IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0674

STATE OF WEST VIRGINIA,

Respondent,

v.

JAQUAYLLA KESSLER,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the July 22, 2021, Order
Circuit Court of Mingo County
Case No. 20-F-63

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I. INTRODUCTION

Respondent, State of West Virginia, by counsel, Lara K. Bissett, Assistant Attorney General, responds to Jaquaylla Kessler's ("Petitioner") brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error and, therefore, this Court should affirm his conviction and sentence.

II. ASSIGNMENT OF ERROR

Petitioner advances a single assignment of error: the circuit court abused its discretion in allowing the State to cross-examine Petitioner regarding a prior felony conviction when the State failed to put Petitioner on notice of its intended use of 404(b) evidence, despite the defense's request for such a disclosure. Pet'r Br. 1.

III. STATEMENT OF THE CASE

Petitioner was indicted for one count of first degree robbery, one count of grand larceny, one count of nighttime burglary, one count of conspiracy to commit first degree robbery, one count of conspiracy to commit grand larceny, and one count of conspiracy to commit burglary. A.R. Vol. I 5-8.

At trial, the victim, Elizabeth Collins ("the victim"), testified that at around 1:00 a.m. on June 17, 2020, she was in her kitchen playing a game on her phone when her friend, Mandy Porter, came to her house. A.R. Vol. II 49-50. Shortly thereafter, Heather Musick, with whom the victim was familiar,[1] walked in the door, dressed all in black and with a hood covering her eyes. A.R. Vol. II 50. Porter jumped up and ran out the door. A.R. Vol. II 50. The victim grabbed her gun and warned Musick to get out of the house. A.R. Vol. II 50. Musick pulled back her hood to identify herself and told the victim that she wanted to tell the victim something about Porter.

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[1] A.R. Vol. II 51.

A.R. Vol. II 50. The victim again demanded that Musick leave. A.R. Vol. II 50. As she left, though, Musick threatened that she would be back later with Musick's girlfriend. A.R. Vol. II 50.

Porter returned to the victim's house around 4:00 a.m. A.R. Vol. II 51. Porter "seemed scared," and the victim locked the door behind her. A.R. Vol. II 51. She then said that she needed to go outside and get her phone. A.R. Vol. II 51. Within seconds, Musick and Petitioner—who the victim knew by the nickname "Q"—came through the living room. A.R. Vol. II 51. Musick and Petitioner were both dressed in black pants and black hooded jackets. A.R. Vol. II 53. Musick and Petitioner pushed the victim down and began pistol whipping her. A.R. Vol. II 54. At one point, Musick directed Petitioner to grab the victim's purses and phone. A.R. Vol. II 55. All the while, Musick continued hitting the victim in the head. A.R. Vol. II 55.

The victim's young daughter came into the room and started screaming. A.R. Vol. II 55. As the victim looked up at her daughter, Musick "took the gun and she smashed and knocked several of [the victim's] teeth out in the front of [her] mouth." A.R. Vol. II 55-56. Musick began to choke the victim, and Petitioner said, "Heather, you need to stop or you're going to kill her." A.R. Vol. II 56. Musick then put the gun in the victim's mouth and threatened to kill the victim and her children if the victim called the police. A.R. Vol. II 56.

Petitioner and Musick took the following items from the victim that night: $27,000.00 in a black Pink brand bag, a Michael Kors purse, a Michael Kors wallet, phones, four pairs of brand new sunglasses, and a pink and purple camouflage gun. A.R. Vol. II 71-72, 76, 91-92. Arrest warrants for Petitioner and Musick were executed on June 18, 2020, at which time Petitioner and Musick consented to a search of their home. A.R. Vol. II 99. At that time, Patrolman Matthew Tiller recovered a Michael Kors purse, a black Pink brand bag, $7,044 in cash, and a pink and purple camouflage gun from the home of Petitioner and Musick. A.R. Vol. II 100-03.

A video recording of a statement Petitioner gave to police on June 18, 2020, was played for the jury but was not transcribed in the record. A.R. Vol. II 116. It is, therefore, unclear what that statement entailed.

Petitioner took the stand in her own defense. A.R. Vol. II 136. She denied being in the victim's house on June 17, 2020. A.R. Vol. II 137. She testified that Porter brought the pink and purple camouflage gun into her home. A.R. Vol. II 137-38. Petitioner further testified that on June 17, 2020, Porter showed up at her home with a Michael Kors purse. A.R. Vol. II 139. She testified that she did not associate with Porter, but Musick did. A.R. Vol. II 138.

Petitioner denied knowing the victim or having ever been to her home. A.R. Vol. II 142. On cross-examination, she denied beating the victim. A.R. Vol. II 143. When asked why she didn't like Porter, Petitioner responded, "Because she gets into a lot of trouble; I don't want anything to do with her." A.R. Vol. II 145. When asked to clarify, Petitioner answered, "She's a drug user." A.R. Vol. II 145. The State then asked how Petitioner knew Porter used drugs, and Petitioner responded, "Because she has came [*sic*] 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." A.R. Vol. II 145. The State then asked, "You and your girlfriend, Heather, pled guilty to felony drug charges before, too, didn't you?" A.R. Vol. II 145. Defense counsel objected on the basis that the only charge she had observed on Petitioner's background check was a felony conspiracy to commit a felony. A.R. Vol. II 146. The State proffered that charge was in relation to a drug offense and that it sought to use the evidence to show motive, opportunity, plan, or identity as an exception to Rule 404(b) of the Rules of Evidence. A.R. Vol. II 146-47.

After a recess to do some legal research, the circuit court ruled that the evidence was admissible but that the State would need to tie it to motive, intent, or opportunity. A.R. Vol. II

147-48. When cross-examination resumed, Petitioner denied that she and Musick previously sold drugs to an informant and was not charged in that regard. A.R. Vol. II 148. Rather, she testified, she was charged with conspiracy. A.R. Vol. II 149. When asked, though, whether the conspiracy was to sell drugs with Musick, Petitioner acknowledged that it was. A.R. Vol. II 149. In fact, Petitioner acknowledged she was indicted, along with Musick, for selling drugs and that she subsequently pled guilty. A.R. Vol. II 149.

On re-direct, Petitioner testified that her prior guilty plea stemmed from "drug issues" and that she completed drug court, following which her charges were dismissed. A.R. Vol. II 154. She testified that she had been clean since then—a period of over a year—and was dedicated to her sobriety. A.R. Vol. II 155. On re-cross, though, Petitioner acknowledged that Musick, with whom she was living, was still involved with drug use. A.R. Vol. II 156. The defense rested its case at the conclusion of Petitioner's testimony. A.R. Vol. II 157.

After a twenty-minute deliberation, Petitioner was convicted on all charges. A.R. Vol. II 203-05. She was sentenced thus: one term of forty years for first degree robbery, one term of not less than one nor more than ten years for grand larceny, one term of not less than one nor more than fifteen years for nighttime burglary, and three terms of not less than one nor more than five years for the three conspiracies. A.R. Vol. I 151-54, 157-60. The sentences were ordered to run consecutively. A.R. Vol. I 152, 158. Petitioner now appeals.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3) and (4).

V. SUMMARY OF THE ARGUMENT

Petitioner opened the door regarding her prior conviction and, thus, the State was allowed to cross-examine her about it without running afoul of the tenets of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). Accordingly, the circuit court did not abuse its discretion in allowing the testimony. Even if the circuit court did abuse its discretion, though, any resulting error was harmless, as the other evidence adduced at trial weighed heavily in favor of conviction and minimized any prejudicial effect of Petitioner's prior bad acts.

VI. ARGUMENT

A. Standard of review.

"A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 8, *State v. Blevins*, 231 W. Va. 135, 744 S.E.2d 245 (2013) (quoting Syl. Pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998)). "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 9, *Blevins*, 231 W. Va. 135, 744 S.E.2d 245 (first quoting *State v. Louk*, 171 W. Va. 639, 301 S.E.2d 596, 599 (1983); then quoting Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983)).

B. Because Petitioner opened the door to testimony regarding her prior drug conviction, she cannot now hide behind Rule 404(b) and *McGinnis*.

Petitioner argues that the circuit court abused its discretion in admitting evidence of her prior drug conviction without notice of its use by the State and without giving a limiting instruction. Pet'r Br. 13-15. Petitioner, though, opened the door to the discussion of her prior conviction. *See* A.R. Vol. II 145. Thus, Petitioner's argument fails.

Generally speaking, under West Virginia Rule of Evidence 404(b), "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a

particular occasion the person acted in accordance with the character" but is admissible for other purposes, including "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." W. Va. R. Evid. 404(b)(1), -(b)(2). However, "'[a] defendant, cannot complain about the admission of bad acts evidence when [s]he [her]self opens the door, either by introducing the subject or by advancing a theory that makes [her] prior acts relevant on an issue other than criminal propensity.' *Lambert v. Maass*, 39 F.3d 1187 (9th Cir. 1994)." *Harrell v. Allison*, No. 3:21-CV-0255-RBM-AHG, 2022 WL 1292142, at *44 (S.D. Cal. Apr. 29, 2022). "'Opening the door' is an equitable principle that permits a party to respond to an act of another party by introducing otherwise inadmissible evidence. Thus, in a prosecution, when a defendant opens an otherwise inadmissible area of evidence during the examination of witnesses, the prosecution may then present evidence in that formerly forbidden sphere." 29 Am. Jur. 2d *Evidence* § 352 (footnotes omitted). This Court recently recognized that same reasoning when it held that when a petitioner's counsel opens the door to other acts testimony, the evidence becomes admissible without a *McGinnis*[2] hearing. *State v. Taylor*, No. 21-0268, 2022 WL 1210533, at *12

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[2] *See* Syl. Pt. 2, *McGinnis*, 193 W. Va. 147, 455 S.E.2d 516:

> 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 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

(W. Va. Supreme Court, Apr. 25, 2022) (memorandum decision) (petition for rehearing filed May 20, 2022).

In the instant case, the State did not specifically notify the defense of its intention to introduce evidence of prior acts under Rule 404(b) of the West Virginia Rules of Evidence,[3] nor did the circuit court conduct a *McGinnis* hearing regarding the evidence; however, that is of no moment because Petitioner was the person who occasioned the introduction of the evidence. Petitioner went to great lengths to try to distance herself from the victim's robbery and beating and to point the finger at Mandy Porter. *See* A.R. Vol. II 137-39, 141-45, 150-52. Petitioner testified that she did not know the victim at all, had never seen her, had never been in her home, and did not participate in the robbery. A.R. Vol. II 142-43, 150, 152. Instead, she repeatedly attempted to deflect blame and attention to Porter, claiming that the victim's handgun found its way into Petitioner's and Musick's shared home because Porter brought it there. A.R. Vol. II 137-38. Petitioner also testified that she saw Porter in possession of the stolen Michael Kors purse. A.R. Vol. II 139. Petitioner insisted, though, she does not "deal with [Porter]" "[b]ecause she usually comes along with trouble." A.R. Vol. II 138-39; *see also* A.R. Vol. II 141 ("I have no relationship with Mandy Porter."), 145 ("[S]he gets into a lot of trouble; I don't want anything to do with her."). The State challenged Petitioner on that, asking Petitioner to specify what kind of trouble Porter gets into and why, exactly, Petitioner did not associate with her. A.R. Vol. II 145. And that is where Petitioner cracked the door, testifying, "She's a drug user." A.R. Vol. II 145. The State asked how Petitioner knew that, and Petitioner pushed the door open further, testifying, "Because

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> 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.

[3] The State did, however, disclose Petitioner's NCIC report prior to trial. A.R. Vol. I 25.

she has came [*sic*] 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." A.R. Vol. II 145. It was only then that the State brought up Petitioner's own drug conspiracy charges with her girlfriend. A.R. Vol. II 145.

Regardless of whether testimony about Petitioner's prior drug conviction was admissible under Rule 404(b) of the West Virginia Rules of Evidence, once Petitioner opened the door to it, that evidence became admissible, even in the absence of pre-trial notice, a *McGinnis* hearing, or a limiting instruction. *See Taylor*, 2022 WL 1210533, at *12. Petitioner took a chance in advancing her theory that Porter was behind this crime and, in so doing, she exposed herself to the light of her own prior bad acts. *Harrell*, 2022 WL 1292142, at *44. Though that is not the reasoning under which the circuit court admitted the testimony, A.R. Vol. II 148, it is firmly established that "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment," Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965); *see also Weirton Ice & Coal Co. v. Weirton Shopping Plaza, Inc.*, 175 W. Va. 473, 476 n.1, 334 S.E.2d 611, 614 n.1 (1985) ("Although it did not furnish the basis for the lower court's judgment, we may affirm the decision of that court when it appears that such judgment is correct on any ground disclosed by the record regardless of the reason assigned by the trial court for its judgment."). Accordingly, this Court should affirm Petitioner's conviction.

C. Even if Petitioner did not open the door, any error arising from the admission of evidence of her prior drug charge and conviction was harmless.

Assuming, *arguendo*, that this Court determines the circuit court did abuse its discretion in allowing the testimony about the prior drug conviction, such error was harmless. "An evidentiary

ruling exceeding the circuit court's discretion does not require that the defendant's conviction be disturbed . . . if the resulting error is harmless." *State v. Varlas*, 237 W. Va. 399, 406, 787 S.E.2d 670, 677 (2016) (citing W. Va. R. Crim. P. 52(a)). When determining whether an error is harmless, this Court views the State's case without the challenged evidence, and "a determination is made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt." *State v. Atkins*, 163 W. Va. 502, 511, 261 S.E.2d 55, 61 (1979). If the remaining evidence is deemed to be sufficient without the evidence in question, the analysis then turns to determining whether the error had any prejudicial impact on the jury. *Id.* In answer to this second question, this Court has explained that "if one cannot say with fair assurance . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *State v. Blake*, 197 W. Va. 700, 709, 478 S.E.2d 550, 559 (1996). In other words, the error "must have affected the outcome of the proceedings in circuit court." *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995).

Here, even excluding the evidence of Petitioner's prior drug conviction, the evidence adduced at trial against Petitioner was damning. The victim in this case testified extensively and unwaveringly about Petitioner's role in her brutal beating and robbery. A.R. Vol. II 51-96. The victim testified that Petitioner, who the victim knew as "Q," came into her home along with Musick, pushed her down, and began beating her. A.R. Vol. II 52-54. The victim testified that Musick directed Petitioner to grab the victim's purse and phone and other possessions and that Petitioner did as she was told. A.R. Vol. II 55. The victim further recalled for the jury how her young daughter came into the room—screaming and crying and begging Petitioner and Musick to stop—and Petitioner physically picked up the child and threw her back into another room.

A.R. Vol. II 57. When Musick began choking the victim, the victim specifically recalled Petitioner warning Musick to stop before she killed the victim. A.R. Vol. II 56.

In addition to the victim's testimony, the jury also saw her recorded statement to police. A.R. Vol. II 70. The victim then identified her stolen property from a photo taken by police. A.R. Vol. II 72. Further, Williamson Police Patrolman Matthew Tiller testified that, pursuant to a written consent,[4] he executed a search of Petitioner's and Musick's home and found items identified by the victim as having been removed from her home by Petitioner and Musick. A.R. Vol. II 99-104. One can say, with fair assurance, that the testimony of the victim and Patrolman Tiller alone was sufficient to support the jury's finding that Petitioner committed first degree robbery, burglary, and grand larceny as well as conspiracy to commit each of those three offenses. *See Blake*, 197 W. Va. at 709, 478 S.E.2d at 559.

By the same token, one can be equally sure that the passing testimony regarding Petitioner's prior drug conviction did not affect the outcome of the trial. *See Miller*, 194 W. Va. at 18, 459 S.E.2d at 129. In fact, any prejudicial effect of that testimony was erased when Petitioner clarified that, as part of that prior conviction, she was diverted to and *successfully completed* drug court, following which her charges were dismissed. A.R. Vol. II 154. Additionally, Petitioner clarified that she had since been sober and was working toward her MBA degree. A.R. Vol. II 141, 155-56.

Because any error in admitting testimony regarding Petitioner's prior conviction was harmless, this Court should not disturb the jury's verdict.

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[4] The written consent was executed by both Petitioner and Musick. A.R. Vol. II 99-100.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the July 22, 2021, Order of the Circuit Court of Mingo County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
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CERTIFICATE OF SERVICE

I, Lara K. Bissett, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, May 26, 2022, and addressed as follows:

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