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NO. 33340

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

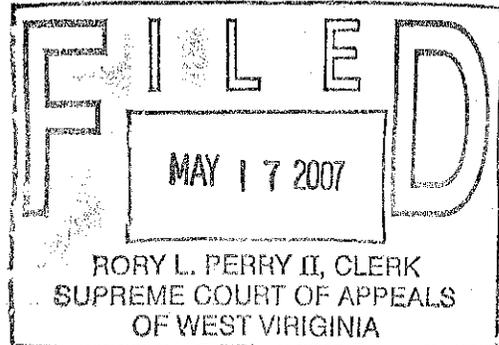
STATE OF WEST VIRGINIA,

*Appellee,*

v.

WILLIAM MILLS, JR.,

*Appellant.*



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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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I.

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

This is an appeal by William Mills, Jr. (hereinafter "Appellant") from the September 8, 2006, judgment of the Circuit Court of Kanawha County (Bloom, J.), which sentenced him to a term of not less than one year nor more than fifteen years in the state penitentiary upon his conviction by a jury of one count of delivery of a controlled substance (cocaine) in violation of West Virginia Code § 60A-4-401. On appeal, Appellant claims that the circuit court's refusal to remove a prospective juror for cause denied him a fair trial.

II.

**STATEMENT OF FACTS**

On October 27, 2006, various police officers from Kanawha County were conducting an undercover drug detail on the West Side of Charleston. (Tr., 118, Aug. 7, 2006.) These officers

were a part of the Metro Drug Unit, which is a unit composed of officers from different agencies throughout Kanawha County that investigates drug crimes. (*Id.*) J.J. Dotson, a police officer with the Charleston Police Department, and Clark A. Greene, a police officer with the City of Nitro, were driving around the area in an undercover vehicle with a recording device attempting to make undercover drug purchases. (*Id.* at 119-19, 131.) Officers Dotson and Greene used a common practice in these undercover details of driving around an area with “buy money,” which is money used to make undercover drug purchases that has been photocopied to match the serial numbers on the bills when a suspect is later arrested for selling controlled substances. (*Id.* at 120, 131.) During this undercover detail, there was another vehicle with police officers inside approximately one or two blocks away known as a “take-down” vehicle that was to make the arrest after a particular purchase occurred. (*Id.* at 120.) Officers Greene and Dotson had a recording device known as a Hawk that was utilized to record an undercover drug transaction and transmit the exchange to the take-down vehicle. (*Id.* at 121, 131-33.)

On the evening in question, the two detectives were driving down Second Avenue. When they approached the 1300 block of Second Avenue toward Florida Street, Officer Dotson noticed a man in a wheelchair waving at them so he pulled over. (*Id.* at 120.) When Officer Greene rolled his window down, the man said, “Hey, the guy on the porch is flagging you down.” (*Id.* at 134.) Officer Greene testified that “flagging one down” is generally a sign that someone is attempting to sell you crack cocaine. (*Id.*) At this point, Officer Greene observed an African-American male approaching the vehicle on the passenger side. (*Id.*) Detective Dotson recognized Appellant as William Mills or “Cowboy,” as he was known on the street. (*Id.* at 122, 153.) Appellant then asked Officer Greene what they were looking for. Officer Greene stated that he was looking for a

"twenty," which is street slang for \$20 worth of crack. (*Id.* at 135.) Appellant asked Officer Greene if they were police officers to which the latter responded that they were not. Appellant then asked Officer Greene to see the money with which the latter wished to make the purchase. Officer Greene then unfolded a \$20 bill which was buy money and held it up. In response, Appellant spat out a bag of crack cocaine into his hand, ripped the bag open with his teeth, and handed the substance to Officer Greene. (*Id.*) Officer Greene then gave Appellant the \$20 of buy money.

After traveling about 50 yards, Officer Dotson pulled over again, and Officer Greene radioed the arrest team in the take-down vehicle, describing Appellant as a black male wearing a gray puffy jacket, a toboggan and blue jeans. (*Id.* at 136.) Lieutenant Carpenter, Commander of the Metro Drug Unit, and Assistant Commander Tony Payne were in the take-down vehicle approximately three-quarters of a block away from Officers Dotson and Greene. They used the description of Appellant given to them by Officer Greene to find him and made the arrest. (*Id.* at 214-15.)

During this arrest, Lieutenant Carpenter observed Appellant throw currency on the ground. The officer then picked up a wadded \$20 bill in the grass to the right of the sidewalk where Appellant was arrested. Lieutenant Carpenter then took the money and compared it to the copies of the buy money he had in his vehicle. The serial number of the \$20 bill that Appellant threw down on the ground matched with one of the copies made of the buy money. (*Id.* at 218.) After Appellant was arrested, Officers Dotson and Greene identified him as the person from whom they purchased the crack cocaine. (*Id.* at 220.)

The substance that Appellant sold Officers Dotson and Greene was sent to the West Virginia State Police Drug Identification Unit to determine its makeup. Carrie Kirkpatrick, a forensic chemist with the West Virginia State Police, examined the substance. Ms. Kirkpatrick conducted a series

of preliminary and confirmatory examinations consisting of a Marquis test, a Scotts test, and an observation with an infrared spectrophotometer. The result of all of these tests was that the substance tested positive for cocaine base. (*Id.* at 266-67.) The rock of cocaine had a weight of .34 grams. (*Id.* at 272.)

At the conclusion of the trial on August 7, 2006, the jury found Appellant guilty of delivery of a controlled substance, a violation of West Virginia Code § 60A-4-401. (*Id.* at 311.)

### III.

#### RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignment of error is quoted below, followed by the State's response:

The trial judge denied Mr. Mills his statutory right to a jury panel of twenty jurors, free from exception, by allowing a person closely associated with law enforcement and an officer scheduled to testify in the case, to remain on the jury panel, requiring the use of a peremptory challenge to strike him, in violation of W.Va. Code § 62-3-3.

#### State's Response:

Applying the abuse of discretion standard, the trial court did not err its denying the motion to remove Juror Douglas for cause and did not deny Appellant's statutory right to a panel of 20 jurors without exception in accordance with West Virginia Code § 62-3-3. The trial court adequately questioned this juror during voir dire and determined that he could make impartial decisions based on the evidence in the case free from prejudice or bias.

#### IV.

#### ARGUMENT

**APPELLANT WAS NOT DENIED A FAIR TRIAL DUE TO JUROR DOUGLAS NOT BEING REMOVED FROM THE PANEL FOR CAUSE. THERE WAS NO ABUSE OF DISCRETION COMMITTED BY THE TRIAL COURT BECAUSE A THOROUGH INQUIRY TOOK PLACE DURING VOIR DIRE, AND IT WAS ESTABLISHED THAT THERE WAS NO DOUBT THAT THE PROSPECTIVE JUROR COULD BASE HIS DECISIONS SOLELY ON THE EVIDENCE PRESENTED AND WITHOUT ANY BIAS OR PREJUDICE IN SPITE OF HIS KNOWING A POTENTIAL WITNESS FOR THE STATE.**

Appellant contends that he was denied a fair trial because the trial court refused his motion to strike Juror Douglas for cause and that he subsequently had to use a peremptory strike to remove the prospective juror. However, when the abuse of discretion standard is applied, there was no error committed, and Appellant was not denied a fair trial. The requirement mandated in West Virginia Code § 62-3-3 of a panel of 20 jurors, free from exception, was not violated. When it was discovered by the trial court that Juror Douglas knew Detective Dan Armstrong, a potential witness for the State's case-in-chief, an inquiry was conducted in the voir dire proceeding to determine if the juror would manifest any bias or prejudice against Appellant due to his acquaintance with the law enforcement officer.<sup>1</sup> Voir dire inquiry is all that is required when questions of potential bias or prejudice arise, and the trial court satisfied this requirement. The juror unequivocally established that he could make his decision in the case free from any bias or prejudice. Additionally, the mere fact that Juror Douglas was an emergency medical technician (EMT) and would encounter law enforcement personnel in his occupation was insufficient grounds to establish bias or prejudice in

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<sup>1</sup>Significantly, the officer in question did not testify during Appellant's trial, and was not even mentioned by any other witnesses for the State.

favor of the State and against Appellant to warrant him being removed from the panel for cause. Further, the trial judge did not utilize the method of rehabilitative questioning to establish that the juror should not be removed for cause. In light of all of this, no abuse of discretion occurred, and Appellant was not denied a fair trial.

**A. THE STANDARD OF REVIEW.**

With respect to appellate review of a trial court's decisions regarding the removal of jurors for cause, this Court has held the following:

The trial court is in the best position to judge the sincerity of a juror's pledge to abide by the court's instructions; therefore, its assessment is entitled to great weight. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias when it is left with a clear and definite impression that a prospective juror would have been unable faithfully and impartially to apply the law.

*State v. Williams*, 206 W. Va. 300, 304, 524 S.E. 2d 655, 659 (1999) (citing *State v. Miller*, 197 W. Va. 588, 605, 576 S.E.2d 535, 552 (1996)). Regarding the test to be applied when reviewing a trial court's decision on a particular juror's qualifications to serve, this Court has held the following:

In reviewing the qualifications of a jury to serve in a criminal case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court.

*State v. Nett*, 207 W. Va. 410, 412, 533 S.E.2d 43, 45 (2000).

In determining whether or not a prospective juror would employ bias or prejudice in his or her decision-making in a case, this Court has held, "The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syl. Pt. 3, *State v. Brown*, 177 W. Va. 633, 355 S.E.2d

614 (1987). Specifically, when the situation arises where a prospective juror knows a particular witness who is employed in the field of law enforcement this Court has held the following:

A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has a right *to obtain individual voir dire of the challenged juror to determine possible prejudice or bias arising from the relationship.*

Syl. Pt. 6, *State v. Beckett*, 172 W. Va. 817, 310 S.E.2d 883 (1983) (emphasis added).

**B. WHEN APPLYING THE ABUSE OF DISCRETION STANDARD AS SET FORTH IN *NETT, SUPRA*, IT IS EVIDENT THAT NO ERROR OCCURRED. ONCE IT WAS ESTABLISHED THAT JUROR DOUGLAS KNEW A POTENTIAL WITNESS FOR THE STATE, THE JUROR WAS THOROUGHLY QUESTIONED TO DETERMINE IF HE COULD MAKE HIS DECISIONS IN THE CASE FREE OF BIAS OR PREJUDICE.**

It is true that Appellant is entitled to a jury panel free from bias or prejudice. Specifically,

West Virginia Code § 62-3-3 states, in pertinent part:

In a case of felony, twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors, free from exception, be completed, from which panel the accused may strike off six jurors and the prosecuting attorney may strike off two jurors.

Despite Appellant's assertions to the contrary, Appellant was afforded a panel of 20 jurors, free from exception, in accordance with West Virginia Code § 62-3-3.

During voir dire, it was established that Juror Douglas was employed with the Kanawha County Emergency Medical Services (EMS). (Tr., 76, Aug. 7, 2006.) It was also brought out during this proceeding that he knew a potential witness for the State's case-in-chief, Detective Dan Armstrong, because both served as volunteer firefighters for the Fire Department of Pinch. (*Id.* at

74.) Once this was made evident to the trial court, Juror Douglas was questioned extensively to determine whether or not he could base his decisions in the case free of bias or prejudice despite his knowledge of Detective Armstrong. (*Id.* at 74-77.) Specifically, the following inquiry of Juror Douglas occurred during voir dire:

The Court: All right, this gentleman back here, you are?

Juror Douglas: Theodore Douglas. I know Van [sic] Armstrong.

The Court: And how do you know him?

Juror Douglas: I'm on the Fire Department of Pinch with him.

The Court: Is that going to have any impact on your ability to be fair and impartial?

Juror Douglas: No, sir.

The Court: Are you going to be able to judge his testimony the same as any other witness who testifies?

Juror Douglas: Yes, sir.

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Defense Counsel: Mr. Douglas, I can't help but notice that you are in your EMS uniform.

Juror Douglas: Yes.

Defense Counsel: And you are a firefighter at Pinch?

Juror Douglas: The Pinch Volunteer Fire Department.

Defense Counsel: And you work as an EMS for?

Juror Douglas: Kanawha County, and I work in Clendenin.

Defense Counsel: Kanawha County. In Clendenin. So you come in contact with police regularly?

Juror Douglas: Yes.

Defense Counsel: How long have you been involved in an EMS?

Juror Douglas: About a year and a half.

Defense Counsel: Are the police involved in a majority of your cases?

Juror Douglas: About every one of them, yes.

Defense Counsel: And do you feel that you have a relationship with law enforcement?

Juror Douglas: I don't know.

\*\*\*

Defense Counsel: Are you more likely to believe the word of a law enforcement officer over any other witness?

Juror Douglas: No.

Defense Counsel: I don't think I have any further questions.

The Court: The corollary to that is you're not going to disbelieve a police officer compared to other witnesses?

Juror Douglas: No.

The Court: You're going to treat all witnesses the same, and give them all the same consideration in accordance with the court's instructions?

Juror Douglas: Yes.

\*\*\*

The Court: You may return to your seat. (*Id.*)

After this inquiry took place, Appellant's counsel moved to strike Juror Douglas for cause.

Based on the answers Juror Douglas gave regarding his ability to be impartial and free from any bias

or prejudice, the judge denied this motion. In making this decision, the judge stated, "He was absolutely crystal clear in all his answers that he would be fair and impartial and would not be swayed, therefore your motion for cause is denied." (*Id.* at 77.) Appellant's counsel subsequently used a peremptory strike to remove Juror Douglas. (*See* Appellant's Brief at 2.)

Based on this extensive inquiry of Juror Douglas during voir dire, there is no doubt that the trial court was able to determine that he was qualified to serve on the jury panel. The trial court questioned this juror as to whether without bias or prejudice he could render a verdict solely on the evidence under the instructions of the court as mandated by *Brown, supra*.

Appellant mistakenly seems to assert that the mere fact that Juror Douglas had knowledge of a potential witness in the State's case-in-chief, he should have been removed from the panel for cause. This is not an accurate assessment of the law, however. As this Court held in *Beckett, supra*, once a relationship with a law enforcement official exists in a particular case, a party has a right to obtain individual voir dire of the challenged juror to determine possible prejudice or bias arising from the relationship. In accordance with this holding, an inquiry took place during voir dire, and it was established that the juror could be impartial in making his decisions. Assuming that Juror Douglas's knowing Detective Armstrong through their common service in the Pinch Volunteer Fire Department created a potential for prejudice toward the law enforcement officer and against Appellant, this Court has held: "Jurors who on voir dire of the panel indicate possible prejudice should be excused *or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse.*" Syl. Pt. 2, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002) (emphasis added). To alleviate any concerns that Juror Douglas being acquainted with Detective Armstrong through their

both serving with the Pinch Volunteer Fire Department could constitute such a relationship that would impede his ability to be an impartial juror, an extensive inquiry occurred in voir dire where both the trial judge and Appellant's counsel questioned him regarding his ability to serve on the panel free from bias or prejudice in accordance with both *Beckett* and *O'Dell*. Comparing the trial court's decision with respect to Juror Douglas and that of others when inquiries took place, two jurors—Juror Peak, who was employed by the State Police and worked with Detectives Armstrong, Boone, Kirkpatrick and Carpenter and whose nephew was an assistant prosecutor, and Juror Davis, who worked with Detective Carpenter as an employee with the State Police Lab—both stated that these relationships and employment situations would have an impact on their respective ability to be fair and impartial in the case and were removed for cause. (Tr., 71-73; 78-79, Aug. 7, 2006.) Accordingly, no abuse of discretion took place on the part of the trial court regarding its decision to deny the motion for removal of Juror Douglas for cause. In each instance where potential bias and prejudice was a concern with prospective jurors, individual voir dire took place where they were questioned by both the court and Appellant's counsel. Where it was made absolutely clear that a juror could make decisions based on the evidence rather than any bias or prejudice—as was the case with Juror Douglas—there was no removal for cause. Conversely, where it was determined that prospective jurors could not make decisions free from bias or prejudice due to their employment relationships with potential witnesses for the State—as was the case with Jurors Peak and Davis—they were removed for cause. As was held in *Williams, supra*, the trial court is in the best position to judge the sincerity of a prospective juror's ability to serve on a panel and be impartial. In light of this, Appellant was given a fair trial and his conviction should not be reversed.

**C. IN EXAMINING PAST DECISIONS BY THIS COURT, JUROR DOUGLAS'S RELATIONSHIP TO DETECTIVE ARMSTRONG DID NOT AMOUNT TO AN INHERENT BIAS AGAINST APPELLANT.**

Appellant contends that because of the mere fact that Juror Douglas served on the same volunteer fire department as Detective Armstrong, the former could not be free from bias or prejudice against him in the case. Additionally, Appellant posits that there was a bias and prejudice against him on the part of this prospective juror due to Juror Douglas being an EMT and the contact his profession has with law enforcement. These factors in and of themselves do not amount to an inherent bias or prejudice, however.

In *Brown, supra*, a situation arose where two prospective jurors were related by marriage to law enforcement officers. After voir dire occurred and the jurors were questioned regarding the potential for bias and prejudice, the trial court denied a motion to remove them for cause. On appeal, this Court upheld the trial court's decision because the jurors indicated by their responses to counsel's questioning that they believed they were capable of weighing the evidence objectively, and there was no abuse of discretion. *Id.*, 177 W. Va. at 639, 355 S.E.2d at 620. According to the Court, the jurors were not automatically disqualified from sitting on the jury solely by virtue of their respective relationship with law enforcement officers. *Id.* In *Beckett, supra*, the Court upheld a trial court's decision to refuse to strike for cause two prospective jurors, one of whom was a sister of a magistrate and the other was the brother of the deputy sheriff who was a jailor at the county jail. As stated above, the Court in *Beckett* held,

A 'prospective juror' consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a

party has a right to obtain individual voir dire of the challenged juror to determine possible prejudice or bias arising from the relationship.

As in *Beckett*, once a relationship between Juror Douglas and Detective Armstrong was established, Appellant's counsel was given the right to individually question the prospective juror to determine if there would be any bias or prejudice in his decision-making in the case. Additionally, the trial judge questioned Juror Douglas on this basis. Just as in these previous cases, no bias or prejudice was indicated and the juror established that he could make decisions based on the evidence presented rather than any bias or prejudice.

Appellant correctly cites this Court's ruling in *State v. West*, 157 W. Va. 208, 219, 200 S.E.2d 859, 866 (1973), that held "when the defendant can demonstrate even a tenuous relationship between a prospective juror and any prosecutorial or enforcement arm of State government, defendant's challenge for cause should be sustained by the court." However, in that particular case, the prospective juror in question was an employee of a state law enforcement agency; specifically, the juror was an employee for the Department of Public Safety for the State of West Virginia. Appellant also cites *Mikesinovich v. Reynolds Memorial Hospital, Inc.*, \_\_\_ W. Va. \_\_\_, 640 S.E. 2d 560 (2006), where the trial court decision was reversed due to its allowing a juror to sit on the panel where the defendant employed his wife. These cases can easily be distinguished from the case at bar. Both of these cases involved direct employment relationships either with law enforcement or a party to the particular action. By contrast, Juror Douglas had knowledge of a potential witness for the State due to their both being volunteers for a volunteer fire department, a relationship that could probably be defined as social in nature and does not necessarily operate as a disqualification as this Court established in *Beckett, supra*.

Appellant contends that Juror Douglas should have been removed for cause due to his being an EMT and that EMS employees very frequently come into contact with law enforcement in their duties. He even cites the close ties to EMS workers and police officers after the tragic events of September 11, 2001. Yet this reasoning is wrongheaded. By applying this logic, EMS employees would be barred from serving on a jury in virtually any criminal case. Surely this Court does not intend such a result. An analogous case would be that of *State v. Bailey*, 179 W. Va. 1, 365 S.E.2d 46 (1987), where the Court upheld the trial court decision not to remove a prospective juror for cause who was employed by the Department of Human Services and dealt with the office of the prosecutor in child support placements and home investigations. In that case, the Court held:

Where a prospective juror, who is not an employee of a prosecutorial agency, indicates during voir dire that her employment involves work with the prosecutor's office, there is no error in the trial court's refusal to strike the prospective juror for cause, absent a showing on the record of bias or prejudice, or a request by counsel for individual voir dire to determine whether such bias or prejudice actually exists.

*Id.*, Syl. Pt. 2. There was no showing of bias or prejudice on the part of Juror Douglas when he was individually questioned by Appellant's counsel and the trial judge during voir dire. Thus, the refusal to remove him for cause should be upheld.

**D. THE TRIAL COURT'S INQUIRY OF JUROR DOUGLAS DURING VOIR DIRE DID NOT CONSTITUTE REHABILITATIVE QUESTIONING AND WAS NOT IMPROPER.**

As Appellant points out, this Court has stated, "Rehabilitation is [the] commonly accepted terminology to describe the questioning of a juror who has made a statement indicating bias or prejudice. It is an inaccurate term, suggesting a goal of getting a juror to change the biased attitude." *O' Dell*, 211 W. Va. at 289, 565 S.E.2d at 411 (citing Daniel J. Sheehan, Jr. and Jill C. Adler, *Voir Dire: Knowledge Is Power*, 61 Tex. B.J. 630, 633 n.11 (1998)). Regarding this practice, the Court

held in *O'Dell*, "Once a prospective juror has made a clear statement during voir dire reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." *Id.*, Syl. Pt. 5. Despite the fact that Juror Douglas stated in voir dire that he knew Detective Armstrong through the Pinch Volunteer Fire Department, there was no presence of a disqualifying prejudice or bias. In fact, he repeatedly made clear that he could be an impartial juror. (Tr., 74-76, Aug. 7, 2006.) There were no facts brought out during voir dire that there was any relationship between this prospective juror and the detective other than their mutual involvement in this volunteer fire department. There was no evidence brought out during voir dire that Juror Douglas came into contact with Detective Armstrong through their respective work as an EMT and a law enforcement officer. The trial judge concluded that Juror Douglas was absolutely clear that he could be impartial in making his decisions and would not be swayed during the proceedings. (*Id.* at 77.)

Apart from the fact that there was no real sign of bias or prejudice on the part of Juror Douglas, there were no rehabilitative questions posed to him by the trial judge. Appellant seems to be referring to the following line of questions posed by the trial judge to Juror Douglas during voir dire:

The Court:                   The corollary to that [juror not being more likely to believe the word of a law enforcement officer over any other witness] is you're not going to disbelieve a police officer compared to other witnesses?

Juror Douglas:               No.

The Court: You're going to treat all witnesses the same, and give them all the same consideration in accordance with the court's instructions?

Juror Douglas: Yes.

(*Id.* at 76.)

These were not rehabilitative questions but rather follow-up inquiries to those previously posed by Appellant's counsel. The trial judge was asking these questions after Juror Douglas responded negatively to the question as to whether he would be more likely to believe the word of a law enforcement officer over any other witness, posed to him by Appellant's counsel. (*Id.*)

In *Nett, supra*, this Court reversed a decision where the trial judge utilized rehabilitative questions on a juror and denied striking him for cause in a DUI case where the latter had two friends killed by drunk drivers and had knowledge of the defendant's prior DUI offenses. In this case, the trial judge's line of questioning went as follows:

TRIAL COURT: That's the question that we're going to get to in a moment so we might as well touch on it now. The question is here you have a person who is charged with Driving Under the Influence of Alcohol, Third Offense. And the fact that you had these experiences with either friends, neighbors involved in the operation of motor vehicles, both with drinking involved, would that experience in any way influence you so that you couldn't sit as a juror after taking that oath and verdict? Keeping in mind, as I will tell you time and again-everybody will-Mr. Nett, at this point as he sits here, is innocent. The Constitution of our country presumes him innocent. That's our system. And he's entitled, as anybody else would be, to have a trial. And that's what we're here to make sure, Can you do that, sir?

JUROR: Hard to say at this point. I can't unequivocally say no.

\*\*\*

TRIAL COURT: The question is, and it's a good question, but would you tend to believe that Mr. Nett is guilty of the current charge because of prior convictions for DUI? That's the key?

JUROR: It's hard to say, looking at it from this side, without seeing all the evidence.

TRIAL COURT: That's a good point. And it's only because we start this case with a clean slate and not to put too fine a point on it, is that you have an empty vessel here and it's only filled with evidence that's admitted during the trial. And the law then that's given to you at the end, and you mesh the two and you apply the facts as you find them to be to the law that I give you and then you deliberate and reach a verdict. That's the system. And the question is-and only you can answer this-as to whether or not, knowing that's the system, could you return a fair, impartial, unbiased verdict?

JUROR: It would be difficult.

TRIAL COURT: Is that "yes" or "no"? Don't be ashamed. I really need to know.

JUROR: At this point, it's really hard for me to say. I don't know that I'd be able to separate myself. I can't say for sure.

*Nett*, 207 W. Va. at 413-14, 533 S.E.2d at 46-47.

The questioning by the trial judge in *Nett* is clearly distinguishable from that employed by the circuit court in the instant case. In the case at bar, the trial judge was merely attempting to clarify and ensure that Juror Douglas had no bias or prejudice in his decision-making process and would not give more weight to the testimony of Detective Armstrong, any law enforcement officer or any other witness. The trial judge in this case was asking follow-up questions during voir dire based on questions posed by Appellant's counsel, and in no way was he attempting to rehabilitate this potential juror. Thus, this questioning does not constitute reversible error.

**E. ANY ERROR IN THE TRIAL COURT'S DENIAL OF JUROR DOUGLAS'S REMOVAL FOR CAUSE WAS HARMLESS AND DOES NOT WARRANT A REVERSAL.**

The State does not concede that the trial judge's denial of Appellant's motion to remove Juror Douglas for cause amounted to reversible error. As stated above, the mere fact that both Detective Armstrong and this potential juror served in the Pinch Volunteer Fire Department and that EMS employees work closely with law enforcement personnel did not establish that Juror Douglas would give more weight to the testimony of law enforcement officers. In fact, Juror Douglas unequivocally stated that he would be an impartial juror when questioned by both Appellant's counsel and the trial judge during voir dire. However, assuming *arguendo* that this denial of Appellant's motion to remove the juror for cause amounted to error, any error was harmless. This Court held in *State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E. 2d 163, 190 (1995), "As to error not involving the erroneous admission of evidence, we have held that nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment." (citing *State v. Hobbs*, 178 W. Va. 128, 388 S.E.2d 212 (1987)). Detective Armstrong may have been involved in the arrest of Appellant, but he was not called as a witness in the trial. Accordingly, the trial court's denial of Appellant's motion to strike Juror Douglas for cause due to his being a member of the Pinch Volunteer Fire Department along with Detective Armstrong, in no way contributed to the judgment against him. Therefore, this amounted to harmless error—assuming it was error at all—and the trial court decision should not be reversed.

V.

CONCLUSION

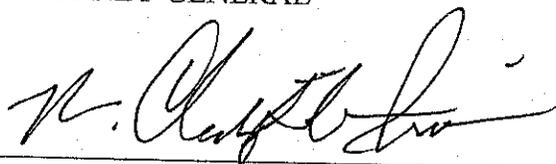
For the foregoing reasons, the judgment of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,  
*Appellee,*

By counsel

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL



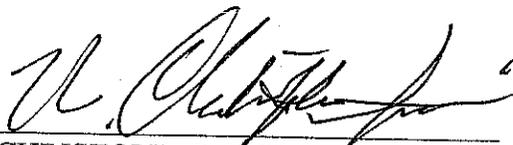
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**CERTIFICATE OF SERVICE**

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 17<sup>th</sup> day of May, 2006, addressed as follows:

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