
NO. 32773

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

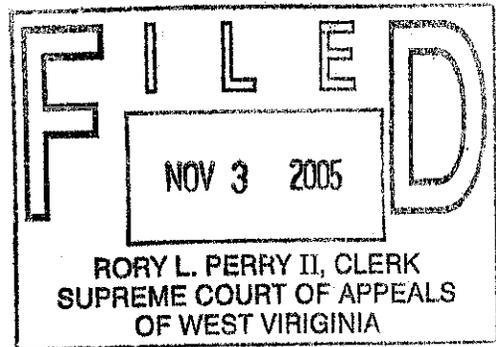
STATE OF WEST VIRGINIA,

Appellee,

v.

ALLEN D. WAUGH,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

This is an appeal by Allen D. Waugh (“Appellant”) from his December 10, 2004, judgment (re-sentencing) of the Circuit Court of Mason County (Watt, J.) of one felony count of second-degree murder. On August 24, 1999, a jury convicted Appellant of second-degree murder, and the circuit court sentenced Appellant to a definite term of 30 years in the penitentiary on May 15, 2000.

On appeal, Appellant complains that the circuit court erred by permitting a sheriff’s deputy to “serve as a bailiff” when the deputy was also a witness in his trial, and examining the mother of the victim “in an attempt to rehabilitate her credibility.”

II.

STATEMENT OF FACTS

A. **FACTUAL HISTORY.**

The relevant facts of this case are rather simple, even though they seem complex. This is so because Appellant murdered the victim, Ronald Plumley, in a bar full of witnesses, and not all of them saw the exact same things. For instance, some of the people saw the shooting,¹ and some of them only heard the gunshot,² and then saw "June bug" (the victim's nickname) crumple to the ground having just been shot by Appellant before he died.

Essentially, Ronald Plumley, the victim; his brother Shawn; and Shawn's girlfriend, Brooke, went to the Dallas Bar on the evening of December 19, 1997. It was karaoke night, and quite a number of people had gathered there for the entertainment, but also to play pool and to eat, as usual, because it was a regular neighborhood bar that served food.³ Eventually, the brothers' mother even showed up, Mrs. Mary Diane Plumley, because she wanted "to talk to them for a while."⁴

But before Appellant murdered Ronnie Plumley, Dallas Howard, the owner of the bar, had already asked Appellant to leave his bar once, because he kept trying to start a fight with Jack Vickers, a fellow who was just minding his own business down at the end of the bar. Twice

¹See, e.g., the testimony of Dallas Howard (bar owner), Tr. Vol. 3, p. 153; the testimony of Jamie Mays (bar patron), Tr. Vol. 3, pp. 180-81; the testimony of Jason Stover (bar patron), Tr. Vol. 4, p. 96; and the testimony of Donald Lambert (worked for karaoke show), Tr. Vol. 5, p. 35.

²See, e.g., the testimony of Jack Vickers (bar patron), Tr. Vol. 5, pp. 13-14.

³See, e.g., the testimony of Dallas Howard (bar owner), Tr. Vol. 3, pp. 139-43; and the testimony of Jack Vickers (bar patron), Tr. Vol. 5, pp. 4 and 8.

⁴Tr. Vol. 3, p. 103.

Appellant approached Mr. Vickers, trying to start something. So Mr. Vickers said to the owner of the bar, Mr. Howard, "Tell [Appellant] to get away and leave me alone."⁵ And that is precisely what Mr. Howard did. He told him that he wanted both Appellant and his brother, Daniel, to leave the bar. Mr. Howard believed Appellant left and came back inside after the first time of harassing Mr. Vickers. After the second time, when Appellant told his brother they had to leave, his brother got very "irate"; in fact, his brother got so mad, "[h]e jumped up on his stool and slammed his hands down on the bar. He said, 'I ain't going no F-ing place.' He jumped off his stool and started a commotion, you know, right in that area."⁶

Now during this same time, Mrs. Plumley was not far from her son, Ronnie, when the final commotion began. Ronnie Plumley, the victim, had just came up to the bar to get some quarters, because he, his brother, and his mother were playing pool. Ronnie, obviously hearing what had just occurred, said to Appellant,

"Allen, why don't you guys go ahead and leave." He said, "The man asked you to leave." He said, "[Mr. Howard] don't have no problem in this bar."

[Ronnie] said whatever you got in your pocket – because [Appellant] had his hand behind his back. He said, "Whatever you got in your pocket, just leave it in there." And [Appellant] – [Appellant] told him, he said, "Well, I've got it." And [Ronnie] said, "Well, you guys just go ahead and leave." [Ronnie] said, "Whatever you got in your pocket, just go ahead and leave it in there."

And [Appellant] took another step backwards and pulled that pistol out, both hands, just like that. I was standing right beside of Ronnie. The reason I did is because I thought [Appellant] had something. I didn't know what. Because he had his hand behind his back. He had a jacket on, black jacket, and when he pulled that

⁵Tr. Vol. 3, p. 147.

⁶*Id.*, pp. 149-50.

pistol out, he brought it around just like that and fired it. And I knew it hit Ronnie hard.⁷

Ronnie Plumley had not made any verbal threats or threatening gestures of any kind to Appellant before he shot the bullet that killed him.⁸ Appellant just shot him.

After being shot, "Ronnie grabbed at his chest . . . and stumbled forward and fell."⁹ His mother, of course, seeing her child murdered before her very eyes, "ran over and picked [him] up."¹⁰ All she could do was "h[o]ld him in [her] arms."¹¹

But after shooting Ronnie, what did Appellant do? "He just flashed his gun around through the bar like that and backed out the door and left."¹²

Even though Dallas Howard and "the karaoke woman" used CPR on Ronnie together, he died before the emergency unit arrived at the scene. How did Mr. Howard know? "[He] was doing CPR when he died."¹³

B. PROCEDURAL HISTORY.

The May 1998 Term of the Grand Jury for Mason County returned a one-count indictment charging Appellant with *Murder*, in violation of West Virginia Code § 61-2-1.¹⁴

⁷*Id.*, pp. 150-51.

⁸Tr. Vol. 3, pp. 151-52.

⁹*Id.*, p. 153.

¹⁰*Id.*, p. 111.

¹¹*Id.*

¹²*Id.*, p. 155.

¹³*Id.*, p. 156.

¹⁴See Indictment, Record ["R."], p. 1.

At the conclusion of his trial, which began on August 17 and ended on August 24, 1999, the jury found Appellant guilty of *Second-Degree Murder*, and that Appellant used a firearm in commission of the crime.¹⁵ On May 15, 2000, the circuit court sentenced Appellant to a definite term of 30 years in the penitentiary for his conviction.¹⁶

For the purpose of perfecting his appeal, the circuit court re-sentenced Appellant to the same term on December 10, 2004.

It is from this conviction and sentence that Appellant brings this appeal.

III.

ASSIGNMENTS OF ERROR

Appellant assigns the following grounds as error:

- A. The Court erred by permitting a Mason County Sheriff's Deputy to serve as a bailiff when said Deputy was a witness in the Appellant's trial.
- B. The Court erred by conducting a direct examination of a witness in an attempt to rehabilitate that witness's credibility.

¹⁵Tr. Vol. 10, pp. 75-77.

¹⁶See Sentencing Order, R. 316-18.

IV.

ARGUMENT

A. BECAUSE DEPUTY BENNETT SERVED NEITHER AS A BAILIFF NOR TESTIFIED AS A *KEY* WITNESS, BOTH OF WHICH ARE REQUIRED UNDER THE *KELLEY*¹⁷ ANALYSIS, THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION TO DISMISS THE ENTIRE JURY PANEL BEFORE THE TRIAL BEGAN.

1. The Standards of Review.

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.’ Syl. Pt. 1, *Burnside v. Burnside*, 194 W. Va. 263, 460 S.E.2d 264 (1995).”¹⁸

“Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction.’ Syl. pt. 20, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974).”¹⁹

2. Discussion.

Appellant complains “[t]he Court erred by permitting a deputy sheriff to serve as bailiff when he was also a witness in the trial.”²⁰ Most importantly, Appellant’s assignment of error does not allege a constitutional violation to due process, the parameters of which are set forth in *State v.*

¹⁷Syl. Pt. 3, *State v. Kelley*, 192 W. Va. 124, 451 S.E.2d 425 (1994).

¹⁸Syl. Pt. 1, *State v. Green*, 207 W. Va. 530, 534 S.E.2d 395 (2000) (*per curiam*).

¹⁹Syl. Pt. 4, *State v. Kelley*, 192 W. Va. at 125, 451 S.E.2d at 426.

²⁰Brief, p. 7.

*Kelley*²¹ and are cited to in Appellant's Brief.²² This point of law, embodied in Syllabus Point 3, is as follows:

A defendant's constitutional rights to due process and trial by a fair and impartial jury, pursuant to amendment VI and amendment XIV, section 1 of the *United States Constitution* and article III, sections 10 and 14 of the *West Virginia Constitution* are violated when a sheriff, in a defendant's trial, serves as a bailiff and testifies as a *key* witness for the State in that trial.²³

Because no proper error is alleged, Appellant's "issue" is a non-issue.

Should this Court deem further investigation is warranted, however, it is easily discernable that Deputy Sheriff Richard Bennett was a witness, but not a *key* witness, as is required in the *Kelley* analysis above for there to even be a *possibility* that Appellant's due process rights were violated. Deputy Bennett also must have been a *bailiff*, as is required in the *Kelley* analysis, again for there to even be a *possibility* that Appellant's due process rights were infringed upon. As will be seen below, Deputy Bennett was *not* a bailiff, and he was only a *minor* witness for the prosecution.

At trial, Deputy Bennett testified that he was the first law enforcement officer who arrived at the scene. He went inside the Dallas Bar, saw a man lying on the floor – the victim – a man he grew up with, and someone was performing CPR on him. Deputy Bennett secured the scene, ensuring the shooter was no longer inside the bar, and called for an ambulance. Eventually the EMS came and went, taking the victim out on a stretcher. Deputy Bennett then retrieved his camera from his patrol car and took a few Polaroid photographs of the scene; he also retrieved one shell casing,

²¹*supra*.

²²Brief, p. 8.

²³Syl. Pt. 3, *Kelley* (emphasis added).

which he bagged and marked using proper police procedure. During that time, he also took statements from two witnesses.

But, as soon as the police investigator, Deputy Carl Peterson, arrived, Deputy Bennett turned over everything he had collected: the photographs, the shell casing, and the statements. Thereafter, Deputy Bennett had nothing else to do with Appellant's case.²⁴

However, before the trial began, defense counsel objected to the entire jury panel summoned to the courtroom based on the allegation that Deputy Bennett

appeared to be serving as a bailiff to [the] jury. In fact, [defense counsel] observed him escort at least one jury member into the jury room. Also noticed that he was operating the metal detector in front of the courtroom. And [Deputy Bennett] was listed by the State as a witness in [the] case.²⁵

An *in-camera* hearing was held regarding this matter long before Deputy Bennett was permitted to take the stand. The following is the relevant testimony of Deputy Bennett during this hearing – both the direct and cross-examination.

DIRECT EXAMINATION

THE COURT: And Deputy Bennett, you were in the Mason County Courthouse this morning?

THE WITNESS: Yes, sir.

THE COURT: And were you there in this courthouse when the jurors that had been called to report began to come in to the courtroom?

THE WITNESS: Yes, sir.

THE COURT: Tell me what happened, Deputy Bennett.

²⁴See generally, Deputy Richard Bennett's Trial Testimony, Tr. Vol. 2, pp. 30-50.

²⁵Tr. Vol. 1, p. 41 (emphasis added).

THE WITNESS: I was told to set up the metal detector outside of the doors. So I set it up.

THE COURT: Who told you to do that?

THE WITNESS: I think it was Danny Pearson said that it had been requested that I set up the metal detector.

THE COURT: He didn't say who requested that?

THE WITNESS: No, he didn't. Not that I can recall.

THE COURT: Did you set it at the entrance to this courtroom?

THE WITNESS: Yes, sir.

THE COURT: Do you remember if any jurors passed through that detector?

THE WITNESS: No, sir. I didn't run any jurors through the detector.

THE COURT: None at all?

THE WITNESS: Not through the detector.

THE COURT: Well, I take it the jurors come to this courtroom while you had the detector?

THE WITNESS: They were sitting in the hallway.

THE COURT: Did you tell them to sit in the hallway or did they just sit on the chairs?

THE WITNESS: They were sitting in the chairs there. It got to be quite a few of them. So I took them down there to the jury room.

THE COURT: And left them?

THE WITNESS: Right. I took them to the jury room. And once it got filled, I put the rest in the law library.

THE COURT: Is that the extent of what you did?

THE WITNESS: Yes, sir.

THE COURT: Did you give them any orders or anything like that?

THE WITNESS: No. I just told them if they were jurors, to go down to the end of the hallway, last door on the right.

THE COURT: That's what you did?

THE WITNESS: Yes, sir.

THE COURT: All right. Cross?

PROSECUTOR: No, Your Honor.

THE COURT: Cross?

CROSS-EXAMINATION

BY DEFENSE COUNSEL:

Q. I understand, Deputy Bennett, that you personally escorted them down, at least some of them?

A. I walked some of them down to the jury room, yes.

Q. Individually as well as groups? .

A. No. There was one big group. They were all standing out in the hallway. I think there was enough to fill up the jury room. Then I walked the rest of them to the law library.

Q. Two different groups? One group? You split up on your way?

A. There was one group. In the first group was big enough to get into the jury room. And then everybody else that come, I just directed them to the law library. Down the hall, last door on your right.

Q. Assist them in getting coffee, water?

A. No. Not this morning I didn't, no.

THE COURT: Wasn't any coffee, was there?

THE WITNESS: I'm not sure. I didn't.

THE COURT: When I got to work, there wasn't any.

THE WITNESS: I got me some water. But that's about it.

THE COURT: Go ahead.

BY DEFENSE COUNSEL:

Q. Did you enter the jury room with that group of jurors?

A. No. I stepped – I was outside of the door. I just told them, “There is the jury room. You all have you a seat.”

Q. The law library where you escorted that group of jurors, did you enter the law library while it was occupied by other jurors with any juror?

A. No, sir. Like I said, I stood at the end of the hall. I said, “It's down the hall, last door to your right.”

DEFENSE COUNSEL: That's all the questions I have.

THE COURT: Any?

PROSECUTOR: No questions.²⁶

Directly thereafter, Appellant renewed his motion to “dismiss the panel[,]”²⁷ the prosecutor objected,²⁸ and the circuit court correctly denied the motion.²⁹

Thus, from the facts above, Deputy Bennett served neither as a bailiff nor testified as a *key* witness, *both* of which are required in the *Kelley* analysis. As such, this Court should find that the

²⁶Tr. Vol. 1, pp. 130-34.

²⁷*Id.*, p. 134.

²⁸*Id.*

²⁹*Id.*

circuit court did not abuse its discretion by denying Appellant's motion to dismiss the entire jury panel.

B. APPELLANT WAIVED HIS RIGHT TO RAISE AN OBJECTION ON APPEAL TO ANY IMPROPRIETIES THE CIRCUIT COURT MAY HAVE MADE IN QUESTIONING THE VICTIM'S MOTHER BY FAILING TO INTERPOSE A CONTEMPORANEOUS OBJECTION AT TRIAL.

1. The Standards of Review.

Generally, the standard of review for an Appellate Court would be as follows.

A trial court must exercise its sound discretion when questioning a witness pursuant to Rule 614(b) of the West Virginia Rules of Evidence. This Court will review a trial court's questioning of a witness under the abuse of discretion standard. To the extent the issue involves an interpretation of the Rule 614(b) as a matter of law, however, our review is plenary and de novo.³⁰

But because Appellant did not object to the circuit court's examination of Mrs. Plumley, the mother of the victim, the standard is based on plain error review.

To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Under the 'plain error' doctrine, 'waiver' of error must be distinguished from 'forfeiture' of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right – the failure to make timely assertion of the right – does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is 'plain.' To be 'plain,' the error must be 'clear' or 'obvious.'

Assuming that an error is 'plain,' the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the

³⁰Syl. Pt. 1, *State v. Farmer*, 200 W. Va. 507, 508, 490 S.E.2d 326, 327 (1997).

outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.³¹

2. Discussion.

Ordinarily, a defendant who has not proffered a particular claim or defense in the circuit court may not unveil it on appeal.

Indeed, if any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, *legal theories not raised properly in the lower court cannot be broached for the first time on appeal*. We have invoked this principle with a near religious fervor.³²

This principle is based on the theory that errors or potential errors are best remedied in the circuit court of jurisdiction, if objected to there.

As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.³³

Additionally, some defense attorneys “neglect” to raise a contemporaneous objection as part of an overarching trial “strategy” designed to prejudice their client and ensure appellate review.

The raise or waive rule was explained in *Wimer v. Hinkle*³⁴ as part of a design ‘to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error.’

³¹Syl. Pts. 7, 8, and 9, *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (1995).

³²*State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996) (emphasis added).

³³*State v. Guthrie*, 205 W. Va. 326, 343, 518 S.E.2d 83, 100 (1999) (quoting Syl. Pt. 17, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974)).

³⁴180 W. Va. 660, 663, 379 S.E.2d 383, 386 (1989) (citation footnoted for ease of reading).

Additionally, we noted in *State v. LaRock*³⁵ that the raise or waive rule seeks to 'prevent[] a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result).'³⁶

For these reasons, this Court should refrain from considering Appellant's alleged error, as he failed to make any timely objection at trial as is required by both the rules of this State and laws of this Court.

However, should this Court decide further review of this issue is necessary, the State offers the following for its edification.

Appellant alleges that "[t]he Court erred by conducting a direct examination of a witness in an attempt to rehabilitate that witness' credibility."³⁷ But,

"A trial judge in a criminal case has a right to control the orderly process of a trial and may intervene into the trial process for such purpose, so long as such intervention does not operate to prejudice the defendant's case. With regard to evidence bearing on any material issue, including the credibility of witnesses, the trial judge should not intimate any opinion, as these matters are within the exclusive province of the jury." Syl. Pt. 4, *State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979).³⁸

The plain language of Rule 614(b) of the West Virginia Rules of Evidence authorizes trial courts to question witnesses--provided that such questioning is done in an impartial manner so as to not prejudice the parties.³⁹

³⁵196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (alteration in the original) (citation footnoted for ease of reading).

³⁶*Guthrie* at 344, 518 S.E.2d at 101.

³⁷Brief, p. 10.

³⁸Syl. Pt. 2, *Farmer, supra*.

³⁹Syl. Pt. 3, *Id.*

In an attempt to discredit the mother of the victim, Mary Diane Plumley, Appellant did recall Mrs. Plumley's statement that she had given the authorities less than three hours after her son had been brutally shot and killed, an event that she had witnessed before her very eyes. Specifically, Appellant tried to find an inconsistency between what Mrs. Plumley told Deputy Peterson in her distressed condition and what she was currently testifying to regarding seeing the gun Appellant whipped from behind him, which was hidden beneath his jacket -- the gun which, in the very next moment, Appellant shot her son. This one shot killed her son very shortly thereafter, and his grieving mother still accompanied her son to the hospital. In his Brief, Appellant recited to her, recalling those terrible memories, what she told police, but Appellant conveniently failed to include some of the most important parts of her statement to the investigating officer, Deputy Peterson. Interesting.

The following is what Appellant included in his Brief from her statement to police.

Q. "No, I didn't see the gun. I just seen [Appellant] when he was reaching back to get it."⁴⁰

The following is what Appellant conveniently excluded from his Brief; the lines are *directly after* the lines Appellant cited above.

Q. cont. "And I was trying to get to him. Because I figured that's what it was[, a gun]."⁴¹

In the transcript of the record, the following exchange came *directly after* the words quoted by Appellant above.

⁴⁰Brief, p.10; Tr. Vol. 3, 122.

⁴¹Tr. Vol. 3, p. 122.

Q. cont. So you told Deputy Peterson you didn't see a gun within three hours after your son was shot, right?

A. I mean, you know, seeing your son lying there dead, you know, then that soon.⁴²

Furthermore, in between portions of the record Appellant cites to in his Brief, Appellant once again directs Mrs. Plumley to the statement she gave to the investigating officer. But the following portion of the record, wherein Mrs. Plumley states she saw the gun Appellant used to murder her son, Appellant conveniently failed to place in his Brief.

Q. I think you said to Deputy Peterson on December 20, 1997, that you walked up to the bar and stood between your son and Jack Vickers and ordered a drink. "I [Mrs. Plumley] was sitting there drinking it and my son [the victim] told me to move. I told him I was just standing there drinking my drink. And he winked his eye at me and told me to move. So I stepped down to the end of the bar. And then my son turned around, faced away from the bar and kind of stepped out from the bar. And the next thing I knew, [Appellant] had took a gun out." Do you remember telling Officer Peterson that on December 20, 1997, at the emergency room?⁴³

So Appellant inserts into his Brief only minimal portions of the record that make it *appear* as though the distraught mother of the victim, a woman who had just witnessed the brutal murder of her son, gives somewhat inconsistent testimony. But that was in her statement – when she was obviously upset by the shooting and killing of her son, which she had witnessed at the hands of Appellant. Mrs. Plumley's testimony *in reality* was not inconsistent, because on the second of the two pages she did see the gun, and at trial she recalled when "[Appellant] pulled a gun and shot [her] son."⁴⁴ Appellant played mind games with Mrs. Plumley during cross-examination in an attempt to

⁴²*Id.*

⁴³*Id.*, p. 123.

⁴⁴Tr. Vol. 3, p. 109.

discredit her. And then Appellant skewed his Brief to make it seem as though she never did see the gun with which Appellant shot and killed her son. Again, interesting.

Appellant then continues to complain of other apparent, yet irrelevant, inconsistencies regarding what Mrs. Plumley heard and where Mrs. Plumley was standing the night she witnessed her son's brutal murder at the hands of Appellant. He did all of this before finally coming to the kernel of his allegation – Assignment of Error “B.”⁴⁵

Appellant cites to three cases in his Brief he claims support his position that the circuit court allegedly erred by questioning Mrs. Plumley, the mother of the victim, in what he called “an attempt to rehabilitate [her] credibility.”⁴⁶ (In all actuality, when read in context with the appropriate portion of the record, the circuit court more than likely questioned Mrs. Plumley in an attempt to make her feel better from just being “beaten-up” on the stand, as it were, by defense counsel.⁴⁷) One of the cases Appellant cites to is a civil, rather than criminal, case,⁴⁸ one of them supports his rehabilitation issue in *dicta*,⁴⁹ and one of them concerns a circuit court's *comments* during trial rather than the *questioning* of a witness.⁵⁰

The circuit court's questioning of Mrs. Plumley was not rehabilitative, as Appellant suggests in his Brief, because the circuit court's questions primarily dealt with Mrs. Plumley herself and with

⁴⁵See Section III. Assignment of Errors.

⁴⁶Brief, p. 10.

⁴⁷For Diane Plumley's *complete* trial testimony, see Tr. Vol. 3, pp. 101-35.

⁴⁸*Alexander ex rel. Ramsey v. Willard*, 208 W. Va. 736, 542 S.E.2d 899 (2000).

⁴⁹*State v. Starcher*, 168 W. Va. 144, 282 S.E.2d 877 (1981).

⁵⁰*State v. Crockett*, 164 W. Va. 435, 265 S.E.2d 268 (1979).

the murder of her son in only the most basic fashion. Indeed, the questions asked by the circuit court seemed primarily designed to make Mrs. Plumley feel better about herself, as the mother of the victim, given the fact defense counsel had berated her so harshly on cross. The following are the extent of the circuit court's questions of Mrs. Plumley, mother of the murder victim:

THE COURT: All right, Mrs. Plumley, I want to ask you some questions. What is the date of your birth?

THE WITNESS: 10/15/53.

THE COURT: Wait a minute now. Ten what?

THE WITNESS: How old were you on this night of December?

THE WITNESS: Forty-three.

THE COURT: And do you have additional sons as well as Shawn and your son that was killed? Do you have any more boys?

THE WITNESS: No, sir.

THE COURT: On that December day, do you recall what time you got up in the morning? The usual time?

THE WITNESS: Yes.

THE COURT: What time was that?

THE WITNESS: About between 7:00 and 7:30.

THE COURT: What time?

THE WITNESS: 7:00, 7:30.

THE COURT: Okay. Did you do your housework that day? What did you do on that day? Do you work?

THE WITNESS: No. I was living with my cousin at the time.

THE COURT: All right. And I think you told me but I lost my notes. About what time did you get down to the bar?

THE WITNESS: Between 10:30 and 11:00.

THE COURT: All right. And the shooting occurred when to your best knowledge?

THE WITNESS: Five till 1:00.

THE COURT: Almost 1:00?

THE WITNESS: Yes, sir.

THE COURT: You had been down there a couple hours, right?

THE WITNESS: Yes, sir.

THE COURT: And in that process – and I hate to remind you – you lost a son, didn't you?

THE WITNESS: Yes, sir.

THE COURT: Saw your son shot down, is that right?

THE WITNESS: Yes, sir.

THE COURT: You went to the hospital?

THE WITNESS: Yes, sir.

THE COURT: With your son?

THE WITNESS: Yes, sir.

THE COURT: I dare say you prayed on the way?

THE WITNESS: Yes, sir.

THE COURT: And how long was your son in the hospital before they told you that he was dead? Got any idea?

THE WITNESS: It was about an hour and a half to two hours.

THE COURT: Then the officer, the deputy began to quiz you and ask you questions?

THE WITNESS: Yes, sir.

THE COURT: How long had your son been dead when the officer questioned you? Hour? Two hours? What would you tell me?

THE WITNESS: I'd say between three hours.

THE COURT: Were you possessed at that time of all you faculties in view of what you went through?

THE WITNESS: I don't understand the question.

THE COURT: All right. Did you know everything you were saying when you tried to answer the deputy's questions?

THE WITNESS: I did the best I could do.

THE COURT: Pardon?

THE WITNESS: I did the best I could do.

THE COURT: Well, were you level headed and calm and collected?

THE WITNESS: Not with my son lying there dead, no.

THE COURT: Did the deputy offer to question you later after you could go home and get some rest and get your head screwed on right?

THE WITNESS: When he took me to the room, I asked him if I could wait until the next morning. And he said no.

THE COURT: It had been -- what is it, about 20 hours since you got any rest? You got up at 7:00 and he questioned you at 3:00.

THE WITNESS: Yes, sir.

THE COURT: All right. That's all the questions I have.⁵¹

⁵¹Tr. Vol. 3, pp. 131-34.

The circuit court's questions certainly did not prejudice Appellant. They did not lead Mrs. Plumley into answering in any way about anything she saw or heard that could or would affect the outcome of Appellant's trial. The prosecution had sufficient evidence to convict Appellant of the charges against him; namely, a plethora of witnesses, besides the victim's own mother, who saw Appellant shoot the victim⁵² – and it was that one shot by Appellant that ultimately killed Ronald Plumley, the victim.

Moreover, Appellant even used the circuit court's questioning of Mrs. Plumley during his closing to illustrate her emotional state and attempt to show how unreliable her testimony was at trial. "You heard the Judge ask her some questions about *how distraught she was that night over this event that happened to her son.*"⁵³ So clearly, Appellant, who made no objections at trial and who used this argument in closing, knew *precisely* what the circuit court was doing by asking Mrs. Plumley the questions it did.

One last point, *Simon v. United States*⁵⁴ illustrates an important point about the role of judges during a trial – he is not merely a moderator; he sits to see that justice is done. Though *Simon* is not on point, and though it is a Fourth Circuit Court of Appeals case out of the Southern District of West Virginia speaking of the role of a federal judge, the message still rings true.

Appellant's counsel strenuously complains that the trial judge questioned the witnesses from time to time in an effort to bring out the facts of the case. This is precisely what he should have done. It cannot be too often repeated, or too strongly

⁵²See, e.g., the testimony of Dallas Howard (bar owner), Tr. Vol. 3, p. 153; the testimony of Jamie Mays (bar patron), Tr. Vol. 3, pp. 180-81; the testimony of Jason Stover (bar patron), Tr. Vol. 4, p. 96; and the testimony of Donald Lambert (worked for karaoke show), Tr. Vol. 5, p. 35.

⁵³Tr. Vol. 10, p. 35.

⁵⁴123 F.2d 80 (1941).

emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other. In no case is the exercise of this power of the judge more important than in one like this, involving, as it does, lengthy circumstantial testimony, the force of which may be lost upon the jury if it is not properly presented or if its salient features are not called to the jury's attention at the time. *The judge is the only disinterested lawyer connected with the proceeding. He has no interest except to see that justice is done, and he has no more important duty than to see that the facts are properly developed and that their bearing upon the question at issue are clearly understood by the jury.*⁵⁵

With this ideology in mind, and for the foregoing reasons, this Court should find that the circuit court did not abuse its discretion by questioning Mrs. Plumley, the mother of the murder victim, especially in lieu of the fact Appellant failed to raise any contemporaneous objection.

⁵⁵*Simon v. United States*, 123 F.2d at 83 (emphasis added).

V.

CONCLUSION

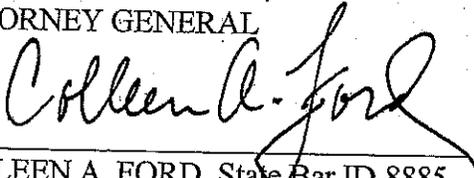
For the foregoing reasons, this Court should affirm the judgment of the Circuit Court of
Mason County.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

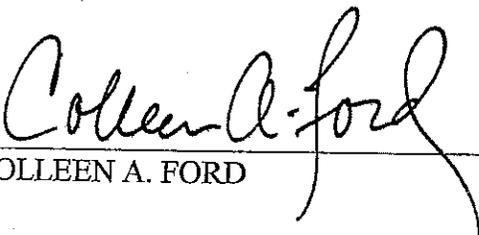


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee State of West Virginia* was mailed to counsel for Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 3 day of November, 2005, addressed as follows:

To: Kevin W. Hughart
P.O. Box 13365
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