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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

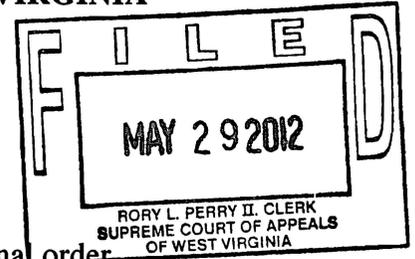
DOCKET NO. 11-1674

CHRISTOPHER WAYNE BOWLING,
Petitioner,

V.)

STATE OF WEST VIRGINIA,
Respondent.

Appeal from a final order
Of the Circuit Court of Raleigh
Cabell County (10-F-142-H)



PETITIONER'S BRIEF

Counsel for Petitioner, Christopher Wayne Bowling

Richard W. Weston (WV Bar # 9734)
Weston Law Office
621 Sixth Avenue
Huntington, West Virginia 25701
(304) 522-4100
RWW@westonlawoffice.com

G. Todd Houck (WV Bar #5674)
105 Guyandotte Avenue
Mullens, WV 25882
(304) 294-8055
gthouck@aol.com

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ASSIGNMENT OF ERROR

The Court improperly allowed the admission of previous bad acts during the trial. The admission of these acts was highly prejudicial to the Petitioner. The Court improperly conducted an in camera hearing, regarding 404(b) evidence. The Court improperly precluded Petitioner from moving for a change a venue.

The Court improperly failed to excuse, after challenged for cause. The Court improperly allowed character evidence of Defendant. The Court improperly allowed prior out of court statements that were testimonial in nature and in violation of Defendant's Constitutional right to confront his accusers. The Court improperly restricted Defendant's right to a meaningful defense, by prohibiting Defendant from fully exploring and/or revealing all the defects and/or condition of the identified weapon. The Court improperly failed to appoint Defendant counsel in this matter after the Court was notified that funds expended on Defendant's behalf were exhausted. The Court improperly failed to give any manslaughter instructions. That the jury's verdict is clearly against the weight of the evidence and could not have been reached by a reasonable process of interring guilt beyond a reasonable doubt but rather by speculation or improperly admitted evidence.

STATEMENT OF THE CASE

Christopher Wayne Bowling (Mr. Bowling) age 39, a self employed carpenter was tried in the Raleigh County Circuit Court for an indictment alleging first degree murder. Mr. Bowling was charged for murdering his wife Tresa Bowling in their home on the evening of January 31, 2010. (See Appx. Vol 14. Pg. 7).

The trial consisted of several days of pretrial motion, including 404(b) hearings, which were covered by and published in the local media, followed by a five day trial that ended in a mistrial on May 9, 2011. Thereafter, on June 21, 2011 a second trial commenced and lasted through July 16, 2011. At the commencement of the second trial, the Court was informed that Mr. Bowling and his family were out of funds to secure legal assistance, experts and investigators. The Court initially refused to appoint appellant's counsel, but required Mr. Weston and Mr. Houck to continue in their roles as appellant's counsel. However, the Court did approve public defender funds for appellant's gun expert and investigator.

Throughout the jury selection process, appellant requested the services of a jury consultant, which was overruled by the trial Court. Several days were spent by the trial court in selecting a jury. Many objections were levied as to the jury knowledge of the case and the jury's settled opinion as to appellant's guilt.

The State's case consisted of the testimony of the Raleigh County Sheriff's Office who were the lead investigators in the case, as well as other officer and emergency personnel who responded to the 911 call. Additionally the State called a host of acquaintance witnesses who provided evidence of prior bad acts of appellant or alleged abusive actions toward his wife, as well as witnesses who offered testimony of prior out of court statements made by Mr. or Mrs. Bowling. All this evidence was permitted despite 404(b) and *Crawford* objections.

The State offered twenty witnesses as to appellant's character, prior bad acts or prior out court statement that were designed to elicit hatred and prejudice toward Mr. Bowling.

The trial court refused to allow Mr. Bowling the right to present evidence to support his defense that this was an accidental discharge of his weapon despite proof from the West Virginia State Crime Lab, as well as, other evidence from the State and Appellant's expert who cited various issues with the gun. Both sources had evidence that the weapon involved in this alleged crime would go out of battery, springs would pop out during shooting or manipulating the gun would cause dimpling on the primer.

The trial court also prevented Mr. Bowling from offering any justification evidence that would be relevant to any actions he may have taken toward his wife. That his actions or demeanor were in response to her addiction and/or abuse to prescription medication. The trial court justified its ruling that there existed no claim of self defense therefore, the victim's character was irrelevant.

On July 15, 2011, the jury returned a verdict of guilty on the indictment for first degree murder. (See Appx. Vol XIII pg. 2853). On July 16, 2011, the jury returned no recommendation for mercy. (See Appx. Vol XIII pg. 2936).

Defense counsel argued for a new trial upon: 1) the court improperly conducted an in camera hearing, regarding 404 (b) evidence. This hearing was in open court, and reported in the local news media and appellant's character evidence was heard by potential jurors prior to trial; 2) the court improperly precluded appellant from moving for a change of venue, or alternatively, prevented defendant's counsel from examining any prospective prejudice against appellant in Raleigh County, West Virginia. This case had received much pre trial publicity in the media, as discussed in paragraph one. Moreover, the first trial in this matter resulted in a mistrial, thereby

garnering more media and prejudicial interests. The court had to voir dire prospective jurors from three separate jury panels; 3) the court improperly failed to excuse, after challenged for cause, two jurors who stated during voir dire that they were under the belief that appellant was guilty; 4) the court improperly allowed character evidence of appellant, including prior bad acts or prior bad hearsay related to appellant's character. The court failed to determine whether the acts occurred, whether the appellant committed the act, the relevancy of the evidence, and finally, the court failed to balance the probative value of the evidence against the danger of unfair prejudice toward the appellant. Additionally, the court allowed one witness to provide testimony of appellant's prior bad acts without any notice to appellant; 5) the court improperly allowed too much evidence of prior bad acts of appellant and/or prior bad hearsay, both of which were related to appellant's character; 6) the court improperly allowed prior out of court statements and documents that were testimonial in nature and in violation of appellant's Constitutional right to confront his accusers; 7) the court improperly restricted appellant's right to a meaningful defense, by prohibiting appellant from fully exploring and/or revealing all the defects and/or poor condition of the identified weapon; 8) the court improperly permitted the state to recall and reference other murder convictions in Raleigh County, West Virginia, and how those cases were related to or similar to the instant case; 9) the court improperly failed to grant a motion for acquittal after the state closed its evidence; 10) the court improperly failed to appoint appellant counsel in this matter after the court was notified that funds expended on appellant's behalf were exhausted; 11) the court improperly failed to give manslaughter instructions; 12) that the jury's verdict in this case is clearly against the weight of the evidence and could not have been reached by a reasonable process of inferring guilt beyond a reasonable doubt but rather by speculation or improperly admitted evidence.

This matter arises as a result of allegations that the Appellant Christopher Wayne Bowling, age 39, (See Appx. Vol XII pg. 2180) murdered his wife Tresa Bowling, hereinafter referred to as victim, in their home on the evening of January 31, 2010. It was alleged that Appellant came home around 11:10 p.m., pulled out a gun and shot his wife in the left temple (See Appx. Vol. X pgs. 1054, 1061; Vol. XI pg. 1546) while his two children slept in their bedrooms only a few feet away. (See Appx. Vol. IX pg. 787). Appellant and his wife had been to the funeral of a family friend earlier in the day and thereafter had spent the evening with friends drinking and reminiscing about their deceased friend. Sometime later in the evening Tresa Bowling went to pick up the kids and Appellant agreed to come home soon thereafter. (See Appx. Vol XII pgs. 2267-2272).

Appellant's best friend, Phillip Jones took Appellant home around 10:40 p.m. Appellant and Jones sat in Appellant's driveway for 20 minutes. Thereafter, Jones left and Appellant went in his home. (See Appx. Vol XI pg. 1546). Inside, Appellant found his wife asleep on the couch. According to appellant he went in the garage to get a soda came back into the home and sat down on the couch with his wife, sitting the area of her hip, while she was looking up at him.

As Appellant was squatting down to sit with his wife, he felt the pressure of the gun he routinely kept in his back pocket. As he removed gun he noticed the slide was out of battery as he tried to right the gun by manipulating it with his hands the gun went off. Appellant discovered his wife had been shot. (See Appx. Vol. XII pgs. 2282-2295).

Raleigh County Deputies and the West Virginia State Police responded to the Appellant's home. Appellant was placed in a police cruiser along with a pocket recorder to record his reaction, and the police attended to the Mrs. Bowling and the children. Mrs. Bowling condition was critical (See Appx. Vol. X pgs. 919-920) and she was pronounced dead approximately 4

hours after the shooting at a nearby hospital. (See Appx. Vol. X pgs.932-936). The police processed the scene and were back at the police station with the Appellant some 58 minutes after the incident was called in (See Appx. Vol. XI pgs. 1342-1345). Testimony was also received that the lead investigator, Detective Bare, was only at the scene for 16 minutes. (See Appx. Vol XII pgs. 1890-1893).

According to the police the Appellant showed no emotion, nor requested information on the condition of his wife and requested that other officers attend to this incident – officers that Appellant personally knew. (See Appx. Vol. X pg. 956). The investigating officer James Bare theory of the case was that the shell casing did not land where it should. That the Appellant and Mrs. Bowling had a history of domestic violence (See Appx. Vol. X pgs. 966, 967, 972), and that the gun did not malfunction, thereby preventing a claim of faulty/accidental discharge. (See Appx. Vol. X pgs. 1018, 1068).

Thereafter, Appellant was arrested and brought to trial before the Raleigh County Circuit Judge John A. Hutchison. Several pre trial hearings were conducted including several days of 404(b) hearings that were directed to be conducted in camera, prior to trial. The 404 (b) witnesses included the victim's 10 year old daughter, victim's sister, and friends of the appellant and victim offered extremely inflammatory testimony about the appellant's bad character. (See Appx. Vol. IV pgs. 4-24, 70 -145). Even though the proceedings were being conducted in camera, the appellant learned the next scheduled day of 404(b) hearing, that the first day of 404(b) hearing had been reported in the local press just days before a jury was to be chosen. (See Appx. Vol. IV pg. 226), and the trial court refused to remove the press regardless of any impact it may have on prospective jurors reading the local press (See Appx. Vol. 4 pg..249; Vol. V pgs. 20-31 and 338-342).

During voir dire, it was evident that every juror with the exception of three had heard about this case, either through the newspaper, tv news or while sitting in the courtroom while the parties were in the process of individual voir dire of the prospective jurors. Additionally, and prior to individual voir dire, a substantial percentage of each of the three panels had made up their minds as to Appellant's guilt. (See Appx. Vol. IV pg. 226).

Initially the Court struck several prospective jurors who expressed a bias against (See Appx. Vol. VIII pgs. 11, 13, 56, 48, 50-51, 127, 154, 174, 245,317, 368). However, near the end of the process, the Court applied a different standard in its determination on whether to strike prospective jurors. These latter jurors were not held to the same standards as jurors who were previously excused for cause. Specifically the Court failed to strike prospective jurors Collins and Long who thought Appellant was guilty based upon the specific facts they knew about in this particular case. (See Appx. Vol. VIII pgs. 418-421, 387, 388, 393).

In its case in chief, the state called 19 witnesses whose had no evidence of the alleged crime, however, their primary purpose was to provide evidence of appellant's other crimes, wrong, or bad acts between the appellant and victim. (See Appx. Vol. IX pgs. 802, 808, 829, 849, 851; Vol. X pgs. 1080, 1083-1086, 1195, 1137; Vol. XI pgs. 1412, 1452, 1456, 1458, 1460, 1461, 1465-1466, 1499, 1519-1520, 1537-1539, 1547, 1550, 1552, 1554, 1574-77, 1587-1589, 1611, 1628, 1630, 1632, 1635, 1637, 1651, 1654, 1665-1668, 1676-1677; Vol. XII pgs. 1853-1856).

The state called five investigating officers, a tool mark specialists, an EMT, attending emergency room physician and the state medical examiner who concluded that on January 31, 2010, the victim had been shot in the left temple by a properly functioning firearm used by appellant. (See Appx. Vol. IX pgs. 785-787; Vol. X pgs. 886, 919-920, 932-933, 936, 966, 977-

978).

The lead investigator Detective Bare testified that he did not take any measurements or prepare any diagrams, and that from his cursory review of the scene, it was his opinion that the appellant's gun was functioning properly and that the location where the spent shell casing came to rest did not support the appellant's version of events. Over repeated objections, the trial court permitted detective Bare to testify, before the jury, that in his opinion appellant was guilty because this criminal case was like other cases he had investigated resulting in murder convictions. Additionally, the detective testified that based upon his investigation, and consultation with the state prosecutor, he believed that appellant had demonstrated a deliberate cruel act against victim or that substantial evidence, beyond a reasonable doubt existed, that appellant shot his wife with malice and this was premeditated murder. (See Appx. Vol. X pgs. 992-993, 982-983, 1301, 1908-1910).

Evidence existed that this gun had many problems and was in a poor condition. Its condition was so poor that the state's gun expert had to order replacement parts in order to test the gun's overall functionality. At the very outset of the case, it was appellant's claim that this was an accidental discharge of a firearm due to the functionality of the gun. That because of the improper functioning of the gun, the gun accidentally discharged while appellant was trying to right the gun's out of battery condition. (See Appx. Vol. V pgs. 8-9, 12). Despite all the evidence regarding the gun's poor condition, the trial court prevented the appellant from demonstrating that the gun in question was junk and because of its poor condition, an accidental discharge was possible. (See Appx. Vol. IX pgs. 701, 702, 703-704, 729, 732, 740-743; Vol. XI pgs. 1736, 1752-1753, 1776, 1777, 1779-1781, 1821, 1788, 1791-1792; Vol. XII pgs. 2453-2460).

The state also offered in its case in chief a jail house snitch, who stated that he had access to appellant while in jail, and that he and appellant routinely discussed his case or did mock trials while in jail. (See Appx. Vol. X pgs. 1236-1253). This witness had a rather extensive criminal history including crimes of fraud and lying to police. After his testimony, the state called a police officer from the State of Ohio to bolster and vouch the credibility of the inmate. (See Appx. Vol. X pgs. 1292-1307).

The appellant took the stand, and offered the following evidence. He and the victim met in 2001 and appellant soon began living with the victim and her daughter from a previous relationship. (See Appx. Vol. XII pg. 2194). They enjoyed each others company by hunting and fishing together and each of them carried guns, (*Id* at pgs. 2195-2197, 2262-2263). They were later married and had a child. (*Id* at 2199, 2206-2207). That the victim ran the business end of appellant's carpentry business. (*Id* at 2208-2212). The appellant attempted to relate the source of some of the couple's friction; however, during the appellants testimony, and throughout the trial, the court refused to permit any evidence of the victim's character. During the relationship, appellant obtained a domestic violence protective order and the victim was removed from the house for several days. Upon returning home the relationship improved. (*Id* at 2229-2250, 2256-2259). Relating to the night in question, the appellant and victim had been to a mutual friend's funeral and thereafter went to a neighborhood bar to have drinks with friends. Thereafter, appellant went to another family friend's home and the victim went to pick up the children. (See Appx. Vol. XII pgs. 2267-2272). While at the other friend's home, appellant drank several beers and called his friend Phillip Jones to pick him up and either take him back to Jones' home due to bad weather, or back to appellant's home. (*Id* at 2273-279). Appellant and Jones arrived at appellant's home and sat in the driveway and talked for 20 minutes. Then

appellant goes in his home kisses his wife and goes to look for a soda. Appellant goes into the detached garage straightens up the garage and attends to groceries (*Id* at 2282-2284).

The appellant comes back into the house and demonstrated to the jury how he crouched down to sit on the couch near his wife's hip area, as she is lying on the couch looking up at him. As he was talking to her, appellant felt pressure from the pistol in his back pocket, where he always carried it. As he was removing the pistol, he noticed it was out of battery and had a glob of lint on the back of the gun. As appellant attempted to right the gun's slide, by applied pressure on the back with his thumb countered by pressure of his index finger either on the trigger guard or trigger, the gun discharged striking the victim. He then picked the victim up in his arms and tried to get her to respond. Thereafter he called 911. (*Id* at 2285-2295). Appellant also described that he kept his criminal case file in his pod at the jail where the snitch would have access to same, and in appellant's opinion there was nothing to hide in his file since this was an accident. (*Id* at 2307-2309).

The appellant hired gun expert Amy Driver, who prepared reports and testified in this matter. The trial court refused to allow Ms. Driver to render an opinion as to the poor working conditions of this gun. Specifically, the trial court prevented the appellant from introducing evidence that during operation of the gun certain springs would pop out of the end of the barrel or ejection port, and these spring affected trigger pressure, as well as allowed the gun to go out of battery or generally perform poorly. (See Appx. Vol. XII pgs. 2453-2460, 2471, 2491-2499, 2501-2503).

The expert corroborated the appellant's version of where and how he was positioned when the gun discharged, and that the gun routinely went out of battery. (See Appx. Vol. XIII pgs. 2470-2489, 2492-2499).

Thereafter, the state called two more 404(b) to further bias this jury against the appellant. (See Appx. Vol. XII pgs. 2645, 2658). Finally during the state's closing arguments on sentencing, the prosecutor referred to appellant as a home-grown terrorists. (*Id* at 2931).

SUMMARY OF ARGUMENT

The Court improperly allowed the admission of previous bad acts during the trial. The admission of these acts was highly prejudicial to the Petitioner. The Court improperly conducted an in camera hearing, regarding 404(b) evidence. The Court improperly precluded Petitioner from moving for a change a venue.

The Court improperly failed to excuse, after challenged for cause. The Court improperly allowed character evidence of Defendant. The Court improperly allowed prior out of court statements that were testimonial in nature and in violation of Defendant's Constitutional right to confront his accusers. The Court improperly restricted Defendant's right to a meaningful defense, by prohibiting Defendant from fully exploring and/or revealing all the defects and/or condition of the identified weapon. The Court improperly failed to appoint Defendant counsel in this matter after the Court was notified that funds expended on Defendant's behalf were exhausted. The Court improperly failed to give any manslaughter instructions. That the jury's verdict is clearly against the weight of the evidence and could not have been reached by a reasonable process of interring guilt beyond a reasonable doubt but rather by speculation or improperly admitted evidence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner request oral arguments. This case qualifies for oral argument under Rules 20 (a) (3)(4).

ARGUMENT

I. The Trial Court Committed Error By Failing To Properly Conduct An In Camera Hearing Regarding 404(B) Evidence.

The trial court abused its discretion by not properly conducting an in camera interview of all the 404b statements offered by the State. In *State v. Dolin* 176 W. Va. 688, 347 S. E. 2d 208 this Court held that before a trial court can determine that evidence of collateral crimes are admissible under one of the exceptions, an in camera hearing is necessary to allow a trial court to carefully consider the admissibility of collateral crime evidence and to properly balance the probative value of such evidence against its prejudicial effect. In *State v. Nicholson*, 162 W.Va. 750, 252 S.E.2d 894 (1979), overruled on other grounds, *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980), this Court pointed out that an in camera hearing is necessary to allow a trial court to carefully consider the admissibility of collateral crime evidence.

Black's Law Dictionary, 4th Addition, defines in camera as: In chambers; in private. A cause is said to be heard in camera either when the hearing is had before the judge in his private room or when all spectators are excluded from the courtroom.

The 404 (b) witnesses who should have been examined in camera, included the victim's 10 year old daughter, victim's sister, and friends of the appellant and victim who offered extremely inflammatory testimony about the appellant's bad character. (See Appx. Vol. IV pgs. 4-24, 70 -145). Even though the proceedings were required to be conducted in camera, the appellant learned the next scheduled day of 404(b) hearing, that the first day of 404(b) hearing had been reported in the local press, just days before a jury was to be chosen. (*Id* at 226). The

trial court refused to remove the press regardless of any impact it may have had on any prospective jurors reading the local press. (See Appx. Vol. IV pg. 249; Vol V pgs. 20-31, 338-342).

During voir dire, it was evident that every juror with the exception of three, had heard about this case, either through the newspaper, tv news or while sitting in the courtroom talking among other prospective jurors – while the parties were in the process of individual voir dire of the prospective jurors. Additionally, and prior to individual voir dire, a substantial percentage of each of the three panels had made up their minds as to Appellant's guilt.

II. The Trial Court Denied The Appellant's Constitutional Right To A Fair Trial By Abusing Its Discretion And Not Striking Prospective Jurors Who Were Challenged For Making Clear Statements Of Bias – They Thought Appellant Was Guilty.

W. Va. Code §62-3-3, grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause, and the trial court fails to remove the juror, reversible error results even if the defendant subsequently uses a peremptory challenge to correct the trial court's error. *State v. Phillips*, 194 W. Va. 569, 461 S. E. 2d 75 (1995).

West Virginia case law has long held that trial courts must resolve any doubt of possible bias or prejudice in favor of the party seeking to strike for cause. Any doubt the court may have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror. *State v. West*, 157 W. Va. 209, 200 S. E. 2d 859, 866 (1973), *Davis v. Wang*, 184 W. Va. 222, 226, 400 S. E.2d 230, 234 (1990).

In *O'Dell v. Miller*, 211 W.Va. 285, 565 S. E. 2d 407 (2002) this Court reversed a trial court, finding that the trial court had abused its discretion by not striking a challenged prospective juror who was a patient and received successful treatment from the defendant doctor. The Court held the appellant was denied a constitutional right not only to a fair and unbiased

jury, but to a jury free from the suspicion of prejudice. The Court further held that when a prospective juror makes an inconclusive or vague statement reflecting the possibility of a disqualifying bias or prejudice, further probing into the facts and background related to that bias is required. However, once a prospective juror has made a clear statement during voir dire reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, retractions or promises to be fair.

The *O'Dell* Court, citing *Walls v. Kim* 250 Ga. App. 259, 549 S. E.2d 797, 799 (2001), reflected that “trial judges must resist the temptation to rehabilitate prospective jurors simply by asking the ‘magic question’ to which all jurors respond by promising to be fair when all the facts and circumstances are in . . . A trial judge should err on the side of caution by dismissing rather than trying to rehabilitate, biased jurors, in reality, the judge is the only person in the courtroom whose primary concern, indeed primary duty, is to ensure selection of a fair and impartial jury.

The *O'Dell* decision was further analyzed in *State v. Newcomb*, 679 S. E.2d 675, 691 (W. Va. 2009), which held “For clarification purposes, and in light of the myriad syllabus points surrounding the issue of when to dismiss a prospective juror for cause we now hold that: When a prospective juror makes a clear statement of bias during voir dire, the prospective juror is automatically disqualified and must be removed from the jury panel for cause. However, when a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias or prejudice exists.”

In affirming the trial court, the *Newcomb* Court stated that this is not a case where the prospective jurors had stated or implied that they had formed an opinion as to the appellant’s

guilt or innocence. *Id.*, 692.

Recently, in *Messer v. Hampden Coal Co.* No. 11-0469 (W.Va. 2102) this Court addressed a prospective juror who had specialized electrical training which may have impacted the ultimate issue for the jury. This Court affirmed the trial court's decision to leave the prospective juror on the panel because the prospective juror's statements regarding his prior experience with electricity, the allocation of responsibility as to whether a line was energized, and the obligation to wear insulated gloves were vague and inconclusive as to ultimate bias or prejudice and did not rise to the level of a clear assertion of bias or prejudice. *Messer* at 15.

A reading of this transcript clearly revealed that three panels of prospective jurors were selected and a significant majority of all panel members had knowledge about this case, whether reading or watching the media, including medial coverage of the 404(b) hearings or talking among themselves while waiting to be selected. (See Appx. Vol. IV pgs. 226, 249; Vol. V pgs. 20-31, 338-342; Vol. IV pg. 226).

The trial court initially exercised appropriate discretion and struck several prospective jurors who expressed a bias against appellant, many believing he was guilty before trial started. (See Appx. Vol. VIII pgs. 11, 13, 56, 48, 50-51, 127, 154, 174, 245, 317, 368). However, near the end of the voir dire, the Court abused its discretion and denied appellant's motion to strike jurors who expressed a clear statement of prejudice or bias against appellant. The trial court failed to strike prospective jurors Collins and Long, for cause after those prospective jurors expressed an opinion that they thought Appellant was guilty based upon the specific facts they knew about in this particular case. (See Vol. VIII pgs. 418-421, 387, 388, 393).

Specifically, Juror Collins,

“stated I have been watching it on the news . . . the lady was killed, shot in her head, and the little girl heard in another room. . . question, if I told you

that if you were a juror in this case, that you would be required to put all that out of your mind and forget it, and base your decision only on the evidence that you hear in the courtroom and only on the law that I give you to apply to that evidence, could you do that? I don't know if I could or not. *Id.* 367. Question, you indicated that you had made up your mind or expressed an opinion about this case. Tell me what your opinion is? Well, I mean, you know, I don't know it's a bad situation. Question, . . . even if you have expressed some opinion, can you put that out – give that up and agree to base your opinion solely on the evidence you hear in the courtroom? I would think I could. *Id.* 388. Question so have you followed this pretty closely from the beginning of it? Yeah. *Id.* 393. Question did just what you had seen on the news make you think he was guilty? Well, it just didn't – I mean, you know, I'm going to be honest, it didn't look good, but you know, I can't say he's guilty, I wasn't there you know. *Id.* at. 393-395.

Juror Long stated

“I heard this man shot his wife in front of his child . . . and when I heard it I believed it at that moment. . . question, so do you think that right now, based upon that evidence, that he's guilty? Yes ,
Id. at 412, 419, 422.

This case is distinguishable from *Messer*, inasmuch as *Messer* dealt with a prospective juror who had a general knowledge or training that related to the issue to be decided by the jury. However in this case the prospective jurors had specific knowledge of the case to be tried and based upon that specific knowledge thought appellant was guilty. Therefore, in accordance with *State v. Newcomb, supra*, prospective jurors Long and Collins made a clear statement of bias during voir dire, and therefore, should have automatically been disqualified and removed from the jury panel for cause. In as much as the *Newcomb Court*, feared these prospective jurors had stated or implied that they had formed an opinion as to the appellants guilt or innocence. *Id.*, 692; thereby preventing any rehabilitation by the trial court.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE WHICH PREVENTED THE APPELLANT A FAIR OPPORTUNITY TO PRESENT A DEFENSE.

This Court has held that the action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed on appeal unless it appears that such action amounts to an abuse of discretion. *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994). *State v. Doonan*, 220 W.Va. 8, 640 S.E.2d 71 (2006).

However, this Court in *State v. Jenkins*, 195 W. Va. 620, 466 S. E. 2d 471 (1995), found an abuse of the trial court's discretion when the evidence excluded prevented the defendant a fair opportunity to present a defense. The *Jenkins* Court, cited to a U. S. Supreme Court case, *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), which held that "an evidentiary ruling . . . deprived [the defendant] of his fundamental constitutional right to a fair opportunity to present a defense." *Id.* at 687, 106 S. Ct. at 2145, 90 L. Ed. 2d at 643. In *Crane* the defendant moved to suppress his confession. The trial judge, upon finding the defendant's confession to be voluntary, denied the defendant's motion. Thereafter, the defendant sought to introduce testimony at trial regarding the physical and psychological environment in which the confession was obtained. The trial judge excluded the testimony after determining that the testimony pertained only to whether the confession was voluntary.

The Supreme Court of the United States pointed out the following when reversing the trial judge's decision to exclude the evidence regarding the environment in which the defendant made his confession: Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' . . . We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an

empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. *Id.* at 690, 106 S. Ct. at 2146 - 47, 90 L. Ed. 2d at 645.

The Jenkins Court also cited another U. S. Supreme Court and West Virginia Supreme Court cases – *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507-8, 92 L. Ed. 682, 694 (1948). *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596, 599 (1983). *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983). *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985). *Board of Education v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990). Holding that if a trial judge's evidentiary ruling deprives a defendant of one of the above minimal constitutional rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense, and to be represented by counsel, then clearly the trial judge has abused his discretion in making such a ruling.

Acknowledging the Supreme Court and West Virginia Supreme Court decisions, the *Jenkins* Court reversed the trial courts ruling on admissibility of a handwriting sample and held “that the Supreme Court of the United States has made clear in the above series of opinions that there are certain rights which are essential for a fair trial person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel” *Jenkins* at 479.

Detective Bare and the medical examiner stated that this was homicide because the gun in question did not malfunction. (See Appx. Vol. X pgs. 1018, 1030, 1067-1068). Dr. Haikal stated that her opinion that this was a homicide was based soundly upon what the detective told her

regarding the gun's functionality. That if the gun was defective her opinion would have been different. *Id* at 1068-1069.

At the very outset of the case, the defense theory of the case was this was an accidental discharge relating to the poor condition of the gun and/or the functionality of the gun. That because of the improper functioning of the gun, the gun accidentally discharged while the appellant was trying to right the gun from its out of battery condition (See Appx. Vol. V pgs. 8-9, 12).

Evidence existed that this gun had many problems and was in a poor condition. Its condition was so poor, it often went into an out of battery condition and that the state's gun expert had to order replacement parts in order to test the gun's overall functionality. Despite all the evidence to the gun's poor condition, the trial court prevented the appellant from demonstrating that the gun in question did not function properly or because of its poor condition – an accidental discharge was possible. (See Appx. Vol. VI pgs. 701, 702, 703-704, 729, 732, 740-743; Vol. XI pgs 1736, 1752-1753, 1776, 1777, 1779-1781; Vol. XII pg.1821; Vol. XI pgs. 1787-1794; Vol. XIII pgs. 2453-2460, 2501).

The trial court refused to allow the State's gun expert Cochrane from fully testifying or showing the jury exhibits which depicted the gun's condition after a test fire, and how the gun's springs had popped out of the gun and were protruding from the gun's barrel or ejection port. (See Appx. Vol. X pgs. 1170-1782).

The trial court further denied the defendant a meaningful defense by prohibiting the appellant's expert to testify as to the guns poor conditioning, performance and issue with springs. Throughout her testimony, the trial court refused to allow her to testify that this gun had malfunctioned, (See Appx. Vol. XIII pgs. 2470 -2471, 2491, 2630-2632), and this was based

upon the many malfunctions reported by the state's expert – which the trial court also excluded from the jury.

During a record vouch, and outside the presence of the jury, the appellant's expert testified that these faulty springs affected the amount of pressure required to engage the trigger, causing the gun to go out of battery, and generally cause the gun to perform improperly. The Court refused this evidence despite its importance to the defense. (See Appx. Vol. XII pgs. 2454-2460).

The trial court also prevented appellant's expert to testify as to her microscopic findings that corroborated appellant's actual version of what happened – his righting of the gun's out of battery condition could have caused an accidental discharge. *Id* at 2453-2460, 2471, 2491-2499, 2630-2632. Specifically in answer to defense questioning in camera the expert stated,

because of the location of the mark and nature of the mark, the appearance of the mark where it's located, it's caused by some – it caused by a portion of the chamber and that, yes, it could lead to an accidental discharge” and the mark indicates that appellant was applying pressure on the back of the slide to get the gun back into battery answer yes. The trial court refused to permit this evidence to the jury. *Id.* 2439-2499.

Appellant contends that this issue was vital to his defense, inasmuch as this was an accidental shooting, the appellant's expert was able to document microscopic findings supporting the appellant's version, but the trial court refused to permit this evidence to be viewed by the jury.

Evidence was received from the state's gun expert Cochrane, that he performed impact testing on this gun to determine if any type of impact or blow to the firearm would have the potential to cause that firearm to fire without any action of the user. (See Appx. Vol. XI pgs. 1749-1752). It was developed that all the test fires and impact testing on this weapon were

performed with a different form of ammunition and not the ammunition which caused the victim's death. All testing was done with lab ammunition and not Federal ammunition. *Id* at 1761, 1792, 1799. The expert stated that,

“if you stop releasing the trigger after the very click, subsequent pulling the trigger will drop the hammer from its reset position without cocking it any further to the rear. This first – or the first click is the trigger bar reconnecting to the hammer block. Pulling the trigger from this point pulls the hammer block out from under the hammer without cocking the hammer to the rear. With primed cartridge cases placed in the chamber of the pistol, the hammer was dropped in this manner and in each of three separate tests, a very slight dimple was left on the primer of the cartridge, but in no instance did the primer fire. (See Appx. Vol. XI pg. 1791).

The state's gun expert Cochrane stated that different types of ammunition could have behaved differently in one firearm from another and it would have some potential to affect how the gun would operate. *Id.* 1773.

The importance of this dimpling vis a vis an accidental discharge was compounded in view of the other state's gun expert, Eddy Hatcher who stated that:

Getting a primer to dimple is seeing if the firing pin is making contact with the primer. If the firing pin makes – contact with the primer, it will make an indentation into the primer, and the primer is what actually causes the gun to fire. The primer explodes, and then that explosion sets off a secondary explosion inside the casing, and then that secondary explosion is what pushes the bullet out of the weapon. And If the dimple is left on the primer but doesn't explode you . . . are talking fractions and fractions of millimeters . . . That certain manufactures of ammunition have a different type of hardness . . . Winchester primers are hard primers . . . and one dimple may cause a primer to explode, where the dimple will not explode on a harder primer . . . Federal ammunition has thinner and soft primers and hypothetically a federal shell may go off with dimpling whereas a Winchester shell would not. (See Appx. Vol. XII pgs. 1953-1968).

The trial court refused to allow, appellant's expert to testify about the type of ammunition used by appellant, that ammunition's effect on dimpling the primers and that ammunition's effect on an accidental discharge. (See Appx. Vol. XIII pgs. 2509-2510).

Appellant has contended from day one this was an accidental discharge, and the state's experts nearly proved that due to this gun's poor condition or functionality that certain manipulation with the gun caused the primers to dimple. If federal primers were used there may have been an accidental discharge. Had Cochrane tested this weapon with federal ammunition, the type of ammunition causing the victim's death, as was actually used, there may have been an accidental discharge in the State Police Lab, which would have clearly corroborated appellant's defense, and possibly exonerated the appellant of this charge .

The trial court's refusal to allow the jury to hear this testimony, and thus denied my client the right to establish and develop his defense. In accordance with *Jenkins, supra*, the trial judge's evidentiary ruling deprived the appellant minimal constitutional rights including the right to examine witnesses offered against him and to offer testimony in support of his or her defense.

IV. The Trial Court Erred In Denying The Appellant Manslaughter Jury Instructions

The standard of review for instructional errors was articulated in *State v. Guthrie* 194 W. Va. 657, 461 S. E. 2d 163 (1995), explaining that a trial court's instructions to the jury must be a correct statement of law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of an specific instruction will be reviewed only for an abuse of discretion.

In *State v. McGuire*, 200 W. Va. 823, 499 S. E. 2d 912 (1997), this Court recognized there existed no statutory definition of voluntary manslaughter in West Virginia, and reviewed several definitions including Blackstone and a federal definition of manslaughter, *Id* at 833 & 834. This Court held that "gross provocation and heat of passion are not essential elements of

voluntary manslaughter, and therefore, they need not be proven by the evidence beyond a reasonable doubt . . . It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter . . . if intent is not proven the crime becomes manslaughter. *Id* at 835.

In *State v. Barker*, 128 W. Va. 744, 38 S. E. 2d 346 (1946) this Court held that the offense of involuntary manslaughter is committed when a person, while engaged in an unlawful act, unintentionally causes the death of another, or where a person engaged in a lawful act, unlawfully causes the death of another.

Where there is competent evidence tending to support a pertinent theory of a case, it is error for the trial court to refuse a proper instruction, presenting such theory, when so requested.' Syllabus, Point 4, *State v. Hayes*, 136 W. Va. 199, 67 S.E.2d 9 (1951). *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972).

As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Matthews v. United States*, 485 U. S. 58, 63, 108 S. Ct. 883, 887 and cited in *State v. McGuire*, *supra*

The trial court abused its discretion in not offering any manslaughter instruction. There existed several scenarios as to what happened on that fateful night, in summary the evidence could support the following pertinent theories: 1) Appellant intentionally killed his wife; 2) the that appellant and the victim were in a fight/argument and appellant maliciously shot his wife; or 3) Appellant accidentally shot his wife committing by the unlawful act of firing his weapon in the home/or appellant wantonly brandished his weapon in the home – either of unlawful act resulted in the accidental death of his wife. The evidence to support the first scenario was the

gun did not malfunction, and Appellant acted in conformity with all the 404b evidence offered, again and again, by the State. The evidence to support the second scenario was from the appellant and victim's daughter, Madison, who heard the Appellant and Victim arguing and Victim stating that it was not her fault. The evidence to support the third scenario was Appellant's testimony as well as the evidence, withheld by the trial court's rulings concerning the poor condition of the gun, and even some allowable evidence that: this gun dimpled federal shells when being manipulated; this gun constantly went out of battery as Appellant stated on that fateful night; or appellant committed an unlawful act by shooting a gun within five hundred feet of a dwelling or wantonly endangered his wife.

It was an abuse of discretion not offer a manslaughter instruction. All of the evidence was presented to the jury, and the Appellant was entitled to a manslaughter instruction given sufficiency of evidence to support a shooting resulting from provocation or malice, or an accidental shooting causing death, or *Matthews, supra*.

After the parties rested the trial court took, up jury instructions and refused appellant any manslaughter instruction. The trial court stated that except for Madison's testimony that "its not my fault," all other evidence in this case that is available suggests no provocation or appellant could not control his anger, and the trial court went on to state that this court has consistently indicated that voluntary manslaughter is by definition a homicide which is committed in the heat of passion, and despite Madison's testimony about it is not my fault the trial court didn't believe there was sufficient evidence of provocation. (See Appx. Vol. XIII pgs. 2685-2686).

In view of *State v. McGuire, supra*, if intent is not proven the crime becomes manslaughter. *Id* at 835, the trial court incorrectly identified and defined what is necessary for voluntary manslaughter; and therefore abused its discretion by not offering said instruction.

Thereafter, the trial court refused involuntary manslaughter instruction because it could not find any evidence of an unlawful or wanton act, or any evidence that he intentionally pointed it at his wife. “ the trial court specifically stated “if there was any evidence in this case that he pointed it at his wife, knowing it was loaded and he intentionally did that, then, you know, you might – have a leg to stand on here.” (See Appx. Vol. XIII pgs. 2690-2693).

Appellant would contend that the court’s statement – if there was any evidence in this case that he pointed it at his wife, knowing it was loaded and he intentionally did that, then you know, you might have a leg to stand on – is exactly the reason an involuntary manslaughter instruction should have been given.

This was the state’s facts and evidence they were using to convict appellant. Moreover, the facts and evidence in this case clearly meet a criminal definition of either unlawful or wanton endangerment as contained in W. Va. Code § 20-2-58, discharging a firearm within five hundred feet of a dwelling, or wanton endangerment § 61-7-11:

§ 20-2-58 It shall be unlawful for any person to shoot or discharge any firearm across or in a public road of this state . . . or within five hundred feet of a dwelling house.

§ 61-7-11. It shall be unlawful for any person armed with a firearm or other deadly weapon, whether licensed to carry same or not, to carry, brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace.

V. The Trial Court Improperly Allowed Prior Out Of Court Statements And Documents That Were Testimonial In Nature And In Violation Of Appellant’s Constitutional Right To Confront His Accusers

Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to

cross-examine the witness. Syllabus point 6, *State v. Mechling*, 219 W. Va. 366 (2006).

A testimonial statement is one “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Syl. Pt. 8, *State v. Mechling*, 219 W. Va. 366 (2006).

A. Palmateer testimony of victim alleging prior shooting in house.

West Virginia State Trooper Andre Palmateer testified about an alleged prior shooting at appellant’s residence.¹ Trooper Palmateer testified that while off-duty, he encountered an upset Mrs. Bowling at a bar in late 2007-2008. (See Appx. Vol. XI pgs. 1570-1). Trooper Palmateer stated that although appearing upset, victim did not initially confide in him so he “had to prod her a little bit as far as, you know, what was going on...” (See Appx. Vol I pg. 46.) She allegedly told him that appellant had been abusive to her and at “one point in time...actually pulled his weapon out and fired a round off in the house.” (See Appx. Vol. XI pg. 1574.) Trooper Palmateer testified that he informed his superior, Sergeant Duckworth, of this alleged incident. *Id.* 1581 However, they never investigated the matter any further or took any action.

This hearsay statement is testimonial for two reasons. First, it is a statement to law enforcement made in the course of interrogation. See *Davis v. Washington*, 547 U.S. 813, 822 (2006)(Statements “are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”) Even though the encounter was made in an informal setting, a bar, Mrs. Bowling was reluctant to talk. Trooper Palmateer questioned her to elicit the responses

¹ Counsel made a proper objection based upon hearsay and Crawford violations yet the Court did not make a ruling on either basis, simply concluding “Overruled.” (See Appx. Vol. XI pg. 1574).

he received. The officer also asked her to report to the State Police Barracks the next day to make a formal report. (See Appx. Vol. XI pgs. 1574-1575). Second, there was clearly not an ongoing emergency as Trooper Palmateer took no action regarding the report. Therefore, the primary purpose of his questioning was to establish or prove past events. At the time of her responses to Trooper Palmateer, Mrs. Bowling's recollection of the past shooting event was potentially relevant to a later criminal prosecution. In fact, the prosecution described this incident as intrinsic evidence to the murder charge against appellant. (See Appx Vol XIV pg. 122).

Even if the statement of victim regarding the shooting incident is not testimonial as a statement made to law enforcement, it is testimonial because it was made under circumstances that an objective witness would reasonably believe would be available for use at a later trial. Syl. Pt. 8, *State v. Mechling*, 219 W. Va. 366 (2006). Victim's report was about a past event where her husband allegedly shot a gun in their house. She informed a member of the West Virginia State Police about this event. True, she told Trooper Palmateer that she did not want him to tell anyone. (See Appx. Vol. XI pg. 1574.) However, the test in West Virginia is an "objective" reasonable person, not the declarant's subjective belief. An objective, reasonable person expects that when they tell a sworn police officer about a shooting in their house, it would be available later use at trial. The victim was allowed to "testify" at trial about this past event, through Trooper Palmateer, without the benefit of cross-examination as required by the Confrontation Clause.

B. Charles Richmond conversations with victim.

Mr. Richmond was a friend of appellant and victim. He testified that victim confided in him in the summer and fall of 2009 about her marriage. (See Appx.

Vol. XI pg. 1611). Mr. Richmond recalled victim stating, “I think her words were, ‘if I’m shot in my sleep, promise me that you’ll tell the police that it was no accident.’”² *Id.*

This statement is testimonial because Ms. Bowling, the ultimate victim, is anticipating her possible murder and identifying the suspect, the appellant, to authorities if found dead. The phrase “promise me you’ll tell the police,” would lead a reasonable, objective witness to anticipate that if so shot, the statement would be available for later use at trial. In fact, the statement was made explicitly made by the declarant for direct law enforcement purpose and is therefore testimonial.

C. Marilyn Smith conversations with victim.

Mrs. Smith was a friend of Mrs. Bowling through their daughters’ volleyball. (See Appx. Vol. VIII pg. 98.) Mrs. Smith testified at the pretrial hearing and much of her testimony was inadmissible hearsay. After the prosecutor asked Mrs. Smith to relay what Mrs Bowling had told her she wanted out of life, and a hearsay objection, the court ruled it admissible as not for the truth of the matter asserted. *Id* at 99. She answered a “normal life.” No explanation was given by the court or prosecutor as to why it was not for the truth of the matter asserted. Directly after this the following exchange occurred:

Q. What, if anything, did Tresa say about the guns in the household and who they were registered to?

Defense Counsel: Objection to hearsay again, Your Honor.

Prosecutor: And not for the truth of the matter asserted, Your Honor.

Defense Counsel: Then what’s it for?

Court: Overruled.

Id.

When Mrs. Smith testified at trial, the testimony was much different and also mostly objectionable. Although not mentioned during her pretrial testimony, Mrs. Smith

² Again, counsel objected to “hearsay and confrontation clause.” (See Appx. Vol XI pg. 1611). The court overruled the objection based upon its prior rulings. *Id.* However, the Court never made a prior ruling regarding this issue.

was asked by the prosecution if Mrs. Bowling ever said anything about divorce. (See Appx. Vol. XI pg. 1537.) Defense counsel objected and the court said it had already given a limiting instruction and that the testimony was not for the truth of the matter asserted but to explain the relationship. *Id.* Mrs. Smith replied that appellant was threatening to divorce her. *Id.* The court's ruling is error because the statement was offered for its truth. However, the main problem, again, was the court's lack of analysis. This statement was never mentioned at the pre-trial hearing. In West Virginia, this "Court cannot perform its function unless the circuit court's [ruling] contains both the factual and legal bases for its ultimate conclusion." *Nestor v. Bruce Hardwood Flooring, L.P.*, 206 W.Va. 453, 456, 525 S.E.2d 334, 337 (1999). There was no analysis of this statement because the generic and broad limiting instruction was drafted before this statement was ever made the testimony was not introduced at the pretrial hearing for analysis.

Mrs. Smith also added new statements at her trial testimony that was not present at the pretrial for analysis. First, she now testified that Mrs. Bowling told her she thought appellant would kill her if she tried to leave. (See Appx. Vol. XI pg. 1538). More damaging to appellant's case was her new testimony that Mrs. Bowling had asked her to tell people if something happened to her. *Id.* at 1538-9. After a defense objection, and the court simply stating "overruled," Smith testified that "she (Mrs. Bowling) said if anything ever happened to her, that I would know what to tell them." First, this also was never disclosed at the pretrial hearing and therefore analyzed for admissibility then or during trial. Second, it is a statement similar to that of Charles Richmond and subject to a Confrontation Clause analysis that was never done. The statement is testimonial hearsay because an objective witness would later believe it could be used at trial and indeed it

was. But even if the statement is considered non-testimonial, the Court should have conducted a full admissibility analysis of this statement as prescribed in Kaufman. First, the court should have performed a *Maynard*³ analysis of this statement, then it should have determined if the statement “bore adequate indicia of reliability.”⁴”

D. Beth Jones “tong incident.”

Beth Jones, victim’s sister, testified about a tong incident that allegedly occurred on July 3, 2009 and was informed about on July 5. The gist of the testimony was that the Bowling’s were at home on this weekend, appellant became angry and struck his wife in the head with grilling tongs, and as a result suffered a laceration. (See Appx. Vol. VIII pg. 87) After objecting to hearsay, the prosecution responded it was admissible because “she is crying and upset and she’s hurt. And she’s telling her sister why she’s crying and upset and hurt.” (*Id.* 87) Defense counsel responded that Mrs. Bowling called her sister two days after the alleged tong incident and therefore it could not be an excited utterance or present sense impression. The court took the ruling under advisement, allowed the testimony, but never later ruled on its admissibility. *Id.*

Beth Jones testified at trial about the alleged tong incident. Since the pretrial hearing, the court never ruled on the prior hearsay objection and also never ruled if the incident was intrinsic or extrinsic subject to 404(b) analysis. At trial, the prosecution focused less on what victim allegedly told her sister Beth in an attempt to avoid the hearsay problem. However, it did introduce a “Women’s Resource Center”

³ Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules. Syl. Pt. 1, *State v. Maynard*, 183 W. Va. 1, 393 S.E.2d 221 (1990).

⁴ [T]he Confrontation Clause contained in the Sixth Amendment to the United States Constitution mandates the exclusion of evidence that does not bear adequate indicia of reliability. Syl, Pt. 5, *State v James Edward S.*, 184 W.Va. 408, 414 (1990).

form about the incident dated July 5, 2009. See Trial Exhibit 43. Beth Jones stated that after her sister told her about the “tong incident,” she called this women’s shelter to get her sister help. (See Appx. Vol. XI pg. 1678). The form is a two-page document that has mostly boxes to check on the front and a narrative on the back. Over an objection for triple hearsay, the court allowed the introduction of the document and allowed Beth Jones to read the narrative into the record. *Id.* 1680. The court overruled the objection stating it had previously made a review of each statement and they are “admissible under the rules.”⁵ *Id.*

If the hearsay problem wasn’t bad enough at the 404(b)/intrinsic hearing, where Beth Jones testified about what victim told her, a new layer of analysis is added with regard to the document. The first layer of hearsay is from victim to Beth Jones reporting the event two days after it happened. It is not a present sense impression or excited utterance two days after the event. The next layer of hearsay is what Beth Jones told the worker at the Women’s Resource Center and was recorded in the narrative. Because the court did not analyze the triple hearsay objection, it is impossible to determine how the prosecution felt this fit a hearsay objection. The document itself is also hearsay and nobody from the Women’s Resource Center testified as to whether it was a business record or otherwise. Finally, the document is testimonial and should have been barred due to the Confrontation Clause. At the least, an objective, reasonable person in Beth Jones shoes would have thought her statements could later be used at trial. This report was two days after the incident and reporting past events. Most importantly, the box

⁵ If this prior ruling was ever made on the record, counsel is unaware where it appears. At the first trial, counsel approached before Beth Jones testified and asked that the document be ruled inadmissible because it is a testimonial statement and it did not even mention grilling tongs. (See Appx. Vol. X pg. 911) The court’s only analysis was “overruled.” *Id.*

checked on the front page states that the matter was referred to law enforcement. Clearly, the court failed to properly analyze this document's admissibility under any standard and it should have been excluded.

E. Gina Jarrell medical records

Gina Jarrell is a psychotherapist that saw both of appellant's children, Leah and Madison Bowling. The State and Ms. Jarrell contend, and the court agreed, that the treatment was solely for therapy, the circumstances indicate it was for future trial testimony. First, victim was killed on January 31, 2010. The children did not begin seeing Ms. Jarrell until August 18, 2011, almost seven months after the death. (See Appx. Vol. VIII pg. 253) (Contrast this with *State v. Edward Charles L.*, where the mother presented the children to a psychologist even before criminal action was contemplated, and *State v. Pettrey* where the treatment began before the alleged sexual abuse of the children was revealed. See *State v. Payne*, 225 W.Va. 602, 607 (2010); *Pettrey*, 209 W.Va. 449, 454 (2001)). Second, the transcript displays that Ms. Jarrell and Madison L. knew she was going to testify. Ms. Jarrell was asked about a treatment note from February of 2011 and she answered "by that time, she was figuring out that she was going to have to testify and she –" (See Appx. Vol. X pg. 1131). Before Mr. Jarrell could finish her sentence the prosecutor cut her off stating "we better not go there." *Id.*

Third, both children's guardians signed medical releases on the first day they attended the "treatment." See Exhibits 30 and 31. Contained in both child's medical records is a consent for release of information, signed by their guardian, dated August 18, 2010, the same day their treatment began. If the appointments with Ms. Jarrell were solely for medical treatment and therapy, there was no need to sign an authorization to

release records and information that was not yet in existence. Last, the children were referred to Ms. Jarrell by West Virginia Child Protective Services, a state agency that is represented by the prosecutor's office in abuse and neglect proceedings.

The most problematic and prejudicial aspect of Ms. Jarrell's "treatment" was the introduction of Leah B.'s records. (See Trial Exhibit 30) Although sister Madison L. did testify, vitiating hearsay or confrontation concerns, Leah did not. Through Ms. Jarrell's testimony, the state sought to introduce her medical records of the children's treatment. (trans. Pp 1118) Defense counsel objected to hearsay and confrontation clause, to which the Court simply stated "Overruled." Id. Although the court had addressed the hearsay issue before, stating the records were admissible under 803(4), at no time did the court rule on the confrontation clause.) "The Confrontation Clause is a rule of procedure, not a rule of evidence. 'If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements.'" *Mechling* 219 W.Va. at 372. Put simply, the confrontation clause analysis always trumps hearsay.

The first problem with the Court's blanket ruling is that the records contain different types of statements. The records begin with an eight page "Child Intake" form. See Trial Exhibit 30. On the first page it states the form is filled out by Philip and Danielle Lilly, whom are actually Leah's sister's dad and step-mom. Some of the verbiage also suggests Ms. Jarrell was writing down what the Lilly's told her. This form contains statements such as:

- "Custody situation w/ mother being murdered."
- "Guardians report upset when she returns from paternal grandmother."

- Family Medical History - alcoholism/substance abuse – Bio Father – Alcohol – in jail/Hx of w/deceased mother. Also cigs. Other drugs.
- Nervous or psychological problems – Bio Mom and Dad
- Leah “told me plainly ‘my dad killed my mom.’”

The rest of the records are mainly “Progress Notes” from Leah’s visits. They continuously state legal conclusions such as “Mom Murdered” and “violent home.”

Many notes are also statements of Leah such as:

- “My dad shot my mom” (Progress Note dated 2/4/2010)
- “My mom is Tresa and she’s dead.” (Progress Note dated 2/4/2010)
- Worried dad will come back and take her. (Progress Note dated 10/6/2010)
- Said “no one wants to live with him.” Screamed I don’t want him to come home. (Progress Note dated 11/3/2010)

As *Kaufman* displays, for at least for *Crawford* analysis purposes, each statement should have been reviewed to determine if it is a testimonial statement subject to inadmissibility due to the Confrontation Clause. Further each statement should have been analyzed to determine if relevant to treatment or diagnosis. The court did not perform this analysis relevant to treatment.

VI. The Trial Court Erred By Improperly Allowed Character Evidence Of Appellant, Including Prior Bad Acts Or Prior Bad Hearsay Related To Appellant’s Character

The appellant requested a 404(b) hearing March 30, 2011. On April, 26-8, 2011 pretrial hearings were held in this case. Although undersigned counsel believed the hearing was strictly 404(b) and *Daubert*, the prosecution called many witnesses. Although it was not clear at the time, the state called 404(b) witnesses, witnesses it deemed intrinsic, and witness to determine hearsay admissibility. The witnesses testified about numerous incidents and numerous errors arose at this pretrial hearing over the course of three days. On April 26, 2011, Madison Grace Lilly, Rebecca Jones, Beth Jones, Marilyn Smith, Mary Ann Lilly, Andre Palmateer, and Charles Richmond were

called by the prosecution for 404(b), intrinsic or hearsay analysis. The state contended that only Marita Judy's testimony was 404(b), the rest being intrinsic or hearsay analysis.

During the pre-trial hearing, Trooper Palmateer testified as mentioned above, about the gun allegedly discharging in appellant's residence. Although this testimony is properly barred under the confrontation clause, it should also have been excluded as hearsay at the pretrial hearing. When defense counsel objected to hearsay, the Court simply stated "Overruled," without analysis. (See Appx. Vol. VIII pg. 121) Likewise, defense counsel objected to Charlie Richmond's pretrial testimony was hearsay and the prosecutor stated it was "asking for a promise" to which the Court agreed. *Id.* at 128. As "asking for a promise" is not a firmly rooted hearsay exception, and the trial court made no analytical ruling as to Palmateer's hearsay statement about a prior bad act.

Beth Jones, mentioned above, as well as Rebecca Jones and Mary Ann Lilly all testified at the pretrial regarding the blender incident. The testimony should have been excluded at the pretrial for numerous reasons. First, most of their testimony was hearsay that should have not been admissible at the pretrial hearing. Rebecca Jones testified at the pretrial hearing that Mrs. Bowling called her on the telephone to report this event. Rebecca Jones stated that the tong incident occurred around July 4th weekend of 2009, and although uncertain of the exact day, Mrs. Bowling called her the day the tong striking occurred. (See Appx. Vol. VIII pgs. 74, 76)⁶ Defense counsel objected to this hearsay report of the tong incident and prosecution stated it was introduced as a present sense impression and excited utterance.

⁶ Mrs. Jones prior statement taken the day after the alleged murder is less specific, "probably July, I want to say June or July."

Beth Jones, Mrs. Bowling sister also testified about the tong incident which she stated occurred on July 3, 2009 and was informed about on July 5. After objecting to hearsay, the prosecution responded it was admissible because “she is crying and upset and she’s hurt. And she’s telling her sister why she’s crying and upset and hurt.” (See Appx. Vol. VIII pg. 87) Defense counsel responded that victim called her sister two days after the alleged tong incident and therefore it could not be an excited utterance. The court took the ruling under advisement, allowed the testimony, but never later ruled on its admissibility. *Id.*

Mary Ann Lilly also testified at the pretrial about the tong incident. She was also informed of it by a telephone call with Mrs. Bowling “a few days after this had happened.” (See Appx. Vol VIII pg. 117).

Marry Ann Lilly also testified about a blender incident that allegedly occurred in 2008 at the Bowling residence. Mary Ann and Madison Lilly and testified about this event at the pretrial hearing. Mary Ann Lilly stated that her and her husband were at the Bowling residence when appellant became upset and threw a red plastic cup that hit her. *Id* at 104. She knew he was upset because the Bowling’s were “bickering a little bit back and forth.” *Id.* at 112. Ms. Lilly acknowledged there was no physical altercation between the Bowlings and she did not see the cup get thrown. *Id.* When Madison Lilly was asked about the event at the pretrial she simply stated that she was in the garage and I’m not—I don’t completely remember what happened, but he got mad and threw a cup at her, and all the stuff, like, flew out.” *Id.* at 12.

Marita Judy was called by the state because she was appellant’s girlfriend many years ago. She alleged that in 2001, appellant grabbed her from behind causing a curling

iron she was using to burn her face. (See Appx. Vol XIV pg. 123). The state sought to introduce this evidence to show state of mind, intent, and absence of mistake or accident.

Id.

After this three days of testimony, defense counsel expected the trial Court to allow argument be counsel, and then issue either a verbal or written opinion on whether the evidence was 404(b) or intrinsic, and if 404(b), the merits of the McGinnis analysis. Counsel also expected the rules of hearsay applied to 404(b) hearings. However, the trial court provided virtually no analysis to the testimony. The first thing the trial court should have done was allow argument and make rulings as to whether prior acts and testimony were 404(b) evidence or intrinsic. The prosecution contended that the following were intrinsic acts: (1) Trooper Palmateer “shooting incident;” (2) tong incident; and (3) blender incident. The court made no ruling, nor heard argument, regarding the intrinsic nature of the shooting incident or tong incident. To determine:

“the admissibility of evidence of ‘other bad acts’ is governed by Rule 404(b), we first must determine if the evidence is "intrinsic" or "extrinsic." See *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990): "'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged."

State v. LaRock, 196 W.Va. 294, 312 (1996). Trooper Palmateer’s testimony about a prior shooting in the house was not intrinsic because it occurred too remote in time (he stated he was told about the incident in 2007-8 but never stated when the shooting alleged occurred.) Second, although Trooper Palmateer stated a round was fired in the house, he never stated the surrounding circumstances or stated it was an intentional act, just a shooting in the house. (121).

The blender incident should also have been characterized as 404(b), an not intrinsic. Although the trial court made some findings with regard to the blender incident, the court never determined if it was 404(b) or intrinsic. It is non-admissible because it was not “inextricably intertwined” with the alleged murder. Madison Lilly testified about the incident, barely remembered it, and stated “he got mad and threw a cup at her.” (12). Mary Ann Lilly testified that appellant became angry and threw a red plastic cup that struck her, not victim. No one was injured.

Next, the trial court should have made ruling and findings regarding the hearsay introduced at the pretrial. Non-testimonial statements are potentially admissible if a witness is unavailable and the statement bears adequate indicia of reliability. *State v. Kaufman*, 227 W.Va. 537, 551 (2011); also see *Mechling*, 219 W.Va. at 371. Reliability can be inferred from when evidence falls within a firmly rooted hearsay exception, *State v. James Edward S.*, 184 W.Va. 408, 414 (1990). Assuming *arguendo* that Palmateer and Richmond’s testimony about the shooting incident and “tell the police if I’m found dead” was not barred by the Confrontation Clause, they should have been subject to a complete hearsay analysis as stated in *Kaufman*.⁷ The trial court should also have applied a proper hearsay analysis to Marilyn Smith’s testimony.

The most glaring error from these pretrial hearings was the failure to afford a full *McGinnis* analysis. In *State v. McGinnis*, 193 W.Va. 147 (1994), the West Virginia Supreme Court crafted the proper 404(b) test for West Virginia requiring numerous findings and analysis by the trial court. After all the above testimony, the only statements made by the trial court regarding 404(b)/intrinsic or hearsay were the following:

⁷ In a criminal case, the Confrontation Clause commands the trial court to pursue the Wright trustworthiness inquiry. In assessing whether a statement is reliable, the trial court must make a record to support its decision on admissibility. Where no such record is made, the reliability test has not been satisfied. *Kaufman* at 415.

Court: (talking about the blender incident) That is 404(b) essentially; is it not. Because it is a bad act. Now she also testified about discussions with the deceased that go to the deceased's state of mind, but I think with regard to the particular blender-throwing or the cup-throwing incident, I think that particular description is, likewise, very, very close to a prior bad act. And so, I think I have to give a cautionary instruction with regard to that description.

Keller: The blender incident, right.

Court: So I think that one occurs. For the record, with regard to Ms. Judy's testimony, I have to make a finding, with regard to Md. Judy's testimony, I have to make a finding, and I find that—based upon a preponderance of the evidence, I find the incident did occur and then given the proper cautionary instruction, which will be given at the time Ms. Judy testifies, and at the end of it at the time we do the charge, I'll give it at both times, and I will give the McGinnis instruction with regard to Ms. Lilly. Is that her name?

Keller: Yes, your honor.

Court: Okay, Ms. Lilly's discussion of the cup throwing, blender incident.

Keller: And your honor, I take it then the Court is also making the requisite Rule 403 finding under McGinnis?

Court: I make, under 403, that that the admission of the prior bad acts' testimony, as set forth in Ms. Judy's testimony, and in Ms. Lilly's testimony, is more probative than prejudicial, and I believe it is appropriately—it should be appropriately admitted before the jury. (See Appx. Vol. VIII pg. 327).

Several errors stand out when the McGinnis test is compared with the court's ruling. First, the court never engaged or allowed defense counsel to even comment on the issue. Second, the court never definitively determined if the blender incident was 404(b) or intrinsic evidence. While the court did find the blender incident occurred, it did not make the finding beyond a preponderance of the evidence. *Id.* In regard to the blender incident and the Marita Judy altercation, the court failed to find that appellant was the actor. *Id.* Likewise, the court did not make a relevancy determination regarding either incident. Last, after the prosecutor urged the court to make a 403 probative v prejudicial balancing test, it did so but provided no analysis or insight into its decision.

VII. The Trial Court Erred By Allowing The State To Recall And Reference Other Murder Convictions In Raleigh County, West Virginia, And How Those Cases Were Related To Or Similar To The Instant Case And Other Issues On Guilt Of Consciousness

The lead detective's direct testimony created several issues of reversible error. First, the trial court erred when it allowed Mr. Bare to testify about four previous cases where a defendant called the police after a shooting, said it was accidental, and were then convicted. (See Appx. Vol. X pg. 982). The prosecution was trying to prove that just because appellant called 911 after the shooting, this act did not vitiate his consciousness of guilt. To do so, the prosecution asked Detective Bare about four cases where defendant called and was later convicted. This testimony is not relevant to the case and should not have been allowed. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. W.Va.R.Ev. 401. If appellant had called the police four times before and lied about committing a crime, it would certainly be relevant. However, the fact that four other strangers called police and falsely reported a crime does not make it more or less probable that appellant did so. This evidence is worse than 404(b) evidence where at least the defendant is the actor and safeguards of admissibility are provided. The prosecution's elicitation of this evidence was "four other criminals did this, so did appellant." But just because four others falsely report a crime has no bearing on whether appellant did.

Second, he was allowed to testify, over objection, regarding the ultimate issue of defendant's guilt. Detective Bare responded yes to the following leading question by the prosecutor "by the time you obtained the warrant and up to until today, have you, as chief investigator, found substantial evidence, *beyond a reasonable doubt*, that the defendant shot his wife with *malice*?" (See Appx. Vol. XII pg. 1909). The basis of the defendant's objection was that Mr. Bare was testifying as to his opinion, a legal conclusion, on the

ultimate issues to be decided by the jury. That is, Mr. Bare was testifying that the evidence showed beyond a reasonable doubt that the Defendant had killed the victim with malice. This clearly invades the province of the jury in coming to a conclusion as to whether the prosecution has met its burden of proof and was not sufficiently probative so as to assist the trier of fact to understand the evidence and determine a fact at issue. Therefore, this testimony should have been stricken under Rule 704 and Rule 701 or Rule 702 of the West Virginia Rules of Evidence.

The West Virginia Supreme Court addressed a similar case in *Jackson v. State Farm Mut. Auto. Ins. Co.*, 600 S.E.2d 346 (W.Va. 2004). In this case, the Court stated that expert testimony that attempted to “testify that the conduct of State Farm’s agents and employees indicated the existence of actual malice” was inadmissible under Rule 702 of the West Virginia Rules of Evidence. *Id.* at 356. The Court’s explanation for this was that this evidence was not the type to “assist the trier of fact to understand the evidence to determine a fact in issue. *Id.* at 357. The Court stated that after the jury was instructed as to the applicable law of malice that “they would be as capable . . . to determine whether State Farm’s conduct indicates the existence of malice. *Id.* Like *Jackson*, Mr. Bare simply testified to his opinion about what the testimony meant and not why or how it was important or relevant to a fact in issue.

Under the analysis of this opinion, it is the Defendant’s position that Mr. Bare’s opinion testimony that he “found substantial evidence, *beyond a reasonable doubt*, that the defendant shot his wife with *malice*” is opinion testimony that goes to the ultimate conclusion for the jury. Further, it is the defendant’s argument that the opinion as to the “beyond a reasonable doubt” standard and the finding of “malice” are exactly those types of

“unhelpful” testimony that the *Perkins* Court defined because they are clearly terms that “had their common vernacular stem from their legalistic roots.” *Id.* Unlike the word “reasonableness,” which the *Perkins* Court found to have similar meanings in both legal and common usage, the “beyond a reasonable doubt” standard and the term “malice” are not words that share context outside of the legal setting.

This testimony, credited to Mr. Bare, through the Prosecutions use of leading questions, was nothing more than an attempt to supplant Mr. Bare’s opinion for that of the Jury on the ultimate issue in a First-Degree Murder case and the defendant’s objection should have been sustained.

The Court also erred during Mr. Bare’s testimony when it allowed him to impermissibly comment on appellant’s Fifth Amendment right to silence. Immediately after the “four other defendant’s called 911” prejudicial testimony, the prosecution tried another nefarious way to prove appellant’s consciousness of guilt. The night/morning of the shooting, appellant waived his constitutional right and made several statements to the police and was then released. The next day, Mr. Bare called appellant and asked him to come to the station because he needed “additional information.” (984). He then testified that appellant did not come in and give him additional information. *Id.* In the seminal *Miranda* case, that Court held it impermissible to penalize someone for exercising their Fifth amendment right. “The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.” *Miranda v. Arizona*, 384 U.S. 436 (1966).

CONCLUSION

Wherefore based on the above, Petitioner Christopher Wayne Bowling, respectfully requests this Court grant him a new trial.

**Christopher Wayne Bowling,
Petitioner,**

By Counsel:



Richard W. Weston (WVSB 9734)
WESTON LAW OFFICE
621 Sixth Avenue
Huntington, WV 25701
Phone: 304.522.4100
Fax: 304.250.3000

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1674

CHRISTOPHER WAYNE BOWLING,
Petitioner,

V.)

Appeal from a final order
Of the Circuit Court of Raleigh
Cabell County (10-F-142-H)

STATE OF WEST VIRGINIA,
Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Weston, do hereby verify that I served the "Petitioner's Brief" this
5th day of May, 2012, via U.S. Mail, postage prepaid, addressed to the following:

Kristen Keller, Esquire
Prosecuting Attorney, Raleigh County
112 North Heber Street
PO Box 907
Beckley, WV 25801
Fax (304) 255-9168



Richard W. Weston (WVSB 9734)
WESTON LAW OFFICE
621 Sixth Avenue
Huntington, WV 25701
Phone: 304.522.4100
Fax: 304.250.3000