

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM MILLS, JR.,

Appellant,

v.

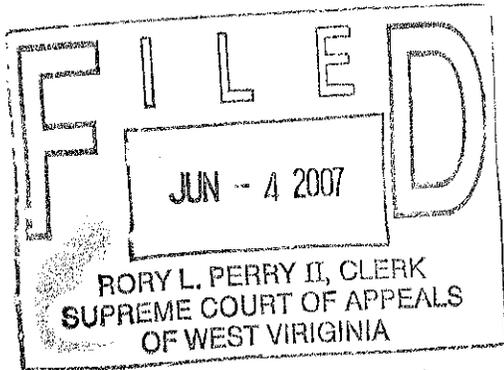
Supreme Court No. ³³³⁴⁰~~070054~~

Circuit Court No. 06-F-194
(Kanawha County)

STATE OF WEST VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT



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POINT ONE: THE STATE HAS MISCHARACTERIZED THE NATURE OF THE RELATIONSHIP BETWEEN JUROR DOUGLAS AND DETECTIVE ARMSTRONG (Responding to States' Brief , 5-6, 7-13)

The state repeatedly downplays the nature of the relationship between Detective Armstrong and Juror Douglas by using phrases such as "Juror Douglas [was] acquainted with Detective," "Juror Douglas had knowledge of [Detective Armstrong]," and Juror Douglas [and, more generally, EMTs] come into contact with law enforcement officers [like Detective Armstrong]."¹ This language is deceptive and false for several reasons:

1. First, this language ignores the real relationship between Juror Douglas and Detective Armstrong. They are not mere acquaintances or people who occasionally come into contact with one another; they are brothers in battle, fighting a war on the streets every day. Firefighters and Paramedics, whether they are career or volunteers, regularly place their lives in the hands of their fellow firefighters, police, and EMTs and Paramedics. Similarly, EMTs depend on law enforcement officers to protect them while they retrieve and care for their patients. In turn, when police officers are injured in the line of duty, they also depend on EMTs to come to their aid. This complex system of trust and reliance is absolutely critical, without which, these organizations would be crippled. *See generally*, Paul D. Shapiro, *Paramedic*, 108, 216-220, 227-228, 231-232, 328-329, 351-352 (1991).²

¹ Mr. Mills directs the Court's attention to the fact that the State's rendition of the facts of the case end prior to the beginning of trial and does not address the *voir dire* process in Mr. Mills' trial at all. State's Brief (SB), 1-4. This appears to be an improper attempt by the State to bring irrelevant facts into the case and convince this Court that Mr. Mills is a bad actor, and thus, undeserving of the guarantee of a fair trial.

² A few lines from *Paramedic* are instructive of the culture of the community of public safety: "The same faces appear at the calls, the same EMTs, medics, and cops. A breakfast date on a slow night is not at all unusual"; "There is a lot of family feeling on the streets. You have to save number one before you save anyone else. Whenever a medic hears a cop call [for help], he starts to respond without waiting to be assigned the call... The street cops know that if any of

This system of trust and reliance creates a close bond between members of these organizations. It can always be expected that a member of one of this team will act in the best interests of his teammates, regardless of which subset each comes from, if for no other reason than to ensure his protection the next time his life is in the hands of that fellow member or group. Such a firefighter, EMT, or police officer would risk alienating not only the individual against whose interests he acted, but also other members who learned of the disloyalty. The system of trust would be broken and that member of the team of public safety would be unable to properly perform his job. *See generally*, Dennis Smith, *Report from Engine Co. 82*, 174 (1972) (describing the close cooperation of police and firefighters); Dennis Smith, *Report from Ground Zero*, (2003) (describing the incredible lengths that all firefighters and police will go to in protecting one another; Tom Downey, *The Last Men Out*, (2004) (detailing the events of one fire company and its dependence on one another for their lives and the welfare of their families).

2. The object of jury selection is to secure jurors who are not only free from improper prejudice and bias, but not even subject to any well-grounded suspicion of any bias. O'Dell v. Miller, 211 W. Va. 285, 288, 565 S.E. 407, 411 (2002). Any doubt the court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror. O'Dell, 211 W. Va. at 288, 565 S.E.2d at 411. Trial courts have an obligation to empanel a fair and impartial jury, and this obligation includes striking prospective jurors who have a significant past or current relationship with a party. O'Dell, 211 W. Va. at 291, 565 S.E.2d at 413. Accordingly, due to Juror Douglas's ties to Detective Armstrong, Juror Douglas should have been stricken for cause rather than having to be removed via peremptory challenge.

their guys are hurt, the medics will be there immediately... There's no question who's treated first if a cop and a suspect are both injured in a shootout: you care for the injured officer. Another ambulance will have to be called for the suspect."; "Cops, firefighters, EMTs, and medics are 'us,' everyone else is 'them.'" *Paramedic*, 108, 216-220, 227-228, 231-232.

3. Juror Douglas possessed an inherent bias against the Appellant because of his relationship with Detective Armstrong through both his employment as a Paramedic and his service with the Detective on the Pinch Fire Department. The State improperly characterizes Douglas's relationship with a law enforcement agent by downplaying its significance through depreciating and misleading language, while focusing on the form of the relationship and not its nature. For example, the State interprets State v. Brown, 177 W. Va. 633, 355 S.E.2d 614 (1987), to hold that jurors will not be disqualified where they possess an abstract relation to a law enforcement agent. This is false, as Brown proceeds to narrow this interpretation by focusing on the nature of the relationship: "There was no showing that the law enforcement officers to which three of the prospective jurors were related or acquainted were in any way connected to the proceedings against the appellant." Brown, 177 W. Va. at 639, 355 S.E.2d at 620. This Court's reasoning emphasizes the fact that the prospective jurors had no ties to an officer engaged in the proceeding, which would thus alter the nature of the relationship by creating an implicit bias against the defendant. The State ignores this important distinction between relationships with an officer involved in the case, therefore failing to acknowledge the actual policy behind the opinion.

Further, in State v. West, 159 W. Va. 218, 219 200 S.E.2d 859, 866 (1973), this Court clearly states, "[w]hen 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." (emphasis added) The State assumes that a direct employment relationship must exist to demonstrate this bias but provides no evaluation of the nature of the relationships at issue. West shows this to be false, asserting the policy behind this holding by stating, "there would be no reason to disqualify an elevator operator in the

State Capitol Building from sitting on a criminal jury in Kanawha County, or to disqualify a State Road employee merely because he is an hourly employee of the State.” West, 159 W. Va. at 219, 200 S.E.2d at 866. This statement shows the nature of the relationship, and not its technical title, should decide when a juror should be stricken for cause.

4. Juror Douglas’ friendship with Detective Armstrong at the fire department absolutely bars his admittance to the jury because the Detective was clearly directly involved with the prosecution of the case: “[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.**” State v. Beckett, 172 W. Va. 817, 823, 310 S.E.2d 883, 889 (1983) (emphasis added). Douglas possessed an inherent bias against Mr. Mills because of the nature of his friendship with Detective Armstrong. That friendship reaches beyond a social nature. When an individual entrusts his life to another, or works in an environment that demands this obligation, the relationship naturally accrues into something much deeper and meaningful.

In sitting on Mr. Mills’ jury, Juror Douglas risked loss of friends, financial loss, loss of his job, and possibly even death by failing to backup a fellow member. As a society, we simply cannot allow someone under that kind of pressure to make decisions regarding another man’s freedom, regardless whether he claims he can be objective and see past those pressures. The nature of the relationship, when coupled with the fact that Armstrong was involved in the case, demonstrates that Douglas should have been dismissed for cause.

POINT TWO: THE STATE SEEMS TO FORGET THAT BIAS CAN BE IMPLIED OR STATED (Responding to State's Brief, 8-9)

The State claims Juror Douglas should not have been dismissed for cause because he claimed not to be biased. This is incorrect.

1. As evidence of the reasonableness and attentiveness of the trial court during voir dire, the State points to the fact that the trial court struck for cause other jurors who stated that they had relationships with the prosecution that the jurors admitted might impact their ability to be fair and impartial. SB 11. The fact that Juror Douglas did not *say* he was biased, like the others did, does not mean that he was not in fact biased. It is not for the juror to decide whether he can render a verdict solely on the evidence. O'Dell, 211 W. Va. at 288, 565 S.E.2d at 411. The trial court must not only consider the prospective juror's promise to be fair but must look behind the juror's statements to his actual situation. O'Dell, 211 W. Va. at 289, 565 S.E.2d at 411.

2. The State seems to forget or ignore that actual bias can be shown either by a juror's own admission of bias or by specific facts showing the juror has such prejudice or connection with the parties at trial that bias is presumed. O'Dell, 211 W. Va. at 288, 565 S.E.2d at 410.

A fair and impartial jury can only be ensured by removing, for cause, prospective jurors who have experiences or attitudes that indicate a significant potential for prejudice in the matter at trial. Accepting such jurors' statements, that they can set aside their biases and be fair, creates the great risk of seating biased jurors, and a clear appearance of prejudice to a party.

O'Dell, 211 W. Va. at 288-289, 565 S.E.2d at 410-411.

3. Juror Douglas demonstrated by his appearance in court wearing his EMS uniform, his admission of co-employment with Detective Armstrong as firefighters, and his admission of close association with the police on a daily basis, that he had a bias for the State. Trial Transcript (T.) 75-77. Regardless of his stated belief he had no bias, the obviousness of his implied bias is impossible to miss.

POINT THREE: FAILURE TO STRIKE JUROR DOUGLAS WAS REVERSIBLE ERROR AND NO HARMLESS ERROR ANALYSIS IS APPROPRIATE (Responding to State's Brief, 18)

The State argues that even if it concedes to the abuse of discretion claim, the claim will fail under principles of harmless error. This is clearly wrong.

1. The State's argument strictly focuses on the fact that Juror Douglas was struck with a preemptory, and ultimately, that Detective Armstrong was not called as a witness.³ This argument, is obviously wrong, ignoring this Court's clear statement that such an error is never harmless.

2. This Court clearly stated:

We are unconcerned that [the prospective juror] did not in fact sit as a juror due to his being removed by preemptory strike. We made clear...that: The language of W.Va. Code § 62-3-3 (1949), grants a defendant the specific right to reserve his or her preemptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his preemptory challenge to correct the trial court's error.

State v. Nett, 207 W. Va. 410, 414, FN4, 533 S.E.2d 43, 47, FN4 (2000),
citing State v. Phillips, 194 W. Va. 569, 588, 461 S.E.2d 75, 94 (1995)).

The State blatantly ignores this law and fails to cite it to this Court as controlling authority contrary to its position.

³ The State controls who it calls as a witness, not Mr. Mills. He is bound by the representation at *voir dire* of Detective Armstrong as a witness, which triggered the colloquy showing Juror Douglas' bias and made it necessary to strike Juror Douglas. Mr. Mills had no choice but to conclude that the State intended to call a witness to which a juror held an allegiance, making it necessary to waste the preemptory to remedy the failure to strike Juror Douglas for cause.

POINT FOUR: THE STATE NEGLECTS TO INCLUDE SEVERAL PERTINENT ELEMENTS OF THE CASES IT CITES IN SUPPORT OF ITS POSITION (Responding to State's Brief, 10, 12-13, 14-17)

Several of the State's citations of law selectively describe the law, often omitting critical elements that stand against its position.

1. The State cites State v. Brown, 177 W. Va. 633, 355 S.E.2d 614 (1987), stating that the decision was upheld because the jurors indicated by their responses to counsel's questioning that they believed that they were capable of weighing the evidence objectively. The State failed to include the important point that there was no showing that the law enforcement officer the jurors were related to or acquainted with were in any way connected with the proceedings against the appellant. Brown, 177 W. Va. at 639, 355 S.E.2d 620.

Similarly, the State cites State v. Beckett, 172 W. Va. 817, 310 S.E.2d 883 (1983), to show that even in situations where a magistrate's or deputy sheriff's brother or sister was on the jury panel, that juror need not be struck for cause. However, the State again leaves out an important point: neither the magistrate nor the deputy sheriff in this case was shown to be actively involved in the prosecution of the case. Beckett, 172 W. Va. at 821, 310 S.E.2d at 888.

This is an important difference from the situation involving Mr. Mills because in this case Detective Armstrong was directly involved in Mr. Mills case. The State ignores this critical distinction.

2. The State avoids the standard of proof required for dismissal of a prospective juror for cause, selectively citing from O'Dell. This ignores the clear rule from that case that the trial court MUST resolve ANY doubt of possible bias or prejudice in favor of the party seeking to strike for cause. O'Dell, 211 W.Va. at 288, 565 S.E.2d at 411 (multiple internal citations omitted) (emphasis added).

3. The State also attempts to show the trial court's questioning of Juror Douglas was not improper rehabilitation by disingenuously calling the court's questions "follow-up inquiries". SB, 16. The State ignores this Court's rule that once a juror has made it clear, either express or implied, that he has a bias, the juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning. O'Dell, 211 W.Va. at 290, 565 S.E.2d at 412. The judge in Mr. Mills' case even used the same question as condemned by this Court in O'Dell. T. 76; O'Dell, 211 W.Va. at 290, 565 S.E.2d at 412.

When Mr. Douglas' allegiance to the team of public safety is considered, he had already made a clear statement of his bias the moment he entered the courtroom in his EMS uniform. His subsequent statements of close relationship with Detective Armstrong and his similar relationship with law enforcement in general made his bias absolutely clear. This made the trial court's questioning of the juror a clear attempt to rehabilitate Juror Douglas and bolster his error by failing to dismiss him for cause. This is rehabilitation and clearly improper.

4. Finally, the State attempts to distinguish State v. West, 157 W. Va. 209, 200 S.E.2d 859, and Mikesinovich v. Reynolds Memorial Hospital, Inc., ___ W. Va. ___, 640 S.E.2d 560 (2006), from Mr. Mills case by claiming that both these cases are different because these cases involved "direct employment relationships either with law enforcement or a party to the particular action." SB, 13.

The State proceeds to denigrate the efforts of volunteer firefighters everywhere who give freely of their time and risk their lives every day by claiming that their relationship is "social". SB at 13. Besides being grossly rude and demeaning to their efforts and belittling to their sacrifices, it ignores the realities of the situation.

As previously discussed, the relationships of firefighters, regardless of whether they are volunteers or career⁴, are as close as they possibly can be. They literally depend on one another for their very lives and the welfare of their families.

From the moment the men discover [the body of a firefighter killed in the line of duty], they fall into ritual...they follow the routine that firemen...have always followed when they lose a man. First they call the members of the downed fireman's company to the body, where everyone removes his helmet and bows his head in prayer. Then the men of the company carry their brother out of the pile...Standing on the sidewalk next to the smoldering pile [a fellow firefighter] knows he will now have to take responsibility for Brian's family for the rest of his life. It will be an honor, but a sad honor, to go to soccer games, teach the boys how to throw a curveball, and do all the stuff Brian won't be able to do. This is how it works in the [fire department]. It has always been this way; the men's commitment to their brothers goes further than death. It must be that way if they are going to continue in this line of work. Each man must know that if he dies doing what he loves, his family will be taken care of.

Tom Downey, *The Last Men Out*, 206-207 (2004)

The relationships of the police and EMS personnel are identical. To claim otherwise is to ignore reality and insult their sacrifices. Unfortunately, that great bond of brotherhood also creates a bias when brought into a courtroom.

⁴ There is no difference in the training, duties, or responsibilities between volunteer and career firefighters. They frequently work together on the fireground without distinction to their origin. They both are held to the same standards and the legal requirements of employment. Wristron v. Raleigh County Emergency Services Authority, 205 W.Va. 409, 421, 518 S.E.2d 650, 662 (1999), see also Justin T. Mayhue, *Through the Eyes of Fire*, (1999) (describing the author's life as both a career and volunteer firefighter); Pat Ivey, *EMT: Beyond the Lights and Sirens*, (1989) (describing the close relationships of a volunteer EMS squad in Central Virginia); Dennis Smith, *Firefighters: Their Lives in Their Own Words*, (1988) (describing the lives and risks of firefighters around the nation, both volunteer and career). The only difference between the two groups is that career firefighters are paid.

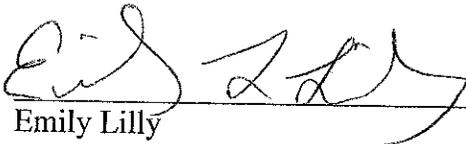
RELIEF REQUESTED

Mr. Mills respectfully requests this Court to reverse his conviction and sentence and remand this case for new trial.

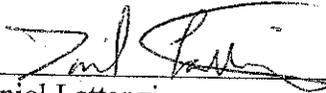
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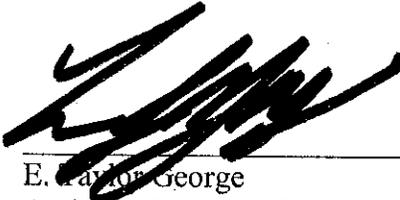
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CERTIFICATE OF SERVICE

I, E. Taylor George, hereby certify that on 4 June 2007 a copy of the foregoing **Reply Brief of Appellant** was mailed or delivered by hand to Mr. R. Christopher Smith, Office of the Attorney General, 1900 Kanawha Boulevard, East, State Capitol Room E26, Charleston, West Virginia 25305.



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