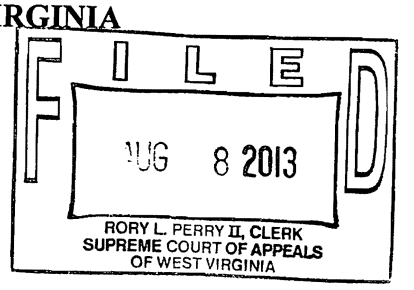
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



NO. 12-1486

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

LAMAR DORSEY,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1486

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

LAMAR DORSEY,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

In October 2010, Lamar Dorsey, a.k.a. "Slim" ("Petitioner"), a Columbus, Ohio resident, began staying, off and on, at Joseph Scott Osborne's ("Osborne") house.[1] Petitioner's reason for staying at Osborne's house was to sell drugs. In exchange for allowing him to operate out of his house, Petitioner gave Osborne crack cocaine. App. R. vol. II, 1158-59, 1161-63, 1167, 1180, 1182, 1184. During his "stays" at Osborne's house, numerous people, as many as 15 or 16, came to the house to buy crack from Petitioner. App. R. vol. II, 1165, 1167. One of these persons was Wendi Gillespie ("Gillespie"), who bought crack out of Osborne's house on approximately 15 occasions; around half of these purchases were made from Petitioner; the other half were made from Osborne. App. R. vol. II, 1006-07, 1168.

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[1] Osborne's house is a trailer located in the Kistler area of Logan County. App. R. vol. II, 1157.

In December 2010, Petitioner moved out of Osborne's house and into Gillespie's house for the purpose of selling crack cocaine.[2] App. R. vol. II, 990-92. During his stay at Gillespie's house, which lasted about three weeks, Petitioner and Gillespie had an agreement with one another, whereby Petitioner would help with paying Gillespie's utility bills, as well as giving her a $20.00 piece of crack for every $100.00 of crack that he sold out of her house. App. R. vol. II, 995. During his three-week stay at Gillespie's, Petitioner did indeed turn over crack and marijuana to Gillespie in exchange for her allowing him to sell crack out of her house.[3] App. R. vol. II, 999, 1004-05, 1073.

On January 21, 2011, Trooper James Harris, of the Logan County West Virginia State Police Detachment, was contacted by two informants that he had previously dealt with on numerous occasions.[4] These informants advised Trooper Harris that Petitioner was back in town and staying

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[2] Gillespie's house, which she was renting, is a trailer located in the Kistler area of Logan County. Gillespie and Osborne were neighbors at the time. App. R. vol. II, 912, 915, 923, 990, 1168. Apparently, Osborne did not have any electrical power or running water at his house, which prompted Petitioner to move to Gillespie's house. App. R. vol. II, 991. Notably, when he moved in with Gillespie, Petitioner did not have any type of overnight bag or luggage; nor did Petitioner have a car. In fact, Petitioner arrived at Gillespie's with nothing other than himself, the clothes on his back, and a golf ball sized chunk of crack. App. R. vol. II, 994-96. During this same time period, Petitioner did not have a job and was not in school. App. R. vol. II, 1005-06.

[3] In the first week, approximately 15 people came to Gillespie's house to buy crack from Petitioner. In the second week, around eight people showed up at Gillespie's to purchase crack from Petitioner. In the third week, approximately 5 people came to Gillespie's, during which visits Petitioner sold crack to them. Gillespie actually witnessed some of these sales, including eight sales the first week, three or four the second week, and one or two during week three. Petitioner did not want Gillespie present when he was carrying out these drug transactions. When she was present, Petitioner would tell Gillespie to leave the room where the transaction was occurring, telling her– "bitch, go back in your room[,] [y]ou don't need to be seeing this." App. R. vol. II, 999. In fact, on one or two occasions, Petitioner told Gillespie that he would kill her if she did not go back to her room. App. R. vol. II, 997-1002, 1066.

[4] These informants were Steven Whitt and Andrew Copley. App. R. vol. II, 912.

at Gillespie's house. The informants further advised Trooper Harris that Petitioner had a substantial amount of crack cocaine in his possession. App. R. vol. II, 912-13. Having a reasonable suspicion that Petitioner was in possession of and selling crack out of Gillespie's house, Trooper Harris, along with three other troopers, Troopers P.J. Dick, J.D. Hensley and J.R. Powers, went to Gillespie's house. App. R. vol. II, 914-15.

Upon their arrival, these four officers "took up positions" around Gillespie's house.[5] App. R. vol. II, 915. Once this was done, Troopers Harris and Dick walked up on the front porch, where Trooper Harris knocked on the door. App. R. vol. II, 915-16. With no one answering this initial "knock," Trooper Harris began knocking louder. During this period, the troopers could hear movement within the house. In fact, Trooper Hensley, who was looking through one of the back windows, actually saw someone running through the house.[6] App. R. vol. II, 916-17. Eventually, someone in the house "spoke up" and asked who was there, to which Trooper Harris announced himself. App. R. vol. II, 916-17. After Trooper Harris identified himself, Gillespie opened the front door and allowed Trooper Harris and the other officers inside the house. App. R. vol. II, 917, 922, 1011, 1035, 1052, 1123.

Once inside, Trooper Harris could still hear movement in the rear of the house. App. R. vol. II, 917. Hearing this movement, and having information from his fellow officers, Trooper Harris

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[5] Troopers Harris and Dick were positioned in the front of the house, while Troopers Hensley and Powers were positioned in the back of the house. App. R. vol. II, 915.

[6] As it turns out, Petitioner was the person that Trooper Hensley saw running through the house. Petitioner actually ran into Gillespie's bedroom, where Gillespie was smoking marijuana, which she had gotten from Petitioner. Once in her bedroom, Petitioner told Gillespie that the police were outside. Gillespie then got up and went to the front of the house. App. R. vol. II, 1007-10, 1122-23, 1149. At this point, Petitioner motioned to Gillespie not to open the door, and that if she did he was going to "kill [her] or things would get ugly." App. R. vol. II, 1011.

proceeded to the back of the house. *Id.* There, Trooper Harris found Petitioner in the bathroom standing in front of the toilet. App. R. vol. II, 917-18, 982. The water in the toilet was running as if it had been just flushed. App. R. vol. II, 918, 983. Trooper Harris noticed a green leafy substance in the toilet, which, in his experience, he believed to be marijuana. App. R. vol. II, 918-19, 921, 958, 983. At this point, Trooper Harris handcuffed Petitioner and escorted him to the front of the residence. App. R. vol. II, 922. During this same period, with much confusion/commotion still ongoing and very apparent safety concerns, the rest of the house was checked to locate any other individuals who may have been in the house. Aside from Petitioner and Gillespie, one other individual, Joseph Hurley ("Hurley"), was found in the house. Hurley had gone to Gillespie's house to purchase, and did so purchase, crack cocaine from Petitioner on two occasions on January 21, 2011. App. R. vol. II, 922-23, 1007, 1107, 1113, 1115, 1119-20.

With the house and its occupants secured, Trooper Harris pulled Gillespie aside and advised her that he had information that crack cocaine was both in and being sold out of her house. App. R. vol. II, 923-24. Trooper Harris then asked Gillespie for her permission to search the house. Gillespie, in turn, freely and voluntarily consented to the search.[7] App. R. vol. II, 924, 1011-13. With Gillespie's consent, Trooper Harris and the other officers conducted a full search of the house. App. R. vol. II, 926-27, 1013. During this search, in a back bedroom, a paper bag was found that contained a substantial amount of money–$2,204.00, as well as a digital scale and a razor blade with cocaine residue on them. Also found during the search, hidden under a washer and dryer, was a .9 millimeter semi-automatic handgun. App. R. vol. II, 926-31, 934-35, 943-44, 953, 965, 970, 982-83,

[7] In gaining Gillespie's consent, Trooper Harris used a consent to search form, which Gillespie freely and voluntarily signed. App. R. vol. II, 924-26, 1012-13. *See also* App. R. vol. I, 205; App. R. vol. III, 1717.

1013-14, 1034-35, 1072, 1139, 1253. Thereafter, Trooper Harris and the other officers took statements from Gillespie and Hurley. App. R. vol. II, 932-33, 935, 944-45, 1112, 1124.[8]

On January 11, 2012, the Logan County Grand Jury returned an eight count Indictment against Petitioner.[9] This Indictment specifically charged Petitioner with two counts of conspiracy to deliver a Schedule II controlled substance–crack cocaine (Counts 1 and 7), one count of possession of a Schedule I controlled substance–marijuana–with the intent to deliver the same (Count 2), one count of possession of a Schedule II controlled substance–crack cocaine–with the intent to deliver the same (Count 3), two counts of delivery of a Schedule II controlled substance –crack cocaine (Counts 4 and 5), one count of delivery of a Schedule I controlled substance–marijuana (Count 6), and one count of possession of a firearm by a convicted felon (Count 8).[10] App. R. vol. I, 1-6.

Petitioner's trial took place on July 9, 10, 11 and 12, 2012, and ended with the jury convicting him of two counts of conspiracy to deliver a Schedule II controlled substance–crack

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[8] Later, on a different day, the police also took a statement from Osborne. App. R. vol. II, 945.

[9] Gillespie was separately charged with conspiracy to distribute a Schedule II controlled substance–crack cocaine, for which Gillespie pled guilty. App. R. vol. II, 993, 1027. Misdemeanor possession of a controlled substance charges were brought against Hurley, which were later dismissed. App. R. vol. II, 1019-20, 1110. Osborne was originally charged with numerous counts of conspiracy to distribute a Schedule II controlled substance–crack cocaine, as well as numerous counts of delivery of a Schedule II controlled substance–crack cocaine; he pled guilty to two counts of simple possession of a Schedule II controlled substance–crack cocaine. App. R. vol. II, 1155, 1171, 1173-74, 1177-78.

[10] This was a superseding Indictment (case no. 12-F-32). Petitioner was originally indicted (case no. 11-F-115) on September 12, 2011. However, on January 30, 2012, the circuit court ("court"), because of delays, dismissed the original Indictment without prejudice in favor of the superseding Indictment. It should be noted that all of the court's previous rulings and orders that were issued in the original case (case no. 11-F-115) were incorporated into the new case (case no. 12-F-32). *See generally* App. R. vol. I, 215, 460; App. R. vol. III, 1683-88, 1733.

cocaine (Counts 1 and 5), and two counts of delivery of a Schedule II controlled substance–crack cocaine (Counts 2 and 3).[11] App. R. vol. II, 1507-08, 1516-17, 1532-33.

On August 28, 2012, the court sentenced Petitioner to two indeterminate terms of 1 to 5 years in the penitentiary for his convictions of two counts of conspiracy to deliver a Schedule II controlled substance–crack cocaine (Counts 1 and 5), and two indeterminate terms of 1 to 15 years for his convictions of two counts of delivery of a Schedule II controlled substance–crack cocaine (Counts 2 and 3). The court further ordered that all of these sentences would run consecutively with one another. App. R. vol. II, 1590-91, 1598-99, 1602-07, 1612-13.

Thereafter, Petitioner brought the current appeal.

II.

SUMMARY OF ARGUMENT

Gillespie freely and voluntarily consented to the search of her trailer. As his sole purpose for being at Gillespie's trailer was to sell drugs, Petitioner did not have a legitimate expectation of privacy in Gillespie's trailer. As such, Petitioner has no standing to assert that the police's initial entry into Gillespie's trailer was illegal, thus invalidating Gillespie's consent to the search of her trailer. Furthermore, contrary to Petitioner's assertion, the police's initial entry into Gillespie's

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[11] Petitioner was acquitted on the delivery of a Schedule I controlled substance–marijuana (Count 4). App. R. vol. II, 1508. It should be noted that, prior to the jury's deliberation of the case, the court merged Counts 2 and 3 (possession of a Schedule I and II controlled substance–marijuana and crack cocaine–with the intent to deliver the same) into Counts 4, 5 and 6 (delivery of a Schedule II and I controlled substance–crack cocaine and marijuana). It should be further noted that the jury did not deliberate on the charge of possession of a firearm by a convicted felon (Count 8), as the court dismissed this charge. Because of all of these developments, for purposes of the jury's deliberation and verdict, the Indictment was amended and renumbered into a five count Indictment. *See generally* App. R. vol. II, 1274, 1311-12, 1316-17, 1402-03, 1447-59, 1507-08, 1516-17, 1532-33.

trailer was legal. Because of all of this, the court correctly admitted the evidence obtained by the police during their search of Gillespie's trailer.

Contrary to his assertion, the court did not summarily reject the plea agreement between Petitioner and the prosecution based on nothing more than their failure to reach a plea agreement the preceding day. Rather, by the time that this plea agreement was presented to the court, the court had had enough of Petitioner's "shenanigans," who had already been offered multiple plea deals by the prosecution and rejected them all.

At no time during the 404(b) hearing did Petitioner object to the prosecution's proffer of the evidence of the uncharged acts of Petitioner–i.e., transferring crack cocaine to Gillespie and Osborne, as well as selling crack out of Gillespie's and Osborne's residences. Furthermore, although no testimony was taken at the 404(b) hearing, the court properly admitted these uncharged acts under Rule 404(b). Thus, contrary to Petitioner's assertion, the court did not commit error by allowing the prosecution to proffer the evidence of the uncharged acts of Petitioner, and then rule on its admissibility without actually hearing testimony from Gillespie and Osborne on the same.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not believe that oral argument is necessary in this case, as the "facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument." Rev. R.A.P. 18(a)(4). However, it appearing that Petitioner has requested oral argument, *see* Pet'r's Br. 14, and if so ordered by the Court, the State will be there to respond. Should the Court order oral argument, the State believes that this case is appropriate for a Rule 19 argument and a memorandum decision. The State, of course, defers to

the discretion and wisdom of the Court on all these points.

IV.

ARGUMENT

A. GILLESPIE FREELY AND VOLUNTARILY CONSENTED TO THE SEARCH OF HER HOME. FURTHERMORE, PETITIONER DID NOT HAVE A LEGITIMATE EXPECTATION OF PRIVACY IN GILLESPIE'S HOME, AS HIS SOLE PURPOSE FOR BEING THERE WAS TO SELL DRUGS. THUS, PETITIONER HAS NO STANDING TO ASSERT THAT THE POLICE'S INITIAL ENTRY INTO GILLESPIE'S HOME WAS ILLEGAL, THUS INVALIDATING GILLESPIE'S CONSENT TO THE SEARCH OF HER HOME. ADDITIONALLY, THE POLICE'S INITIAL ENTRY INTO GILLESPIE'S HOME WAS LEGAL AT ANY RATE. GIVEN ALL OF THIS, THE CIRCUIT COURT PROPERLY ADMITTED THE EVIDENCE OBTAINED BY THE POLICE DURING THEIR SEARCH OF GILLESPIE'S HOME.

> "On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference."

Syl. Pt. 1, *State v. Hoston*, 228 W. Va. 605, 723 S.E.2d 651 (2012) (quoting Syl. Pt. 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994)).

> Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made.

State v. Lilly, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995) (footnote omitted).

> "When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error."

Syl. Pt. 13, *State v. White*, 228 W. Va. 530, 722 S.E.2d 566 (2011) (quoting Syl. Pt. 1, *State v. Lacy*,

196 W. Va. 104, 468 S.E.2d 719 (1996)).

At trial, the court permitted the prosecution to introduce evidence gathered by the police during their post-consent search of Gillespie's house, which consisted of $2,204.00, a digital scale and a razor blade with cocaine residue on them, a .9 millimeter pistol, as well as the post-arrest statements of Gillespie and Hurley. Prior to the court's admission of these items and statements, a lengthy, in depth suppression hearing was held in this case, during which Trooper Harris and Gillespie testified. The evidence adduced during this hearing is as follows:

In October 2010, Gillespie met Petitioner through one of her friends and neighbors– Osborne. App. R. vol. I, 102-03. After this introduction, Gillespie purchased crack cocaine from Petitioner, out of Osborne's house, approximately 15 times. App. R. vol. I, 103-04. In December 2010, with no electrical power or water at Osborne's, Petitioner approached Gillespie and asked her whether he could stay at her trailer. Petitioner's stated reasons for wanting to stay with Gillespie were that he was in trouble and could not leave the county, and to sell crack cocaine. App. R. vol. I, 106-07. Gillespie agreed and Petitioner did indeed move in with her. App. R. vol. I, 107. When Petitioner moved in with Gillespie, an agreement was "struck" between the two, whereby Petitioner would help to pay Gillespie's utility bills, of which Petitioner paid the water bill one or two times. This agreement also entailed Petitioner giving Gillespie a $20.00 "rock" of crack for every $100.00 of crack that he sold out of her trailer. App. R. vol. I, 107-08, 138, 168. In fact, Petitioner "made good" on this agreement by providing Gillespie with crack during the three-week period that he stayed with Gillespie. App. R. vol. I, 113, 115-16, 169.

Gillespie's trailer was a rental, the rent of which was actually paid by HUD. App. R. vol. I, 109-11, 138. Gillespie was the only one on the lease of this property and she was not permitted

to sublet the same. App. R. vol. I, 110-11. As such, Petitioner did not sign a lease agreement, or any other document for that matter, with Gillespie. App. R. vol. I, 111-12. Nor did Petitioner enter into a lease agreement with Gillespie's landlord allowing him to stay permanently at the trailer. App. R. vol. I, 111. Nor was there ever any verbal agreement between Petitioner and Gillespie, whereby Petitioner was to stay permanently with Gillespie. In fact, Gillespie wanted and expected Petitioner to leave at some point. App. R. vol. I, 112, 159.

Furthermore, when he arrived at Gillespie's trailer, Petitioner came with nothing more than the "clothes on his back"–he did not have any luggage or bags, a cell phone or a car. App. R. vol. I, 108-09, 161-62. Petitioner's reason for moving in with Gillespie was "[t]o sell crack cocaine." App. R. vol. I, 112. In fact, other than his crack customers, Petitioner did not have any other social visitors during the three-week period that he stayed with Gillespie. App. R. vol. I, 112-16. During this three-week period, Petitioner sold crack out of Gillespie's trailer as many as 30 times to as many as 15 people. App. R. vol. I, 113-15, 139.

On January 21, 2011, Trooper Harris received calls from two informants, both of whom Trooper Harris had worked with in the past for several years. These informants advised Trooper Harris that Petitioner was back in town and was selling crack cocaine out of Gillespie's trailer. App. R. vol. I, 23, 51-52, 87. Based on this information, as well as his past dealings with Petitioner, Trooper Harris and three other troopers, Troopers Hensley, Dick and Powers, went to Gillespie's trailer to investigate the matter. App. R. vol. I, 23-25, 53, 64, 84. Upon their arrival, these four officers "took up positions" around Gillespie's trailer.[12] App. R. vol. I, 25-26, 54.

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[12] At the moment that these officers arrived at her trailer, Gillespie was in her bedroom smoking marijuana, which she had obtained from Petitioner. App. R. vol. I, 121-22. Petitioner and (continued...)

With this done, Trooper Harris knocked on the front door of the trailer. App. R. vol. I, 26, 53. During this time, Trooper Harris could hear activity going on inside the trailer. App. R. vol. I, 26, 54. Getting no response to his initial "knock," Trooper Harris knocked again–louder this time–and identified himself.[13] App. R. vol. I, 26, 55. At this moment, another one of the officers, Trooper Hensley, came to the front of the trailer where Trooper Harris was positioned, and informed Trooper Harris that he saw someone run to the back of the trailer and that he could hear the toilet being flushed.[14] App. R. vol. I, 26, 55. Hearing this, Trooper Harris strongly believed that there was criminal activity going on inside the trailer–i.e., destruction of evidence and/or a firearm being obtained. App. R. vol. I, 27-29.

Trooper Harris then knocked on the door again, identified himself, and stated to the occupants that the door needed to be opened. App. R. vol. I, 26, 56, 141-42. At this point, Gillespie responded that she was coming to the door, to which Trooper Harris told her that she needed to hurry up. App. R. vol. I, 26-29, 56. Trooper Harris also informed Gillespie that another officer could see her through a window standing in front of the front door. App. R. vol. I, 27. This again led Trooper Harris to believe that Gillespie was "stalling," thus allowing someone else in the trailer time to destroy evidence. App. R. vol. I, 27, 29, 56. This also presented an officer safety issue for Trooper Harris, who was in a dangerous position, as he was standing just outside the front door and did not

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[12](...continued)
Hurley were also in the trailer at the time; Hurley was there to buy crack cocaine. App. R. vol. I, 122.

[13] During this same general time frame, Petitioner came into Gillespie's room and told her that the police were outside. App. R. vol. I, 122, 140.

[14] In fact, it was Petitioner that Trooper Hensley saw running to the back of the trailer. App. R. vol. I, 122-23.

know what the trailer's occupants were doing just on the other side of the door.[15] App. R. vol. I, 27.

Eventually, Gillespie opened the door and allowed Trooper Harris and the other officers to enter the trailer. App. R. vol. I, 29, 33, 63, 126, 148-49, 157. At this point, for reasons of officer safety, Trooper Harris proceeded to the back of the trailer to secure any individuals and/or weapons in this area. App. R. vol. I, 30, 33, 64. During this "protective sweep," Trooper Harris located Petitioner in the bathroom standing in front of the toilet. App. R. vol. I, 30, 33-34, 63. There, Trooper Harris noticed that the toilet had been recently flushed and that it contained a green leafy substance, which, given his experience, Trooper Harris determined to be marijuana. App. R. vol. I, 30-33, 66. At this point, Trooper Harris handcuff Petitioner and escorted him to the front of the trailer, where he, Gillespie and Hurley were checked for weapons. App. R. vol. I, 34-35, 66, 68.

With the trailer and its occupants secured, Trooper Harris pulled Gillespie aside and informed her that he had information that Petitioner was staying at her trailer for the sole purpose of distributing crack cocaine. App. R. vol. I, 35, 44, 68. Trooper Harris then asked Gillespie for permission to search the trailer. App. R. vol. I, 35, 70. In turn, Gillespie freely and voluntarily consented to the search and signed a consent to search form documenting her consent. App. R. vol. I, 35, 38-39, 40, 42-43, 70, 130-33, 158. In asking for her permission to search the trailer, Trooper Harris did not threaten Gillespie or, in any way, tell her that actions would be taken against her if she did not consent to the search. App. R. vol. I, 43-44, 133, 159. In fact, Trooper Harris informed

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[15] During this same time period, Petitioner was at the other end of the trailer. App. R. vol. I, 124. From there, Petitioner motioned to Gillespie–i.e., made a cutting motion across his neck–not to open the door. App. R. vol. I, 124, 156. To prevent Gillespie from opening the door, Petitioner also told Gillespie: "Bitch, don't open the door. I'll kill you." App. R. vol. I, 124, 156.

Gillespie that she was not required to consent to the search. App. R. vol. I, 41.

With Gillespie's consent, a search of the trailer was made. At no time during this search did Gillespie withdraw her consent or otherwise tell the police to stop their search and/or get out of her residence. App. R. vol. I, 134. During the search, in a back bedroom, a paper bag was found, which contained $2,204.00, as well as a digital scale and a razor blade with a white powdery substance on them. App. R. vol. I, 45-46. Hidden under a washer and dryer, a .9 millimeter pistol was also found during the search. App. R. vol. I, 47. Following the search, Petitioner, Gillespie and Hurley were arrested and statements were taken from Gillespie and Hurley. App. R. vol. I, 48.

Despite all of this evidence, Petitioner asserts on appeal that the court committed error by admitting, at his trial, the evidence gathered by the police during their post-consent search of Gillespie's trailer–i.e., $2,204.00, a digital scale and a razor blade with cocaine residue on them, a .9 millimeter pistol, and the post-arrest statements of Gillespie and Hurley. In making this assertion, Petitioner essentially argues that the police's initial entry into Gillespie's trailer, without a warrant, was illegal, as the police did not have probable cause to believe that a crime was occurring at the time of the entry. This illegal entry, argues Petitioner, invalidated Gillespie's later given consent to search her trailer. Thus, further argues Petitioner, the above physical evidence and statements were "fruit of the poisonous tree" and should not have been admitted by the court. *See generally* Pet'r's Br. 14-27. The State disagrees.

> "The general rule is that the voluntary consent of a person who owns or controls premises to a search of such premises is sufficient to authorize such search without a search warrant, and that a search of such premises, without a warrant, when consented to, does not violate the constitutional prohibition against unreasonable searches and seizures."

Syl. Pt. 22, *State v.* Ladd, 210 W. Va. 413, 557 S.E.2d 820 (2001) (quoting Syl. Pt. 8, *State v. Plantz*,

155 W. Va. 24, 180 S.E.2d 614 (1971), *overruled in part on other grounds by State ex rel. White v. Mohn*, 168 W. Va. 211, 283 S.E.2d 914 (1981)). *See State v. Mullens*, 221 W. Va. 70, 106, 650 S.E.2d 169, 205 (2007) (quoting Syl. Pt. 1, *State v. Angel*, 154 W. Va. 615, 177 S.E.2d 562 (1970)) ("'The State and Federal Constitutions prohibit only unreasonable searches and seizures and there are numerous situations in which a search and seizure warrant is not needed, . . . , things that are obvious to the senses, . . . , as well as searches and seizures made that have been consented to.'"). *See also* Syl. Pt. 1, *State v. Basham*, 159 W. Va. 404, 223 S.E.2d 53 (1976) ("Where a person voluntarily and knowingly consents to a search of his premises, such a search may be conducted in the absence of a search warrant.").

"Whether a consent to a search is in fact voluntary or is the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Syl. Pt. 2, *State v. Buzzard*, 194 W. Va. 544, 461 S.E.2d 50 (1995) (internal quotation marks omitted). *See also State v. Flippo*, 212 W. Va. 560, 568, 575 S.E.2d 170, 178 (2002) (quoting Syl. Pt. 8, *State v. Craft*, 165 W. Va. 741, 272 S.E.2d 46 (1980)) ("This Court has observed that '[w]hether a consent to a search is in fact voluntary or is the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.'").

> The circuit court, and this Court on review, should consider the following six criteria when evaluating the voluntariness of a defendant's consent: 1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) the defendant's knowledge of his right to refuse to consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel. While each of these criteria is generally relevant in analyzing whether consent is given voluntarily, no one factor is dispositive or controlling in determining the voluntariness of consent since such determinations continue to be based on the totality of the circumstances.

Syl. Pt. 3, *Buzzard, supra.*

Here, there is no doubt that Gillespie consented to the police's search of her trailer. Nor is there any doubt that Gillespie's consent was freely and voluntarily given. She testified as much at the suppression hearing. At no time did Trooper Harris, or any of the other officers for that matter, threaten Gillespie or, in any way, tell her that actions would be taken against her if she did not consent to the search. In fact, Trooper Harris informed Gillespie that she was not required to consent to the search. On top of this, Gillespie signed a consent to search form, which further substantiates that her consent to search the trailer was freely and voluntarily given. Lastly, on this point, at no time during the search of her trailer did Gillespie withdraw her consent, whether by telling the police to stop their search and/or get out of her residence. For all of these reasons, and more, the court, and correctly so, found that Gillespie's consent to search her trailer was valid and voluntary. App. R. vol. I, 200-01.

Furthermore, Gillespie's consent was not, as contended by Petitioner in this appeal, rendered invalid by the police's initial entry, without a warrant, into Gillespie's trailer. Essentially, in making this argument, Petitioner is asserting a violation of the constitutional rights someone else–namely, Gillespie. This he cannot do. *See State ex rel. Leung v. Sanders*, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003) ("One specific aspect of standing is that one generally lacks standing to assert the rights of another."). More specifically, Petitioner's constitutional rights are not "at play" by the police's warrantless entry into Gillespie's trailer, as Petitioner did not have any reasonable expectation of privacy in this trailer in the first place.

Gillespie's trailer was a rental and she was the only one on the lease. Under the terms of her lease, Gillespie was not permitted to sublet the trailer, or any portion thereof, to anyone else. Nor was Gillespie permitted to have other persons living with her on a permanent basis. Nor was

there ever any agreement, written or otherwise, between Petitioner and Gillespie, whereby Petitioner was to stay permanently at Gillespie's trailer. In fact, Gillespie wanted and expected Petitioner to leave at some point.

Furthermore, when he arrived at Gillespie's trailer, Petitioner came with nothing more than the "clothes on his back" and, of course, "a pocket full of" crack cocaine. Additionally, other than paying the water bill on a couple of occasions, Petitioner did not "pick up the tab," or otherwise help to do so, on any of the other household expenses, whether it be the rent (which was actually paid by HUD), the electric/gas bill, the cable/satellite television bill, the grocery bill, etc. Petitioner did give crack to Gillespie during the time that he was at her trailer. However, this was not done as payment for staying at Gillespie's. Rather, it was payment for allowing him to sell crack out of her trailer. Bluntly stated, Petitioner's sole reason for being in Gillespie's trailer was to sell crack cocaine, which is exactly what he did–and all he did. This is further evidenced by the fact that, other than his crack customers, Petitioner did not have any other social visitors during the three-week period that he stayed with Gillespie. It is obvious on these facts that Petitioner did not have a reasonable expectation of privacy in Gillespie's trailer. So too was the finding of the court:

> [T]he reason that Mr. Dorsey was at her [Gillespie's] residence was to use that as a base to sell crack cocaine.

App. R. vol. I, 196.

> I believe where one is on a premises for an illegal purpose as Mr. Dorsey was in this case, that he has no reasonable expectation of privacy. That was the sole reason that he was there[.]

Id.

> The reason that he was there was for an illegal purpose so I do not believe that he had any reasonable expectation of privacy of his own in any part of the trailer, including the bedroom that he occupied where the money and scales and razor blade

> were found. Similarly not in the laundry room where the gun was . . . found underneath one of the appliances in that laundry room.

App. R. vol. I, 197. Needless to say, the court was absolutely correct in making these findings.

Finally, the police's initial entry into Gillespie's trailer was legal at any rate.

> "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution-subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative."

Syl. Pt. 3, *Ullom v. Miller*, 227 W. Va. 1, 705 S.E.2d 111 (2010) (quoting Syl. Pt. 1, *State v. Moore*, 165 W. Va. 837, 272 S.E.2d 804 (1980), *overruled in part on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991)).

> Examples of recognized exceptions to the general warrant requirement include certain brief investigatory stops, searches incident to a valid arrest, seizures of items in plain view, searches and seizures justified by exigent circumstances, consensual searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable.

Ullom, 227 W. Va. at 9, 705 S.E.2d at 119.

"'Exigent circumstances exist where there is a compelling need for the official action and there is insufficient time to secure a warrant, police may then enter and search private premises . . . without obtaining a warrant.'" *State v. Kendall*, 219 W. Va. 686, 692, 639 S.E.2d 778, 784 (2006) (quoting *State v. Buzzard*, 194 W. Va. 544, 549 n.11, 461 S.E.2d 50, 55 n.11 (1995)).

> Exigent circumstances may exist in many situations: three well recognized situations are when police reasonably believe (1) their safety or the safety of others may be threatened, (2) quick action is necessary to prevent the destruction of potential evidence, or (3) immediate action is necessary to prevent the suspect from fleeing.

Kendall, 219 W. Va. at 692, 639 S.E.2d at 784. *See Id.* (quoting *State v. Lacy*, 196 W. Va. 104, 112 n.7, 468 S.E.2d 719, 727 n.7 (1996) ("'Recognized situations in which exigent circumstances exist

include: danger of flight or escape; danger of harm to police officers or the general public; risk of loss, destruction, removal, or concealment of evidence; and hot pursuit of a fleeing suspect.'").

> The test of exigent circumstances for the making of an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test based on what a reasonable, well-trained police officer would believe.

Syl. Pt. 6, *Kendall*, *supra* (internal quotation marks and citations omitted).

> The existence of a reasonable belief should be analyzed from the perspective of the police officers at the scene; an inquiring court should not ask what the police could have done but whether they had, at the time, a reasonable belief that there was a need to act without a warrant.

Syl. Pt. 7, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

In short, and contrary to Petitioner's contention in this appeal, the police may have had nothing more than a reasonable suspicion that criminal activity was occurring at Gillespie's trailer when they first arrived at the trailer, but, by the time they actually entered the trailer, this reasonable suspicion[16] was elevated to probable cause[17] brought about by exigencies after their arrival. One

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[16] Reasonable suspicion exists when "there is articulable suspicion that a person has committed or is about to commit a crime." *State v. Todd Andrew H.*, 196 W. Va. 615, 619, 474 S.E.2d 545, 549 (1996). "'When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.'" Syl. Pt. 2, *State v. Legg*, 207 W. Va. 686, 536 S.E.2d 110 (2000) (quoting Syl. Pt. 2, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994)).

[17] "'Probable cause to make an arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that an offense has been committed.'" Syl. Pt. 1, *State v. Drake*, 170 W. Va. 169, 291 S.E.2d 484 (1982) (quoting Syl. Pt. 7, *State v. Craft*, 165 W. Va. 741, 272 S.E.2d 46 (1980)). *See* Syl. Pt. 2, *Drake*, *supra* (quoting Syl. Pt. 2, *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973)) ("'An officer, with authority to conserve the peace, may, without a warrant, arrest any (continued...)

really need only look at the court's discussion of the suppression hearing evidence, as well as its rulings thereupon, to know that this is exactly what occurred. First, as properly pointed out by the court, "[t]he officers were there for a legitimate purpose," as "[t]hey have a duty to investigate criminal activity." App. R. vol. I, 198. Court also correctly pointed out that:

> Trooper Harris . . . had previous occasions to investigate and charge this Defendant with drug related activity; and he had information that Mr. Dorsey was back in Logan County . . . at Wendi Gillespie's residence . . . [a]nd also that there was distribution of crack cocaine taking place at that residence which would have been similar activity to which Trooper Harris had investigated and arrested Mr. Dorsey on before.

Id. Along these same lines, the court found that

> they [the police] had every right to be at Ms. Gillespie's residence to investigate the information that had been provided to Trooper Harris by two people who in the past had provided reliable information. Taken with the fact that Trooper Harris was also particularly familiar with Mr. Dorsey's background and had previously arrested him on other occasions.

App. R. vol. I, 198-99.

In finding that Trooper Harris', and the other officers', initial entry and "protective sweep"[18] of the trailer was warranted under the circumstances, the court stated as follows:

> When []he [Trooper Harris] knocked on the door some of the other officers heard and saw activity within the residence which would lead them to believe that

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[17](...continued)
person who he, upon probable cause, believes has committed or is committing a felony, though it afterwards appears that no felony was actually perpetrated.'").

[18] Notably, "[n]either a showing of exigent circumstances nor probable cause is required to justify a protective sweep for weapons as long as a two-part test is satisfied: An officer must show there are specific articulable facts indicating danger and this suspicion of danger to the officer or others must be reasonable. If these two elements are satisfied, an officer is entitled to take protective precautions and search in a limited fashion for weapons." Syl. Pt. 6, *Lacy, supra.*

> occupants of the residence were going to other rooms in a hurried fashion or making efforts to use the toilet which infers if there was drug activity in there that there was an effort to dispose of illegal drugs that may be inside. So that was additional information which Trooper Harris validly used along with the information that once he identified Mr. Dorsey in there and was aware of Mr. Dorsey's background of having been convicted of having firearms in his possession; having been involved in drug related arrests where firearms were found on the premises. To preserve his and the other people present and the other officers present safety, it was certainly reasonable for him [Trooper Harris] to secure Mr. Dorsey, Mr. Hurley and Ms. Gillespie until the officers could confirm that the residence was safe and secure.

App. R. vol. I, 199-200. Simply put, the court's findings on this point were both factually and legally "on the money."

As a final note on this issue, the police did not just burst into Gillespie's trailer. Rather, Gillespie voluntarily opened the door and let them in. Nowhere is this more evident than Gillespie's own testimony at the suppression hearing:

> Q. Did there come a time when you allowed the officers to enter your house?
>
> A. I unlocked the door.
>
> Q. Did you open it?
>
> A. Yes, I did.
>
> Q. Did you allow them to enter?
>
> A. Yes, I did.

App. R. vol. I, 126. *See also* App. R. vol. I, 148-49.

As an afterthought, in his quest to convince this Court that he had Fourth Amendment protections while staying with Gillespie, Petitioner refers to himself as a guest of Gillespie. Characterizing himself as Gillespie's guest is a real "stretch," to say the least. The fact of the matter is that neither Petitioner or Gillespie had any real fondness for one another. Their relationship, if

you can even call it that, was not pleasurable–it was strictly business. The sole basis for their interaction with one another was, if you will, the transfer of "coke" for the right to sell "coke" out of the trailer and nothing more. Again, to convince the Court of his perceived Fourth Amendment protections, Petitioner also notes that he had control of Gillespie's trailer. Bluntly stated, Petitioner had control of the trailer "alright," but this control was established by Petitioner instilling fear in Gillespie.

B. THE CIRCUIT COURT DID NOT SUMMARILY REJECT THE PLEA AGREEMENT BETWEEN PETITIONER AND THE PROSECUTION BASED ON NOTHING MORE THAN THEIR FAILURE TO REACH A PLEA AGREEMENT THE PRECEDING DAY.

"There is no absolute right under either the West Virginia or the United States Constitutions to plea bargain. Therefore, a circuit court does not have to accept every constitutionally valid guilty plea merely because a defendant wishes so to plead." Syl. Pt. 2, *State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 465 S.E.2d 185 (1995). "In fact, '[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.'" *State v. Myers*, 204 W. Va. 449, 457, 513 S.E.2d 676, 684 (1988) (quoting *Mabry v. Johnson*, 467 U.S. 504, 507 (1984)). "'West Virginia Rules of Criminal Procedure, Rule 11, gives a trial court discretion to refuse a plea bargain.'" Syl. Pt. 1, *State v. Sears*, 208 W. Va. 700, 542 S.E.2d 863 (2000) (quoting Syl. Pt. 5, *State v. Guthrie*, 173 W. Va. 290, 315 S.E.2d 397 (1984)).

> Although the parties in criminal proceedings have broad discretion in negotiating the terms and conditions of a plea agreement, this discretion must be permissible under the West Virginia Rules of Criminal Procedure. Similarly, the decision whether to accept or reject a plea agreement is vested almost exclusively with the circuit court.

Syl. Pt. 3, *Brewer*, *supra*.

On appeal, Petitioner asserts that the court committed error by summarily rejecting the plea agreement between himself and the prosecution based on nothing more than the parties failure to reach a plea agreement the preceding day. *See generally* Pet'r's Br. 27-30. Not at all!

To begin with, this plea deal was presented to the court on the second day of Petitioner's trial, July 10, 2012, after a full day was spent on the *voir dire* and impanelment of the jury. *See generally* App. R. vol. I, 440-850; App. R. vol. II, 853-58. Furthermore, prior to this plea deal, numerous other plea proposals were made by the prosecution to Petitioner and presented to the court. Specifically, on March 29, 2012, a pretrial conference was held in this case, during which a plea agreement between the parties was tentatively reached but "fell through." *See generally* App. R. vol. I, 295-97. On the first day of his trial, July 9, 2012, the court was informed of at least three plea offers from the prosecution to Petitioner, all of which Petitioner rejected. *See generally* App. R. vol. I, 443, 447-55. Notably, Petitioner's counsel recommended to Petitioner that he accept the prosecution's last offer on this day. Petitioner declined because he wanted assurances, in the form of a binding plea agreement, from the court that he would be given probation. The court, and rightfully so, rejected any such binding plea agreement. *See generally* App. R. vol. I, 453-56.

By the time that the parties presented their last plea agreement to the court, the court, and understandably so, was "fed up" with Petitioner's "shenanigans." Petitioner had already been offered multiple plea deals by the prosecution and rejected them all. Because of this, the court, and again understandably so, took the position that–since you gentlemen haven't been able to get along–it's time to get it on.[19]

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[19] It should also be noted that Petitioner has not "gotten along" with his counsel in this case, as he changed lawyers at least two times–going from appointed counsel Hatfield to retained counsel (continued...)

C. THE CIRCUIT COURT DID NOT ERR WHEN IT ALLOWED THE PROSECUTION TO PROFFER WHAT THE 404(b) EVIDENCE WOULD BE THAT IT INTENDED TO PRESENT AT TRIAL AND RULE ON ITS ADMISSIBILITY BASED ON THE PROFFER WITHOUT ACTUALLY HEARING THE EVIDENCE FROM THE 404(b) WITNESSES.

> 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. Mongold, 220 W. Va. 259, 264, 647 S.E.2d 539, 544 (2007).

> This Court reviews a lower court's determination regarding the introduction of Rule 404(b) other crimes evidence under an abuse of discretion standard. We have emphasized that a circuit court abuses its discretion in admitting Rule 404(b) evidence only where the court acts in an "arbitrary and irrational" manner.

State v. Hager, 204 W. Va. 28, 36, 511 S.E.2d 139, 147 (1998) (citation omitted).

"Rule 404(b) is an inclusive rule through which all relevant evidence of other crimes or acts is admitted unless the sole purpose of the evidence is to demonstrate criminal disposition." *Hager*, 204 W. Va. at 37, 511 S.E.2d at 148 (citing *State v. Edward Charles L.*, 183 W. Va. 641, 647, 398 S.E.2d 123, 129 (1990)). "In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence . . . maximizing its probative value and minimizing its prejudicial effect." *State v. Willett*, 223 W. Va. 394, 397, 674 S.E.2d 602, 605 (2009).

At trial, the court permitted the prosecution to introduce evidence of numerous uncharged acts committed by Petitioner during his "stays" with Osborne and Gillespie. These uncharged acts

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[19](...continued)
Summers and then back to appointed counsel Hatfield.

consisted of numerous instances of Petitioner transferring crack cocaine to Osborne and Gillespie, as well as selling crack to others out of Osborne's and Gillespie's residences. On appeal, Petitioner asserts that the court committed error by admitting this evidence. In support of this assertion, Petitioner argues that the court did not conduct a evidentiary hearing, during which Osborne and Gillespie would have testified. Instead, further argues Petitioner, the court allowed the prosecution to proffer what Osborne's and Gillespie's 404(b) evidence would be and ruled on the admissibility of this proffered evidence, rather than taking the testimony of Osborne and Gillespie concerning the uncharged acts and then ruling on its admissibility. Petitioner further argues that this constituted reversible error on the court's part. *See generally* Pet'r's Br. 30-32. Again, the State disagrees.

First of all, there was a 404(b) hearing, which took place on March 1, 2012, albeit Osborne and Gillespie did not testify at this hearing. *See generally* App. R. vol. I, 234-68. During this hearing, the prosecution proffered what Osborne's and Gillespie's trial testimony would be, as it concerned the uncharged acts of Petitioner transferring crack cocaine to Osborne and Gillespie, and selling crack out of Osborne's and Gillespie's residences. In addition to this proffer, the prosecution argued for the admissibility of these uncharged acts as permissible original evidence and, alternatively, as permissible 404(b) evidence. *See generally* App. R. vol. I, 238-45. At no time during the 404(b) hearing did Petitioner object to the prosecution's proffer and request that Osborne and Gillespie be brought in to testify. After accepting the prosecution's proffer, the court ruled that the uncharged acts of Petitioner were admissible under Rule 404(b). *See generally* App. R. vol. I, 261-65. In so ruling, the court found as follows:

> Of course all of this evidence upon proper instruction by the Court is admissible under 404(b), the uncharged acts of the sale of cocaine show the intent of the Defendant. They show a common plan and scheme; and they show a lack of mistake on his part. The common plan and scheme was to sell crack cocaine. So

> there may have to be limiting instructions given at the time that evidence is about to be presented and again in the instructions of the court at the end of the case. But I believe that the State has the right to introduce all of that evidence.

App. R. vol. I, 264.

Simply put, the court was absolutely correct to admit these uncharged acts of Petitioner under Rule 404(b).

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident . . . .

W. Va. R. Evid. 404(b).

> [O]ne of the accepted bases for the admissibility of evidence of other crimes arises when such evidence, "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context[.]"

Hager, 204 W. Va. at 37, 511 S.E.2d at 148 (quoting *U.S. v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980)). *See also Hager*, 204 W. Va. at 37, 511 S.E.2d at 148 (internal quotation marks omitted) ("[E]vidence of other crimes [is admissible] in order to complete the story or to show the context of the crime.").[20]

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[20] The court also correctly found that the probative value of this evidence outweighed its prejudicial effect. App. R. vol. I, 265. "'As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.'" Syl. Pt. 4, *State v. Winebarger*, 217 W. Va. 117, 617 S.E.2d 467 (2005) (quoting Syl. Pt. 10, in part, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994)). "The balancing of probative value against unfair prejudice is weighed in favor of admissibility and rulings thereon are reviewed only for an abuse of discretion." *State v. LaRock*, 196 W. Va. 294, 312, 470 S.E.2d 613, 631 (1996). "[A]n appellate court should find an abuse of discretion [in Rule 403 rulings] only when the trial court acted 'arbitrary or irrationally.'" *State v. Knuckles*, 196 W. Va. 416, 424, 473 S.E.2d 131, 139 (1996) (*citing State v.*

(continued...)

Furthermore, even if Osborne and Gillespie had testified at the 404(b) hearing, Petitioner's uncharged acts of transferring and selling crack cocaine would have been admitted. In denying Petitioner's post-trial motion for a new trial, this too was fully explained by the court:

> I don't see anything in that hearing that would merit the granting of a new trial or finding that the court had improperly conducted that hearing.
>
> When you take the actual testimony that was given it closely matches what the State [pr]offered. I don't see how if the witnesses had been called that it would have been any other ruling by the court on whether the 404(b) evidence was going to be allowed in. . . . So I find no error committed by the court in the way the 404(b) evidentiary hearing was conducted and no error during the trial by the State's introduction of the evidence.

App. R. vol. II, 1580-81. On top of this, the court gave the jury very thorough limiting instructions concerning the permissible consideration of this evidence–i.e., Petitioner's uncharged acts of transferring and selling crack cocaine–by themselves. These limiting instructions were given both at the time that this evidence was introduced and during the court's final charge to the jury. *See generally* App. R. vol. II, 985-89, 1159-60, 1460-64.

As a final note on this issue, one of the 404(b) witnesses, Gillespie, had already testified and was subjected to cross-examination, during the suppression hearing, about the uncharged acts of Petitioner transferring and selling crack cocaine, and the court found her testimony to be very credible. *See generally* App. R. vol. I, 103-04, 107-08, 113-16, 118, 139-40, 168-69, 195. As for the other 404(b) witness, Osborne, from the record it appears that it would have been impossible to have him testify at the 404(b) hearing, or at any other time prior to Petitioner's trial, as he was "on the run" and was not "picked up" by the police until after the first day of Petitioner's trial, July 9,

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[20](...continued)
McGinnis, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994)).

2012. *See generally* App. R. vol. II, 861-62, 978. Notably, it also appears from the record that, after he was arrested and being held in a holding cell, Osborne was threatened by Petitioner, who told him that he better keep his mouth shut. *See generally* App. R. vol. II, 977-78.

V.

CONCLUSION

Petitioner's conviction should be affirmed.

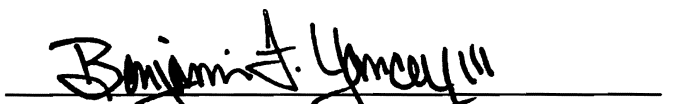
Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1486

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

LAMAR DORSEY,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Benjamin F. Yancey, III, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Brief of Respondent State of West Virginia* upon Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 8th day of August, 2013, addressed as follows:

Crystal L. Walden
Deputy Public Defender
Kanawha County Public Defender Office
Post Office Box 2827
Charleston, West Virginia 25330

BENJAMIN F. YANCEY, III