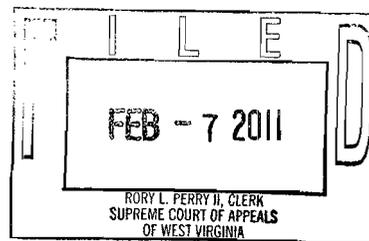


ARGUMENT DOCKET



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35670

STATE OF WEST VIRGINIA

V.

AMOS GABRIEL HICKS

REPLY BRIEF OF APPELLANT AMOS GABRIEL HICKS

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I

The appellee State of West Virginia's brief sets forth reasons to justify the admissibility of the Rule 404(b) evidence which are inconsistent with its Notice of Intention to Introduce 404(b) evidence and its arguments at trial.

In the Statement of Facts section of its brief, appellee states:

“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 (sic) and the drug activity was the cause of the burglary which produced the motive for the shootings.” (Appellee’s Brief, p. 2.)

Later in its brief, the appellee argues:

“[T]he contact that he had with the appellant from the time the appellant’s house was burglarized by Jamie Chantel Webb to the time appellant reported that Ms. Webb’s grandmother had tried to run over him with her car, until the appellant told him (Douglas Mose Mullins) that 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.” (Appellee’s Brief, p. 16-17.)

Contrast these statements with the State’s theory expressed in its Notice of Intention to Introduce 404(b) evidence:

“The State’s theory of this case is that the motive for Jamie Chantel 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 Ten Thousand Dollars (\$10,000.00) to kill Ms. Webb and her close friend, Jeffrey Mullins, and provided 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 and Appellant’s Brief, p. 6.)

The State’s response brief is also contradicted by the testimony of its star witness,

Douglas Mose Mullins:

Q: As time went on, did Mr. Hicks continue to talk to you about Jeff Mullins and Chantel Webb about what they had done?

A: Well, yeah, on different occasions, I mean a lot of different things were said that had come up. I mean, not like - - every conversation we had wasn't about them, I mean, you know what I mean, but just at different times he had brought it up, you know what I mean, because it made him mad because it - - had violated his home, his place of residence. (Trial Transcript, Vol. II, p. 134.) (emphasis supplied.)

Similarly, the State's response brief is also inconsistent with the credible evidence as to the time interval between the beating of Melissa Coleman and the Mother's Day 2001 shootings. Appellee's brief alludes to the testimony of Robin Bolen from whose husband appellant retrieved the stolen guns two days after their theft. She also testified that shortly after the theft she moved out of McDowell County, but heard from her mother about the shootings approximately two months later. (Trial Transcript, p. 37-39.)

This is in direct contradiction of Ms. Coleman's own testimony the shootings occurred approximately one year after her beating.

Q: Let's see, how old did you say your son was when this incident happened?

A: He was little. He was still in the crib because he was trying to crawl over it. My mom - -

Q: (Interposing) He was what?

A: He was little. He was, maybe four or six months old or something because he was born December 7, 1999. My mom had custody of him. She had him because I never got to keep him.

Q: When did this belt whipping incident occur?

A: Mother's Day of 2000, I think.

Q: Okay, so, the year before - - the year before - - well, let's back up just a bit. So, the break-in occurred two or three days before Mother's Day of 2000, correct?

A: Right.

Q: It was the very next year, a year later, when Chantel Webb was killed on Mother's Day - -

A: Right.

Q: - - and Jeffrey Mullins and Don Ball was shot, correct?

A: Right.

Q: So, that - - it didn't happen - - the belt, whipping incident didn't happen in 2001. It happened in 2000, didn't it?

A: Right.

Q: And the break-in, of course, happened in the same year, just two or three days before? So that would have been May of 2000 as well?

A: Right.

Q: Was your son - - your son was born, when, in December of 1999?

A: Yes.

Q: So, he'd have been what, five or six months old at the time?

A: Yes. (Trial Transcript, Vol. II, p. 443-444.)

Ms. Coleman's testimony about the one year interval between the beating and the shootings is corroborated by appellant's daughter, Chasity Davis, who lived with him in the trailer at the bottom of Brown Mountain and which Ms. Coleman and Ms. Webb broke in and stole guns and jewelry. According to Ms. Davis, she moved in with her father in the mobile home at the bottom of Brown Mountain in May of 2000. (Trial Transcript, p. 553.) Later in November of 2000, he moved into a small brick home four or five miles up the road on Brown Mountain:

Q: At some point, ma'am, did you learn about a break-in and theft of some guns from your father's residence?

A: I heard about it, yeah.

Q: Okay, and do you know which residence where that theft occurred? In other words, was it the trailer or the little brick house, or was it on the West Virginia side?

A: It was the trailer in Buchanan County.

Q: Okay, and when did you learn just approximately about the break-in?

A: I would say it was around April or May 2000 or somewhere in that area.

Q: Okay, is there any question to you in your mind that you learned about that break-in in May or April of the year 2000 as opposed to 2001?

A: No, I am very certain it was in 2000. (Trial Transcript, Vol. III, p. 552)

Why is this evidence important to the propriety of the admission of 404(b) evidence of appellant's past drug dealing? The reason is that the approximate one year interval between the Coleman beating and the shootings is too "tenuous and remote" to be relevant to charges for which Mr. Hicks was convicted. It must also be remembered that before the break-in, Ms. Coleman told Ms. Webb that appellant did not have any drugs at his trailer and asked her not to break in. Ms. Webb went in anyway and came out with guns and jewelry covered in a beach towel. (Trial Transcript p. 426, 432.) Clearly, the State's argument that "the drug activity was the cause of the burglary which produced the motive for the shootings" is not supported by any credible evidence.

II

A Fourth Circuit decision militates against a finding that the prior bad acts admitted in the instant case were relevant to the homicide charges for which Appellant was convicted.

In United States v. Johnson, 617 F.3rd 286 (4th Cir. 2010), the Court of Appeals grappled with the Rule 404(b) FRE which is identical to the state rule and concluded testimony concerning Johnson's past drug dealing was too "tenuous and remote" to be relevant to charges of conspiracy to possess cocaine with intent to sell.

In Johnson, a confidential informant identified an individual named Pickens as a large cocaine dealer. The DEA obtained a wire tap on Pickens' home phone for sixty days. Over that two month period, Pickens received hundreds of calls including one hundred nine (109) calls regarding drugs. Of these one hundred nine calls (109), only eight (8) were between Pickens and defendant Johnson. On the strength of these eight (8) phone calls, the DEA concluded that Johnson was a supplier for Pickens and indicted him with eleven co-conspirators, all but two of whom plead guilty - Johnson and another co-defendant.

The government alleged that Johnson's criminal activity took place in July and August 2007. Utilizing Rule 404(b), the government introduced evidence that the defendant had purchased drugs from a Mr. Timpson several years before the 2007 conspiracy. Another informant, Mr. Holloway, testified he got his drugs from the defendant for two years beginning in 2003. Holloway's evidence was contradicted by other co-defendants. Similarly in 2000 when questioned by the authorities, Holloway did not name Johnson as a supplier, but did identify two others with whom he dealt for approximately three months. The Fourth Circuit found no connection between defendant Johnson and the charged conspiracy other than Mr. Holloway's statements. No drugs found were upon Johnson or any location under which he had control. There was no surveillance evidence indicating a nexus between Holloway and Johnson. No financial information was introduced to show that Johnson had significant or questionable assets or was living beyond his income or

means. Johnson argued that Timpson's testimony was not admissible under Rule 404(b) because the alleged prior drug transaction was not significantly related to the conspiracy charge so that it could be considered probative of intent, knowledge or elements of the offense. The Court agreed:

“In order for evidence of prior drug transactions to be admissible in a criminal drug conspiracy case, the prior acts must be relevant to the charged defense. Thus, we have repeatedly found that the prior act which is charged to be probative of an element of the offense must be “sufficiently related to the charged offense.” (Citations omitted.) Therefore, the more closely the prior act is related to the charged conduct – either in time pattern or state of mind – the more probative it is of the defendant's intent or knowledge in relation to the charge conduct.” (Citations omitted.) Johnson, 617 F.3rd at 297.

The fact that the defendant may have been involved in drug activity in the past does not in and of itself provide a sufficient nexus to the charged conduct where the prior activity was not related in manner or in time, manner, place or pattern of conduct. Johnson, 617 F.3rd at 297.

Johnson also argued that the trial court erred in admitting the testimony of co-defendant Timpson who said he brought drugs from Johnson in 1998 on the grounds that it was not sufficiently related to the alleged conspiracy which took place in the summer of 2007. Johnson also argued that the meager protection afforded by the trial court's limiting instruction cannot outweigh prejudice “incurred by evidence that does not meet the mandate of the rule in first instance.” Johnson, 716 F.3rd at 297. The Fourth Circuit agreed the fact that a defendant may have been involved in drug activity in the past does not in and of itself provide a sufficient nexus to the uncharged conduct where the prior activity is not related in time, manner or pattern of conduct. Johnson, 716 F.3rd 297.

Citing other Fourth Circuit opinions, the Johnson court identified property admitted prior bad acts. In United States v. Rawle, 845 F.2d 1244, 1247(4th Cir. 1988.) The defendant was charged with transporting marijuana on I-95 in an empty tractor-trailer. Several years earlier he was charged with a similar scheme. The Court found that because similar methods were used, such as placing paper products in the back of the trailer and creating false bills of lading to conceal the contraband, there was sufficient similarity between the prior bad acts and the alleged act of the defendant in the case at bar. Rawle, 845 F.2d at 245-248.

In United States v. Mark, 943 F.2d 444 (4th Cir. 1991) the Court of Appeals upheld evidence of the admissibility of evidence of a prior drug transaction testimony under Rule 404(b) to prove knowledge and intent in a drug conspiracy case. Unlike Johnson, Mark's prior drug transactions occurred in the *same state* and during the *same year* he was arrested for the drug trafficking. The Court also found that because Mark testified on his own behalf regarding his innocuous relationship to the co-defendants, the "extrinsic act evidence... was *sufficiently related to the* charged defense and clearly relevant" to prove its intent and knowledge in the case. Mark, 943 F.2d at 448. (emphasis in original.)

In United States v. Hernandez, 975 F.2d 1035 (4th Cir. 1992), the Court of Appeals found error in the admission of 404(b) prior bad act evidence on the grounds it bore only a "slight relationship to the acts charged in the indictment." Hernandez, 975 F.2d at 1038, 1040. The prior bad act evidence was a witness who testified that Hernandez told him about a recipe for cooking "crack" cocaine and selling it in New York six months before the crime for which Hernandez was indicted. In rejecting the admissibility of Ms. Hernandez's prior

bad acts of manufacturing and sale of “crack” prior to the charged conspiracy, the court found:

“[H]ere – unlike *Lewis*, the probative value of the evidence is slight. Hernandez’s “cooking” recipe and her sale of crack in New York at some indefinite time are in no way connected to the cocaine she is charged with selling in this case. The evident effect, if not the purpose of Deleon’s testimony relating to Hernandez’s statement about her activities in New York was to bolster Delacruz’s testimony about her acts in Washington by depicting her (Hernandez) as an experienced crack dealer. But this is precisely the effect Rules 403 and 404(b) seek to avoid. Among consideration of all of the circumstances, we think the balance is so one-sided that admission of the evidence was error.” *Hernandez*, 975 F2d at 1041.

The *Hernandez* Court went on to find the admission of the 404(b) evidence was harmful. *Hernandez*, 975 F2d 1041-1042.

In *Johnson*, the drug transactions that co-conspirator Timpson alleged he perpetrated with Johnson occurred over five years before the charged conspiracy allegedly began in the case. Not only was the testimony remote in time, but Timpson could not link Johnson to any of his co-defendants.

As in *Hernandez*, the *Johnson* court looked to the overall weakness of the government’s case against Johnson, his testimony and those witnesses supporting his innocence of the charges and found the admission of the Rule 404(b) evidence to be harmful.

“When viewed in light of the paucity of evidence the government presented, and the strength of the case Johnson presented, Timpson’s testimony cannot be said to be harmless where it provided a powerful allegation linking to Johnson to a totally unrelated drug dealing conspiracy that took place several years before the investigation that led to Johnson’s indictment. In sum, the government has failed to carry its burden of demonstrating – let alone advance any argument at all – that the Timpson testimony ‘did not have a substantial and injurious effect nor influence on the result’ (Citations omitted.) Consequently, we must reverse.” *Johnson*, 617 F.3d at 298-299.

III

Mr. Hicks' argument is reconcilable with this Court's latest decision on Rule 404(b). State v. Lively, 226 W.Va. 81, 697 S.E.2d 117 (2010).

In Lively, the defendant was convicted of first degree murder and arson in the death of E.K. "Doc" Whitley in a March 2005 house fire. The trial court permitted the state under Rule 404(b) to admit evidence from a fellow inmate of Lively that Lively's mother worked for "Doc" Whitley, that Lively and co-defendant Owens went to Whitley's home to steal money and drugs and set the house on fire with him in it after they stole his laptop computer. The trial court also admitted evidence of Lively and Owens' being in a fist fight in October 2002 with two men, one of whom like Whitley was disabled. Evidence of Lively and Owens' involvement in a January 2001 attempted arson was also admitted. Specifically, the laptop evidence was to show motive, plan or intent to steal from Whitley. The prior violent attack on two men and their attempt to burn a building with Molotov cocktails showed common scheme or plan and action in concert to commit violent crimes. Lively, 697 S.E.2d at 130-132.

While the Lively decision is close one as illustrated by Justice Ketchum's dissent, its 404(b) evidence is much less tenuous and remote at the 404(b) evidence of appellant's trailer as a drug dealer in the case at bar.

Even viewing the evidence from a vantage favorable to the state, there was no plan between appellant and Mose Mullins to kill. Mose Mullins testified appellant gave him no instructions as to how to carry the shootings out; did not tell him when and where to commit the shootings; did not tell him how to shoot the victims; did not tell him how to dispose of

the evidence and repeatedly lied to law enforcement about his involvement in the shootings.
(Trial Transcript, 253-256.)

Logic tells us if there were no plan, then admitting prior bad act evidence to support this nonexistent element or 404(b) component is clearly the sort of character evidence the Rule was designed to prevent.

Likewise, there is little or no evidence of preparation except Mose Mullins obtaining the gun from appellant. There is no evidence or permissible inference therefrom that casts appellant as a “big time drug dealer from Buchanan County” that makes preparation for the shootings any more or less likely.

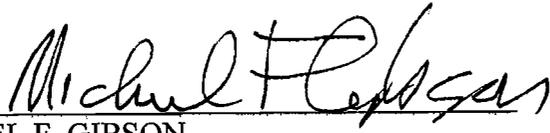
Finally, the State’s proof of appellant’s role as a drug dealer offers nothing in an attempt to prove appellant’s motive – to punish or retaliate against Ms. Webb and others for breaking in his trailer and stealing guns and jewelry.

CONCLUSION

For these reasons and those previously stated in appellant’s brief, appellant prays that this Court reverse the trial court’s admission of the Rule 404(b) and remand this case to the Circuit Court of McDowell County for a new trial with appropriate instructions, and for such other and further relief this Court may deem appropriate.

AMOS GABRIEL HICKS, P.Q.

Respectfully submitted:

A handwritten signature in black ink that reads "Michael F. Gibson". The signature is written in a cursive style with a horizontal line underneath it.

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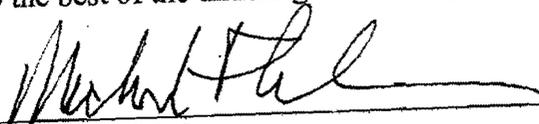
v.

FELONY NO: 08-F-154-S

AMOS GABRIEL HICKS, a/k/a Gabe Hicks
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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 Reply 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 Reply Brief of Appellant Amos Gabriel Hicks upon counsel for the State of West Virginia:

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This the 7 day of February, 2011.



MICHAEL F. GIBSON