IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON, WEST VIRGINIA

NO. 22-674

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Appeal from a final order
of the Circuit Court of
Berkeley County (20-F-213)

JOSEPH WAYNE MASON

Defendant Below, Petitioner.

REPLY BRIEF

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ASSIGNMENTS OF ERROR

1) The lower court erred by allowing into evidence a social media post without sufficient authentication.

2) The lower court erred by permitting the discussion of res gestae and/or 404 (b) evidence related to the Petitioner's gang and drug affiliations and his dislike of police informants.

3) The lower court erred by permitting improper hearsay testimony under the guise of a "prior consistent statement."

4) The lower court erred by failing to sever the Petitioner's trial from that of his co-defendant.

5) The effects of these errors are cumulative, and they combined to deny the Petitioner a fundamentally fair trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

After review of the State's Response, the Petitioner continues to believe that argument under Rule 19 would be appropriate as this case involves both a case "involving assignments of error in the application of settled law" and "an unsustainable exercise of discretion where the law governing that discretion is settled." W.Va. R. of App. Pro. 19. The admission of the social media post was clear error regarding settled law, and the 404 (b)/*res gestae* evidence that was introduced regarding drugs, gangs, and snitches was an abuse of discretion.

As such, Mr. Mason believes a memorandum decision would not be appropriate except insofar as the admission of the social media post was such clear error that this case may be reversed in a memorandum decision.

ARGUMENT

In its Response, the State has largely repeated the error that the lower court made below and has continued to misunderstand or misstate the applicable law as applied to each of the assignments of error. The Petitioner wishes to reply to the two most egregious errors made by

the State and lower court in that: 1) the legal standard for the admission of a social media post is not satisfied merely by authenticating account ownerships, and 2) the proffered reason for the admission of the prior bad acts bears no relationship to the State's theory at trial.

I. In addition to showing that a message came from a particular social media account, to be admissible, the proponent must come forth with some evidence that the message came from the claimed individual.

The State below and on appeal has convincingly shown that the social media picture of the gun at issue in the matter was attributable, at least for admissibility purposes, to the Instagram account of Mr. Mason. Response at 7-10; A.R. at 1141-43. The State makes much of this and claims that as the account contains Mr. Mason's nickname, pictures of Mr. Mason, and hearsay testimony from Ms. Powell that it was Mr. Mason's account, therefore it *just knows* that the picture in question was posted by Mr. Mason. Response at 8-9. It then determines in a conclusory fashion that because the standard for authentication is "rather slight," *id.* at 7, "circumstantial." *id.* at 8, or "slight," *id.* at 9, then it has carried its burden for admissibility of the picture. The State is indisputably incorrect.

In addition to its erroneous legal conclusion, the State makes at least two factual errors along the way. First, the picture **does not show Mr. Mason holding the firearm**. A.R. at 64; Response at 8-9 ("He [Sgt. Bowman] took photos of screenshots of photos of Petitioner holding a firearm that was the same make and model as the one used to kill Ms. Hawkridge."); Response at 9 ("Petitioner mistakenly believes that the State was required to introduce direct evidence that Petitioner took the picture of himself holding the pistol used to kill Ms. Hawkridge.").

The picture is merely a picture of a firearm. A.R. at 64. Nobody is holding the firearm. *Id.* It is unknown if this photo of a firearm was taken by anyone or if it is a stock photo from a promotional website.[1]

Second, the State argues that Ms. Powell "further testified about her knowledge of the gun that appeared in the photo—confirming the specific post's tie to Petitioner himself." *Id.* at 8. This is incorrect. Never, not once did Ms. Powell, in any testimony at trial or at a pretrial hearing, testify about the Instagram photo of the gun. She did testify that the account was Mr. Mason's, however for the reasons below that alone is insufficient. A.R. at 1327.

The State's information stems from Sgt. Bowman's pretrial testimony. When asked if Ms. Powell was familiar with "[Mr. Mason]'s Instagram account, he replied:

> A. Yes.
>
> Q. Referring to the Instagram picture in dispute in this hearing, the picture of the gun, was she familiar with that particular post?
>
> A. She had mentioned it during her statement, yes.
>
> Q. Yes. And did she say that gun was similar or the same as the gun that was used in the murder of Taylor Hawkridge?
>
> A. She believed it was the one that was used.
>
> Q. She believed it was the gun?
>
> A. Yes.

A.R. at 637-38. At no time does Ms. Powell, by way of hearsay through Sgt. Bowman, state that she believed that Mr. Mason posted the picture of this gun, only that she believes that

[1] The Petitioner concedes that the State's confusion may result from his initial notice of appeal whereby counsel stated that the picture was of Petitioner holding the firearm. However, the Petitioner's Brief cites the page of the Appendix Record, A.R. at 64, which clearly shows the picture at issue.

this was the gun that was used to murder Taylor Hawkridge.[2] This does absolutely nothing to tie the picture to Mr. Mason.

In addition, attacking Ms. Powell's credibility for this hearsay declaration, far from being "inappropriate" is an essential ingredient for testing the basic question of whether the picture is "what the proponent claims it is." Response at 8; W.Va. R. of Evid. 901 (c). If the story is the now seventh version of a statement by the proponent, after being promised a recommendation of a large sentence reduction for murder, it is more than appropriate to cast a wary eye towards her credibility to determine if what she says is accurate.

Apart from these factual inaccuracies, the State ignores the controlling law which provides that proving that the Instagram account belongs to Mr. Mason is insufficient. *State v. Benny W.*, 837 S.E.2d 679, 684 (W.Va. 2019) ("[P]roving only that a message came from a particular account, without further authenticating evidence, has been held to be inadequate proof of authorship.").

The cases that the State cites do not contradict this holding. In *Palmer*, this Court found that "an email containing a reference to a Facebook post (and comments about the post) which purportedly reflected petitioner's character trait of threatening those adverse to him" was admissible. Response at 8; *State v. Palmer*, No. 14-0862, *4 (W.Va. Sup. Ct., June 3, 2016) (memorandum decision). The Court's rationale was as follows:

> In the instant case, the circuit court completed an appropriate analysis of the authenticity of the document prior to its admission at trial. Additionally, the circuit court, prior to admission of the document, conducted an in camera review of the exhibit and other corresponding documents subpoenaed from Facebook and jail telephone calls between petitioner and his family members, which substantiated the information contained within the exhibit. Moreover, the circuit court permitted petitioner to proffer the testimony of an expert witness regarding the ability to easily fabricate a Facebook page to rebut this exhibit. Accordingly,

[2] It is further unclear how Ms. Powell could ever say that the gun depicted, to the exclusion of all other guns of the same make and model, is the one she "believes" is the murder weapon.

> we agree with the circuit court's ruling and find no clear error or abuse of discretion in permitting the admission of State's Exhibit No. 154.

Palmer at *4. What was contained in the jail calls or gathered from the Facebook subpoenas is not said but it "substantiated" the information to the satisfaction of the Court enough in this memorandum opinion. *Id.* In *Benny W.*, the Court elaborated on the authentication in *Palmer*:

> The defendant in Palmer appealed from his conviction for first degree murder of his father-in-law. One of the issues raised was that the State did not properly authenticate an e-mail containing a reference to a Facebook post and comments about the post. In the Facebook post the defendant essentially stated that he had a mental list of people he was going to 'strike' because they did him and his wife wrong. This post was authenticated by a witness who had a conversation with the defendant on Facebook and believed that the statement in the Facebook post was made by the defendant based on the manner of speech used in the post, the Facebook profile picture of defendant, and the fact that the content of the post was something only the witness and defendant had knowledge of….

Benny W., 837 S.E.2d at 686. It is clear that in *Palmer*, the lower court had much more evidence than simple account ownership. It had a witness who had *the conversation at issue* with Mr. Palmer, could testify to Mr. Palmer's manner of speech, and that the message was something that only the witness and Mr. Palmer had knowledge of. In this case we have a simple picture of a common firearm with none of the unique identifying clues that were present in *Palmer*.

The State takes Petitioner to task for saying that account ownership "is not important at all." Response at 9. The Petitioner concedes that account ownership, along with other evidence is important, but the State takes this quote without that implicit context. It attempts to bolster this unfair characterization of the Petitioner's argument by citing additional cases that hold that account ownership is relevant along with other evidence of individual posting. *Id.*

Further, the "absurd submission" argument that is attributed to the Petitioner, *id.*, is the authentication of a printout of a screenshot from another unknown phone discussed at the beginning of page 11 of the Petitioner's Brief. The idea that this picture came from any reliable source or should be admissible based on this convoluted chain of custody is indeed an "absurd submission" because the police made no attempt to retrieve or preserve any metadata or any other marks which would indicate where this photograph originated.

The State is simply mixing its arguments and concealing their collective gaping weakness: there was no evidence, slight, circumstantial, or otherwise, that the Petitioner himself posted the picture at issue, and it ignores the clear holding by this Court that account ownership, without more, is not sufficient for authentication of a social media post. *Benny W.*, 837 S.E.2d at 684.

As such, the lower court erred by admitting the picture and for that reason Mr. Mason should be granted a new trial.

II. The given rationale for the admission of prior bad act evidence bears no relevance to the actual facts of this case.

The State lays out the well-worn law regarding intrinsic or *res gestae* evidence along with the same for admissibility of 404 (b) evidence. Response at 10-11; 12-13. If the State had then correctly set forth the facts of this case, the Petitioner would likely then make a valiant yet losing argument on the issue given this Court's recent opinions in this area giving an expansive leash to the State in the admission of this type of evidence. *See, e.g.*, *State v. Vincent*, No. 21-0656 (W.Va. Sup. Ct., December 6, 2022) (memorandum decision).

The State argues that Mr. Mason's purported prior acts of drug dealing, gang membership, and hatred of police informants was intrinsic to the case because "[s]hortly before she was killed, Ms. Hawkridge had become a confidential informant and it was believed she had

snitched on Petitioner or was about to snitch on him….Given his dislike of police informants and the possibility that Ms. Hawkridge would dampen his career as a drug dealer, Petitioner wanted her killed." Response at 11.

"Moreover, the culture of the Crips gang creates an environment that abhors cooperation with law enforcement." *Id.* "In other words, the evidence of Petitioner's gang and drug affiliations and dislike of informants was probative of the Petitioner's motive to have Ms. Hawkridge killed and is inextricably intertwined and provide context to the crimes charged." *Id.* at 11-12.

The State argued much the same for motive under a 404 (b) analysis. *Id.* at 12-15. The glaring issue with the State's argument, here and below, is that it bears no relationship to the motive it argued at trial. It argued below that Mr. Mason was a paid lackey for Armstead Craig who orchestrated the murder because Ms. Hawkridge informed on him, and that Mr. Mason coordinated the murder with Mr. Small and paid him a sum of the money he received. A.R. at 1344. Thus, Mr. Mason's purported motive in committing this murder, even according to the State, was purely financial. The only time the State mentions hatred of informants, gang membership, or drug dealing as a motive is in its improper attempts to get prior bad act evidence admitted—not a word of it came from the only direct witness against him at trial, Ms. Powell.

When it suited the State, such as when it argued for a joint trial for Mr. Mason and Mr. Small, it shifted gears to the theory of the case that it actually presented. Response at 21. Gone are the personal motivations of Mr. Mason but now, when the loss of a joint trial is at stake, he and Mr. Small are "inextricably intertwined" because they entered this conspiracy together for financial gain. *Id.* It cannot be said that this prior bad act evidence is consistent with the State's

theory of the case when the State's theory of the case is not consistent with its theory of the case. The lower court should not have allowed this sham.

For understandable reasons, this Court has been generous with allowing prior bad act evidence in through a variety of devices. However, it should not countenance this sort of gamesmanship by the State depending on what point of law it wishes to win on in that moment.

If the State's conduct in this case is rewarded, it is difficult to see how in any "crime against a person case", any sort of prior bad act testimony could not come in or any rules created by this Court could not be circumvented by a creative prosecutor. Any prior illegal or even embarrassing act could be used by a prosecutor simply decreeing, without evidence, only in a pretrial hearing, that the embarrassing trait might have possibly been known to the victim and that was the motivation for the act of violence.

A policy of liberal admission would then be turned into a blank check for the State to abuse, which is it already doing by at least attempting to introduce this type of evidence in nearly all cases around the state.

This jurisprudence is not only tremendously unfair to anyone facing trial but eviscerates any protections purported to be given by W.Va. R. of Evid. 404 (b). It is further not supported by any published decision of this Court and thus it is perfectly consistent with current law to reverse Mr. Mason's convictions and uphold the generous admission of prior bad act evidence that this Court has previously granted prosecutors. Even under the expansive reach of current case law, the lower court abused its discretion by admitting prior bad act evidence on simply "made up" rationales by the State.

The Petitioner stands by his other previously asserted assignment of errors and believes that he has sufficiently addressed them in his original brief. Mr. Mason's convictions should be reversed.

CONCLUSION

For the foregoing reasons and those contained in the Petitioner's Brief, the Petitioner respectfully requests that this Court reverse his conviction and sentence from the Circuit Court of Berkeley County and remand the matter to that court with instructions to grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of this Petitioner's Brief to be served by the Supreme Court File and Serve Express system on this 1st day of April, 2023.

/s/ Jason T. Gain

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