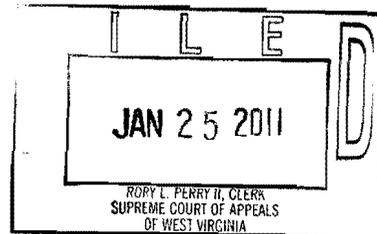


IN THE SUPREME COURT
OF APPEALS
OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

APPELLEE,

V.

APPEAL NO. 35670

AMOS GABRIEL HICKS,

APPELLANT.

BRIEF OF APPELLEE

PRESENTED BY:

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II. Table Of Authorities Relied Upon

State v. Bonham, 184 W. Va. 555, 401 S.E.2d 901 (1990)

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

State v. Dolin, 176 W. Va. 688, 347 S.E.2d 208 (1986)

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

State v. Johnson, 179 W. Va. 619, 371 S.E.2d 340 (1988)

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

State v. McGinnis, 193 W. Va. 147, 455 S.E.2d 516 (1994)

State v. Miller, 184 W. Va. 492, 401 S.E.2d 237 (1990)

State v. Willett, 223 W. Va. 394, 674 S.E.2d 602 (2009)

TXO Production Corp. v. Alliance Resources Corp., 187 W. Va., 457, 419 S.E.2d 870 (1992), *aff'd* 509 U.S. 443, 113 S.Ct. 2711, 125 L.E.2d 366 (1993)

III. Statement Of Facts

On Mother's Day, May 13, 2001, Mose Douglas Mullins, Jr., (*hereinafter referred to as "Doug Mullins"*) a 35-year-old married man who had never been charged with the commission of a crime in his life, used a Ruger 9mm semiautomatic pistol to shoot in the head and hip and fatally wound Jamie Chantel Webb, a 22-year-old, 114-pound mother of two infant daughters. Doug Mullins then shot 22-year-old Jeffrey Mullins in the back of the head and fired multiple shots into the chest and abdomen of Don Ball.

Arrested by state police later that day, Doug Mullins first denied any involvement in the shootings. After being indicted for murder and two counts of malicious assault, Doug Mullins pled guilty to murder of the second degree and both malicious assault charges. His plea agreement required him to cooperate with the state in its continuing investigation of the crimes and to testify truthfully before any state or federal grand jury and at trial if necessary.

Contrary to the representations in the appellant's brief, Doug Mullins was sentenced to consecutive maximum terms of 40 years in prison for murder and indeterminate terms of not less than two years nor more than 10 years for both counts of malicious assault. In other words, he was sentenced to 44 years to 60 years in prison. (*Trial transcript, pages 273, 274*)

Seven years after the crimes, the McDowell County Grand Jury indicted the appellant, Amos Gabriel Hicks, of Whitewood, Virginia, for allegedly being an accessory before the fact to the murder of Jamie Chantel Webb and the malicious assault of Jeffrey Mullins, and for allegedly conspiring with Doug Mullins to commit those offenses.

The appellant's illegal drug activity was at the very root of the alleged conspiracy that culminated in the Mother's Day shootings. The drug activity was the connection between him and Doug Mullins, and the drug activity was the cause of the burglary which produced the motive for the shootings.

State witness Melissa Coleman testified that she and Jamie Chantel Webb went to the appellant's residence to buy drugs. Ms. Coleman said she had been buying large quantities of Oxycontin from Hicks and she wanted to introduce Ms. Webb to him in order that she could buy drugs from him.

When they found that Hicks was not home, Webb decided to break in to try to steal drugs. The two women left the residence with guns that they stole from Hicks.

Ms. Coleman testified at trial as follows:

Q. Okay, Was there a time when Jamie Chantel Webb went with you to Whitewood, Virginia, to Mr. Hicks' trailer?

A. Yes.

Q. Was that more than once, or was it just one time?

A. Just one time.

Q. To your knowledge, before that day, and this is based on your personal knowledge, had she ever gone over there to meet him and to buy drugs from him?

A. No, not to my knowledge, no.

Q. Tell us about that day. Under what circumstances did you go over there with Jamie Chantel Webb?

A. Well, I was going to get her introduced to him. That was the whole purpose of her going with me. She wanted to get introduced to him; so, I didn't make the phone call before like I was supposed -- I usually do before you go to his house. He wasn't there; so, I was going to introduce her because she wanted to buy some dope off of him.

Q. Now, by his house were you still talking about the --

A. (Interposing) The trailer.

Q. --singlewide mobile home.

A. Yeah.

Q. Okay. He wasn't there?

A. No.

Q. What happened when you realized that he was not home?

A. She got this idea that she wanted to break into his house to see if she can get the dope. I informed her there is no dope -- he ain't going to keep his dope inside his house. I asked her not to do it, but she done it, anyway, and I didn't leave her. I sat in the car and waited on her, basically, because I wasn't going to leave her. She was my friend.

(Trial transcript, pages 424-426)

Ms. Coleman testified that Ms. Webb came out of the defendant's mobile home carrying "a bunch of guns" and "gold chains" which they put into the back of Ms. Coleman's car and covered with a beach towel before driving away. (*Trial transcript, page 432*)

Several witnesses, including Hicks' daughter, testified at trial that Hicks was very angry about the burglary and learned without reporting it to the police that Ms. Coleman and Ms. Webb were the perpetrators. He also suspected that Jeffrey Mullins was with them.

The defendant's daughter, Chastity Davis, testified:

Q. Well, did the Defendant himself tell you what was stolen in that break-in?

A. Guns, He said guns.

Q. Did he say how many guns?

A. No.

Q. Did he tell you who did it?

A. No, he didn't tell me, but I heard through other people that it was Chantel and I think Jeffrey maybe that broke in.

Q. (Interposing) You heard that from family members?

A. I didn't -- Yeah, from family members and from other people around just talking about it.

Q. You heard it was Chantel Webb and Jeffrey Mullins who broke into his home?

A. (Interposing) And I believe Melissa. I'm not -- I'm not really sure, but I think those were the three that broke in.

Q. Did you know Melissa's name, last name?

A. Coleman.

(Trial transcript, page 555, 556)

Within a few days of the burglary, Hicks recovered the stolen guns from Robin and Roy Bolen. He boasted to them that he had whipped Ms. Coleman with a belt when he caught up with her.

Vickie Elswick, another state witness who was acquainted with the defendant because she and her husband obtained drugs from him to sell and for her husband to use, testified that the defendant told her and her husband about the burglary and what he had done to recover the stolen property. Ms. Elswick testified as follows:

Q. Okay, Do you recall ever having a conversation with Gabe Hicks about someone breaking into his trailer over on Brown Mountain and stealing some property from him?

A. Yes.

Q. Tell us what you remember about that.

A. Freddie took me over there, and he was talking about some girl, and they broke into his house and stole a gold chain, some pills, guns, and he was going to get his stuff back, and he talked about meeting her on the road and pulling her out of car and whipping her with a belt.

Q. Do you remember the terminology that he used in connection with how he described to you how he had whipped her?

A. He said he whipped her like you would a red-headed stepchild.

(Trial transcript, page 391)

Jeffrey Mullins, left without the use of his right arm and confined to a wheel chair as a result of the gunshot wounds suffered on May 13, 2001, testified at trial that the defendant confronted him twice before the shootings. On the first occasion, Mullins was standing alongside the road when Hicks and another man pulled up beside him in Hicks' truck. The defendant asked him if he had anything to do with stealing his guns and Mullins denied any involvement.

Approximately three weeks before the shootings, the defendant again approached Jeffrey Mullins at the S & M convenience store.

Q. Tell us what you remember about that day.

A. I remember I got out -- out -- I'm nervous so bear with me.

Q. Just take your time.

A. And I got out. I was in the back driver seat. I got out of the back passenger seat and pumped Lulabelle's gas. All right, when I got back in the car, Lulabelle's car, I saw Gabe and Leona, Gabe Hicks and Leona, pull up on Gabe's motorcycle, big Harley, and he came right up walking real fast over towards me, and I shut -- shut my door real quick, and he threw -- he threw a punch at me, and I -- I dodged it. Then he said -- This is what he said, "You're a dead motherfucker."

(Trial transcript, page 462, 463)

Lulabelle Webb, grandmother of Jamie Chantel Webb, corroborated Jeffrey Mullins' account of the defendant's actions and threats toward him that day. (*Trial transcript, 324-328*)

Robin Bolen testified that she heard of Jamie Chantel Webb's death approximately two months after Hicks recovered the stolen guns from her and her husband.

Q. Approximately, how long was Hicks there at your home to get the guns back?

A. Ten minutes at the most.

Q. During that time he -- he mentioned to you and your husband that he had whipped Melissa Coleman?

A. That's how he found out where the guns were.

Q. Now, sometime after that, did you learn, did you receive news, or did somebody call you and tell you that Chantel Webb had been shot to death?

A. Yes. We had moved to North Carolina and my mother called and told me.

Q. How much time, Robin, had passed, approximately, between those two events when --

A. (Interposing) About two months.

Q. From the time Mr. Hicks picked up the guns or from the time they were left there?

A. From -- They wasn't left there about two days; so, from about the time he picked them up and I heard about Chantel it was about two months.

Q. So, two days between the time they were actually left there at your home until he picked them up --

A. Yes.

Q. -- and then about two months later you got the call telling you that Chantel Webb had been shot to death?

A. Uh-huh.

(Trial transcript, pages 371, 372)

The murder weapon, a 9mm Ruger pistol, was recovered from a wooded area of Bradshaw Mountain with the assistance of James "Rusty" Waldron who was with Mose Douglas Mullins, Jr., at the time of the shootings.

When the appellant was questioned October 16, 2008, by ATF Agent Aaron Yoh and McDowell County investigator Mike Spradlin, he provided to them a copy of the "Bill of Sale" allegedly showing that the defendant bought the gun on October 18, 1999, and that he sold the same 9mm Ruger pistol to Mose Douglas Mullins, Jr., on February 7, 2000. The "Bill of Sale" was signed by the defendant and his stepson, Andrew Thomas, but was not signed by Doug Mullins. *(Trial transcript, page 412)*

Before that revelation, the state had been unable to put the murder weapon in the appellant's hands other than the statements of Doug Mullins, who testified that Hicks provided him the gun when he offered him

\$10,000.00 to kill Ms. Webb and Jeffrey Mullins. Agent Yoh also testified that when he interviewed attorney Timothy Lupardus in 2003 the attorney confirmed that two women brought to his office \$10,000.00 in cash, much of which was in small bills, to retain him to represent Doug Mullins. *(Trial transcript, pages 415 & 416)*

Freddie and Jessie Lynn Elswick both testified that they traded a gun to the appellant for drugs and were not asked to sign any writing. In addition, they testified that even though Mr. Elswick was a drug addict the appellant would "front" large quantities of pain pills to him to sell. They would then take money back to the appellant to pay for the pills used by Mr. Elswick and to obtain a new supply. *(Trial transcript, pages 499-501; 388-391)*

That evidence corroborated the testimony of Doug Mullins and was relevant in regard to establishing the motive, plan and preparation for the shootings of Jamie Chantel Webb and Jeffrey Mullins.

According to Doug Mullins, the defendant became even more angry toward Jeffrey Mullins and Jamie Chantel Webb after the encounter at the S & M Market. Doug Mullins said the defendant told him Lulabelle Webb had tried to run over him with her car when he approached Jeffrey Mullins. *(Trial transcript, pages 136 & 137)*

Doug Mullins then testified that his drug addiction had caused him to become deeply in debt to the appellant because he was using more Oxycontin pills than he was selling to other users. He testified that his only way out was to take Hicks up on his plan to kill Jamie Chantel Webb and Jeffrey Mullins. He described his addiction, his indebtedness to the defendant and the development of the murder plan as follows:

Q. Okay. Did he later talk to you about his intentions toward Jeff Mullins and Chantel Webb?

A. Yes.

Q. Tell us about that.

A. Kind of -- Kind of bear with me here because this is -- this is the part that -- that I am most ashamed of for myself, you know. We -- I had went to his home, to Gabe's house, pick up the drugs like I normally do, you know, drop the money off and, you know, pick up other drugs, and while I was there, I had helped -- I was helping him put together a patio -- like dinette set for outside. Okay? And I don't know, something -- he was -- he was really agitated that day whenever I got there, you know, and we were out I think in the front yard, and he -- he said that -- that he'd give \$20,000.00 for the whole -- for the whole family, kill the whole -- you know, get rid of the whole family, I mean, more or less in that tone. You know what I mean?

Again, like I said, he 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 that just out of anger, you now, so --

Q. And had he earlier discussed with you his desires concerning Jeffrey and Chantel? Before he made the comment to you about wanting the whole family killed, did he -- said something to you earlier about those two young people, Chantel and Jeffrey?

A. I don't -- I don't recall. I'm not -- I mean, I don't know what you're asking me, specifically.

Q. Well, what I'm asking you is did the Defendant, himself, communicate to you, tell you who he wanted to have killed?

A. Not at that point. At that point, no. At that point, no. I mean, he just made the verbal response, like I said, but -- but not specifics, no.

Q. Later on, did he talk more specifically about what he wanted done?

A. Yeah, that was -- it was at another date. I guess maybe two or three weeks later I'm saying, couple weeks later, because like I said, I was going back and forth, you know, to exchange the money for the drugs, but once we -- the next time I went over, I asked him if he was serious about that, and he said, yes, and he said, well, he said -- he said, \$5,000 apiece, you know, any -- anything that happened, you know, and I got to be honest with you.

At that time, I had messed up the drugs and the money again and was indebted to him again. Well, the debt had not been paid from the previous one, let me back up, and I said, well, look, I said, I'd take it on. I said that way I can -- I can clear my debt, and I can get back in his graces; so, to speak, so that I could get my drug connection going good again so that I could make money and drugs for myself again.

Q. When you tell us you'd messed up the drug money or drugs again, what do you mean by that? What have you done to get back in debt with Mr. Hicks?

A. Well, I had done -- I had done more of the drugs that I could pay for.

Q. Used them yourself?

A. Yes.

Q. Can you tell us about how much you were in debt to Mr. Hicks?

A. Approximately, around \$5,000.

Q. When you asked him if he was serious about having them killed and about \$5,000 apiece, what did he say?

A. Said -- He said, well, said, "What kind of gun are you wanting, you want a rifle, or you want a pistol?" And I thought for a second and I said, "Well, I guess a pistol," and he give me a pistol.

Q. What type of pistol did he give to you, Mr. Mullins?

A. Was a -- It was a 9mm. It was a semiautomatic pistol, handgun.

Q. Let me hand you what's marked for identification purposes as State's Exhibit No. 51 and ask if you recognize this?

A. Yes, sir. Yes, sir, I do.

Q. What is it?

A. It's a -- The brand name of it is a Ruger. It's a 9mm pistol.

Q. And is this the type of handgun the Defendant gave you when you asked him if he was serious about having these people killed?

A. Yes.

Q. And did he actually turn this over to your possession on that day?

A. Yes.

Q. And was there with it a magazine or what's commonly called a clip for --

A. (Interposing) Yeah.

Q. -- the ammunition?

A. Yeah.

Q. Had you ever seen this gun before that day, before he gave it to you?

A. Yes, I had. First time I had saw it, I bought it off of him. I had give him a -- \$200 I think for it or something like that, and then I kept it for a while, and after my mother passed, I was going down to my sister's house in North Carolina, and I had gotten up with him, had tracked him down and - - and I'd said that I'd like to have five Oxy 20's, I'd like to trade the gun back to him, and he -- and we did. We traded it back.

Q. And then when you talked to him about having these four people killed, he gave this gun to you to use for that purpose.

A. Yes.

(Trial transcript, pages 138-142)

After Doug Mullins was arrested for the shootings, the appellant's sister-in-law, Josie Hicks, was dispatched to West Virginia with a bag of cash to accompany Doug Mullins' wife, Pam Mullins, to Pineville to retain attorneys Timothy P. Lupardus and Sante Boninsegna, Jr. to represent Mullins. *(Trial transcript, 78-81)*

Lupardus testified at trial that a woman did accompany Pam Mullins to his office, paid a substantial part of the fee in cash and that Pam Mullins later told him she had to see Gabe Hicks to get the rest of the money. *(Trial transcript, pages 342-344)*

At trial, Doug Mullins testified that he shot and intended to kill Ms. Webb, Jeffrey Mullins and Don Ball even though neither of them had

committed any wrong against him because he needed the money the appellant offered to pay him. The murder weapon was provided to him by the appellant for that purpose and the money for his lawyers was delivered to his wife by the appellant's sister-in-law.

After hearing all of the testimony, including that of Doug Mullins, who was subjected to a withering cross-examination, the jury was instructed that they were to judge the credibility of all of the witnesses and to determine the facts. The jury then convicted the appellant of murder of the first degree without a recommendation of mercy, malicious assault and conspiracy to commit murder as an accessory before the fact.

Despite the arguments of the appellant to the contrary, the jury found Doug Mullins to be a credible witness whose testimony was corroborated in every material respect, including his relationship with the appellant, ownership of the murder weapon and the motive for the conspiracy.

IV. Discussion of Law

A. Trial Court Properly Considered Rule 404(B) Evidence At *McGinnis* Hearing, Made Required Findings On The Record And Gave Adequate Limiting Instructions.

The appellant contends that the trial court erred by admitting Rule 404(b) evidence which the appellant labels "irrelevant" to the prosecution of him for being an accessory before the fact to murder and malicious assault and conspiracy to commit murder. The appellant further argues that the evidence was "so grossly prejudicial" that the trial court's limiting instructions to the jury "would be of no value." (*Appellant's Brief, page 17*)

The trial court required the state to file a detailed written notice of its intention to introduce Rule 404(b) evidence and the specific purposes for which such evidence would be introduced. The state's notice was filed on May 18, 2009. On July 6, 2009, Judge Stephens conducted a lengthy *McGinnis* hearing after which he left the record open to have the state provide to defense counsel certain transcripts of grand jury testimony concerning some of the Rule 404(b) evidence.

On July 20, 2009, the trial court reviewed on the record each item of the proffered evidence, allowed defense counsel to argue the defendant's objections to each, and then made specific findings on the record in

compliance with this Court's directives in *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994) and *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

Those findings were then confirmed in the Court's written order that was entered on July 20, 2009.

The trial court made findings that the state had shown by a preponderance of the evidence that other "crimes, wrongs or acts" had occurred, that the state was offering the evidence for the permissible purposes of proving motive, preparation and plan, and that the probative value of the evidence outweighed the danger of unfair prejudice to the defendant.

Without question, the state's case relied heavily on proof of motive and on the testimony of Doug Mullins. The jury's verdicts were clearly based on the jurors' judgment that he was a credible witness.

The appellant's relationship with Doug Mullins was directly linked to the drug activity. Mullins testified that he had sold drugs for the appellant over a period of years and that he became addicted to the drugs that were "fronted" to him by the appellant. The contact that he had with the appellant from the time the appellant's home was burglarized by Jamie Chantel Webb, to the time the appellant reported that Ms. Webb's grandmother had tried to

run over him with her car, until the appellant told him he was serious about having Ms. Webb and Jeffrey Mullins killed and provided him with the murder weapon, all came about because Doug Mullins was meeting with the appellant in order to obtain narcotic drugs to sell and use.

The debt of thousands of dollars that Mullins owed to the appellant was the reason Mullins decided to carry out the appellant's wishes to kill Jamie Chantel Webb and Jeffery Mullins. He took the murder weapon from the appellant and decided to commit the shootings as the only way he could pay the appellant and stay in his good graces.

The testimony of Melissa Coleman was that she also had a relationship with the appellant that was based on her purchase of drugs from him. She and Jamie Chantel Webb went to the appellant's home to buy drugs and committed the burglary because he was not at home.

Freddie and Jessie Lynn Elswick's testimony about the appellant's drug activity corroborated Doug Mullins' testimony about the business arrangement between the appellant and those who sold drugs for him as well as the appellant's willingness to accept guns in exchange for drugs without any paper trail existing.

Evidence of the appellant's drug activity was extremely relevant and was at the very core of the motive for the shootings and the preparation and plan for the crimes.

In *State v. Miller*, 184 W. Va. 492, 401 S.E.2d 237 (1990), this Court affirmed the trial court's ruling that evidence of the defendant's illegal drug trafficking was proper under Rule 404(b) as tending to prove his motive for shooting and killing the victim.

After discussing the admissibility of "other crimes" evidence "to show that defendant has a reason for having the requisite state of mind to do the act charged" [*quoting from State v. Johnson*, 179 W. Va. 619, 371 S.E.2d 340, 348 (1988) (*quoting State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208, 217)], the Court held in *State v. Miller*:

In our analysis of the present facts, it is clear that the trial court did hold an in camera hearing prior to the admission of evidence concerning the prior acts. Furthermore, the probative value of the evidence was significant in that the victim reporting the appellant to law enforcement officials for his drug dealing clearly demonstrated a motive for her murder. Additionally, the state offered evidence which tended to prove that the appellant knew his girlfriend had reported him to the authorities. Thus, the probative value far outweighed any prejudicial effect on the jury, especially since the jury was instructed that such evidence could be considered solely for the purpose of determining whether the defendant had a motive for committing the crime. Consequently, we find no error was committed by the trial court regarding the introduction of this evidence.

State v. Miller, 401 S.E.2d at 244.

In *State v. Willett*, 223 W. Va. 394, 674 S.E.2d 602 (2009), this Court held that the trial court properly admitted evidence that a witness was involved in 50 to 100 illegal drug transactions with the defendant over a period of two years to show the defendant's motive, planning and intent pursuant to Rule 404(b).

In its prosecution of Gloria Jean Willett for four counts of possession of controlled substances with intent to deliver and one count of conspiracy, the state called four law enforcement witnesses and one other witness, Alan Reed, a jail inmate who had reported to the police that drugs were being sold from the defendant's home.

"Mr. Reed testified that he was a drug addict and that during the period 2003 to 2005, he visited Mrs. Willett's home 'about 50 to 100 times' to obtain narcotic pills from Mrs. Willett. Mr. Reed also testified that he brought other individuals to Mrs. Willett for the purpose of buying narcotic drugs. On those occasions, Mrs. Willett would give him drugs as a gratuity for bringing customers to her," the Court observed from the record in *State v. Willett*.

The Court further stated in the *Willett* opinion, "Mr. Reed's testimony about the uncharged drug transactions was integrally connected to the criminal activity charged in the indictment." The appellee contends in the

case at bar that the testimony of Doug Mullins, Melissa Coleman, Jessie Lynn Elswick and Freddie Elswick concerning the appellant's drug activity was "integrally connected" to the conspiracy between him and Doug Mullins and the motive for the crimes that they conspired to commit.

In *State v. Bonham*, 184 W. Va. 555, 401 S.E.2d 901 (1990), this Court affirmed the trial court's ruling that allowed the state to introduce Rule 404(b) evidence of other crimes, including evidence that the defendant provided a "hit man" with controlled substances in connection with getting him to assault another person.

"Certainly, a key element of the charges against the defendant was that he intentionally conspired to set into motion against the victim intrinsically violent acts which caused the victim's death," the Court stated. "The fact that the defendant had knowledge that Rush Smith was a violent person, as well as the fact that he had previously associated with Rush Smith to commit violent acts, tended to show that he intended Rush Smith to act in a similar manner toward the victim in the present crime. This Court believes that the evidence did tend to establish intent, preparation, knowledge, and identity, and, under the circumstances, the Court concludes that the evidence of the collateral crimes was properly admissible under Rule 404(b) of the West Virginia Rules of Evidence." *State v. Bonham*, 401 S.E.2d at 905.

Applying the analysis of that opinion to the case at bar, the appellee contends that the evidence of the appellant "fronting" drugs to Doug Mullins and Freddie Elswick, who then sold them to other addicts, and the appellant's knowledge of their own addiction to the drugs, was relevant to show why he recruited Doug Mullins to carry out the plan to kill people he believed had broken into his home to steal drugs, guns and jewelry.

In *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), this Court approved the state's introduction of evidence of multiple prior acts of violence by the defendant to show intent and the absence of accident in a case in which the defendant was charged with the murder of his 19-month-old son.

The Court explained in *LaRock* a standard of review involving the following three-step analysis. "First, we review for clear error the trial court's factual determination that there is sufficient evidence to show that the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the 'other acts' evidence is more probative than prejudicial under Rule 403." See *State v. Dillon*, 191 W. Va. 648, 661, 447 S.E.2d 583, 596 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d

870 (1992), *aff'd* 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986); *State v. LaRock*, 470 S.E.2d at 629, 630.

As the *McGinnis* hearing transcript discloses in the case at bar, Judge Stephens carefully considered all of the proposed Rule 404(b) evidence and the arguments of counsel for both parties before making on-the-record findings that the evidence was admissible for the limited, permissible purposes of proving motive, preparation and plan. The trial court further made clear, on-the-record findings that the state had established by a preponderance of the evidence that the other acts were committed and that the probative value of the evidence outweighed the danger of unfair prejudice to the defendant.

"In this context," this Court held in *State v. LaRock*, 470 S.E.2d at 630, "It is presumed that 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 Rule 403 determination the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction." (*other citations omitted*)

The appellant concedes in his brief that the trial judge gave the jury limiting instructions before the witnesses testified about other crimes, wrongs or acts and in the court's final charge to the jury. Those instructions directed the jury to consider that evidence only in regard to motive, preparation and plan.

The appellee asserts that the record clearly shows that all of the requirements set forth by this Court for the admission of Rule 404(b) evidence were met and the experienced trial judge did not abuse his discretion in his rulings.

B. Appellant's Argument That Evidence Was Insufficient Is Without Merit.

The standard of review that applies to a claim that the evidence was insufficient to support a conviction was clearly stated by this Court in *State v. Guthrie*, 194 W. Va. 657, 668, 461 S.E.2d 163, 174 (1995):

Our function 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, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

The Court further held in *Guthrie* that the jury's verdicts should be respected and affirmed unless there is no evidence upon which verdicts of guilty beyond a reasonable doubt could be based. (*Guthrie, Syllabus Point 2*)

In *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996) (*Syllabus Point 2*), the Court held, "When a criminal defendant undertakes a sufficiency challenge, all the evidence . . . must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt."

In the case at bar, the state presented clear evidence that Melissa Coleman and Jamie Chantel Webb drove to the appellant's home near Whitewood, Virginia, to buy drugs. When they found that he was not home, Ms. Webb broke into the residence to steal drugs or other personal property. Ms. Coleman testified that Ms. Webb came out of the home carrying gold chains and guns.

Ms. Coleman and Mr. and Mrs. Roy Bolen testified that Ms. Coleman and Jamie Chantel Webb sold or pawned the stolen guns to Mr. Bolen. According to Robin Bolen, two days later the appellant came to their home and recovered the guns by paying Mr. Bolen the amount he had given to Ms. Coleman and Ms. Webb. According to Mrs. Bolen and Doug Mullins, the appellant whipped Ms. Coleman with a belt to get her to tell him where the guns were. Mrs. Bolen further testified that she learned of Jamie Chantel Webb's death approximately two months after the appellant came to her home to recover his guns.

Doug Mullins, who had sold and used narcotic drugs that he obtained from the appellant for several years, testified that the appellant was angry about the burglary and offered to pay him \$10,000.00 -- "\$5,000.00 apiece" - - to kill Jamie Chantel Webb and Jeffrey Mullins. When Mullins, who at the time was thousands of dollars in debt to the appellant because of his drug addiction, asked the appellant if he was serious about the offer, the appellant provided him with a Ruger 9mm semiautomatic pistol to carry out the plan.

Jeffrey Mullins and Lulabelle Webb, Jamie Chantel Webb's grandmother, both testified that a few weeks before the shootings the appellant approached them at the S & M Market in McDowell County, assaulted Jeffrey Mullins and told him, "You're a dead motherfucker."

The appellant's daughter testified at trial that she was aware of the burglary of the appellant's mobile home and that guns and jewelry had been stolen. She testified that her father and other family members believed that Jamie Chantel Webb, Jeffrey Mullins and Melissa Coleman were the perpetrators of the crime.

After Doug Mullins was arrested for the murder of Ms. Webb and the malicious woundings of Jeffrey Mullins and Don Ball, the appellant's sister-in-law was sent into McDowell County with a bag full of cash and instructions to take Doug Mullins' wife, Pam Mullins, to Pineville, West Virginia, to hire a lawyer to represent Doug Mullins. In 2003, attorney Timothy P. Lupardus told Agent Aaron Yoh of the United States Bureau of Alcohol, Tobacco and Firearms that Pam Mullins and another woman brought \$10,000.00 in cash to his office to retain him and Sante Boninsegna, Jr., to represent Doug Mullins.

Several years after the murder weapon was recovered in the woods on Bradshaw Mountain, near the McDowell County, West Virginia, Buchanan County, Virginia, line, the appellant provided to Agent Yoh and McDowell County Prosecuting Attorney's investigator Mike Spradlin a "bill of sale" purporting to show that the appellant bought the same handgun from an individual in 1999 but then sold it to Doug Mullins a year before the murder

of Jamie Chantel Webb. The writing was signed by the appellant and his stepson but was not signed by Doug Mullins.

Although the appellant devotes most of his brief to attacking the credibility of Doug Mullins, the jurors, who were properly instructed by the trial court that they were the judges of the credibility of all of the witnesses and that they could disregard all or any part of any witness' testimony if they believed he or she had knowingly testified falsely about any material fact, obviously believed Doug Mullins.

During cross-examination that lasted for several hours, the appellant's counsel attempted to discredit Doug Mullins with his initial statement to the state police on the day of the crimes in which he denied any participation and his statement in support of his pleas of guilty to charges of murder of the second degree and two counts of malicious assault, for which he received the maximum sentences of 40 years plus two terms of not less than two nor more than 10 years, all of which were ordered to be served consecutively.

In addition, the appellant's counsel had been provided transcripts of Doug Mullins' testimony before a federal grand jury and the McDowell County Grand Jury. The appellee asserts that Doug Mullins came through the withering cross-examination with his credibility intact because he was

sincere, ashamed of his crimes and doing his best to finally give completely truthful answers to all of the questions.

In addition, the appellee points out that Doug Mullins' testimony was corroborated by the photograph of him and the appellant attending a motorcycle rally in South Dakota, clear evidence of the burglary of the appellant's home and his resulting hostility toward the victims, the whipping of Melissa Coleman by the appellant before he recovered his stolen guns, the appellant having been in possession of the 9mm pistol that was used to commit the crimes, the delivery of \$10,000.00 in cash to retain an attorney for Doug Mullins, and the testimony of Mr. and Mrs. Elswick concerning the fronting of large amounts of narcotics to a drug addict who sold some of them and used the rest.

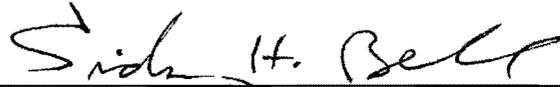
The state's evidence was clearly sufficient to satisfy a reasonable trier of fact of the guilt of the appellant beyond a reasonable doubt.

V. Conclusion

The State of West Virginia, the appellee herein, requests that this Honorable Court affirm the rulings of the trial court, deny the relief prayed for in the appellant's petition for appeal, and affirm the jury's verdicts finding the appellant guilty of murder of the first degree, without a

recommendation of mercy, guilty of malicious assault, and guilty of conspiracy to commit murder.

Respectfully submitted,



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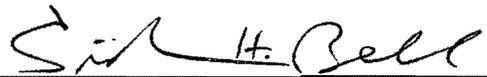
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CERTIFICATE OF SERVICE

I, Sidney H. Bell, attorney for the appellee, hereby certify that a true copy of the foregoing Brief of Appellee was served upon the appellant, Amos Gabriel Hicks, by depositing said copy into the United States mail, postage prepaid, addressed to his attorney, Michael F. Gibson, Gibson, Lefler & Associates, Attorneys at Law, 1345 Mercer Street, Princeton, WV 24740, on this the 21st day of January, 2011.



SIDNEY H. BELL
Attorney for Appellee