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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

**State of West Virginia,
Plaintiff Below, Respondent,**

FILE COPY

vs.) No. 21-0674

(Lower Court Case No. 20-F-63)

**Jaquaylla Kessler,
Defendant Below, Petitioner.**

PETITIONER'S BRIEF

**FROM THE CIRCUIT COURT OF
MINGO COUNTY, WEST VIRGINIA**

**TO THE HONORABLE JUSTICES
OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

**Mark Hobbs, Esq., (WVSB#1744)
Counsel for Petitioner
Post Office Box 974
Chapmanville, West Virginia 25508
(304) 855-4878/(304) 855-4877
Hobbslaw82@frontier.com**

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Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

TABLE OF AUTHORITIES

STATUTORY LAW:

1. West Virginia Code §61-2-12(a)(1), page 1 and 2.
2. West Virginia Code §61-3-13(a), pages 1 and 2.
3. West Virginia Code §61-3-11(a), page 2.
4. West Virginia Code §61-10-31, page 2.

CASE LAW:

1. *Syl. Pt. 10, in part, State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994), pages 7 and 13.
2. *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986), page 6.
3. *State v. Hedrick*, 204 W.Va. 547, 553, 514 S.E.2d 397, 403 (1999), page 14.
4. *In re Interest of Carlita B.*, 185 W.Va. 613, 630, 480 S.E.2d 365, 382 (1991), page 13.
5. *Gable v. Kroger Co.*, 186 W.Va. 62, 66, 410 S.E.2d 701, 705 (1991), page 13.
6. *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988), page 14.
7. *State v. LaRock*, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996), page 7.
8. *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), pages 6, 14 and 15.
9. *State v. Taylor*, 215 W.Va. 74 (2004), page 13.

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

WEST VIRGINIA RULES:

1. West Virginia Rules of Evidence Rule 404(b), pages 1, 3, 6, 7, 8, 9, 10, 13, 14 and 15.
2. West Virginia Rules of Evidence Rule 104(a), page 6.
3. West Virginia Rules of Evidence Rule 401, page 7.
4. West Virginia Rules of Evidence Rule 402, pages 7 and 13.
5. West Virginia Rules of Evidence Rule 403, pages 6, 7, and 13.
6. West Virginia Rules of Evidence Rule 609(a)1, page 9.

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

ASSIGNMENT OF ERROR

I.

THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN THE COURT PERMITTED THE PROSECUTING ATTORNEY ON CROSS EXAMINATION TO QUESTION PETITIONER ABOUT A PRIOR FELONY DRUG CONVICTION NOTWITHSTANDING THAT PETITIONER'S COUNSEL HAD TIMELY FILED DEFENDANT'S REQUEST FOR PRODUCTION OF RULE 404(b) EVIDENCE (APPENDIX VOLUME I, PAGES 32-33). THE STATE NEVER PLACED THE PETITIONER ON NOTICE OF SUCH EVIDENCE AND PETITIONER NEVER OPENED THE DOOR FOR THE INTRODUCTION OF SUCH EVIDENCE TO BE ADMISSIBLE.

STATEMENT OF THE CASE

Jaquaylla Kessler, hereinafter referred to as Petitioner, is an African American female who was indicted by the April 2020 term of the Mingo County, West Virginia, Grand Jury. The Indictment alleged that on the night of June 16, 2020, the Petitioner committed six (6) felony offenses which allegedly occurred within the confines of the City of Williamson, Mingo County, West Virginia.

The Indictment charged the following offenses against the Petitioner:

COUNT I

JAQUAYLLA KESSLER, on or about the 16th day of June, 2020, in Mingo County, West Virginia, did commit *ad crimen ipsum* of 1st Degree Robbery in violation of State of West Virginia Code §61-2-12(a)(1). (Appendix Volume I, page 5.)

COUNT II

JAQUAYLLA KESSLER, on or about the 16th day of June, 2020, in Mingo County, West Virginia, did commit *ad crimen ipsum* of Grand Larceny in violation of West Virginia Code §61-3-13(a). (Appendix Volume I, page 5.)

COUNT III

JAQUAYLLA KESSLER, on or about the 16th day of June, 2020, in Mingo County, West Virginia, did commit *ad crimen ipsum* of Nighttime Burglary in violation of West Virginia Code §61-3-11(a). (Appendix Volume I, pages 5-6.)

COUNT IV

JAQUAYLLA KESSLER, on or about the 16th day of June, 2020, in Mingo County, West Virginia, did commit *ad crimen ipsum* of Conspiracy to Commit First Degree Robbery in violation of West Virginia Code §61-10-31 and §61-2-12(a)(1). (Appendix Volume I, page 6.)

COUNT V

JAQUAYLLA KESSLER, on or about the 16th day of June, 2020, in Mingo County, West Virginia, did commit *ad crimen ipsum* of Conspiracy to Commit Grand Larceny in violation of West Virginia Code §61-10-31 & §61-3-13(a). (Appendix Volume I, page 6.)

COUNT VI

JAQUAYLLA KESSLER, on or about the 16th day of June, 2020, in Mingo County, West Virginia, did commit *ad crimen ipsum* of Conspiracy to Commit Burglary in violation of West Virginia Code §61-10-31 & §61-3-13(a). Note: should cite West Virginia Code §61-3-11(a).

Found during the April 2020 Term upon the testimony of Chief G. Dotson sworn in open court and sent before the Grand Jury to give evidence to that body. (Appendix Volume I, page 7.)

The Petitioner was alleged along with Co-Defendant, Heather Musick, to have committed said crimes.

On June 23, 2020, your Petitioner was arraigned on the six (6) count Indictment before the Honorable Miki Thompson. The Petitioner was represented by Attorney Robin Cisco. Your Petitioner entered a plea of not guilty. The Arraignment Order entered July 8, 2020, from the Arraignment held June 23, 2020, incorrectly alleges assault during the commission of a felony, armed robbery and malicious assault. Furthermore, the transcripts from the Arraignment Hearing reflect said hearing was held on July 9, 2020, rather than June 23, 2020, as reflected in the Arraignment Order. (Appendix I Volume I, pages 9-11) (Appendix Vol. II, pages 3-6).

Routine Discovery requests were filed and exchanged between the State and Petitioner's Counsel. It should be noted that on or about July 30, 2020, Petitioner's attorney filed "Defendant's Request for Production of Rule 404(b) Evidence." (Appendix Volume I, pages 32-33.) This document is listed as it becomes an essential part of the argument for Petitioner's Assignment of Error.

Petitioner's bail was set at One Hundred Fifty Thousand Dollars (\$150,000.00) cash only and the Petitioner remained incarcerated in lieu of said bail.

On August 18, 2020, a Pre-Trial conference was held via Microsoft Teams. Counsel for Petitioner moved to continue the trial scheduled in this matter as an investigator had been hired and said investigation would not be concluded prior to the Trial scheduled. Counsel for the Petitioner further requested additional discovery that had yet to be received from the State and body cam footage, if available. There was no objection by the State of West Virginia regarding the continuance. The Court Ordered additional evidence be provided or made available for review for both Counsel for your Petitioner and the Co-Defendant's Counsel. The State further agreed to turn over

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any body cam footage if said footage was available. The Court further Ordered Petitioner's right to a speedy trial within the term of Court waived due to said motion. A hearing was scheduled for September 24, 2020, at 10:00 a.m. (Appendix Vol. II, pages 7-10).

On September 24, 2020, a hearing was held via Microsoft Teams for a Pre-Trial Conference. The Court addressed Counsel for Petitioner's Motion to Suppress. The Court further addressed being in compliance with regards to the Covid regulations and discussed picking the panel for Trial. (Appendix Volume II, pages 11-13.)

On October 15, 2020, a hearing was held via Microsoft Teams wherein Counsel for Petitioner had requested a Motion to Continue the Trial as the investigation was not yet complete. The Court swore the Petitioner and Petitioner waived her right to a speedy trial. Counsel for Petitioner made a Motion to Reduce Petitioner's Bond pending the new trial date. The State of West Virginia objected to said reduction and the Court Ordered the current bond to remain the same. (Appendix Volume II, pages 14-16.)

On January 28, 2021, a hearing was held via Microsoft Teams to schedule a new Pre-Trial and Trial date. The Court scheduled Pre-Trial March 4, 2021, and Trial March 25, 2021. (Appendix Volume II, pages 17-18).

On March 4, 2021, a Pre-Trial Conference was held via Microsoft Teams. Counsel for Petitioner indicated to the Court an Omnibus Discovery Motion requesting Grand Jury transcripts was filed along with a Motion to Suppress if the victim was unavailable for Trial. Counsel for the Petitioner further requested the State provide an updated witness list and exhibit list. The State of West Virginia agreed to provided such documents by the deadline. (Appendix Volume II, pages 19-22.)

The jury selection process began on March 25, 2021, and a twelve (12) person jury with two (2) alternates jurors were selected. (Appendix Volume I, pages 106-107) (Appendix Volume II, Transcript Volume II, pages 5-32). The Jury Trial began March 29, 2021, and concluded the same day. The jury returned guilty verdicts on all six (6) counts of the Indictment on the same day. (Appendix Volume I, pages 124-129) (Appendix Volume II, Transcript Volume II, pages 33-207).

The Petitioner returned to Court on June 8, 2021, for sentencing before the Honorable Miki Thompson. The Court sentenced the Petitioner as follows:

1. First Degree Robbery: Forty (40) years; and
2. Grand Larceny: One (1) to Ten (10) years; and
3. Nighttime Burglary: One (1) to Fifteen (15) years; and
4. Conspiracy to Commit First Degree Robbery: One (1) to Five (5) years; and
5. Conspiracy to Commit Grand Larceny: One (1) to Five (5) years; and
6. Conspiracy to Commit Burglary: One (1) to Five (5) years.

All sentences were Ordered to run consecutively. Consequently, the Petitioner would be eligible for parole in fifteen (15) years and would discharge said sentence in forty (40) years. The Sentencing Order entered June 22, 2021, is the Order that this Appeal is taken. (Appendix Volume I, pages 151-154) Furthermore, an Agree Re-Sentencing Order was entered on July 22, 2021. (Appendix Volume I, page 157-160).

The West Virginia Supreme Court of Appeals extended the time to perfect an Appeal in this matter pursuant to a motion filed by Petitioner's Counsel which graciously granted an extension to file Petitioner's Brief by April 6, 2022. Subsequent thereto, Counsel for Petitioner requested another extension of time through April 13, 2022, which the Supreme Court graciously granted.

SUMMARY OF ARGUMENT

The Circuit Court abused its discretion by improperly admitting 404(b) evidence of a prior drug conviction regarding the Petitioner. The Court allowed inadmissible evidence of such conviction to be introduced and heard by the jury as the Court did not follow the parameters of State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Your Petitioner, Jaquaylla Kessler, does not believe oral argument is necessary as this matter concerns very concise issues regarding West Virginia Rules of Evidence Rule 404(b).

STANDARD OF REVIEW

The standard of review for trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, the West Virginia Supreme Court of Appeals reviews for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, the West Virginia Supreme Court of Appeals reviews *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, the West Virginia Supreme Court of Appeals reviews for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

The 1994 case of State v. McGinnis, *supra* offers standards a Judge should accomplish before admission of 404(b) evidence.

Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court

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must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the 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.

State v. LaRock, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996) (footnote omitted) our West Virginia Supreme Court of Appeals have also held that "[a]s to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse." Syl. Pt. 10, in part, State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994). With this standard in mind, Petitioner turns to the parties contentions.

ARGUMENT

1. **THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN THE COURT PERMITTED THE PROSECUTING ATTORNEY ON CROSS EXAMINATION TO QUESTION PETITIONER ABOUT A PRIOR FELONY DRUG CONVICTION NOTWITHSTANDING THAT PETITIONER'S COUNSEL HAD TIMELY FILED DEFENDANT'S REQUEST FOR PRODUCTION OF RULE 404(b) EVIDENCE (APPENDIX VOLUME I, PAGES 32-33). THE STATE NEVER PLACED THE PETITIONER ON NOTICE OF SUCH EVIDENCE AND PETITIONER NEVER OPENED THE DOOR FOR THE INTRODUCTION OF SUCH EVIDENCE TO BE ADMISSIBLE.**

The Petitioner took the stand and testified regarding her denial of the six (6) charges against her. During cross examination, the Prosecuting Attorney, without filing

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Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

an answer to the Petitioner's "Defendant's Request for Production of 404(b) Evidence,"
stated:

"Cross Examination by Mr. Jewell

- Q So you don't know Elizabeth Collins?
A No. I do not.
Q You don't know the woman that you and Heather beat almost to death that night at her house?
A I do not know her. I never beat her, sir.
Q You never beat her. That's your testimony?
A Yes, it is.
Q You never knew her before - Elizabeth?
A No. I do not know her.
Q You heard her testify. Correct?
A I heard her testify.
Q If you all didn't know each other why in the world would she have any motivation to lie about you?
A I don't know.
Q If you weren't there how could she specifically describe you?
A She did not specifically describe me.
Q She didn't describe you?
A No. She did not.
Q She didn't describe Heather Musick's girlfriend?
A She said Heather Musick's girlfriend. She gave no description of me. Someone could have told her Heather Musick's girlfriend.
Q She didn't say Heather Musick's girlfriend is black -
A - Mandy Porter -
Q - Did you hear her say that?
A Yes, I did.
Q And looks like a man, and I don't mean that in any offense. Those were her words.
A That was her words.
Q She described you. Right?
A That's not a full description.
Q It's not a description. You are Heather Musick's girlfriend, are you not?
A Yes, I am.
Q You were on June of 2020. Correct?
A Yes, I was.
Q You were the night that this happened at Elizabeth's house, June 16 and June 17, 2020. You were Heather's girlfriend then. Correct?
A Yes.
Q You were living together with Heather. Correct?
A Yes.
Q At the house on East Fourth Avenue?
A Yes.

- Q This business about Mandy Porter, you don't like to be associated with Mandy Porter. Why is that?
- A Because she gets into a lot of trouble; I don't want anything to do with her.
- Q What kind of trouble? What about her specifically do you not like to be associated with?
- A She's a liar. She's a thief.
- Q What about drug use?
- A She's a drug user.
- Q How do you know that?
- A Because she has come to my home and asked my girlfriend multiple times to trade her - do drug deals with her, buy her drugs - prescription medicine and find ways to get her other drugs.
- Q You and your girlfriend, Heather, pled guilty to felony drug charges before, too, didn't you?

MS. CISCO: Objection, Your Honor. May we approach, please?

THE COURT: You may.

(Bench Conference)

MR. JEWELL: Your Honor, that's properly -

MS. CISCO: - I received a background check that was provided to me in discovery and the only charge that's on the background check is a felony, a conspiracy to commit a felony against the State. There's no drug charges on the background check.

MR. JEWELL: Those were the drug charges and you know full well the drug charges. Your Honor, it goes to a mode of opportunity and things like that and it's properly admissible.

THE COURT: It goes beyond the scope of direct.

MR. JEWELL: It goes to motive. I can always impeach any witness, including this one.

THE COURT: What is it, 609?

MR. JEWELL: It would also be 404.

THE COURT: If you're going to impeach a defendant with a prior felony conviction that wouldn't stand -

MR. JEWELL: - She pled guilty and was sentenced to drug court.

THE COURT: 609(a)1, "For purposes of attacking credibility of a witness accused in a criminal case evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing."

MR. JEWELL: But this goes to the 404 allowable exception. It's the opportunity and motive.

THE COURT: How is it that you're wanting to use it?

MR. JEWELL: Exception to 404(b), Your Honor; I wasn't anticipating her testifying. It would be a prior crime or prior act that shows the motive, intent, opportunity, lack of mistake, identity.

THE COURT: How does that relate to the drug charge? I know the status of that.

MR. JEWELL: Previous, prior act;

THE COURT: Explain again. I don't understand. Evidence of a crime, wrong or

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other act is not admissible to prove a person's character, but you can use it to show the things that you specified, so which specifically are you trying to show?

MR. JEWELL: She testified that she didn't want any part of the drugs and mentioned it and that had nothing to do with Mandy being in her home, and that directly controverts that. Your Honor, it impeaches her as to her motive or plan or identity and things of that nature.

THE COURT: We'll see what the case law says. Let's go off the record.

(Off-the-record discussion)

THE COURT: Ladies and gentlemen, we're going to have to send you out for just a few more minutes.

(Jury retires.)

THE COURT: It will be admissible under 404(b) as a wrong or an act. I don't think it requires any kind of criminal conviction, but you need to tie it into motive, intent, opportunity. Be sure that's clear that it falls in one of the exceptions.

All right; Bring the jury back.

(Jury is seated in jury box.)

THE COURT: All right. Let the record reflect the jury is back into the room.

Mr. Jewell, you may continue.

MR. JEWELL: Thank you, Judge.

Q (Mr. Jewell continuing) Ms. Kessler, I think when we got cut off I was asking you about your and Heather's previous drug activity. Isn't it true that you previously sold drugs to an informant working with law enforcement?

A No. It is not.

Q You were not charged along with your co-conspirator, Heather Musick, in that regard?

A I was not charged with distributing of anything, no, I was not.

Q Not charged with a delivery - a felony delivery of drug charges?

A I have a conspiracy.

Q Conspiracy to do what? Sell drugs with Heather Musick, right?

A Yes.

Q That was here in Mingo County?

A Yes.

Q It was after you came down here from Pennsylvania. Correct?

A Yes.

Q You and Heather Musick were indicted for selling drugs. Correct?

A. Yes.

Q You admit you did that. Correct? You admit you pled guilty to that. Right?

A I did plead guilty, yes.

Q Okay; So, again, what was your address, just for the record, in June of 2020?

A 904 East Fourth Avenue.

Q Any other adults living there other than Heather Musick?

A No.

Q Isn't it true that you never told law enforcement that it wasn't me, I wasn't there?

A Law enforcement never asked me. They never even - I tried to speak with them at the scene of the crime and afterwards. They kept cutting me off. They only wanted to speak with Heather. They never wanted to speak with me.

Q But it is your testimony here today that Elizabeth Collins did not describe you as the person in her home with Heather Musick that night?

A Yes.

Q Do you know what perjury is?

A Yes.

Q You know you're under oath. Correct?

A Yes.

Q Moreover, why would Elizabeth Collins have any motivation to lie about you if you never knew her, and, as you say, you weren't even there that night?

A Mandy Porter.

Q I'm asking why would Elizabeth Collins have any reason to lie about you?

A I'm trying to explain to you.

Q I don't want to hear about Mandy. I'm asking about Elizabeth.

A I don't know Elizabeth, but Elizabeth knows Mandy Porter and Mandy Porter was the one at my home insisting that -

Q - We're not talking about your home. We're talking about Elizabeth's home.

A I was not at Elizabeth's home.

Q Elizabeth said you were.

A I say I was not. I wasn't.

Q She described you. She said you were there.

A She says jet black and looks like a man. I have other features than that I'm just black.

Q I believe she also said, "Heather's girlfriend, Q." Your nickname is Q. Correct?

A And Mandy Porter could have told her and, no, my nickname is not Q. Only Heather calls me that, and Mandy Porter has been in my home enough to know.

Q So Heather does call you by your nickname Q?

A It's not a nickname. She's the only one who calls me that.

Q But you go by Q to Heather. Right?

A Yes.

Q Let me ask you another question. If you weren't there - If you don't know Elizabeth Collins why would Elizabeth volunteer the information that you agree that would help someone in your position, that you, Jacquaylla said, "Heather, stop or you're gonna kill her." Why would she make that up, make up your description, and make up what you said?

A I don't know why she would put me there, to begin with. Like I said - Like I was trying to explain, her and Mandy Porter is the connection.

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Mandy Porter was at my home asking me to do favors. He knows that I was recently dealing with drugs. At the current time I was in school. I was away from drugs. I was trying to stay away. She kept asking me for money to buy drugs. I told her no. She asked me to find someone to get her drugs. I told her no, so she has a motive -

Q - She, being who? Mandy?

A Yes. Mandy Porter.

Q We're talking about Elizabeth?

A I don't know Elizabeth. You keep -

Q That's according to you?

A That's according to her as well.

Q According to who as well?

A That's according to Elizabeth as well.

Q Yes. She didn't know you before that night, but you heard her testify. Correct?

A She doesn't know me today either, sir.

Q I'm not saying you all have some long lasting school friendship where you grew up together, but she knows - she said that she pointed the finger at you. Were you sitting over there when she identified you as the person with Heather Musick in her house that night?

A Yes, she did, but, as you said, this was a year ago. She has seen plenty of pictures of me since then.

Q Well, you watched her video statement at the City Police?

A Yes, and she did not say me.

Q Did you watch her video statement at the City Police?

A Yes, I did.

Q And did you see her injuries?

A Yes, I did.

Q That was taken just a few hours the following day after this incident?

A Yes, I did.

Q She described you then. She said you were Heather Musick's girlfriend then, that day, over - right the day after?

A She said Heather Musick's girlfriend twice, both Heather Musick's girlfriends. Does she have two girlfriends?

Q I don't know. Does she?

A No, she doesn't, so why is she saying -

Q - So, you're the only one?

A Yes, I am, but she testifies to two.

MR. JEWELL: No further questions, Judge.

THE COURT: Redirect? (Appendix Volume II, pages 143-154).

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

Other Crimes, Wrongs, or Acts. 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. Citing *State v. Taylor*, 215 W.Va. 74 (2004).

Petitioner makes one assignment of error. She contends the Circuit Court abused its discretion in finding there was a proper purpose supporting introduction of Petitioner's prior drug conviction. Petitioner alternatively posits that Petitioner's prior drug conviction violated W.Va. R. Evid. 403 since its prejudicial effect substantially outweighed its probative value.

Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." Our West Virginia Supreme Court of Appeals have held that the Court reviews a trial court's decision that the probative value of evidence is not substantially outweighed by its prejudicial effect is reviewed only for abuse of discretion, *e.g.*, *Syl. Pt. 10, Derr, supra; Gable v. Kroger Co.*, 186 W.Va. 62, 66, 410 S.E.2d 701, 705 (1991) ("Rules 402 and 403 of the West Virginia Rules of Evidence [1985] direct the trial judge to admit relevant evidence, but to exclude any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice to the defendant. Such decisions are left to the sound discretion of the trial judge..."); *In re Interest of Carlita B.*, 185 W.Va. 613, 630, 480 S.E.2d 365, 382 (1991) ("While the West Virginia Supreme Court of Appeals recognize that the probative

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

value of such evidence may, at some point, be substantially outweighed by its unfair prejudicial impact, that balancing is within the sound discretion of the trial court, and its decision will be reversed only upon a clear abuse of discretion.”), “The West Virginia Supreme Court of Appeals have also cautioned, however, that the West Virginia Supreme Court of Appeals will not simply rubber stamp the trial court’s decision when reviewing for an abuse of discretion.” State v. Hedrick, 204 W.Va. 547, 553, 514 S.E.2d 397, 403 (1999).

In this case, the State introduced considerable evidence of Petitioner’s prior drug conviction. While the State may point to State v. Johnson, 179 W.Va. 619, 371 S.E.2d 340 (1988), where the West Virginia Supreme Court of Appeals approved the introduction of a defendant’s past drug use to show motive to commit breaking and entering and concomitant larceny, Petitioner’s case does not believe Johnson, supra, disposes of the issue of the admissibility of introduction of a prior felony drug conviction. In Johnson, for example, much of the evidence of drug use and the property crimes used to sustain the habit related not the defendant, but to the defendant’s co-conspirators. Here, though, the State’s 404(b) evidence showed that Petitioner had a drug conviction that was discharged more than two (2) years prior to this alleged incident. Indeed, in Johnson, supra the evidence of the defendant’s drug use was limited to testimony that the defendant “partied” with his co-conspirators-which we found was apparently a reference to the recreational use of drugs.

The Circuit Court gave no limiting instructions in this case (either at the time the evidence was offered at trial nor when the Court was instructing the jury before deliberations) as recommended by McGinnis, supra.

When the Prosecutor asked “You and your girlfriend, Heather, pled guilty to felony drug charges before, too, didn’t you?” (Appendix Volume II, Transcript II, page 145). The attorney for the Petitioner properly objected and a discussion was held outside the presence of the jury. The Judge seemed to agree with Petitioner’s Counsel and even asked “how does that relate to the drug charge?” (Appendix Volume II, Transcript II, page 147). However, the Judge eventually bought into the Prosecutor’s assertion that 404(b) evidence could be admitted. Again, there was no notice, no limiting instruction to the jury about this type of evidence when the Court reconvened and the Court never came close to protecting the Petitioner’s rights against substantive prejudice.

The whole concept of our American Judicial system, which appears to be the envy of the world, is the concept of fairness. Consequently, how more egregious can a Defendant in a criminal trial be denied fairness than to improperly present evidence to the jury of a prior drug conviction which had nothing to do with the Indictment. Furthermore, Petitioner submits that once the jury heard the evidence of the prior felony drug offense, and the reference that she was a black lesbian from Pennsylvania, the jury probably decided at that time the Petitioner was guilty.

More egregious is the fact that the Circuit Court essentially ignored the requirements of McGinnis, supra. Surely the Circuit Court was aware of McGinnis, supra, which sets the standard for the introduction of 404(b) evidence. Consequently, we must conclude that the Circuit Court abused its discretion.

CONCLUSION

In conclusion, your Petitioner, Jaquaylla Kessler, should be granted a new trial on the failure to comply with the rules pertaining to the admission of 404(b) evidence and remand this case back to Circuit Court.

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Jaquaylla Kessler,

By Counsel



Mark Hobbs, Esq. (WVSB#1744)
Counsel for Petitioner
Post Office Box 974
Chapmanville, West Virginia 25508
(304) 855-4878/(304) 855-4877
Hobbslaw82@frontier.com

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508

CERTIFICATE OF SERVICE

I, Mark Hobbs, Counsel for Petitioner, do hereby certify that a true and accurate copy of the foregoing **PETITIONER'S BRIEF** was hand delivered, to the following:

Laura K. Bissett, Esq.
Assistant Attorney General
Office of the Attorney General
Appellate Division
1900 Kanawha Boulevard, East
Building 6, Suite 406
Charleston, West Virginia 25305

With the original and ten (10) copies being hand delivered to:

Edythe Nash Gaiser, Clerk
West Virginia Supreme Court of Appeals
State Capitol - Room E-317
Charleston, West Virginia 25305

On this the 13th day of April, 2022.



Mark Hobbs

Mark Hobbs
Attorney at Law
Professional Building
(304) 855-4878

Post Office Box 974
Chapmanville, WV 25508