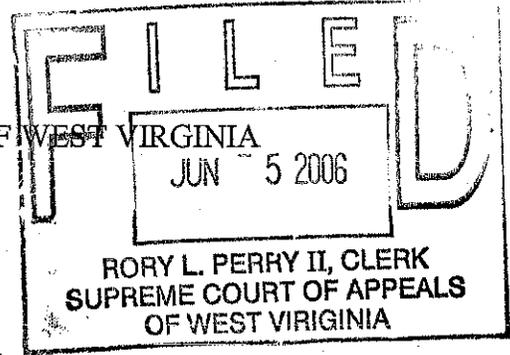


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

Supreme Court No. 33039

v.

Circuit Court No. 01-F-85-M
(McDowell)

ANTHONY RAY WHITT,

Appellant.

APPELLANT'S BRIEF

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1 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, § 5-2(c),
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Richard P. Conti, The Psychology of False Confessions, The Journal of Credibility Assessment
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There is a strong likelihood the jury convicted an innocent man in this case. With his father by his side, 22 year-old Anthony Ray Whitt (Whitt) walked into the McDowell County Sheriff's Office on February 3, 2001, and falsely confessed to killing Dorothy Mitchell, his father's mistress. The likelihood that Whitt's confession was not false is very remote as Whitt and Dorothy Mitchell had a close, mother-son relationship, and dearly loved each other. Whitt, a naïve and gullible young man, unfortunately, had just fallen in love with Dorothy's killer, Lori Day, his girlfriend, described by Whitt as his first love and the love of his life. Whitt falsely confessed to protect Day after Day convinced him she accidentally killed Dorothy. Day was described by one of her relatives at trial as a very dangerous liar.

At Whitt's trial for first degree murder in McDowell County Circuit Court, it was undisputed Lori Day developed a strong animosity toward Dorothy Mitchell after Day moved into Whitt's bedroom at the War Drive-In in November 2000. Day's hatred and anger resulted from her having to do household chores Dorothy designated and a phone call Dorothy received from Day's sister-in-law concerning Day's children and her unfitness as a parent, which Dorothy reported to others in the Whitt household. Shortly before the homicide on January 29, 2001, Day told no less than three people that if Dorothy didn't get off her back she was going to take something and knock her brains out.

On the night of the homicide, Lori Day followed through on these threats, and Whitt discovered Day in Dorothy's bedroom, with Dorothy's body wrapped in a blanket. Day told Whitt she accidentally killed Dorothy as a result of an argument. Unfortunately, Whitt, blinded by his love for Day, believed her. Whitt wanted to call 911, but Day convinced him not to, telling him she was pregnant with his child and they would hurt her if he did. Instead, Day

persuaded him to help her dispose of the body which they took to a remote place in Mercer County. During these events, Whitt was so upset that he got sick twice and vomited because, as he related at trial, someone he loved was killed by someone he loved.

Over the next few days, Whitt and his father were very upset and Whitt tried to get Day to confess, but she refused and convinced him to confess. Five days after the homicide, Whitt decided to take the blame and falsely confessed to killing Dorothy because everybody was hurting, Day was not going to confess, he loved Dorothy, and he wanted her to have a proper burial.

Whitt's false confession, that he shook Dorothy, then choked her, and she fell out of bed and hit her head, was completely inconsistent with the actual cause of death, blunt force trauma to the head. When Whitt found out the actual cause of death, he knew that Day had lied to him and he had been tricked and fooled. Whitt had his attorney contact the State Police and he gave another statement explaining what really happened.

Whitt's innocence and testimony that Lori Day alone killed Dorothy was further corroborated by three persons to whom Day confessed. Two of the individuals, Jennifer Ray and Jessica Mullens, were inmates at the Southern Regional Jail with Day. Both testified Lori Day told them she hit Dorothy in the head with a baseball bat and Whitt did not have anything to do with the murder, except for covering it up. Ray also said Lori Day told her that Whitt was so in love with her that she could convince him to do anything for her. Day further confessed to Tina Ashworth, Whitt's brother's girlfriend.

Lori Day also confessed to her cousin, Donna Brewster, but told her a different story, implicating Whitt. The trial court erroneously found Day's statements to Brewster to be statements against penal interest under West Virginia Rule of Evidence (W.V.R.E.) 804(b)(3).

Over objection of defense counsel, Brewster was permitted to testify that Day told her that she (Day) and Whitt killed Dorothy and that Whitt hit Dorothy in the head with a baseball bat. Day's prejudicial hearsay statements implicating Whitt were the only evidence to corroborate the autopsy finding that the victim died from blunt force trauma to the head.

To establish his innocence, Whitt subpoenaed co-defendant Lori Day as a witness. During voir dire, Day was brought out of the witness room and introduced to the jury as a potential witness. When Whitt tried to call Day as a witness, Day invoked the Fifth Amendment but was advised by the trial court she did not have a privilege against self-incrimination because she was previously acquitted of the murder and had been granted complete immunity from prosecution. After Day said she would not testify, Day was found in contempt and jailed. The trial court refused to permit Whitt to call her to the stand as a witness. Whitt was thereby denied his constitutional rights to compulsory process, to present a defense, and to confront his accusers.

On October 10, 2002, the jury found Whitt guilty of second degree murder. The trial court subsequently sentenced Whitt to forty (40) years in prison.

STATEMENT OF FACTS

The evidence in this case strongly indicates that Whitt did not commit this murder. It was undisputed at trial that Anthony Whitt (Whitt) and the victim, Dorothy Mitchell, his father's mistress, had a loving, mother-son like relationship. (Trial Transcript (Tr.), Volume (Vol.) II 25, 147-48, 150-51, 173) (Tr. Vol. III 73-74). Dorothy cared for and helped raise Whitt from birth. (Tr. Vol. II 25) (Tr. Vol. III 147-49, 198-200). Whitt and other witnesses testified he and Dorothy were close; they loved each other; they never argued; they always greeted each other with a hug and a kiss; and that Whitt was always doing things for Dorothy and taking her places. (Tr. Vol. II 26, 147-52, 173, 205-06) (Tr. Vol. III 73-74, 200-03). Even the night of the homicide, Whitt made two special trips outside the home to get water and kerosene for Dorothy. (Tr. Vol. III 230-39).

About three months before Dorothy's death on January 29, 2001, another woman, Lori Day, came into Whitt's life. Day was Whitt's first girlfriend with whom he had fallen in love. Whitt described their relationship as something special and believed Day was the love of his life. (Tr. Vol. III 255). Day moved into Whitt's bedroom at the War Drive-In where Whitt and his brother, Everett Whitt Jr., lived about a month and a half or two months before Christmas. (Tr. Vol. II 122, 151, 195). Dorothy Mitchell also came to live at the Drive-In around the Christmas holiday as it was difficult to travel the road to her house during the winter. (Tr. Vol. II 7).

Lori Day's relationship with Dorothy was just the opposite of Whitt's. Dorothy expected Day to do household chores such as washing dishes and Day became very upset and angry with Dorothy over it. (Tr. Vol. II 64-66, 207-09) (Tr. Vol. III 46-47, 213, 222). Two weeks before the homicide, Day complained about having to do the dishes to Whitt's sister, Polly Whitt, and told Polly "if that damned old woman [Dorothy] didn't leave me alone, I'm going to knock her

brains out.” (Tr. Vol. II 207-08). On January 28, 2001, less than 24 hours before the homicide, Day similarly complained to Deborah Hall, a neighbor, about Dorothy and the household chores and stated she was going “to do something about it.” (Tr. Vol. III 46-48).

Day was further upset with Dorothy over a phone call the latter received on January 23, 2001, from Day’s sister-in-law in North Carolina concerning Day’s children which Dorothy reported to others in the household. (Tr. Vol. II 154-56) (Tr. Vol. III 24, 217-18). According to Bobby Frazier, a neighbor who was present, Dorothy asked Day how she could be an unfit mother and Day became angry at Dorothy, was crying, and said if she had her way she would go down there and kill the whole f’ing bunch. (Tr. Vol. III 24-25). That same day, Day wrote Whitt a letter, Defendant’s Exhibit One, in which she said she had had her limit and “would you please have a talk with that bitch [Dorothy] and tell her to stay off of my ass before I flip completely out.” (Tr. Vol. III 222).

On Sunday, January 28, 2001, before the homicide that night, Lori Day came to the trailer beside the Drive-In where Ed Pierson and Bobby Frazier were watching the Super Bowl football game and was crying and carrying on about Dorothy. (Tr. Vol. III 127-29). Pierson said Day told him “she was going to take something and beat her [Dorothy’s] brains out. She was going to knock her G.D. brains out.” (Tr. Vol. III 129). Frazier also testified Day was angry, had tears in her eyes, and said “if Dorothy doesn’t get off my f’ing back and let me alone, I’m going to knock her f’ing brains out.” (Tr. Vol. III 27-30).

On the night of the homicide, Whitt and Day went to bed around 2:00 a.m., had sex, and Day left the bedroom to go to the bathroom. Whitt fell asleep for what he thought was 15 to minutes and when he awoke Day was not there so he went looking for her. (Tr. Vol. III 242, 244). Whitt found Day in Dorothy’s bedroom by her bed putting clothes in garbage bags and

Dorothy was lying in the floor wrapped in a blanket. (Tr. Vol. III 244, 250-52). Day told Whitt she and Dorothy were arguing over Day's children, and that she had accidentally killed Dorothy. (Tr. Vol. III 252). Although Whitt said he believed Day's statement it was an accident, he wanted to call an ambulance. Day told him "no, I am pregnant with your baby," and that "they will hurt me if you do." (Tr. Vol. III 254-55). Whitt felt awful, cried, got sick, and went to the bathroom and vomited. (Tr. Vol. III 259-60). Day persuaded Whitt not to call the rescue squad as he thought Day was having his child, believed her statement it was an accident, and "didn't know exactly what to do." (Tr. Vol. III 257). Day convinced Whitt to help her take the body to a place to dispose of it. However, after they took the body outside to the car, Whitt got sick again and vomited. (Tr. Vol. III 259). At Day's suggestion, they took the body to a trash dump in Mercer County, along with trash bags of Dorothy's clothes. (Tr. Vol. III 257, 263-65). Whitt did not want to leave Dorothy there, but Day persuaded him otherwise. (Tr. Vol. III 265).

Day made up a story that Dorothy had told her and Whitt in the middle of the night she was leaving for a few days, which Whitt told his brother Everett. (Tr. Vol. III 267). Whitt was upset and tried to convince Day over the next few days to confess. Day refused, telling Whitt no one would believe her that it was an accident because she had been in and out of trouble all her life. (Tr. Vol. III 272-73). Whitt's family was also upset over Dorothy's disappearance, particularly his father who was almost delirious, and Whitt testified he sat and cried at night wondering what to do. (Tr. Vol. III 272, 277-78). Blinded by his love for Day, Whitt was persuaded by Day to falsely confess. Day told Whitt he was young and he probably wouldn't get more than a couple years. (Tr. Vol. III 276).

Five days after the homicide, Whitt decided to take the blame for the homicide because "everybody was hurting," Day was not going to confess, he loved Dorothy, and wanted her to

have a proper burial. (Tr. Vol. III 280). Whitt further said he took the blame for Day because he thought Day would not be believed, he was in it too far, and Day would get life or a long time in jail. (Tr. Vol. III 280).

Whitt falsely told his father he and Dorothy had an argument and he accidentally killed her. Whitt told his father that he grabbed Dorothy, shook her, she fell on the floor, and hit her head on the night stand. Whitt said this is what Day said happened. (Tr. Vol. III 281-83). That same day, Whitt and his father went to the McDowell County Sheriff's Office where Whitt said he falsely confessed to killing Dorothy. (Tr. Vol. III 285-87, 297). In the videotaped confession, State's Exhibit One, Whitt said Dorothy was "just like a mother to him" and that "I killed somebody I loved." Whitt said he and Dorothy got in an argument, he shook her, and then choked her. He thought she passed out and then she fell off the bed. Whitt said he put the body in his brother's car and the next day took the body to a trash dump in Mercer County. State's Exhibit One. After his confession, Whitt took the Sheriff and other law enforcement officials to that location. (Tr. Vol. I 96-97).

Whitt's false description of how he caused Dorothy's death is inconsistent with the medical examiner's testimony that the cause of death was blunt force trauma to the left side of her head from being struck with a blunt object. (Tr. Vol. I 119-20, 127). Dr. Kaplan, the medical examiner, confirmed that Whitt's explanation was inconsistent with blunt force trauma. (Tr. Vol. I 127).

When Whitt's attorney subsequently told him the actual cause of death, Whitt knew Day had lied to him, and was "torn apart" with that news. (Tr. Vol. III 287-89). Whitt wanted to straighten things out so he had his attorney contact the State Police and Whitt gave another statement, Defendant's Exhibit Eight, this time describing what actually happened. Whitt

testified his initial false confession was foolish as he was tricked and fooled, even though he believed it was the right thing to do at the time. (Tr. Vol. III 297). Whitt repeatedly denied killing Dorothy. (Tr. Vol. III 296-97).

Several witnesses corroborated Whitt's claim of innocence and testimony. Jennifer Ray, who was in the Southern Regional Jail with Lori Day, said Day confessed to her that she hit Dorothy in the head with a baseball bat and that Whitt did not have anything to do with the murder, except covering it up. (Tr. Vol. III 154, 160). According to Ray, Lori Day also told her Whitt wanted to call the rescue squad but Day told him she was pregnant and she would go to jail. Day further told Jennifer Ray "that [Whitt] was so in love with her that she could convince [Whitt] to do anything for her." (Tr. Vol. III 154).

Jessica Mullens, another inmate at the regional jail with Lori Day, similarly testified that Day told her she took a ball bat and hit Dorothy above the left ear and then took a pillow and "finished the stupid bitch off." (Tr. Vol. III 172, 178). Day told Mullens Whitt was in jail because he helped put the body in the car and throw the clothes bags over the hill, but he did not do anything else. (Tr. Vol. III 179). Mullens said Day told Whitt she was pregnant with his child and that "they would kill her if they found out she did it." (Tr. Vol. III 179). Day further told Mullens she (Day) told Whitt that if he loved her, he wouldn't say anything about it. Mullens said Whitt kept trying to get Day to go to the police, but she refused. (Tr. Vol. III 179).

On cross-examination, Mullens admitted that Day initially told her that Whitt and his father killed Dorothy (Tr. Vol. III 184); but then Day told her two or three times she killed Dorothy by herself. (Tr. Vol. III 190).

Lori Day also confessed to Tina Ashworth, Everett Whitt Jr.'s (Anthony Whitt's brother) girlfriend, when Ashworth visited Day in the regional jail. When Ashworth asked Day what

happened, Day said she killed Dorothy, but did not say how. (Tr. Vol. III 86, 89). Day did not implicate Anthony Whitt, but on subsequent visits Ashworth said Day changed her story and said Whitt's father or Bobby Frazier had something to do with it. (Tr. Vol. III 89-90).

Right after the homicide, before she went to jail, Lori Day also confessed to her cousin, Donna Brewster, but implicated Whitt in the commission of the murder. Defense counsel objected to Brewster's testimony regarding what Day told her, but the trial court ruled, albeit erroneously, Day's statements were admissible as statements against penal interest under W.V.R.E. 804(b)(3). (Tr. Vol. II 42, 44-47). Brewster testified that Day told her she and Whitt killed Dorothy; that Whitt hit Dorothy in the head with a baseball bat; and that they then smothered her with a pillow. (Tr. Vol. II 51-52, 54-55). The prosecutor used these statements in closing argument to support his assertion that Day and Whitt both participated in the homicide. (Tr. Vol. IV 53-55, 86-87, 89).

To establish his innocence, Whitt subpoenaed Lori Day and tried to call her as a witness. (Tr. Vol. I 69) (Tr. Vol II 85). Day tried to invoke the Fifth Amendment but the trial court advised her she did not have a privilege against self-incrimination since she was acquitted at her trial and then granted immunity from prosecution. (Tr. Vol. II 85). Day said she still would not testify, was held in contempt, and sent to jail. (Tr. Vol. II 89-90). The trial court, however, refused to permit Whitt to call Day to the stand as a witness. (Tr. Vol. III 105-09).

ASSIGNMENT OF ERROR

- I. Whitt Was Denied His Constitutional Rights To Compulsory Process, To Present A Defense, And Confront His Accusers When The Trial Court Refused To Allow Him To Call As A Witness Co-Defendant Lori Day, Who No Longer Had A Valid Fifth Amendment Privilege Because She Was Previously Acquitted And Was Granted Immunity From Further Prosecution.

DISCUSSION OF LAW

I. Whitt Was Denied His Constitutional Rights To Compulsory Process, To Present A Defense, And Confront His Accusers, When The Trial Court Refused To Allow Him To Call As A Witness Co-Defendant Lori Day, Who No Longer Had A Valid Fifth Amendment Privilege Because She Was Previously Acquitted And Was Granted Immunity From Further Prosecution.

To establish Whitt's innocence and defense that co-defendant Lori Day alone committed the murder, defense counsel subpoenaed Day and tried to call her as a witness at trial. (Tr. Vol. I 69) (Tr. Vol. II 85). When Day, through her attorney, tried to invoke the Fifth Amendment privilege against self-incrimination, the trial court advised her she could not claim the privilege because she was previously acquitted¹ and had been granted complete immunity from prosecution. (Tr. Vol. II 86-89). However, after Day said she would not testify, the trial court refused to permit Whitt to call her as a witness even though she could no longer claim a valid Fifth Amendment privilege. Instead, Day was merely found in contempt and sent to jail. (Tr. Vol. II 89-90) (Tr. Vol. III 105-09.).

The resulting prejudice to Whitt was substantial. Whitt needed Day as a witness to (1) question her about all of the evidence indicating that she alone committed the murder to support his defense; and (2) to confront and cross-examine her about her prejudicial hearsay statements to Donna Brewster implicating Whitt in the homicide, which was the only evidence to corroborate the autopsy finding the victim died from blunt force trauma to the head. Even if Day would have refused to testify, her silence would have had evidentiary value. The trial court's refusal to permit Whitt to call Day as a witness before the jury denied him his fundamental right

¹ Danny Barie, the Assistant Prosecuting Attorney who prosecuted Lori Day, told undersigned counsel that Day did not testify at her trial. Barie is sending counsel a letter to this effect which counsel will lodge with the Clerk's office.

to compulsory process, his right to confront his accusers, and his due process right to present a defense, guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article III, §§ 14 and 10 of the W.Va. Constitution, respectively.

Standard of Review

A trial court's rulings on the admission or exclusion of evidence in the exercise of its discretion are reviewed under an abuse of discretion standard. Syl. Pt. 1, State v. Harris, 216 W.Va. 237, 605 S.E.2d 809 (2004). However, "a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as . . . the right to offer testimony in support of his or her defense . . . which [is] essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, § 14 of the West Virginia Constitution." State v. Guthrie, 205 W.Va. 326, 337 n.17, 518 S.E.2d 83, 94 n.17 (1999) (quoting Syl. Pt. 3, in part, of State v. Jenkins, 195 W.Va. 620, 466 S.E.2d 471 (1995)).

Whitt's Rights To Compulsory Process And To Present A Defense Were Denied

The right to compulsory process to compel the attendance of witnesses and their testimony is a fundamental right essential to an accused's due process right to a fair trial:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967). Accord Taylor v. Illinois, 484 U.S. 400, 408, 108 S.Ct. 646, 652 (1988) ("Few rights are more fundamental than that of an

accused to present witnesses in his own defense. . .”). In Washington, a Texas statute prohibited a defendant from calling his accomplices as witnesses. Id. at 16-17, 87 S.Ct. at 1922. The Supreme Court found the statute unconstitutional:

We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. (footnote omitted).

Id. at 23, 87 S.Ct. at 1925.

The right of compulsory process has been similarly recognized by this Court. In State v. Harman, 165 W.Va. 494, 501, 270 S.E.2d 146, 151 (1980), the defendant was denied the right to call his alleged accomplice to the witness stand so the jury could see his physical characteristics. This Court found reversible error because the Fifth Amendment did not preclude the witness' appearance before the jury. The Court further stated that “unlike the circumstances involving a defendant at trial, a witness may not refuse to take the stand.” Id. at 504, 270 S.E.2d at 153.

Thus, the witness here did not have the right to decline to take the stand. Under the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution, the defendant has a constitutional right to have compulsory process for obtaining witnesses in his favor, and disallowance of a subpoena to bring a material witness before the jury constitutes reversible error. (citations omitted).

Id.

Like the witness in Harman, Lori Day could not claim the privilege against self-incrimination. Day's previous acquittal at trial for first degree murder and the trial court's grant of complete immunity guaranteed she was no longer in jeopardy for that offense. Thus, Whitt had the right to call Day to the stand to testify. As this Court stated in In re Anthony Ray Mc, 200 W.Va. 312, 323, 489 S.E.2d 289, 300 (1997), “[t]he law is clear that ‘an ordinary witness

may decline to answer only after making the requisite showing of the danger of self-incrimination.” (quoting 1 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, § 5-2(c), at 479 (1994)). See Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818 (1951) (“It is for the court to say whether his silence is justified, Rogers v. United States, 1951, 340 U.S. 367, 71 S.Ct. 438, and to require him to answer if ‘it clearly appears to the court that he is mistaken.’ Temple v. Commonwealth, 1880, 75 Va. 892, 899.”). See also State v. Kilmer, 190 W.Va. 617, 621 n. 3, 439 S.E.2d 881, 885 n. 3 (1993), where the Court noted that if the co-defendant no longer had a Fifth Amendment privilege because he had exhausted his right to appeal his conviction, “the circuit court could have compelled his testimony.”

Moreover, it is a well-established principle in American jurisprudence that an accused has the right to the testimony of a material witness who does not have a privilege against self-incrimination.

The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence . . . The power to compel testimony and the corresponding duty to testify are recognized in the Sixth Amendment requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor.

Kastigar v. United States, 406 U.S. 441, 443-44, 92 S.Ct. 1653, 1655-56 (1972). In United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090 (1974), the Court stressed the importance of the right to compulsory process to the functioning of our adversary system of justice:

The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Id. at 709, 94 S.Ct. at 3108. The Court further said, “‘the public . . . has a right to every man’s evidence,’ except for those persons protected by a constitutional, common-law, or statutory privilege, (citations omitted). . . .” Id. (quoting Branzburg v. Hayes, 408 U.S. 665, 668, 92 S.Ct. 2646, 2660 (1972)). See also Ullman v. United States, 350 U.S. 422, 439 n. 15, 76 S.Ct. 497, 507 n. 15 (1956) (“But it is very man’s duty to give testimony before a duly constituted tribunal unless he invokes some valid exemption in withholding it.”).

Therefore, a witness may refuse to testify only if she has a valid privilege against self-incrimination. State v. McDaniel, 665 P.2d 70, 76 (Ariz. 1983), *overruled on other grounds* by State v. Walton, 769 P.2d 1017, 1031 (Ariz. 1989); United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980); United States v. Gomez-Rojas, 507 F.2d 1213, 1220 (5th Cir. 1975); United States v. Boothe, 335 F.3d 522, 526 (6th Cir. 2003); State v. Sanders, 842 S.W.2d 170, 174 (Mo. App. 1992); E.L.L. v. State, 572 P.2d 786, 788 (Alaska 1977); State v. Willoughby, 532 A.2d 1020 (Maine 1987).² This principle applies as well to accomplices who have been granted immunity.

If two persons witness an offense-one being an innocent bystander and the other an accomplice who is thereafter imprisoned for his participation-the latter has no

² Some courts even permit a witness who has a valid privilege against self-incrimination to be called as a witness if there is some valid purpose for having the witness invoke the privilege in the jury’s presence. United States v. Vandetti, 623 F.2d 1144, 1146-47 (6th Cir. 1980); Gray v. State, 796 A.2d 697, 717-18 (Md. 2002); State v. Corrales, 676 P.2d 615, 620-21 (Ariz. 1983). Cf. Bowles v. United States, 439 F.2d 536, 541-42 (D.C. Cir. 1970); United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973); United States v. Deutsch, 987 F.2d 878, 883-84 (2d Cir. 1993); State v. Kirk, 651 N.E.2d 981, 984 (Ohio 1995) (cases holding defendant did not have right to call witness who would assert Fifth Amendment in front of jury). See also Lindsey v. United States, 484 U.S. 934, 108 S.Ct. 310, 310-11 (1987) (White and Brennan, Justices, dissenting from denial of certiorari, pointing out the split among the circuits on issue of whether government could force witness to take the stand solely to invoke privilege against self-incrimination in front of jury). Other courts do not require the witness to take the stand even where their refusal to testify is based on an invalid assertion of the privilege against self-incrimination. United States v. Griffin, 66 F.3d 68, 70 (5th Cir. 1995); Martin v. United States, 756 A.2d 901, 905 (D.C. App. 2000).

more right to keep silent than the former. The Government of course has an obligation to protect is [sic] citizens from harm. But fear of reprisal offers an immunized prisoner no more dispensation from testifying than it does any innocent bystander without a record.

Piemonte v. United States, 367 U.S. 556, 559 n.2, 81 S.Ct. 1720, 1722 n. 2 (1961). See Coffey v. State, 744 S.W.2d 235, 239 (Texas App. 1987). Thus, even though Lori Day did not want to testify “[she could] not employ the privilege to avoid giving testimony that [she] simply would prefer not to give.” Roberts v. United States, 445 U.S. 552, 560 n. 7, 100 S.Ct. 1358, 1364 n. 7 (1980).

In this case, the trial court refused to allow defense counsel to call Lori Day to the stand because, according to the court, “when she would not testify and take the 5th, I think it would lead to speculation on the part of the jury.” (Tr. Vol. III 106). The trial court’s reasoning is inadequate to deny the fundamental right to compulsory process. Speculation can occur anytime a witness takes the stand and refuses to answer a question. An expectation the witness might decline to testify cannot override the defendant’s fundamental right to put the witness on the stand and compel their testimony. Otherwise, the right to compulsory process is potentially a dead letter with any witness who indicates they do not want to testify.

If the right to compulsory process has any meaning, it is the right to compel testimony. See Taylor, 484 U.S. at 409, 108 S.Ct. at 653 (“The right to compel the witness’ presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness’ testimony heard by the trier of fact.”). If the witness refuses to testify, the court has the authority to hold them in contempt and must so advise the witness. However, until the witness takes the stand and counsel attempts to question them, neither the court nor counsel actually knows whether the witness will refuse to testify. Even if the witness says they will not testify, as Lori Day did here, they could change their mind after being instructed by the judge in

front of the jury they must answer the question or be held in contempt. See United States v. Beye, 445 F.2d 1037, 1042 (9th Cir. 1971) (Ely, Circuit Judge, dissenting).

On the other hand, if the witness invokes the Fifth Amendment, it is appropriate for the court to hold an *in camera* hearing to determine whether that invocation is valid. In re Anthony Ray Mc., 200 W.Va. at 324 n. 21, 489 S.E.2d at 301 n. 21. If the court determines the invocation of the privilege is not valid, as the trial court did here, the witness must take the stand and if the witness attempts to invoke the Fifth Amendment, they must be instructed they do not have the privilege and must answer the question. If they persist in refusing to answer, the court may hold them in contempt. In re Yoho, 171 W.Va. 625, 301 S.E.2d 581 (1983). However, until the process of putting the witness on the stand in front of the jury occurs, the defendant has not been afforded his right of compulsory process.

Even assuming, arguendo, the witness may refuse to testify or remain silent, except where the privilege against self-incrimination is applicable, “the [Supreme] Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause.” (citations omitted). Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S.Ct. 1551, 1558 (1976) (adverse inference may be drawn from inmate’s silence at prison disciplinary proceeding). This is because silence has evidentiary value in some circumstances. See, e.g., United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-54, 44 S.Ct. 54, 56 (1923) (“Silence is often evidence of the most persuasive character.”) (Brandeis, Justice, speaking for an unanimous court)); Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309 (1982) (Court upheld prosecutor’s cross-examination of defendant regarding his post-arrest silence because defendant had not been given Miranda warnings). Accord State ex rel. Boso v. Hedrick, 182 W.Va. 701, 706, 391 S.E.2d 614, 619 (1990). See also Syl. Pt. 9, State ex rel.

Myers v. Sanders, 206 W.Va. 544, 526 S.E.2d 320 (1999) (trial court may draw adverse inference from habeas petitioner's silence as a result of his assertion of Fifth Amendment privilege during deposition); Addonizio v. United States, 405 U.S. 936, 92 S.Ct. 949, 952 (1972) (Douglas, J., dissenting from denial of certiorari) (stating that invocation of Fifth Amendment privilege by coconspirator who had been acquitted or whose conviction was final would be improper. . . . "In any event, if the witness refused to answer questions, the defendant would at least obtain whatever inference of innocence might result from the apparent guilt of the witness.").

In People v. Lopez, 71 Cal. App. 4th 1550, 1553 (1999), a witness attempted to invoke his Fifth Amendment privilege but was advised by the trial court he no longer had such a privilege. The appellate court stated that if the witness had a valid Fifth Amendment privilege, he could refuse to testify, but where he did not, he could be called to testify and jurors could consider his refusal to testify:

But where a witness has no constitutional or statutory right to refuse to testify, a different analysis applies. Jurors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony. (Emphasis in opinion).

Id. at 1554. The same analysis is applicable here. Since Lori Day no longer had a Fifth Amendment privilege, she could not legitimately refuse to testify, and the jury could properly infer her guilt if she did refuse.

In Gray v. State, 796 A.2d 697 (Md. 2001), Maryland's highest court considered whether the trial court has discretion to permit a defendant to call a witness to invoke his Fifth Amendment privilege before the jury. Like the case at bar, the defendant in Gray contended another person committed the murder, which was supported by ample evidence, including incriminating admissions of guilt by the other person. Id. at 708. The defendant further argued

that it “would be unfair to not allow [the defendant] to put on a witness that [the defendant] alleges committed the murder and have the witness invoke his Fifth Amendment privilege in front of the jury because the very invocation of the privilege contains relevant evidentiary inferences supporting the theory of the defense.” *Id.* The Gray court agreed the trial court has the discretion to permit the defense to call the alleged perpetrator as a witness:

If the trial court finds that such sufficient evidence, linking the accused witness to the crime and believable by any trier of fact, exists that could possibly cause any trier of fact to infer that the witness might have committed the crime for which the defendant is being tried, then the trial court has the discretion to permit, and limit as normally may be appropriate, the defendant to question the witness, generally, about his involvement in the offense and have him invoke his Fifth Amendment right in the jury’s presence.

Gray, 796 A.2d at 717.

Since Whitt similarly presented sufficient evidence for the jury to find that Lori Day alone committed the murder, the trial court should have made this determination and exercised its discretion to permit his counsel to call Day as a witness. This case presents an even more compelling case than Gray because the witness in Gray had a valid Fifth Amendment privilege and Lori Day did not.

It is axiomatic that a defendant has a fundamental due process right to present a defense and that relevant evidence important to an accused’s defense cannot be excluded by arbitrary evidentiary rulings. Holmes v. South Carolina, ___ U.S. ___, ___, 126 S.Ct. 1727, 1734-35 (2006) (a defendant’s right to have a meaningful opportunity to present a complete defense is violated by evidence rule prohibiting introduction of evidence of a third party’s guilt if prosecution has introduced forensic evidence that strongly supports a guilty verdict); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973); Syl. Pt. 3, Jenkins, 195 W.Va. 620, 466 S.E.2d 471.

Here, if Lori Day refused to testify after properly being ordered to by the trial court, the evidentiary value of her refusal to testify or silence would have no less relevance or probative force than that of a criminal defendant who voluntarily takes the stand and testifies, but then refuses to answer questions on cross-examination. See Caminetti v. United States, 242 U.S. 470, 494, 37 S.Ct. 192, 198 (1917) (“where the accused takes the stand. . . and voluntarily testifies . . . he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in existence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.”).

Whitt's Defense Was Unfairly Prejudiced

Whitt was denied his right to compulsory process, due process right to present a defense, and right to confront his accusers, because the trial court arbitrarily denied him the right to call as a witness his co-defendant, Lori Day, “whose testimony would have been relevant and material to the defense.” Washington, 388 U.S. at 23, 87 S.Ct. at 1925. Had defense counsel been permitted to question Day, he arguably could have established that she, not Whitt, committed the murder. As defense counsel argued to the trial court, Day was an essential witness who could make a difference in the outcome of the trial. (Tr. Vol. III 107).

Whitt's defense was that he falsely confessed to the homicide to protect his girlfriend Lori Day, who alone committed the murder. The State's entire case hinged on whether the jury believed Whitt's confession which was inconsistent with the actual cause of death (blunt force trauma to the head). Moreover, when Whitt learned the actual cause of death, he made another statement to the police, consistent with his trial testimony, that Day, not he, killed the victim.

Other than Whitt's false confession, the only other evidence the State presented to prove that he was responsible for Dorothy Mitchell's death was Lori Day's hearsay statements to her

cousin, Donna Brewster, implicating Whitt, specifically that she (Day) and Whitt killed Dorothy and Whitt hit Dorothy in the head with a baseball bat. Day's prejudicial hearsay statements were the only evidence which corroborated the autopsy finding as to the cause of death (blunt force trauma to the head) as Whitt's confession did not. Over defense counsel's objection (Tr. Vol. II 42, 46-47), the trial court erroneously admitted Lori Day's hearsay statements as statements against penal interest under West Virginia Rule of Evidence (W.V.R.E.) 804(b)(3). (Tr. Vol. II 44-47). See In re Anthony Ray Mc., 200 W.Va. 312, 321-22, 489 S.E.2d 289, 298-99 (1997) (only self-inculpatory statements are admissible and "that self-serving collateral statements, even those couched in neutral terms, are not admissible under Rule 804(b)(3)." (footnotes omitted).³

Because Whitt was not permitted to call Lori Day as a witness, he was denied the opportunity to cross-examine her regarding these extremely prejudicial hearsay statements implicating him in the homicide. In short, Day's prejudicial hearsay statements went to the jury unchallenged. In addition, the prosecutor used Day's statements to support his closing argument that Day and Whitt both participated in the homicide. (Tr. Vol. IV 53-55, 86-87, 89). That the jury believed Day's statements is evident from its verdict.

Moreover, Day's statements are very unreliable evidence. In State v. Mullens, 179 W.Va. 567, 371 S.E.2d 64 (1988), the Court reiterated the longstanding view of the Supreme Court of the United States that "accomplices' confessions that incriminate defendants are presumptively unreliable." Id. at 570, 371 S.E.2d at 67.

³ Whitt raised this error in his first assignment of error in his petition for appeal and clearly demonstrated that all of Day's statements were either self-serving collateral statements, e.g., "Anthony hit her [Dorothy] in the head . . . [with] . . . a baseball bat" (Tr. Vol. II 55), or neutral collateral statements, e.g., "she [Lori Day] and Anthony had killed Dorothy[.]" (Tr. Vol. II 51), and therefore inadmissible as self-inculpatory statements against penal interest under W.V.R.E. 804 (b)(3). The Court, however, refused to hear this issue. The Court also denied on May 24, 2006, Whitt's motion to grant review on this issue in a 3-2 vote, Justices Albright and Starcher, dissenting.

Such a confession is hearsay subject to all the dangers of hearsay generally. Moreover, statements of a codefendant about what the defendant said or did are less credible than ordinary hearsay evidence because of the strong motivation of the codefendant to shift the blame to the defendant and exonerate himself. (citations omitted).

See also State v. Mason, 194 W.Va. 221, 231, 460 S.E.2d 36, 46 (1995) (“absent sufficient independent indicia of reliability to rebut the presumption of unreliability’ the introduction of a third-party confession against a defendant is a violation of the Confrontation Clause.”) (quoting Syl. Pt. 2, Mullens, 179 W.Va. 567, 371 S.E.2d 64 (1988)). Accord State v. Marcum, 182 W.Va. 104, 386 S.E.2d 117 (1989); Lee v. Illinois, 476 U.S. 530, 543, 106 S.Ct. 2056, 2063 (1986); Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999).

In this case, there are no independent indicia of reliability which demonstrate the trustworthiness of Lori Day’s statements to Donna Brewster and rebut their presumptive unreliability. In other words, Day’s “presumptively unreliable statements were [not] made under circumstances affirmatively establishing that they were so reliable that cross-examination of [Day] was ‘of marginal utility.’” Mason, 194 W.Va. at 232, 460 S.E.2d at 47 (quoting Idaho v. Wright, 497 U.S. 805, 820, 110 S.Ct. 3139, 3149 (1990)). Accord In re Anthony Ray Mc., 200 W.Va. at 327, 489 S.E.2d at 304. When Lori Day talked to Donna Brewster and implicated Whitt she clearly had reason to fabricate what happened and claim that Whitt was responsible for delivering the fatal blow to the victim’s head with a baseball bat. In addition, Donna Brewster, Sherry Brewster, and Tammy Miner, three of Day’s cousins who had known Day her entire life, testified Day had a reputation for lying. (Tr. Vol. II 61-62) (Tr. Vol. III 52-53, 58, 68-69). Miner even described Day as “a very dangerous liar.” (Tr. Vol. III 58). Cross-examination of Day would not have been of marginal utility. The trial court’s erroneous admission of Day’s prejudicial hearsay statements, and refusal to allow Whitt to call Day as a witness and confront

and cross-examine her regarding these statements, denied Whitt his constitutional rights of confrontation. Sixth Amendment, U.S. Constitution; Article III, § 14, W.Va. Constitution.

The trial court's refusal to allow Whitt to call Lori Day as a witness further denied Whitt the opportunity to cross-examine her about most of the evidence at trial which demonstrated that she, not Whitt, killed Dorothy Mitchell and Whitt initially confessed to protect Day from being prosecuted. Whitt's innocence is most readily seen in the stark contrast between his relationship with Dorothy Mitchell and that of Lori Day with Dorothy. Several witnesses described Whitt's relationship with Dorothy as a loving mother-son like relationship. (Tr. Vol. II 25, 147-48, 150-51, 173) (Tr. Vol. III 73-74) (Tina Perkins, Dorothy's daughter; Everett Eugene Whitt, Anthony's father; Ernest Ray Webb, a family friend). Whitt testified he loved Dorothy as a mother and "could never hurt that woman." (Tr. Vol. III 297). Whitt and several witnesses explained that relationship and related that Whitt and Dorothy were close; they loved each other dearly; they never argued; they always greeted each other with a hug and kiss; and that Whitt was always doing things for Dorothy and taking her places. (Tr. Vol. II 26, 147-52, 173, 205-06) (Tr. Vol. III 73-74, 200-03). Even Dorothy's daughter, Tina Perkins, agreed that Whitt and her mother were "close." (Tr. Vol. II 25). This relationship continued up to and including the night of the homicide, as Whitt made special trips that evening to get water for Dorothy because a house pump was broken and obtain kerosene for her. (Tr. Vol. III 230-39).

By contrast, Lori Day's relationship with Dorothy was just the opposite. Day, Whitt's girlfriend, moved into Whitt's bedroom at the War Drive-In about a month and a half or two months before Dorothy Mitchell came around the Christmas holiday. (Tr. Vol. II 151, 195) (Tr. Vol. III 298). Dorothy, Whitt's father's mistress, lived at the Drive-In in the winter months because it was difficult to get up the road to her house. (Tr. Vol. II 7). Day became upset and

angry with Dorothy because Dorothy complained Day was not doing her share of household chores, e.g., washing dishes. (Tr. Vol. II 64-66, 207-09) (Tr. Vol. III 46-47, 213, 222). About two weeks before the homicide, Day came to Polly Whitt's (Anthony's sister) trailer, was mad and crying, and told her she (Day) did not see why she had to do the dishes if she didn't eat there and that "if that damned old woman [Dorothy] didn't leave me alone, I'm going to knock her brains out." (Tr. Vol. II 207-08). On January 28, 2001, less than 24 hours before the homicide, Day complained to Deborah Hall, a neighbor, about Dorothy, having to do household chores, and Day told Hall she (Day) was going "to do something about it." (Tr. Vol. III 46-47).

Day was also upset with Dorothy over a phone call Dorothy received on January 23, 2001, five days before the homicide, from Day's sister-in-law in North Carolina regarding Day's children which Dorothy reported to others in the Whitt household. (Tr. Vol. II 154-56) (Tr. Vol. III 24, 217-18). According to Bobby Frazier, a neighbor who was present when Dorothy received the call, Dorothy asked Day how she could be an unfit mother. (Tr. Vol. III 23-24). Day became angry at Dorothy, was crying, and said if she had her way she would go down there and kill the whole f'ing bunch. (Tr. Vol. III 24-25). The same day Dorothy reported the phone call, Day wrote a letter to Whitt, Defendant's Exhibit One, stating, *inter alia*: "I know I said I would take anything from this bunch of assholes to be with you, but I've had my limit! Would you please have a talk with that bitch [Dorothy] and tell her to stay off of my ass before I flip completely out." (Tr. Vol. III 222).

Significantly, on Sunday afternoon, before the homicide that night, Lori Day told Bobby Frazier that "if Dorothy doesn't get off my f'ing back and let me alone, I'm going to knock her f'ing brains out." (Tr. Vol. III 27-28). When Day made that statement she was angry and had tears in her eyes. (Tr. Vol. III 29). Ed Pierson, who was watching the Super Bowl football game

with Frazier when Day made this statement, similarly reported that Day was crying and carrying on about Dorothy and "said she was going to take something and beat her [Dorothy's] brains out. She was going to knock her G.D. brains out." (Tr. Vol. III 127-29).

On Sunday evening, January 28, 2001, the night of the homicide, Whitt and Day went to bed in the early morning hours (around 2:00 p.m.), had sex, Day got up to go to the bathroom, and Whitt dozed off. (Tr. Vol. III 242-43). When Whitt woke up, 15 to 20 minutes later he estimated, Lori was not there so he went looking for her and found her by Dorothy's bed shoving clothes in garbage bags. (Tr. Vol. III 244, 250-52). Dorothy was lying in the floor wrapped in a blanket. (Tr. Vol. III 251). When Whitt asked what she was doing, Day told him that "it was an accident, that she killed Dorothy," and that she and Dorothy were arguing over Day's children. (Tr. Vol. III 252). Whitt testified he believed Day's statement that it was an accident and told her he wanted to call 911 or an ambulance. Day told him "no, I am pregnant with your baby," and that "they will hurt me if you do." (Tr. Vol. III 254-55).

Whitt said he had had girlfriends before but Day was the first one he had fallen in love with and she was the love of his life. (Tr. Vol. III 255, 313). Whitt further said his relationship with Day was something special, and that he always wanted a child. (Tr. Vol. III 255). Whitt didn't call the rescue squad because he believed Day's statement it was an accident, thought Day was having his child, and "didn't know exactly what to do." (Tr. Vol. III 257). Day convinced him to help her take the body to a place to dispose of it, he helped her load it into his brother's car, and they took the body to a trash dump off Route 52, along with the trash bags containing Dorothy's clothes. (Tr. Vol. III 257, 263-65). Whitt told Day he didn't want to leave Dorothy there like that, but Day told him it was getting daylight and they needed to get back before somebody found out. (Tr. Vol. III 265).

Whitt testified he felt awful and got sick twice that night, vomited, and was crying because “[s]omebody he loved just got killed and somebody he loved had killed her.” (Tr. Vol. III 259-60).

That morning, at Day’s suggestion, Whitt told his brother, Everett Whitt Jr., that Dorothy came to him in the middle of the night and said she was leaving for a couple days. (Tr. Vol. III 267). Over the next few days, Whitt was upset and tried to persuade Day to confess since she found out she was not pregnant, but Day said no one would believe her that it was an accident because she has been in and out of trouble all her life. (Tr. Vol. III 272-73). In the meantime, Whitt observed his father crying and upset for several days over Dorothy’s absence to the point that his father was starting to become delirious. (Tr. Vol. III 272, 277-78). Whitt said he was affected pretty badly by his father’s crying and would sit and cry at night wondering what to do. (Tr. Vol. III 272). Day convinced Whitt to falsely confess, telling him he was young, and he probably wouldn’t get more than a couple years. (Tr. Vol. III 276).

On Saturday morning, five days after the homicide, Whitt decided to take the blame for it because “everybody was hurting,” Day “was not going to do anything about it,” he loved “Maw” (Dorothy), and wanted her to have a proper burial. (Tr. Vol. III 280). Whitt said he took the blame rather than Lori because he figured Day would not be believed, he was in it too far, and Day would get life or a long time in jail. (Tr. Vol. III 280). See Richard P. Conti, The Psychology of False Confessions, The Journal of Credibility Assessment and Witness Psychology, Vol. 2, No. 1, at 21 (1999) (“Frequently, false confessions are offered to protect a friend or relative. . .”); John P. Cronan, Do Statements Against Interests Exist? A Critique of The Reliability of Federal Rule of Evidence 804(B)(3) And A Proposed Reformulation, 33 Seton Hall L. Rev 1, 20 (2002) (“Professor Paul Cassell agrees with [Dr. Gisli] Gudjonsson that a desire to

protect others often results in false confessions.”). See also Paul G. Cassell, Protecting the Innocent From False Confessions and Lost Confessions -- and From Miranda, 88 J. Crim. L. & Criminology 497, 519 (1998); Gisli H. Gudjonsson, The Psychology of Interrogations, Confessions, and Testimony 226 (1992).

Whitt told his father he and Dorothy had an argument and that he accidentally killed her. (Tr. Vol. III 281-82). Whitt said he grabbed Dorothy, shook her, and she fell and hit her head on the night stand as that is what Day had told him. (Tr. Vol. III 282-83). Whitt’s father then took Whitt to the Sheriff’s Office where Whitt said he gave a false confession on videotape to killing Dorothy. (Tr. Vol. III 285-87, 297). In the videotaped confession, State’s Exhibit One, Whitt said Dorothy was “just like a mother” to him. He further said they got into an argument, he shook Dorothy, then had her around the neck choking her; he thought she passed out, and then she fell off the bed. He said he then put the body in his brother’s car and left it there until the next day (Monday) when he dumped the body in Mercer County after taking his sister to a doctor’s appointment. Whitt stated on the videotape, “I killed somebody I loved.” State’s Exhibit One.

Whitt’s description of how he caused Dorothy’s death is totally inconsistent with the medical examiner’s testimony that the cause of Dorothy’s death was blunt force trauma to the left side of her head as a result of being struck with a blunt object. (Tr. Vol. I 119-20, 127). Dr. Kaplan, the medical examiner, agreed that Whitt’s explanation was not consistent with blunt force trauma. (Tr. Vol. I 127).

When Whitt learned the actual cause of Dorothy’s death from his attorney, Whitt said he was torn apart with the news, knew Day had lied to him, and wanted to try and get it straightened out. (Tr. Vol. III 287-89). Whitt had his attorney contact the state police and on March 2, 2001,

Whitt gave a second statement, Defendant's Exhibit Eight, this time describing what actually happened. Whitt said he thought his initial false confession was the "right thing to do" at the time, but now realizes it was foolish as he was tricked and fooled. (Tr. Vol. III 297). Whitt repeatedly denied killing Dorothy Mitchell. (Tr. Vol. III 296-97).

Whitt's innocence and testimony that Day committed the murder was corroborated by several witnesses. Jennifer Ray, who was in the Southern Regional Jail with Lori Day, testified Day told her she hit Dorothy in the head with a baseball bat and that Whitt did not have anything to do with the murder, except for covering it up afterwards. (Tr. Vol. III 154, 160). Ray further related that Day told her Whitt wanted to call the rescue squad but Day told him she was pregnant and she would go to jail for it. Lori Day also told Jennifer Ray "that [Whitt] was so in love with her that she could convince [Whitt] to do anything for her." (Tr. Vol. III 154).

Jessica Mullens, who did not previously know Whitt or his family, testified she was also an inmate in the regional jail with Lori Day. Mullens related Lori Day told her she took a ball bat and hit Dorothy above the left ear and then took a pillow and "finished the stupid bitch off." (Tr. Vol. III 172, 178). Mullens said Day told her Whitt was in jail because he helped put the body in the car and put the clothes bags over the hill, but he did not do anything else. (Tr. Vol. III 179). According to Mullens, Day told her she (Day) told Whitt she was pregnant with his child and that "they would kill her if they found out she did it." (Tr. Vol. III 179). Mullens further said Day told her she (Day) told Whitt that if he loved her, he wouldn't say anything about it; and that Whitt kept trying to get her to go to the police, but she refused. (Tr. Vol. III 179).

Tina Ashworth, Everett Whitt Jr.'s (Anthony Whitt's brother) girlfriend, testified she knew Lori Day since Lori was seven years old and that she visited Day in the regional jail about

fourteen times. (Tr. Vol. III 77-78, 84). Ashworth said on her first visit she asked Day what happened and Day told her that she had killed Dorothy, but did not say how she did it. (Tr. Vol. III 86, 89). Day called Dorothy a bitch and said she (Day) didn't like the way Dorothy treated her. (Tr. Vol. III 80). Day further told her if Whitt's father got her out on bond so she could see her children, she would confess. (Tr. Vol. III 87).

Kevin Payne, whose wife's brother was married to Lori Day, indicated that Lori Day stayed with him and his wife after she got out of jail. (Tr. Vol. III 135-36). Kevin Day said one day Lori was wiping her hands numerous times and she said it seemed like she still had blood on her hands. (Tr. Vol. III 144). Lori Day also told him there were times she and Dorothy got along well and other times that "she could have killed [Dorothy] in a second and never thought twice about it." (Tr. Vol. III 145).

The trial court's refusal to let Day be called as a witness was further prejudicial to Whitt because Day was brought out of the witness room and introduced to the jury during voir dire. (Tr. Vol. I 10). When she did not testify the jury could reasonably infer that Whitt decided not to call her as a witness because her testimony would not be favorable. The jury certainly could conclude that after hearing Donna Brewster's testimony regarding Day's confession implicating Whitt. It was important to Whitt's defense that he try to present Day as a witness to convince the jury otherwise. Whitt had "a right to produce [Day] and thus show the jury that [he] is bringing forward such witnesses as may have knowledge bearing on the case." United States v. Gernie, 252 F.2d 664, 669 (2d Cir. 1958). The trial court's refusal to allow Whitt to call Day as a witness was an abuse of discretion which denied him his constitutional rights to compulsory process, to present a defense, and to confront his accusers, resulting in prejudicial error.

RELIEF REQUESTED

For the foregoing reasons, Whitt requests the Court to reverse his conviction and sentence and remand his case to the Circuit Court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on the 5th day of June, 2006, I mailed a copy of the foregoing Appellant's Brief to Counsel for Appellee, Dawn E. Warfield, Deputy Attorney General, 1900 Kanawha Boulevard East, Room E-26, Charleston, West Virginia 25305.


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