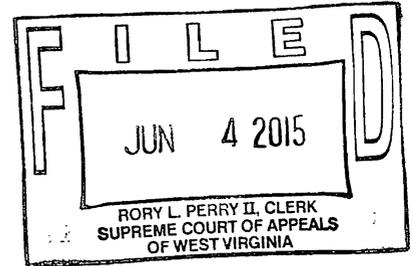


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

NO. 15-0195



STATE OF WEST VIRGINIA

Plaintiff/Respondent

v.

Appeal from a final order
of the Circuit Court of
Harrison County (14 -M-13-3)

MATTHEW CALVERT,

Defendant/Petitioner

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- 1) The trial court below committed plain error when it failed to narrowly construe the criminal statute at issue with the commands of the First Amendment of the United States Constitution and Article III § 7 of the West Virginia Constitution; no reasonable juror could have found that Petitioner's comment amounted to a "true threat."
- 2) West Virginia Code §61-3C-14a is unconstitutionally vague and overbroad in violation of the First Amendment of the United States Constitution and Article III § 7 of the West Virginia Constitution.
- 3) The trial court committed reversible plain error by not instructing the jury on the material elements of the offense charged.
- 4) The trial court committed reversible error when it failed to exclude, after objection, non-noticed 404(b) evidence and failing to establish the requirements of: (1) the prosecution offered the evidence for a proper purpose; 2) the evidence was relevant; (3) make on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice; and (4) the trial court not giving a limiting instruction.
- 5) The court below violated the Petitioner's due process right and committed reversible error by admitting into evidence an electronic document that was not an original as two posts were missing from the chat log, which martially detracted from the factual context from which any "true threat" analysis must be made and refused to give an adverse inference jury instruction for the State's failure to preserve the lost posts.

STATEMENT OF THE CASE

On the 5th day of November, 2013, Detective Webber obtained a Warrant for Arrest charging the Petitioner of felony threats to commit terroristic acts in violation of West Virginia Code §61-6-24(b). ("A.R.") at 6. During the May, 2014 term of the Harrison County, West Virginia grand jury, returned a no true bill for count one of the indictment related to the felony charge of threats to commit terroristic acts but did return a true bill with regards to count two of the indictment regarding committing the offense of West Virginia Code §61-3c-14a(a)(3), Obscene, Anonymous, Harassing and Threatening Communications by Computer. *Id.* at 10.

On the 17th day of October, 2014, a pretrial hearing was held with regard to pretrial motions. *Id.* at 35. Petitioner moved the court to suppress 404(b) evidenced which the parties were in agreement. *Id.* at 46-47. The court granted the motion to suppress evidence collected from Detective Webber's illegal search of his home. *Id.* at 46. The court denied the Petitioner's motion to exclude the "Topix" chat log missing two posts based on W.Va. R. of Evid. 1002 only to argue to the weight of the evidence. *Id.* at 36-41.

On December 1, 2014, a one day jury trial was held. *Id.* at 111. The State's evidenced consisted of the chat log from "Topix" missing the two posts and testimony from Detective Webber concerning his subjective concern regarding the posts and of police responding to the Petitioner's home in the past, the court denied the Petitioner's objection on 404(b). *Id.* at *Id.* 109-274 144-158, 169. Detective Webber testified he sent notice to "Topix" to preserve only the Petitioner's posts and the two posts missing were not the Petitioner's. *Id.* 150-155. Webber testified that the two posts were removed for being reported as abusive. *Id.* at 155.

When cross examined by the Petitioner, Detective Webber, acknowledged to have been directly supervised by former police chief Goff and having a prior relationship with Mrs. Golf *Id.* at 179. When questioned about computer hacking, he acknowledged that it is illegal. *Id.* at 184-185. On redirect, he interjected his own personal knowledge and bias by stating "I can assure you that he - - it would be very unlikely that anyone in his family had the knowledge to hack someone's computer..." *Id.* at 187.

After the State's case in chief, the court denied Petitioner's motion for a judgment of acquittal on the basis that the State had not established Petitioner made the posts and the State had failed to articulate a particular crime the Petitioner threatened to commit. *Id.* at 191-192.

Petitioner's case in chief consisted entirely of his testimony regarding the posts. *Id.* at 194-235. Petitioner testified to his interpretation of the threatening post by Mrs. Goff and it was his intention with his comment to deter violence coming to his home and if put in that situation he would defend himself. *Id.* at 206-217. During cross examination, the Petitioner testified that people should be able to question and comment about what goes on in their community, it is freedom of speech. *Id.* at 217-235. When questioned by the State why the Petitioner felt the need to be anonymous, he testified that "in this town when you speak up against this kind of stuff going on there could be retribution." *Id.* at 224-225.

Petitioner's Jury Instruction 1 was his interpretation of the sufficiency of the evidence to be found guilty of W.Va. Code §61-3C-14a(a)(3). *Id.* at 64-66. Petitioner's Jury Instructions 2 and 3 were the Petitioner's interpretation of the laws of self-defense in West Virginia. *Id.* at 67-68. Petitioner's Jury Instruction 4 was the Petitioner's adverse inference instruction regarding the state failing to preserve the missing posts. *Id.* at 69. The court denied Petitioner's Jury Instructions. *Id.* at 241.

During the Jury Instructions to the jury there was no 404(b) limiting instruction, no instruction interpreting the statute with the commands of the First Amendment, no instruction on the material elements of the "crime" Petitioner threatened to commit, or adverse inference instruction. *Id.* at 243-253. During closing the State argued to the jury that "You can look at the content and know that there's the intent to harass or abuse another person." *Id.* at 255. The State also argued to the jury that "You know that shooting someone with a gun is a crime. I can't think of any circumstance where it's not a crime." *Id.*

The Petitioner, in his closing argument, argued that even though he used language that was rude, offensive, profane and provocative it did not make them illegal. *Id.* at 258. The

Petitioner argued that he was only making a lawful statement that he would defend his home and his family against illegal aggression. *Id.* at 257. On rebuttal the State argued that the comments were “not lawful for fighting words, and the law says that it’s unlawful to make a threat.” *Id.* at 261. The jury was excused and began to deliberate at 4:25 p.m. *Id.* at 266. At 6:07 p.m. the jury had reached a verdict. *Id.* at 267. The jury returned a verdict of guilty. *Id.* at 268.

A sentencing hearing was scheduled for and had on January 28, 2015. *Id.* at 301-327. The Petitioner filed a motion for post-verdict judgement of acquittal pursuant to Rule 29(c) of the West Virginia Rules of Criminal Procedure based on lack of sufficient evidence to sustain a conviction as the State had failed to articulate what crime the Petitioner was guilty of threatening to commit. *Id.* The Petitioner also filed a Motion for a New Trial based on the court’s error in introducing into evidence an electronic chat log that was missing two posts in violation of W.Va. R. of Evid. 1002 and 1003; the court erred when it allowed testimony of police officers responding to the Petitioner’s home in the past in violation of W.Va. R. Evid 404(b) and 403; and the court erred when it failed to properly instruct the jury on the laws of self-defense. *Id.* The court denied both motions. *Id.*

The court imposed a sentence of incarceration of sixty days in the regional jail but suspended the sentence for a litany of probation terms and restrictions. *Id.* at 314. On March 4, 2015, the Petitioner’s counsel timely filed a “Notice of Appeal.”

In April of 2013, Clarksburg police responded to Clarksburg city councilman Sam “Zeke” Lopez’s house for a domestic call. See generally Agreed Record at 132. During the course of the incident, Mr. Lopez called the police chief Goff to assist him to avoid arrest. *Id.* On July 8, 2013, Marshall Goff resigned as Clarksburg police chief to escape prosecution for violating civil rights and lying to federal investigators. *Id.* at 224.

The Petitioner, after learning of the incident with Mr. Lopez on “Topix,” began to frequent this website. *Id* at 196. In October of 2013, someone created a threat titled “Goff.” *Id* at 195. An individual claiming to be the sister of the former police chief Goff by the name of “Tina Gallo” began to respond to posters on the forum, post #8. *Id* at 77-78. The Petitioner posted under the name “that explains it” on post # 13 as follows: “didn’t the gallos run this town with corruption years ago? makes since goff is related to them. And I saw his son driving a cop car is he a police officer too? oh god we will never get away from this family.” *Id* at 81.

At this point, an individual claiming to be the wife of the former police chief, Cheryl Ann Harold Goff, joined the forum at post # 18 and respond to the participants, “you must know our address, so feel free to stop by and we can settle this discussion like adults.” *Id* at 83. The individual claiming to be the sister of Goff posted a direct response to that of the Petitioner’s stating as follows:

Let me get one this straight. DO NOT EVER, AND I MEAN EVER, bring my son into this discussion. Do you understand me? Since you know so much regarding my family, please come to my house. You and I will have a very brief discussion on your issues at hand, because apparently you have more than one on your mind. You can take this to the bank. I am a Goff, married to a Gallo; who, unknown to you is not originally from WV. They are from NY., do not get that twisted. Next, the Goff’s and the Gallo’s are here to stay. If you are wondering who is behind me as I speak...the list is long, so why you feel like a frog, leap! As far as my son driving a police car...again, my suggestion is you leave my son out of this. Do not think for one minute I would not defend anyone in my family because I will, but listen you low life scum...do not mention my son again. Remember hackers are everywhere, and I know a few.

Id. at 85-86. The Petitioner directly responded to this posting, which was the subject of the criminal charge and indictment, under the same name “that explains it” on post #31 as follows:

Please let me respond, I beg you to hack it and look for me! Your husband violated my most sacred right. I will have no problem

answering your husband, your son, your friend, and any Clarksburg police department officer with my Mossberg shotgun, and I vow to you today, I will raise heaven and earth to have your husband convicted for what he did to me. I reiterate, please come looking for me, you come to my house bitch, I will open your chest with my 12 gauge, that I promise you from the bottom of my heart. Your husband wasn't a great man, he was a tool and the problem along with Zeke Lopez and the rest of Clarksburg's officials. Please take notice along with Patsy Trecost, who I am also sure who took part in my railroading.

Id. at 72. Within five minutes of this posting, Detective Webber with the Clarksburg police department, who had been monitoring this forum at his home sent a request to "Topix" to preserve this post, as supported by the time stamp underneath #31. *Id.* at 144.

After having been assured that only this post and two others posted under the same name of "that explains it" were preserved, the following day obtained a search warrant for "Topix" to obtain the IP address of this poster, then obtained a search warrant for Time Warner Cable that ultimately lead to the discovery of the Petitioner on October 29, 2013. *Id.* at 160-168.

Detective Webber contacted the Petitioner to see if he would come into the department to speak with him. *Id.* at 16. On October 30, 2013 at 1:30 p.m., the Petitioner went into the Clarksburg police department to speak with Detective Webber and upon witnessing his daughter's mother working as Detective Webber's secretary, immediately turned and walked out. *Id.* at 16. Detective Webber contacted the Petitioner by phone on October 30, 2013 at 1:39 p.m., at which time Petitioner indicated his inability to trust Detective Webber, upon which time Detective Webber indicated that it had nothing to do with his daughter's mother and he would be seeking an arrest warrant for felony threats of terroristic acts in violation of §61-6-24(b) of West Virginia Code for the posts made on "Topix." *Id.*

The Petitioner now tenders unto the Court his Petition for Appeal.

SUMMARY OF ARGUMENT

The trial court below committed plain error when it failed to interpret W.Va. Code § 63-3C-14a, which makes criminal a form of pure speech, with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech. *Watts v. United States*, 394 U.S. 705, at 707 (1969). The trial court failed to interpret the statute against the “background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on the government and public officials. The language of the political arena, like labor disputes, is “often vituperative, abusive, and inexact.” *Id.* (internal citations omitted). Political hyperbole is not a true threat. *Id.* at 708. The court failed to instruct the jury that the State may punish under the First Amendment threatening expression, but only if the “speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003)

Had the trial court below interpreted the statute with the commands of the First Amendment in mind, no juror could have found the Petitioner’s comment amounted to a “true threat.” At best, Petitioner’s comment was simply a crude statement that he would engage in lawful self-defense, at worst, it was mere political hyperbole found in *Watts* and *United States v. White*, 670 F.3d 498 (4th Cir. 2012).

The statute in question is unconstitutionally vague and overbroad in violation of the First Amendment and W.Va. Const. art. III, §7. Within the context of the internet, words such as “contact” and “communications” are too vague to cause a person of common intelligence to guess as to its meaning and differ to its application. The statute is overbroad on its face as it

criminalizes a substantial amount of protected speech. Speech in the areas of public concern can often be abusive and to speak anonymously is protected speech. The “threat to commit a crime” element is not limited to protect the advocacy of force or unlawful violence that does not incite imminent lawlessness such as that found in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) or *Hess v. Indiana*, 414 U.S. 105 (1973). The only provision that appears constitutional is W.Va. Code § 61-3C-14a(a)(4) obscenity provision due to its extensive limiting definitions and, therefore, all other provisions should be severed.

The trial court below committed plain error when it failed to instruct the jury and require the state to prove beyond a reasonable doubt all material elements of the crime charged. It is a basic tenant of law that the jury must be instructed on all material elements of an offense before a conviction can be sustained by proof of them and that obligation is not impaired by the failure of the defense or state to make such a request. *State v. Miller*, 400 S.E.2d 611 (W.Va. 1990).

The trial court below committed reversible error when it failed to exclude the inappropriate and prejudicial evidence of police responding to the Petitioner’s home in the past, when no notice was given, and failing to find good cause shown for lack of evidence, the state failing to specify its purpose for introduction, whether the evidence was relevant for that specific purpose, make on-the-record finding that the evidence was more probative than prejudicial, and the trial court failing to give a limiting instruction for the specific purpose of its introduction at the time of its introduction and during the jury charge.

The trial court below abused its discretion and committed reversible error by admitting into evidence an electronic document that was not an original as two posts were missing from the chat log. The two posts were missing because the state failed to preserve the evidence even though a criminal investigation was ongoing. The state had the duty, and the authority to

preserve the posts and breached that duty by failing to preserve them, even though they were admittedly abusive. It substantially prejudiced the Petitioner as there was no substitute evidence to supplement the missing posts and due to their character, as abusive posts, materially altered the contextual background, of what was said, how it was said, and where it was said, from which all “true threats” analysis must be evaluated. The trial court abused its discretion if refusing to give the adverse inference jury instruction.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court should set this case for oral argument because the dispositive legal issues have not been authoritatively decided in this jurisdiction, and the decisional process likely will be aided by oral argument. Petitioner believes the case should be set for a Rule 20 argument because the case involves issues of first impression and constitutional rights.

ARGUMENT

I. Standard of Review

“When the constitutionality of a statute is challenged, the scope of our review is necessarily plenary”. *State v. Yocum*, 759 S.E.2d 182, at 185 (W.Va. 2014). See Syl. Pt. 1, *State v. Rutherford*, 672 S.E.2d 137 (W.Va. 2008) (“The constitutionality of a statute is a question of law which this Court reviews *de novo*.”). With regard to the Petitioner’s assignment of error predicated on insufficiency of evidence, the standard is:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no

evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

Id. (internal citations omitted).

The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence 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. Syl. Pt. 2, *Perrine v. E.I. Du Pont De Nemours & Co.*, 694 S.E.2d 815 (W.Va., 2010).

"To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 459 S.E.2d 114 (W.Va. 1995).

"In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. pt. 3, *State v. Vance*, 535 S.E.2d 484 (W.Va. 2000).

II. The trial court bellow committed plain error when it failed to narrowly construe the criminal statute at issue with the commands of the First Amendment of the United States Constitution and Article III § 7 of the West Virginia Constitution; no reasonable juror could have found that Petitioner's comment amounted to a "true threat."

On December 1, 2015, at the conclusion of a jury trial, the Petitioner was found guilty of the offense of obscene, anonymous, harassing, and threatening communications by a computer,

cellphone or electronic communications device with the intent to harass or abuse another to threaten to commit a crime against any person or property. West Virginia Code §61-3C-14a states as follows:

- (a) It is unlawful for any person, with the intent to harass or abuse another person, use a computer to:
 - (1) Make contact with another without disclosing his or her identity with the intent to harass or abuse;
 - (2) Make Contact with a person after being requested by the person to desist from contacting them;
 - (3) Threaten to commit a crime against any person or property; or
 - (4) Cause obscene material to be delivered or transmitted to a specific person after being requested to desist from sending such material.
For the purposes of this section, “obscene material” means material that:
 - (A) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest;
 - (B) An average person applying contemporary adult community standards, would find, depicts or describes, in a patently offensive way, sexually explicit conduct consisting of an ultimate sexual act, normal or perverted, actual or simulated, an excretory function, masturbation, lewd exhibition of the genitals or sadomasochistic sexual abuse; and
 - (C) A reasonable person would find, taken as a whole, lacks literary, artistic, political or scientific value.

A statute such as this one “which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.” *Watts*, 394 US at 707. The First Amendment, applicable to the States through the Fourteenth Amendment, provides that “Congress shall make no law... abridging the freedom of speech.”

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

The Court has always recognized that expression on issues of public concern “has always rested on the highest rung of the hierarchy of First Amendment values, and is entitled to special

protection.” *Connick v. Myers*, 461 U.S. 138, at 145 (1983) (internal quotation marks omitted). “For speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). “Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (internal quotation marks and citations omitted). When speech deals with matters of public concern or public debate we “must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.” *Id.* at 1219(internal citations omitted).

This also includes the right to not disclose one’s identity when speaking. *Tally v. California*, 362 U.S. 60 (1960). In *Tally*, the Supreme Court declared unconstitutional a ban on anonymous handbills. The Court observed that the “obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government.” *Id.* at 64.

With this background in mind, the First Amendment has permitted limited restrictions upon the content of speech. “It is clear that ‘fighting words’ – those that provoke immediate violence – are not protected by the First Amendment.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (internal citations omitted). Other speech such as “obscenity,” expressions that appeal to the prurient interest, are not protected. See *Roth v. United States*, 354 U.S. 476 (1957).

However, the “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg* 395 US at 447. The constitutional guarantees of free speech and free press do not permit the State to proscribe vulgarity because it is “often true that one man’s vulgarity is another’s lyric.” *Cohen v. California*, 403 U.S. 15, 25 (1971). Finally, mere “political hyperbole” is not a true threat and is protected speech. *Watts*, 394 U.S. 708.

In *Watts*, 394 US at 705, the Petitioner was convicted of violating a 1917 statute which prohibits any person from “knowingly and willfully ... [making] any threat to take the life of or to inflict bodily harm upon the President of the United States...” *Id.* The facts surrounding his conviction were that during a public rally on Washington Monument grounds, a member of the group suggested that the young people present should get more education before expressing their views. *Id.* at 706. The Petitioner responded: “They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” *Id.*

The Court held that “the kind of political hyperbole indulged in by the petitioner fits within the statutory term.” *Id.* The language must be interpreted against the “background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on the government and public officials.” *Id.* (internal citations omitted). The language of the political arena, like labor disputes, is “often vituperative, abusive, and inexact.” *Id.* (internal citations omitted).

In *Black*, 538 US at 343, the Court was faced with a cross-burning statute that criminalized cross-burning if done “with the intent of intimidating any person or group of persons...on the property of another.” *Id.* at 348. The statute also contained a provision that made the act of burning a cross *prima facie* evidence of an intent to intimidate. *Id.* The Court acknowledged that the historical purpose of cross-burning can serve two purposes; 1) of political association, or 2) a very virulent form of intimidation, depending on the context the act is performed. *Id.* at 360. Because the statute contained the *prima facie* provision, the statute was unconstitutional because it left open the possibility that pure political cross-burning could be prosecuted and convicted. *Id.* at 365.

The Court held *Black*, that the State may punish threatening expression under the First Amendment, but only if the “speaker **means to communicate** a serious expression of **an intent to commit** an act of **unlawful violence** to a particular individual or group of individuals.” *Id.* at 359 (emphasis added). This objective test requires the reasonable listener to evaluate the communication within the entire context of what was said, including the surrounding events, what was said, where it was said, how it was said, was it conditional and the listener’s reaction. The Court went on to state that the purpose behind proscribing “true threats” is to “protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.” *Id.* at 360 (internal quotations omitted). “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.*

The most recent case the Fourth Circuit has faced to confront the “true threats” doctrine was *White*, 670 F.3d at 498. In *White*, a jury convicted William White on four counts (of a seven-

count indictment), Counts 1, 3, 5, and 6. *Id.* at 501. The convictions on Counts 1, 5, and 6 were for transmitting in interstate commerce – by email, U.S. Mail, and telephone – threats to injure or intimidate individuals, in violation of 18 U.S.C. §875(c) prohibiting interstate communications containing threats to injure a person. *Id.* White moved a for Rule 29 motion for judgment of acquittal based on arguments that his communications were political speech protected by the First Amendment and, in any event, the evidence was insufficient to support a finding of guilt. *Id.* The court below denied the motion as to Counts 1, 3, and 5 and granted it as to Count 6. *Id.*

William White was the “Commander” of the American National Socialist Workers’ Party, which he formed in 2006, conducted activities from his home in Roanoke, Virginia, promoting his neo-Nazi white supremacist views by publishing a white supremacist monthly magazine; by posting articles and comments on his white supremacist website, “Overthrow.com,” and by conducting a radio talk show. *Id.*

Count 1: Citibank employee Jennifer Petsche

Following a dispute with Citibank over past due amounts he began to get personal. *Id.* at 502. White paid money to locate a large amount of personal information about Petsche, the employee at Citibank, and he informed her of this fact. *Id.* at 512. White specifically threatened in an email he sent to her personal account that he would act if she did not respond quickly, concluding the email by comparing Petsche to Judge Lefkow, whose relatives had been murdered, and including a link to the media coverage. The Court concluded that any reasonable person would have taken it as a threat of violence.

Count 5: Kerr

Kerr was the director of a “diversity training program” at the University of Delaware. *Id.* at 504. White, after identifying himself, called to speak with Kerr, her assistant advised him that

she was not in the office, and White responded that he knew she was there because he just spoke with her husband. *Id.* The caller then recited the home telephone number and address of Kerr. *Id.* When the assistant asked if she could take a message, the caller replied, “Yes. Just tell her that people that think the way she thinks, we hunt down and shoot.” *Id.* According to the assistant, the caller delivered this message in a “cold” and “dead sounding” tone of voice. *Id.* The assistant later testified that after receiving the call, she sensed “evil” and began to pray for safety. *Id.* When Kerr was told of the call, she broke down and began to cry out of concern for her family and her family’s safety. *Id.*

On White’s website, “Oberthrow.com,” he created a post he titled “University of Delaware’s Marxist Thought Reform.” *Id.* The website listed all of the personal information of Kerr and her family. *Id.* The website instructed readers to “go to their homes,” and beneath Kerr’s information were the words, “We shot Marxists sixty years ago, we can shoot them again!” *Id.* There was also a post entitled “Smash the University of Delaware,” which included the personal information of Kerr with the instruction, “You know what to do. Get to work!” *Id.* The Court concluded that the evidence amply supported White’s conviction due to the personal phone call and message stating “people who thought the way that Kerr thought were hunted down and shot,” along with the postings on his website. *Id.*

Count 6: Richard Warman

Richard Warman was a Canadian civil rights lawyer who actively fought “hate speech” and targeted white supremacist movements. *Id.* at 505. In July 2006, White began a “campaign of terror” that lasted two years, which White repeatedly advocated for violence towards him, even championing his murder. *Id.* The only direct contact made by White to Warman occurred in October 2006 when White mailed a package to Warman’s home address. *Id.* The package

contained White's magazines, which had a picture of Warman on the back with caption, "Yeah, We Beat This Prick." *Id.* Beneath the caption, Warman's home address printed with the words, "Tired of the Jews taking away your rights?" *Id.*

In February 2007, White published a "work of fiction" on his website entitled "The Death of Robert Waxman in the Not Too Distant Future," the original had been "The Death of Robert Warman..." and featured a protagonist smiling as he placed a shotgun in Waxman's mouth and pulled the trigger. *Id.* White continued to post comments about Warman throughout 2007, repeatedly calling for his assassination and posting his home address. None of the communications during 2007, however, formed the basis for Count 6. The government introduced these pre-2008 communications only for context. *Id.*

There were two comments in 2008 that did make up the indictment. The first in February 2008, White posted on the Vanguard News Network, a white supremacist website run by Alex Linder, an article describing the firebombing of a Canadian civil rights activist's house by a neo-Nazi group and wrote underneath the link, "Good. Now someone do it to Warman." *Id.* The second, in March 2008, White posted an entry on his own website entitled "Kill Richard Warman, man behind human rights tribunal's abuses should be executed." *Id.* The post began:

Richard Warman, the sometimes Jewish, sometimes not, attorney behind the abuses of Canada's Human Rights Tribunal should be drug [sic] out into the street and shot, after appropriate trial by a revolutionary tribunal of Canada's white activists. It won't be hard to do, he can be found easily at his home, at [Warman's home address].

Id. at 506. The post closed with an "irreconcilable fact: Richard Warman is an enemy, not just of the white race, but of all humanity, and he must be killed. Find him at home and let him know you agree: [Warman's home address]." *Id.* In May 2008, White reiterated this call, posting a blog entry entitled "Kill Richard Warman" that included Warman's home address and the statement:

“I do everything I can to make sure everyone knows where to find this scum, particularly because it makes him so mad: Kill Richard Warman! [Warman’s home address].” *Id.* This May 2008, communication was also not the basis for Count 6, but only for context. *Id.*

As to Count 6, the court below granted White’s motion for judgment of acquittal, concluding that, viewing the evidence in the light most favorable to the prosecution, no rational finder of fact could have found that a reasonable recipient of the communications charged in Count 6, familiar with its context, would have considered the communication “to be a serious expression of an intent to commit an act of unlawful violence” and therefore a “true threat,” as required for a violation of §875(c). *Id.* at 507.

The Court concluded that the two posts that made up Count 6 were communications clearly calling for someone to kill Richard Warman. *Id.* at 513. The Court went on to say that neither communication actually provided a threat from White that expressed an intent to kill Warman. *Id.* Concluding for White to have called on others to Kill Warman when others were not even part of White’s organization, amounted more to political hyperbole of the type addressed in *Watts* than a true threat. *Id.* The Court went onto reason that the two communications forming the basis for Count 6 were posted to a neo-Nazi website and not sent directly to Warman. *Id.* The Court concluded that the communications that formed the basis of Count 6 were expressions not directed to Warman but to the public generally and did not communicate an intent to take any action whatsoever. *Id.* The Court found that under the circumstances the communications fell short of being true threats, even with the further context provided by the earlier communications. *Id.* at 513-514.

The facts before this Court will now be addressed. In April of 2013, the Clarksburg police department responded to a domestic violence call at the residence of Sam “Zeke” Lopez, a

Clarksburg city councilman. Instead of being arrested, he called the police chief Goff to intervene with the responding officers to prevent his arrest. At some point, information was leaked onto a public forum on the internet called "Topix" regarding the details of the incident and the District Attorney for the Northern District of West Virginia, William Ihlenfeld, gave police chief Goff an ultimatum to either retire or he would be prosecuted for civil rights violations and lying to investigators regarding the incident.

On or about October 2013, someone created a thread on this same chat log "Topix" entitled "Goff." The "Goff" thread was posted under the Clarksburg, West Virginia forum. At the outset it is clear that this particular chat log is local and that it deals with an issue of public concern, the recent scandal of Goff and Lopez.

All of the posters were anonymous using pseudonyms to prevent disclosure of their identities, except for two individuals, someone claiming to be Goff's sister and another claiming to be Goff's wife. The Petitioner, recognized the last name of the individual claiming to be Goff's sister in post #7, Gallo, remembering that in Clarksburg, in the 80's, there were individuals who ran the town with corruption with the last name of Gallo and were forced out by the federal government and made the following post #13: "didn't the gallos run this town with corruption years ago? Makes since goff is related to them. And I saw his son driving a cop car is he a police officer too? oh god we will never get away from this family[.]"

Petitioner, by mentioning Goff's son, was making a point that nepotism is a byproduct of corruption, one that has went on in Clarksburg for decades. The individual claiming to be Goff's sister, "Sister Tina," and someone claiming to be Goff's wife, "Cheryl Ann Herold Goff," began posting attacks to the posters on the thread and Goff's wife requesting posters to engage in

physical confrontations by stating in post #18 “you must know our address, so feel free to stop by and we can settle this discussion like adults.”

The individual claiming to be “Sister Tina” in direct response to the Petitioner’s first post, as evidenced by his post entirely being contained within her post, #22 states:

Let me get one thing straight. DO NOT EVER, AND I MEAN EVER, bring my son into this discussion. Do you understand me? Since you know so much regarding my family, please come to my house. You and I will have a very brief discussion on your issues at hand, because apparently you have more than one on your mind. You can take this to the bank. I am a Goff, married to a Gallo, who, unknown to you is not originally from WV. They are from NY., so do not get that twisted. Next, the Goff’s and the Gallo’s are here to stay. If you are wondering who is behind me as I speak...the list is long, so if you feel like a frog, leap! As far as my son driving a police car...again, my suggestion is you leave my son out of this. Do not think for one minute I would not defend anyone in my family because I will, but listen you low life scum...do not mention my son again. Remember hackers are everywhere, and I know a few.

There is some confusion as to whether this is Goff’s wife or sister, but in any event, it is clear the poster was trying to intimidate posters on the forum by making repeated requests to come to “my” house and a physical confrontation would take place, the list of people backing her up was “long,” and if the poster didn’t take her up on her request, she knew “hackers” and she, along with her posse would come to the posters house if they did not comply. Clearly the type of “true threat” *Black* had in mind when it held “[i]ntimidation, in the constitutionally proscribable sense of the word, is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm...” *Black*, 538 US at 360.

The Petitioner, in direct response to the Goff family member’s post, posted in post #31, as evidenced by the prior post being completely included directly above, in an attempt to show

he would not be intimidated and an attempt to prevent such a scenario from occurring, and for which was the sole basis of the indictment, stated:

Please let me respond, I beg you to hack it and look for me! Your husband violated my most sacred right. I will have no problem answering your husband, your son, your friend, and any Clarksburg police department officer with my Mossberg shotgun, and I vow to you today, I will raise heaven and earth to have your husband convicted for what he did to me. I reiterate, please come looking for me, you come to my house bitch, I will open your chest with my 12 gauge, that I promise you from the bottom of my heart. Your husband wasn't a great man, he was a tool and the problem along with Zeke Lopez and the rest of Clarksburg's officials. Please take notice along with Patsy Trecost, who I am also sure who took part in my railroading.

Several things to note about this message, Petitioner will concede that this post is “vehement, caustic, insulting and even outrageous,” but that is not enough to remove it from the First Amendment protections when dealing with matters of public concern. This message was not a “true threat” as defined in *Black*, the Petitioner did not communicate “an intent to commit an act of unlawful violence.” The Petitioner stated he would move heaven and earth to have Goff “**convicted**,” not shot or harmed.” (emphasis added). The Petitioner never provided any identifying information to notify any recipients of his location because he didn't want them to know his location. Further, it took Detective Webber nearly thirty days and two search warrants to locate the same. At best, this post was, however crudely, a statement that the Petitioner would engage in lawful self-defense if presented with the situation to where such would be necessary, at worst this post amounted more to the type of political hyperbole found in *Watts* and *White*.

Petitioner's other two posts for context, not part of indictment, post # 36 states “threats, threats, exactly what I responded to, you want to see someone willing to follow through, come find me. As for threats to the Clarksburg Police, they know they aren't welcome here and if they

come looking for trouble, they will get all they can handle. NOT a threat, a promise.” Petitioner’s post # 37 states “Marshall Goff is a tool, a crook, and gets away with it. He should be in jail getting but f*cked by the people he abused and put in Jail. Maybe he can go munch on some of the pu*s his daughter eats.” These posts support Petitioner’s position further, no disclosure of identity or location, no indication of an intent to do anything, but rather crude puffery.

The ultimate responsibility in criminal cases to ensure the jury is instructed according to constitutional requirements must be placed on the trial court. *State v. Dozier*, 255 S.E.2d 552 (W.Va. 1979). When given, instructions to a jury are the court’s instructions, *Sate v. Riley*, 151 S.E.2d 308 (W.Va. 1966), and, irrespective of who requests them, the court must see to it that all instructions conform to constitutional requirements. *State v. Dozier*, 255 S.E.2d 552 (W.Va. 1979). Instructions, to be effective, must correctly state the law to the jury. *State v. Simmons*, 309 S.E.2d 89 (W.Va. 1983). Instructions which do not state the law correctly, which are at variance with the crime charged in the indictment, which are not supported by the evidence, or which are abstract are erroneous and should not be given. *State v. Simmons*, 309 S.E.2d 89 (W.Va. 1983).

At the conclusion of the one day jury trial, the circuit court denied all of the petitioner’s instructions and instructed the jury regarding the offense charged in the indictment, as follows:

Before the defendant, Matthew Gregory Calvert, can be convicted of obscene, anonymous, harassing and threatening communications by computer, cellphones, and electronic communication, the State of West Virginia must prove to the satisfaction of the jury beyond a reasonable doubt that: 1) the defendant, Matthew Gregory Calvert, 2) in Harrison County, West Virginia, 3) on or about and between the 4th day of October 2013 and the 7th day of October 2013, 4) did unlawfully with the intent to harass or abuse another person, 5) use a computer, mobile phone, personal digital assistant, or other electronic communication device, 6) to threaten to commit a crime against any person or property.

There is no limiting instruction interpreting this statute with the commands of the First Amendment clearly in mind or giving the jury an ability to distinguish what is a threat from what is constitutionally protected speech. The court did not instruct the jury that “true threats” encompasses those statements “where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Black*, 538 US at 360. The court also did not instruct the jury that political hyperbole indulged in during “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and unpleasantly sharp attacks on government and public officials,” *Watts*, 394 US at 708, and that language in the political arena is “often vituperative, abusive and inexact,” was not given.

This Court has repeatedly acknowledged that “the provisions of the Constitution of the State of West Virginia may, in certain circumstances, require higher standards of protection than afforded by the Federal Constitution.” Syl. Pt. 2, *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979). West Virginia Constitution art. III, § 7 provides that “No law abridging the freedom of speech, or of the press, shall be passed; but the Legislature may, by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character...”

It is obvious by the plain text that West Virginia’s Constitution has limited what areas of speech may be proscribed, “obscene” publication or “libel” and “defamation of character.” Petitioner would not argue that this State does not have an interest to “protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.” *Black* The scope of governmental regulation of protected first amendment activity designed to serve a substantial governmental

interest must be “no greater than is essential to the furtherance of that interest.” *United States v. O’Brien*, 391 US 367, 377 (1968).

This Court has recognized that nowhere in the United States Constitution are the terms that are included in W.Va. Const. art. III, § 1 “equally free and independent” or “safety” or comparable rights guaranteed. *Woman’s Health Center v. Panepinto*, 446 S.E.2d 658, 663 (W.Va. 1993). As interpreted by the court below, by refusing to give a jury instruction on self-defense, it is a crime to make a statement that one would act in self-defense, yet this Court has held that the right to self-defense is a matter of substantial public policy. *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713 (W.Va. 2001). One strains to think how these two contradictory holdings can be reconciled. Petitioner would urge this Court to adopt, as a matter of law, that a statement that one would act in self-defense, if it would be justifiably reasonable, is protected speech under W.Va. Const. art. III, §7. The Petitioner would also urge this Court to adopt the standard that in order to be proscribable speech the speaker must have the specific intent to threaten as implied by *Black*.

The court below committed reversible “plain error” as articulated in *State v. Miller*, 459 S.E.2d 114 (W.Va. 1995) and mandated by *Watts*, for failing to properly instruct the jury and interpreting this statute with the commands of the First Amendment applicable to the States by the Fourteenth and W.Va. Const. art. III, §7.

The next step in the analysis is to determine whether the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. The Petitioner was on a public message board where he had a lawful right to be. He was engaged in expressing his constitutional right to freedom of speech dealing with a matter of great public concern. He was participating on this message board under an anonymous name which he had a

lawful right to do. The Petitioner did elude to the use of force with a 12 gauge shotgun, but this language was conditioned on Goff's wife coming to his house with a long list of people to do him serious bodily harm, exactly the type of unlawful violence the Petitioner was trying to prevent. The comment was neither sent to Goff's wife directly or personally, but on a public message board in direct response to her "true threat." The Petitioner at no time let his identity be known and didn't want his identity to be known. As proven by the great lengths and delay it took Detective Webber to acquire the Petitioner's identity. The Petitioner was engaging in the type of protective behavior this State's constitution would defend.

III. West Virginia Code §61-3C-14a is unconstitutionally vague and overbroad in violation of the First Amendment of the United States Constitution and Article III § 7 of the West Virginia Constitution.

The doctrine of vagueness as described by this Court emerged as "a tool for protecting the exercise of expression and association rights has evolved from a fundamental principle of procedural due process. As a matter of basic procedural due process, a law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *West Virginia Citizens Action Group v. Daley*, 324 S.E.2d 713, 719 (W.Va. 1984) (internal quotations and citations omitted). This Court went onto explain that:

[A]n additional consideration is raised in the free speech context which creates a heightened need for specificity. Because ambiguity in the regulation of speech may inhibit citizens from fully exercising their fundamental constitutional rights by causing them to steer far wider of the unlawful zone, than if the boundaries of the forbidden areas were clearly marked, the vagueness doctrine demands a greater degree of specificity in the free speech context than in other contexts. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. To minimize the potential chilling effect of regulations governing the exercise of rights guaranteed under constitutional free speech provisions, those regulations must be both narrowly and clearly drawn.

Daley, 324 S.E.2d at 719-720 (internal quotations and citations omitted). This Court acknowledged that it was not just fair notice that is required by the vagueness doctrine but to create standards governing the exercise of discretion during enforcement of the law to prevent arbitrary and erratic arrests and convictions because that would create “a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.” *State v. Flinn*, 208 S.E.2d 538, 543-44 (W.Va. 1974).

The United States Supreme Court described the overbreadth analysis in *Houston v. Hill*, 482 US 451 (1987) as follows:

We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application . . . Instead, [i]n a facial challenge to the overbreadth and vagueness of a law, a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. Criminal statutes must be scrutinized with particular care, e.g., those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.

Id. at 458-59 (internal quotation marks and citations omitted).

As discussed in section II, *supra*, the statute at issue here does prohibit communicative speech and, therefore, subject to vagueness and overbreadth analysis. See *State v. Thorne*, 333 S.E.2d 817 (W.Va. 1985). It is obvious without saying that to use a computer to make contact, they must be connected somehow, presumably the internet. Further, it goes without saying the internet is an enormous and complex thing far too detailed for the purposes of this brief. The internet allows users around the world to connect with each other through numerous networks connected to each other. Within the context of the internet, the terms “communications” and “contact” without further explanation are too vague for a criminal statute.

One may send a communication to an individual directly by an email or instant messaging application without any affirmative steps taken by the recipient to make contact. However, a speaker may also make a communication by posting comments at the bottom of news articles posted on the internet or on public message boards on the internet that inevitably come into contact with another person when that other person accesses the same news article or public forum. Without limiting the term “communication” or “contact” with respect to the internet, it does not put a person of ordinary intelligence on notice as to what type of “contact” or “communication” is proscribable and allows for discriminatory application by law enforcement.

The statute at issue here is also overbroad as it applies to a substantial amount of protected speech. By its own construction, communication by computer are not face to face communications, but rather outside the presence of the listener over a computer network, therefore, the “fighting words” doctrine is inapplicable as anything said over the internet is not an analogous situation that could “tend to incite an immediate breach of the peace.” *Gooding v. Wilson*, 405 U.S. 518, 525 (1972). Even if this Court were to conclude that speech over the internet could “incite an immediate breach of the peace,” *Gooding* tells us the language used in this statute exceeds the limited boundary of “fighting words.”

The Court in *Gooding* was faced with a statute that prohibited the use of “opprobrious words or abusive language, tending to cause a breach of the peace...” *Id.* at 519. In *Gooding*, the Court looked to Webster’s Third New International Dictionary (1961) which defined “opprobrious” as “conveying or intended to convey disgrace,” and “abusive” as including “harsh insulting language.” *Id.* at 525. On this statute’s face, by using the term “abuse,” it sweeps too broadly the narrow specificity commanded by *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), and

its progeny. The problem with this statute “is it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application.” *Gooding*, 405 U.S. at 528.

As *Watts* concluded, “language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact.” *Id.* at 708(internal citations omitted). Also, one also has the right to not disclose one’s identity when speaking. *Talley*, 362 U.S. at 60. It is thereby obvious to see the reach of this statute sweeps far too broadly into the area of free speech that “occupies the highest rung of the hierarchy of First Amendment values and entitled special protection.” *Myers*, 461 U.S. at 145.

Under the language of this statute, a group of concerned citizens who want to speak out against their corrupt local government, gather anonymously, out of fear of retribution, the same reasons our founding fathers published anonymously to escape England’s “obnoxious press licensing laws,” on a public forum on the internet to discuss their local political officials conduct and engage in language that is “vituperative, abusive and inexact” only to be joined on this public forum by the same government officials or their family members that the concerned citizens have a duty to speak out about, to be threatened by the same government officials or their family members for speaking out and then those same concerned citizens be charged with a crime and prosecuted by the police department of the same local government for defending themselves or for engaging in abusive discussions. This type of scenario seems to be exactly what our founding fathers wanted to prevent, and exactly what is occurring in the case currently before this Court.

Provision (a)(3) is also overbroad, as it proscribes “threats to commit a crime against person or property,” with no limiting instruction. This prong of the statute is neither limited to protect the advocacy of force or unlawful violence as found in *Brandenburg* or *Hess*, or the emotionally

charged rhetoric of Charles Evers' in *Claiborne Hardware Co.* Nor is this prong of the statute limited as to protect against the type of political hyperbole found in *Watts*. Nowhere in this statute is the term "crime" limited in its scope to define "true threats" as defined in *Black*. All of these decisions were given prior to this statute's enactment.

The only provision of this statute which appears to be constitutional is (a)(4) "Cause obscene material to be delivered or transmitted to a specific person after being requested to desist from sending such material," as this prong is extensively limited and defined by the detailed definition of "obscene material" as described in subparts (A) through (C), which appears to be in line with the United States Supreme Court precedent. See *Miller v. California*, 413 U.S. 15 (1973).

"A statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and the others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained.

Syl. Pt. 6, *State v. Heston*, 71 S.E.2d 481 (W.Va. 1952). Further, West Virginia Code §61-3C-21 provides for severability of any provision of article 3C allowing the remaining provisions to stand alone. Based on the foregoing, provisions § 61-3C-14a(a)(1)-(3) are unconstitutionally vague and overbroad and should be severed from the statute allowing only §61-3C-14a(a)(4) to remain valid and constitutional.

IV. The trial court committed reversible plain error by not instructing the jury on the material elements of the offense charged.

It is a basic tenant of law that the jury must be instructed on all material elements of an offense before a conviction can be sustained by proof of them and that obligation is not impaired by the failure of the defense or state to make such a request. *State v. Miller*, 400 S.E.2d 611 (W.Va. 1990). If an underlying offense is an essential element of the overarching offense

charged, the jury, in order to convict a person of the overarching charge, must be instructed on the material elements of the underlying charge. *State v. Stacey*, 384 S.E.2d 347 (W.Va. 1989).

In *Stacy*, the defendant was charged and convicted of felony-murder. *Id.* at 348. The state's underlying offense for the felony-murder charge was the commission of or attempt to commit robbery. *Id.* at 351. The trial court instructed the jury on felony-murder but did not instruct the jury on each essential element of the underlying felony of robbery and on the State's burden of proving the underlying felony beyond a reasonable doubt. *Id.*

This Court held “[t]he plain error doctrine enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court.” *Id.* at 352) (internal quotations and citations omitted). The jury instructions were erroneous because they failed to inform the jury that the State had the burden to prove all of the elements of the underlying felony involved in felony-murder. *Id.* This Court reasoned “it is clear that the lower court’s failure to properly instruct the jury as to the state’s constitutional duty in proving the elements of the underlying felony in felony-murder substantially impaired the truth-finding function at trial and constitutes reversible error.” *Id.* This Court explained “since the underlying felony is an essential element of felony-murder, the jury, in order to convict a person of felony-murder, must be informed of what constitutes the underlying felony... and the only logical way to accomplish this is to instruct the jury as to the elements of the underlying felony.” *Id.* at 354.

The essential element at issue on this appeal, in fact the only element, was whether the Petitioner “threatened to commit a crime.” Not only did the trial court below fail to instruct the jury on any essential element of any potential underlying “crime,” it failed to even mention the name of any crime in the jury instructions. The only mention of a crime, was by the state during

closing arguments when the state said “I don’t know if he shoots him if he’s going to kill him where it could be murder. I don’t know if he’s going to miss where it would be assault...” The court below in failing to properly instruct the jury on the underlying elements of any crime substantially impaired the truth-finding function at trial and constitutes reversible error. The Petitioner raised this argument in his motion for a new trial which was rejected by the trial court.

V. *The trial court committed reversible error when it failed to exclude, after objection, non-noticed 404(b) evidence and failing to establish the requirements of: (1) the prosecution offered the evidence for a proper purpose; 2) the evidence was relevant; (3) make on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice; and (4) the trial court not giving a limiting instruction.*

Rule 404(b) of the West Virginia Rules of Evidence states:

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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

When a defendant is on trial for a criminal accusation, he shall be convicted, only on the evidence showing his guilt of the specific offense charged. See *State v. Finley*, 355 S.E.2d 47 (W.Va. 1987).

The first determination to be made under Rule 404(b), the court must determine whether the evidence is “intrinsic” or “extrinsic.” See *State v. Minigh*, 680 S.E.2d 127 (W.Va. 2009). Other bad act evidence can be said to be intrinsic if the evidence of the other bad act and the current criminal allegation, are so inextricably intertwined or part and parcel of proof of the charge in the indictment. See *State v. LaRock*, 470 S.E.2d 613 (W.Va. 1996). If evidence is

intrinsic, it is admissible and not governed by Rule 404(b). See *State v. Minigh*, 680 S.E.2d 127 (W.Va. 2009).

The court then must conduct an evaluation as to whether the evidence is relevant as applied to Rules 401 and 402 and the evidence will only be relevant, under Rule 404(b), if it is related to a fact other than the character of the defendant and is related to proof of motive, opportunity, intent. *State v. Scott*, 522 S.E.2d 626 (W.Va. 1999) (per curiam). Evidence can be admissible for “other purposes” if the “[e]vents, declarations and circumstances which are near in time, causally connected with, and illustrative of transactions being investigated are generally considered *res gestae* and admissible at trial.” *State v. Biehl*, 687 S.E.2d 367 (W.Va. 2009). The trial court must also find by a preponderance of the evidence that the prior bad acts occurred and the opponent was the actor. See *State v. Walker*, 425 S.E.2d 616 (W.Va. 1992).

The state is required to specify the purpose which the 404(b) evidence is being offered to prove and the trial court must instruct the jury to this limited purpose to consider the evidence for only that purpose. See *State v. Newcomb*, 679 S.E.2d 675 (W.Va. 2009). After the court determines the 404(b) evidence is relevant to one of the specific purposes stated on the record by the prosecution, the trial court must then conduct the balancing required under Rule 403. *McGinnis*, 455 S.E.2d at 528.

Under Rule 403 balancing, with regard to Rule 404(b), is whether such evidence has the potential to cause undue prejudice, and, if so, whether the danger of such undue prejudice substantially outweighs its probative value. *State v. LaRock*, 470 S.E.2d 613 (W.Va. 1996). The probative value of prior acts is directly correlated to the prosecution’s need for the extrinsic evidence and the lesser need for the evidence enhances the determination that the prejudicial effect outweighs its evidentiary value. *State v. Simmons*, 337 S.E.2d 314, 315-316 (W.Va. 1985).

The trial court must make “an on-the-record Rule 403 determination that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice...” *LaRock*, 470 S.E.2d at 630. In *State ex rel. Caton v. Sanders*, 601 S.E.2d 75 (W.Va. 2004), “[i]f the 404(b) evidence is determined to be admissible, then a limiting instruction **shall** be given at the time the evidence is offered, and **must** be repeated in the trial court’s general charge to the jury at the conclusion of the evidence.” *Id.* (emphasis added).

This Court was faced with the task of determining whether the trial court properly handled the introduction of Rule 404(b) evidence in *State v. Ricketts*, 632 S.E.2d 37 (W.Va. 2006). In *Ricketts*, the defendant was charged with malicious assault and the prosecution gave proper “Notice of Intent to Introduce 404(b) Evidence” to use a prior conviction of felony distribution of a controlled substance for the purpose of motive and intent *Id.* at 39. The trial court ultimately ruled that it was more prejudicial and wasn’t admissible. *Id.* However, on cross-examination, the prosecution attempted to elicit the evidence from the defendant and the court allowed it over the defense’s objection. *Id.* at 40. At the conclusion of the trial, the trial court acknowledged its mistake in allowing the evidence and gave a limiting instruction to the jury to disregard the testimony in its entirety during deliberations. *Id.*

At the outset of its discussion, this Court said that the defendant will be presumed to be protected from 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.

Ricketts, 632 S.E.2d at 42. (internal citations omitted). This Court concluded that these requirements were not met. *Id.* This Court held no character evidence had been put on by the

defense to open the door for the admittance of 404(b) evidence. *Id.* This Court found that the evidence was not relevant to motive or intent and once objected by the defense, the trial court did not make a determination on or off the record that the probative value of the evidence outweighed any prejudice. *Id.* This Court found that even though a limiting instruction had been given to the jury to disregard the testimony, the damage had been done and the bell could not be “unrung.” *Id.* Relying on *McGinnis*, this Court concluded that the improper introduction of the 404(b) evidence was reversible error and remanded for a new trial. *Id.*

In the matter now before this Court, the state never gave “Notice” to the Petitioner that it intended to use 404(b) evidence during the trial. It was plainly obvious that one was needed when the defense filed a Motion *in limine* to keep mention of any 404(b) out of the trial. In the pre-trial hearing it was trial counsel’s understanding that the state was in agreements to keep all 404(b) evidence out and when given the opportunity to dispel this notion failed to do so. The only mention of an intent of using 404(b) evidence was prior to empaneling the jury on the day of the trial. The state never specified as to the purpose of its use, only that it wanted to introduce testimony that police had responded to the Petitioner’s home in the past and redact any information regarding the Petitioner’s expunged domestic violence arrest.

When defense objected to this request that it would be far more prejudicial than probative, the trial court made no finding or ruling, or to excuse notice for good cause shown, other than to say “you better look at the case of *State v. Marcus McKinley*.” The trial court made no finding by a preponderance of the evidence that the act occurred or that the petitioner committed the act. The trial court didn’t make a finding that the evidence was relevant for the specific purpose the state wanted to use it, as it couldn’t because the prosecution did not specify

the purpose. The trial court did not conduct the required Rule 403 balancing to determine whether the probative value of the testimony far outweighed the prejudicial value.

During the State's case-in-chief, it tried to introduce the evidence of the police presence at the Petitioner's home in the past when it asked Detective Webber "[a]nd had he been involved with the Clarksburg Police Department in the past?" The defense timely objected and the trial court allowed it into evidence. Again, the trial court did not engage in any of the requirements set out in *McGinnis*, *Caton*, and *LaRock*. It is clear that the only intended purpose of the testimony was to prejudice the Petitioner by portraying him in a bad light that he has a violent character, and that because he acted violently in the past he acted violently during the crime charged in direct contravention of Rule 404(a)'s purpose of inadmissibility.

Presumably the trial court ruled on the matter when it said, better take a look at *State v. McKinley*. But *McKinley* holds that when a defendant is on trial for the first degree murder of his wife, two prior domestic battery charges occurring within two months of her murder are intrinsically related to the underlying charge and are outside Rule 404(b) analysis. The fact that police responded to the Petitioner's home for domestic issues in August of 2012 is completely unrelated as to near in time, causally connected with, and illustrative of transactions being investigated with regards to the Petitioner's responses on an internet public forum to the recently removed police chief's wife in October of 2013.

On his own admission, Detective Webber acknowledged that the Petitioner himself called on at least one occasion and to his knowledge the Petitioner never acted in a threatening manner to the police when they arrived at his home. It goes without explanation that the way the evidence was introduced the Petitioner never put character evidence at issue and thereby opened the door because it occurred during the State's case-in-chief. Based on the foregoing the inappropriate

admission of 404(b) evidence and the trial court's failure to take the required steps to protect the Petitioner from prejudice as held in *Ricketts* and committed reversible error.

VI. *The court below violated the Petitioner's due process right and committed reversible error by admitting into evidence an electronic document that was not an original as two posts were missing from the chat log, which materially detracted from the factual context from which any "true threat" analysis must be made and refused to give an adverse inference jury instruction for the State's failure to preserve the lost message posts.*

West Virginia Rules of Evidence 1002 states "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided..." *Id.* Rule 1003 of the West Virginia Rules of Evidence states "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." *Id.* Rule 1004 of the West Virginia Rules of Evidence states "[t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if – (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith..." *Id.*

The West Virginia Legislature sought to assist these rules of evidence when modern technology is used to reproduce duplicates when is passed West Virginia Code § 57-5-12 that states that a reproduction of a document will be deemed a duplicate and be admissible into evidence if the system that produces the document **does not permit deletions or changes.** *Id.* (emphasis added).

This Court established the standard of which to apply to the State's responsibility to preserve evidence in *State v. Osakalumi*, 461 S.E.2d 504 (W.Va. 1995), when it stated:

When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1)

whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.

Id. at 512. The Court in *Osakalumi*, when announcing this standard, acknowledged that the provisions of the West Virginia Constitution, in certain situations, require higher standards of protection than those provided by the Federal Constitution. *Id.* This Court went onto say that based on state constitutional law, fundamental fairness requires this Court to evaluate the failure to preserve evidence in the context of the entire record because due process of the law is “synonymous with fundamental fairness.” *Id.*

The facts at issue in *Osakalumi* involved the victim being shot on a couch. The central issue to the defense was whether the death of the victim was the result of suicide or murder. *Id.* at 513. The police had in their possession one couch that contained a bullet and bullet holes that supplied the investigation with a theory of bullet trajectory. *Id.* At the time the police took the couch into their possession, they did not have a body. *Id.* at 506. During the lapse of time between acquiring the couch and discovering the body, the couch started to emit an odor and, with the consent of the prosecution, the police destroyed the couch but failed to take any notes on its dimensions or the location of the bullet holes or take pictures of the couch. *Id.* at 506.

Applying the Courts newly created standard to the facts, the Court determined that the couch clearly would have been discoverable as it was material to the defense. *Id.* at 513. The

Detective's theory of trajectory was clearly important to the defendant's guilt. *Id.* The State breached this duty by destroying the couch and failing to photograph or take dimensions of the couch. *Id.*

The Court then went on to apply the three-part consequence analysis. Applying the first factor, negligence, the Court concluded that even though there was no body, because they found a bullet, blood and bone fragments, the couch was clearly a part of a pending investigation and therefor acted negligently in disposing of the couch. *Id.* The second factor of the consequence analysis is "the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available." *Id.* The Court concluded that the only secondary evidence presented was a diagram drawn from memory and that was seriously unreliable. *Id.* at 514. The Court then performed the final factor of whether there was "sufficiency of the other evidence produced at trial to sustain conviction." *Id.* The Court concluded that the jury could have reasonably concluded that the appellant was somehow involved with the death, the expert could not have concluded the death was a homicide without the trajectory analysis performed from a reliable source. The Court ultimately concluded that the jury instruction was insufficient and the appellant's rights of due process under W.Va. Const. art. III, §§ 10 and 14 were violated. *Id.*

This Court created the following standard for analysis when a party requests an adverse inference jury instruction in *Tracy v. Cottrell*, 524 S.E.2d 879 (W.Va. 1999):

[B]efore a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and

(4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test.

Id. at 890.

The standards set out in *Osakalumi* and *Tracy* are substantially similar and will now be applied to the facts currently before this Court. Before the trial below, trial counsel filed a Motion *in limine* to exclude the production of the chat log as it was not a duplicate as required by the West Virginia Rules of Evidence and W.Va. Code § 57-5-7 because the print out was missing two posts and, therefore, the system used for its reproduction allowed for deletions or changes. The trial court denied this motion and allowed the printed chat log to come into evidence.

The lost posts on the “Topix” chat log would be disclosed by W.Va. R. of Crim Pro. 16 as the chat log made up a substantial portion of the evidence involved in the State’s case. The State did have a duty to preserve the posts, by Detective Webbers own admissions he had been monitoring the “Goff” thread because of its title and informed the administrator of “Topix” that he was involved in a criminal investigation. The state breached this duty by failing to preserve all of the posts. The State had control and authority over the posts as confirmed by Webber’s testimony he had, and exercised, the ability to “preserve” message posts. Also, during his testimony, Webber testified that he was only concerned with Petitioner’s posts even though the chat log contained close to forty posts at this point. By his own admission, posts are removed for being abusive. Yet, his only concern was that the two posts removed did not come back as being posted by the Petitioner. One wonders how he knew that if they had been removed.

The Petitioner was substantially prejudiced by the State failing to preserve the posts. As *Black* mandates, a “true threats” analysis must be done from the complete contextual perspective

of what was said, where it was said, and how it was said. Presenting a conversation with two posts removed, posts admittedly being removed for being abusive, eliminates comments that contain vituperative and abusive language and thereby materially alters the tenor of the entire conversation and completely takes it out of context. There was no secondary evidence available to present the contents of these missing posts and the trial court specifically ruled that the Petitioner wasn't to testify as to the contents of the missing posts.

In addition to the trial court allowing the chat log to be admitted without the missing posts, it refused to give the Petitioner's adverse inference jury instruction with all of the testimony on the record detailing the State's failure to preserve the posts. The Petitioner believes that under the circumstances, allowing the chat log into evidence while missing these two posts, his right of due process under W.Va. Const. art. III, §§ 10 and 14 was violated by rendering the trial fundamentally unfair. Also, the trial court abused its discretion in refusing to give the Petitioner's jury instruction #4, adverse inference jury instruction.

CONCLUSION

Based on the foregoing countless "plain errors" and instances of abuse of discretion that rendered the trial below so fundamentally unfair as to cast serious questions as to the integrity and public reputation in the judicial proceedings below, this Court must reverse the verdict. Because the record contains no evidence for which a jury could find guilt beyond a reasonable doubt, this Court must acquit the Petitioner as a matter of law.

Respectfully submitted,



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