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No. 33323

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

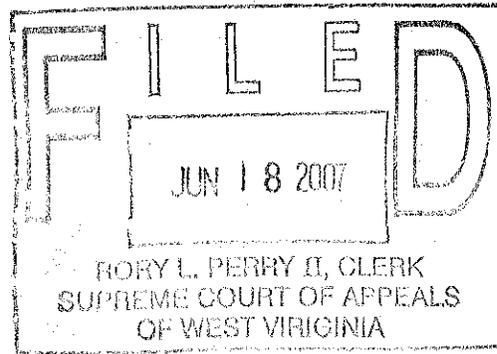
STATE OF WEST VIRGINIA,

*Plaintiff below,  
Appellee,*

v.

ERIC ALLEN FOSTER,

*Defendant below,  
Appellant.*



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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The State agrees with Appellant's procedural recitation as stated in his memorandum but would add the following:

Appellant and his co-defendants, Matthew Wayne Bush and Jeffrey Wayne Stewart, were each charged in a seven count indictment returned by the Nicholas County, West Virginia Grand Jury on May 12, 2004. Each were charged with two counts of murder in the first degree in violation of the provisions of W. Va. Code § 61-2-1, two counts of malicious assault in violation of the provisions of W. Va. Code § 61-2-9 and three counts of wanton endangerment with a firearm in violation of the provisions of W. Va. Code § 61-7-12. The alleged victims in the murder and malicious assault counts and two of the three wanton endangerment counts were Travis Painter and

Michael Murphy. The third wanton endangerment count alleged the victim to be one Jeremy Hanna who was at the location of the shootings, the Murphy camp, on the night in question.

The defendants were tried separately with Appellant's trial being held in Richwood, West Virginia before the Honorable Gary Johnson. Trial was held October 7, 2004.

Each count of the indictment charged Appellant and each of his co-defendants substantively and alleged that the three were "acting in concert" with each other in the commission of the charged offense. It appears from the record that the State elected to proceed only on the murder charges.

## II.

### FACTS OF THE CASE

On December 30, 2003 Appellant was at the home of his co-defendant, Matt Bush, where he and Mr. Bush were working on a well pump (Tr. 7-9, Vol. III). While so engaged, one Travis Painter, an acquaintance of Appellant and Mr. Bush, came to the house and an argument ensued between Appellant and Mr. Painter during which Mr. Painter brandished a pistol (Tr. 5-7, Day 3). During the confrontation Appellant disarmed Mr. Painter without significant incident and thereafter Mr. Painter stated that the ongoing problems between the two were "stupid" (Tr. 7, Day 3).

Mr. Painter also invited Appellant to visit the nearby camp of Mr. Painter's brother-in-law, Michael Murphy, that evening in order for the two to resolve their differences.

Later on the evening of December 30, Appellant, Mr. Bush, and a bare acquaintance of Appellant's, Jeffrey Stewart, traveled to Mr. Murphy's camp site, located a few miles from Mr. Bush's residence (Tr. 7-9, Day 3). They traveled in Appellant's pickup truck (Tr. 7-9, Day 3).

Appellant was driving the truck with Mr. Bush in the middle and Mr. Stewart occupying the passenger side window seat. Mr. Stewart was in possession of a loaded, uncased .12 gauge shotgun. Appellant was aware of Mr. Stewart's having the shotgun (Tr. 8, Day 3).

### III.

#### ISSUES

- A. **THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE CONVICTIONS**
1. **Did the Circuit Court err in giving a jury instruction on murder in the second degree?**
  2. **Did the Circuit Court err in denying appellant's Motion to Dismiss for Judgment of Acquittal as to murder in the first and second degrees?**
  3. **Was the Circuit Court's instruction as to "acting in concert" and principal in the second degree erroneous?**
- B. **WAS THE JURY PANEL SO TAINTED AS TO DENY APPELLANT A FAIR TRIAL?**
- C. **WAS APPELLANT'S TRIAL COUNSEL INEFFECTIVE?**
- D. **SHOULD THIS COURT ADOPT A RULE IN THIS CASE REQUIRING PERSONS CHARGED WITH OFFENSES CARRYING A POSSIBLE PENALTY OF LIFE IMPRISONMENT HAVE MULTIPLE COUNSEL, AND THEREBY REVERSE APPELLANT'S CONVICTION AS HE DID NOT?**
- E. **WAS THERE CUMULATIVE ERROR IN THIS CASE WARRANTING REVERSAL?**
- F. **IS THE SENTENCE IMPOSED IN THIS CASE DISPROPORTIONATE?**

### IV.

#### STANDARDS OF REVIEW

The Respondent agrees with Appellant's recitation of the applicable standards of review as to the issues raised in Appellant's memorandum.

V.

ARGUMENT

**A. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICTS IN THIS CASE**

The test for an appellate court when reviewing a challenge to the sufficiency of evidence supporting a conviction or convictions is perhaps the most stringent in the law.

The relevant inquiry for this Court is whether upon viewing the entirety of the evidence admitted while viewing such evidence in the light most favorable to the state, any rationale trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

The Appellant is correct that the record reflects no direct evidence that Appellant had a weapon in his possession during the relevant time frame nor was there direct evidence that Appellant was engaged in any planning of the shooting of Messrs. Painter and Murphy. The latter point would appear, however, mooted by the lack of premeditation as an element of the offenses of conviction.

As to the Appellant's former point, such is not a necessity given the fact that Appellant is charged with "acting in concert" with his co-defendants, not necessarily as a shooter.

It should also be noted that the State presented evidence inconsistent with Appellant's as to the placement of persons at the time of the shootings from which the jury could have inferred that Appellant was, in fact, a shooter (Tr. 168-225, Vol. I, pp. 118-47, Vol. II).

When this Court views the evidence in the manner in which it has previously prescribed for itself on this issue, crediting all inferences and credibility assessments in favor of the prosecution there was evidence presented sufficient to convince the jury of Appellant's guilt beyond a reasonable doubt.

The record is unequivocal that Appellant and Mr. Painter had engaged in a physical dispute earlier on the day of the killings and had a previous ongoing disagreement (Tr.7-9, Day 3). The record is equally clear that Appellant drove to the camp of Mr. Murphy late at night in the company of co-defendants Bush and Stewart, knowing Mr. Stewart, a virtual stranger to him, was in possession of a .12 gauge shotgun (Tr. 7-9, Day 3). There was also evidence, controverted by Appellant, that his girlfriend, Tina, warned Appellant of possible trouble in going to meet Messrs. Painter and Murphy and he persisted in his desire to go (Tr. 73-75, Vol. III).

The Appellant's argument as to sufficiency of the evidence is actually multiple in nature. Appellant argues that the State failed to meet its burden as to proving malice beyond a reasonable doubt or that Appellant "acted in concert" with his co-defendants.

For clarity each of these arguments will be addressed separately.

Generally, this Court's position on challenges to the sufficiency of the evidence are found in *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). Syllabus points one and three of *Guthrie*, *supra* state:

1. The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

...

3. A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a

reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

It is against this legal backdrop one must consider the evidence presented below.

The Appellant submits that the state failed under the *Guthrie, supra*, standard to present sufficient evidence of malice on Appellant's part. The record reflects that Appellant and one of the victims, Mr. Painter, had the very day of his death been involved in a physical confrontation at the home of Appellant's co-defendant, Matthew Bush (Tr. 7-9, Vol. III). There was also uncontroverted evidence that Appellant and Mr. Painter had differences which preceded December 30, 2004 (Tr. 7-9, Vol. III).

Additionally, when Appellant went to the camp of the second victim, Michael Murphy, late on the night of December 30, 2004, he drove an armed stranger, Mr. Stewart, who carried a .12 gauge shotgun of which Appellant was well aware (Tr. 7-9, Vol. III).

Malice, express or implied, is an essential element of both first and second degree murder.

The circuit court, as conceded by appellant, provided the jury with a "fairly thorough" instruction on malice as an element of murder (App. Memo p.13, Tr. Vol. III p. 97). A reading of the actual instruction in light of the state's "concerted action" theory of prosecution could quite plausibly be described as overly favorable to Appellant.

A reasonable trier of fact could have found sufficient evidence of malice on Appellant's part to sustain a finding beyond a reasonable doubt on the element of malice.

The Appellant also alleges that the circuit court's instruction as to the lesser included offense of second degree murder was incorrect but quotes the court's instruction on first degree as to Mr. Painter (App. Memo p. 14, Tr. Vol. III p. 98). The court's instruction as to second degree murder regarding Mr. Painter is found on the same page as the first degree instruction. It is a correct statement of the elements of second degree murder, excising the elements of premeditation or deliberation (Tr. Vol. III, p. 14).

The Appellant's true problem regarding sufficiency of the evidence would appear to be addressed to the State's use of the "concerted action principle" as a charging mechanism and the instruction thereon. While Respondent would concede that "concerted action" is not ordinarily charged, the record reflects that no objection was lodged against its use in the indictment and the concept was explained to the jury via instruction.

Appellant argues that the circuit court's instruction as to concerted action was erroneously incomplete as it failed, per *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1990) to inform the jury that the evidence must show that the Appellant was "acting with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." (App. Memo pp. 15-16). Such is not the case. This is exactly how the circuit court instructed the jury (Tr. Vol. III p. 105).

**B. THE JURY PANEL WAS NOT TAINTED SO AS TO DENY APPELLANT A FAIR TRIAL**

Appellant contends that the jury panel in this case was so tainted as to deny appellant a fair trial. This agreement is based upon two circumstances. First, that Juror Selby, having previously

been a victim in a misdemeanor domestic battery wherein the State of West Virginia was represented by then Prosecuting Attorney Keith McMillion.

Additionally, Appellant argues that a number of other jurors, some seven, knew persons who were involved in the case, as witnesses or co-defendants and that, cumulatively, this constitutes reversible error.

The record reflects that voir dire was rather extensive (Tr. Vol. I pp. 9-102) and that each of the jurors whose presence is alleged to be prejudicial were subject to standard questions relating to knowledge and bias. Each of the jurors stated unambiguously that they could sit and objectively base their individual decision on the evidence (Tr. 25-27, 35-36, 46-48, 54-59, Vol. I).

The record reflects that counsel for Appellant was given the opportunity to question each of the jurors in question and the record further reflects that there was no motion to strike made by the defense as to any of them. Additionally, there is no evidence of record that a change of venue was sought. Assuming, *arguendo*, that cause existed to strike the jurors questioned by Appellant, direct appeal is not the vehicle for redress.

This Court has held that when a defendant has knowledge of grounds or reason to challenge a prospective juror for cause and fails to do so prior to the jury being sworn, the Defendant may not raise the issue of the trial court's failure to strike the juror for cause on direct appeal. *State v. Tommy Y.* \_\_\_ W. Va. \_\_\_, 637 S.E.2d 628 (2006).

**C. THE APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT RIPE FOR REVIEW NOR IS SUCH ERROR APPARENT ON THE RECORD**

Assignments of error alleging ineffective assistance of counsel are, by necessity, fact intensive. In reviewing an attorney's performance under the two-pronged test first articulated in

*Strickland v. Washington*, 466 U.S. 668, 690 (1984), this Court must first judge the reasonableness of counsel's conduct within the context of the facts of the case, viewed at the time of the conduct, without the benefit of hindsight. There exists a "strong presumption" that counsel rendered reasonably effective assistance, and counsel is afforded "wide latitude" in making tactical decisions. *Id.* at 689. The Court must also find that counsel's conduct prejudiced the appellant's defense. In order to establish prejudice the appellant must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 691. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An Appellate court need not address each issue independently. Once the Court finds that the Appellant has failed to meet his burden of proof on either prong, it need inquire no further.

Oftentimes the most relevant facts, such as trial counsel's tactical decisions, the atmosphere in the courtroom, the witnesses's demeanor, the jury's demeanor, or the existence of evidence not presented to the jury, are not found in the trial transcript. Taking this into account, this Court has repeatedly held that claims of ineffective assistance of counsel generally are not ripe for Appellate review. *State v. Miller*, 194 W. Va. 3, 12, 459 S.E.2d 114, 125 (1995). In Syl. pt. 10, *State v. Triplett*, 187 W. Va. 760, 762-763, 421 S.E.2d 511, 513-514 (1992), this Court ruled:

It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before a lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.

In the instant case, Appellant, while acknowledging the general inappropriateness of raising ineffective assistance of counsel on direct appeal, seeks same nonetheless and cites cases which are simply inapplicable to the facts of this case in support of his position.

The gist of Appellant's trial defense was that, while present, Appellant did not plan, encourage or participate in the crimes which occurred (Tr. Vol. I p.133, Tr. Vol III , pp.16-69, 131-138). On its face such would appear to plausibly explain the "failure" of counsel to argue lack of intent or malice and to eschew a self-defense theory. Admittedly, this is all being seen through the prism of the seemingly novel use of the concerted action principal as a charging mechanism rather than as a mechanism to ascribe culpability for persons other than principals such as joint venturers somewhat akin to co-conspirators.

In the Appellant's argument that counsel, and in fact in another argument raised, the court erred in regard to the instruction as to acting in concert. Again, the record reflected that the instruction given tracks the language in *State v. Fortner, supra*.

The Respondent acknowledges that Appellant's counsel's closing was rather brief and did not mention the "mere presence" doctrine, although the court correctly instructed the jury thereon.

In summary, it cannot fairly be found that counsel's as yet unexplained actions conceivably constitute *per se* ineffective assistance consistent with being considered on direct appeal.

**D. WEST VIRGINIA LAW DOES NOT REQUIRE APPOINTMENT OF MULTIPLE COUNSEL IN CASES WHERE THERE IS THE POSSIBILITY OF A LIFE SENTENCE OR SENTENCES**

Appellant concedes there is currently no statutory or common law requirement that a person on trial for an offense exposing him or her to a possible life sentence should have multiple counsel.

However laudatory this idea and the concept of uniformity among the counties are, this forum would not appear to be the appropriate one in which for this Court to require it for a number of reasons.

First, it was not raised below.

Second, the record reflects that for at least a portion of the trial additional counsel appears to have been assisting (Tr. 21, Vol. I).

Third, Appellant's argument presupposes defense counsel's ineffectiveness and such is not apparent from this record.

**E. THE RECORD DOES NOT REFLECT CUMULATIVE ERROR SUFFICIENT TO MEET THIS COURT'S TEST THEREFORE**

The Appellant, without citation of any authority, avers that cumulative error requires reversal of the Appellant's convictions.

Respondent acknowledges that where the record reflects such a level of errors preclude a defendant a fair trial, the conviction or convictions should be set aside.

Specifically, the alleged error in using composition is not reflected in the record. While, admittedly, a number of the jurors knew certain of the witnesses, co-defendants, the victims or their families, none of the jurors during voir dire made anything akin to a clear statement reflecting a discriminatory bias or prejudice, *O'Dell v. Miller*, 211 W. Va. 285 565 S.E.2d 407 (2002), in fact, quite the opposite. There could easily be valid, tactical rationale for not seeking their removal for cause which are not apparent on this record.

The "error" in the instruction on concerted action again tracks the language in *State v. Fortner, supra*. The last of the "errors" again attacks the performance of appellant's counsel. Respondent would, again, submit the record is incomplete and that issue is not ripe for consideration.

**F. THE SENTENCE IMPOSED WAS CONSTITUTIONALLY AND STATUTORILY PERMISSIBLE AND NOT DISPROPORTIONATE**

The Appellant attacks the sentences enforced below as disproportionate to the point by constitutional infirmity. Such is simply not supported by the law or the record. Appellant was convicted of two counts of murder in the second degree. The circuit court, after consideration of all the facts and circumstances of the case, and Appellants' personal history and circumstances through the pre-sentence report, imposed a sentence of forty years on each count, running consecutively. The sentence was, unquestionably, the maximum available to the court, per the provisions of W. Va. Code § 61-2-3. Appellant is effectively serving a sentence of twenty (20) to eighty (80) years, with parole eligibility after twenty (20) years. Such a sentence, while certainly significant, should hardly shock the conscience of this Court in a case involving the deaths of two people.

**CONCLUSION**

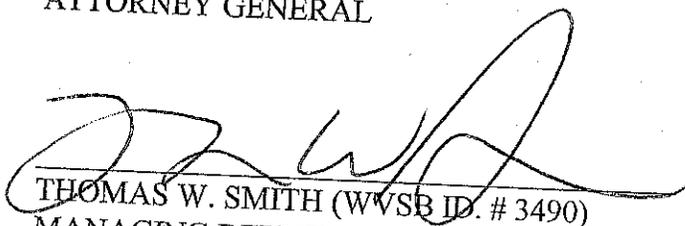
For all the reasons set forth herein and apparent on the face of the record, this Court should affirm the judgment of the Circuit Court of Nicholas County in all respects.

Respectfully submitted,

**STATE OF WEST VIRGINIA,**

By Counsel

DARRELL V. McGRAW  
ATTORNEY GENERAL

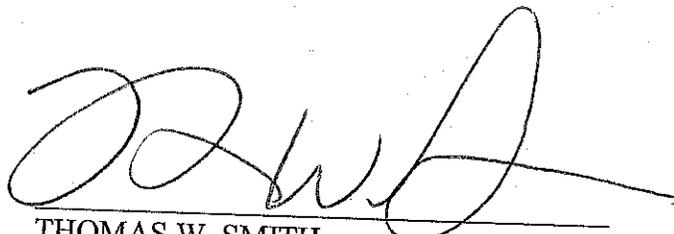


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CERTIFICATE OF SERVICE

I, Thomas W. Smith, Managing Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing Brief of Appellee, State of West Virginia was served by depositing the same postage prepaid in the United States Mail, this 18<sup>th</sup> day of June, 2007, addressed as follows:

Margaret L. Workman  
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THOMAS W. SMITH