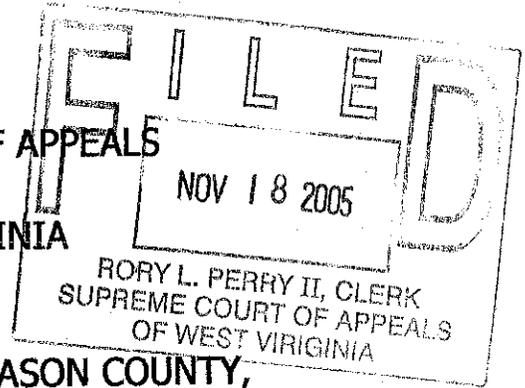


CASE NO. 051014

IN THE SUPREME COURT OF APPEALS
OF THE
STATE OF WEST VIRGINIA



FROM THE CIRCUIT COURT OF MASON COUNTY,

WEST VIRGINIA

CASE No. 98-F-21

STATE OF WEST VIRGINIA
Appellee,

VS.

ALLEN D. WAUGH,
Appellant.

**APPELLANT'S RESPONSE TO
BRIEF OF APPELLEE STATE OF WEST VIRGINIA**

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TABLE OF AUTHORITIES

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Wimer v. Hinkle, 180 W.Va. 660, 663, 379 S.E.2d 383, 386 (1989)

West Virginia Rules of Evidence, Rule 614(b)

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**APPELLANT'S RESPONSE TO
BRIEF OF APPELLEE STATE OF WEST VIRGINIA**

ARGUMENT

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

Appellee presents the premise that the Deputy was not a key witness as is required in the *Kelley* analysis. In *State v. Kelley*, 192 W.Va. 124, 451 S.E.2d 425 (1994), the Sheriff was one of the first officers on the scene and when State Trooper David Garrett arrived, the Sheriff turned the investigation over to him and left the scene. In the instant case, Deputy Sheriff Richard Bennett was also the first officer on the scene and when Deputy Sheriff Carl Peterson arrived, Deputy Bennett turned the investigation over to Deputy Peterson. In *Kelley* the Sheriff was still considered to be a key witness, even though he did not conduct

the investigation of the crime. The circumstances in the instant case are basically the same. In *Kelley*, the Court found that it could not say the Sheriff was a minor witness for the prosecution. The same can be said for Deputy Sheriff Richard Bennett. He was a crucial witness for the State of West Virginia and he does fall in the category of a "key witness" as set forth in *Kelley*.

Deputy Sheriff Richard Bennett, may not have performed the duties of a bailiff, *per se*, however, he had substantial contact with the jurors. In fact, pursuant to Deputy Sheriff Bennett's testimony in the *in camera* hearing, he had contact with almost every juror on the panel. Deputy Bennett said, "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." Deputy Bennett went on to say, "I took them to the jury room. And once it got filled, I put the rest in the law library." Deputy Bennett had substantial contact with the jurors and it is highly improbable to think that his contact with the jurors did not cause some or all of the jurors to place more credibility on his testimony than any other witness the State of West Virginia produced and used in the trial of this case.

B. RESPONSE TO APPELLEE'S ARGUMENT "B" WHEREIN APPELLEE STATES, "APPELLANT WAIVED HIS RIGHT TO RAISE AN OBJECTION ON APPEAL TO ANY IMPROPRIETIES THE CIRCUIT COURT MAY HAVE MADE IN QUESTIONING THE VICETIM'S MOTHER BY

FAILING TO INTERPOSE A CONTEMPORANEOUS OBJECTION AT TRIAL."

It is true that trial counsel for Appellant did not object to the circuit court judge's questioning of the witness. However, this Court has stated in State v. Miller, 194 W.Va. 3, 459 S.E.2d 114, (1995), "In the seminal case of United States v. Olano, 507 U.S. 725, ----, 113 S.Ct. 1770, 1776-79, 123 L.Ed.2d 508, 518-21 (1993), the Supreme Court defined plain error as: (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." This case satisfies this four prong test for plain error in that, it was plain error for the presiding judge to attempt to rehabilitate the witness. Further, it affected the substantial rights of the Appellant and seriously affected the fairness, integrity and public reputation of the judicial proceedings in that a fair trial could not be had because the presiding judge took it upon himself to make a witness appear to be a better person in the eyes of the jury than what she appeared to be after trial counsel's examination.

Appellee refers to the "raise or waive rule" as explained in Wimer v. Hinkle, 180 W.Va. 660, 663, 379 S.E.2d 383, 386 (1989). In this case, it would be impossible for the trial judge to correct the potential error, even if trial counsel had objected to the judge's questioning of the witness. This is one of those instances where the harm was already done as soon as the judge started

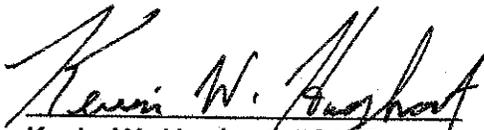
questioning the witness. The witness' credibility was enhanced immediately upon the judge's questioning the witness because it would appear to the jury that the judge, in his inherent credibility and authority, saw a credibility in the witness that trial counsel had been trying to destroy through his line of questioning.

Appellee states "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." It is not the place of the Appellee to determine the reason the judge questioned the witness. However, if in fact the judge was attempting to make the witness "feel better" he was also rehabilitating her in the sight of the jury. Caring about how a witness feels, has no part in a fair and impartial trial. A jury of twelve should be able to determine if a witness is telling the truth without a trial judge attempting to rehabilitate the witness when she had just been "beaten up" as Appellee says, by counsel. Judicial conduct of this nature is exactly why Rule 614(b) of the West Virginia Rules of Evidence provides that a trial court judge can question a witness provided "[T]he court's interrogation shall be impartial so as not to prejudice the parties." Questioning a witness in an attempt to rehabilitate that witness or as the Appellee would like this Court to believe, questioning the witness "in an attempt to make her feel better", is not impartial and is prejudicial.

There is a distinct difference in a trial court judge questioning a witness in an effort to bring out the facts of a case and in questioning a witness in an effort to rehabilitate the witness.

CONCLUSION

THEREFORE, for the reasons set forth in the Brief of the Appellant and this Response, this Court should remand this case to the Mason County Circuit Court and grant the Appellant a fair and impartial trial.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
Appellee,

vs.

Appeal No. 32773
(From the Mason County Circuit
Court, Civil Action No. 98-F-21)

ALLEN D. WAUGH,
Appellant.

CERTIFICATE OF SERVICE

I, Kevin W. Hughart, hereby certify that I have served the Appellant's
Response to Brief of Appellee State of West Virginia on the 16th day of
November 2005, by First Class, United States Mail to the following persons.

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