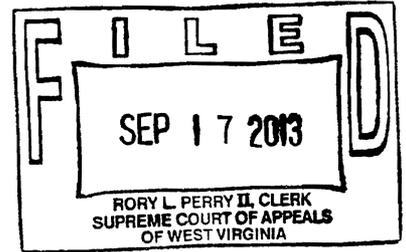

IN THE
SUPREME COURT OF APPEALS
OF THE
STATE OF WEST VIRGINIA
No. 13-0574



STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

Case No. 13-0574

CARLOS ANGLE,
Defendant Below, Petitioner.

PETITIONER'S BRIEF

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I
FROM THE HONORABLE FRED L. FOX, II
09-F-83

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ASSIGNMENTS OF ERROR

- I. **THE CIRCUIT COURT ERRED IN ADMITTING RULE 404(b) EVIDENCE BECAUSE THAT EVIDENCE WAS NOT ADMITTED FOR A PROPER PURPOSE.**
 - A. **Evidence Offered to Show “Lustful Disposition” is Only Admissible in Cases Involving Sex Crimes Against Children.**
 - B. **The State Set Forth Multiple General Reasons for Using the Evidence Without Explaining with Specificity How the Evidence was Related to those Reasons.**
- II. **THE CIRCUIT COURT’S FACTUAL DETERMINATION THAT THERE WAS SUFFICIENT EVIDENCE THAT THE OTHER ACTS OCCURRED WAS CLEARLY ERRONEOUS.**
- III. **THE CIRCUIT COURT ERRED WITH REGARD TO THE ANALYSIS OF THE RELEVANCE OF THE EVIDENCE UNDER RULES 401 AND 402.**
- III. **THE CIRCUIT COURT ERRED WITH REGARD TO THE BALANCING TEST REQUIRED BY RULE 403.**
 - A. **The Circuit Court Failed to Conduct the Balancing Test on the Record as Required.**
 - B. **The Proposed Evidence Was More Prejudicial Than Probative.**
- IV. **THE IMPROPER INCLUSION OF 404(b) EVIDENCE WAS NOT HARMLESS ERROR.**

KIND OF PROCEEDING AND NATURE OF THE RULING

The case at bar was a criminal trial following a two count indictment of Burglary and Sexual Assault in the First Degree, which resulted in a conviction on the felony charge of Sexual Abuse in the First Degree, a lesser included offense of that charged in Count II of the indictment and an acquittal on Count I of the indictment (Burglary). Petitioner was sentenced to life imprisonment following the filing of a separate recidivist information, which was also tried and of which he was convicted, and which is being appealed separately by other counsel. Motions for post-verdict judgment of acquittal and for a new trial were made and denied prior to sentencing.

STATEMENT OF THE CASE AND FACTS

On or about June 1, 2009 the Petitioner, Carlos Angle, was indicted by a grand jury in the Circuit Court of Marion County on charges of Burglary and Sexual Assault in the First Degree. (A.R. 5). A jury trial was held July 27, 2011 and July 28, 2011, during which Petitioner was found guilty of Sexual Abuse in the First Degree, a lesser included offense of Sexual Assault in the First Degree. Petitioner was found not guilty of Burglary. (A.R. 449)

Prior to trial in this case the State filed a Notice of Intent to Use 404(b) Evidence, specifically, evidence of additional subsequent charges of Sexual Assault in the Second Degree against an adult female, Sexual Abuse in the First Degree against a juvenile female, and Conspiracy to Commit a Felony, for which Petitioner had been indicted, but not yet tried or convicted, in Marion County, WV. (A.R. 7). The State alleged in its Notice of Intent to Use 404(b) Evidence that the evidence would be used to show “motive, intent, and absence of mistake” and cited as authority *State v. McIntosh*, 207 W.Va. 561, 534 S.E.2d 757 (2000). (A.R.

7). Petitioner's Counsel filed a written response to the State's Notice of Intent to Use 404(b) Evidence, which argued that the *McIntosh* reasoning only applied in cases that involve child sexual assault or sexual abuse and that inclusion of the offered 404(b) evidence would be more prejudicial than probative. (A.R. 10-12).

An in-camera hearing was held on July 26, 2011 to determine the admissibility of the 404(b) evidence the State intended to use at trial in this matter. At that hearing the Court ruled that the 404(b) evidence was admissible. (A.R. 14-35). No order was entered following that hearing. (A.R. 2-4).

Trial in this matter was scheduled for and held on July 27, 2011 and July 28, 2011. At trial, defense counsel again objected to the use of the 404(b) evidence during the afternoon recess on the first day of trial, citing the fact that witness testimony did not support similarities in mode of operation between the cases and that the State's contention that Petitioner had made admissions in the collateral case was not supported by the officer's testimony. The Court denied the motion. (A.R. 222-224). At the beginning of the second day of trial the Court, *sua sponte*, expressed concern regarding whether its 404(b) ruling was proper but still allowed the ruling to stand. At that time defense counsel objected to the State's limiting instructions on the 404(b) evidence, arguing again that the instruction did not precisely narrow down the purpose of the evidence. (A.R. 319-322).

At the close of the State's evidence Petitioner's counsel moved the Court for a directed verdict of not guilty, which motion was denied with regard to Count I (Burglary) and granted in part with regard to Count II (Sexual Assault in the Second Degree). The Court determined as a matter of law that there was insufficient evidence to prove Sexual Assault in the First Degree as

charged in the indictment, but the jury was only permitted to deliberate on the lesser included offense of Sexual Abuse in the First Degree and Burglary as charged in the indictment. The defense motion for judgment of acquittal was reserved to the defense to be heard fully at a later time. (A.R. 373-374; A.R. 449-450). The jury returned a verdict on July 28, 2013, finding the Petitioner guilty of the lesser included offense of Sexual Abuse in the First Degree and not guilty of Burglary. (A.R. 444; 449-450).

Following trial in this matter, Petitioner's attorney filed a written Motion for Post Verdict Judgment of Acquittal and a Motion for New Trial. (A.R. 452-456). A post-trial motions hearing was held in this matter on May 3, 2013, at which time defense counsel again raised issues surrounding the use of 404(b) evidence, specifically lack of specificity regarding the purpose for which the evidence was admitted, lack of similarity between the mode of operation in the collateral and instant cases, generality of the limiting instructions, lack of relevance of the 404(b) evidence, failure of the Court to conduct the balancing test required under Rule 403, and unfair prejudice as a result of the 404(b) evidence. (A.R. 462-475). The Court ultimately denied both motions. (A.R. 478-483).

Sentencing in this matter was postponed until March 19, 2013, following Petitioner's separate trial on charges of recidivism. Following conviction on those charges, which are being appealed separately, Petitioner was sentenced to imprisonment in the penitentiary for life. The Order from that hearing was not entered until April 16, 2013. (A.R. 484-486). This appeal followed.

STANDARD OF REVIEW

With regard to a trial court's ruling on the admissibility of evidence, this Court has previously held that the standard of review is as follows:

A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard. Syl. Pt. 4 *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998).

In addition, this Court has previously held that the standard of review for a trial court's admission of evidence pursuant to Rule 404(b) is as follows:

The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403. *State v. LaRock*, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996).

SUMMARY OF ARGUMENT

- A. The 404(b) evidence in this matter was not admissible to show a "lustful disposition toward the victim" because lustful disposition evidence has been specifically limited to cases of sex crimes against children.
- B. The 404(b) evidence was not admissible because the State did not set forth a specific proper purpose for which the evidence was offered, instead citing four separate reasons and offering no specific information as to how the 404(b) evidence would address them.
- C. The Court failed to make a proper factual determination that there was sufficient evidence the crimes offered as 404(b) evidence had actually occurred and that they were committed by the Petitioner.

- D. The Court failed to address the relevance of the 404(b) evidence as required by Rules 401 and 402. Had this analysis been conducted it would have revealed that under those rules the evidence was irrelevant to the case at bar.
- E. The Court did not conduct the balancing test required by Rule 403. Had this balancing test been conducted it would have shown that the admissibility of the 404(b) evidence was vastly more prejudicial than probative.
- F. The erroneous inclusion of 404(b) evidence was not harmless error because the admitted evidence was so prejudicial that there is a high probability its inclusion contributed to the conviction.

STATEMENT REGARDING ARGUMENT AND DECISION

Counsel for Petitioner believes that oral argument is appropriate in this case under Rule 18(a). This case is appropriate for Rule 19 oral argument because it involves assignments of error in the application of settled law. This case would not be appropriate for a memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ADMITTING RULE 404(b) EVIDENCE BECAUSE THAT EVIDENCE WAS NOT ADMITTED FOR A PROPER PURPOSE.

A. Evidence Offered to Show “Lustful Disposition” is Only Admissible in Cases Involving Sex Crimes Against Children.

One of the numerous purposes that the State proposed for the offered 404(b) evidence was that the State intended to use evidence of Petitioner’s collateral crimes to show a “lustful disposition toward the victim” as set forth in *State v. Edward Charles L.*, 398 SE 2d 123 and upheld by *State v. McIntosh*, 207 W.Va. 561, 534 S.E.2d 757 (2000). The admission of the

offered evidence for this purpose was improper because evidence can only be admitted under the reasoning set forth in *State v. Edward Charles L.* when the case at bar involves sex crimes against children, which was not the case here.

Prior to the decision in *State v. Edward Charles L.*, the controlling case regarding the admissibility of collateral crimes evidence to show lustful disposition was *State v. Dolin*, 176 W.Va 688, 347 S.E.2d 208 (1986). In *Dolin* the Court held that “[i]t is impermissible for collateral sexual offenses to be admitted into evidence solely to show a defendant's improper or lustful disposition toward his victim.” The *Dolin* Court reasoned that “[t]o recognize a sexual propensity exception in addition to the numerous exceptions to the collateral crime rule would provide a convenient path to damage a defendant's character and would sweep additional sexual offenses into evidence which would obviously prejudice and confuse a jury in its consideration of the crime charged in the indictment.”

In *State v. Edward Charles L.* and later in *State v. McIntosh*, the Court modified the decision in *Dolin* by holding that “collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition to children generally, or a lustful disposition to specific other children, provided such acts occurred reasonably close in time to the incident(s) giving rise to the indictment. To the extent this conflicts with our decision in *State v. Dolin*, 176 W.Va 688, 347 S.E.2d 208 (1986) it is overruled.” This holding makes clear that the admissibility of lustful disposition evidence is limited to cases involving child sexual assault or sexual abuse, and is not extended to sex crimes in which the alleged victim is an adult at the time of the offense.

In the case at bar the alleged victim was a 19 year old woman, not a child. In both *State v.*

prejudice.”

State v. Edward Charles L., 398 S.E.2d 123, 183 W.Va. 641 (W.Va., 1990).

The above reasoning makes perfectly clear that the purpose of the exception set forth in *Edward Charles L.* is to enhance the credibility of a child who has been sexually assaulted or sexually abused. None of the above issues is present in this case, because the victim in the case at bar was an adult at both the time of the offense and the time of trial. To attempt to enhance her credibility with evidence of subsequent sexual assaults is clearly an invitation to the jury to conclude that the allegations in the instant case must be true because someone else has made similar accusations.

The admission of the 404(b) evidence at issue for the purpose of showing a lustful disposition toward the victim was improper under this Court’s previous rulings regarding lustful disposition evidence. *State v. Edward Charles L.* and *State v. McIntosh* permit the introduction of lustful disposition evidence of other sexual crimes only in cases where the victim of the instant case was a minor and not, as the State contended, in all cases of sexual abuse or in cases where the victim in the collateral case was a minor. As such, the Circuit Court’s ruling that the offered evidence was admissible for the purpose of showing lustful disposition toward the victim should be reversed.

B. The State Set Forth Multiple General Reasons for Using the Evidence Without Explaining with Specificity How the Evidence was Related to those Reasons.

In addition to the purpose of “lustful disposition” as addressed above, the State also offered the 404(b) evidence of collateral sexual assaults for several other possible purposes, namely “motive, absence of mistake, and intent,” (A.R. 7) and mode of operation (A.R. 31) for a total of

five purposes, four of which were included in the limiting instruction presented to the jury. (A.R. 51).

With regard to the purposes for which 404(b) evidence may be offered, this Court has previously held as follows:

“When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.”

State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994) at Syllabus Point 1. In this case, the State did precisely what *McGinnis* has held that they may not do—it set forth a list of possible purposes pulled directly from Rule 404(b) for which it intended to offer the evidence, without specificity or precision, and without clarity in the record as to the specific and precise purpose for which the evidence was being used, either at the time the evidence was originally ruled admissible or at trial.

Lustful disposition having been discussed previously, the first purpose proposed by the State was motive, which the Court has previously defined in the context of 404(b) admissibility:

“supply[ing] the reason that nudges the will and prods the mind to indulge the criminal intent.” Two evidentiary steps are involved. Evidence of other crimes is admitted to show that defendant has a reason for having the requisite state of mind to do the act charged, and from this mental state it is inferred that he did commit the act. Evidence of another crime has been admitted to show the likelihood of defendant having committed the charged crime because he needed money, sex, goods to sell, was filled with hostility, sought to conceal a previous crime, or to escape after its commission, or to silence a potential witness.”

State v. Johnson, 179 W.Va. 619,627,371 S.E.2d 340,348 (1988) (citations omitted).

At no point in either the trial itself or in the *McGinnis* hearing did the State ever attempt to address how the evidence of subsequent charges might even potentially show motive to commit the crimes in the case at bar, which occurred nine months previously. Indeed, aside from the State's Notice of Intent to Use 404(b) Evidence (A.R. 7) and in the jury instructions regarding the use of the 404(b) evidence (A.R. 15, 392), the only mention of Mr. Angle's motive throughout the entirety of trial in this matter is the mention in the State's closing and rebuttal that the purpose of the assault was sexual gratification (A.R. 407, 435). In fact, the State even argued in its own closing that "She didn't know the why. The why doesn't matter. Only that it did." (A.R. 404).

The record is clear that no evidence whatsoever was presented to suggest how two alleged sexual assaults committed nine months after the one at issue in the case at bar could be related to motive to commit the earlier crime, other than the obvious and impermissible inference that a person who committed a later assault would probably have been motivated to commit an earlier one—that Mr. Angle's "motive" was that he is a bad man who likes to rape people.

The second possible purpose offered by the State was 'absence of mistake.' The issue of absence of mistake was raised several times in the trial of this matter, and yet at no time is any explanation given as to what mistake, precisely, the State wished to dispute. At no point in the record did Petitioner or his counsel assert that he touched the victim in this case by mistake, that he believed her to be someone else, that he misunderstood consent, or any other type of defense that might have been construed as a "mistake." Nor did the State, in its use of the evidence, ever indicate how the 404(b) evidence addressed a possible mistake, other than to state in its opening statement that the new charges showed that this wasn't a mistake (A.R. 126) and then again in its

In contrast, the evidence from the collateral case was that the alleged victims were respectively 16 and 24. (A.R. 17). In that case the assaults were alleged to have taken place at a party where the victims were both intoxicated, in concert with at least two other individuals, during the party and in full view of multiple individuals walking in and out of the room while the assault was going on, and in which Mr. Angle happened upon another individual sexually assaulting the alleged victim and joined in. (A.R. 18-27). It should be noted that these details also only apply to the assault of the adult victim in that matter, as no evidence whatsoever relating to the juvenile victim was presented anywhere in the record, aside from the introduction at trial of the bare fact that Mr. Angle had been charged with sexually assaulting a juvenile who was intoxicated. (A.R. 333).

Looking at the circumstances in this light, there certainly appears to be no real mode of operation, as the assaults took place in vastly different settings and under vastly different circumstances. The only real connection between these two cases appears to be that young women in the same neighborhood were sexually assaulted, and that Mr. Angle was accused in each case. This issue was addressed both at the *McGinnis* hearing, as has already been discussed, and then again at trial on two different occasions prior to the introduction of the evidence. (A.R. 222-224, 321-322).

Prior to the introduction of the 404(b) evidence, and after hearing testimony from several witnesses, defense counsel asked the trial court to reconsider its ruling on the 404(b) evidence on the grounds that the testimony heard that day indicated that, directly contrary to the apparent mode of operation the State proposed, the victim in the instant case was not intoxicated, and indeed had not been drinking at all. The trial court denied the motion at that time as well. (A.R.

222-224).

In addition to the obvious differences between the two cases, there is also a fairly simple fact that was also pointed out by defense counsel at the original *McGinnis* hearing—that the elements alleged by the State as constituting mode of operation are so general as to be present in a vast majority of sexual assault cases, and insufficient to constitute a true mode of operation. (A.R. 28-30).

These factors make clear that the State set forth to use the 404(b) evidence in this matter purely to show the defendant's character for criminal behavior, and that the list of possible purposes was set forth only as the barest nod to the requirements of *McGinnis*, without any real effort to be specific in its application. The trial court's decision that the evidence was admissible for a proper purpose was error, and should be reversed.

II. THE CIRCUIT COURT'S FACTUAL DETERMINATION THAT THERE WAS SUFFICIENT EVIDENCE THAT THE OTHER ACTS OCCURRED WAS CLEARLY ERRONEOUS.

Two separate pieces of evidence were offered by the State for use as 404(b) evidence as addressed above. First, the alleged sexual assault of another adult female and second, the alleged sexual assault of a juvenile, which were alleged to have occurred on the same night and at the same location. (A.R. 18-27). Because evidence of two separate crimes, even if charged in the same indictment, were offered for admission, and both crimes were mentioned during trial (A.R. 330-335; 400), the trial court should have addressed each piece of evidence separately to determine whether there was sufficient evidence that the Petitioner committed each of them.

In *State v. LaRock* this Court held that the first step in reviewing the admission of evidence under Rule 404(b) is to review for clear error the trial court's factual determination that there is

sufficient evidence to show the other acts occurred. *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996). In this case no such factual determination appears to have ever been made, and even if we assume, *arguendo*, that the trial court considered the sufficiency of the evidence before making its ruling, that determination was clearly erroneous based on the evidence presented in the *McGinnis* hearing.

First, it should be noted that the record does not show that the trial court conducted any analysis with regard to the likelihood that the Petitioner committed the offered crimes. If such analysis is to be conducted on the record, the Court fails outright. Nothing in the transcript of the *McGinnis* hearing indicates that the trial court even considered this issue (A. R. 14-35), and no Order was ever entered following that hearing which would have more fully set forth the Court's findings and conclusions on this issue (A.R. 2). As such, the only record of the Court's findings of fact or conclusions of law on this point is contained in the transcript itself.

The transcript of the *McGinnis* hearing indicates that only one witness was called, Sergeant William Matthew Pigott, who testified regarding his investigation of the collateral crimes being offered as 404(b) evidence. (A.R. 16-26). No exhibits were marked or admitted into evidence at this hearing. (A.R. 15).

The testimony of Sergeant Pigott focuses almost exclusively on his questioning of the Petitioner with regard to the alleged sexual assault against the adult victim, in fact specifically noting that Mr. Angle denied any contact with the juvenile victim and that he (Sergeant Pigott) did not press that issue further during his interview (A.R. 24). On cross examination Sergeant Pigott admitted that nearly all of his testimony in that hearing related only to the adult victim (A.R. 26).

With regard to the adult victim, Sergeant Pigott testified that “Mr. Angle had been named as a person of interest in the matter. He was located and detained pending further investigation.” (A.R. 18). Nowhere in his testimony does Sergeant Pigott elaborate on how Mr. Angle came to be a person of interest in the investigation or what information the patrol officers had that led them to him.

In addition, during the course of his testimony Sergeant Pigott focuses exclusively on a single interview that he conducted with Mr. Angle. He does not discuss any other aspects of his investigation. He makes reference to other witness statements that differed from Mr. Angle’s account of that evening, but does not elaborate as to who those witnesses were or the specifics of their statements, except to indicate that he advised Mr. Angle during the course of the interview that they had witnesses who saw him standing in between the adult victim’s legs with his penis out, which Mr. Angle allegedly admitted to (A.R. 20-21). Although there is discussion in Sergeant Pigott’s testimony as to whether the adult victim was consenting to sexual intercourse there is no testimony whatsoever about any specific sexual contact on behalf of Mr. Angle. The only testimony Sergeant Pigott gave regarding the occurrence of actual sexual contact was his statement that “both were engaging in sexual acts with Ms. Coburn (A.R. 19), and he indicates only that they had learned that information “through all of our interviews and previously talking to Mr. Angle” (A.R. 19) without discussing exactly what was said by whom or producing any statements to that effect. No further evidence was presented beyond Sergeant Pigott’s testimony with regard to either victim.

The State presented closing arguments that the alleged acts occurred and that Mr. Angle committed those acts, and that it had established that by the preponderance of the evidence (A.R.

27). Defense counsel argued that Mr. Angle had not been convicted of the collateral crimes, that they were merely allegations, and that as such the Court should not admit them (A.R. 30). After hearing the evidence and arguments of counsel, the Court stated only that it found the evidence to be “proper 404(b) evidence” (A.R. 32).

Because no evidence whatsoever was presented with regard to Mr. Angle and the juvenile victim, any determination the Court may have made with regard to the sufficiency of the evidence relating to that matter was clearly erroneous under *LaRock* and *McGinnis*, and as such any reference at trial to the juvenile victim should have been excluded. The evidence presented with regard to the adult victim was far and away insufficient to meet the “preponderance of the evidence” standard set forth in *McGinnis*, and as such any determination the Court may have made with regard to the sufficiency of the evidence with regard to that matter was also clearly erroneous, and should also have been excluded at trial.

III. THE CIRCUIT COURT ERRED WITH REGARD TO THE ANALYSIS OF THE RELEVANCE OF THE EVIDENCE UNDER RULES 401 AND 402.

This Court has previously held in *State v. McGinnis* that once a determination has been made that it is sufficiently likely that the other acts occurred and that the defendant committed them, the next step is to determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence. Syllabus point 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

Rule 401 of the West Virginia Rules of Evidence states as follows regarding the definition of relevant evidence:

"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.”

Rule 402 addresses the treatment of relevant and irrelevant evidence, stating:

“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible.”

Under these rules the treatment of evidence under Rules 401 and 402 and *State v. McGinnis* is straightforward—the Court must determine whether the offered 404(b) evidence has a tendency to make the existence of any fact that is of consequence to the case at bar more or less probable. WV Rules of Evidence, Rule 401. If the offered evidence is relevant as defined in Rule 401, it is admissible pending the Rule 403 balancing test required in *McGinnis*, discussed below. If the offered evidence is not relevant to the facts of consequence to the case at bar, it is not admissible.

In this case, although a *McGinnis* hearing was held to address the admissibility of the 404(b) evidence, it does not appear from the record of that hearing that the trial court made any determination whatsoever regarding the issues of relevance as set forth above. As discussed above, no order was entered following the *McGinnis* hearing, so the trial court’s initial determination can only be inferred from the transcript of the hearing itself.

In “Defendant’s Response to State’s Notice of Intent to Use 404(b) Evidence” defense counsel raised the issue of relevance, stating “other than the fact that both cases involve allegations of sexual misconduct, nothing about the other case involves ‘substantially similar conduct, similar locations, similar circumstances, and similar methods’” and later “there is no

‘common thread which ties the [other alleged acts] to the crime in question’.” (A.R. 11, internal citations omitted).

At the *McGinnis* hearing the State presented the testimony of the investigating officer from the collateral case. Officer Pigott’s testimony focused only on the collateral case in this matter, specifically, a single interview held with Mr. Angle and the circumstances surrounding the alleged assault—that both victims in the collateral case were under the influence of alcohol, that the incident occurred at the home of one of the alleged victims which was in approximately the same area as the victim in the instant case, and that the incident in the companion case occurred during a “social-type engagement” at which Mr. Angle stopped in. (A.R. 16-26). No evidence was presented at the *McGinnis* hearing regarding how the issues Officer Pigott testified to in the collateral case related to the instant case, or how the offered 404(b) evidence would make any consequential fact more or less likely as required by Rule 401. Officer Pigott’s testimony was the only actual evidence presented at the hearing, after which the State simply made a number of statements concluding that the evidence was probative, despite the lack of and testimony that supported that position. (A.R. 27-32).

The State initially argued at that hearing that the testimony presented showed that the offered evidence would be probative for the jury regarding motive, absence of mistake, and lustful disposition, although no clarification was made as to how, precisely, that evidence would be probative. (A.R. 27-28). Later in the hearing, after defense counsel argued both the very general nature of the alleged connection and the total lack of discussion regarding the balancing test in Rule 403 (A.R. 28-30), the State elaborated on its argument, indicating that the connection between the cases was that the sexual assaults occurred in the victims’ homes in approximately

the same neighborhood, that the victims were approximately the same age, that Mr. Angle befriended the victims in both cases, and that he took advantage of them in a vulnerable state. (A.R. 31). All of this, according to the State, makes the evidence relevant to of mode of operation and absence of mistake. (A.R. 31).

At no time during the *McGinnis* hearing did the Court appear to address the issues of relevance as required by Rules 401 and 402. As has been noted previously, the only ruling the trial court made was to state that “it’s proper 404(b) evidence” and to order the State to prepare a limiting instruction. (A.R. 32). As no written order was entered following that hearing, it appears from the record that no findings whatsoever were made regarding the relevance of the evidence.

Even if we disregard the silence of the record on this issue and assume that the Court considered relevance as required, any determination that the offered 404(b) evidence was relevant to the case at bar was an abuse of discretion because the State failed entirely to present any evidence for consideration that the collateral crimes at issue were relevant to the case at bar, as has been discussed previously above with regard to the purposes for which the evidence was offered and whether or not it was proper for those purposes.

Because the Court failed to address the issue of relevance under Rules 401 and 402 prior to ruling on the admissibility of the offered 404(b) evidence, and because the evidence presented both at the *McGinnis* hearing and trial in this matter was insufficient to show that the evidence was relevant to any fact at issue in the case at bar, the trial court abused its discretion in this element of the admissibility determination and the decision should be reversed.

IV. THE CIRCUIT COURT ERRED WITH REGARD TO THE BALANCING TEST REQUIRED BY RULE 403.

A. The Circuit Court Failed to Conduct the Balancing Test on the Record as Required.

This Court has previously made clear on several occasions that “[t]he balancing necessary under Rule 403 must affirmatively appear on the record.” *State v. McGinnis*, 193 W.Va. at 156, 455 S.E.2d at 525; *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62 (2011). It is quite clear in this case that the balancing test was never conducted.

The transcript of the *McGinnis* hearing is entirely silent on the issue of the Rule 403 analysis. As stated previously, the only comment the Court made regarding the admissibility of the evidence was the single comment “I think it’s proper 404(b) evidence.” (A.R. 32). No order was entered following that hearing. The issue of the balancing test was raised again in Petitioner’s written Motion for Post-Verdict Judgment of Acquittal and Motion for New Trial, where counsel specifically set out the requirements from *McGinnis* that the Court conduct the Rule 403 balancing test, and that those specific findings be placed on the record. (A.R. 454-455).

At the post-trial hearing in this matter the issue of the Rule 403 balancing test was again, specifically raised by defense counsel. (A.R. 473-475). The trial court made no rulings at that hearing, but indicated intent to look at the issue (A.R. 475). The order which was entered following that hearing denied both of the Petitioner’s motions. (A.R. 480). Despite setting forth in that order the specific language from *State v. McGinnis* which sets forth the requirement for the balancing test under Rule 403, and language from *State v. LaRock* which specifically noted the requirement that the 403 determination be on-the-record, the trial court still concluded that the *McGinnis* hearing in which no balancing test was ever conducted on the record was proper.

(A.R. 482).

Clearly, the failure of the trial court to conduct the Rule 403 analysis on-the-record as required by *McGinnis* and *LaRock* was an abuse of discretion that constitutes reversible error, and the trial court's rulings regarding the admissibility of the offered 404(b) evidence should be reversed.

B. The Proposed Evidence Was More Prejudicial Than Probative.

Although the trial court failed entirely to conduct the Rule 403 analysis, and can be reversed on those grounds alone (*State v. McFarland*), the question of whether the offered evidence was more prejudicial than probative is still relevant.

The high potential for abuse of 404(b) evidence is why this Court has held that it must be subjected to a Rule 403 balancing test to determine whether the probative value of the evidence "is substantially outweighed by its potential for unfair prejudice" under an abuse of discretion standard. *McGinnis*, at 155, 524; *LaRock* at 310-11, 629-30. This Court has repeatedly urged caution with regard to the consideration of 404(b) evidence because it is "inescapable that where a trial court erroneously admits Rule 404(b) evidence, prejudicial error is likely to result." *Id.* at 153, 522. In addition, this Court has specifically addressed the issue of the prejudice which tends to result from collateral crimes, reversing convictions when collateral crimes evidence has been improperly included and finding that it is impermissible to introduce evidence which reflects only the propensity to commit a crime. *Id.*; see *State v. Ricketts*, 219 W.Va. 97, 632 S.E.2d 37 (2006)(erroneous admission of collateral crimes is cause for reversal of conviction); *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62 (2011)(reversing conviction for improper inclusion of collateral crimes).

First, to the issue of the probative value of the evidence, the State, despite enumerating a list of reasons it intended to use the offered evidence, (A.R. 27-31), only appeared to make a specific argument with regard to the tendency of the evidence to show mode of operation. (A.R. 31). The crux of this argument appeared to be that the Petitioner's mode of operation was to make friends with women in his neighborhood and then assault them in their homes while they were partying and he believed that they were in a vulnerable state. (A.R. 31). The qualification of these facts as a "mode of operation" is difficult to fathom when the specific facts of each case are considered—the instant case involved a solitary adult female victim who was allegedly assaulted the morning after a party when a Mr. Angle broke into her apartment while she was alone, completely sober, and sleeping in her own bed. The collateral case involved allegations of sexual assault against a juvenile victim, about which no details whatsoever were provided anywhere in the record, as well as a sexual assault against another adult female on the same night who was intoxicated and allegedly was assaulted during a party at her home by two or three individuals at the same time, as other people walked in and out of the room and observed the assault. (A.R. 19-25).

In addition, the actual use of the 404(b) evidence at trial did not appear to have been used to illustrate any particular purpose. Officer Pigott testified to only the barest facts of the collateral crimes—that Mr. Angle was found at the scene of a reported sexual assault, that there were two alleged victims, one of whom was a juvenile, and that the assaults occurred during a social gathering of people drinking alcohol, including both victims. (A.R. 330-335). The State also mentioned in both its opening and closing arguments that Mr. Angle had been, subsequent to the case at bar, accused of a similar crime, without any further elaboration. (A.R. 125, 400). To

suggest that this evidence was highly probative of any issue in the case is difficult to fathom from the record.

Turning to the issue of whether the evidence was prejudicial, it is equally difficult to fathom how it could not be. The State offered evidence of not one, but two subsequent sexual assaults alleged to have been committed by Mr. Angle, in which one of the victims was a juvenile. In the realm of evidence that might prejudice a jury, evidence of sexual assault against a child is one of the most inflammatory examples imaginable. Most jurors would be inclined to convict the defendant based on that bare fact alone, regardless of what the evidence at trial showed. Once the jury heard that Mr. Angle was alleged to have sexually assaulted both another adult and a child, it is difficult to imagine that the jury was able to consider that evidence only for the “limited purpose of explaining whether the defendant had motive, explain an absence of mistake, an apparent mode of operation or whether the defendant exhibited a lustful disposition toward the alleged victim” (A.R. 392), particularly given that the State gave the barest nod to the reasons it claimed to have offered the evidence, giving no details of the other alleged crimes, and offering only the barest facts of those allegations. (A.R. 330-335). Officer Pigott’s testimony regarding these collateral crimes was the as the last evidence presented at trial, providing even more reason to think its true purpose was to prejudice the jury against the defendant.

It is clear that both the purpose and the effect of the offered evidence was to poison the minds of the jury, to induce them to conclude that if the defendant had been charged with sexually assaulting other women it was more likely that he had done so in this case—he was a bad man who does bad things and he shouldn’t get away with it. The mere fact that evidence might be helpful to the State in obtaining a conviction does not make it probative of a material issue as

required by Rule 403 and *McGinnis*, and in this case the extreme prejudice compared to the virtually nonexistent probative value of the offered evidence makes it clear that the trial court's decision should be reversed.

V. THE IMPROPER INCLUSION OF 404(b) EVIDENCE WAS NOT HARMLESS ERROR.

The final test with regard to the issues set forth above is whether the trial court's errors were harmless. This Court has previously adopted the following harmless error test:

“Where improper evidence of a non-constitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

Syl. pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979); Syllabus Point 4, *State v. Day*, 225 W.Va. 794, 696 S.E.2d 310 (2010).

In the instant case, as is common in cases involving sexual assaults, the State's primary evidence was the testimony of the victim, and thus a crucial issue to the resolution of the case was the victim's credibility. The introduction of 404(b) evidence in this case served to lend credibility to the victim's testimony by illustrating that she was not the only person who had accused Mr. Angle of sexual assault—in essence, allowing the jury to conclude that the allegations in the collateral crimes made it more likely that he had committed the crimes in the instant case. In addition, this Court has noted previously the highly prejudicial effect that can result from collateral crimes evidence, stating,

“when a jury hears evidence that a defendant has committed some bad acts beyond those in the indictment, the jury dispenses with any notions that the defendant is innocent and reviews the evidence from the perspective that the defendant is a ‘bad person.’ *State v. Baker*, 230 W.Va. 407, 738 S.E.2d 909 (2013) *citing State v. Willett*, 223 W. Va. 394, 400-01, 674 S.E.2d 602, 608-09 (2009) (Ketchum, J., concurring); *State v. Scott*, 206 W. Va. 158, 168, 522 S.E.2d 626, 636 (1999) (Starcher, C.J., dissenting) (“The niceties of a McGinnis analysis do little to remove the overwhelming prejudicial effect that is heaped upon a defendant in a criminal case, once a jury learns of the defendant’s previous bad acts.”).”

Once the improper 404(b) evidence is removed from the State’s case the evidence against Mr. Angle becomes considerably weaker, particularly in light of his acquittal on the charge of Burglary. The likelihood that impartial minds could be convinced beyond a reasonable doubt of Mr. Angle’s guilt is considerably less without the assistance of the impermissible inference, and the introduction of collateral sex crimes, one of which was against a child, was almost certain to have prejudiced the jury and contributed to Mr. Angle’s conviction.

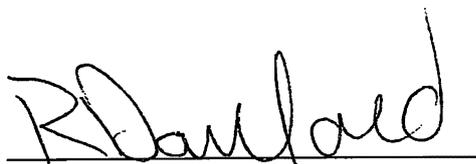
In addition, it is unlikely that the limiting instructions offered by the trial court were in any way curative of the improper evidence. As discussed thoroughly above, the limiting instruction was vague and non-specific, instructing the jury that it could consider the evidence “for the limited purpose of explaining whether the defendant had motive, explain an absence of a mistake in apparent mode of operation, whether the defendant exhibited the lustful disposition toward the alleged victim, as well as in this instance, for which the defendant is on trial. You may only consider it with respect to these limited purposes.” (A.R. 336). Quite aside from the lack of clarity in the instruction is the issue that four purposes were introduced for the jury’s consideration, and none of them was in any way apparent from the testimony regarding the evidence at trial. (A.R. 330-335).

State v. LaRock states that “it is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction.” *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (W.Va., 1996). In the case at bar virtually none of these elements have been met. It cannot be presumed that Mr. Angle was protected from undue prejudice. In light of the highly prejudicial nature of the evidence of Mr. Angle’s subsequent charges of sexual assault, as well as the nature of the State’s evidence as a whole, it cannot be said that the trial court’s improper admission of 404(b) evidence did not contribute to his conviction on the charge of Sexual Abuse in the First Degree. As such, the Court should find that the error in this case was not harmless, and reverse.

CONCLUSION

The Petitioner’s conviction on the charge of Sexual Abuse in the First Degree should be vacated. The Circuit Court’s ruling that the Rule 404(b) evidence offered by the State in this matter was admissible should be reversed, and this matter should be remanded for a new trial on the charge of Sexual Abuse in the First Degree, with instructions for the exclusion of the Rule 404(b) evidence offered previously.

The undersigned does hereby certify in accordance with the Revised Rules of Appellate Procedure that the facts alleged are faithfully represented and that they are accurately presented to the best of my ability.

A handwritten signature in black ink, appearing to read "R. Danford", written over a horizontal line.

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IN THE
SUPREME COURT OF APPEALS
OF THE
STATE OF WEST VIRGINIA

No. 13-0574

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

Case No. 13-0574

CARLOS ANGLE,
Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Robyn M. Danford, do hereby certify that I served a true copy of the foregoing upon the below-named persons on the 16 of September, 2013, by U.S. Mail, postage prepaid, as follows:

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