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

**SUPREME COURT NO: 19-0143**



**HARRY LEE SMITH, JR.**

**PETITIONER/APPELLANT**

**V.**

**STATE OF WEST VIRGINIA,**

**RESPONDENT/APPELLEE**

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**APPEAL FROM THE CIRCUIT COURT OF  
KANAWHA COUNTY, WEST VIRGINIA**

**(2018-F-172)**

**REPLY BRIEF OF APPELLANT**

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**DERRICK W. LEFLER  
1607 HONAKER AVENUE  
PRINCETON, WV 24740  
WV STATE BAR NO.: 5785  
TELEPHONE: (304) 425-4484  
FACSIMILE: (888) 540-7248**

***ATTORNEY FOR PETITIONER/APPELLANT***

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## **ARGUMENT**

Appellee submits several arguments to counter the errors asserted in appellant's initial brief. Appellant provides the following responses to several of appellee's arguments. For ease of reference and continuity, heading numbers in this brief correspond to those appearing in appellant's initial briefing. For those arguments not specifically addressed herein, appellant stands on the grounds and arguments set forth in his initial briefing.

### **I. Defective Indictment:**

As Appellee concedes in its brief, the key issue with reference to the sufficiency of the indictment in question is whether the kidnapping charge set forth in the indictment returned against Harry Smith, Jr., alleges all elements essential to the offense. Appellee asserts that the indictment is sufficient and the Circuit Court's ruling is proper because, it contends, transportation was not an essential element of the kidnapping charge.

To support this position appellee engages in a tortured exercise to argue against the clear intention of the construction of the kidnapping statute. In doing so, respondent walks past the obvious to advocate its position.

Appellee focuses upon the use of a second "infinitive verb" in subsection (2) of West Virginia Code §61-2-14a. However, appellee fails to explain in any meaningful manner the significance of the presence of more than one infinitive verb.

Likewise, the appellee argues because subsection (2) differs from subsections (1) and (3) in that it includes, "a second infinitive verb and corresponding modifier" its point is proven. The folly of this argument is most readily displayed by the fact that "infinitive verbs" as identified by the appellee would not fit within the context of subsections (1) and (3).

What is patently obvious is that in constructing the kidnapping statute the legislature set about to define the individual methods by which the offense could be committed by an individual who takes "custody of, conceals, confines or restrains another person against his or her will by force, threats of force, duress, etc.," and the requisite intent for each of those methods. Each subsection identifies, at the outset, the action required by the offender. In subsection (1) it is "to hold" for the purposes identified. For subsection (3) it is "to use" for the purpose identified. Likewise, for subsection (2) the action is "to transport" for the purposes identified, those being, "to inflict bodily injury or to terrorize."

Clearly, had the legislature intended the construction suggested by appellee, there would have been a fourth subsection, the additional subsection reading "to terrorize the victim or another person."

To the extent that appellee argues that appellant's construction would render the word "to" superfluous, a correct reading of the subsection in question shows this to be incorrect. Subsection (2), read in the context of the whole statute, requires the concealment, confinement by force, duress, etc. to be with the intent to "Transport." However, the subsection also inserts an additional

Intent element as to the purpose of the transportation, that being the intent "to inflict bodily injury or to terrorize the victim or another person." Therefore, there is no superfluous language in the provisions in question. The presence of this additional intent element provides the context for the presence of the second infinitive verb which troubles the appellee.

## **II. Improper Assignment of Mitigation Finding**

Appellee has agreed and conceded that reversible error was committed below with the submission of interrogatories to the jury concerning sentencing on the kidnapping charge. Appellant urges the court to acknowledge and accept appellee's confession. Appellant further submits that in conjunction with the errors asserted regarding the indictment vacation of appellant sentences is called for.

## **III. Insufficient Evidence as to Mitigation Findings**

Appellee argues against appellant's assertion as to "bodily harm" purportedly inflicted upon Amy Rose, urging a definition of "bodily harm" defined by "physical pain, illness, or impairment of the body."

However, these concepts "physical pain, illness or impairments" are quite specific to the individual. What is very painful to one person may not be at all painful to another. The jury did not have the benefit of Amy Rose's testimony, as she had passed away in time between the event and trial due to causes

unrelated to the charges against appellant. Without testimony from Amy Rose, and provided only very brief and vague descriptions from Dustin Rose, the evidence was simply insufficient to find that Amy Rose had been subject to "bodily harm."

#### **IV. Improper Admission of Evidence of Post Event Impact**

Appellee addresses appellant's assertion in error relating to the admission of testimony of Destiny Rose as to the effect of the events of December 4, 2017, by asserting that the lack of citation to authority merits a decision to give no consideration to the argument. However, appellant's argument was clearly grounded in the relevance of such testimony. As such, the authority for the argument would be simple citation to Rules 401 and 403 of the West Virginia Rules of Evidence.

In addressing the substance of appellant's argument appellee suggests that the court's admission of Destiny Rose's post-event difficulties, was relevant to his intent to terrorize other victims. The logic of this argument goes that if the events terrorized Destiny, then they necessarily terrorized Amy and Dustin as well. However, even if that type of evidence were relevant to those other victims, the post event sequela as to Destiny Rose does not advance the proof of that element as to those other individuals.

The appellant was not charged with an offense that had as an element Destiny Rose being terrorized. The post event affects are further removed from any potential relevance, and clearly serve only to inflame or prejudice the jury. The admission of this as evidence was patently prejudicial and should not have been admitted.

#### **V. Failure to Properly Address Rule 404(b) Evidence**

In responding to appellant's assertion of error in the fact the trial court failed to conduct any sort of the required analysis before admitting 404(b) evidence, appellee first asserts that any error is mooted because counsel for appellant declined the trial court's offer of a limiting instruction. However, the appendix reference accompanying such assertion appears to be incorrect.<sup>1</sup> Counsel does not recall making such an election, and has reviewed the record and cannot find the exchange referenced by appellee.

Nonetheless, even assuming appellant made the election asserted, the error persists. The limiting instruction relating to the introduction of 404(b) evidence has been recognized as an obligation incumbent on the trial court, as this court has recognized the limiting instruction as a requirement. See Syllabus Pt. 2, State v. McGinnis, 455 S.E.2d 516 (W.Va. 1994), State v. Ricketts, 632 S.E.2d 37, 38 (W.Va. 2006).

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<sup>1</sup> Page 302 of the Appendix appears in Appendix Volume II, and is the cover page for Day Two of the trial transcript.

The appellee cites State v. Ferrell, 399 S.E.2d 834, 842 (W.Va. 1990). As support for its position there counsel for defendant did not request the instruction, so it was not given and there was no error in light of the lack of the request.

However, the Ferrell decision does not reflect the state of law on this point in this state. The Ferrell decision pointed to this court's decision in State v. Dolin, 347 S.E.2d 208 (W.Va. 1986), as setting forth the requirements for the admission of 404(b) evidence. However, subsequent to the Ferrell decision, this court in State v. McGinnis, further define the process by which such evidence is to be admitted. In Syllabus Pt. 2, the court stated "if the trial court is then satisfied Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence." 455 S.E.2d 516 at Syllabus Pt. 2.

More recently in State v. White, No. 14-0918 (November 20, 2015) (Memorandum Decision), citing McGinnis and Ricketts the Court found trial court erred in failing to give a limiting instruction the time for all 404(b) evidence was admitted into evidence despite the fact counsel for defendant did not request such an instruction.

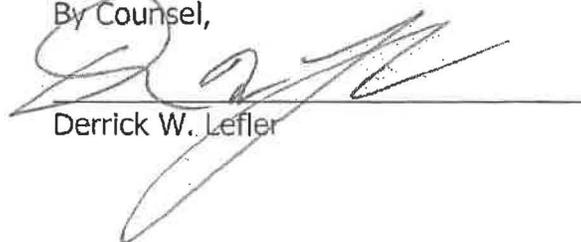
Appellee also suggest that any error in the admission of 404(b) evidence was "harmless." However, appellant suggests that in matters such as the case at

hand where the jury is required to consider not only guilt, but also must determine whether the defendant deserves a grant of mercy that the error, while not causing the conviction, can have a significant and disproportionate impact on the jury's consideration of mercy, a decision of almost as significant gravity as guilt or innocence. It is the impact upon that consideration in the instant matter that generates harm which cannot said to be harmless there.

### **CONCLUSION**

For the reasons set forth herein, Appellant respectfully requests, for the reasons stated herein that his appeal be granted and decision below be set aside, or in the alternative, that the matter be remanded to the circuit court with instructions for further proceedings.

HARRY LEE SMITH, JR.,  
By Counsel,



Derrick W. Lefler