

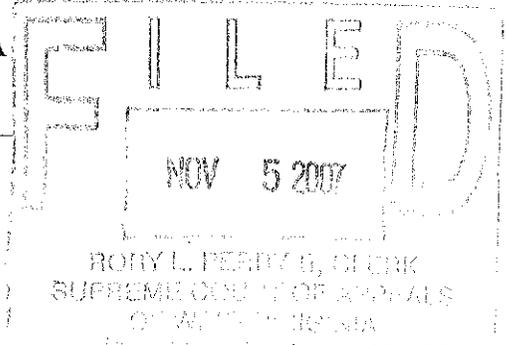
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IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below - Appellee,



VS.

CIRCUIT COURT OF ROANE COUNTY
CASE # 03-F-57

DREU FERGUSON, JR.,
Defendant Below - Appellant.

APPELLANT'S BRIEF

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State v. Wotring, 167 W.Va. 104, 279 S.E.2d 182 (1981)

West Virginia Rules

West Virginia Rules of Evidence Rule 704

P E T I T I O N

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

On September 25, 2003, the Defendant appeared for the return of his indictment. An omnibus discovery motion was filed and Dennis Curry and Teresa Monk were appointed as counsel in this case. The case was continued to October 20, 2003 for arraignment.

On October 20, 2003, the Defendant appeared for arraignment. The Defendant waived the reading of the indictment and plead "not guilty." The Defendant's counsels moved the Court for a forensic evaluation to determine the Defendant's competency and ability to stand trial. The Court granted the motion for a forensic exam and generally continued the motion.

On January 26, 2004, the Defendant appeared at a status conference. The examination had been completed however the report had not been received. The case was continued to February 9, 2004 for status report.

On January 29, 2004 the report was received from the forensic evaluator and the Court entered an order finding the Defendant competent to stand trial.

On February 19, 2004, a status hearing was held. A trial date was set for June 14, 2004 for trial in Roane County.

On February 19, 2004 an order was entered to allow for copies of the taped preliminary hearing held in this case in the Roane County Magistrate Court on July 15, 2003.

A pretrial date was set for May 14, 2004 however the jail did not transport the Defendant and the case was continued to May 18, 2004 for status.

On May 18, 2004 the Defendant appeared for status. The trial case was taken off of the trial docket because the State elected to try the Defendant on case number 03-F-2 first and the same jury panel could not be used. The case was continued to May 27, 2004 for status.

On May 27, 2004, the Defendant appeared for a status hearing. On September 13, 2004, the Defendant appeared for a status hearing. The Defendant made an oral motion to continue the trial. The Court ordered that the motion be put into writing.

Due to difficulty finding an unbiased jury in Roane County on the other felony case, the Court transferred venue to Mason County for the trial. The case was continued to October 26, 2004 for trial in Mason County.

On October 26, 2004 a jury was selected in Mason County on this case. The case was continued to October 27, 2004 for commencement of the trial.

On October 27, 2004 a suppression hearing on pretrial motions was held. The State began its case-in-chief. The case was continued to October 28, 2004 for continuation of the trial.

On October 28, 2004 the trial resumed. One juror was excused for illness. The Court fell ill and the case was continued to November 3, 2004 to resume the trial.

On November 3, 2004 the trial continued. One juror was dismissed due to illness and twelve jurors remained without an alternate. The State ended its case and the Defendant moved for a Judgment of Acquittal. The motion was denied. The Defendant

began his case-in-chief and rested. The case was continued to November 4, 2004 for continuation of the trial.

On November 4, 2004, the trial resumed. The Court instructed the jury and closing arguments were heard. The jury began its deliberations. The jurors passed a note requesting a Dictionary. The Court, by note, denied their request. The case was continued to November 5, 2004 for trial.

On November 5, 2004 the trial continued. It was discovered that one juror ad brought in to deliberations a "Law Dictionary for Non Lawyer" and some of the pages were marked which would have related to this case. A mistrial was declared due to the juror misconduct.

On February 28, 2005, the Defendant appeared for a status hearing. The Court changed the venue to Jackson County for trial. A trial date of June 21, 2005 was set with a back-up date of July 19, 2005 determined as well.

On May 16, 2005, the Defendant appeared and a hearing was held on additional pretrial matters. The Defendant requested additional psychological forensic evaluations. The case was continue to August 11, 2005 for status and the case was taken off of the trial docket.

On August 11, 2005 a status hearing was held. The case was continued to November 14, 2005 for status.

On November 14, 2005, the Defendant appeared for status hearing. The forensic testing had begun but there was no report. The case was continued to December 21, 2005 for hearing.

On December 21, 2005, the Defendant appeared for a status hearing. The forensic report was received and the case was continued to January 4, 2006 for status.

On January 4, 2006, the Defendant appeared for a status conference. The case was continued to January 25, 2006 for status.

On January 25, 2006, the Defendant appeared for status. The forensic exam was ordered incomplete without a psychiatrist and a psychologist. The case was continued to April 17, 2006 for status.

On April 17, 2006 the Defendant appeared for status. The Defendant was scheduled to be examined by a psychiatrist. A trial date was set in Jackson County for July 31, 2006.

On July 13, Counsel Teresa Monk was out ill and the Court appointed Drew Patton to assist Dennis Curry in the trial of this matter.

On July 31, 2006, the Defendant appeared for trial in Jackson County. Voir Dire was conducted. The Court determined that an unbiased jury could not be selected in Jackson County. The Court transferred venue back to Mason County. The trial was set for September 18, 2006.

On September 22, 2006, the Court entered an order. Counsel Dennis Curry fell ill and former Counsel Teresa Monk was re-appointed to conduct the trial with Drew Patton. The trial was continued to October 2, 2006.

On September 27, 2006, the Defendant appeared for status. The trial was set to begin in Mason County on October 30, 2006.

An order was entered by the Court on October 11, 2006 which continued the start of the trial to October 31, 2006 due to the caseload of the judges.

On October 31, 2006 the Defendant appeared. A jury was empanelled. The case was continued to November 1, 2006 to begin the trial.

On November 1, 2006 the Defendant appeared for trial. The State began its case-in-chief. The case was continued to November 2, 2006 for continuation of the trial.

On November 2, 2006 the State concluded its case. The Defendant moved the Court for a Directed Verdict. The Court denied the motion. The Defendant put on its evidence including testimony of Dr. Timothy Saar. The Defendant rested. The State put Dr. Ralph Smith to rebut the testimony of Dr. Timothy Saar. The Defendant put on rebuttal evidence of the Defendant's mother to rebut Dr. Smith. All Parties rested. The case was continued to November 3, 2006 for continuation of the trial.

On November 3, 2006, the Defendant appeared for the continuation of the trial. The State at that time objected to the testimony of Dr. Timothy Saar. The Court dismissed the Saar evidence and ordered it stricken from the record. The Defendant made a motion to re-open its case to correct the alleged deficiencies in Dr. Saar's testimony. The Court denied the motion. The Court instructed the jury to disregard all of the Saar-Smith testimony and commented that Saar's testimony did not rise to the level as approved of by the West Virginia Supreme Court of Appeals. The Defendant moved for a mistrial. The Court denied the motion. The jury deliberated and found the Defendant guilty of Voluntary manslaughter the case was continued to December 4, 2006 for post-trial motions.

On December 4, 2006 the Defendant appeared for a hearing on post-trial motions. The Court denied the motions. The Defendant moved to be sentenced without a pre-sentence report. The Court sentenced the Defendant to fifteen (15) years in the

penitentiary with credit for time served. The sentencing order was filed on December 7, 2006.

On January 4, 2007 the Defendant filed an Intent to Appeal and requested transcripts.

On April 5, 2007 the Defendant moved the Court to extend the time for filing of Petition for appeal and it was granted extending the date two weeks to April 22, 2007. That date falls on a Sunday and the Petition was filed on April 23, 2007.

STATEMENT OF FACTS

The facts from the jury trial in this matter are as follows. On June 11, 2003, Dreu Ferguson Jr. and his wife Jessica lived on Beauty Street in Spencer, WV. One of the Ferguson's' neighbors was a William "Wild Bill" Freas. [Record p. 978] Dreu Ferguson had reason to believe that Freas and some of his juvenile friends had previously broken into his apartment and stolen some of Ferguson's personal property. [Record p. 984] Freas would also tease and taunt Ferguson about these matters and the fact that Ferguson's wife was often home alone. [Record p. 988]

The day of June 11, 2003, Ferguson saw that Freas was home and sitting on his front porch. Ferguson picked up his lever-action rifle and walked over to Freas' residence intending to scare Freas into admitting that he had stolen Ferguson's property. Ferguson confronted Freas and cocked the rifle and fired into the air as a warning. Although he did not remember doing so, he cocked the rifle again. [Record pp. 996-998]

Jeremiah Starcher, a friend of Freas, was on the porch talking to Freas when Dreu Ferguson approached the porch. After Ferguson fired the warning shot, Starcher jumped off of the porch running down the street to get help. When Starcher turned around again he saw Ferguson standing at the steps to Freas' porch with the rifle pointed at Freas' chest.

Ferguson testified that Freas then moved toward him saying "I've been blasted before. If you are going to blast me then blast me." [Record p. 998] At that point the rifle fired and Freas clutched his chest and stumbled backward on the porch. [Record p. 1000] Ferguson then ran with the rifle and left the scene in his car. The police were called. [Record p. 91001]

Just a few minutes later Spencer Police Chief Gary Williams arrived on the scene. He found Freas just inside the doorway of his house with a gunshot wound to his chest. Freas was pronounced dead. [Record pp. 756-757]

A warrant was issued for the arrest of Dreu Ferguson. Ferguson turned himself in a couple of days later in Indiana. [Record p. 769] Chief Williams drove to Indiana and brought Dreu Ferguson back to West Virginia after Ferguson waived extradition. On the way back Ferguson asked Chief Williams "Did he suffer?" and Chief Williams told Ferguson "No Dreu, I don't think he suffered. Then Ferguson said "Good at least he didn't suffer." [Record p. 772] Ferguson was arrested on First Degree Murder charges and was denied bond.

ASSIGNMENTS OF ERROR

1. The Court erred in striking the testimony of Dr. Timothy Saar when his testimony amounted to explaining the Defendant's lack of capacity to form intent without saying the buzz words "capacity to form intent."

2. The Court erred in not allowing the Defendant to re-open his case and recall Dr. Timothy Saar to correct the technical language defect and further clarify his testimony.

3. The Court erred and prejudiced the jury by instructing the jury the Dr. Saar's testimony was to be stricken from the record because it did not "arise to the standard set by the West Virginia Supreme Court of Appeals" when the evidence should have been stricken without comment by the Court.

POINTS AND AUTHORITIES RELIED UPON

West Virginia Cases

State v. Donley, 216 W.Va. 368, 607 S.E.2d 474 (2004)

State v. Joseph, 214 W.Va. 525, 590 S.E. 2d 718 (2003)

State v. Leep, 212 W. Va. 57, 569 S.E.2d 133 (2002)

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State v. Wotring, 167 W.Va. 104, 279 S.E.2d 182 (1981)

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ARGUMENT AND DISCUSSION OF LAW

1. **The Court erred in striking the testimony of Dr. Timothy Saar when his testimony amounted to explaining the Defendant's lack of capacity to form intent without saying the buzz words "capacity to form intent."**

In this case, the Defendant presented the testimony of Dr. Timothy Saar. Dr. Saar evaluated the Defendant, Dreu Ferguson, and diagnosed him with a mental condition which can affect intent but which was different than the diagnosis of the State's witness Dr. Ralph Smith. Later, the State presented the testimony of Dr. Smith to rebut the testimony of Dr. Saar. The evidence was then closed. The next day, before the Defendant anticipated delivering closing arguments, the State objected the testimony of Dr. Timothy Saar because the words "diminished capacity to form intent: were not spoken. A transcript of the testimony was transcribed and Defense counsel pointed out that although the words were not spoken, the requisite mental condition and its effects were testified to by Dr. Timothy Saar. The Court struck the entire testimony of Saar and Smith from the record.

The controlling precedent in this case is State v. Joseph, 214 W.Va. 525, 590 S.E. 2d 718 (2003). It is in this case that the West Virginia Supreme Court of Appeals refined the defense of diminished capacity. This case revealed that a diminished capacity defense permits a defendant to introduce expert testimony regarding a mental disease or defect that rendered the Defendant incapable, at the time the crime was committed, of forming a mental state necessary for an element of the crime charge. (Syllabus pt. 2 State v. Joseph.)

Dr. Saar testified that the Defendant suffers from an Antisocial Schizoid condition. [Record pp. 946-955] Dr. Saar stated that due to this condition, where normal people see different options when make decisions, Ferguson only sees one option and proceeds to act. Dr. Saar determined that at the time of the victim's death, Ferguson was dealing with some major stressors that heavily impacted and negated an intent to kill. While it is true that the doctor did not specifically talk about a "capacity to form intent" he did describe this very concept when he talked about the lack of options and the scene specific stressors that he believed were working on Ferguson the day of the crime.

Just like the experts in State v. Joseph, Dr. Saar gave the jury a valid diagnostic determination, discussed how it affected the Defendant's judgment and discussed why he believed the Defendant suffered from this disease at the time of the crime and discussed how the disease affected the Defendant's intent.

The Court also based its decision to eliminate the expert testimony of Dr. Saar because he had testified about the "ultimate" issue of intent. However, State v. Joseph permits an expert witness to discuss the issue of intent specific to the circumstances surrounding the crime and state an opinion on the ultimate issue of the case. This Court pointed out in State v. Joseph that Rule 704 of the West Virginia Rules of Evidence allows an expert witness to testify to an opinion about an ultimate issue that must be determined by a jury.

2. The Court erred in not allowing the Defendant to re-open his case and recall Dr. Timothy Saar to correct the technical language defect and further clarify his testimony.

Even if the technical words “diminished capacity to form intent” were necessary, and we do not believe that they were, the Defendant moved the Court to be allowed to re-open his case and present the testimony of Dr. Timothy Saar to testify as to that phrase. The Trial Court denied this motion. [Record p. 1880] However, technically, the Trial Court re-opened the evidence when it allowed the State to make an untimely objection. The evidentiary record was re-opened and the court struck testimony yet denied the Defendant the opportunity to easily correct the problem.

In State v. Nixon, 178 W.Va. 338, 359 S.E. 2d 566 (1987), the West Virginia Supreme Court of Appeals held that:

A trial court should only allow a case to be reopened for good cause and upon proper showing, but a trial court also has a duty not to close the case until all the evidence offered in good faith and necessary to the ends of justice has been heard. Syllabus Pt. 5 State v. Nixon.

In State v. Nixon, the State found new evidence after the close of evidence and before the case was submitted to the jury. The Trial Court allowed the State to re-open its case and proceed. The only difference in this case is the fact that the Defendant, who has constitutional rights that the State does not have, wanted to re-open the case and recall the expert.

In this case, the point at which the Defendant moved to re-open his case was before instruction, before closing arguments and before any jury

deliberation. Given the late objection to the testimony of Dr. Saar, justice would require the Court to give the Defendant an opportunity to correct the situation. If the objection had been timely made, Dr. Saar could have been recalled to the stand the same day as the alleged crucial omission.

3. **The Court erred and prejudiced the jury by instructing the jury the Dr. Saar's testimony was to be stricken from the record because it did not "arise to the standard set by the West Virginia Supreme Court of Appeals" when the evidence should have been stricken without comment by the Court.**

Even if all the other prior actions by the Court were not prejudicial enough, the Court not only struck the testimony of Dr. Timothy Saar, a witness who was crucial to the Defendant's diminished capacity defense, the Court commented on the evidence in front of the jury. The Court instructed the jury that Dr. Saar's testimony did not arise to standards set by the West Virginia Supreme Court of Appeals.

In State v. Donley, 216 W.Va. 368, 607 S.E.2d 474 (2004), the West Virginia Supreme Court of Appeals held:

"The trial judge in a criminal trial must consistently be aware that he occupies a unique position in the minds of the jurors and is capable, because of his position, of unduly influencing jurors in the discharge of their duty as triers of the facts. This Court has consistently required trial judges not to intimate an opinion on any fact in issue in any manner. In criminal cases, we have frequently held that conduct of the trial judge which indicates his opinion on any material matter will result in a guilty verdict being set aside and a new trial awarded." Syl. pt. 4, State v. Wotring, 167 W.Va. 104, 279 S.E.2d 182 (1981)." Syl. Pt. 4, State v. Rogers, 215 W.Va. 499, 600 S.E.2d 211 (2004)

In this case, the Court could have instructed the jury to disregard the testimony without instructing the jury as to why the evidence was stricken. By devaluing the Defendant's evidence in front of the jury, the Court can leave the impression that there was no evidence of lack of intent (even though the Defendant testified that he had no intent to kill) and that the Defendant in some way was being deceptive by putting on evidence that did not arise to a level which is required. Since Dr. Saar was not permitted to correct this alleged deficiency, the jury was left with the impression that Dr. Saar's diagnosis and opinion was false and invalid.

The defendant was unfairly prejudiced by the by the trial judge's commentary, during instructions, on the testimony of the defendant's expert witness. At the conclusion of instructions, the defendant moved for a mistrial but his motion was denied.

It is reversible error in a criminal case for a trial judge to indicate his or her opinion on any material matter. Specifically, this court has held:

"The trial judge in a criminal trial must consistently be aware that he occupies a unique position in the minds of the jurors and is capable, because of his position, of unduly influencing jurors in the discharge of their duty as triers of the facts. This Court has consistently required trial judges not to intimate an opinion on any fact in issue in any manner. In criminal cases, we have frequently held that conduct of the trial judge which indicates his opinion on any material matter will

result in a guilty verdict being set aside and a new trial awarded." Syl. pt. 4, State v. Wotring, 167 W. Va. 104, 279 S.E.2d 182 (1981). Syl. Pt. 4, State v. Rogers, 215 W. Va. 499, 600 S.E.2d 211 (2004).

In the instant case, the defendant attempted to raise a "diminished capacity" defense at trial and this defense was dependent upon the testimony of the defendant's expert witness, the psychologist, Dr. Timothy Saar. Extensive testimony was elicited from Dr. Saar, including the fact that he had diagnosed the defendant as suffering from Schizoaffective Disorder, a psychotic condition which impaired his ability to cope with, and react to, stress. Unfortunately for the defendant, and as discussed elsewhere in this brief, Dr. Saar did not expressly state his opinion that the defendant "lacked the capacity to form the intent to kill" at the time the victim was shot.

While this oversight may have denied the defendant entitlement to have a "diminished capacity" instruction read to the jury, the trial judge reacted by striking the expert's entire testimony and forbidding counsel to mention "psychological issues" during closing argument. The fact that the defendant suffered from a psychotic disorder was removed from the jury's consideration when deciding on the defendant's intent. This overbroad evisceration of the defendant's case constitutes "conduct" on the judge's part, as it could hardly escape the jury's notice and it intimates the opinion that the defendant should be found guilty of murder. Further, the judge interjected prejudicial commentary as he struck the evidence. The jury was instructed as follows:

“You have heard the testimony of Timothy Saar and certain opinions that he expressed. . . . The Court has made a determination that the testimony of Dr. Saar does not rise to the level recognized under our law for him to express opinions relating to his evaluation of Mr. Ferguson. . . . For the reasons [sic] that the opinion expressed by Mr. Saar does not rise to the level recognized by the West Virginia Supreme Court of Appeals to be permitted to go to the jury for jury consideration, you shall disregard and put out of your mind testimony of Janis Blake, Dr. Timothy Saar, Dr. Ralph Smith and Janet Springstedah. No psychological issues are not [sic] an issue in this case.”
[Trial Transcript, page 544, line 14 thru 545, line 14].

By the time instructions were given the jury knew that Dr. Saar holds a doctorate degree in psychology, they had heard his qualifications, and they had heard his diagnosis of the defendant; yet, they were instructed that his testimony “does not rise to the level recognized under our law for him to express opinions relating to his evaluation of Mr. Ferguson.” This comment implies that a huge problem exists and, when coupled with the striking of his entire testimony, an inescapable impression was cast that Dr. Saar committed perjury or falsified his report or something of that magnitude.

Even if it were justifiable for the trial judge to strike all of the evidence he did, he has a duty to use neutral language that does not disparage the defendant’s expert. The judge could have as easily stated that due to technical rules, which must be followed, the entire testimony of the expert witnesses has been stricken and is not to be discussed or considered by the jury and, therefore, the testimony of Janet Springstedah is not relevant and is also stricken. Thus, no fault or condemnation would have been directed to any particular witness or to either side of the case.

At the very least, the message in fact delivered by the trial judge suggests that the defendant's expert is essentially a hired mouthpiece without any professional scruples and the whole diminished capacity defense was a sham beneath the jury's consideration.

As it happens, the witness stand in the Mason County Courthouse is extremely close to the jury box. While Dreu Ferguson testified the jury was able to plainly see his unusual posture, expressions, and his slight facial tics, and they could probably tell that he is afflicted with a mental illness. In all likelihood, this recognition contributed greatly to the jury's decision to return a verdict of manslaughter rather than murder. However, it is not the policy of criminal law to punish someone for having a mental illness and Mr. Ferguson had a right to present expert testimony relating to the effect this mental illness had on his ability to form intent to kill at the time he confronted one of the people "preying" on him and his wife. If this evidence was improperly presented, so be it; but the judge's stripping the defendant's entire case away and saying it is because of the substandard "level" of that evidence is tantamount to him instructing the jury that the defendant was faking a mental illness.

Once the expert testimony was stripped from the defendant's case, the defendant's own testimony was the only evidence he had left. With no corroborating evidence left, the defendant's credibility was supremely important. A direct assault on the defendant from the bench was devastating to the defendant's case. Further, this implication degraded the character and credibility of the lawyers who litigated the case because it suggests that the lawyers solicited

an opinion from a medical expert of ill repute. Such an injury to the defendant, personally, and to the defense lawyers, coming during instructions when the jury was somber with the weight of a capital responsibility hard upon them, was a tremendous prejudice to Mr. Ferguson. Evidence was closed and the defendant could not be rehabilitated on the witness stand. The lawyer closing the case might as well have been tossed into a pit and forced to deliver his argument from that demeaning position.

Any reasonable hope of an involuntary manslaughter verdict having been destroyed the defendant moved for a mistrial, based upon his prejudiced position as described above, before the case went to the jury. [Trial Transcript, page 572, lines 24, 25.]

This Court has previously reversed a criminal defendant's conviction when the trial judge interjected misleading and prejudicial commentary concerning expert testimony. For example, in State v. Leep, 212 W. Va. 57, 569 S.E.2d 133 (2002), the trial judge's commentary significantly diminished the jury's role as fact finders by effectively instructing them as to the weight to accord test results and an expert's analysis of those results. Id. @ 212, W. Va. 71, 569 S.E. 147. In Leep, a defense expert's testimony tended to debunk the state's scientific evidence concerning positive test results for an STD in a criminal case of child sexual-assault. (Actually, the test relied upon by the state rendered a high percentage of false positive results and warnings had been issued against its use for the purposes the state used it for. Id.) However, at the conclusion of this expert's testimony, which was very damaging to the state's case, the trial judge

cut in and advised the jury that he had already ruled that the state's evidence was admissible and accepted in the scientific community and that it could be considered by the jury. Thus, highly suspect evidence presented by the state was debunked by the defendant's expert and then unfairly rehabilitated by the judge, to the defendant's prejudice.

In the instant case relevant expert evidence, presented by the defendant, was stricken by the judge with disparaging commentary which similarly prejudiced the defendant. In fact, the appellant's case suffered more injury because the jury was not allowed to grant any weight at all to his expert. In Leep, the defendant's conviction was overturned due to the judge's comment significantly diminishing the jury's role as fact finders and, by the same reasoning, Mr. Ferguson's case merits a like result.

Prejudicial conduct by a trial judge, toward a criminal defendant does not always warrant reversal. For example, in State v. Rogers, the trial judge referred to the defendant and his codefendant as "damn fools" when a state's witness was testifying. While recognizing that "conduct of trial judge which indicates his opinion on any material matter will result in a guilty verdict being set aside and a new trial awarded," this Court concluded in Rogers that the judge's comment "was deprived of much of its significance as a result of appellant Rogers' closing argument. Therefore, it would be difficult to sustain the proposition that the Trial Judge's comment constituted plain error." Id. @ 215 W. Va. 505, 600 S.E.2d 217. This Court then affirmed the conviction order in Rogers. Id.

However, the case at hand presents much stronger reasons for overturning a conviction. In the instant case, the appellant is not asking this Court to invoke the plain error doctrine. Defendant's counsel recognized immediately at trial the prejudicial effect the trial judge's disparaging language would have on the jury and made a timely objection. [Trial Transcript, page 572, lines 24, 25.] Further, in Rogers, counsel for the defendant was able to turn the trial judge's comment to the defendant's advantage at closing argument by pointing out that no one would be as foolish as the state's case makes the defendant out to be and, therefore, the state's theory must be wrong. Whereas, during the instant case, defendant's counsel could not argue that the alleged substandard "level" of Dr. Saar's testimony tended to prove the defendant's case. It is simply impossible to glean advantage from there.

The belittling effect of the trial judge's comment on the very heart of the defendant's case could not be mitigated through argument, as was done by defense counsel in Rogers, because in the instant case "psychological issues" were declared taboo. The defendant's legitimate diagnosis of a psychotic disorder could not even be mentioned in closing argument, though vital to the issue of his intent or lack thereof. Further, in the instant case, the trial judge's disparaging commentary occurred after evidence was closed and amounted to a solemn summation of the defendant's whole case; it was not simply a one-liner uttered to elicit laughs during the midst of evidence taking. Thus, the reasons the Rogers Court cited for refusing to overturn the defendant's conviction, despite improper commentary by the trial judge, are not present in the instant case and Dreu

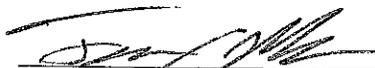
Ferguson's conviction should be overturned so that his case may be submitted to a jury free of unfair prejudice.

It should also be noted that the jury came back with a verdict of Voluntary Manslaughter and this evidence on intent is the difference between a verdict of Voluntary Manslaughter and the misdemeanor offense of Involuntary Manslaughter.

PRAYER FOR RELIEF

Therefore, the Appellant respectfully prays that this Honorable Court will grant his appeal, reverse the conviction and remand the case with instructions for a new trial allowing expert testimony be heard by a jury upon his mental status at the time of the commission of the alleged criminal acts.

DREU FERGUSON, JR.
By Counsel



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CERTIFICATE OF SERVICE

I, Teresa C. Monk, hereby certify that I have served this BRIEF OF APPELLANT on the

5th day of November, 2007 by personal delivery to:

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