side effects. Moreover, by appellant's counsel's own admission, the appellant/defendant had a very limited amount of MDMA use that they could attempt to attribute to the victim and that it would not even satisfy the three month standard let alone the six month. *T.T. at 627/4-20.*

Accordingly, if admitted, the discovery of the MDMA and Dr. Sullivan's testimony could assist the jury in considering at best that "possibly" chronic MDMA use leads to enhanced aggression and paranoia. In addition, the fact that MDMA was found on the victim at the time of his killing, without any indication that he was a chronic user, would mean that not only would any side effects be just a possibility based not on any scientific basis, but only Dr. Sullivan's opinion, but moreover, that the victim's chronic use, which would be necessary to even put him in the potential category to suffer side effects, can only be speculation. Clearly, any probative value this disputed evidence, if even scientific, would be outweighed by the prejudicial effect it would have on the jury and the high likelihood that it would mislead the jury into believing the victim was a chronic drug user.

For all of the reason stated herein in section 2, sub-parts (a) and (b), the proffered "scientific evidence" presented by Dr. Sullivan was properly excluded by the trial court. Moreover, without the admission of that proffered evidence to draw some relevant nexus to the MDMA and the underlying killing of Maurice Sears, the MDMA found on the victim continues to have no relevance to this matter. Thus, its admission, or the admission of Dr. Sullivan's speculative opinions at trial, would merely amount to an end run attempt to present improper, non-relevant character evidence

to the jury. As such, without a further linkage to the events of this matter the MDMA remains in admissible.

c) **The trial court did not err in its exclusion of the presentation of the defense theory that the subject MDMA equates to the victim probably being a drug dealer, ad thus is more likely to carry a firearm.**

The final basis upon which the appellant attempts to make the MDMA relevant and therefore admissible in the underlying trial of this matter is to assert that, the presence of 12.5 MDMA tablets indicates that Mr. Sears was more probable than not a drug dealer, and accordingly, was a person more probable than not to have a firearm on the day in question. The trial court, Judge Mazzone presiding, held that any "evidence" through the form of argument or opinion on the theory that the MDMA's presence equates to Mr. Sears being a dealer and therefore being a dealer was likely to carry a gun, was inadmissible pursuant to WVRE 403. *See July 10th, 2008 Memorandum ad Opinion Order, R. at 848-856, 852.* This Court had consistently held that "a trial court's decision on the admissibility of evidence will not be disturbed absent an abuse of discretion." *State v, Bass, 189 W.Va 416, 432 S.E.2d 86 (1993).* Moreover, "a circuit court has considerable latitude in determining whether to admit evidence as relevant...." *Craddock v. Watson, 197 W.Va 62, 475 S.E. 2d 62 (1996).*

In reviewing the exclusion of any testimony regarding the assertion that the victim was a drug dealer thus more likely to have a gun, and further denying the admission of the subject MDMA for this particular purpose, it is clear the trial court did not abuse its discretion. The trial court held a motion hearing to address the potential admissibility of the MDMA, and further expert "technical evidence" asserting that the MDMA established that the victim was a drug dealer. At the motion hearing the only proffered evidence that the MDMA equated to the victim being a drug dealer was the expected testimony of a former police officer that 12.5 tablets was consistent with a delivery amount of MDMA. There were no representations of prior knowledge or specific known events of

the victim dealing MDMA or any other drug, the drugs were not package in multiple packages, nor was there any other evidence of drug dealing in the form of scales, large amounts of cash or packaging materials. In short, while the proffer evidence regarding the potential "drug dealing" of the victim may have had some relevance, the weight of that evidence in establishing his drug dealing activity was very thin, at best. The mere fact that the MDMA may have been some indication of drug dealing does not alone in any way make it relevant to this matter. The relevance of the victim's "potential" drug dealing to his homicide requires not only a speculative leap that he is in fact a drug dealer, but moreover, the acceptance of the Appellant's theory that if he is a drug dealer he is more likely to have a gun.

Again, while this evidence may have some relevance to the issue of who brought the gun that shot the victim, its relevance is very tenuous, and when weighing that slight relevance against the unfair prejudice it would produce, it is clear the court did not abuse its discretion in excluding the evidence of the MDMA for the purpose of trying to show the victim was a drug dealer and thus, more likely to have possessed a firearm.

Finally, even should the exclusion of the MDMA and former law enforcement testimony for the purpose of showing the victim was a drug dealer be determined to be an abuse of discretion and therefore an error, that error is harmless given the other testimony provided in this case. Specifically, seven eye witnesses, Claudia Goreyab, Elizabeth Goreyab, Shelia Swiger, Richard Edgell, Justin Gibbons, Michael Callaway, and Melissa Seachrist, testify that they did not see the victim, Maurice Sears, either in possession of a firearm that morning, with a firearm in his hand while confronting the defendant, pull a firearm from his pocket or waste band, or with a firearm in his hand or around his person after he fell shot to the ground. *See T.T. at 253/9-16; 314/15-24; 333/21-23; 334/11-24; 342/ 21-23; 362/9-14; 369/12-13; 390/12-22; 403/23-24; 404/1-8; and 407/6-15* . Moreover, the

defendant, Frederick Ferguson, who took the stand in his own defense, did not and could not testify that the victim had, or attempted to pull a firearm during their altercation.

Only one witness, the defendant's friend Robert "Pablo" Hodge states that the victim attempted to pull the firearm and was shot with his own weapon. However, an examination of Mr. Hodge's testimony will show that he was thoroughly impeached on cross-examination to the extent that he said he could not identify his own voice in a tape recorded phone call with the defendant, after minutes before identifying his voice in the same phone call, once he realized that the phone call impeached his previous testimony on direct examination. *See T.T. at 635-692.* Given the weight of the evidence presented regarding the issue of who brought and/or produced the firearm that shot and killed Maurice Sears, and the limited relevance to the evidence excluded by the trial court's 403 ruling, any error that may have existed from the MDMA exclusion for the purpose to show the defendant as a drug dealer and thus more likely to possess a firearm is harmless.

Accordingly, for all of the arguments presented above the no error occurred in the exclusion of the MDMA found on the victim from the trial in this matter, nor in the exclusion of any testimony regarding the "possible" side effects of chronic MDMA use or drug dealers possessing firearms.

C. The Trial Court did not err by excluding evidence of allegations of domestic violence between Mr. Sears and two prior girlfriends.

The Appellant argues that the Court erred in not admitting evidence of specific acts of domestic violence between Mr. Sears and two prior girlfriends. The Appellant sought to introduce evidence of specific criminal acts allegedly committed on two women, not involved in any way in this matter, thirteen months and twenty-three months respectively prior to the Appellant killing Mr. Sears. For reasons that will follow hereinafter, the Appellant's argument that said evidence should have been admitted is contrary to existing West Virginia legal principles regarding character

evidence law. As such, the prior domestic violence incidents involving the victim had no relevance to the trial in this matter and would not only have been unfairly prejudicial but would also have mislead the jury as improper character evidence. It should be noted that the Appellant was not prohibited from presenting reputation and opinion character evidence on Mr. Sears. He, in fact, did so at the trial through the testimony of Wheeling Police Officer Patricia Boniey and Tracy McWhorter who both testified that Mr. Sears was not a peaceful man.

A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are reviewed for an abuse of discretion. *See McDougal v. McCammon, 193 W. Va. 229, 455 S.E.2d 788 (1995).* A party challenging a circuit court's evidentiary rulings has an onerous burden because a reviewing court gives special deference to the evidentiary rulings of a circuit court." *Gentry v. Mangum, 195 W.Va. 512, 518, 466 S.E.2d 171, 177 (1995); see Syl. Pt. 6, State v. Bass, 189 W.Va. 416, 432 S.E.2d 86 (1993).* Even when a trial court has abused its discretion by admitting or excluding evidence, the conviction must be affirmed unless a defendant can meet his or her burden of demonstrating that substantial rights were affected by the error. *See State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (1996).* In other words, a conviction should not be reversed if we conclude the error was harmless or "unimportant in relation to everything else the jury considered on the issue in question." *Yates v. Evatt, 500 U.S. 391, 403, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432, 449 (1991).*

Rule 404 of the West Virginia Rules of Evidence allows the introduction of the victim's character as follows:

> Evidence of a pertinent trait of character of the victim of the crime, other than a crime consisting of sexual misconduct, offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor....

W. Va. R. Evid. 404(a)(2).

The admissibility of specific instances of conduct is governed by Rule 405 of the West Virginia Rules of Evidence which states:

> **Specific instances of conduct.** - In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

W. Va. R. Evid. 405(b).

This Court has addressed the specific issue raised by the Appellant and has determined that specific instances of conduct as in the case at hand are clearly not admissible. The Court stated:

> Under Rule 405(b) of the West Virginia Rules of Evidence, a defendant in a criminal case who relies on self-defense or provocation may introduce specific acts of violence or threats made against him by the victim, ***and if the defendant has knowledge of specific acts of violence against third parties by the victim, the defendant may offer such evidence.*** (Emphasis added)

Syl. pt. 3 of *State v Woodson, 181 W.Va. 325, 382 S.E.2d 519 (1989). See also State v. Beegle, 188 W.Va. 681, 425 S.E.2d 823 (1992) (Relying upon Woodson holding that Defendant could not introduce specific instances of violence by the victim against third parties that the defendant did not have knowledge of at the time of the shooting).*

In the case *sub judice*, the evidence attempted to be introduced by the Appellant were specific instances of conduct by the victim. The Appellant did not have knowledge of the specific instances at the time of the killing. Therefore, this type of character evidence is specifically excluded by the West Virginia Rules of Evidence and *State v Woodson*. Accordingly, the Circuit Court properly excluded this improper character evidence.

Even if this Court overrules *State v Woodson*, the evidence sought to be admitted would not be admissible because it would not pass the Rule 403 balancing test. *See Dietz v. Legursky, 188 W.Va. 526, 425 S.E.2d 202 (1992).* The basis stated by the Appellant for necessity of the admission of this evidence was again to establish that Mr. Sears was the first aggressor. *See Appellant's brief*

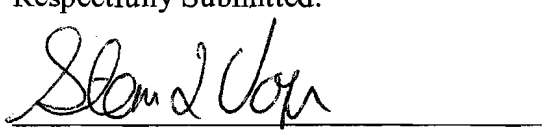
at 35. However, the issue of Mr. Sear's being the first aggressor was never disputed by the State, and thus not a fact at issue. Furthermore, the Appellant never really truly argued self-defense in this matter. He argued that the shooting was accidental, not intentional. In order to properly assert self-defense as an affirmative defense in this matter, the shooting would have to had been intentional but with some excuse as to why it occurred. The Appellant was simply trying to prove that the victim was a bad person, which is barred by the West Virginia Rules of Evidence.

VI.

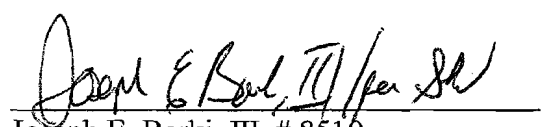
CONCLUSION AND RELIEF REQUESTED

Based upon the forgoing, the State submits that the Appellant's assignments of error are without merit. Accordingly, the State respectfully requests that this Honorable Court deny the Appellant's petition for appeal and affirm the underlying conviction and subsequent sentence.

Respectfully Submitted:



Stephen L. Vogrin, #8018



Joseph E. Barki, III, # 8510

CERTIFICATE OF SERVICE

Service of the foregoing **BRIEF OF APPELLEE, STATE OF WEST VIRGINIA** was had the Appellant, Fred K. Ferguson, III, via Facsimile and U.S. Mail through his counsel of record, Joseph J. Moses, Esquire, to his last known address of Moses Law Office, 1425 Chapline Street, Wheeling, West Virginia 26003 and Martin P. Sheehan, to his last know address of Sheehan and Nugent Law Office, 41-15th Street, Wheeling, WV, this 24TH day of September, 2010.

Stephen L. Vogrin
Assistant Prosecuting Attorney

Stephen L. Vogrin
Assistant Prosecuting Attorney
216 Ohio County Courthouse
Wheeling WV 26003
(304) 234-3631