
NO. 34142

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

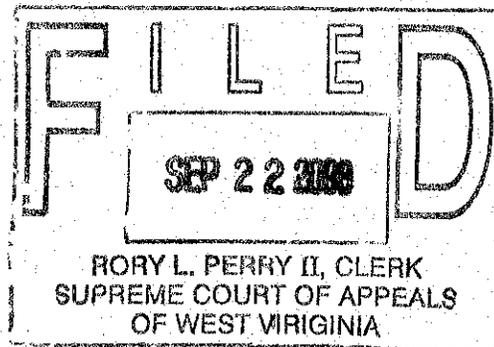
STATE OF WEST VIRGINIA,

Appellee,

v.

PAUL NEWCOMB,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

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

This is an appeal by Paul Newcomb (hereinafter "Appellant") from the August 3, 2007, judgment of the Circuit Court of Logan County (O'Briant, J.), which sentenced him to life without mercy in the state penitentiary upon his conviction by a jury of one count of first degree murder in violation of West Virginia Code § 61-2-1. On appeal, Appellant assigns several grounds of error.

II.

STATEMENT OF FACTS

This case arises out of the stabbing death of Dennis Toler in the Christian area of Logan County. Appellant's wife, Ms. Johnna Newcomb, was a drug addict. Ms. Newcomb became addicted to OxyContin after suffering injuries from a car accident. (Tr., 182, Aug. 1, 2007.) At one point, Ms. Newcomb was sent to a drug rehabilitation center, but she eventually relapsed. (Tr., 126,

155, Aug. 2, 2007.) During this addiction period, there was about a two-year time span from approximately 2004 until the victim's death where Ms. Newcomb would leave her home and be gone for days and weeks doing drugs. (Tr., 114-15, Aug. 1, 2007.)

Eventually, Johnna Newcomb started going to a methadone clinic in Williamson. (Tr., 155, Aug. 2, 2007.) At some point during the time Ms. Newcomb was going to the methadone clinic, she met Dennis Toler. While in line at the clinic, Dennis Toler asked her if she was interested in purchasing more methadone. (*Id.* at 115-16.) Eventually, Ms. Newcomb started seeing Mr. Toler, and she would do sexual favors for additional doses of methadone. (*Id.* at 118.) During this two-year time period, Johnna Newcomb left Appellant and her children and stayed with the victim approximately three to five times. (*Id.* at 119.) Various conflicts occurred between Appellant and the victim during this time period. (Tr., 124-27, 245-50, Aug. 1, 2007; Tr., 129-30, 131-34, 161-63, Aug. 2, 2007.) One of the conflicts resulted in a violent confrontation outside of the Williamson methadone clinic where Appellant stabbed Mr. Toler. (Tr. 124-27, 245-50, Aug. 1, 2007; Tr. 131-34, Aug. 2, 2007.)

On the day before this fatal incident, Appellant had a telephone conversation with Johnna while she was at the Toler house where she said that she wanted to come home, in particular due to their son, John's, birthday approaching. (Tr., 136, Aug. 2, 2007.) It was agreed that Appellant would pick her up.

During the early morning hours of April 1, 2006, Appellant was drinking at a bar called Destiny's in Man. (Tr., 75, Aug. 1, 2007.) When it got late, the owner of the bar drove Appellant to the Elk Creek area. The purpose was so that Appellant could get a ride to work that morning with a co-worker since he did not want to drive after being at a bar. (*Id.* at 99-101.) Appellant waited in

the Elk River area for approximately 40 to 45 minutes and then started walking along a set of railroad tracks until he saw his wife come out of Mr. Toler's house. (Tr., 139-40, Aug. 2, 2007.) At that point, Dennis Toler came out of the house, and a verbal confrontation between him and Appellant ensued. (*Id.* at 141-42.) Ms. Newcomb attempted to keep the two men apart and was unintentionally stabbed by Appellant. (Tr., 149, Aug. 1, 2007.)

There were some discrepancies between Ms. Newcomb's police statement from April 1, 2006, and her trial testimony. However, what is consistent is that a fight broke out in the bedroom where Appellant stabbed Mr. Toler. (*Id.* at 151-59.)

Dennis Toler lived in his parents' house on the bottom floor. His parents both woke up to a loud bang and what sounded like a fight. (Tr., 10, 20-21, Aug. 2, 2007.) Ms. Toler let her son into their portion of the house, and the latter said that Appellant stabbed him again. (*Id.* at 22.) Ms. Toler said her son came in holding his back and side. (*Id.*) At this point, Dennis Toler went to the bed where his father was and lay down. (*Id.*) His parents took him to the living room and wiped the blood from him with a towel. (*Id.* at 10.) Dennis's father testified that there was blood all over the walls where his son was holding himself up. (*Id.* at 13.) Ms. Toler stated that the whole house was a bloody mess. (*Id.* at 23.) Shortly thereafter, Dennis Toler died in his parents' living room. (*Id.* at 12.)

Logan County Deputy Sheriff W.D. Harvey arrived on the scene and found Johnna Newcomb pointing to Appellant yelling, "There he is. There he is." He later heard Dennis Toler's parents and Ms. Newcomb screaming the same thing. (*Id.* at 222-24.) Deputy Sheriff Harvey then noticed that Appellant was coming toward him, so he ordered him to get on his knees and have his hands out where they would be visible. At first, Appellant did not comply, but then he eventually did. (*Id.* at

224.) Deputy Sheriff Harvey handcuffed Appellant and took him to his cruiser because the latter was combative. Deputy Sheriff Harvey testified that he did not know the facts, and based on Appellant's behavior, he did this for safety reasons. (*Id.* at 225.) However, according to the deputy sheriff, Appellant was not under arrest at this time, and it was proper protocol to handcuff someone beforehand for safety purposes. (*Id.*) Deputy Sheriff Jeffrey Robinette came to the scene and discovered Appellant's knife in an adjacent field across Route 80. (*Id.* at 206-07.)

Logan County Deputy Sheriff Mike C. Sutherland was dispatched to the scene on the morning in question. When he arrived at the house, he observed Dennis Toler lying dead on the floor with puncture wounds all over his body. (Tr., 130, July 31, 2007.) When Deputy Sheriff Sutherland found Appellant outside of the house, the latter had blood on his hands. (*Id.* at 156.) At approximately 6:21 a.m., the deputy sheriff read Appellant his *Miranda* rights, and at about 6:42 a.m., he took a statement from him. (*Id.* at 159.) In this statement, Appellant admitted to stabbing Mr. Toler three times. (*Id.* at 167.) Appellant also admitted to bringing the knife with him to the Toler house. (*Id.* at 168-69.)

At trial, Appellant admitted to stabbing Dennis Toler two to three times. (*Id.* at 227-28.) Dr. Zia Sabet, Medical Examiner for the State of West Virginia, performed an external examination of the victim's body and testified at the trial. Dr. Sabet testified that he discovered thirteen stab wounds to Dennis Toler; three in the left side of the neck, five in the front of the chest, and five in the back. (Tr., 34, 39, Aug. 1, 2007.) He also found one incised wound on the left forearm, one incised wound and two abrasions on the ring and little fingers. (*Id.* at 35.) There were also scratches and abrasions on the left side of Dennis Toler's temple. (*Id.* at 35-36.) One stab went between the ribs and penetrated into the large lung. (*Id.* at 45.) One wound had an estimated depth of penetration of eight

and one-half inches where the entire knife penetrated the body up to its handle. (*Id.*) There were stab wounds in four different places where the knife passed through the heart. (*Id.* at 49.) Dr. Sabet also discovered internal bleeding. He stated that there was approximately one liter of blood in the right chest cavity and one liter of blood in the left chest cavity, as well as about 800 cc of blood in the abdominal cavity. (*Id.*) One wound passed through the left lung and into the diaphragm and liver. (*Id.* at 50.) Dr. Sabet testified that, in his medical opinion, the manner of death was homicide and the cause of death was multiple stab wounds and assault. (*Id.* at 63.)

On August 3, 2007, the jury convicted Appellant of first degree murder without recommendation of mercy. (R. at 357; Tr., 105, Aug. 3, 2007.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's responses:

1. That the circuit court's failure to strike two jurors for cause was an abuse of discretion.

State's Response:

There was no abuse in discretion in the circuit court's denial of Appellant's motion to strike for cause the two jurors in question. The jurors showed they could make decisions free from any bias once the law was explained to them, and no rehabilitation occurred.

2. That the trial court erred in permitting the introduction of statements made by the Defendant while in custody inconsistent with the essence of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and West Virginia cases expanding thereon.

State's Response:

There was no abuse of discretion on the part of the circuit court in overruling Appellant's motion to suppress inculpatory statements he made to a paramedic because, although made before *Miranda* warnings were given, they were not in response to a police interrogation.

3. The trial court erred in permitting the state to introduce the alleged murder weapon at trial because the police questioned the Defendant about the location of the knife while the Defendant was in custody but without reading the Defendant his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and West Virginia cases expanding thereon.

State's Response:

There was no *Miranda* violation in the discovery of the murder weapon, and the fruit of the poisonous tree did not come into play because the underlying statement regarding the knife by Appellant was a result of his blurting out rather than a police custodial interrogation. Alternatively, the murder weapon would easily have been found through inevitable discovery due to its close proximity to where Appellant was apprehended, and its being in plain view.

4. The circuit court was clearly erroneous in its findings relating to the admissibility of the Defendant's written statement as there was a clear violation of the prompt presentment rule.

State's Response:

There was no violation of the prompt presentment rule, and any delay in bringing Appellant before a magistrate was due to reasonable, standard police procedures at a crime scene rather than for the primary purpose of obtaining a statement from him.

5. The circuit court abused its discretion when admitting certain Rule 404(b) evidence from a case dismissed in Mingo County.

State's Response:

The admission of an alleged prior stabbing incident was a proper application of Rule 404(b) to establish, motive, intent and lack of mistake, and accident and there was no abuse of discretion.

IV.

ARGUMENT

A. **THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE CIRCUIT COURT IN ITS DENIAL OF APPELLANT'S MOTIONS TO STRIKE VARIOUS JURORS FOR CAUSE.**

Appellant wrongfully asserts that the circuit court abused its discretion when it denied motions to strike Jurors McKnight and White for cause. No rehabilitation occurred with respect to Juror McKnight, but rather an instruction of the law, which she indicated she could follow without bias. With respect to Juror White, further probing indicated that she could indeed be unbiased and that she was not initially speaking clearly. There was no protest that she could be impartial when the facts were to the contrary as is prohibited in *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

1. **The Standard of Review.**

“We review the trial court’s decision on [striking a juror] under an abuse of discretion standard.”

State v. Johnston, 211 W. Va. 293, 294, 565 S.E.2d 415, 416 (2002), quoting *State v. Wade*, 200 W. Va. 637, 654, 499 S.E.2d 724, 741 (1997).

“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.” Syllabus point 5, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002).

Syl. Pt. 2, *State v. Griffin*, 211 W. Va. 508, 566 S.E.2d 645 (2002).

The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

Syl. Pt. 4, *State v. Miller, supra*; Syl. Pt. 1, *State v. Griffin, supra*.

2. **There Was No Abuse of Discretion in the Circuit Court's Denial of Appellant's Motion to Strike Juror McKnight for Cause Because She Indicated She Could Make Decisions Without Bias When the Law Was Explained to Her, and No Rehabilitation Took Place.**

Appellant contends that Juror McKnight should have been stricken for cause upon his motion due to her initially stating that she would believe a police officer over an ordinary citizen. He argues that the juror was rehabilitated after she indicated a bias in favor of police officers where she later said that she would not engage in this belief; and thus, should have been stricken for cause. However, there was no rehabilitation, but rather she was informed what the law was and what she was required to do. Once she understood this, she indicated that she could make decisions free of any bias. The exchange during voir dire that Appellant refers to went as follows:

Defense Counsel: Now do you believe that police officers' testimony should be believed more than non-police officer testimony?

Juror McKnight: I would say, yes.

Defense Counsel: I think you indicated that your next door neighbor was John Reed, a home confinement officer?

Juror McKnight: Yes, that's correct.

Defense Counsel: How long has he been your next door neighbor?

Juror McKnight: I've known him since probably I was in the first grade, a very long time.

Prosecutor: If the court instructs you that you have to treat each witness equally and listen to what they have to say and judge the evidence on what you see here on the stand, can you do that?

Juror McKnight: Yes, absolutely.

Prosecutor: You had indicated that you might tend to believe police officers.

Juror McKnight: Right.

Prosecutor: But can you still, if the court instructs you you're not to give a police officer any more weight than any other witness, can you just wait until you hear what each person would have to say?

Juror McKnight: Yes, I can do that.

(Tr., 239-41, May 16, 2007.)

Appellant's counsel moved to strike Juror McKnight for cause. The prosecutor argued that once she was instructed and understood what the court expected of her, she was clear that she could make such decisions free of any bias. Based on this, the circuit judge denied Appellant's motion to strike this juror for cause. (*Id.* at 243-44.)

Conversely, Jurors Lori Workman and Krista Vance were excused by the trial judge when they expressed a bias in favor of police officer testimony where the prosecutor gave no instruction to them on weighing all testimony equally. (*Id.* at 117-19; 199-200.) Additionally, Jurors Marvel Farley and James Kubow were both struck for cause upon Appellant's motions where the prosecutor did not instruct them on the law. (*Id.* at 127-31; 179-82.)

The prosecutor gave Juror David Sanders instructions on weighing all testimony fairly, and he was struck for cause. Yet his answers seemed a bit ambiguous. The following exchange occurred with him during voir dire:

Defense Counsel: Do you believe that police officer testimony should be more believed than non-police officer testimony?

Juror Sanders: The police officer should be more believed than the non-police officer?

Defense Counsel: Yes.

Juror Sanders: Yes.

Defense Counsel: So if it was a scenario where a police officer came in and testified to one thing and then a non-police officer, just someone off the street were to testify about the same set of facts, you would tend to believe the police officer more simply because he's a police officer?

Juror Sanders: Yes.

Prosecutor: When I asked you that question, I said can you give everybody the same treatment and listen to all the witnesses, and you said yes. If the judge instructs you that you can't treat a police officer any better than anyone else and you've got to listen to everyone's evidence.

Juror Sanders: Listen to them equally.

Prosecutor: Can you do that?

Juror Sanders: Yes. Just testimony I guess from the police officer, and the same testimony from a non-police officer, it seems like I would believe the police officer more because he is a cop. But I guess I can trust everybody equally.

Prosecutor: If the judge tells you that's the standard, everybody has to be, you listen to everything everybody's got to say, you use your common sense.

Juror Sanders: Regardless of who they are.

Prosecutor: As to what somebody tells you sounds like it makes sense, can you do that?

Juror Sanders: Yes.

(*Id.* at 261-64.) This juror did not seem to be as adamant about being able to weigh all testimony equally upon the prosecutor's instruction and even seemed a bit confused. As previously mentioned, the judge granted Appellant's motion to strike for cause in this instance. (*Id.* at 265-66.)

Yet in the case of Juror McKnight, the prosecutor was not engaging in an improper attempt to rehabilitate prospective jurors as was held unlawful in *Griffin, supra*, but rather was explaining what the law actually was and if, after being informed, whether she could follow it. If Juror McKnight would have said that she would believe a police officer over another witness after the law was explained to her, and the State engaged in rehabilitative follow-up questions to attempt to establish her as being unbiased, that would definitely be error. But that is not what took place. Regarding this practice of informing prospective jurors of what is expected of them, Appellant correctly points out what the State said during these exchanges:

The same back and forth argument, Your Honor. If you ask these people, they're initially going to show some deference to police officers, but if the Court gives them an instruction, he indicated he could follow that instruction and he'll apply the law as the Court directs.

(Tr., 265, May 16, 2007.)

The Supreme Court of Louisiana dealt with this issue and held,

A refusal by a trial judge to excuse a prospective juror for cause on the ground that he is not impartial is not an abuse of discretion where, after further inquiry or instruction, the potential juror has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence.

Louisiana v. Jacobs, 789 So. 2d 1280, 1284 (La. 2001), citing *Louisiana v. Robertson*, 630 So. 2d 1278, 1281 (La. 1994). Similarly, the Court of Criminal Appeals of Texas held that a trial judge did not abuse his discretion when he overruled a defendant's challenge of a juror for cause where after

the juror was instructed of the law he stated that he could make decisions accordingly when he initially showed a preference in favor of the death penalty. *Kemp v. Texas*, 846 S.W.2d 289, 297 (Tex. Cr. App. 1992). Just as these courts did, the State asks this Court to rule accordingly and allow jurors to be questioned upon a full instruction of the law in affirming the trial judge's decision here.

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

What occurred in this case, where jurors had explained to them what was required by law and subsequently showed a clear ability to be unbiased, can easily be distinguished from the trial court's actions in *Nett*. There was no abuse of discretion by the trial judge in denying Appellant's motion to strike Juror McKnight for cause. Thus, Appellant's claim fails on this ground.

3. **There Was No Abuse of Discretion in the Circuit Court Decision Denying Appellant's Motion to Strike Juror White for Cause. Despite Her Initial Use of Ambiguous Wording, She Stated That She Could Be Fair. Additionally, the Criminal Convictions of Her In-Laws Did Not Amount to Facts to the Contrary to an Ability to Be Unbiased.**

Appellant points to statements made during individual voir dire of Juror Tara White where she made comments to the fact that the case was sensitive as proof that she was biased. Additionally, he contends that her belief that her in-laws should have been punished more severely for their murder convictions is proof that facts were to the contrary that she could be unbiased despite statements

showing an ability to be impartial. Appellant asserts that this was a violation of the standard established in *Miller, supra*. However, these arguments are erroneous.

During the voir dire of Juror Tara White, the following exchanges took place:

Prosecutor: You had indicated that some member of your family had been incarcerated in jail either in Logan or somewhere else. Is that correct?

Juror White: Yes.

Prosecutor: The question I have, is there anything about your relationship with them [Juror White's in-laws] through their various Court cases and things like that, does that cause you to have any kind of opinions with the Court system or police officers or prosecutors in a negative way or I guess even in a positive way, one way or another? Does the fact that they have had a lot of familiarity with the Court system cause you yourself to have any opinion?

Juror White: To be honest, I have never been to any of their hearings or anything, no contact. I've talked to them on the phone or anything like that, but not when it came with the Court.

Prosecutor: Do you feel like any of them got like a raw deal in Court because of the police or prosecutors or the Court system?

Juror White: No.

Prosecutor: That would cause you to have a negative opinion about the system itself?

Juror White: No, not raw.

Prosecutor: All we're looking for is a juror that would say I'll listen to the evidence that's presented in this case and make my decision based on that. So the question I'm asking is either because those people all got in trouble, you think maybe they deserved what they got or not, do you feel that you could push all that aside and just hear this case?

And all we're asking for is an honest opinion. If you don't, then that's fine, too.

Juror White: Well, I'm going to go back to the honesty. I am very, very sensitive and I don't know if I could, be fully judgmental.

Prosecutor: When you say "sensitive", do you mean to other criminal acts, or---

Juror White: I don't know how to explain it to you. Let me see if I can put it in the right words. Something as major as this, I don't know if I could be as fair as I would need to be, you know, swaying my judgment.

Prosecutor: Let me ask you this. Are you saying because of the kind of case this is?

Juror White: Yes.

Prosecutor: So you're saying this is a real serious case, you think.

Juror White: Yes.

Prosecutor: Now are you saying just because this is a serious case, that would cause you problems, or are you saying because of these other things that have happened to your in-laws?

Juror White: Nothing— putting my in-laws aside, it has nothing to do with them. Just specifically because of the type of case that it is.

Prosecutor: You have concerns about yourself in this case because of the type of case it is?

Juror White: Right, yes.

Prosecutor: What is it that, what are your concerns if I could ask that?

Juror White: Just specifically because it is a murder, and I don't know if I could actually handle the whole situation with it. I don't know.

Prosecutor: Do you feel like, though, you'd be inclined one way or another?

Juror White: I'm sure that I could come to a decision. There's no doubt in that. But I know that it would be a sensitive issue. Do I make sense?

Prosecutor: Just personally sensitive to you.

Juror White: Yes. Sometimes words don't come out right. I'm sorry.

Defense Counsel: Ma'am, the prosecutor asked you several questions about your in-laws case and he even ask [*sic*] you whether you thought they got a raw deal. Do you feel the opposite, you feel like they should have gotten greater punishment?

Juror White: Yes, I do.

Defense Counsel: And I think your testimony was that you weren't involved in those cases.

Juror White: No.

Defense Counsel: Or those hearings.

Juror White: No, not at all. I tried to stay away from them.

(Tr., 23-59, July 30, 2007.) The circuit judge overruled Appellant's motion to strike Juror White for cause. (*Id.* at 59-60.)

The convictions of Juror White's in-laws could not fall under the category of facts to the contrary where a juror states in voir dire that he or she can make decisions free from any bias as is established in *Miller, supra*, and *Griffin, supra*. It is true that Juror White said that her in-laws should have received more severe sentences for their murder convictions, yet the facts and circumstances surrounding the present case are completely unique to the former. In *Nett, supra*, this Court reversed a lower court decision where a juror was not struck for cause in a DUI case where he had two friends killed by drunk drivers, and he admitted that he knew about the defendant's prior drunk-driving convictions. (*Id.*, 207 W. Va. at 414, 533 S.E.2d at 47.) That scenario is distinguishable from the one presented in the case at bar. At no point does this juror state that she would have trouble being unbiased due to her in-laws' convictions. In fact, she testified that she

really did not follow the court proceedings involving her in-laws. Thus, Appellant's argument fails regarding her in-laws convictions causing an inability for her to be free of bias.

It is true that Juror White testified that she could have a problem being fair and that her judgment could be swayed, yet this was all in the context of her belief that murder cases were "sensitive" ones. If every juror were probed as to the sensitive nature of murder cases, they probably would all agree that they indeed are. But she also said that at times her words "don't come out right." When the prosecutor asked her if she would be inclined one way or the other, she stated, "I'm sure that I could come to a decision. There's no doubt in that." This seems to be an indication of an ability to be unbiased from a juror who admitted to having trouble saying the correct words. When looking at the totality of the circumstances, as Appellant urges this Court to do, it appears this juror just had a concern about the sensitive nature of murder cases, had trouble communicating and, when probed specifically about bias, could be impartial.

In *Griffin, supra*, the Court concluded that there was juror bias and reversed the case on said grounds where a juror involved in grand jury proceedings in the past had the following exchange with the trial judge:

The Court: Do you believe that when somebody has been indicted, they are most likely to be guilty than not based on your experience when you were with grand juries?

Juror Young: Probably.

(*Griffin*, 211 W. Va. at 511, 566 S.E.2d at 648.) The juror in *Griffin* seems much more clear in her having a bias as opposed to a juror who admits to not saying things correctly and who eventually states that she could be unbiased. Thus, Appellant's argument fails on this ground as well.

B. THE STATEMENTS MADE BY APPELLANT TO AN EMERGENCY MEDICAL SERVICE (EMS) EMPLOYEE DID NOT AMOUNT TO A POLICE INTERROGATION; AND THUS, CORRECTLY RULED TO BE ADMISSIBLE.

Appellant made various statements upon being questioned by an EMS worker while being treated on the scene before he was *Mirandized* and formally arrested. These statements were overheard by Deputy Sheriff Harvey. Appellant wrongfully argues that these statements were made due to police questioning before he was given his *Miranda* rights. Yet, these statements were made as a result of a question posed by someone who was not a police officer at this time. The statements were not a result of a custodial interrogation by the police. Thus, the *Miranda* safeguards were not triggered and the statements were properly admitted as evidence.

1. The Standard of Review.

Concerning our standard of review of the circuit court's exclusion of the evidence at issue, we note that "[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion."

State v. Guthrie, 205 W. Va. 326, 332, 518 S.E.2d 83, 89 (1999), quoting *State v. Louk*, 171 W. Va. 639, 643, 301 S.E.2d 596, 599 (1983), citing Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But,

since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. 291, 300-02, 100 S. Ct. 1682, 1689-90 (1980).

The special safeguards outlined in *Miranda* are not required where a suspect is simply taken into custody, but rather only where a suspect in custody is subjected to interrogation. To the extent that language in *State v. Preece*, 181 W.Va. 633, 383 S.E.2d 815 (1989), and its progeny, may be read to hold differently, such language is expressly overruled.

Guthrie, supra, at Syl. Pt. 8.

2. **The Inculpatory Statements Made by Appellant to Ray Bryant Were a Result of an EMS Worker Asking Him a Question While Being Medically Examined. Therefore, Mr. Bryant's Question Could Not Have Been Perceived as a Police Practice Amounting to an Interrogation as Established in *Innis, Supra*, Requiring a *Miranda* Warning.**

While Appellant is accurate that he made incriminating statements to an EMS worker before being *Mirandized* who was also a part-time police officer for the town of Man; the fact of the matter is that Ray Bryant was not acting as a police officer or on duty as one at the time, and Appellant could not have perceived this to be a police custodial interrogation. Thus, there was no *Miranda* violation.

Deputy Sheriff Harvey was dispatched to the scene, and the victim's mother answered the door. The deputy sheriff then observed Dennis Toler lying on the floor. He then observed Johnna Newcomb outside and heard her screaming, "there he is, there he is." (Tr., 212, July 31, 2007.) Then he saw Appellant near a road yelling, "[Y]ou want me, you want me, here I am, come and get me." (*Id.*) At that time the victim's parents were pointing to Appellant and screaming, "There he is, there he is." (*Id.* at 214.) At that point, Appellant started to come toward the police officer. Deputy Sheriff Harvey told Appellant to get on his knees and show his hands for safety reasons. At first

Appellant did not comply, but then he eventually did. (*Id.*) Because Appellant initially refused to comply with orders and the officer was not fully aware of what was going on in this situation, he drew his weapon and handcuffed Appellant. (*Id.* at 214-15.) Deputy Sheriff Harvey stressed that Appellant was not under arrest at that point in time. Putting Appellant in handcuffs was proper protocol for safety due to his being combative and the officer's lack of knowledge of the facts. (*Id.* at 215.) Deputy Sheriff Harvey then took Appellant to his cruiser and had an Emergency Medical Services (EMS) worker examine him. (*Id.* at 216.)

At the Suppression Hearing Deputy Sheriff Harvey testified that he did not interrogate Appellant at this time but was attempting to secure the area. (Supp. Hr'g, 71, March 8, 2007.) While Appellant was being treated by the EMS worker, Ray Bryant, Deputy Sheriff Harvey overheard a conversation between them. (*Id.* at 71, 79.) During this hearing, the following testimony was brought forth during the examination of Deputy Harvey:

Prosecutor: You said that there were two statements by the Defendant. One is "Yeah, I stabbed him." Then the other is "he deserved" it or something like that.

Harvey: He said did you stab that guy up there and he said, "Yes." He said, well, that guy up there is dead.

Prosecutor: That is what I'm saying. He who, Ray Bryant, he being Ray Bryant.

Harvey: Said, "Did you stab that guy?"

Prosecutor: And he said, "Yeah."

Harvey: Paul Newcomb said, "Yes."

Prosecutor: Did Ray Bryant say something else?

Harvey: No sir. Well, yes, he said, "that guy is dead up there."

Prosecutor: He said, "That guy is dead."

Harvey: Right.

Prosecutor: Ray Bryant said that?

Harvey: Yes, sir.

Prosecutor: Then the Defendant said?

Harvey: "That's what that mother f---er gets."

(*Id.* at 83-84.) Deputy Sheriff Harvey testified that he was not a part of this conversation but was still trying to secure the area. (*Id.* at 71.)

Appellant goes out of his way to point out that Ray Bryant was a part-time police officer to establish that the latter was "acting in his role" as such when this conversation occurred. However, the fact remains that Ray Bryant was performing his duties as an EMS worker when this took place. Deputy Sheriff Harvey testified that Mr. Bryant was examining and medically treating Appellant at the time. (*Id.*) Deputy Harvey stated that Ray Bryant was at the scene in his EMS capacity and not in his police capacity. (*Id.* at 82.) Appellant asserts that the question Mr. Bryant asked had nothing to do with medical treatment. More likely, that is true, and this case would have probably been made easier by the conversation not taking place. But the deputy sheriff also heard Ray Bryant ask Appellant if he was okay and if he was hurt. (*Id.*) *Innis, supra*, held that *Miranda* safeguards come into play and police are prohibited from engaging in words or actions that they should know would be reasonably likely to elicit an incriminating response without such warnings. Yet this holding requires police action which did not exist here. The simple fact that Appellant cannot overcome is that there was an EMS employee treating him rather than a policeman, despite the fact that Mr. Bryant engaged in police activity at other times. What is more, *Innis* held that this is to be based upon the perceptions of the suspect. There is no way that Appellant, while being medically treated

by an EMS worker, would perceive this to be words and actions by the police. In ruling in favor of the State, the circuit judge stated the following:

There is no evidence presented to the Court by which the Court could take judicial notice of Mr. Bryant's time that he may or may not have served as a police officer. The testimony before the Court is that Mr. Bryant was one of the EMS attendants that had been called to the scene when the emergency call came in and that after the Defendant was handcuffed by Deputy Harvey, he was taken to Mr. Bryant for an initial evaluation of whether he might need any medical treatment.

At that time, Mr. Bryant was evaluating him as an EMS attendant. Emergency Medical Service attendant, asked him if he had been the individual that had stabbed the other person involved, and Mr. Newcomb, the Defendant, voluntarily responded that he had. There is no evidence that Ray Bryant was engaged by the police to assist in there investigation or was prompted in trying to get information from the Defendant or was acting as an Agent of the police at that time.

The Defendant's response to that question posed by Mr. Bryant would be admissible in the State's case-in-chief. That was a statement directly overheard by Deputy Harvey to Ray Bryant.

The testimony further indicates that upon hearing that, that Ray Bryant informed the Defendant that the person who had been stabbed had in fact passed away and that was a statement not prompting a response. The response made by the Defendant was unsolicited and not as a result of any interrogation and given when Mr. Bryant wasn't acting as an Agent for the police so Mr. Newcomb's response would likewise be admissible.

(Supp. Hr'g, 124-25, March 8, 2007.)

Petitioner cites *State v. Phillips*, 205 W. Va. 673, 520 S.E.2d 670 (1999), which held the following:

A municipal police officer on off-duty status is not relieved of his obligation as an officer to preserve the public peace and to protect the public in general pursuant to West Virginia Code § 8-14-3 (1998). Indeed, such police officers are considered to be under a duty to act in their lawful and official capacity twenty-four hours a day.

Id. at Syl. Pt. 5. Yet that case upheld the authority of a security guard who was a police officer off duty to make a lawful arrest when the same was challenged. *Id.* at 681-83, 520 S.E.2d at 678-80.

This is different than requiring an EMS employee treating a person in custody to *Mirandize* him before asking questions or talking to the person, even if the person also is employed as a part-time police officer, when he or she is acting in the capacity as an EMS worker.

Appellant characterizes this statement overheard by Deputy Sheriff Harvey as hearsay. Yet this is actually an admission by a party opponent in which the West Virginia Rules of Evidence state is not hearsay. According to West Virginia Rule of Evidence 401(d)(2):

(d) Statements Which Are Not Hearsay. A statement is not hearsay if—

....

(2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Appellant's statements to Ray Bryant, an EMT attendant, overheard by Deputy Harvey clearly fall in this category as those which are not hearsay.

In light of all of this, there was no abuse of discretion on the part of the circuit court. Therefore, Appellant's claim fails on this ground.

3. **The Statements Made by Appellant to Deputy Sheriff Harvey Were Blurted Out Rather Than a Result of Police Interrogation. Therefore, Appellant's Miranda Rights Were Not Violated, and the Statements Were Properly Admitted.**

Appellant cites yet more unsolicited statements he made when Deputy Harvey had him handcuffed and was taking him to get a medical examination and possible treatment. It is true that the deputy sheriff had not *Mirandized* Appellant at this point, yet these statements were blurted out

and not a result of police interrogation. Specifically, Appellant refers to this testimony from Deputy Sheriff Harvey during the March 8, 2007, Suppression Hearing:

Prosecutor: Is that the only statements that were made verbally in your presence, what you just testified too [*sic*] or were there some others?

Harvey: He was rambling on, the statement, I don't know if it was when I had just took [*sic*] him to the car, when I was walking him up to the car to get him checked out. But he was going on "how would you feel if your wife spent all your money on drugs and this SOB was screwing your wife and giving her drugs."

(*Id.* at 75.) Appellant points out that the deputy sheriff was confused about when this statement was made. However, this was the same time period that Deputy Harvey said he had Appellant handcuffed and was taking him to his cruiser because the latter was combative, he initially did not comply and the officer did not have all of the facts. Again, the deputy sheriff stated that he did this for his own safety, he had not arrested Appellant and this was proper protocol. (Tr., 225, July 31, 2007.) So this statement was merely blurted out and was not due to police interrogation where *Miranda* safeguards are triggered. According to *Guthrie, supra*, this Court upheld the admissibility of statements made by a defendant being transported to police headquarters before he was given *Miranda* warnings which were not a result of a police custodial interrogation. *Guthrie*, 205 W. Va. at 341-43, 518 S.E.2d at 98-101.

In its ruling the statements admissible, the trial judge stated the following:

With regard to this statement made in the presence of Deputy Harvey, the Defendant was in custody but this was not as a result of any sort of interrogation. These were utterances made by the Defendant, not prompted by any questioning from the officer and they were voluntarily made, there is no evidence to indicate any intoxication or impairment of the Defendant. He was excited and upset, somewhat belligerent and non-complaint but *Miranda* applies to avoid an interrogation and so that series of statements which are referred too [*sic*] by Officer Harvey as rambling on by the Defendant would be admissible in the State's case-in-chief.

(Supp. Hr'g, 119-20, March 8, 2007.)

Just as in *Guthrie*, these statements made prior to *Miranda* warnings were unsolicited and not a result of a custodial interrogation by Deputy Sheriff Harvey. Thus, there was no abuse of discretion in its admission, and Appellant's argument fails.

C. THE CIRCUIT COURT DID NOT ERR IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF THE MURDER WEAPON. THE STATEMENTS MADE BY APPELLANT AND HEARD BY THE OFFICER IN QUESTION LEADING TO THE DISCOVERY OF THE MURDER WEAPON WERE NOT GIVEN AS ANSWERS TO A POLICE CUSTODIAL INTERROGATION. THEREFORE, THERE WAS NO VIOLATION OF *MIRANDA v. ARIZONA*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Appellant contends that the admission of the murder weapon by the State was error on the part of the circuit court because it was discovered as a result of questioning in violation of his *Miranda* rights. While it is accurate that information was given by Appellant with respect to the knife before he was given a *Miranda* warning, he gave this information without there being any custodial interrogation by the police. In light of this, the admission did not violate his *Miranda* rights. At worst and contrary to Appellant's argument, the knife could easily have been discovered through a proper use of the inevitable discovery doctrine. However, that is really not necessary due to Appellant's giving of information apart from a police interrogation.

1. **The Standard of Review.**

Concerning our standard of review of the circuit court's exclusion of the evidence at issue, we note that "[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion."

State v. Guthrie, 205 W. Va. at 332, 518 S.E.2d at 89, quoting *State v. Louk*, 171 W. Va. at 643, 301 S.E.2d at 599, citing Syl. Pt. 2, *State v. Peyatt*, *supra*.

The special safeguards outlined in *Miranda* are not required where a suspect is simply taken into custody, but rather only where a suspect in custody is subjected to interrogation. To the extent that language in *State v. Preece*, 181 W.Va. 633, 383 S.E.2d 815 (1989), and its progeny, may be read to hold differently, such language is expressly overruled.

Guthrie, Syl. Pt. 8.

To prevail under the inevitable discovery exception to the exclusionary rule, Article III, Section 6 of the West Virginia Constitution requires the State to prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct; (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct; and (3) that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct.

Syl. Pt. 4, *State v. Flippo*, 212 W. Va. 560, 575 S.E.2d 170 (2002).

2. **The Evidence of the Murder Weapon Was Properly Admitted, and There Was No Abuse of Discretion on the Part of the Circuit Court. The Statement Given by Appellant Which Led to the Discovery of the Knife Was Not a Result of an Interrogation, and There Was Not a Violation of the Fruit of the Poisonous Tree Doctrine.**

It is true that Deputy Sheriff Harvey obtained information from Appellant before the latter was *Mirandized* which contributed to discovering the murder weapon. Yet the information was not a result of a police custodial interrogation, but rather a statement made by Appellant without prompting by Deputy Sheriff Harvey.

As mentioned above, at the Suppression Hearing Deputy Sheriff Harvey testified he did not interrogate Appellant at this time before the latter was read his *Miranda* rights but was attempting to secure the area. (Supp. Hr'g, 71, March 8, 2007.) At the March 27, 2007 Suppression Hearing, Deputy Harvey testified that while he was taking Appellant to his cruiser, Appellant said that he

threw a knife over the road. (Supp. Hr'g, 42, March 27, 2007.) The deputy stated that he did not question Appellant regarding this, but rather the latter just "blurted it out". (*Id.*)

At approximately 6:22 a.m., Appellant was transferred to Deputy Sheriff Sutherland's cruiser and read his *Miranda* rights. Appellant then gave a statement. (Tr., 155-69, July 31, 2007.) In this statement, Appellant admitted to bringing the knife to Dennis Toler's house, stabbing Mr. Toler, and throwing the knife across the road in a field. (*Id.* at 167-69.) Eventually, Trooper Sparks and Deputy Sheriff Robinette located the murder weapon. (*Id.* at 176, 207 and 249.) Deputy Robinette was the first to spot the knife near a riverbank. (Supp. Hr'g, 20, 26, March 27, 2007.)

Assuming that the knife was found as a result of what Deputy Sheriff Harvey heard Appellant say to him, this was not a violation of the latter's *Miranda* rights. It is obvious that the deputy sheriff heard what Appellant said, yet the statement was not a result of an interrogation. The standard established in *Guthrie, supra*, is that *Miranda* safeguards apply where a suspect is in custody and an interrogation occurs. No police interrogation occurred until Deputy Sheriff Sutherland took custody of Appellant, read him his *Miranda* rights and took a statement from him. Even the authority Appellant cites holds that there must be a custodial interrogation for *Miranda* safeguards to be triggered:

"Volunteered admissions by a defendant are not inadmissible because the procedural safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were not followed, *unless the defendant was both in custody and being interrogated at the time the admission was uttered.*" Syl. Pt. 2, *State v. Rowe*, 163 W. Va. 593, 259 S.E.2d 26 (1979).

Syl. Pt. 1, *State v. Hopkins*, 192 W. Va. 483, 453 S.E.2d 317 (1994) (emphasis added). No such interrogation took place while Appellant was in custody. The officer merely heard something blurted out by Appellant while taking the latter to his cruiser. Again, in *Guthrie, supra*, this Court held that

the defendant's *Miranda* safeguards did not apply where he made incriminating admissions while being transported by police officers where the latter did not engage in a custodial interrogation nor in any subtle or overt tactics to obtain information from him. *Id.*, 205 W. Va. at 341-43, 518 S.E.2d at 98-100. In light of this, Appellant's *Miranda* rights were not violated, the discovery of the murder weapon did not go against the fruit of the poisonous tree doctrine and his argument fails.

3. **Following Appellant's Argument of Fruit of the Poisonous Tree, It Can Be Properly Established That the Murder Weapon Was Discovered Through a Legal Use of the Inevitable Discovery Rule.**

As outlined above, the State has shown that the murder weapon was not discovered as a result of a *Miranda* violation and the fruit of the poisonous tree since the officer in question heard Appellant's statement blurted out to him rather than a police custodial interrogation taking place. Yet assuming, *arguendo*, that Deputy Sheriff Harvey obtained this information improperly, it may be shown that the knife would be discovered anyway through an inevitable discovery.

Again, the State in no way concedes that Appellant's *Miranda* rights were violated, yet even if this Court were to accept that argument, all three factors in *Flippo, supra*, are satisfied. Appellant is correct that the State argued during the March 27, 2007, Suppression Hearing that if it was found that the statement by Appellant were obtained improperly, the inevitable discovery doctrine would apply. (Supp. Hr'g, 73, March 27, 2007.) As Deputy Sutherland testified, apart from this statement, the police officers would have canvassed the area and even used metal detectors from where Deputy Harvey apprehended Appellant and eventually found the knife. (*Id.* at 62-63.) Trooper Sparks described where the knife was found as a field area, and the weapon was standing straight up in the air with the blade in the mud. (*Id.* at 11, 15.) Deputy Sheriff Robinette stated that the knife was not hidden in any way when he saw it. (*Id.* at 24.) So the knife would have been found easily in daylight

in the general area of where Appellant was found apart from any statement made, and the probability of inevitable discovery was great. Similarly, the leads were in the possession of the police at the time of any alleged misconduct in the form of the direct location of where Appellant was apprehended. This also gives rise to the third factor in *Flippo, supra*, that the officers' searching of the general area around where the Appellant was found by Deputy Harvey where the knife was in plain view would have been the alternative line of investigation apart from any statement. This was the argument of the State during the hearing, and the circuit court ruled in its favor. (*Id.* at 75-79, 87.)

It is worth noting that the circuit court ruled that any statement heard by Deputy Harvey while Appellant was in custody and yet to be *Mirandized* was to be suppressed in the State's case-in-chief. (*Id.* at 86.) Additionally, Deputy Sheriff Robinette testified that Trooper Sparks took Appellant down to the riverbank after Appellant blurted out the statement to Deputy Sheriff Harvey, and Appellant pointed out the general direction of where the knife was located. (*Id.* at 24.) Trooper Sparks also testified to Appellant pointing out this area. (*Id.* at 13.) The circuit judge ruled that this testimony was to be suppressed as well. (*Id.* at 87.) However, the court did rule that the murder weapon could be introduced into evidence due to the inevitable discovery doctrine. (*Id.*) Regarding this ruling, the court stated the following:

Any reference that the Defendant indicated to Trooper Sparks the general location of the knife, there was testimony from Deputy Robinette that Trooper Sparks brought the Defendant back down to the location where they were searching, and the Defendant pointed out where the knife generally was, so any reference by Deputy Robinette, Trooper Sparks denied that, but any reference that it was the Defendant that pointed that out would be suppressed in the State's case-in-chief.

However, I believe that when the search was started, it was dark. They had the general location of where the Defendant had been. There was information that

he did not have a vehicle on the scene, and I believe the inevitable discovery rule test is met, so the State can use the knife in its case-in-chief.

(*Id.*)

It is again worth pointing out that this Court held in *Guthrie, supra*, that questions regarding the admissibility of evidence are within the sound discretion of the trial court, and are to be disturbed only when there is an abuse of discretion. There was no abuse here. This is mainly because the murder weapon was in plain view and located in very close proximity to where Appellant was apprehended, so any later police search would have found it. Regarding inevitable discovery, the United States Supreme Court held, "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means [. . .] then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." *Nicks v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509 (1984). If one were to accept Appellant's argument that his statement regarding the knife was unlawful and discovery was the fruit of the poisonous tree, there is absolutely no question that the police would have found it anyway and inevitable discovery would apply. Despite the circuit court ruling that the statement was to be suppressed, the State has established in the previous argument that based on *Guthrie, supra*, and *Hopkins, supra*, the statement should have been ruled admissible due to it resulting from Appellant blurting it out rather than a custodial interrogation by the police. But regardless of the fact that the State does not concede a *Miranda* violation and the discovery being fruit of the poisonous tree, inevitable discovery would apply. Therefore, Appellant's argument fails.

D. THERE WAS NO VIOLATION OF THE PROMPT PRESENTMENT RULE BECAUSE THE REASONING GIVEN AND FACTORS THAT CAME INTO PLAY IN ANY DELAY IN BRINGING APPELLANT BEFORE A MAGISTRATE WERE NOT FOR THE PRIMARY PURPOSE OF OBTAINING A CONFESSION FROM HIM.

Appellant contends that the prompt presentment rule was violated when there was some delay in bringing him before a magistrate. While it is true that there was some delay in presenting him, there was no violation of this rule. Among other factors, the police officers involved were very busy processing and securing the scene, and the hour of arrest was not conducive to immediately bringing Appellant before a magistrate. The delay was not for the primary purpose of obtaining a confession from him. There is precedent where this Court upheld the introduction of evidence in question where much longer delays occurred, and legitimate factors came into play.

1. The Standard of Review.

Concerning our standard of review of the circuit court's exclusion of the evidence at issue, we note that "[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion."

State v. Guthrie, 205 W. Va. at 332, 518 S.E.2d at 89, quoting *State v. Louk*, 171 W. Va. at 643, 301 S.E.2d at 599, citing Syl. Pt. 2, *State v. Peyatt*, *supra*.

““The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.” Syl. Pt. 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), as amended.’ Syl. Pt. 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).” Syl. Pt. 8, *State v. Milburn*, 204 W.Va. 203, 511 S.E.2d 828 (1998).

Syl. Pt. 6, *State v. Johnson* 219 W. Va. 697, 639 S.E.2d 789 (2006).

2. **The Primary Purpose in Any Delay in Presenting Appellant to a Magistrate Was Not to Obtain a Confession from Him. Thus, the Prompt Presentment Rule Was Not Violated and the Statement Was Properly Admitted in the Circuit Court.**

There was some delay with respect to the time Appellant was apprehended and when he was arrested. Additionally, some time elapsed between his arrest and when he gave a statement after being *Mirandized* and when he was taken before a magistrate. However there was no violation of the prompt presentment rule, and his statement was properly admitted into evidence.

According to West Virginia Code § 62-1-5(a)(1),

An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.

Despite the fact that this Court held in *Johnson, supra*, that a delay in the police taking a defendant to a magistrate as required by West Virginia Code § 62-1-5(a)(1) may be considered as a factor in a confession being involuntary, and in turn, inadmissible where the primary factor in such a delay is to obtain the statement, the following was held in Syl Pt. 2, *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1989):

“‘Ordinarily the delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule.’ Syl. Pt. 4, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).” Syl. Pt. 8, *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706, cert. denied, 488 U.S. 895, 109 S.Ct. 236, 102 L.Ed.2d 226 (1988).

As previously stated, Deputy Sutherland was the primary investigator in this case. (Supp. Hr’g, 73, March 8, 2007.) Deputy Sutherland arrived at the scene at 4:44 a.m. and immediately started processing the scene. (*Id.* at 86, 98.) Upon arrival, Deputy Sheriff Sutherland got his crime scene kit out of his cruiser and went to the victim’s residence. When the deputy sheriff came back

out of the house to arrest Appellant and take a statement from him, he stated it was approximately 6:23 a.m. (*Id.* at 111.) He testified that from the time he arrived and processed the scene until he arrested and took a statement from Appellant, the latter was sitting in Deputy Harvey's cruiser for about an hour to an hour and a half. (*Id.* at 106.)

Before Appellant was transferred from Deputy Harvey's vehicle to Deputy Sutherland's cruiser, he asked Deputy Sutherland for a cigarette. The deputy sheriff gave Appellant a cigarette, and the latter smoked it before being arrested and *Mirandized*. (*Id.* at 92.) During this transportation from one cruiser to the other and while Appellant was smoking, the deputy sheriff testified that no questions were asked and no statements were taken. (*Id.*) At this point Deputy Sutherland transported Appellant to his car, arrested Appellant and *Mirandized* him. (*Id.* at 100.) After reading Appellant his *Miranda* rights, the deputy sheriff read Appellant a waiver form in order to take a statement from him. He also let Appellant read it. The deputy sheriff told Appellant that he did not have to answer any questions and did not have to tell him anything. (*Id.* at 97, 100.) When Deputy Sutherland read the *Miranda* form to Appellant, the latter stated that he did not need a lawyer because whatever he told the police officer would be the same as what he would tell his lawyer. (*Id.* at 107.) Despite what Deputy Sutherland said regarding what time this procedure began, the *Miranda* form was signed by Appellant with the time of 6:21 a.m. documented. (*Id.* at 97.) The statement documented that it concluded at 6:42 a.m. (*Id.* at 101.)

Appellant goes out of his way to note that Deputy Sheriff Sutherland questioned Appellant upon arrival at the scene where he noticed that the latter was mad. When the deputy sheriff was cross-examined and asked repeatedly if he had questioned Appellant upon arrival about what had happened, he stated that he might have but did not recall doing so. (*Id.* at 110.) However, on four

occasions during his testimony at the March 8, 2007, Suppression Hearing, Deputy Sutherland stated that upon arrival the only question he asked Appellant while the latter was in Deputy Harvey's vehicle was if he was all right because he saw blood on him rather than what had happened. (*Id.* at 87, 108-10.) This was the same time period where Deputy Sutherland testified that it appeared Appellant was mad. (*Id.* at 109.) It is clear that this does not constitute a violation of Appellant's *Miranda* rights, and there was no custodial interrogation on the part of Deputy Sutherland.

As stated above, *Johnson, supra*, held that a delay in presenting a defendant to a magistrate may be a factor in the totality of the circumstances in ruling evidence inadmissible where the primary purpose is to obtain a confession. Deputy Sutherland testified twice at the March 8, 2007, Suppression Hearing that Appellant was not kept at the scene rather than being brought before a court for the purpose of getting a confession from him. (Supp. Hr'g, 103-04, March 8, 2007.) At this hearing, the circuit court made the following ruling:

There was no prompt presentment issue. The Defendant's argument is illogical. To follow it would mean that either one, when as soon as Deputy Sutherland placed the Defendant under arrest he would have to make an election either to leave the crime scene at that point and time and take the Defendant immediately to the courthouse and at 6:30 in the morning there would not have been a magistrate in anyway. They don't come in until 8:30; or, to jail, and give up the opportunity to further process the crime scene.

Or, if he stayed at the crime scene to give up any right to interview the Defendant to try and further ascertain what had happened. So neither of those scenario's [*sic*] make sense and I believe Deputy Sutherland acted properly in making the decision to leave the Defendant in the cruiser, process the crime scene and then it certainly is well within his purview as an officer to try and take a statement after giving the Defendant his rights and giving him an opportunity to exercise those rights which the Defendant chose not to do.

So the motion to suppress will be overruled with the exception of anything that the Defendant might have said when Deputy Sutherland first approached him, has not been—Deputy Sutherland would not remember it so the State would be precluded from bringing that up later on if Deputy Sutherland's memory is refreshed.

(*Id.* at 119-20.) So the court recognized that the delay in having Appellant wait in the cruiser was for legitimate law enforcement purposes rather than for obtaining a confession, and bringing him before a magistrate at that early hour would have been impossible. In numerous cases, this Court has upheld admission of evidence when attacked on the basis of prompt presentment where the delay in bringing a defendant before a magistrate was found not to be for purposes of obtaining a confession. In *Johnson, supra*, this Court held there was no violation of West Virginia Code § 62-1-5(a) where the defendant was arrested and brought before a magistrate approximately two hours and forty minutes later where the police were questioning his accomplice and no evidence was shown that the purpose was to obtain a statement from him. 219 W. Va. at 703, 639 S.E.2d at 795. In *State v. Plantz*, 155 W. Va. 24, 180 S.E.2d 614 (1971), this Court found no violation of West Virginia Code § 62-1-5(a) where the defendant was detained from approximately 8:30 p.m. until 9:30 a.m., a period of about thirteen hours, where a justice in the county was not available during the intervening time. 155 W. Va. at 44, 180 S.E.2d at 626. It is worth reiterating that Appellant made a voluntary statement after he was given *Miranda* warnings because this Court has also held that a delay in presenting a defendant to a magistrate after he has confessed does not violate our prompt presentment statute because its purpose is to avoid prolonged interrogation in order to coerce a confession. *State v. Whitt*, 184 W. Va. 340, 345, 400 S.E.2d 584, 589 (1990), citing *State v. Hutcheson*, 177 W. Va. 391, 352 S.E.2d 143 (1986); *State v. Humphrey*, 177 W. Va. 264, 351 S.E.2d 613 (1986).

Appellant takes issue with the delay in light of Deputy Harvey being on the scene, as well as the fact that it was brought out in the subsequent suppression hearing that other officers were present. Yet, it was established through Deputy Sutherland's testimony in the March 8, 2007, hearing that Deputy Harvey was a rookie officer and not as qualified to secure the area. (Supp. Hr'g, 91, March 8, 2007.) Additionally, when Appellant brought up the issue of other police officers on the scene at the March 27, 2007, Suppression Hearing, the circuit judge made the following ruling:

The additional testimony that there were other officers on the scene is not enough, from what I've heard today, to change the court's previous ruling. I still don't find that the only reason that he was kept at the scene or the primary reason that he was kept at the scene was to obtain a statement. They had two victims. They had to process the crime scene, remove the body, try to locate the knife, interview of certain witnesses, take care of the Defendant's wife who was also a victim and make sure that she was transported to the hospital to treat her injuries, and so there was a number of other things going on there at the scene that were well within the reasonable purview of what the officers were supposed to do, and it was only after all of those other things were taken care of that an interview was made of the Defendant.

(Supp. Hr'g, 87-88, March 27, 2007.)

In light of all of this, it was clearly established that the delay that occurred in bringing Appellant before a magistrate was not for the primary purpose of obtaining a confession from him. There was no abuse of discretion on the part of the circuit court in admitting this evidence. Therefore, Appellant's argument fails on this ground.

E. THE ADMISSION OF A PRIOR STABBING INCIDENT BY APPELLANT AGAINST THE VICTIM IN WILLIAMSON WAS A PROPER 404(B) ADMISSION OF PAST BAD ACTS TO SHOW MOTIVE, INTENT AND LACK OF MISTAKE OR ACCIDENT. THERE WAS NO VIOLATION OF WEST VIRGINIA RULE OF EVIDENCE 403 IN ITS ADMISSION.

Appellant contends that the admission of a prior stabbing incident by him against Mr. Toler outside of a methadone clinic in Williamson was a violation of West Virginia Rule of Evidence 403

in that it misled the jury by creating a “trial within a trial” where he had to establish self-defense twice. However, this admission was proper under Rule 404(b) to show motive, intent and lack of mistake and accident on his part. There was no abuse of discretion on the part of the circuit court. It was properly admitted, and the trial judge gave a limiting instruction to the jury.

1. **The Standard of Review.**

Standard of review for trial court’s admission of prior bad acts evidence involves three-step analysis; first, Supreme Court of Appeals reviews for clear error the trial court’s factual determination that there is sufficient evidence to show the other acts occurred; second, Court reviews de novo whether trial court correctly found that evidence was admissible for a legitimate purpose; and third, Court reviews for an abuse of discretion the trial court’s conclusion that the other acts evidence is more probative than prejudicial.

State v. Mongold, 220 W. Va. 259, 254, 647 S.E.2d 539, 544 (2007), citing *State v. LaRock*, 196 W. Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996).

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va.R.Evid. 404(b).” Syl. Pt. 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. Pt. 1, *State v. McIntosh*, 207 W. Va. 561, 534 S.E.2d 757 (2000).

2. **The Evidence Admitted Regarding the Prior Stabbing Incident Was a Proper One Under Rule 404(b) With Specificity as to Its Purpose. There Was No Violation of Rule 403.**

Appellant asserts that the introduction of evidence of an alleged prior stabbing of the victim by Appellant outside of a methadone clinic in Williamson on September 30, 2005, constituted a violation of West Virginia Rule of Evidence 403 in that it confused the jury and made Appellant assert self-defense twice and defend himself in a “case within a case.” However, this admission was a proper one under West Virginia Rule of Evidence 404(b).

West Virginia Rule of Evidence 403 states the following:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Additionally, West Virginia Rule of Evidence 404(b) states the following:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Testimony regarding an alleged prior stabbing incident by Appellant against Mr. Toler took place primarily during the examinations of Johnna Newcomb and Appellant as well as the two police officers who responded to the dispatch, Deputy Sheriff E.L. Sherrill and Patrolman Grady Dotson. Despite Appellant's assertion that the introduction of this prior incident violated Rule 403 by confusing the jurors, this was really a valid use of the Rule 404(b) exception to the prohibition of introducing other crimes, wrongs or acts.

This Court held in *McIntosh, supra*, the following:

“When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.”

Syl. Pt. 3, *McIntosh*, citing Syl. Pt. 1, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

During the March 27, 2007, Suppression Hearing, the prosecutor gave specific, detailed purposes for the introduction of this evidence, rather than merely mentioning a litany of possible Rule 404(b) uses, as is the mandate of *McIntosh*. During this hearing, the State argued the following regarding the introduction of this evidence:

I know that the Court is well familiar with the rule and law surrounding that [Rule 404(b)]. The State must show that it bears to motive and intent, lack of intent, things of that nature. Clearly here we have in a period of from September 2005, until April of 2006, roughly five (5) months. Five and a half months later, this same Defendant, attacked this same Victim in a manner nearly identical to the manner in which we allege he killed Paul Toler and that is repeated stabbing.

Simply stating, again, you have same Defendant, same Victim, same incident occurring within five (5) months of this trial or I'm sorry, this incident. We believe that would go directly to motive, showing that he had some jealousy or some previous incident or occurrence with his wife that caused him to attack Mr. Toler on that occasion. It is the same that led him to attack Mr. Toler that night here in Logan County six months later.

It would go to lack of mistake. It would go to the identity of the Defendant and as far as motive goes, I believe that there is obvious motive and the State will present evidence, be able to present evidence, that this Defendant was aware that he was possibly going to be in trouble or be indicted for that charge in Mingo County and that this may have been an attempt to— I think the State would be allowed to argue that this may have been an attempt to silence the witness against him over there as this case may further develop at trial, based on how these witnesses testify. Johnna Newcomb at the time has given inconsistent testimony but it may well be that there was some plan or something on the part of both of them to do this to Mr. Toler. She gave the statement to the police and I know that the Court does not have that in front of it but again, recanted that statement at the preliminary hearing in this case.

Again, clearly, the same Victim. Same Defendant, same act five months earlier and I think it fits nearly every category of the Rule 404(b) exceptions and we'd ask the Court allow the State to use that in its case-in-chief with the limiting instruction the Court would give as it deems proper.

(Supp. Hr'g, 45-46, March 27, 2007.) Based on this, the circuit court ruled that the evidence was admissible under Rule 404(b). (*Id.* at 50-52.)

The State laid out detailed, specific purposes for this 404(b) evidence in accordance with *McIntosh, supra*, establishing thorough explanations and rationales for motive, intent, plan, identity and lack of mistake or accident. *McIntosh* also held that the judge must give a limiting instruction to the jury as to the purpose of the introduction of such Rule 404(b) evidence. The circuit court gave such a limiting instruction before the evidence was introduced and during the charge to the jury at the conclusion of the trial. (Tr., 98, July 31, 2007; Tr., 27, Aug. 3, 2007.) Appellant asserts that this evidence violated Rule 403, yet the circuit court determined that this evidence was relevant for purposes of motive, intent, preparation of plan and lack of mistake or accident; and that its probative value outweighed the prejudicial effect. (Supp. Hr'g, 51-52, March 27, 2007.) Appellant contends that this evidence of an alleged prior bad act violates Rule 403 because it tends to confuse the jury and forces Appellant to assert two arguments of self-defense. Yet, this is the nature of the introduction of Rule 404(b) evidence in many cases. Appellant gives no examples of where testimony of the alleged September 30, 2005, stabbing and the offense for which he was charged were interwoven in the State's case-in-chief nor does he show any instance where the jurors came back with questions indicating any confusion.

Using the standard of review established in *Mongold, supra*, there was a clear factual basis for this evidence, it was established that it was given for a legitimate purpose and there was no abuse of discretion with respect to its probative value outweighing any prejudice. Thus, Appellant's argument fails on this ground.

V.

CONCLUSION

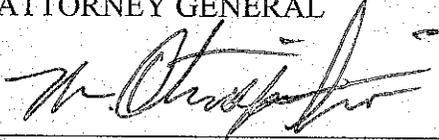
For the foregoing reasons, the judgment of the Circuit Court of Logan County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel,

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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 22nd day of September, 2008, addressed as follows:

Dwayne J. Adkins, Esq.
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A handwritten signature in black ink, appearing to read "R. Christopher Smith", written over a horizontal line.

R. CHRISTOPHER SMITH