
NO. 33097

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

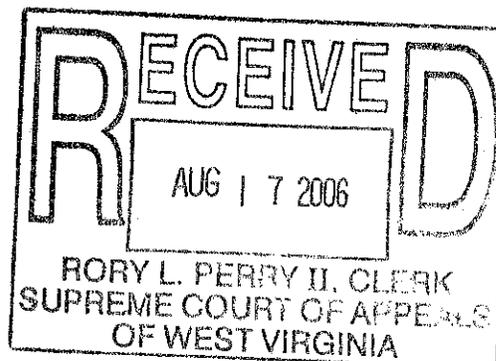
STATE OF WEST VIRGINIA,

Appellee,

v.

GERALD THOMPSON,

Appellant.



BRIEF OF APPELLEE

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BRIEF OF APPELLEE

I.

**KIND OF PROCEEDING AND THE
NATURE OF THE RULING BELOW**

Gerald Thompson (hereinafter the Appellant) was convicted of one count of operating a clandestine methamphetamine (meth) laboratory. *See* W. Va. Code § 60A-4-411(a). The Appellant's petition raises three assignments of error: (1) that West Virginia Code § 60A-4-411(b) is unconstitutionally vague and overly broad; (2) that the trial court's *sua sponte* questioning of witnesses evinced a bias against the Appellant; and (3) the trial court improperly denied defense counsel's motions to strike certain jurors for cause.

The Appellant was convicted on September 1, 2005. The trial court sentenced him to no more than two, no less than ten years in the penitentiary by sentencing order entered November 1, 2005. The Appellant now appeals this order.

II.

STATEMENT OF THE FACTS

On April 13, 2004, West Virginia State Troopers M.L. Bailey and R.E. Stephenson received a shots fired complaint from Mary Thompson of Reed Fork Road, Clay County, West Virginia. (Tr. 63-64, 327-28.) When they arrived Ms. Thompson advised them that her son, Gerald Thompson, had been firing his rifle earlier that day, that she was afraid to return to her house, and wanted him taken off the property.¹ (Tr. 64-65, 66.) Because of Ms. Thompson's complaints and pursuant to standard procedure both troopers entered the Appellant's apartment. (Tr. 66-67.)

They did not find the Appellant, but they did find a table. Next to the table was a bucket with mason jars inside. One jar contained a blueish liquid, one contained a white solid, and another contained some form of liquid and base. (Tr. 130.) Two rubber hoses were protruding from two holes poked into the top of one of the jars.² (Tr. 67, 331.) The troopers also found a box containing matches, a rubber hose, a can of Coleman fuel,³ and a black lock box containing coffee filters,⁴

¹The Appellant lived in a cellar top house located on his mother's property, approximately 30 yards from her house. (Tr. 65, 328.)

²Hydrogen chloride gas generators may be manufactured by using jars with a rubber hose sticking out of it. These generators are used to convert the meth into powder. (Tr. 244, 315.)

³Coleman fuel contains petroleum distillate, a substance found in several of the samples submitted to the State Police crime lab. Coleman fuel is used to is used as a solvent during the separation of pseudoephedrine from the other elements contained in common cold medications such as Sudafed. (Tr. 240.)

⁴Coffee filters are used to extract pure iodine, a basic ingredient of meth. (Tr. 241-42.) They are also used to filter the meth. from any additional liquid after the meth has been cooked. (Tr. 242, 255).

hollowed out ballpoint pens, mason jar lids, and razors.⁵ (Tr. 72-73, 113-15.) Upon inspection of the Appellant's bed, the officers found a can of acetone,⁶ a bag of rock salt, and a gallon jug of muriatic acid.⁷ (Tr. 75-76.) They also found a shoe box containing two documents listing the ingredients necessary to manufacture meth, along with four boxes and two bags of matches with the striker pads removed.⁸ (Tr. 80, 82-84-85, 88-89, 248.) The troopers found four additional mason jars, matches, coffee filters, and tubes sitting on a table in the middle of the Appellant's bedroom. (Tr. 86-87.) They also found a hotplate. (Tr. 125.) Based on his training and experience Trooper Stephenson identified these materials as items commonly found in a meth lab. (Tr. 67, 72.)

On April 21, 2004, Troopers Baily and Stephenson arrested the Appellant in a camper near Summersville. (Tr. 94.) Upon his arrest they drove him to the Nicholas County Courthouse for processing. (Tr. 95.) After receiving his *Miranda* warnings the Appellant signed a waiver form. (Tr. 97-98; R. 195.) Both Trooper Bailey and Trooper Stephenson testified that the Appellant knowingly, intelligently, and voluntarily waived his rights, and that they did not coerce or trick the Appellant into signing the form. (Tr. 99-100, 337.)

⁵Razors are commonly used to scrape off the red phosphorous from matchbook strikers. (Tr. 241.) They are also used to cut the drug into lines which are then snorted using hollowed out pen tubes. (Tr. 256.)

⁶Acetone is used as an organic solvent used to reduce meth. (Tr. 243.)

⁷Muriatic acid is commonly used to cook meth. (Tr. 245.)

⁸Matchbook strikers contain red phosphorous which is commonly used to cook meth. (Tr. 239, 240-41.) It takes a large number of matches to produce sufficient quantities of red phosphorus, thus it is common to find substantial quantities of matchbooks with their striking covers torn off. (Tr. 240-41, 253.)

While sitting in a State Police cruiser the Appellant gave a short confession. (Tr. 102; R. 196.) Trooper Stephenson asked the Appellant questions, wrote the questions down, listened to the answers, and wrote them down. (Tr. 106.) The Appellant confessed to having a meth lab in his home, stated that he had cooked about three or four batches, but had not cooked batch for approximately a month.

The State called forensic chemist Kerry Kirkpatrick. Ms. Kirkpatrick worked for the Drug Identification section of the West Virginia State Police Crime Lab. (Tr. 187.) The court qualified her as an expert in forensic chemistry. (Tr. 195.) Ms. Kirkpatrick had tested three glass vials of blue tinted liquid, two glass vials containing clear liquid, one glass vial containing severed pieces from a coffee filter, one glass vial containing chunky powder, four glass vials containing yellow liquid, five glass vials containing brown liquid, and one glass vial containing several coffee filter samples and clear liquid. (Tr. 196.) She found traces of petroleum distillate,⁹ hydrochloric acid, and sodium chloride. (Tr. 201-02.) She testified that all of these materials are consistent with manufacturing meth. (*Id.*) She did not find traces of the finished product in any of the items she tested. (Tr. 204.)

The State then called State Police Clandestine Lab Training and Response Coordinator Lieutenant M.L. Goff. (Tr. 222.) The trooper testified that, for the last four to five years, he had specially trained in the processing, sampling, and dismantling of clandestine laboratories, and had responded to approximately 75 clandestine lab scenes. (Tr. 224.) The trial court designated Lt. Goff as an expert, certified and trained in hazardous inspection of clandestine laboratories and site preparation. (Tr. 226-27.)

⁹Petroleum distillate can be found in such items as Coleman fuel, lighter fluid, and gasoline. (Tr. 205.)

The Lieutenant testified that he was dispatched to the Appellant's house the evening of April 13, 2004. (Tr. 226.) Upon his arrival he inspected the house. In his opinion, based upon his training applied to the totality of the surroundings, he believed that the Appellant was operating a clandestine meth lab. (Tr. 228, 262, 303.) He based his opinion on several factors: the condition of the area, the nature of the items recovered, such as the chemicals, the matches, and the containers, the combination of these chemicals and equipment, and the recipes. (Tr. 262.) When asked what differentiated the items found in the Appellant's house from normal everyday substances, Trooper Goff testified that materials such as hydrochloric acid, solvents, and matches are not usually found together. (Tr. 263.) Trooper Goff photographed the scene, and took samples from each container he believed to be relevant for submission to the State Police Crime Lab. (Tr. 228.) After he preserved these samples he had the containers sealed and disposed of by a hazardous waste contractor. (Tr. 231.)

At the close of the State's case-in-chief Appellant's counsel moved for a judgment of acquittal. The trial court denied Appellant's motion. (Tr. 357-58, 360-62.) The defense then presented its case-in-chief. In addition to several witnesses including the Appellant's mother, and his girlfriend, the Appellant chose to testify. (Tr. 430-31.)

The Appellant conceded that he had been firing a .22 pistol and a rifle the day the police arrived. (Tr. 474.) He claimed that he told Troopers Bailey and Stephenson had coerced him into giving a statement by threatening to beat him up and to arrest his wife. (Tr. 463-64.) He claimed that he used the muriatic acid during his masonry work. (Tr. 465.) He also claimed that the acetone and the rock salt belonged to his mother. The Coleman fuel was to light lanterns he had used before his apartment was wired for electricity. (Tr. 467.) He could not recall why the troopers found jars

and hoses and denied possessing the documents listing the materials used to manufacture meth. (Tr. 471.) The Appellant conceded that both he and his girlfriend left his mother's property after he had fired the shots and spent the next eight days living in a trailer in Nicholas County. (Tr. 482-83.)

During its charge to the jury, the trial court instructed them that nothing said by the trial court is to be considered evidence of any fact, or indicating any opinion concerning any fact, the credibility of any witness, the weight of any evidence, or the guilt or lack of guilt of the defendant. (Tr. 498.) Upon mature consideration of the evidence the jury convicted the Appellant of one count of operating or attempting to operate a clandestine drug laboratory. (Tr. 533-34.) *See* W. Va. Code § 60A-4-411(a). The court sentenced the Appellant to a period of not more than two, not less than ten years in the penitentiary.

Although the trial court allowed post-conviction bail, the State filed a motion to revoke Appellant's bond upon his arrest for one count of Domestic Battery, and one count of Domestic Assault. The Appellant had been arrested for striking his wife, Kristen (Samples) Thompson, and attempted to strike her father, Kermit Sullivan. At trial the Appellant claimed that the police had coerced him into giving a confession by threatening to arrest his wife, claiming that he "loved his wife with all [his] heart and . . . wouldn't want nothing to happen to her." (Tr. 464.)

III.

PROCEDURAL HISTORY

The Appellant was originally charged by criminal complaint with possession with intent to distribute marijuana, and operation of a clandestine meth lab. (R. 30.) The circuit court appointed counsel on April 23, 2004. (Tr. 17.) After his April 30, 2004, preliminary hearing the Appellant was bound over to the Circuit Court of Clay County. (R. 74.) On March 22, 2005, the Clay County

Grand Jury returned a two-count indictment charging the Appellant with possession with intent (Count 1), and operating or attempting to operate a clandestine drug laboratory (Count 2). The Appellant was arraigned on April 5, 2005, by Clay County Circuit Court Judge, the Honorable Jack Alsop. (Tr. 148.)

On July 30, 2005, Appellant's counsel filed a motion to suppress Appellant's statements, and the fruits of the investigating officers' search of the Appellant's apartment. (R. 241.) He also filed a motion to dismiss the clandestine laboratory charge because the statute was overbroad, and vague. (R. 247.) After an August 8, 2005, suppression hearing the trial court (Facemire, J.) denied the Appellant's motions to suppress and motion to dismiss count 2 of the indictment. (R. 375-76; 8/8/05 Suppression Hr'g Tr. 132-33.) Without objection from the State, the court dismissed Count 1 of the indictment. (8/8/05 Suppression Hr'g. Tr. 134.)

The trial court began voir dire on October 3, 2005. Because it could not assemble a panel of 20 impartial jurors, it continued the case. The Appellant's trial began on August 30, 2005, and ended on September 1, 2005. (R. 401-02.) The Appellant filed his Notice of Intent to Appeal on October 3, 2005. (R. 434-35.) By order entered November 1, 2005, the trial court sentenced the Appellate to two to ten years. (R. 510.)

IV.

ASSIGNMENTS OF ERROR

The Appellant has alleged the following assignments of error:

1. Whether the trial court erred when it failed to grant Thompson's Motion to Dismiss Count II of the Indictment because *West Virginia Code*, 60A-4-411 (2003) is overly broad and void for vagueness and is therefore unconstitutional under both the United States Constitution and the West Virginia Constitution.

2. Whether the trial court erred in making inquiries of testifying witnesses that tended to prejudice the jury against the defendant through the substance and form of the questions as well as by the tenor and tone of the questions.
3. Whether the trial court erred when it refused Thompson's Motions to Strike certain jurors for cause and whether the trial court erred when it refused Thompson's Motion for Mistrial because of conduct of certain juror that tended to give the appearance of impropriety.

V.

ARGUMENT

A. BECAUSE THE APPELLANT DOES NOT HAVE STANDING TO MOUNT A FACIAL CHALLENGE TO WEST VIRGINIA CODE § 60A-4-411, AND THE STATUTE CLEARLY SETS FORTH THE ACTUS RES AND MENS REA THE DOCTRINE OF VOID FOR VAGUENESS IS INAPPLICABLE IN THIS CASE.

1. Standard of Review.

In deciding whether a criminal statute should be declared void for vagueness, this Court applies the standard set forth in Syl. Pt. 1 of *State v. Finn*, 158 W. Va. 111, 208, S.E.2d 538 (1974), "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by the statute and to provide adequate standards for adjudication."

A statute is presumed to be constitutional. When the constitutionality of a statute is questioned, every reasonable construction must be resorted to by a court in order to sustain constitutionality and any doubt must be resolved in favor of the constitutionality of the legislative enactment. Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 629, 153 S.E.2d 178, 179 (1967).

2. **Discussion.**

The advent of methamphetamine, and its widespread use in this State is troubling and unique. The Legislature has explicitly recognized the issues associated the manufacture and use of methamphetamine. In 2005, it passed the Methamphetamine Laboratory Eradication Act in which it noted that the illegal production of methamphetamine is an increasing problem nationwide, and particularly prevalent in rural West Virginia Counties.¹⁰ See W. Va. Code § 60A-10-2(a). The Legislature found methamphetamine to be addictive and dangerous to the health of the user and those around the user. W. Va. Code § 60A-10-2(b) & (c). Further, it found that methamphetamine laboratories are clandestinely operated in an unsafe manner, often resulting in explosions and fires. W. Va. Code § 60A-10-2(b).

The statute also states:

This it is in the best interest of every West Virginian to develop viable solutions to address the growing methamphetamine problem in the State of West Virginia. The Legislature finds that restricting access to over-the-counter drugs used to facilitate production of methamphetamine is necessary to protect the public safety of all West Virginians.

Id.

Because meth can be manufactured using legally acquired products, it presents a unique challenge to law enforcement. There are few, if any, other controlled substances manufactured the

¹⁰Although this article of the Code had not been passed until after the Appellant's trial, this Court may, from the statute's context, adduce the Legislature's general approach to eradicating methamphetamine labs. "Statutes which relate to the same persons or things, . . . or have a common purpose will be regarded *in pari materia* to assure recognition and implementation." Syl. Pt. 5, in part, *Fruehauf Corp. v. Huntington Moving and Storage*, 159 W. Va. 14, 217 S.E.2d 907 (1975). See also Syl. Pt. 1, *State ex. rel. Schorath v. Condry*, 139 W. Va. 827, 83 S.E.2d 470 (1954) (statutes relating to the same subject matter are to be read *in pari materia* whether passed at the same time or at different times).

same way. It is this unique manufacturing process which lies at the heart of the dilemma. How does the State fit the compelling needs of law enforcement to eradicate meth labs within the confines of its citizen's due process rights? The Legislature chose to balance these two competing interests by passing West Virginia Code § 60A-4-411. Contrary to the Appellant's position, the statute does set forth the offense with sufficient clarity, but also incorporated a flexible approach, recognizing that meth is manufactured by using materials legally purchased at any convenience store. Apart from a hypothetical, the Appellant has failed to produce a single piece of concrete evidence suggesting that law-enforcement is arresting law-abiding citizens for possessing matches, or acetone. This Court should not address self-serving hypotheticals: it should focus on the facts set forth in the record. *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 503 n. 21 (1982) ("The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to a Rolling Stone magazine . . . is of no due process significance unless the possibility ripens into a prosecution.").

West Virginia Code § 60A-4-411 reads:

(a) Any person who operates or attempts to operate a clandestine drug laboratory is guilty of a felony, and, upon conviction, shall be confined in the state correctional facility for not less than two years nor more than ten years or fined not less than five-thousand dollars nor more than twenty-five thousand dollars, or both.

(b) For the purposes of this section a "clandestine drug laboratory" means any property, real or personal, or in which a person assembles any chemicals or equipment or combination thereof for the purpose of manufacturing¹¹

¹¹"Manufacture" is defined as the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or re-labeling of its container, except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging or labeling of a controlled substance:

methamphetamine,¹² methylenedioxymethamphetamine or lysergic acid diethylamide in violation of the provisions of section four hundred one of this article.

(c) Any person convicted of a violation of subsection (a) of this section shall be responsible for all reasonable costs, if any, associated with remediation of the site of the clandestine drug laboratory.¹³

(1) By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or

(2) By a practitioner, or by his authorized agent under his supervision for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

W. Va. Code § 60A-1-101(n).

¹²Methamphetamine is a Schedule II Controlled Substance. W. Va. Code § 60A-2-206(d)(2).

¹³See also Ohio Rev. Code Ann §2925.041(a) (no person shall assemble or possess one or more chemicals that may be used to manufacture a controlled substance with intent to manufacture a controlled substance); Ariz. Rev. Stat. Ann. § 12-1990(1) (clandestine drug laboratory means real property on which methamphetamine . . . is being manufactured or where a person is arrested for having any chemicals or equipment used in the manufacture of methamphetamine); Ariz. Rev. Stat. Ann. § 13-3407(A)(3) (a person shall not knowingly possess equipment or chemicals or both for the purpose of manufacturing a dangerous drug); Ark. Code. Ann. § 5-64-403(c)(5) (unlawful for any person to use or possess with intent to use drug paraphernalia to manufacture methamphetamine); 720 IL. Comp. Stat. Ann. 646/30 (unlawful to knowingly engage in the possession, procurement, transportation, storage or delivery of any methamphetamine); 1 Ky. Rev. Stat. Ann. § 218A.1432(1)(b) (person is guilty of manufacturing methamphetamine if possesses two or more chemicals or equipment with intent to manufacture); LA. Rev. Stat. Ann. § 40:983(A)(1) (creation of a clandestine laboratory includes the purchase, sale, distribution, or possession of any material, compound, mixture, preparation, supplies, equipment or structure with intent that materials be used for manufacture of methamphetamine); Mo. Rev. Stat. § 195.233 (unlawful to use or possess with intent to use drug paraphernalia to manufacture, compound, process, controlled substance); Mont. Code Ann. § 45-9-132 (person commits the offense of operating a clandestine laboratory if procures, possesses, or uses chemicals, supplies or equipment for the criminal production or manufacture of drugs); N.J. Stat. Ann. 2C:35-4 (any person who knowingly maintains or operates a facility for the manufacture of methamphetamine, or knowingly aids, promotes or finances facility guilty of felony); N.Y. Penal Law § 220.70 (guilty of possession of methamphetamine manufacturing material in the second degree if possess precursor, chemical reagent, or solvent with intent to use to manufacture meth.).

The Appellant challenges this statute facially under the doctrines of overbreadth, and void for vagueness. Generally, successful facial challenges to statutes are the deviation, not the norm. *See Sabri v. United States*, 541 U.S. 600, 609-610 (2004) (because facial challenges invite judgments on fact-poor records, and encourage speculation, they should not be addressed in “relatively few settings” and only for “weighty” reasons).

In the case at bar the Appellant clearly engaged in prohibited conduct; therefore, he lacks the standing to mount a facial challenge to the statute. Under the overbreadth doctrine this Court must first, “determine whether the enactment reaches a substantial amount of constitutionally protected conduct.” *Village of Hoffman Estates v. Flipside Hoffman Estates*, 455 U.S. at 494. If it does this Court may invalidate a challenged enactment if it proscribes a substantial amount of conduct protected by the First Amendment. *E.g. United States v. Salerno*, 481 U.S. 739, 745 (1987); *Chicago v. Morales*, 527 U.S. 41, 54-55 n. 22 (1999). W. Va. Code § 60A-4-411 is not directed at any First Amendment Rights of speech, religion, assembly or association. There is no federally protected constitutional right to purchase a pack of matches, or a can of Coleman fluid. Therefore, the Appellant’s overbreadth challenge is without merit.

A statute which does not reach a substantial amount of constitutionally protected conduct will be upheld if it “define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In *State ex. rel. Appelby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800 (2002), this Court held that a facial challenge to a statute implicating no constitutionally protected conduct will fail if the challenger’s conduct clearly falls within the statute’s restrictions. “A plaintiff who engages in some conduct that is clearly

proscribed cannot complain of the vagueness of the law as applied to others.” *Appelby*, 213 W. Va. at 528, 583 S.E.2d at 815. *See also Salerno*, 481 U.S. at 745.

The Appellant has not challenged the law as applied to him, nor argued that there was insufficient evidence to convict him. Instead he speculates:

That is to say that an ordinary law-abiding citizen who happens to have a mason jar, a can of Coleman fuel, flashlight batteries, matches from his favorite restaurant, a camp stove sitting on a picnic table in a state park, and a police officer with a passing knowledge of the contents of the 2003 version of West Virginia Code 60A-4-411, may be arrested, incarcerated, tried and convicted irrespective of the fact that the citizen does not realize that his conduct is forbidden by statute.

Appellant’s Brief at 6-7.

The Appellant’s hypothetical asks this Court to leave its reason and common sense behind. Surely a law-abiding citizen understands that it is illegal to assemble chemicals or equipment for the purpose of manufacturing meth. The Code includes an extensive definition of the term “manufacture.” W. Va. Code § 60A-1-101(n). It also lists methamphetamine as a controlled substance. *See* W. Va. Code § 60A-4-401(a) (unlawful for any person to manufacture a controlled substance). *See State v. Leeson*, 82 P.3d 16, 19 (Mt. 2003) (“It would be difficult, if not impossible, for a person to inadvertently purposely or knowingly take action in furtherance of the criminal production or manufacture of dangerous drugs.”).¹⁴

¹⁴*See* 45-9-132 MCA (2001):

(1) A person commits the offense of operation of an unlawful clandestine laboratory if the person purposely or knowingly engages in:

(a) the procurement, possession, or use of chemicals, precursors to dangerous drugs, supplies equipment or a laboratory location for the criminal production or manufacture of dangerous drugs . . .

Certainly, the Appellant knew what he was doing was illegal. He manufactured his drugs in the woods, kept all of his materials in his house, including some in a black lock box, and others in a shoe box. He abruptly left his house shortly before the police arrived and hid out in a trailer in Nicholas County until he was arrested. *See* Syl. Pt. 6, *State v. Payne*, 167 W. Va. 252, 280 S.E.2d 72 (1981) (evidence of flight may be admitted to demonstrate consciousness of guilt under certain circumstances). After his arrest he admitted to cooking meth with the materials found in his house.

The statute also requires intent. West Virginia Code § 60A-4-411(b) defines a clandestine drug laboratory as “any property, real or personal, on or in which a person assembles any chemicals or equipment and combination thereof *for the purpose of manufacturing* methamphetamine . . . in violation of the provisions of section four hundred of this article.” (Emphasis added.) *See People v. Cervi*, 717 N.W.2d 356, 365 (Mich. App. 2006) (“for the purpose of” language in statute incorporates specific intent requirement); *People v. Atkins*, 18 P.3d 660, 666 (Cal. 2001) (phrases such as “with the intent” to achieve or “for the purpose of” achieving some further act require specific intent). *See also* ALI Model Penal Code § 2.02(2)(a)(I) (defendant acts purposely if “it is his conscious object” to engage in specific behavior or to bring about a specific result”). *Cf.* Syl. Pt. 4, *State v. Basham*, 159 W. Va. 404, 223 S.E.2d 53 (1976) (phrase “dishonest purpose” as contained in receiving stolen property statute is an *element of intent* which must be proven by the state beyond a reasonable doubt); *State v. Leeson*, 82 P.3d at 19 (requirement that defendant purposely or knowingly engage in the listed activities requires state to prove that defendant had

....

(c) the setting up of equipment or supplies in preparation for the criminal production or manufacture of dangerous drugs

intent to operate an unlawful and clandestine laboratory); *Matheney v. Commonwealth*, 191 S.W.3d 599, 604 (Ky. 2006) (rejecting void for vagueness challenge the Court stated, “We construe the language of KRS. 218A.1432(1)(b) that states ‘the chemicals or equipment for the manufacture of methamphetamine’ to mean that one must possess two or more chemicals or items of equipment with the intent to manufacture methamphetamine.”).

The Appellant also contends that the statute fails to set minimal guidelines to govern law enforcement. *Kolender v. Nelson*, 461 U.S. at 358. He argues that this lack of standards encourages piecemeal and arbitrary enforcement. See *State v. Lantz*, 90 W. Va. 738, 739, 111 S.E. 766, 767 (1922) (“The court and the jury create the offense. They say what shall be necessary to constitute the offense instead of confining their inquiry to whether or not the accused party has done something forbidden by the legislature.”); *Grayned v. Rockford*, 408 U.S. 104, 109 (1972) (unconstitutionally vague laws delegate nature of prohibited conduct to the police, judges and juries for resolution on an *ad hoc* or subjective basis).

This inquiry should focus on two issues: whether law enforcement can arrest a person for possession of any “chemicals or equipment” used to manufacture meth, and if they can infer intent from the possession of some of these products. For the Court to address these issues under the current set of facts would be premature. Neither were in play during the Appellant’s trial, thus this Court could not base its answer on the facts of the case at bar.

The statute does include an element of intent which the State must prove beyond a reasonable doubt in order to obtain a conviction. The jury must review all of the evidence and then decide whether the State has proven this element. This Court has not held, and the statute does specify whether a jury may infer intent from the possession of certain every-day household items. This

Court should wait until that case comes before it, before taking up the issue. Until then the Court should not set evidentiary standards, designed to address situations which have yet to occur.

Clearly, the statute does not prohibit a general category of behavior, leaving the arresting officer or the jury to determine whether the defendant's behavior falls inside the statute's prohibitions. *Lantz*, 90 W. Va. at 739, 111 S.E. at 767; *Chicago v. Morales*, 527 U.S. 41 (1999) (phrase "no apparent purpose" contained in definition of loitering in city ordinance violates second prong of void for vagueness test by vesting police officers with unchecked authority to determine whether a person's purpose is "apparent"). Unlike *Morales* where the officer had to determine if the people were gathered for no apparent purpose, W. Va. 60A-4-411 provides that the officer must reasonably believe that a suspect has assembled materials for a specific purpose, to manufacture meth. See *Morales* ("It is true, . . . that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparent harmful purpose or effect.") Before an officer may arrest a suspect the officer must have probable cause to believe that the defendant possesses chemicals or equipment used to manufacture meth, that these chemicals and equipment have been assembled, and that the suspect was the one who assembled them.¹⁵ Then the officer must then find probable cause to believe that the suspect did this

¹⁵As Trooper Goff testified, meth labs usually contain the same chemicals and equipment. Oftentimes, the combination of these chemicals and equipment in the same place suggests the intent to use them to manufacture meth.

In the same vein, the United States Supreme Court has held that fighting words are not speech as contemplated by the 1st Amendment. Even if these words are commonly used, it is the unique way in which they are combined which separates them from protected speech. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

with the intent to manufacture meth. To interpret the statute as permitting the State to arrest, prosecute and convict a defendant by proving that he assembled certain products might render the intent element redundant. See Syl. Pt. 9, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953) (“It is a cardinal rule of statutory construction that a statute should be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof[.]”).

“Probable cause has been defined as reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion.” *State v. Lilly*, 194 W. Va. 595, 601, 461 S.E.2d 101, 108 (1995). See *State v. Nitcher*, 2006 WL 2323483 (IA. 2006) (slip copy) (odors emanating from home, shuffle of person’s feet when police entered, denial of presence of obvious chemical odors constituted probable cause to believe that occupants were operating a meth lab); *State v. Bowles*, 18 P.3d 250 (Kan. App. 2001) (purchase of materials associated with the production of meth, strong odor of ether coming from residence, incredible explanation by owner of source of odor, and statements by confidential informant sufficient to establish probable cause to search for meth lab); but see *State v. Blair*, 62 P.3d 661, 666 (Kan. App. 2002) (odor of ether coming from defendant’s home not sufficient probable cause, unlike marijuana, ether is a legal product, the odor of a legally obtained product not sufficient to establish probable cause); *State v. Schneider*, 80 P.3d 1184, 1189 (Kan. App. 2003) (purchase of cold pills alone does not amount to reasonable suspicion of intent to manufacture meth).

Trooper Goff testified that he based his opinion on the totality of the circumstances. (Tr. 303.) The Court did not instruct the jury to infer intent from the mere possession of certain products and equipment. The State produced evidence that certain chemicals and equipment were found in the Appellant’s house. It introduced the testimony of three officers, all with prior experience in this

field, who stated that some of these products were modified in a manner consistent with the manufacture of meth.¹⁶ They produced evidence that some of these ordinary household products were assembled in an unusual manner. There was evidence that the arrangement of these products, such as the mason jar in the trash can, was consistent with cooking meth. The State introduced expert testimony by Trooper Goff, on the methods used to manufacture meth, and how evidence recovered from the Appellant's home was consistent with one of these methods. The State did not base its case on the possession of a mason jar, bags of matches, and some Coleman fuel.

B. THE TRIAL COURT'S QUESTIONS DID NOT INDICATE BIAS, OR PREJUDICE THE APPELLANT.

1. Standard of review.

Although the Appellant claims that the record is "replete with examples of the trial court's failure to heed the clear mandate of the law," he has only cited this Court to two examples. (Appellant's Brief at 8-9.) Under the longstanding law of this State, the Appellant has waived any further objections. *State v. Piscioneri*, 68 W. Va. 76, 77, 69 S.E. 375, 376 (1910) ("To find error if it exists, we must search through the mass of testimony and pass upon every objection and ruling therein noted. Ordinarily we would not do so. The particular evidence must be specified out of the great mass.") (citation omitted); *see also* Syl. Pt. 4, *O'Neal v. Peake Operating Co.*, 185 W. Va. 28, 404 S.E.2d 420 (1991).

Appellant has cited this Court to these two questions because he did not object to other questions propounded by the trial court. Therefore, even if this Court were to address the Appellant's unsupported contentions, it should review them for plain error. *See* W. Va. R. Evid.

¹⁶Such as the mason jar with the two rubber tubes running out of the lid, and the matchbooks with the striking covers removed.

614(c) (“Objections to the . . . interrogation [of witnesses] may be made at the time or at the *next available opportunity* when the jury is not present.”¹⁷) (emphasis added); *State v. Rogers*, 215 W. Va. 499, 504-05, 600 S.E.2d 211, 216-17 (2004) (Failure to preserve objection to trial court’s comments analyzed under plain error standard of review); *State v. Austin*, 93 W. Va. 704, 707-08, 117 S.E. 607, 610-11 (1923).

Under the plain error standard the Appellant must prove that there is an error, that is plain, and that affects the Appellant’s substantial rights. Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). An error affects substantial rights only if “the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect.” Syl. Pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996) (emphasis added).

“This court will review a trial court’s questioning of a witness under the abuse of discretion standard. To the extent the issue involves and interpretation of Rule 614(b), as a matter of law, however, our review is plenary and *de novo*.” Syl. Pt. 1, in part, *State v. Farmer*, 200 W. Va. 507, 490 S.E.2d 326 (1997).

2. Discussion.

The United States Court of Appeals for the Ninth Circuit succinctly summarized the law regarding the propriety of a trial court’s questions to a witnesses:

The law grants judges wide discretion to participate in the questioning of witnesses. It is well established that a trial judge is more than a moderator or an umpire. It is entirely proper for him to participate in the examination of witnesses for the purposes of clarifying the evidence, confining counsel to evidentiary rulings, controlling the orderly presentation of the evidence and preventing undue repetition

¹⁷“The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time assuring that objections are made in apt time to afford the opportunity to take possible corrective measures.” Advisory Committee’s Note to Fed. R. Evid. 614(c).

of testimony. The court overstep[s] the bounds of propriety and deprive[s] the parties of a fair trial, thus requiring a new trial, only if the record discloses actual bias on the part of the trial judge or leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality.

Swinton v. Potomac Corp., 270 F.3d 794, 808 (9th Cir. 2001) (citations omitted); *see also State v. Wilder*, 177 W. Va. 435, 440, 352 S.E.2d 723, 728 (1986) (to prove prejudice an appellant must establish that the trial court expressed an opinion on a matter and point out the manner in which he was prejudiced by the trial court's conduct).

In its opening charge the Court instructed the jury that they were the sole judges of the witnesses' credibility, and that they could not infer from his conduct that he favored one side or the other. (Tr. 56.) He repeated this instruction twice after all of the evidence was in. (Tr. 498, 505.) *See State v. Rogers*, 215 W. Va. 499, 505, 600 S.E.2d 211, 217 (2004) (similar instruction mitigated potential prejudice resulting from trial court's comment).

The Appellant first claims that the trial court commented on his guilt by referring to his confession as a confession. The court's characterization of the Appellant's confession as a confession was accurate.¹⁸ *See Opper v. United States*, 384 U.S. 84, 91 n.7 (1954) ("A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or some essential part of it."). The statement speaks for itself, and it is doubtful that the court's comment adversely affected the jury's understanding of the document. It would defy reason to interpret the Appellant's statement as exculpatory. It is nearly impossible to believe that a reasonable juror would interpret Appellant's admission that he had a meth lab in his apartment as exculpatory, only to be swayed by the trial court's characterization of it as a "confession." The

¹⁸A transcript of the statement is contained in the Appellant's Brief at 8. When asked whether the meth lab the troopers had found was his, the Appellant replied, yes.

court's question did not intimate that the confession was voluntary, or credible. Defense counsel thoroughly explored the voluntariness and credibility of the Appellant's statement during his case in chief. (Tr. 460-65.)

The Appellant also claims that the following exchange denied him a fair trial:

COURT: Now, I note that Exhibit 3a and 3b are recipes, so to speak.

GOFF: Yes, sir, lists of ingredients that sort of . . .

COURT: No, I assume these recipes aren't for making a cake.

GOFF: That's correct sir. Not a cake I'd want to eat.

COURT: So these recipes are consistent for making what?

GOFF: The items listed are consistent with one of the, recipes for manufacturing methamphetamine.

COURT: And anybody that possessed wouldn't have any other reason to possess it, other than *information to make meth*?

GOFF: I know of no other reason to have a list of anything involving the ingredients together, no . . .

COUNSEL: We would object to that question, that . . .

COURT: I'll note and . . .

JEROME: . . . calls for [speculation] on part of the witness.

(Tr. 308-09.)

The judge's question did not rob the Appellant of a fair trial. *See United States v. Pisani*, 773 F.2d 397, 402 (2d Cir. 1985) (judge's comments, even if better left unsaid, do not constitute sufficient grounds for reversal unless behavior was so prejudicial that it denied defendant a fair trial). The trial court asked Trooper Goff if the document's only purpose was to provide *information*

related to the manufacture of meth. It did not suggest that only meth manufacturers would possess this document. Again, the document speaks for itself. It is doubtful that any juror did not believe that a document, containing a list of ingredients which an expert witness had identified as materials used to manufacture meth served any other purpose. The Appellant did not contest the document's purpose or content; he did not suggest that it was his, but was not what it appeared to be. He denied ever seeing it before. Therefore, the document's content was less important than proof that the Appellant had possessed it. The court did not inquire on this issue.

The Appellant also claims that some of the trial court's comments towards defense counsel created an impression of partisanship favoring the State. The Appellant points to a comment made by the court outside the presence of the jury. (Appellant's Brief at 10; Tr. 291.) Taken within its context the trial court's comment was justifiable. After repetitive cross-examination of Trooper Goff, defense counsel asked him to re-examine pictures taken at the crime scene. (Tr. 287.) He then asked the trooper to explain why all 37 of the pictures mentioned in the police report were not admitted into evidence. In response to several questions Trooper Goff testified that he did not recall how many pictures he had taken, or whether others had taken pictures. (Tr. at 288-91.) The trial court called a brief recess, and advised defense counsel that he could argue about the missing pictures during his closing, but the court would not allow him to ask the trooper any further questions about the missing pictures. (Tr. 291-92.)

In fact the missing pictures were photographs of flower pots containing marijuana seeds. This evidence supported the first count of the indictment, which had been dismissed during the pre-trial suppression hearing. (8/8/05 Suppression Hr'g Tr. 134.) Defense counsel had, in fact, opened

the door to questions regarding the dismissed count. When the State asked to explore the matter further, the court prohibited it from doing so. (Tr. 299.)

The Appellant also claims that the trial court demonstrated its bias by threatening his counsel with Rule 11 sanctions. Defense counsel spent the bulk of his cross-examination of Trooper Stephenson reviewing the same set of photos he would later review with Lieutenant Goff.¹⁹ The trooper went through the pictures, repeated what they were, and if the objects depicted were moved before the pictures were taken. Trooper Stephenson had just answered these same questions during direct examination. The officer also testified that, although he was trained to recognize meth labs, he had never been trained in cooking meth, and was not a chemist. (Tr. 145.) Despite this clear testimony, defense counsel continued to question the witness about the nature of the ingredients involved in cooking meth. (Tr. 153-54.)

At this point the court admonished defense counsel:

Counsel approach the bench. Mr. Novobilski, this witness is already testified that he is not a chemist, he does not know the terminology that you're using. And, I suggest you go somewhere else in this matter. That's totally outside the scope of direct examination. It's totally inappropriate after he's testified he doesn't understand the terminology. And, if you persist in that, I going to visit Rule 11 sanctions, and we'll go back and talk about it in Chambers.

(Tr. 154.)

The trial court appropriately exercised its discretion ensuring that the Appellant's trial not be bogged down with needless repetition. The court admonished counsel at the bench, not before the jury. *See State v. Wilder*, 177 W. Va. at 440, 352 S.E.2d at 728 (comment by court that trial

¹⁹These were the same questions defense counsel asked Trooper Goff on cross-examination.

counsel was belaboring point during cross-examination did not reveal court's opinion on any material matter).

The trial court did not prevent the Appellant from cross-examining any of the State's witnesses, or presenting a defense. *See State v. Crockett*, 164 W. Va. 435, 265 S.E.2d 268 (1979) (trial court severely and repeatedly curtailed the defendant's ability to examine key witnesses on dispositive issues, thereby preventing her from fully presenting a defense). Nor is there evidence that the trial court's questions rehabilitated the witnesses. *State v. Starcher*, 168 W. Va. 144, 146, 282 S.E.2d 876, 879 (1981) (*per curiam*) ("we have recognized that it is improper for the trial court to invade the province of the jury by examining witnesses extensively and by engaging in the rehabilitation of them.") (citing *Crockett*). Trooper Goff's cross-examination re-hashed his testimony on direct. He did not alter his opinions, nor did defense counsel undermine his conclusions; therefore, there was no need to rehabilitate the witness.

Additionally, the State presented substantial evidence of guilt, including the testimony of three experienced State troopers, one certified as an expert. It proved that the substances found at the Appellant's home were consistent with manufacturing methamphetamine, it proved that arrangement of these substances was consistent with a meth lab, it introduced a lab report stating that the liquids taken from mason jars in the Appellant's home were consistent with making methamphetamine, and it introduced evidence and that objects found in the Appellant's home had been modified for the purpose of manufacturing methamphetamine.

Given the strength of the State's case, and the nature of defense counsel's cross-examination, there is no evidence that the trial court's questions resulted in prejudice or affected the Appellant's substantial rights under the plain error standard of review. This Court has approved the actions of

a trial judge in eliciting “facts material to the case” where “the examination did not indicate the judge's opinion upon any fact in issue.” *State v. Hayes*, 136 W. Va. 199, 210, 67 S.E.2d 9, 15 (1951) (citing Syl. Pt. 6, *State v. McCausland*, 82 W. Va. 525, 96 S.E. 938 (1918)).

C. BECAUSE THE APPELLANT FAILED TO PROVE BIAS, THE TRIAL COURT’S DECISION NOT TO STRIKE CERTAIN JURORS FOR CAUSE WAS NOT AN ABUSE OF DISCRETION, NOR DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT’S MOTION FOR A MISTRIAL BECAUSE OF THE BEHAVIOR OF ONE JUROR.

1. Standard of Review.

This Court has ruled that “[a] trial court’s ruling on a challenge for cause is reviewed under an abuse of discretion standard.” *State v. Phillips*, 194 W. Va. 569, 588, 461 S.E.2d 75, 94 (1995); *Doe v. Wal Mart Stores*, 210 W. Va. 664, 670, 558 S.E.2d 663, 669 (2001).

The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause. An appellate court only should interfere with a trial court’s discretionary ruling on a juror’s qualification to serve because of bias when it is left with a clear and definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Syl. Pt. 6, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

2. Discussion.

The Appellant’s last Assignment of Error claims that the trial court abused its discretion when it refused to strike certain jurors for cause. Appellant first discusses Juror Holcomb. During voir dire Juror Holcomb told the court that he worked night shift and had not slept since 12:30 p.m. the day before he was called for juror duty. (Tr. 10-11.) There was no evidence that he suffered from a physical infirmity or was under the influence of any controlled substances. He was understandably tired. Although the trial court’s decision to keep him on the panel demonstrated a marked lack of sympathy for Mr. Holcomb, it did not prejudice the Appellant. There was no evidence that this juror

was unable to perform his duties due to his lack of sleep, nor was there evidence of bias. Most importantly, the Appellant was not forced to use one of his peremptory strikes to remove Juror Holcomb: The State used one of its two strikes to remove him from the panel. (R. 476.)

Juror McLaughlin told the court that she had worked as a driver's examiner at the Clay State Police Detachment from 1993 until 2002. Although she knew one of the troopers, she testified that she could render an impartial verdict. (10/3/05 Tr. 18-19.) Appellant's counsel challenged her for cause, claiming that her position had exposed her to State troopers on a daily basis, thus disqualifying her. The trial court denied counsel's motion. (10/3/05 Tr. 40-41.)

During a second round of voir dire Juror McLaughlin again testified that she had given driver's license exams at the Clay State Police Detachment. (Tr. 38-39.) She also testified that she had been Trooper Bailey's landlord for approximately six to seven months. (Tr. 35.) She stated that she did not have a social relationship with him, but had seen him around the detachment. (Tr. 36.) Again, she testified that her previous employment would not influence her performance, that she could listen to the evidence impartially, follow the court's instructions, and render a fair and impartial verdict. (Tr. 38-39.) Raising the same grounds which the court had earlier denied, Appellant's counsel moved to strike Juror McLaughlin. Because there was no evidence of actual bias, the trial court again denied the Appellant's motion. (Tr. 41.)

The trial court's decision was not an abuse of its discretion. Neither her former employment, or her landlord-tenant relationship with Trooper Baily constituted grounds for disqualification *per se*. Therefore, it was the Appellant's burden to prove that this juror was biased. Syl. Pt. 6, *State v. Miller, supra*. The Appellant did not establish the nature and regularity of her contact with the State troopers participating in his case, or how often she communicated with Trooper Bailey while he was

her tenant. After she revealed that she had worked at the Clay Detachment, the court questioned her. She testified, without hesitation, that she could perform her duties fairly and impartially. The trial court believed her. This Court has recognized that the trial court is in the best position to assess the credibility of a potential juror's responses to questions posed on voir dire. *State v. Phillips*, 194 W. Va. at 590, 461 S.E.2d at 96.

The Appellant failed to develop any record of prejudice, and asked the court to disqualify her for speculative reasons. *See State v. Juniors*, 915 So. 2d 291 (La. 2005) (existing landlord-tenant relationship between assistant prosecutor and juror did not justify defendant's strike for cause as there was no evidence that the lease was anything but an arm's length transaction, or that the relationship required any sort of regular contact or marked familiarity between the parties); *State v. White*, 171 W. Va. 658, 301 S.E.2d 615 (1983) (juror's social relationship with state trooper not sufficient to sustain challenge for cause as evidence only proved the most casual acquaintance).

The Appellant also claims that the trial court abused its discretion by refusing to strike Juror Moore because he shook hands with Trooper Stephenson while exiting the courtroom. The juror had never met Trooper Stephenson before that day. Upon questioning by the court the juror testified that he could listen to all of the evidence, and render an unbiased verdict. (Tr. 39.) The court did not believe that this *de minimis*, contact sufficiently proved bias. (Tr. 41.) The court's decision was not an abuse of discretion.

This Court has never held that the mere exchange of pleasantries between a potential juror and a potential witness constitutes sufficient evidence to support a strike for cause. Oftentimes potential jurors, counsel, the court, and law enforcement are in close contact with each other during the course of a trial. A witness might hold a door open for a juror, or a prosecutor and a juror may

say good morning to each other. Like the handshake, these constitute mere formalities, which do not prove anything but the civility of the participants.

The Appellant argues that the handshake created an “appearance of impropriety.” Even if this Court were to accept this as true, proof of an “appearance of impropriety” is not enough. “The true test of whether a juror should be struck for cause is whether that juror can render a verdict based solely on the evidence.” *State v. Phillips*, 194 W. Va. at 588, 461 S.E.2d at 94. It is the juror’s state of mind which is relevant; how the incident appeared to others is not the issue. Indeed, the Appellant has not proven that anyone else saw this handshake.

Lastly, the Appellant claims that the trial court should have granted him a mistrial based upon Juror April Hardway’s conduct during trial. Although the Appellant claims that Juror Hardway’s conduct was so egregiously inappropriate that it rendered his trial unfair, he did not object until the trial court, *sua sponte*, raised the issue. (Tr. 212-13.) The court then called the juror into chambers. Before bringing her back the court asked both attorneys if they had any specific questions they wanted it to ask: Neither side offered any. The court told her that it had seen her laughing, and making faces towards the court during the proceedings. When it asked her if there were problems she said no. The court politely told her that it would appreciate it if she would change her behavior: she agreed to do so. (Tr. 217-18.)

The Appellant moved for a mistrial, claiming the juror’s conduct was so inappropriate that it rendered her incompetent to sit any further. The court astutely observed, “Until the court brought it up counsel had not even mentioned it and the court was concerned about it and I did bring it and I decided to take this corrective action.” (Tr. 219-20.) It then denied the Appellant’s motion. (Tr.

220-21.) The Appellant made a second motion, based on the same grounds, the next day. The court denied it again. (Tr. 357.)

A mistrial is an extraordinary remedy which should only be resorted to when there is an obvious failure of justice. The decision is left to the sound discretion of the trial court. *See State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983) (“A trial court is empowered to exercise this discretion only where there is a ‘manifest necessity’ for discharging the jury before it has rendered a verdict.”) (citations omitted). “The manifest necessity in a criminal case . . . may arise from various circumstances. Whatever the circumstances they must be forceful to meet the statutory prescription.” Syl. Pt. 2, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938); W. Va. Code § 62-3-7.

The Appellant failed to demonstrate “manifest necessity” The trial court fully explored the matter in chambers, and did not find evidence of bias. Although the juror’s conduct may have been immature or inappropriate, it did not merit the strong medicine of a mistrial.

VI.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Clay County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee, upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 17 day of August, 2006, addressed as follows:

To: Jerome R. Novobiliski, Esq.
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ROBERT D. GOLDBERG