
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 33870

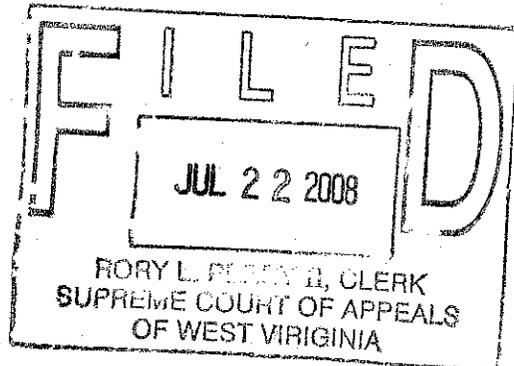
STATE OF WEST VIRGINIA,

Appellee,

v.

MELVIN RANDALL MESSER,

Appellant.



STATE OF WEST VIRGINIA'S BRIEF

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I.

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

Appellant was charged in Indictment S06-F76 with two (2) counts of First Degree Murder [West Virginia Code § 61-2-1] in connection with the willful, deliberate and premeditated killing of Christopher Bruce Chapman and Walter Lee Gauze.

Appellant filed various pretrial and post-trial motions that were considered and ruled upon by the trial court.

Appellant was convicted by jury trial of two (2) counts of First Degree Murder with a recommendation of mercy and received consecutive sentences of confinement in a state correctional facility for a definite term of life with mercy.

II.

STATEMENT OF FACTS

On January 7, 2006, Appellant, Tommy Banig and Walter Lee Gauze were involved in a burglary. *Trial Transcript Volume 3, Page 51.* Afterward, there had been some trouble. *Trial Transcript Volume 3, Pages 100-101, 116-118.* However, the tension had abated by April 2006. *Trial Transcript Volume 3, Pages 116-118.*

On Friday, March 31, 2006, Appellant and Banig went to Robert Brewer's residence while dressed in camouflaged bullet proof vests and discussed selling a .22 rifle and black .45 Hi-Point automatic handgun to Brewer. Brewer purchased the .22 rifle and offered \$75.00 for the black .45 Hi-Point automatic handgun. Appellant and Banig declined to sell the black .45 Hi-Point automatic handgun and advised Brewer that Appellant and Banig may have to use it. *Trial Transcript Volume 3, Pages 143-152.*

On Monday, April 3, 2006, Gauze, Christopher Bruce Chapman, Sonya Belt,

Jamie Domosley and Josh Mollette purchased a case of beer and went to Banig's residence to party and drink beer. *Trial Transcript Volume 3, Pages 88-90, 95, 110, 115-118, 120, 136 and 138.* Banig resided in a trailer at Marrowbone, Mingo County, West Virginia. *Trial Transcript Volume 3, Pages 28, 88 and 116.* Chris Brewer opened the door to Banig's trailer and Chapman entered followed by Gauze and Belt. *Trial Transcript Volume 3, Pages 90, 97 and 121-122.* Chapman and Gauze proceeded in a narrow, small hallway directly to the right of the door. *Trial Transcript Volume 3, Pages 28, 122-123 and 131.* In a matter of seconds, Appellant exited a bathroom at the end of the hallway and shot Chapman in the left back. Appellant then shot Gauze twice in the right upper torso. Appellant finished the unaccompanied outburst of violence by shooting Chapman in the right ear lobe. *Trial Transcript Volume 3, Pages 34-44, 48-50, 52-60, 91, 123, 171-172, 183-185.*

Chapman and Gauze were pronounced dead at the crime scene. *Trial Transcript Volume 3, Pages 30, 169 and 181.* Chapman was shirtless and wearing flip-flops. A beer can in a foam koozie was found adjacent to Chapman's body. Similarly, a beer can and set of keys were found near Gauze's body. *Trial Transcript Volume 3, Pages 35-39, 94 and 138.* Appellant confessed to shooting Chapman and Gauze, but contrived a claim of self-defense. However, neither Chapman nor Gauze was armed and there was no evidence of an altercation prior to the shootings. *Trial Transcript Volume 3, Pages 53-55, 89, 95, 97, 106, 119, 121, 123-124 and 129.*

Phillip Kent Cochran, a firearm examiner with the West Virginia State Police Forensic Laboratory, confirmed that the black .45 Hi-Point automatic handgun fired the bullets that killed Chapman and Gauze. *Trial Transcript Volume 3, Page 159.* Iouri

Boiko, M.D., Ph.D., of the West Virginia Office of Chief Medical Examiner performed the post-mortem examinations of Chapman and Gauze. *Trial Transcript Volume 3, Pages 168 and 181.* Dr. Boiko did not find any evidence of defense or confrontation wounds on either Chapman or Gauze. *Trial Transcript Volume 3, Pages 174 and 185.* Dr. Boiko concluded that both Chapman and Gauze sustained incapacitating injuries and neither posed a threat after the apparent first shot. *Trial Transcript Volume 3, Pages 175, 184 and 186.* The cause of death was gunshot wounds to the head and torso [Chapman] and torso and left arm [Gauze] *Trial Transcript Volume 3, Pages 176 and 186.* The manner of death was homicide. *Trial Transcript Volume 3, Pages 176 and 186.*

III.

APPELLANT'S FIRST ASSIGNMENT OF ERROR

The defendant was denied due process protection under Article 3 Section 10 of the West Virginia Constitution and the Fifth Amendment of the United States Constitution by the prosecuting attorney's repeated misstatement of facts not in evidence during closing argument.

IV.

STATE OF WEST VIRGINIA'S RESPONSE TO FIRST ASSIGNMENT OF ERROR

The prosecuting attorney's closing argument was based solely on the evidence and reasonable inferences therefrom.

V.

DISCUSSION OF LAW

The West Virginia Supreme Court of Appeals has held:

A prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury

as to the inferences it may draw. Syllabus Point 7, State v. England, 180 W.Va. 342, 376 S.E.2d 548 (1988).

There is clear authority that it is proper for a prosecuting attorney to suggest plausible inferences drawn from the evidence. See State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995). See also State v. Asbury, 187 W.Va. 87, 415 S.E.2d 891(1992) ["A prosecutor is allowed to argue all reasonable inferences from the facts."].

It is axiomatic that a prosecutor has a right to fully discuss, from the prosecutor's standpoint, the evidence in a case, including inferences that may be reasonably drawn from the evidence. A prosecutor is entitled to wide latitude in drawing inferences from the evidence. The "reasonable inference" limitation provides a sufficient safeguard against prosecutorial abuse. Whether the evidence bears a logical and proximate connection to the point the prosecutor wishes to prove are the most obvious considerations in determining whether the inference is reasonable. See Stein Closing Arguments 2d § 1:17.

VI.

ARGUMENT

Appellant's argument misconstrues the role and function of the jury in analyzing evidence. A jury is not limited to the bald statements of witnesses and may draw reasonable inferences from the evidence that are justified by common sense and experience.

Appellant's argument further misconstrues the role and function of the prosecuting attorney. West Virginia law clearly authorizes a prosecuting attorney to logically interpret the evidence and argue reasonable inferences therefrom.

- INFERENCE: Appellant went to the bathroom armed.

- EVIDENCE: Appellant discussed selling a black .45 Hi-Point automatic handgun to Brewer shortly before Appellant murdered Chapman and Gauze. The black .45 Hi-Point automatic handgun that Appellant discussed selling to Brewer was identical to the black .45 Hi-Point automatic handgun identified as the murder weapon. *Trial Transcript Volume 3, Pages 142-152.*

Neither Chapman nor Gauze was armed. *Trial Transcript Volume 3, Pages 89, 106, 119, 124 and 129*

- INFERENCE Appellant came out of the bathroom armed and shooting.

- EVIDENCE Appellant confessed to coming out of the bathroom. *Trial Transcript Volume 3, Pages 52 and 54.*

Neither Chapman nor Gauze was armed. *Trial Transcript Volume 3, Pages 89, 106, 119, 124 and 129.*

Gunshots were fired within seconds of Chapman and Gauze entering Banig's trailer. *Trial Transcript Volume 3, Pages 91 and 123.*

There was no fighting before gunshots were fired. *Trial Transcript Volume 3, Pages 95 and 123.*

There was no crime scene evidence that a fight took place before Appellant murdered Chapman and Gauze. *Trial Transcript Volume 3, Pages 53-55.*

Neither Chapman nor Gauze had defense or confrontation wounds. *Trial Transcript Volume 3, Pages 174 and 185.*

The foregoing inferences are plausible, reasonable and logically connected to evidence. The foregoing inferences were certainly not misstatements of fact with no evidentiary basis. Therefore, the Sugg test is inapplicable.

VII.

APPELLANT'S SECOND ASSIGNMENT OF ERROR

The defendant was denied due process protection under Article 2 Section 10 of the West Virginia Constitution and the Fifth Amendment of the United States Constitution by the inconsistent

factual positions taken by the State of West Virginia in the defendant's prosecution and the indictment of Tommy Banig.

VIII.

STATE OF WEST VIRGINIA'S RESPONSE TO SECOND ASSIGNMENT OF ERROR

The State of West Virginia did not take factually incompatible positions in Appellant's prosecution and the Tommy Banig indictment.

IX.

DISCUSSION OF LAW

Inconsistent factual positions in successive litigation are regulated by rules that increasingly are referred to as judicial estoppel. See Federal Practice and Procedure 2d § 4477. The doctrine has three (3) elements: a party must be asserting a position factually incompatible with a position taken in an earlier judicial or administrative proceeding; the position must have been adopted by the tribunal; and the inconsistent positions must have been taken intentionally for the purpose of gaining unfair advantage. King v. Herbert J. Thomas Memorial Hospital, 159 F.3d 192 (1998).

X.

ARGUMENT

Appellant attempts to apply the judicial estoppel doctrine in reverse given that Appellant was convicted before Banig was indicted. Nevertheless, the State of West Virginia did not take factually incompatible positions in the present case and Tommy Banig indictment. Appellant's argument is flawed since it is perfectly logical that both Appellant and Banig could exercise possession of the black .45 Hi-Point automatic handgun on the same day. In fact, Brewer and Spence saw both Appellant and Banig in possession of the black .45 Hi-Point automatic handgun shortly before Chapman and

Gauze were murdered.

The separate prosecutions of Appellant and Banig were unrelated. The crimes charged against Appellant [First Degree Murder - West Virginia Code § 61-2-1] and Banig [Firearm Possession Violation - West Virginia Code § 61-7-7(b)(1)] were different with distinct elements. The crimes were committed on different dates. The theories of prosecution were different. Finally, the State of West Virginia did not gain unfair advantage nor did Appellant suffer any prejudice from the later Banig prosecution.

XI.

APPELLANT'S THIRD ASSIGNMENT OF ERROR

The defendant was denied due process protection under Article 3 Section 10 of the West Virginia Constitution and the Fifth Amendment of the United States Constitution by the State's failure to present exculpatory evidence to the grand jury.

XII.

STATE OF WEST VIRGINIA'S RESPONSE TO THIRD ASSIGNMENT OF ERROR

The State of West Virginia presented substantial exculpatory evidence to the grand jury that returned Appellant's indictment.

XIII.

DISCUSSION OF LAW

The function of a grand jury is to determine whether there is sufficient probable cause to require the defendant to stand trial, not to determine the truth of the charges against the defendant. See State ex rel. Pinson v. Maynard, 181 W.Va. 662, 383 S.E.2d 844 (1989); Bracy v. United States, 435 U.S. 1301, 98 S.Ct. 1171, 55 L.Ed.2d 489 (1978). The West Virginia Supreme Court of Appeals has held:

Except for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the

evidence considered by the grand jury, either to determine its legality or its sufficiency. Syllabus Point 2, State ex rel. Pinson v. Maynard, 181 W.Va. 662, 383 S.E.2d 844 (1989).

In United States v. Williams, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992), the United States Supreme Court declined to impose a prosecutorial duty to disclose substantial exculpatory evidence to the grand jury. The West Virginia Supreme Court has not specifically held that a prosecuting attorney has a broad duty to present all exculpatory evidence to a grand jury.

XIV.

ARGUMENT

While the State of West Virginia may not have presented every conceivable mitigating factor before the grand jury, the State of West Virginia indisputably presented substantial exculpatory evidence that tended to negate Appellant's guilt:

- Appellant gave a statement asserting that he [Appellant] took the gun from Chapman and shot them. *Grand Jury Transcript, Page 10.*
- Banig initially gave a statement consistent with Chapman having the gun and Appellant wrestling the gun away. *Grand Jury Transcript, Page 10.*
- Banig initially gave a statement that they [Chapman and Gauze] brought the gun with them [Chapman and Gauze]. *Grand Jury Transcript, Page 12.*
- Melissa Banig gave a statement that she [Melissa Banig] saw a knife in Gauze's hand on a charm or something. *Grand Jury Transcript, Page 13.*
- There was a pocket knife found closed up in his [Gauze's] pocket. *Grand Jury Transcript, Page 14.*
- Banig said that he [Banig] and Melvin Randall [Appellant] had - made a little bit of problem with these guys [Chapman and Gauze] and were kind of stressed out a little bit about that. *Grand Jury Transcript, Page 14.*

- Tommy Banig said that possibly there may have been a little problem with these boys [Chapman and Gauze]. They [Banig/Appellant - Chapman/Gauze] were a little rough with each other sometime or another and there were threats or accusations or something. *Grand Jury Transcript, Page 15.*
- Domosley initially stated that she [Domosley] saw Banig with a gun in the hallway. *Grand Jury Transcript, Page 17*
- Banig first stated that Melvin Randall [Appellant] took the gun away from these boys [Chapman and Gauze] and shot them with it. *Grand Jury Transcript, Pages 19, 20.*

It would have been prejudicial to Appellant for the State of West Virginia to present Appellant's entire statement to the grand jury because Appellant confessed to being involved in a burglary in which a woman was violently assaulted. Appellant undoubtedly would have then requested dismissal of the indictment for improper presentment of other crimes, wrongs or acts. Another reason the State of West Virginia did not present Appellant's entire statement to the grand jury is the numerous and obvious fabrications therein. Finally, Appellant's statement contained some information immaterial for the grand jury stage of the proceedings.

It is axiomatic that the prosecuting attorney must be afforded reasonable discretion in selecting what evidence is appropriate for grand jury presentment. A grand jury's function is to determine whether there is sufficient probable cause to require the defendant to stand trial. Compelling the prosecuting attorney to present all exculpatory evidence during grand jury proceedings would effectively change the grand jury's historical role from an accusatory body to an adjudicatory body and therefore usurp the petit jury's function. Such a requirement is simply incompatible with our procedural system.

The record is abundantly clear that the State of West Virginia did not selectively

present evidence in order to mislead the grand jury. Moreover, there has been no prima facie showing of willful, intentional fraud in obtaining Appellant's indictment.

XV.

APPELLANT'S FOURTH ASSIGNMENT OF ERROR

The evidence presented does not support a conviction of first degree murder.

XVI.

STATE OF WEST VIRGINIA'S RESPONSE TO FOURTH ASSIGNMENT OF ERROR

The State of West Virginia presented legally sufficient evidence to support the First Degree Murder convictions.

XVII.

DISCUSSION OF LAW

The standard of review for a sufficiency of evidence challenge has been summarized by the West Virginia Supreme Court of Appeals as follows:

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 reviewing 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. Syllabus Point 1, State v. Guthrie, 94 W.Va. 657, 461 S.E.2d 163 (1995); Syllabus Point 1, State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996).

The evidence must be analyzed in a light most favorable to the prosecution:

When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's

favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt. Syllabus Point 2, State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996).

XVIII.

ARGUMENT

It is undisputed that Appellant on April 3, 2008, in Mingo County, West Virginia, did shoot and kill Chapman and Gauze. The only essential elements of First Degree Murder at issue are intent, deliberation and malice. The State of West Virginia presented ample evidence of intent, deliberation and malice as follows:

- Appellant and Banig advised Brewer that Appellant and Banig may have to use the .45 black Hi-Point automatic handgun. *Trial Transcript Volume 3, Page 144.*
- Chapman and Gauze were unarmed and there was no fighting before Appellant shot and killed Chapman and Gauze. *Trial Transcript Volume 3, Pages 89, 95, 97, 106, 119, 121, 123-124 and 129.*
- Both Chapman and Gauze sustained incapacitating injuries and neither posed a threat after the first shot. *Trial Transcript Volume 3, Pages 175, 184 and 186.*
- Chapman was shot execution-style in the head after sustaining a fatal shot in the back. *Trial Transcript Volume 3, Pages 174-175.*

Appellant's self-defense claim went undeveloped and was inconsistent with the evidence. The State of West Virginia refuted Appellant's self-defense claim as follows:

- Chapman and Gauze went to Banig's residence to party and drink beer. *Trial Transcript Volume 3, Pages 88-90, 95, 110, 115-118, 120, 136 and 138.*
- Chapman was shirtless and wearing flip-flops. A beer can in foam koozie was found adjacent to Chapman's body. Similarly, a beer can and set of keys were found near Gauze's body. *Trial Transcript Volume 3, Pages 35-39, 94 and 138.*
- Chapman and Gauze were unarmed and there was no fighting before Appellant shot and killed Chapman and Gauze. *Trial Transcript Volume 3, Pages 89, 95, 97, 106, 119, 121, 123-124 and 129.*
- Both Chapman and Gauze sustained incapacitating injuries and neither posed a

threat after the first shot. *Trial Transcript Volume 3, Pages 175, 184 and 186.*

- Chapman was shot execution-style in the head after sustaining a fatal shot in the back. *Trial Transcript Volume 3, Pages 174-175.*

The foregoing evidence and reasonable inferences that could be drawn therefrom were sufficient to convince a reasonable and rational trier of fact beyond a reasonable doubt that Appellant intentionally, deliberately and maliciously murdered Chapman and Gauze.

XIX.

APPELLANT'S FIFTH ASSIGNMENT OF ERROR

The circuit court erred in not suppressing the defendant's statement as he was not informed of the magnitude of the crime and potential penalty prior to waiving his Miranda Rights in violation of Article 3 Section 5 and Article 3 Section 10 of the West Virginia Constitution and the Fifth Amendment of the United States Constitution.

XX.

STATE OF WEST VIRGINIA'S RESPONSE TO FIFTH ASSIGNMENT OF ERROR

The trial court's ruling to permit introduction of the Appellant's statement into evidence was proper as the Appellant's Miranda Rights were not violated.

XXI.

DISCUSSION OF LAW

In the landmark case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held:

A prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment right against self-incrimination.

The procedural safeguard that must be utilized is referred to as a *Miranda* warning that clearly informs a person in custody of the following:

- You have the right to remain silent.
- Anything you say can be used against you in court.
- You have the right to consult with a lawyer and to have a lawyer present during interrogation.
- If you are indigent, a lawyer will be appointed to represent you.
- If you decide to answer questions without a lawyer present, you may invoke the right to remain silent thereafter.

See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The West Virginia Supreme Court of Appeals has held:

In determining the voluntariness of a confession, the trial court must assess the totality of all the surrounding circumstances. No one factor is determinative. Syllabus Point 5, in part, State v. Moore, 193 W.Va. 642, 457 S.E.2d 801 (1995); Syllabus Point 7, in part, State v. Farley, 192 W.Va. 247, 452 S.E.2d 50 (1994).

Considerable deference is given to the trial court's decision:

A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence. Syllabus Point 4, State v. Moore, 193 W.Va. 642, 457 S.E.2d 801 (1995); Syllabus Point 3, State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (1978).

XXII.

ARGUMENT

Appellant was not in custody when Appellant voluntarily gave a written statement to Trooper First Class J. L. Scarbo. Even so, it is undisputed that Appellant was given a *Miranda* warning and clearly informed of *Miranda* rights. In fact, Appellant acknowledged and did knowingly and intelligently waive Appellant's *Miranda* rights by

reviewing, initialing and signing an Interview and Miranda Rights Form [D.P.S. Form 79]. Appellant was free to leave at anytime. There is no evidence whatsoever that Appellant was pressured, coerced or threatened into giving a statement. Finally, it is clear from the totality of circumstances that Appellant had a self-serving motive for giving a statement, namely to contrive a self-defense claim.

XXIII.

APPELLANT'S SIXTH ASSIGNMENT OF ERROR

The circuit court erred in requiring defendant's counsel to call off the names of prospective witnesses when trial strategy changes and the witnesses are not called; thus causing the jury to speculate on the reasoning for not calling the witnesses resulting in prejudice to the defendant and denial of due process protection under Article 3 Section 10 of the West Virginia Constitution and the Fifth Amendment of the United States Constitution.

XXIV.

STATE OF WEST VIRGINIA'S RESPONSE TO SIXTH ASSIGNMENT OF ERROR

The trial court did not err in requiring Appellant's counsel to call off the names of potential witnesses during voir dire since such disclosure is necessary to impanel an unbiased, impartial jury and when jury instructions are issued that specify the defendant's rights.

XXV.

DISCUSSION OF LAW

The purpose of voir dire examination has been explained by the West Virginia Supreme Court of Appeals as follows:

Voir dire examination is designed to allow litigants to be informed of all relevant and material matters that might bear on possible disqualification of a juror and is essential to a fair and intelligent exercise of the right to challenge either for cause or peremptorily. Such examination must be meaningful so that the parties may be enabled to select a jury competent to judge and determine the facts in issue without bias, prejudice or partiality.

Syllabus Point 1, Thornton v. CAMC, Etc., 172 W.Va. 360, 305 S.E.2d 316 (1983).

Voir dire inquiry in a criminal case is within the sound discretion of the trial court and is subject to review only when the discretion is clearly abused. See Syllabus Point 5, State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994); Syllabus Point 2, State v. Beacraft, 126 W.Va. 895, 30 S.E.2d 541 (1944).

XXVI.

ARGUMENT

It is standard for West Virginia trial courts to elicit the names of potential witnesses during voir dire to determine any family, friendship, business or social relationship between prospective jurors and witnesses. The existence and nature of a relationship between a juror and witness is unquestionably material to the issue of whether a juror can determine the facts in issue without bias, prejudice or partiality. Such information is essential to accomplish a meaningful voir dire examination.

Appellant engages in unfounded conjecture by suggesting that Appellant was prejudiced by the trial court's elicitation of potential witnesses during voir dire. Regardless, the trial court sufficiently instructed the jury of the presumption of innocence, Appellant's right to remain silent and State of West Virginia's continuing burden of proof.

XXVII.

CONCLUSION

On April 3, 2006, Appellant tragically murdered Chapman and Gauze in a random, senseless outburst of violence. Chapman and Gauze went to Banig's residence with a case of beer expecting to party. In fact, both were only armed with a

can of beer when ambushed and murdered by Appellant. Chapman was shot execution-style in the head after being incapacitated by a lethal initial shot to the back. Gauze was turning to escape before being incapacitated by an initial shot and then finished off for good measure by a second shot.

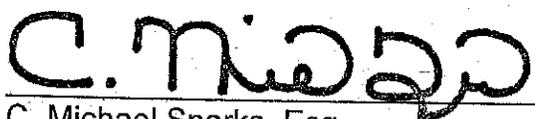
Appellant's contrived self-defense claim went undeveloped at trial. Appellant's self-serving confession was dominated by obvious fabrications inconsistent with the evidence. For example, there was no evidence of forced entry, gunshots or a fight before Appellant ambushed Chapman and Gauze within seconds of entering Banig's trailer. In a nutshell, Chapman and Gauze unwittingly came to a gunfight with a case of beer and ended up dead - murdered in cold blood by Appellant.

XXVIII.

RELIEF REQUESTED

The State of West Virginia respectfully requests that this Honorable Court affirm the jury verdict and deny the relief requested by Appellant.

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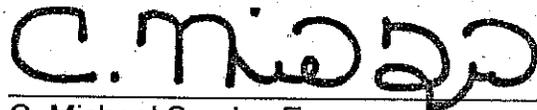
Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing
“**State of West Virginia’s Brief**” was served via United States Mail upon the following
parties:

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Dated the 18th day of July, 2008.



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