IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-0013

Brian Allen Merchant Jones,
Defendant Below, Petitioner,

vs.

State of West Virginia
Plaintiff Below, Respondent.

Appeal from the Circuit Court of Marion County
Honorable David R. Janes, Judge
Case No. CC-24-2021-F-138

PETITIONER'S BRIEF

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1) The circuit court erred by allowing the State to elicit inadmissible hearsay testimony at trial over Petitioner's objection.

2) The circuit court erred by not granting Petitioner's requests for a mistrial due to the State's introduction of inadmissible flight evidence during its closing arguments.

3) The circuit court erred by not granting Petitioner's motion for a new trial.

4) The circuit court erred by not granting Petitioner's motions for judgement of acquittal due insufficient evidence presented by the State at trial.

STATEMENT OF THE CASE

This matter originates from the Circuit Court of Marion County, West Virginia, in which the Petitioner was charged in a four count indictment alleging that he had committed: (1) the felony offense of conspiracy to commit felony controlled substance offenses, (2) the felony offense of use of a firearm in the commission of a felony, (3) the felony offense of possession of a firearm by a prohibited person, and (4) the misdemeanor offense of involuntary manslaughter. JA at 13–15.

Petitioner proceeded to trial on the first and second counts of the indictment but plead guilty to the third and fourth counts of the indictment. JA at 17–18. After a two-day trial, during which various evidentiary objections and motions for mistrial were made, the Petitioner was convicted of the remaining two counts contained in the indictment. JA at 21-24. The Court denied Petitioner's motions for a judgment of acquittal. JA at 233, 281–83. The Court later denied Petitioner's post-trial motions for a judgement of acquittal and for a new trial. JA at 291–301, 32-34.

The State further initiated recidivist proceedings against the Petitioner, alleging him have previously been convicted of a felony offense in this State. JA at 35. The Petitioner acknowledged

his prior felony conviction and was ultimately sentenced by the Court to a cumulative definite term of imprisonment of twenty-six (26) years. JA at 37–47.

The Petitioner seeks relief in the form of a reversal of his convictions and sentence under counts one and two of the indictment, with remand to the circuit court to proceed with sentencing of the Petition on counts three and four only.

SUMMARY OF THE ARGUMENT

The circuit court below committed reversable error by allowing inadmissible evidence to be presented to the jury at trial. First, the circuit court abused its discretion by finding that the hearsay testimony was not presented "for the truth of the matter asserted." The hearsay evidence was clearly admitted for the truth of the matter asserted, and to create a stronger evidentiary link for the prosecution's methamphetamine delivery conspiracy theory at trial. Second, the circuit court further abused its discretion by allowing Rule 404(b) evidence when (1) no notice had been given of the prosecution's intent to use said evidence, (2) the circuit court did not conduct the request *McGinnis* analysis of the Rule 404(b) evidence, and (3) did not grant a mistrial when again utilized by the prosecution in its closing. This Rule 404(b) evidence was highly prejudicial, as it purported to connect the Petitioner with his alleged co-conspirator by their alleged joint involvement in a prior marijuana delivery conspiracy.

Finally, the circuit court did not grant a mistrial when the prosecution referenced flight evidence which was neither admitted, nor admissible at trial during its closing argument rebuttal. This improper usage and reference to flight was highly prejudicial and created the necessity for a mistrial, as there was no other appropriate remedy. The circuit court also committed reversable error by failing to grant the Petitioner's post-trial motions for a new trial and/or judgment of acquittal. The circuit court abused its discretion by denying the motion for a new trial based on the evidentiary issues. The circuit court abused its discretion by denying the Petitioner's motion

for a judgment of acquittal as well as both the incompatibility of West Virginia Code § 61-7-15A to a conspiracy felony and insufficiency of the evidence presented at trial. The prosecution's theory that a firearm was "used or presented" during the commission a drug conspiracy defies a plain reading and application of West Virginia Code § 61-7-15A. Finally, the evidence presented by the prosecution was highly circumstantial and no reasonable juror could have returned a verdict of guilty.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3), Petitioner asserts that oral argument is necessary given that the dispositive issues have not been authoritatively decided and that, pursuant to West Virginia Rule of Appellate Procedure 18(a)(4), the decisional process would be significantly aided by oral argument.

Further, Petitioner asserts that the matter should be set for oral argument under West Virginia Rule of Appellate Procedure 20(a), as this case involves: (1) an issue of first impression, (2) an issue of fundamental public importance, and (3) a constitutional question regarding the validity of a court ruling. Alternatively, Petitioner asserts that the matter should be set for oral argument under West Virginia Rule of Appellate Procedure 19(a), as this case involves: (1) an assignment of error in application of settled law and (2) a narrow issue of law.

ARGUMENT

A. The circuit court erred in allowing inadmissible hearsay evidence at trial.

The circuit court abused its discretion by allowing inadmissible hearsay evidence against the Petitioner at trial over the objection of the Petitioner, finding that the hearsay evidence was not offered for the "truth of the matter asserted." "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. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

In interpreting what evidence constitutes inadmissible hearsay evidence under the West Virginia Rules of Evidence, this Court has held that "[g]enerally, out-of-court statements . . . are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules." Syl. Pt. 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990). In examining an instance where hearsay was ostensibly presented for a purpose other than the "truth of the matter asserted," this Court found such claims lacking where the evidence was "a fundamental link" in the prosecution. *State v. Phillips*, 187 W.Va. 205, 208, 417 S.E.2d 124, 127 (1992).

In this case, the evidence presented at trial was direct evidence that the Petitioner's alleged, deceased, co-conspirator (the declarant) was engaging in a conversation regarding the sale, and proposed price for the sale, of methamphetamine. JA at 143–147. However, at the bench conference following the Petitioner's objection, the circuit court ultimately overruled the objection and found that: "[t]he Court's of the opinion it's not offered for the truth of the matter asserted. She's just relaying her conversation with her son. All right?" JA at 146. No further analysis on the hearsay objection was conducted by the Court. *Id.*

Contrary to the circuit court's summary conclusion regarding the purpose of the hearsay evidence, this evidence was used by the prosecution to show that there was a drug conspiracy occurring and culminating the night of the conversation. Similar to the hearsay conversation utilized by the prosecution in *Phillips*, this evidence was employed to link between methamphetamine sales by the declarant and the Petitioner. Accordingly, the circuit court abused

its discretion by allowing the hearsay evidence. Therefore, this Court must reverse the conviction of the Petitioner, and remand this matter to the circuit court for a new trial.

B. The circuit court erred by not granting Petitioner's requests for a mistrial due to the State's introduction of inadmissible flight evidence during its closing arguments.

The circuit court abused its discretion by refusing to grant a mistrial following the prosecution's references to flight in its closing argument which were not admitted at trial. "A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. Pt. 5, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). Further, "[f]our factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). "The ultimate test 'is whether the remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Sugg*, 193 W.Va. at 405, 456 S.E.2d at 486 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

During the testimony of one witness at trial, the circuit court sustained the Petitioner's objection relating to flight evidence, in that no notice was provided for the evidence, and the prosecution further assured the circuit court that although it had submitted a potential instruction regarding flight evidence, it did not intend to use flight evidence. JA at 175–76. However, on closing rebuttal, the prosecution stated "[s]o no he didn't take responsibility for it . . . [a]nd [he] ran, like a coward, for months and months and – (request to approach denied by the circuit court)

[f]ive months later he turns himself in. That's not taking responsibility." JA at 276–77. Following the conclusion of the rebuttal the circuit court heard arguments on the Petitioner's request for a mistrial, and found that although the remarks were problematic, they were not grounds for a mistrial. JA at 279. Despite stating "I wish he hadn't have gone there, but he did," the circuit court appeared to rely on its general instruction to the jury that argument by attorneys is not evidence as curative in this instance, and therefore a mistrial was unnecessary. JA at 280.

This Court has held that:

> [t]he decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a "manifest necessity" for discharging the jury before it has rendered its verdict. This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.

State v. Lowery, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008) (citing *State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983) (citations omitted)). In this instance, the prosecution calculatedly referenced flight—despite the lack of formal notice, despite the circuit court sustaining the Petitioner's objection to the introduction of said evidence, and despite prosecution's assurance to the circuit court that such evidence would not be advanced following the earlier bench conference. While the statement by the prosecution was brief, it occurred during the prosecution's closing rebuttal, as one of the last thoughts given to the jury before its deliberations and clearly prejudiced the Petitioner. Finally, it cannot be said that these comments were invited error, or opening the door to correction, given that Petitioner's closing argument simply highlighted the Petitioner's guilty pleas to two counts of the indictment as a measure of acceptance of responsibility—not an indication that there was an immediate surrender to law enforcement. JA at 264.

Given the gravity of the statements made and the stage at which they were made, granting a mistrial was a "manifest necessity." There was no available remedy sufficient to counteract the prejudicial effects of the remarks. Accordingly, the circuit court abused its discretion in refusing the Petitioner's request for a mistrial. Therefore, this Court must reverse the Petitioner's convictions and remand this matter for further proceedings, with instructions to grant the Petitioner's request for a mistrial.

C. The circuit court erred by not granting Petitioner's motion for a new trial.

The circuit court abused its discretion by denying the Petitioner's motion for a new trial due to numerous issues during the trial. This Court "review[s] a circuit court's order denying a motion for a new trial for abuse of discretion." *State v. Woodrum*, 843 S.E.2d 767 (2020). "Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." *State v. Woodrum*, 843 S.E.2d 767 (2020) (citing Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621 (1976)).

Petitioner's post-trial motion for a new trial incorporates the arguments *supra* and also challenged the circuit court's admitting, and later failing to grant a mistrial due to, improper 404(b) evidence of an alleged prior marijuana delivery conspiracy between the Petitioner and his deceased, alleged co-conspirator. JA at 26-30, 290–301). Rule 404(b) of the West Virginia Rules of Evidence prohibits evidence of crimes, wrongs, and other acts except where it is admissible for another purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." W. Va. R. Evid. 404(b). This Court has clearly established the procedure for trial courts to follow in ruling upon the admissibility of Rule 404(b)

evidence. *See State v. Willett*, 674 S.E.2d 602, 223 W.Va. 394 (2009). Specifically this Court has explained that:

> [w]here 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 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.

Willett, 674 S.E.2d 602, 606, 223 W.Va. 394 (2009). However, such an analysis did not occur, and the Petitioner's objection was overruled with little justification except for the prosecution's vague asserted purpose. JA at 186-87. The prosecution again invoked this inadmissible evidence multiple times in its closing, making clear that its purpose was for direct evidentiary value to tie the Petitioner to prior bad acts when it argued (1) that "[t]hey'd recently stepped up their trade from marijuana to delivering methamphetamine;" (2) "[i]t was difficult to watch [the family] have to testify about their loved one being engaged in this activity. Particularly when it moved from marijuana to methamphetamine, which they very clearly were not comfortable with at all;" and (3) "[s]he thinks it's a zip of marijuana because she knows they've been dealing marijuana together, [alleged co-conspirator] and Petitioner." JA at 249, 252, 257.

This evidence was admitted and used for a plainly impermissible purpose. The necessary 404(b) notice by the prosecution and analysis by the circuit court was entirely absent. Further, the usage of this evidence at trial and into closing resulted in extreme prejudice to the Petitioner and

in the "manifest necessity" of a mistrial. Accordingly, the Petitioner was entitled to a new trial on these grounds, as well as the additional grounds raised, argued *supra*, individually or cumulatively, and the circuit court abused its discretion in denying Petitioner's motion. Therefore, this Court should reverse the ruling of the circuit court, vacate the Petitioner's conviction, and remand this matter with instructions for the circuit court to conduct a new trial.

D. The circuit court erred by not granting Petitioner's motions for judgement of acquittal due insufficient evidence presented by the State at trial.

i. The elements under West Virginia Code § 61-7-15A are incompatible with a conspiracy crime as the predicate felony.

The circuit court abused its discretion by denying the Petitioner's motion for judgement of acquittal, as adequate evidence to prove the elements of "while engaged in the commission of a felony" and "uses or presents a firearm" in West Virginia Code § 61-7-15A was not present at trial. This Court has held "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *State v. Myers*, 229 W.Va. 238, 728 S.E.2d 122 (2012). West Virginia Code § 61-7-15A provides that: "any person who, while engaged in the commission of a felony, uses or presents a firearm shall be guilty of a felony." W. Va. Code § 61-7-15A.

The prosecution's theory of the case in relation to Count 2 of the indictment was that the Petitioner "used or presented" a firearm while engaged in the "commission" of a felony drug conspiracy. JA at 14. The evidence presented at trial details that the Petitioner was with his alleged co-conspirator (ostensibly after a conspiracy had been formed) in his room and a firearm he had come into the possession of when the firearm was accidently discharged. JA at 248, 264. Based upon a plain, common sense reading of West Virginia Code § 61-7-15A, the elements of "while engaged in the commission of a felony" as the attendant circumstance to the *actus reus* of "uses or presents" are incompatible with the prosecution's theory.

First, given that the predicate felony alleged by the prosecution is the inchoate crime of conspiracy, it is contradictory to say that the *actus reus* occurred *during the commission* of a felony. The predicate conspiracy alleged under West Virginia Code 60A-4-414 requires a defendant to "conspire[] with one or more persons to commit a felony violation of section four hundred one of this article, if one or more of such persons does any act to effect the object of the conspiracy." W.Va. Code § 60A-4-414. By its very nature, conspiracy is an incomplete type of later, potential completed crime. It is unclear under the prosecution's theory when a person may run afoul of the provisions of West Virginia Code § 61-7-15A in relation to conspiracy, from agreement to a later overt act, to stages in between.

Instead, the operation of West Virginia Code § 61-7-15A most logically applies to the commission of an "*active*" felony crime, such as robbery, kidnapping, or rape. A similar provision, West Virginia Code § 61-2-10, assault during the commission of a felony, specifically pertains to both "the commission of, or attempt to commit a felony." W.Va. Code § 61-2-10. The Legislature specifically extended this provision to apply to attempts, showing a contemplation of inchoate crimes, which is absent in the later West Virginia Code § 61-7-15A.

Second, it is unclear how a person "uses or presents" a firearm during the course of a conspiracy felony. The most natural usage of "uses or presents" in the context of the statute reflects a typical intentional use or brandishing which furthers or advances the goals of the predicate felony. Again, this logically follows with "*active*" felony crime such as robbery, kidnapping, or rape, but confounds when applied to an inchoate crime such as conspiracy or solicitation.

As such, under a straightforward reading and interpretation of the statute in question, the evidence presented at trial could not, and did not, meet the elements of West Virginia Code § 61-7-15A. Accordingly, the circuit court incorrectly interpreted the elements of the crime as charged,

and further abused its discretion in denying Petitioner's motion for judgement of acquittal. Therefore, this Court must vacate the Petitioner's conviction as to Count 2 of the underlying indictment in this case.

ii. There does not exist sufficient evidence presented by the State at trial to support the Petitioner's convictions for the offenses under Counts 1 and 2 of the indictment.

The circuit court abused its discretion by denying the Petitioner's motion for judgement of acquittal, as there was insufficient evidence to support the guilty verdicts returned at trial. This Court has ruled that a verdict should be set aside when the record contains "no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt." Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Further:

> [t]he function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt."

Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). In this case, the evidence was highly circumstantial. The evidence connecting the Petitioner with his alleged co-conspirator consisted almost entirely of the alleged co-conspirator referencing the Petitioner's name while negotiating with a third party and the suggestion that the Petitioner was using a cell phone of a separate person that was proven to be communicating with the alleged co-conspirator. JA at 218–23. The Petitioner was never found to be in possession of any illegal substances, cash, or any other indications of being involved in an active drug conspiracy ring. While it is true that the Petitioner carries a "heavy burden" per this Court's rulings in *Guthrie* and its progeny, the Petitioner believes that this case fits the narrow circumstances in which this Court can find that evidence presented at trial was simply insufficient to meet the prosecution's burden of proof

beyond a reasonable doubt. Therefore, this Court should vacate the Petitioner's convictions as to Counts 1 and 2.

CONCLUSION

Wherefore, for the reasons set forth above and for the combination of those reasons, the Petition, Brian Allen Merchant Jones, prays that this Honorable Court reverse the rulings of the circuit court, and remand this matter for further proceedings consistent with this Court's opinion and instructions.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that I have caused a copy of the foregoing "Petitioner's Brief" to be served on May 31, 2023, via File & Serve Xpress to all parties.

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