



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35670

STATE OF WEST VIRGINIA

v.

AMOS GABRIEL HICKS

BRIEF OF APPELLANT AMOS GABRIEL HICKS

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BRIEF

Comes now the appellant, Amos Gabriel Hicks, by counsel, and submits the following brief seeking a reversal and setting aside of the McDowell County jury verdict of July 23, 2009 conviction for being an accessory before the fact to the first degree murder of Jamie Shantel Webb, for being an accessory before the fact to the malicious wounding of Jeffrey Mullins and conspiracy with Douglas Mose Mullins to carry out these offenses.

I.

KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

Petitioner was charged by the October 2008 term of the McDowell County Grand Jury by feloniously and lawfully, knowingly and intentionally, procuring, assisting or abetting Mose Douglas Mullins Jr. to feloniously, unlawfully, maliciously, willfully, deliberately, premeditatedly, and with the use of a firearm murder Jamie Shantel Webb in violation of W.Va. Code §61-2-1 and §61-11-7.

Count II of the Indictment charges malicious assault in that Amos Gabriel Hicks aided and abetted Mose Douglas Mullins Jr. in maliciously assaulting Jeffrey Mullins in violation of W.Va. Code §61-2-1.

Count III charged that Amos Gabriel Hicks unlawfully, feloniously, knowingly and intentionally conspired with Mose Douglas Mullins Jr. to murder Jamie Shantel Webb in violation of W.Va. Code §61-10-31, §61-2-1 and §61-11-7, as amended.

On July 6, 2009, a 404(b) hearing was conducted pursuant to the State announcing its intention to use testimony of petitioner's past history of illegal drug selling to show motive, plan and/or preparation. (Transcript 7/6/09 Hearing, p.8-29).

Beginning July 20, 2009, the charges were tried to a jury impaneled before the Honorable Booker Stephens, Judge of the Circuit Court of McDowell County. This trial concluded on July 23, 2009, when the jury rendered a guilty verdict on all three counts.

The defendant timely filed a Motion for New Trial which was denied on October 5, 2009. The defendant was then sentenced in accordance with the jury's recommendation for life without mercy on the murder conviction; two to ten years for malicious assault and one to five years for conspiracy, with all sentences to run consequently. (Transcript, October 5, 2009 Post-conviction Motion Hearing, p. 25).

It is from these proceedings that appellant, Amos Gabriel Hicks, seeks relief.

II.

STATEMENT OF FACTS

BACKGROUND: The Shootings

On May 13, 2001, Mose Douglas Mullins (hereinafter "Mose"), James "Rusty" Waldron (hereinafter "Rusty"), Jeffrey Mullins, Shantel Webb and Don Ball met at the S&M Market in Jolo, West Virginia. Ostensibly, their plan for the afternoon was to meet in the country and get high on drugs. Mose and Rusty left the S&M Market in a yellow Nova and drove to a secluded part of Payne Fork Hollow Road and turned the car around to face back out of the hollow. Jeffrey Mullins, Shantel Webb and Don Ball, in Shantel Webb's grandmother, Lula Bell Webb's red Sunfire, pulled nose to nose with Moses' vehicle.

Mose got out of his yellow Nova, walked to its rear, opened the trunk, and then came up to the driver's side of the Sunfire and started talking to Don Ball and Jeffrey Mullins. Rusty was sitting in the passenger seat of Moses' vehicle, rolling a marijuana joint. Shantel Webb was standing outside the Nova speaking to Rusty. Without threat or warning, Mose

presented a .9 mm pistol and started shooting. After he heard the first gun shots, Rusty looked up, could not see Jeffrey Mullins, but saw Mose leaning into Don Ball's Sunfire. Then he heard multiple gun shots from the car, after which Mose stood up beside the Firebird and walked over to the front passenger side where Shantel Webb and Rusty were talking. Shantel Webb asked Mose, "What are you doing?" and he shot her in the abdomen.

According to Rusty, after Mose shot Don Ball and Jeffrey Mullins in the Firebird and came back to Shantel, Don Ball got out of the Firebird and ran into the woods. After shooting Ms. Webb in the abdomen, Mose ran after Don Ball, but could not catch him. As he returned to the scene, Mose saw Shantel lying in the road and asked her, "Are you in pain?" Shantel did not answer, and Mose shot her in the head. (Vol. 3, pg. 631-635).

Mose drug Shantel's body and the unconscious Jeffrey Mullins over an embankment so his vehicle could pass by the other vehicle and exit Payne Fork Hollow Road. Thinking he might be able to get away from Mose, Rusty drove to his brother's house near Keen Ridge, but his brother was not there. They spoke to Johnny Ray Viars, a neighbor from whom Mose borrowed a shirt. After about five minutes, they left Keen Ridge for Compton Mountain where, in an isolated site, Mose discarded the pistol, cut off and discarded his bloody pants' legs and shirt. (Vol. 3, pg. 647).

Leaving Compton Mountain, Mose and Rusty drove his car to a do-it-yourself car wash in Whitewood, Virginia, where Mose washed blood splatter off the Nova. They left the car wash for Brown Mountain at R.C. Coal's Store where Mose got gas. Then they drove back to the Brit Day Trailer Park where Mose and Rusty lived. There, they were arrested by a large number of state and county law officers.

At this point, Mose Mullins was interviewed by Corporal Jason Cooper of the West Virginia State Police. Mose denied any involvement in the shootings, asking the police who was shot and who was involved. (Vol.1 pg. 161).

Moses' Plea Agreement:

Seventeen months later, on December 23, 2002, Mose Douglas Mullins entered into a plea agreement with the State under which he plead to one count of second degree murder and two counts of malicious assault, with one malicious wounding sentence to run concurrently with the second degree murder sentence. Under this plea agreement, his exposure for executing Shantel Webb, and seriously wounding Don Ball and Jeffrey Mullins was reduced from life without parole to a maximum of forty years with parole eligibility in 2015 after he served twenty-five percent (25%) of his sentence. (Vol. 2, pgs.188-192).

Moses' Statements:

From his arrest on May 13, 2001 until appellant's trial in the summer of 2009, Mose Mullins gave nine statements, three of which were under oath. On the stand in this case, Mose admitted he lied or perjured himself in the various statements (Vol. 2 pp 170-171).

1. May 13, 2001 – Statement to State Police Corporal Jason Cooper in which Mose Mullins denies any involvement in the shootings. (Vol. 2, pg. 16, 197).
2. Shortly after his arrest in the summer of 2001 – Statements to his lawyers, Tim Lupardus and Sonny Boninsegna. (Vol. 2, pg. 177).
3. December 23, 2002 – Plea colloquy before Judge Stephens. In his testimony, under oath, Mr. Mullins emphatically denied that Rusty was involved in any way in the shootings. Specifically, he did not pay him or offer to pay him, did not ask Rusty to act as a lookout, did not ask Rusty help dispose of the bodies, did not assist after the shooting in washing cars or discarding blood-soaked clothing. This is the first time he implicates petitioner in the shootings. (Vol. 2, pp.191-194; pp. 213-219; pp. 239-241).

4. January 30, 2003 – Presentence Investigative Report including a letter from Mose to his Probation Officer. (Vol. 2, pg. 189).
5. February 14, 2003 - Statement to representative of the Federal Bureau of Alcohol, Tobacco and Firearms. (Vol. 2, pp. 175-178).
6. February 26, 2003 – Federal Grand Jury testimony. (Vol. 2, p. 194).
7. December 29, 2003 - Statement to Special Prosecutor Fred Giggenbach given in preparation for his testimony in the trial of Rusty Waldron for murder. (Vol. 2:227-228; 2:256-262, 2:276-278). (Vol. 2 pp. 220-225).
8. May 5, 2004 – Testimony at Rusty Waldron’s trial in which he implicated Rusty Waldron by saying that he offered Rusty [for the first time] \$1000.00 to act as a “lookout.” (Vol. 2, pp 176-182; pp 242-245).
9. October 21, 2008 - State Grand Jury Testimony. (Vol. 2, pg. 194).

During his trial testimony, Mose admitted he perjured himself at his plea hearing when he told Judge Stephens Rusty had involvement in the shootings as well as the proposed targets of the shootings and the amount of money Hicks promised him for the shootings. (Vol. 2 pg. 236).

Notice of State’s Intention to Introduce 404(b) Evidence:

Prior to trial in this case, the State provided its Notice of Intention to Introduce 404(b) Evidence. In that notice, the State succinctly described its theory:

“The State’s theory of this case is that the motive for Jamie Shantel Webb’s murder was the defendant’s desire to retaliate against her for breaking into his home and stealing several firearms. The defendant solicited Mose Douglas Mullins Jr. to carry out the murder plan by offering him \$10,000.00 to kill Ms. Webb and her close friend, Jeffrey Mullins, and providing him with the .9 mm handgun that Mullins used to kill Ms. Webb and severely wound Jeffrey Mullins.” (State’s Notice to Introduce 404(b) Evidence).

In its motion and during the course of a Rule 404(b) hearing conducted on July 6, 2009, the State advised that it intended to prove the other crimes, wrongs or acts through the testimony of Mose, Melissa Coleman, Jessie Lynn Elswick, Freddie Elswick and Hobert

Mullins. The State argued their testimony should be admitted for the specific purpose of proving “motive,” “preparation” and/or “plan” of the defendant and Mose. The evidence sought to be admitted from these witnesses was that the appellant was actively involved in the illegal sale of marijuana, Tylox and Oxycontin for several years prior to the murder of Shantel Webb, and that he used Mose and others including Jessie Lynn Elswick and her husband, Freddie, to sell drugs for him. (Tr. July 9, 2001 Hearing pp. 9-30).

The State proffered that Melissa Coleman, Jessie Lynn Elswick and Mose have described in statements and prior testimony, the appellant’s vengeful state of mind in regard to the theft and sale of firearms by Melissa Coleman and Shantel Webb, and his desire to retaliate against them.

Jessie Lynn Elswick and Freddie Elswick would testify that prior to 2001, petitioner “fronted” the narcotic drugs Tylox and Oxycontin to her and husband, Freddie Elswick. They would take the money from their sales to the defendant and receive more pills for sale. Both Mr. and Mrs. Elswick are serving prison sentences for their involvement in narcotic drug trafficking.

It was also proffered that Jessie Lynn Elswick would testify that petitioner complained to her about his house having been broken into and some of its personal property being stolen. According to Ms. Elswick, the defendant said he ran into one of the women who had stolen his property and whipped her with a belt “like a red-headed stepchild.” (State’s Notice of Intention to Introduce Rule 404(b) Evidence).

In its response to the State’s Notice of Intention to Introduce Rule 404(b) Evidence and during the course of the July 6, 2009 hearing, petitioner objected, alleging that the proposed 404(b) evidence of petitioner’s prior dealings with illegal drugs is irrelevant

because by the State's announced theory of the case, Shantel was killed in retaliation for stealing petitioner's guns. Moreover, the use of prior uncharged crimes was grossly prejudicial because it was really offered to show petitioner's bad character and that he acted in conformity therewith. (Defendant's Response to State's Notice of Intention to Introduce Rule 404(b) Evidence).

The Court admitted the 404(b) evidence stating:

"Well, I am prepared to rule on those matters, and pursuant to the case of State v. McGinnis, 455 S.E.2d 516, (1994), there are six procedural steps, according to that case, that the Court must go through in order to make its ruling. The first step is a hearing which must be held outside the presence of the jury, which was waived in this instance. The State of West Virginia must identify:

2) The specific purpose for which the evidence will be used. My recollection indicates that the State – the State is maintaining the specific purposes for which it offers the evidence is for motive, plan and there was a third one.

Mr. Bell: Preparation, your honor.

The Court: Preparation and plan?

Mr. Bell: Yes.

The Court: Okay.

3) The third step is the trial court must be satisfied by preponderance of the evidence that the after conduct occurred and that the defendant committed the same. The Court finds, based on its review, that the acts and conduct occurred and they were committed by the defendant.

4) Under No. 4, the trial court must determine that the evidence is relevant under Rule 401 and Rule 402 of the West Virginia Rules of Evidence. The Court finds that the evidence that the State wishes to offer as to other wrongs and acts is relevant under 401 and 402.

5) The trial court must under Rule 403, balance out whether or not the evidence offered for admission, whether the probative value would outweigh any prejudicial effect to the defendant. Under the balancing test of Rule 403, the Court concludes that the probative value of this

evidence outweighs any prejudicial effect of the defendant.

6) Step 6 is the trial court should give a limiting instruction to the jury when the State offers its evidence and the State will – and the Court will comply with that procedural matter by giving a limited mandatory instruction to the jury. The Court notes the objection of the defendant and his counsel to the Court’s ruling as to the 404(b) matters. (1:7-9).”

The Court granted the defense motion for a continuing objection to the Court’s ruling on the 404(b) evidence (1:9).

Rule 404(b) Evidence: Trial Testimony:

Jessie Elswick testified she has known Mr. Hicks since they graduated from Whitewood High School in 1982. In the late 1990’s, she and her husband, Freddie, bought illegal narcotic pain medication from appellant, once every six to twelve months. She testified that her husband frequently got red Tylox capsules from Mr. Hicks. (2:384-387). She also testified that during the time she dealt with Hicks, he moved from a trailer to a large brick home. During the time she knew him, she was not aware of Mr. Hicks having a steady job. Mr. Hicks would customarily front the Elswicks with Oxycontin to sell and, in turn, they would return Hicks the money they got from selling the drugs and keep a cut for themselves. While the Elswicks were dealing with petitioner, Freddie Elswick was taking 60-80 mg. Oxycontin a day.

The only thing Mrs. Elswick recalled about the subject charges was that her husband once took her over to Mr. Hicks’ home, where she heard Hicks talking about some girl who had broken into his house and stole a gold chain, some pills and guns. She said he talked about meeting her on the road and whipping her with a belt like a “red-headed stepchild,”

and getting his guns back. Mrs. Elswick had been convicted of drug trafficking with a firearm and spent approximately five years in a federal penitentiary.

At the time of his testimony, Freddie Elswick was serving a thirty year sentence in Federal Prison in Buckner, North Carolina for drug trafficking with a firearm. Mr. Elswick had known Mr. Hicks for twenty-five to thirty years and bought Hydrocodone, Tylox, Oxycontin and Lorcet 10 from him beginning in 1994. (3:497) He would typically buy one hundred tablets of Oxycontin 40 mg., at one hundred tablets at a time, for which he paid Mr. Hicks \$3,250.00. Other times, he would send his wife, Jessie, to get the pills from petitioner. Mr. Elswick testified when he would run out of pills, he would develop sweats, chills, nausea and diarrhea. (3:499-500). Mr. Elswick testified that Mr. Hicks would front pills to him, and also traded pills for a deer rifle and a shotgun in 1995 or 1996. (3:500). Mr. Elswick estimated that he obtained Oxycontin from petitioner about fifteen times. The prosecutor asked Mr. Elswick about the types of homes in which Mr. Hicks lived and he described how, over the years, Mr. Hicks moved up from a doublewide mobile home on Bradshaw Mountain to a mobile home in Whitewood, Virginia, and finally, to a large brick home with a large yard on Brown Mountain near Whitewood. (3:502-503). In the spring of 2001, Mr. Elswick testified that appellant brought him drugs and money he had obtained in Myrtle Beach, South Carolina. This was a couple of days before Mr. Elswick heard about the shooting. Mr. Elswick testified that he did not know Mose, Shantel Webb, Jeffrey Mullins or Don Ball. (3:504).

Kevin Wayne Riffe was Randy "Homebrew" Riffe's brother. He testified that one day, he hitched a ride to his brother's house up Bug Hurley Hollow with Mr. Hicks and ran

into Melissa Coleman. Mr. Riffe said they started arguing and Mr. Hicks took off his belt and “whipped” Melissa Coleman five to eight times “like you would a youngun, you know.” (3:518).

Therell Riffe testified that in the late 1990’s or 2000, he sold a .9 mm Ruger pistol to Hicks. He could not recall how much he sold it for and believes the sale took place around 1999, or earlier.

Karen Payne Pruitt worked at the RC Store in Whitewood, Virginia, on May 13, 2001. On that day, she saw Mose Mullins Jr. at the store. Mose bought \$5.00 worth of gas for a yellow Chevy Nova. Approximately ten minutes before Mose Mullins came to the store, she had heard from another customer about a triple shooting in the vicinity.

According to Ms. Pruitt, Mose was dressed in cutoffs, no shirt and no shoes. She remarked to him to be careful not to cut his feet on the gravel and glass in the parking lot. She also noticed another man in the store with Mose, who just walked around. (3:527-535).

Chastity Davis testified that she is Mr. Hicks’ daughter. She recalled that Mr. Hicks moved from a single-wide mobile home on Brown Mountain in Buchanan County, Virginia, to a brick house on up the mountain from the trailer in November of 2000. She testified that the break-in and theft of the guns and jewelry from her father’s home took place in April or May of 2000, when he was still living in the trailer at the bottom of Brown Mountain. (3:551-553). She also testified that her father and his girlfriend at the time, Renatta Heyak, and his current girlfriend, Leona, frequently went out of state on motorcycle rallies. (3:558).

Bertha Hicks, appellant’s mother, testified that she did not know Shantel Webb or the other two victims. She was aware of the break-in and theft from appellant’s mobile

home sometime before appellant bought a brick home on Brown Mountain on November 28, 2000. (3:565-566).

Moses' Attorney Fees:

Mrs. Hicks testified that Josie Hicks, who was married to appellant's brother, John, told her that Pam Mullins, Mose's wife, needed some money for attorney fees, bills and expenses. Ms. Hicks gave her \$200.00 when Josie Hicks came by her house a day or two later. She recalled that the money was in cash and in small denominations, ones and fives. (3:568-569). She denied ever having any conversation with Mose or appellant about Mose's attorney fees, or gathering money for Pam's bills or a legal fund. She denied that she ever gave Josie Hicks \$10,000.00 for Moses' attorney fees and family expenses. (3:570).

Pam Mullins' family are cousins to members of the Hicks family. Shortly after the May 13, 2001 shootings and the incarceration of Mose Mullins, Mose asked her to help get him a lawyer. She denied that her husband ever told her to go to Mr. Hicks and borrow, or otherwise, obtain \$10,000.00 for expenses and attorney fees. On the contrary, she testified that she obtained monetary gifts and loans from family members, sold her trailer, car and other belongings to raise money for Moses' defense. She testified that "all parts of my family gave me money," including Josie and Bertha Hicks. She recalls Josie Hicks giving her money in a brown paper bag, which she took to attorney Tim Lupardus. (3:582-4). She testified that Mr. Hicks never offered her, or gave her, any money for her husband's legal expenses. (3:584-86).

Pineville attorney Tim Lupardus testified that attorney Sonny Boninsegna, and he were retained by Moses' wife, Pam, to represent him in the murder case. The fee agreed was \$10,000.00, and was paid in three unequal cash installments. He would not remember

the dates of payments or amounts of the installments, he testified Pam represented to him the money came from family donations and the sale of property. (2:342-4, 351-357).

Mr. Lupardus stated that his client, Mose, represented to him throughout the course of his representation, that Mr. Hicks did not ask him to commit the murder and wounding. (2: 358). Mr. Lupardus also allowed that Mose lied to him when he first began to represent him. (2:354).

The Break-In and the Beating of Melissa Coleman:

As stated, the State sought to prove that the motive for the shootings was that Shantel Webb, and a friend named Melissa Coleman, broke into Mr. Hicks' home in Whitewood, Virginia and stole guns and jewelry from him. They pawned the guns to a man named Roy Bolen in Raysal, West Virginia, for \$200.00. Within a day, petitioner learned that Mr. Bolen had the guns and he bought them back from Mr. Bolen for \$250.00. (2:375-379).

Melissa Coleman testified that she had bought large quantities of Oxycontin from petitioner – probably a couple of hundred at a time. The frequency of her purchases was every other day for a couple of months. (2:423-424). She estimated she bought or traded for a total of nearly \$7,000.00 worth of drugs from Hicks. (2:429). On numerous occasions, she observed Mr. Hicks at his home with a Maxwell House coffee can filled at least halfway up with Oxycontins. (2:427).

Ms. Coleman testified that it was Shantel Webb's idea to go to Hicks' house, break in and steal what they could. While Ms. Coleman waited in the car, Shantel Webb went into Hicks' single-wide trailer near Whitewood, West Virginia, put a sock over her hand and broke through the trailer door. After about ten minutes, Ms. Webb returned to the car with a long gun, several handguns] and gold chains. (2:430-432). No drugs were taken from

Hicks' home to Ray Bolen's home in Raysal, where Shantel either sold or pawned the guns for several hundred dollars. According to Ms. Coleman, she, Shantel and their friends bought Oxycontin with the money Shantel got from the guns. (2:433-435).

Approximately three days later, Ms. Coleman and her husband, Stevie, went to the late Randy "Homebrew" Riffe's house to buy drugs. While waiting for the drugs outside Homebrew's home in Bug Hurley Hollow, Ms. Coleman and Kevin Riffe, Homebrew's brother, encountered Mr. Hicks and Mose as he drove up behind them. (2:436-438).

Ms. Coleman said Hicks approached her car and demanded to know if she knew who broke into his house. She denied breaking into his house, but he kept yelling at her that he knew that she knew who broke into his home. (2:438). The argument continued to escalate until petitioner asked Mose for his belt and "whipped" Ms. Coleman with it. (2:438-439). Ms. Coleman stated that she never divulged to petitioner that Shantel had broken into his home and stolen his guns. (2:442). Ms. Coleman testified that the break-in and theft occurred two or three days before Mother's Day, 2000 – a year before the shootings. (2:443).

Ms. Coleman testified that she was a convicted felon, having been convicted of breaking and entering and stealing money for drugs. (2:447-448). She testified that the only threat Hicks made to her was do not go to the law about the beating. Contrary to Moses' testimony, Ms. Coleman emphatically denied that Mr. Hicks ever threatened to kill her. (2:450).

John Gary aka "Johnny" Mullins testified that he knew appellant as "Big Man," and had known Mose for many years. During the time frame of 2000-2001, he visited Mr. Hicks' home more than five times with Mose. At no time did he hear any conversation

between Hicks and Mose close to Hicks discussing the possibility of Mose killing someone. (3:608).

Teresa Collins testified that she knew Gabe Hicks, by sight, and had seen him at Moses' home, but she could not remember how many times. She did recall going to Hicks' home in Virginia with her boyfriend, Johnny Mullins, approximately two years before. She recalled that Mr. Hicks saw her walking down the road and stopped to give her a ride to Three Forks. She denied ever going with Johnny Mullins over to Virginia, to Gabe Hicks' house. She denied any conversations with her husband about the shootings, and denied having any conversations with her husband or the police, about somebody was going to get hurt. (3:703-706).

Mose Mullins' testimony about his participation in the shootings was vaguely similar to Rusty Waldron's. Vague, because Mose Mullins admitted he "momentarily lost consciousness" before and during the shootings. (2:219).

"Had to be honest with you I don't really remember much about that day." (2:218).

* * * * *

"...[j]ust as if I was standing there talking to him (Don Ball), and it was just like something snapped in me." (2:218).

* * * * *

"Next thing I know I had done shot Mr. Ball and Mr. Mullins and Ms. Webb. When I came to, I was standing there next to Ms. Webb and she was lying on the ground." (2:218).

Moses' Potential Motives for Shootings:

Ms. Coleman also admitted that she told ATF Agent, Aaron Yoh, that one and half weeks prior to the May 13, 2001 shootings, Shantel Webb approached her to help steal

Oxycontin from Mose. (2:454-455). When asked if she told Agent Yoh that Shantel and she actually stole 220 Oxycontin from Mose while Jeffrey Mullins and Stevie Coleman waited in the car, she answered:

A: "No, sir, I did not. If I did, I do not remember saying that. That has been so long ago I do not remember saying that, but if I did, I don't remember." (2:456).

Upon redirect by the prosecutor, Ms. Coleman again equivocated:

Q: (interposing) Well let me – what I am asking you is, you're telling the jury here they, you're telling the jury here today under your oath that you and your husband did not steal anything from Doug Mullins -.

A: No I personally didn't, but they might have.

Q: -a week and a half or two weeks before-

A: We did know it happened though, for a fact. (2:456-7).

Special Agent, Aaron Yoh, of the ATF testified in the State's case in chief about the registration history of the .9 mm Ruger pistol utilized in the shootings. (2:408-416). Called later by the defense, Agent Yoh testified that he had taken a statement from Melissa Coleman about the theft of drugs belonging to Mose Mullins.

According to Agent Yoh:

"Ms. Coleman stated that approximately 1-1/2 weeks prior the shooting, Shantel Webb approached her to help her steal Oxycontin pills from Doug Mullins. She stated that her and Jeffrey Mullins had watched Doug Mullins hide his narcotics and knew where they were located. She stated that she and Shantel Webb stole approximately 220 Oxycontin pills while Jeff Mullins and Coleman's husband, Stevie, waited in the car." (Tr. 3:599).

When asked about the disposition of the pills, Agent Yoh responded:

A: "She stated that on – paragraph 4- she stated that Shantel Webb and Mullins were selling them. That'd be Jeffrey Mullins that were selling a lot of pills that had been stolen." (3:599).

III.

**ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL IN THE MANNER IN
WHICH THEY WERE DECIDED IN THE LOWER COURT**

The petitioner asserts that the Circuit Court of McDowell County erred in the following particulars:

1. The Court erred in admitting the testimony of Melissa Coleman, Jessie Elswick and Freddie Elswick pursuant to Rule 404(b) W.V.R. Evid.
2. The Court failed to meaningfully determine the scope for which the 404(b) evidence would be permitted.
3. The evidence before the trial court was insufficient as a matter of law to sustain the verdict which was contrary to the law and evidence.

IV.

**POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW AND
FACTS**

A.

THE COURT ERRED IN ADMITTING RULE 404(b) EVIDENCE

The trial court erred in admitting evidence of Hicks' alleged drug dealing, because the evidence was irrelevant to the prosecution for being an accessory before the fact, to murder and malicious wounding and conspiracy to commit murder, and so grossly prejudicial that a curative instruction would be of no value.

W.Va. Rule of Evidence 404(b), mandates that evidence of other crimes or bad acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. The purpose for this exclusion is to:

“[p]revent the conviction of an accused for one crime while the use of evidence that he has committed other crimes, and to preclude the inference that because he committed other crimes previously, it is more liable to commit the crime for which he is presently indicted and being tried.” State v. McDaniel, 211 W.Va. 9, 12, 560 S.E.2d 484, 487 (2011) quoting State v. Thomas, 157 W.Va. 640, 654, 203 S.E.2d 445, 455 (1974). However, evidence of other crimes or bad acts may be introduced for specific purposes listed in the Rule if the evidence is relevant and its probative value outweighs its prejudicial effect. Those purposes include proof of motive, opportunity, intent, preparation, planned knowledge, identity or absence of mistake or accident. McDaniel, 560 S.E.2d at 487. See also: Perrine v. E.I. DuPont De Nemours and Company, 225 W.Va. 482, 694 SE2d 815, petition for rehearing denied, 2010 WL 2243 936 (W.Va. 2010).

In the instant case, the State, and in turn, the Court circumscribed the specific purposes for which the 404(b) evidence would be used to motive, plan and preparation (1:8).

The trial court’s determination regarding the introduction of evidence under Rule 404(b) is reviewed under an abuse of discretion standard. State v. McGinnis, 193 W.Va. 147, 159, 455 S.E.2d 516, 528 (1994). However, the issue of whether the trial court correctly found the 404(b) evidence was admissible for a legitimate purpose, is reviewed *de novo*. Syl. Pt. 3. State v. LaRock, 470 S.E.2d 613, W.Va. (1996). The contest over the admission of evidence under Rule 404(b) is well-recognized as presenting significant and pivotal points, which many times drives the verdict.

“In the exercise of discretion to admit or exclude evidence of collateral crimes charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected for the charge which the accused is being tried.” Syl. Pt. 2, State v. Nelson, 221 W.Va. 327,655 S.E.2d 73

(W.Va. 2007).

In order to ameliorate the potential prejudice to a defendant by admitting prior bad act evidence, this Court constructed certain mandates by which the interest of the accused are to be protected:

“It is presumed a defendant is protected from undue prejudice if the following requirements are met:

- 1) The prosecution offered the evidence for a proper purpose;
- 2) The evidence was relevant;
- 3) The trial court made an on-the-record determination under 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by the potential for unfair prejudice; and
- 4) The trial court gave a limiting instruction. Syl. Pt. 3, State v. LaRock, 470 S.E.2d 613, (W.Va. 1996); State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994).

Purpose and Relevance:

In this case, the appellant does not contend that the trial court failed to conduct the hearing required by McGinnis, and concedes that a limiting instructions was given as required under McGinnis. The appellant asserts that the trial court abused its discretion in determining that evidence of his alleged drug dealing was relevant to his prosecution for first degree murder, malicious assault and conspiracy. Appellant also avers that the trial court erred in conducting meaningless and *pro forma* balancing of prejudice versus probity.

The first requirement of the guidelines as set forth in McGinnis and LaRock supra is that the State identify a “proper purpose” for the admission of the evidence of other bad acts:

It is not sufficient for the prosecution or trial court to cite or mention the litany of possible uses listed in 404(b). The specific and precise purpose for which the evidence is offered must be clearly shown from the record and that purpose alone must be told to the jury and the trial court’s instruction. Syl. Pt. 1, State v. McGinnis, 455 S.E.2d 516, (W.Va. 1994).

It is clear that the obligation to identify a proper purpose for the admission of prior bad act evidence involves much more than simply listing one or more of the purposes enumerated in the Rule:

“To satisfy the requirement to clearly show the specific and precise purpose for which evidence is offered under W. Va. Rules of Evidence 404(b) as set forth in Syl. Pt. 1 of State v. McGinnis (citation omitted) the proponent of the 404(b) evidence does not only identify the factor issue to which the evidence is relevant, but must also plainly articulate how the 404(b) evidence is probative of that fact or issue.” Syl. Pt. 5, State v. Sanders, 215 W.Va. 755, 601 S.E.2d 75 (W.Va. 2004). (emphasis supplied).

The connection between the evidence and the permissible purpose should be clear, and the issue on which the other crimes evidence is said to bear should be the subject of genuine controversy. For example, if the prosecution maintains that the other crime reveals defendant’s guilty state of mind, then his intent should be disputed. But, if the defendant does not deny that the actual act was deliberate, the prosecution may not introduce the evidence merely to show that the acts were not accidental. 1 McCormick on Evidence §19 (6th ed. 2006).

In order, then, to admit evidence under 404(b), “a court must be able to articulate a way in which the tendered evidence logically tends to establish or refute a material fact in issue, and that chain of logic must include no link involving an inference of a bad person is disposed to do bad acts. Once the chain of logic has been articulated, it’s probative strength must be weighed under Rule 403 against any potential for unfair prejudice. The Government of the Virgin Islands v. Piney, 967 F.2d 912, 915 (3rd Cir. 1992).

While the purposes identified by the State for the admission of the 404(b) evidence was only to prove motive, preparation and/or plan for the shootings; the State’s opening statement belies these pristine reasons and foreshadows a more prejudicial purpose:

“I mean, here’s this big-shot drug dealer from Buchanan County, and we will submit to you, it bruised his ego, damaged his reputation, and he wanted to make an example of Shantel and Jeffrey and make them pay for what they had done to him for stealing his guns.”
(State’s Opening 1:20.)

If, indeed, the reason for the 404(b) evidence was to prove motive, the introduction of evidence of the details of defendant's drug dealing, including pricing, cost, profit and amounts, does not make the shootings in retaliation for Melissa Coleman and Shantel's breaking into petitioner's home and stealing guns and jewelry any more or less likely.

With respect to planning and preparation, even a cursory review of the totality of the evidence demonstrate that there was little or no planning or preparation by anyone, let alone Mr. Hicks. (2:252-255).

The only evidence of planning or preparation comes with Moses' trial testimony that Hicks promised him \$10,000.00 or \$20,000.00 for killing Shantel Webb, Jeffrey Mullins and "the whole family." Even Mose admits that at the time of their conversation, Hicks did not tell Mose who he wanted killed. (2:139).

Moreover, Mose testified he did not know if Hicks was serious about wanting the family killed.

"Again, like I said, he [Hicks] was – he was angry visibly, you know what I mean? You know what I mean, at the time? Like I said, I couldn't tell you then if he was like – if he was being serious or if he was saying it out of anger. (2:139).

Two to three weeks later when "messed up" on drugs and allegedly indebted to Hicks for drug money, Mose testified he went to Hicks' home and asked him if he still wanted the people killed. He said "yes," and petitioner gave him a .9 mm semi-automatic pistol. (2:141-3).

With respect to homicide, this Court has found that evidence of other violent acts between a defendant and a victim is generally admissible on the basis that it bears upon intent, malice or motive for the homicide. State v. Hager, 204 W.Va. 28, 36, 511 S.E.2d 139, 147 (1998). (Affirming admission of evidence of domestic violence between defendant

and a decedent); State v. Newcomb, 223 W.Va. 843, 868, 679 S.E.2d 675, 700 (2009).

(Upholding evidence that five months before the fatal stabbing, defendant had stabbed the same victim); State v. LaRock, 196 W.Va. 294, 311, 470 S.E.2d 613, 630 (1996).

(Affirming admission of defendant's prior abuse of his deceased infant son.) See generally: State v. Smith, 178 W.Va. 104, 108 n.2, 358 S.E.2d 188, 192 n.2 (1987).

In this case, there is no evidence connecting petitioner's alleged drug dealing with any violence toward Shantel Webb, Jeffrey Mullins or Don Ball. This Court has upheld the admission of a defendant's drug use to show motive under Rule 404(b), but this was an incident in which the defendant killed the victim because the victim had sold him some "bad acid." State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205, cert. denied, 531 U.S. 1020 (2000). Here there is no evidence that Hicks' anger at Ms. Webb, Jeff Mullins, or Don Bell had anything to do with the quality, quantity, use, sale or possession of illegal drugs.

See also *State ex rel. Kitchen*, 2010 WL 2346245, *11-14 (W.Va. 2010) (in trial on charges of murder and conspiracy to commit malicious assault, the admission of statements between the defendant and his accomplice that '[t]hey grew dope up in the hollow,' '[t]hey said it was the best they ever did,' and they should 'whip[] their ass for stealing our weed' was proper as evidence of the motive of the defendant to assault the victims)."

The Court abused its discretion in admitting extensive testimony from various witnesses about the details of Hicks' dealings, including prices, amounts and identities of other customers over his many year history of drug sales. This evidence was not relevant or material to the charges in the indictment and certainly were not part of any plan or preparation for killing in retaliation for theft of guns and jewelry. There was no evidence that appellant paid Mose with drugs or gave him drugs to embolden him to commit the

killing. Cf State v. Bonham, 184 W.Va. 555, 559, 401 S.E.2d 901, 905 (1990), (evidence that the defendant illegally transferred amphetamines to a “hit man” as well as evidence that defendant had associated with the hit man in the past and knew him to be violent tended to establish intent, preparation, knowledge and identity.) Even if the reason for admitting evidence of Mullins’ drug debt to Hicks was minimally relevant to the shootings, the details of Hicks’ drug dealings with others and his apparent favorable change in financial circumstances did not tend to make the existence of any fact of consequence about the determination of the motive for the killing more or less probable than it would be without the evidence. Rule 401, W.V.R. Evid. (1985).

After watching Mr. Hicks whip Ms. Coleman, Mullins testified that if Hicks told her he found out that she was involved in the break-in, he would kill her where she slept. When asked if Hicks was serious about the remark, Mose stated:

A: “Well he was angry. He was angry. You know what I mean? I— I don’t know if he was serious about actually killing her or just verbally you know how you say things when you are angry sometimes, you know. As far as I know, I mean that’s what he was doing. He was saying it out of anger but.” (2:131)

Importantly, and despite understandable, animosity toward Hicks, Ms. Coleman herself testified that at no time during or after the spanking incident did Hicks threaten to kill her. (2:449-450).

Balancing Under Rule 403:

Even if this Court were to uphold the trial court’s finding that Mr. Hicks’ drug dealing was relevant to motive, plan and/or preparation, the trial court nevertheless abused its discretion in failing to conduct any meaningful balancing of prejudice with probity, and

failed to set any boundaries for the admission of the prejudicial evidence of defendant's alleged drug trafficking under W.V.R.Evid. 403.

On the matter of unfair prejudice, this Court has observed:

“Under Rule 403, [u]nfair prejudice does not mean damage to a defendant's case that results from the legitimate force of the evidence; rather it refers to evidence which tends to suggests (sic) decision on an improper basis.” State v. LaRock, 196 W.Va. 294, 312, 470 S.E.2d 613, 631 (1996).

The Advisory Committees' note to Federal Rule of Evidence 403 explains that:

“ '[U]nfair prejudice' within this context means an undue tendency to suggest a decision on an improper basis, commonly though not necessarily an emotional one.” State v. Taylor, 215 W.Va. 74, 78-79, 593 S.E.2d 645, 649-650 (2004).

In Taylor, this Court recognized the potential for an incurably prejudicial effect of evidence of narcotic addiction on a jury and held that the trial court abused its discretion by admitting evidence of the defendant's use of illegal drugs as proof of a motive to steal. The Court also looked to the chronology of events and found the prejudice was enhanced because the State's evidence related to acts that were over four months old at the time of the offense. Taylor, 215 W.Va. at 79-80, 593 S.E.2d at 650-651.

Although the State elicited testimony of Mr. Hicks' alleged drug dealing as opposed to drug addiction, it is submitted that the prejudicial effect is enhanced because selling drugs is generally viewed by society as more noxious than being addicted. The Rule 404(b) evidence adduced by the State not only portrayed petitioner as a “big time drug dealer from Buchanan County,” but described the volume, variety, pricing and identities of other customers. The State introduced evidence as to defendant's assets, including his progress from a single-wide trailer to a large brick house with a large yard. Such evidence coupled

with evidence of his unemployment, had no legitimate admissibility in the trial and only operated to inflame the jury about Hicks' apparent success in this illegal business.

Furthermore, just as in Taylor, 215 W.Va. 74, 593 S.E.2d 645, much of the testimony involved conduct years before the theft of the guns by Melissa Coleman and Shantel Webb in the spring of 2000, and the May 13, 2001 shootings. What possible relevance could years old drug prices, quantities sold and purchasers have in this case of a killing in retaliation for theft. This evidence is too remote in time to be relevant in this case. Moreover, the older the evidence is the less likely it is going to be relevant and the more likely it is to be unreliable and in turn prejudicial. In contrast, in *State ex rel. Kitchen v. Painter* 2010 WL 2346245, *11-14 (W.Va. 2010), evidence that the defendant cultivated marijuana and sought to punish the victims for stealing the marijuana was not remote in time, since the defendant allegedly stated his motive the same day that the victim stole his marijuana.

To find this testimony would not likely generate a prejudicial and socially emotional response in the jury, is to ignore the harsh reality of life in economically depressed McDowell County, West Virginia. Just as in Taylor, the State's "use of [appellant's drug] dealing went too far." Taylor, 215 W.Va. at 85-93, 593 S.E.2d at 651.

In this case, this evidence was "used to convince a jury that they should convict the defendant because he or she is not a nice person." State v. Willett, 223 W.Va. 394, 400, 674 S.E.2d 602, 608 (2009), Ketchum J., concurring.

In his concurring opinion in State v. Willett, 674 S.E.2d 602, (W.Va. 2009), Justice Ketchum recognizes the very significant potential for prejudice from any use of Rule 404(b) evidence in criminal trials:

“But the real world truth is that, when a jury hears that a defendant has committed some bad acts beyond those in the indictment, the jury dispenses with any notions that the defendant is innocent and reviews the evidence from the perspective that the defendant is a ‘bad person.’ It is undeniable that a jury may be well be more inclined to convict once they hear that a defendant may have engaged in other ‘bad acts’ even if the defendant was never charged or convicted for that other conduct.” Willett, 674 S.E.2d at 609. [See also: State v. Lively, 226 W.Va. 81, 697 2d 117, 137 (2010) (Ketchum, J., dissenting) (“It is beyond imagination that a bar fight that took place over three years before the charged crime has probative value demonstrating that Lively and Owens acted together to set a fire that killed Dr. Whitley.”)]]

As for the efficacy of a limiting instruction, it is simply too much to expect a jury to ignore the persistent impact of evidence of large scale drug dealings and the assets derived therefrom for any other reasons than motive, plan or preparation.

B.

THE JURY’S VERDICT WAS CONTRARY TO LAW AND THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO SUSTAIN A CONVICTION

In a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of a crime with which the defendant is charged. Syl. Pt. 3, State v. Srnsky, 582 S.E.2d 859 (W.Va. 2003).

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt. Thus, relevant inquiry is whether after viewing the evidence in light most favorable to the prosecution, any rationale trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Syl. Pt. 1, State v. Guthrie, 461 S.E.2d 163 (W.Va. 1995).

With Mr. Hicks’ conviction, we see the convergence of errors related to the admissibility of evidence into a perfect storm of prejudice:

- 1) The trial court’s admission of irrelevant and prejudicial 404(b)

evidence of the details of petitioner's alleged past drug dealings,

- 2) The introduction of collateral issues creates a perilous and untenable choice for defense counsel between ignoring the collateral evidence, creating an impression for the jury that the prior bad act evidence is admitted or trying to refute this evidence which further diverts the jury's attention from the clearly relevant issues in the case,
- 3) The fact that the State's case relied exclusively on the testimony of the incredible Mose Mullins to establish Hicks' involvement in the shooting. One needs only to skim the cross-examination of Mr. Mullins to see the constellation of different issues upon which he admittedly lied or perjured himself. Mose Mullins that he was a good liar, good enough to enhance his success as a drug dealer, hide his drug activities from his wife and Corporal Jason Cooper, Judge Stephens, his own lawyer, Mr. Lupardus, and others who interviewed him during the course of the investigation of these shootings.
- 4) The lack of any meaningful discussion by the trial court as to how this was relevant to motive, plan or preparation or how its probative value outweighs potential prejudice. The fact that the trial court failed to give any discussion concerning limitations for the admissibility of 404(b) evidence made it difficult for counsel and this reviewing court to determine the boundaries contemplated by the court's ruling.

It is difficult to imagine a more unreliable and untrustworthy witness with a greater incentive to blame appellant for the crimes than Mose. The following is just a partial list of the more significant areas in which Mose Mullins admitted that he lied and/or perjured himself, or was contradicted by unassailable evidence:

- 1) In his testimony concerning the whipping of Melissa Coleman a year before the shooting, Mose testified that after whipping Melissa Coleman four or five times, Hicks told her that if he found out that she were involved in the break-in he would "kill her where she slept." (1:30) However, Ms. Coleman testified that no such threat to her occurred. (2: 449-450)

2) Despite his many statements, the first time Mose ever told anyone about buying a gun from Mr. Hicks before the shooting was at Mr. Hicks' trial. (2:179). Mose did not implicate Mr. Hicks for seventeen months after the shooting.

3) Mose Mullins conceded that he perjured himself at his plea hearing when he told Judge Stephens that Rusty Waldron did not know about his plan to kill Shantel and had no involvement in the shootings. Later, after his plea bargain was approved by Judge Stephens, Mr. Mullins changed his tune and told officers, and ultimately testified at Rusty Waldron's trial, that he had offered Rusty \$1,000.00 to act as lookout before the shootings.

4) Mose testified that the first time Mr. Hicks brought up his killing Ms. Webb and others, was in February or March, 2001, when Mose Mullins and Johnny Mullins were in Mr. Hicks' yard. According to Mose, at that time Mr. Hicks offered him \$20,000.00 to kill Shantel Webb, Lula Bell Webb, Jeffrey Mullins and Melissa Coleman.

Mose further testified that the conversation concerning the proposed killings of these four people was in the presence of Johnny Mullins, who was close enough to hear the conversation. (2:204-205). Yet, Johnny Mullins testified that no such conversation took place.

5) By his own account, Mose was sick and drugged out and does not really remember much about the day of the shooting. (2:218-219).

6) In his letter accompanying the presentence investigative report, Mose discussed suffering from depression for fifteen years, but never got help until he was incarcerated and saw the psychologist at the Southern Regional Jail some five to six times.

At his plea hearing, Mose told Judge Stephens, under oath, that he had never been treated by a psychiatrist or psychologist. (2:227-228).

7) Mose testified that in discussions with Hicks about the shootings in the months before they occurred, he was totally deaf in one ear and had a ruptured eardrum in the other. (2:230).

8) Mose Mullins admitted that his first conversation with Mr. Hicks about killing was at his home with Johnny Mullins, when Hicks allegedly said "I'd give \$20,000.00 for the whole family." (2:236). However, at his plea hearing, he testified that the contract was \$10,000.00 for just Shantel Webb and Jeffrey Mullins. Mose Mullins testified that he lied and intentionally left out about the \$20,000.00, and the other two that were supposed to have been shot. (Tr. 2: 236-237).

9) Mose admitted that he lied in his interview to Special Prosecutor Fred Giggenbach, who was preparing him for his testimony in the trial against Rusty Waldron. He told Mr. Giggenbach that he really did not have a plan to kill anybody, but if he ran into any of his targets he was "going to take care of business." (2:255).

10) He admitted on the witness stand that he told the police a "crock" about his and others involvement in the shootings. (2:256). In addition to lying to his wife about his drug use and selling, he admitted that he lied to her about where he was going on the day of the shooting. (2:256).

11) After his execution of the plea agreement where he obligated himself to be completely truthful to law enforcement, he continued to lie:

Q: But that was long after you were supposed to be completely truthful and cooperative, correct?

A: I still thought I could get out of it.

Q: As a matter of fact, you testified in response to Mr. Bell's questions – I wrote this down. You can correct me if I am wrong. "I thought I could tell a lie good enough to get out of it."

A: Yes sir.

Q: And so, you felt confident that when you were speaking to the State Police at that time you were good enough, confident enough that you could tell a lie and buffalo them and get out of this, didn't you?

A: I honestly believed that, yes. (2:260-261).

C.

THE TRIAL COURT ERRED IN NOT GRANTING PETITIONER A NEW TRIAL

Petitioner filed a motion for a new trial following the jury trial ending July 23, 2009. Within the motion for the new trial, petitioner set forth grounds incorporated into this petition to the extent that the argument set forth herein are found to have merit and constitute error, thus, the trial court's failure to grant petitioner a new trial was erroneous as well.

V.

RELIEF PRAYED FOR

WHEREFORE, petitioner respectfully requests that this court vacate his convictions for first degree murder, two counts of malicious assault and one count of conspiracy and to grant him a new trial for the reasons stated herein.

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Respectfully submitted:



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IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Respondent

V. FELONY NO: 08-F-154-S

AMOS GABRIEL HICKS, a/k/a Gabe Hicks
Petitioner

CERTIFICATION

Pursuant to Rule 4A of the West Virginia Rules of Appellate Procedure, the undersigned certifies that the facts set forth and alleged in this Brief are faithfully represented and accurately presented to the best of the undersigned's ability.



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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served a true copy of the foregoing Brief of Appellant Amos Gabriel Hicks upon counsel for the State of West Virginia:

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This the 23 day of November, 2010.



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