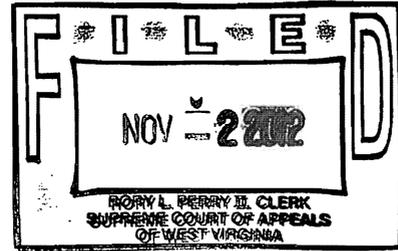

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1273



STATE OF WEST VIRGINIA,

*Plaintiff below,
Respondent,*

v.

RODNEY L. HYPES,

*Defendant below,
Petitioner.*

STATE OF WEST VIRGINIA'S SUPPLEMENTAL BRIEF

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STATE OF WEST VIRGINIA'S SUPPLEMENTAL BRIEF

I.

ARGUMENT

A. The Circuit Court did not abuse its discretion in admitting the Petitioner's Statement of 2009 because the only ground raised below was under Rule 403 but the evidence is not unfairly prejudicial.

First, the only objection raised below at trial was on the basis of Rule 403. App. Vol III, at 155. See also App. Vol. II at 50. An objection on one ground waives all other objections that could have been made. See *State v. DeGraw*, 196 W. Va. 261, 272, 470 S.E.2d 215, 226 (1996). See also *State v. Simons* 201 W. Va. 235, 239, 496 S.E.2d 185, 189 (1997) (per curiam); *State v. Browning*, 199 W. Va. 417, 425, 485 S.E.2d 1, 9 (1997). Therefore, any 404(b) claim before this Court is waived.

Second, this Court has recognized that the circuit court's decision to admit evidence against an unfair prejudice challenge is reviewed only for abuse of discretion. See *Craddock v. Watson*, 197

W. Va. 62, 66, 475 S.E.2d 62, 66 (1996) (per curiam). “It is not an easy thing to overturn a Rule 403 ruling on appeal.” *United States v. Udeozor*, 515 F.3d 260, 264 (4th Cir.2008). “Rule 403 is a rule of inclusion, ‘generally favor[ing]admissibility[.]’” *United States v. Wells*, 163 F.3d 889, 896 (4th Cir.1998) (citation omitted). “[E]xclusion of relevant evidence under Rule 403 is done sparingly as an ‘extraordinary remedy.’” *United States v. Williams*, 49 Fed. Appx. 420, 426 (4th Cir. 2002) (citation omitted). “Our recent cases have held with regular consistency that an appellate court should find an abuse of discretion only when the trial court acted ‘arbitrary or irrationally.’” *State v. Knuckles*, 196 W. Va. 416, 424, 473 S.E.2d 131, 139 (1996). A decision is “arbitrary and irrational” only if it “cannot be supported by reasonable argument.” 1 Stephen A. Satzberg, et al., *Federal Rules of Evidence Manual* § 403.02[19] at 403–43 (8th ed.2002). Hence, “Appellate Courts will check to see that the Trial Court has conducted a balancing process. The result of a careful balancing process will not itself be second-guessed.” *Id.* § 403.02[19] at 403–44 (footnotes omitted). “The Appellate Court will not reverse a Rule 403 decision simply because the Appellate Judges would have ruled differently had they been trying the case.” *Id.* § 403.02[19] at 403–43 (footnote omitted). Here the court undertook such a balancing. App. Vol. IV at 13.

In 2007, the Police seized a copy of *Uncle Fester’s Cookbook*. App. Vol. III at 66. In his 2009 statement, the Petitioner admitted when questioned about methamphetamine manufacture that “I got my information and start with Uncle Fester’s Cookbook.” *Id.* at 162. There is a clear link between 2007 and 2009. The clear link is therefore the crux of showing that the Petitioner’s statement that he is addicted to cooking methamphetamine is relevant. Clearly the Petitioner was aware in 2007 of the components of, and how to, cook methamphetamine. App. Vol. IV at 12. Knowledge is essential to proving a charge under West Virginia Code § 60A-4-411:

In order to sustain a conviction for violation of W. Va. Code § 60A-4-411 (2003), by assembling any chemicals or equipment for the purpose of manufacturing methamphetamine, the State must prove beyond a reasonable doubt that the defendant had actual or constructive possession over the chemicals and/or equipment. In order to establish constructive possession where the defendant is present in a vehicle wherein such materials are found, the State must prove beyond a reasonable doubt that the defendant had knowledge of the presence of the chemicals and/or equipment to be used for the purposes of manufacturing methamphetamine and that such items were subject to the defendant's dominion and control.

Syl. Pt. 6, *State v. Cummings*, 220 W. Va. 433, 647 S.E.2d 869 (2007). The Petitioner's admission that he started his meth career through Uncle Fester's Cookbook certainly related back to 2007—where a copy of such a book was seized in Apt. # 233 and went to prove knowledge.

Further, the Petitioner at some point had to become addicted to cooking methamphetamine. Since he started cooking methamphetamine in 2007, it was evident that his addiction related back to then and gave background to his crime in 2007. “An admission of a party opponent is, by its very nature, always prejudicial. Rule 403, however, protects only against those statements that are unfairly prejudicial.” *Becton v. Starbucks Corp.* 2007 WL 2688128, 3 (S.D. Ohio). And in making this assessment, “we must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.” *United States v. Udeozor*, 515 F.3d 260, 265 (4th Cir. 2008) (quoting *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir.1990)). And, “[w]hen evidence is particularly probative, we will tolerate a higher risk of prejudice.” *United States v. Rivera*, 6 F.3d 431, 443 (7th Cir. 1993) (citation omitted). “Evidence, like these incriminating statements . . . is highly probative[.]” *United States v. Jones*, 2000 WL 1719502, 1 (4th Cir.) (per curiam). The evidence here is not Rule 403 excludable because it went to prove an element of the crime. *See United States v. Allen*, 341 F.3d 870, 888 (9th Cir.2003) (rejecting a Rule 403 challenge because an admission offered was for a related but not conclusive

element of the crime, and the government was entitled to prove its case-in-chief); *Carmichael v. Government of the Virgin Islands*, 2004 WL 3222756, 8 (D.V.I.) (“The court also did not abuse its discretion in admitting the evidence under Rule 403, where evidence of Carmichael’s repayment was probative of the material issues of the case and would be generally admissible as an admission against interest.”).

II.

CONCLUSION

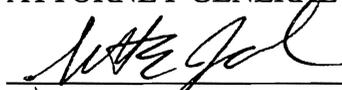
The circuit court should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

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CERTIFICATE OF SERVICE

I, SCOTTE E. JOHNSON, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "*STATE OF WEST VIRGINIA'S SUPPLEMENTAL BRIEF*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 21 day of November, 2012, addressed as follows:

To: Gina M. Stanley, Esq.
Cabell County Public Defender Office
320 9th Street
Huntington, WV 25701



SCOTT E. JOHNSON