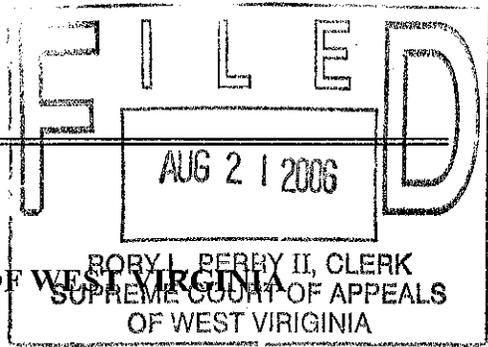


NO. 33039

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

ANTHONY RAY WHITT,

Appellant.

**BRIEF OF APPELLEE,
STATE OF WEST VIRGINIA**

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BRIEF OF APPELLEE,
STATE OF WEST VIRGINIA

I.

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

This is an appeal by Anthony Ray Whitt (hereinafter “Appellant”) from the June 7, 2005, order of the Circuit Court of McDowell County Circuit Court (Murensky, J.), which re-sentenced Appellant to 40 years of incarceration for his conviction of second degree murder.¹

In his petition for appeal, Appellant raised two assignments of error. By order entered March 2, 2006, this Court granted appellate review as to Assignment of Error No. 2 only.² In his

¹Appellant was originally sentenced by order of January 13, 2003. He was re-sentenced on March 8, 2004, and June 7, 2005, in order to enlarge the time frame for filing an appeal.

²In his first assignment of error, Appellant contended that the trial court erred in admitting, over objection, hearsay statements that implicated Appellant in the murder of Dorothy Mitchell. The Court denied review on this assignment of error, and refused Appellant’s subsequent Motion to Grant Assignment of Error No. 1. Consequently, that issue is not properly before this Court.

second assignment of error, Appellant contended that he was denied his constitutional rights to compulsory process when the trial court refused to allow him to call co-defendant Lorie Day³ as a witness when she had previously refused to testify.

II.

STATEMENT OF FACTS

The evidence at trial was that Anthony (“Moe”) Whitt, along with his girlfriend Lorie Day, lived at the “War Drive-In” in McDowell County, West Virginia. (Tr. Vol. III, pp. 194-95.)⁴ The Drive-In was a combination of a public bar and grill, and a private section where family members lived. (*Id.* at 205-06.)

Dorothy Mitchell was the long-time mistress of the Appellant’s father who stayed at the Drive-In during the winter months. (Tr. Vol II, pp. 138, 145.) The Appellant’s father described the relationship between the Appellant and Dorothy as close and loving. (*Id.* at 148-51.) This relationship apparently was disrupted by the arrival of Lorie Day.

Lorie Day came into Appellant’s life as the first woman who had “fallen in love” with him. (Tr. Vol. III, p. 265.) However, the evidence at trial was replete with examples of the strained relationship between Dorothy Mitchell and Lorie Day, which culminated in late January 2001, with a note written by Lorie Day to the Appellant. The note asks the Appellant to “have a talk with that bitch and tell her to stay off my ass before I flip completely out[.]” (Tr. Vol. III, p. 222; Defendant’s Ex. 1.) Continuing, the note also delivered an ultimatum to the Appellant: “I have took all of her shit

³Although Ms. Day’s first name is spelled “Lori” throughout the record, it appears that the correct spelling of her name is actually “Lorie.”

⁴The trial transcript, comprised of four individually paginated volumes, is found at pages 329-A through -C and 329-E of the Record.

that I'm going to take and if I say anything about it, then I won't be able to stay here with you. I'd have to go back to Newhall." (*Id.*)

Sometime in the early morning hours of January 29, 2001, Dorothy Mitchell died from a fractured skull, caused by a blow from a blunt object. The assailant also twisted her head back with sufficient force to break her neck. (Tr. Vol. I, p. 119; *see also* State's Ex. 4.) Five days later, the Appellant confessed to her murder. (Tr. Vol. I, pp. 87-97, 113.)⁵ His videotaped confession was played for the jury. (*Id.* at 96; *see* State's Ex. 1.) The Appellant testified at trial about the disposal of Ms. Mitchell's body at an illegal dump site on Coaldale Mountain. (Tr. Vol. III, pp. 262-64.) After giving his confession, Appellant led police to the body, which he had hidden under a pile of refuse. (Tr. Vol. I, pp. 96-97, 106-07, 160.) Family members later found two of Dorothy Mitchell's rings in the Appellant's bedroom. (Tr. Vol. II, pp. 22-23, 130.)

Lorie Day's cousin, Donna Brewster, testified that on the day after the murder, Lorie told her "that her and Anthony had killed Dorothy." (Tr. Vol. II, p. 51.) A day or so later, Lorie told her that the Appellant hit Dorothy in the head, both of them smothered her with a pillow, and then they wrapped the body up and disposed of it together. (*Id.* at 52-53.)⁶ Ms. Brewster said she didn't report this at the time because she was afraid of the Appellant. (*Id.* at 53-54.) After the Appellant confessed, Lorie gave Ms. Brewster more details about the murder, stating that Appellant had hit Ms. Mitchell in the head with "a baseball bat" before they smothered her. (*Id.* at 55.) Ms. Brewster then urged Lorie to report this, and they called the police. (*Id.*)

⁵During this time period, Dorothy Mitchell's family members had filed a missing person's report and were frantically searching for her.

⁶These statements were admitted by the trial court, over defense counsel's objection, as statements against interest. (*See* Tr. Vol. II, pp. 45-46.)

The defense consisted mainly of testimony that Lorie Day, not the Appellant, was the one who had actually killed Dorothy Mitchell. At trial, the Appellant attempted to call Lorie Day as a defense witness. Ms. Day, who had been acquitted of Dorothy's murder some seven months earlier, invoked her Fifth Amendment rights on advice of counsel and refused to testify, despite being given complete immunity from prosecution. (Tr. Vol. II, pp. 86-89.) The circuit court found Lorie Day in contempt and ordered her jailed, stating that she could purge herself of the contempt by agreeing to testify. (*Id.* at 89-90.)⁷ Counsel for Appellant then moved that the court advise the jury of Ms. Day's refusal to testify, which motion the court denied, stating that it would lead to speculation by the jury. (*Id.* at 90-91.) Later in the trial, Appellant asked to call Lorie Day as a witness in the presence of the jury, but the court would not allow her to be called for the same reasons previously stated. (*See* Tr. Vol. III, pp. 105-06.)

Appellant's trial counsel, however, was able to introduce other testimony implicating Lorie Day in the murder. Appellant's sister, Polly Whitt, testified that Lorie had threatened to "knock her [Dorothy Mitchell's] brains out" if she didn't leave her alone. (Tr. Vol. II, p. 208.) Deborah Hall stated that on the day before the murder, Lorie was angry about Dorothy's treatment of her, and said that "she was going to do something about it." (Tr. Vol. III, pp. 46-47.) Defense counsel elicited testimony from Tammy Minor, Lorie Day's cousin, that Lorie was both a liar and violent. (*Id.* at 58.) Defense witness Tina Ashworth testified that Lorie had confessed to her during a jail visit (*id.* at 86-87), and Edward Pierson stated that Lorie told him "she was going to take something and beat her [Dorothy Mitchell's] brains out." (*Id.* at 129.)

⁷Due the contempt order, Ms. Day was confined to jail until the end of the trial, and was released the next day. (*See* R. 150, 155, 167, 170-71.)

Jennifer Ray, who was in jail with Lorie Day, testified that Lorie bragged that she had killed “Maw” [Dorothy Mitchell] for pain pills and money, and said that “God made her do it.” (Tr. Vol. III, pp. 152-53.) Both Ms. Ray and Jessica Mullens, another jail inmate, testified that Lorie described in detail how she had killed Dorothy by hitting her in the head with a baseball bat, and had convinced the Appellant to help her dispose of the body. (*Id.* at 154-55, 178-79.)

The Appellant testified in his own defense, and informed the jury that Lorie told him “It was an accident. I [Lorie] killed Maw.” (Tr. Vol. III, p. 252.) According to the Appellant, Dorothy Mitchell was already dead when he discovered her, and he helped Lorie dispose of the body rather than calling the police because he thought Lorie was pregnant with his child. (*See id.* at 251-65.) He said that he decided to confess because he wanted to end the family’s pain and give Dorothy a proper burial. (*Id.* at 280.) After he learned that Lorie had lied to him, Appellant gave a written statement to police on March 2, 2001, implicating Lorie Day in the murder. (*Id.* at 288-89; *see* Tr. Vol. III, pp. 4-15, Defendant’s Ex. 8.)

After hearing the testimony, the jury convicted the Appellant of the lesser-included offense of second degree murder. (Tr. Vol. IV, p. 94; R. 236.) Appellant’s motion for a new trial was denied following a hearing on November 1, 2002. (R. 258-60.) In the pre-sentence report prepared by the Probation Department, the Appellant made no mention of the facts of the crime, only stating that he “thought as much of her [Dorothy Mitchell] as I did my own mother.” (R. 306.) On January 8, 2003, the circuit court imposed a determinate sentence of 40 years’ imprisonment. (R. 286-88.) The Appellant was re-sentenced for purposes of extending his appeal period, by order entered June 7, 2005. (R. 384.) It is from this order that the Appellant now appeals.

III.

ASSIGNMENT OF ERROR

This Court granted the Appellant's petition for appeal on March 2, 2006, solely as to the following assignment of error:

Whitt Was Denied His Constitutional Rights to Compulsory Process 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.

(Petition for Appeal at 10.)⁸

IV.

ARGUMENT

A. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO ALLOW APPELLANT TO CALL CO-DEFENDANT LORIE DAY AS A WITNESS IN FRONT OF THE JURY AFTER DAY HAD INVOKED HER PRIVILEGE AGAINST SELF-INCRIMINATION AND REFUSED TO TESTIFY.

Lorie Day was acquitted following her trial on March 13, 2002. On or about March 14, 2002, the McDowell County Circuit Clerk provided Appellant's trial counsel with a subpoena to secure Lori Day's attendance as a witness for his defense. (*See* R. 97.) After Ms. Day was served, her attorney filed a motion to quash the subpoena and for a protective order, invoking Lorie Day's right against self-incrimination. (*See* R. 100.) Consequently, when Ms. Day reported for Appellant's trial on October 7, 2002, she was accompanied by her trial counsel, Gloria Stephens. (*See* Tr. Vol. I, p. 69; Tr. Vol. II, pp. 85-86.)

⁸This was Assignment of Error No. 2, as presented in the Appellant's Petition for Appeal and granted by this Court. In his brief to this Court, the Appellant has added claims that the trial court's ruling also denied him his rights to present a defense and confront his accusers. These claims are related to Assignment of Error No. 1, which was twice denied appellate review by this Court.

As previously discussed, when the Appellant called Lorie Day to testify *in camera*, she invoked her Fifth Amendment privilege, which the court found to be invalid because she had been granted complete immunity. (Tr. Vol. II, pp. 85-89.) However, Ms. Day still refused to testify on advice of her counsel. (*Id.* at 89.) Accordingly, she was found in contempt of court and jailed until a day after the trial. After Day refused to testify, defense counsel asked “that the jury be informed by the Court that Ms. Day – at the very least that Ms. Day took the 5th and declined to testify.” (Tr. Vol. II, p. 90.) The trial court ruled:

I’m going to deny the motion for the reason that I’m not sure why she refused to testify. And so any reason that the jury may come up [with] for that would be speculative. And to give them a full briefing as to what all took place would almost require that they be informed that she had been found not guilty, and they’re not supposed to know that. So because I believe that it would put an end to speculation, I would deny that.

(Tr. Vol. II, p. 91.)

The Appellant suffered no resulting prejudice. Although Ms. Day refused to testify, because she was unavailable the Appellant was able to introduce testimony before the jury from several witnesses regarding hearsay statements that had been made by Day which implicated her in Dorothy Mitchell’s murder, without objection by the State.

Later in his case-in-chief, Appellant’s defense counsel again asked to call Lorie Day as a witness, noting that the jury had seen her during voir dire and “there may be a risk of drawing an adverse conclusion from her presence and then absence. So we’d at least like to get her out and that we’re calling her.” (Tr. Vol. III, pp. 105-06.) The court would not allow Ms. Day to be called in the jury’s presence, for the reason that if she refused to testify “it would lead to speculation on the part of the jury.” (*Id.* at 106.)

Defense counsel then proposed, “before we rest, we would ask for a recess until Ms. Day decides to testify. We believe that that may stimulate a change of heart on her part, more so than simply placing her in jail.” (*Id.*) In response to questions from the court, Appellant’s attorneys admitted that they had never interviewed Lorie Day, and did not know what she would testify to if called. (*Id.* at 107.) However, defense counsel argued that because her credibility was so much at issue Ms. Day was an essential witness, and “regardless of what she says, we could beat up on her[.]” (*Id.*) The court denied the request for a recess, observing that the defense had already “attacked her credibility here very forcefully” with unrebutted testimony from numerous witnesses, and that “we could recess here for months and she may refuse to testify.” (*Id.* at 107-08.)⁹

There was no error in the trial court’s rulings. If Lorie Day’s invocation of her Fifth Amendment privilege and her resulting refusal to testify despite being threatened with contempt had taken place before the jury, jurors would have been able to draw improper inferences from her invocation of the privilege.

The Appellant was not denied his constitutional right to compulsory process, because he was able to subpoena Ms. Day to appear at his trial, and the trial court quite properly held Day in contempt when she refused to testify despite the court’s finding that she had no valid privilege. That is all that the law requires.

⁹Indeed, during an *in camera* discussion at the conclusion of the defendant’s case, Lorie Day’s attorney informed the court that Ms. Day did not intend to change her mind about testifying, and was willing to remain in jail for as long as the trial lasted. (*See Tr. Vol. IV, p. 9.*)

1. **The Standard of Review.**

“The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.’ Syllabus point 10, *State v. Huffman*, 141 W. Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds*, *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994).” Syl. Pt. 1, *State v. Calloway*, 207 W. Va. 43, 528 S.E.2d 490 (1999).

2. **The Circuit Court Did Not Abuse its Discretion by Refusing to Allow the Appellant to Call Lorie Day Before the Jury.**

The Compulsory Process Clause of the Sixth Amendment grants a criminal defendant the right to offer testimony of favorable witnesses, and to compel their attendance at trial. *See also* W. Va. Const. art III, § 14. The right to compel the attendance of a witness is the right to present a defense, which is fundamental to due process. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L.Ed. 2d 1019 (1967). However, “the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him ‘compulsory process for obtaining *witnesses in his favor*.’ U.S. Const., Amdt. 6 (emphasis added).” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446, 73 L. Ed. 2d 1193 (1982).¹⁰ Thus, a defendant claiming an unconstitutional deprivation of witness testimony “must at least make some plausible showing of how their testimony would have been both material and favorable to his defense.” *Id.*

The Appellant was not denied these rights because the circuit court did compel Lorie Day’s attendance at Appellant’s trial, and she did in fact take the stand – albeit out of the presence of the

¹⁰Similarly, our Constitution provides that the accused “shall be awarded . . . compulsory process for obtaining witnesses *in his favor*.” W. Va. Const. art. III, § 14 (emphasis added).

jury. (See Tr. Vol. II, pp. 87-89.) However, the Appellant was not able to examine Ms. Day because she refused to testify. Whether her claim of a Fifth Amendment privilege was valid is irrelevant because she categorically refused to testify, even after being jailed for contempt.

When confronted with the similar issue of whether a witness should be required to invoke the privilege in front of the jury, the Fifth Circuit has said that “the validity of the witness’s privilege is unimportant” because “a defendant’s right to compulsory process was ‘exhausted by [the witness’s] physical availability at court.’ . . . Once a witness appears in court and refuses to testify, a defendant’s compulsory process rights are exhausted. It is irrelevant whether the witness’s refusal is grounded in a valid Fifth Amendment privilege, an invalid privilege, or something else entirely.” *United States v. Griffin*, 66 F.3d 68, 70 (5th Cir. 1995) (quoting *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir.), cert. denied, 419 U.S. 1053, 95 S. Ct. 631, 42 L. Ed. 2d 648 (1974)). See also *State v. Roy*, 668 A.2d 41, 44 (N.H. 1995) (“The compulsory process clause, however, gives a defendant the right to produce witnesses, not their testimony, and [our] Constitution gives no further guarantee that a witness will testify.”). Therefore, the relevant question in the present case is whether the trial court could have done more to protect the Appellant’s rights. At that point, the court had already done everything within its power to force Lorie Day to testify.

The Supreme Court has said that when a witness declines to answer questions on the grounds that he may incriminate himself, “[i]t is for the court to say whether his silence is justified, *Rogers v. United States*, 340 U.S. 367, 71 S. Ct. 438 [1951], and to require him to answer if ‘it clearly appears to the court that he is mistaken.’” *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 818 (1951) (quoting *Temple v. Commonwealth*, 75 Va. 892, 899 (1880)). The circuit court in Appellant’s trial did as *Hoffman* requires. When Lorie Day’s counsel stated that Day would not be

testifying, the court determined that Day's claim of a Fifth Amendment privilege was not valid and ordered her to testify. When Ms. Day persisted in her refusal, the court held her in contempt and jailed her until after the trial. (Tr. Vol. II, pp. 86-89.) Furthermore, when Appellant called Day, he scarcely made an argument explaining how her testimony would be favorable to his defense.

In the present case, the circuit court took great pains to prevent the jury from learning about Lorie Day's case and her not guilty verdict. (See Tr. Vol. I, pp. 30-31; Tr. Vol. II, p. 86.) This concern provided another reason for Day not to testify. Appellant even had concerns that the jury would catch something from Day's testimony that pointed to her acquittal, which promoted the court to admonish Day not to discuss the outcome of her trial. (*Id.* at 84, 86.)

The State also voiced concerns that if the court informed the jury about Day's refusal to testify, jurors would speculate and draw inferences as to why she had refused. (Tr. Vol. II, pp. 90-91.) These concerns were legitimate, as was recognized by the trial court in denying the Appellant's request. If a judge informs the jury "that, although present, [a] witness is unavailable for questioning since he would assert his fifth amendment testimonial privilege, the jury may be led to draw inferences of the witness' guilt. This situation may create serious problems of prejudice for either side but may be less prejudicial than having the witness personally refuse to answer." *United States v. Vandetti*, 623 F.2d 1144, 1150 (6th Cir. 1980).

Actually putting the witness on the stand to invoke the privilege before the jury creates even more serious problems. As the Sixth Circuit pointed out, "using the words 'I take the fifth amendment' in front of the jury . . . have acquired a connotation that is tantamount to a plea of guilty before the jury." *Vandetti*, 623 F.2d at 1150. Moreover, Day's refusal to testify, even when given

complete immunity, is likely to seem even more incriminating than invoking her Fifth Amendment privilege. After all, Day went to jail just because she did not want to testify.

The United States Supreme Court and several jurisdictions require that if a questionable witness such as Lorie Day is going to take the stand, the party calling the witness must make an offer of proof, explaining what he expects the witness to testify about. At the Appellant's trial, however, his attorneys did not know what Day would say once she took the stand because they had not even interviewed her.

In *Valenzuela-Bernal*, *supra*, the respondent was accused of transporting an illegal alien in violation of federal law. He wanted to call as witnesses two other illegal aliens who were also passengers in the car, but the government had already deported them. 458 U.S. at 861, 102 S. Ct. at 3443. To determine whether the absence of these witnesses violated the Compulsory Process Clause, the Supreme Court noted that its decision in *Washington v. Texas* "suggests that more than the mere absence of testimony is necessary to establish a violation of the right." 458 U.S. at 867, 102 S. Ct. at 3446. The Court found that the Sixth Amendment by its terms only guarantees a criminal defendant the right to "compulsory process for obtaining *witnesses in his favor*." (quoting U.S. Const. amend. VI; emphasis added). 458 U.S. at 867, 102 S. Ct. at 3446. Thus, a defendant must make some reasonable showing that the witness's testimony "would have been both material and favorable to his defense." *Id.* The respondent argued that the requirement of materiality was too stringent because he did not get to interview the witnesses. *Id.* at 870; 102 S. Ct. at 3448. The Court responded, "while this difference may well support a relaxation of the specificity required in showing materiality, we do not think that it affords the basis for wholly dispensing with such a showing." *Id.* To demonstrate the required materiality, the Court stated that a defendant may make

an offer of proof indicating “the events to which a witness might testify, and the relevance of those events to the crime charged.” *Id.* at 871; 102 S. Ct. at 3448. *See also State v. McDaniel*, 665 P.2d 70, 76 (Ariz. 1983) (in banc) (“[A]n individual cannot establish a Sixth Amendment violation without ‘some showing that the evidence lost would be both material and favorable to the defense.’”) (quoting *Valenzuela-Bernal*, 458 U.S. at 873, 102 S. Ct. at 3449); *Smith v. State*, 457 So. 2d 997, 999 (Ala. Crim. App. 1984) (“To successfully claim reversible error in this situation, defense counsel must have made some offer of proof or a sufficient statement of evidence that he anticipated to elicit from this witness. . . . The statement must suggest what the evidence anticipated would be, and how it is both relevant and material.”) (citations omitted).

Some states, like New Hampshire, have even gone as far as to say that the proponent must show that the evidence is directly exculpatory. In *State v. Winn*, 694 A.2d 537 (N.H. 1997), the defendant claimed that her due process rights were violated when the trial court refused to compel the State to grant immunity to one of her witnesses. However, her claim failed because she “made an insufficient showing that [her witness’] testimony would be directly exculpatory or at a highly material variance with the State’s evidence.” *Id.* at 540.

In the present case, the Appellant made no attempt to explain the evidence he hoped to elicit from Lorie Day, or how it would be either material or favorable to his defense. The only claims that Appellant made were that “her credibility is so much at issue . . . that it could be a determinate part of the trial,” and that “we could beat up on her regardless of what she says and she’s essential.” (Tr. Vol. III, p. 107.) These statements hardly demonstrate that Day’s testimony would have been either material or favorable to the defense, or that the Appellant had a good faith belief that Day would testify about any issues pertinent to his trial. Given that Ms. Day had even refused to testify during

her *own* trial, any such belief would appear to be unfounded. Further, Appellant made no proffer as to the events to which Day might testify or to the relevance of such events, as required by the Supreme Court in *Valenzuela-Bernal*. Finally, even if Day had testified and the Appellant was able to attack her credibility, it could have actually *harmed* his defense by making her statements to defense witnesses such as Jessica Mullens and Jennifer Ray appear more unreliable.

The Appellant relies upon this Court's decision in *State v. Harman*, 165 W. Va. 494, 270 S.E.2d 146 (1980), as support for his position. In *Harman*, this Court found a denial of the right to compulsory process, and therefore reversible error, in the trial court's disallowance of the defendant's request for a subpoena to call his accomplice to the witness stand so that the jury could view his *physical* characteristics, because the constitutional right against self-incrimination does not prevent a witness from merely *appearing* before the jury. The trial court in *Harman* had also ruled that the defendant must first obtain permission from the accomplice's attorney before calling him as a witness. The Court stated, "unlike the circumstance involving a defendant at trial, a witness may not refuse to take the stand." 165 W. Va. at 504, 270 S.E.2d at 153.

In contrast to the present case, the witness in *Harman* was not being asked to provide *testimony*, which is constitutionally protected. Because Lori Day was granted immunity and therefore no longer had a valid claim of privilege against self-incrimination, the Appellant argues that he had the right to call her to the stand to testify. The State concedes that the Appellant had the right to call Day; however, he was not entitled to require her to invoke the privilege *before the jury*.

Ordinarily, it is desirable that the jury not know that a witness has invoked the privilege, since neither party to litigation is entitled to draw any inference from a

witness's invocation.¹¹ Therefore, if a party anticipates that his witness will invoke the privilege, he should alert the trial court of this. The witness' invocation and the court's inquiry into the justification for the witness' reliance on the privilege should take place out of the presence of the jury.

McCormick's Hornbook on Evidence § 130 (5th ed. 1999) (footnote omitted) (citing *People v. Ford*, 754 P.2d 168, 174 n.6 (Cal. 1988) (recommending use of "pretestimonial hearing" out of presence of jury for this purpose)).

Prior to trial, the Appellant was advised that Lorie Day would invoke the privilege against self-incrimination when her attorney filed a motion to quash the subpoena served on Day. Accordingly, the trial court appropriately held an *in camera* hearing to address this issue, during which Ms. Day was placed under oath and invoked her privilege against self-incrimination.

Appellant argues that "[t]he right to compel a 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." *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S. Ct. 646, 653 (1988). However, a constitutional problem arises when a witness is presented who refuses to testify, in that "such a witness permits the party calling the witness to build its case out of inferences arising from the use of the testimonial privilege, . . . a violation of due process." *Vandetti*, 623 F.2d at 1148 (citation omitted). *See also Bowles v. United States*, 439 F.2d 536, 541-42 (D.C. Cir.1970) (en banc), *cert. denied*, 401 U.S. 995, 91 S. Ct. 1240, 28 L. Ed. 2d 533 (1971) ("It is well settled that the jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defense. . . . The rule is

¹¹One exception to this rule is when a witness has already given testimony damaging to the defendant and invokes the privilege in response to the defendant's cross-examination, because such a situation implicates the Confrontation Clause. *See McCormick*, § 135. Such is not the case here.

grounded not only in the constitutional notion that guilt may not be inferred from the exercise of the Fifth Amendment privilege but also in the danger that a witness's invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations.”) (citation omitted).

In accordance with McCormick’s general rule, several jurisdictions have ruled that it is inappropriate to have a witness take the stand only to invoke his Fifth Amendment privilege in front of the jury. See *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973) (“If it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand. Neither side has the right to benefit from any inferences the jury may draw simply from the witness’ assertion of the privilege either alone or in conjunction with questions that have been put to him.”); *Griffin*, 66 F.3d at 70 (rejecting defendants’ contention that the Compulsory Process Clause guaranteed them the right to place a witness on the stand for the sole purpose of having him invoke an *invalid* Fifth Amendment privilege in the jury’s presence: “The Sixth Amendment requires that a witness be brought to court, but it does not require that he take the stand after refusing to testify.”) (citing *Lacouture*, 495 F.2d at 1240); *United States v. Beye*, 445 F.2d 1037, 1038 (9th Cir. 1971) (holding defendant was not entitled to require witness to take the stand and invoke his privilege in the presence of the jury); *United States v. Castorena-Jaime*, 285 F.3d 916, 931 (10th Cir. 2002) (“Defendants do not, however, have the right to force a witness to invoke his Fifth Amendment privilege before the jury.”) (citing *United States v. Hart*, 729 F.2d 662, 670 (10th Cir. 1984)); *Bowles*, 439 F.2d at 542 (“An obvious corollary to these precepts is the rule that a witness should not be put on the stand for the purpose of having him exercise his privilege before the jury. . . . This would only invite the jury to make an improper inference. For the same reason no

valid purpose can be served by informing the jury that a witness has chosen to exercise his constitutional privilege. That fact is not one the jury is entitled to rely on in reaching its verdict.”) (citation omitted).¹²

In *Martin v. United States*, 756 A.2d 901, 906 (D.C. 2000), the D.C. Court of Appeals affirmed the trial court’s decision not to call a defense witness to the stand after finding him in contempt for refusing to testify, even though he asserted no claim of privilege. Relying upon the general rule against such testimony where a valid privilege exists, the Court reasoned:

The policy reasons which govern when the Fifth Amendment privilege is properly invoked are applicable when a privilege of another sort is asserted, and also when there is no valid claim of privilege at all. Putting a witness on the stand in front of the jury for the sole purpose of observing his refusal to testify invites the jury to speculate and draw impermissible inferences. See *Gearns*, 577 N.W.2d at 436 (“The impermissible inference is no less present when the privilege might be invalid.”). A witness should be questioned outside the presence of the jury when it is clear that the witness will refuse to testify on the basis of any privilege or reason. See *Hagez v. State of Maryland*, 110 Md. App. 194, 676 A.2d 992, 1005 (1996) (State’s

¹²See also *People v. Cudjo*, 863 P.2d 635, 657 (Cal. 1994) (in bank) (rejecting defendant’s claim that trial court should have either informed jurors of witness’ refusal to testify or compelled witness to claim privilege in jury’s presence: “[p]ermitting the jury to learn that a witness has invoked the privilege against self-incrimination serves no legitimate purpose and may cause the jury to draw an improper inference of the witness’s guilt or complicity in the charged offense.”) (citations omitted); *Faver v. State*, 393 So.2d 49, 50 (Fla. Dist. Ct. App. 1981) (holding that trial court properly refused defense counsel’s request to call witness to the stand and force him to invoke his Fifth Amendment privilege before the jury); *People v. Sapia*, 359 N.E.2d 688, 690 (N.Y. 1976) (“[D]efendant contends that it was prejudicial error to deny defense counsel’s request to call Fodderell to the witness stand and to put him to his claim of privilege against self incrimination in the presence of the jury. We have no hesitancy to state our conclusion that there was no abuse of discretion by the Trial Judge in this regard.”) (citing *United States v. Martin*, 526 F.2d 485, 487 (10th Cir. 1975); *Ellis v. State*, 683 S.W.2d 379, 382 (Tex. Crim. App. 1984) (en banc) (“[T]his court has repeatedly held that a defendant has no right to have a witness assert or invoke his Fifth Amendment privilege against self-incrimination in the presence of the jury.”) (citations omitted); *but cf. Gray v. State*, 796 A.2d 697, 714 (Md. 2002) (holding that a trial court has some discretion to permit a defendant to call a witness to the stand to invoke his Fifth Amendment privilege in the presence of the jury, if the court first determines whether sufficient evidence has been presented of the possible guilt of the witness).

unrelenting questioning of witness in presence of jury prejudiced defendant even though witness asserted invalid claim of spousal immunity); *United States v. MacCloskey*, 682 F.2d 468, 478 n.19 (4th Cir.1982) (“We think that the best procedure to follow after a witness has improperly invoked the Fifth Amendment or any privilege in such a situation, is to issue an order, outside of the jury’s presence, directing him to testify and admonishing him that his continued refusal to testify would be punishable by contempt.”) (citations omitted). . . .

. . . . Therefore, the court followed the correct course of action when it prevented the witness from being called to the stand in front of the jury for the sole purpose of refusing to answer the government’s questions, and in holding the contempt hearing out of the presence of the jury.

Although Gibson did not assert a Fifth Amendment privilege or any valid reason for refusing to testify, it was likely that the jury, upon observing his assertion, would speculate as to possible reasons for Gibson’s refusal, including, but not limited to, fear, intimidation, criminal activity on his part, or his previous misstatements about the case. The rationale for not requiring a witness on the stand to assert a Fifth Amendment claim before the jury applies with substantially equal force to cases such as the one before us, where the witness refused to testify simply because he was unwilling to do so.

Martin, 756 A.2d at 905-06 (footnote omitted).

The same rationale should apply in the present case. Thus, while the Appellant may enjoy the right to compel Ms. Day’s presence, he should not be able to compel her to invoke her testimonial privilege before the trier of fact. At most, he may be entitled to an instruction to the effect that jurors should draw no inference from Ms. Day’s absence because she was not available to either side, without disclosing the reason for her unavailability. *See, e.g., Bowles*, 439 F.2d at 542. However, the Appellant requested no such instruction.

Neither is Appellant entitled to have his conviction set aside on the ground that Ms. Day had no valid claim of privilege. *See Sapia*, 359 N.E.2d at 691 (“Nor may testimony be extracted from a witness who appears but persistently refuses to testify despite the sanction of punishment for contempt. . . . in none of such instances do our courts accord a broader meaning to the Sixth

Amendment guarantee by holding that where the desired testimony may not be compelled, such circumstance requires that the conviction of the defendant be set aside.”).

Even if Lorie Day had agreed to testify, any inculpatory statements by her would likely have been inadmissible under the standard set forth by this Court in Syl. Pt. 5 of *State v. Frasher*, 164 W. Va. 572, 265 S.E.2d 43 (1980), *overruled on other grounds by State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995): “For evidence of the guilt of someone other than the accused to be admissible, it must tend to demonstrate that the guilt of the other party is inconsistent with that of the defendant.” *See also Harman*, 165 W. Va. at 498, 270 S.E.2d at 150. This is where the Appellant failed. He wanted to present evidence that someone else committed the murder of Dorothy Mitchell; namely, Lorie Day. However, unless Ms. Day broke down on the stand and admitted that she had acted alone (a highly unlikely possibility in light of her previous statements and actions), her testimony would not have established the Appellant’s innocence. The fact that Ms. Day may have also been involved does not mean that the Appellant did not participate in killing Ms. Mitchell. Under the concerted action principle,¹³ a jury could find that both the Appellant and Day were responsible for Dorothy Mitchell’s vicious murder.

3. The Appellant’s Defense Was Not Unfairly Prejudiced When Lorie Day Refused to Testify At His Trial.

A large portion of the Appellant’s brief challenges the admissibility of Lorie Day’s hearsay statements to Donna Brewster implicating him in the murder. However, as previously discussed, this issue is not properly before the Court. Moreover, the Appellant was not unduly prejudiced by the

¹³A concerted action is “[a]n action that has been planned, arranged, and agreed on by parties acting together to further some scheme or cause, so that all involved are liable for the actions of one another.” Black’s Law Dictionary (8th ed. 2004).

introduction of this testimony. As the circuit court noted, Lorie Day indeed “testified” through her words and actions that were related by other defense witnesses, and that testimony mostly proved that Day was hateful and a liar. (*See* Tr. Vol. III, pp. 106-08.) Appellant further argues that Day’s statements should not have been admitted because they were unreliable. If Ms. Day’s statements are so unreliable, her testimony should not be admissible in any event.

The Appellant places great reliance upon *Gray v. State*, 796 A. 2d 697, 714 (Md. 2002), wherein the Maryland Court of Appeals held that a trial court may allow a defendant to call a witness whom he believes committed the crime to invoke his Fifth Amendment privilege before the jury, if the court first determines that there is sufficient evidence of the possible guilt of the witness. Significantly, the defendant in *Gray* was not only unable to call the alleged perpetrator as a witness, but the trial court also refused to permit him to introduce inculpatory hearsay statements the witness had made, as declarations against penal interest. The Court of Appeals reversed, holding that it was error to deny the admission of the hearsay statements when the witness was unavailable to the defense. *Id.* at 701-02, 707. By contrast, the Appellant was allowed to introduce numerous hearsay statements made by Lorie Day in order to impeach her previous statements to Donna Brewster, without any objection by the State or restriction by the trial court. Unlike the defendant in *Gray*, the Appellant was not deprived of his ability to present a defense. Therefore, the trial court did not abuse its discretion when it refused to allow Appellant to call Lorie Day to the witness stand solely to force her to invoke her Fifth Amendment rights before the jury.

Appellant repeatedly asserts that he should have been able to question Ms. Day before the jury because her statements to Donna Brewster were “the *only* evidence to corroborate the autopsy finding the victim died from blunt force trauma to the head.” (Appellant’s Brief at 11, 21.) This is

simply not true. As previously detailed in the Statement of Facts, *supra*, Lorie Day told at least two other persons that Dorothy Mitchell was killed by a blow to the head with a baseball bat. (See Tr. Vol. III, pp. 154-55, 178-79.) The only thing unique about her statements to Donna Brewster was that those statements placed the blame for swinging that bat on the Appellant alone. However, in other hearsay statements introduced by the defense, Ms. Day stated that she was the one who actually did the killing. The jurors heard both versions, and decided which one to believe. Appellant was not deprived of any evidence relevant to his defense by the trial court's evidentiary rulings, and suffered no undue prejudice.

Additionally, the Appellant contends that he was prejudiced by Day's absence because she was introduced to the jury during voir dire. He claims that "[w]hen 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." (Appellant's Brief at 29.) However, when Day was introduced to the jurors as a potential witness they were not told whether she was a witness for the State or for the defense. (See Tr. Vol. I, p. 10.) Additionally, the record demonstrates that the Appellant was not prejudiced by this introduction.

On October 21, 2002, Appellant filed a Motion for a New Trial, in part on the grounds that "one or more of the jurors in this trial were aware that Co-defendant Lorie Day had refused to testify at this trial" and that "some jurors wondered why Ms. Day had not testified." He argued that this constituted "deliberating on evidence not properly before the jury." (R. 214.) During the November 1, 2002 evidentiary hearing on the motion, the court noted:

[S]o what if they did know that Lori Day had been – refused to testify at the trial? If I remember, Mr. Mancini [defense counsel], on more than one occasion during the trial, you tried to get me to either tell the jury that or to bring her down and actually

put her on the witness stand to take the 5th Amendment so they would know that she did [not] testify. So you must have assumed that that knowledge would have helped your client. Because I am confident that you would have not introduced any evidence or wanted to introduce any evidence that you would have thought would have been detrimental to your client. So you must not have thought the jury's knowledge of Lori Day refusing to testify was detrimental.

(11/1/02 Hr'g Tr., p. 11.)

At this hearing, juror Kathryn Belfiore testified that when they were asked to identify Ms. Day as a possible witness during jury selection, and then she did not testify, "we made an assumption about why she didn't testify." (*Id.* at 15.) She explained, "the only assumption I could make was that she did not testify either on her own or on advice from her lawyer or whatever. Her attorney was here." (*Id.* at 18.) Ms. Belfiore also stated that the jurors did not discuss this, and that the subject of Day's guilt or innocence did not enter into their deliberations. (*Id.* at 16-17, 19.)

Juror Belfiore's testimony shows that if the jurors inferred anything at all from Lorie Day's absence, it was that she had decided not to testify because she feared incriminating herself – which is precisely the effect that the Appellant sought to achieve. Consequently, he was not prejudiced by the trial court's failure to explain her absence from the trial.

The trial court's rulings did not deprive the Appellant of any constitutional rights, and his conviction should therefore be affirmed.

V.

RELIEF REQUESTED

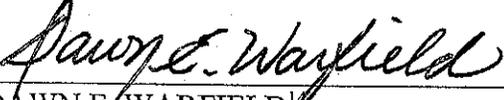
WHEREFORE, for the foregoing reasons the judgment of the Circuit Court of McDowell County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel,

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CERTIFICATE OF SERVICE

I, DAWNE. WARFIELD, Deputy Attorney General and counsel for the Appellee, do hereby certify that I have served a true copy of the foregoing *Brief of Appellee, State of West Virginia* upon counsel for the Appellant by depositing it in the regular United States mail, postage prepaid, this 21st day of August, 2006, addressed to him as follows:

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