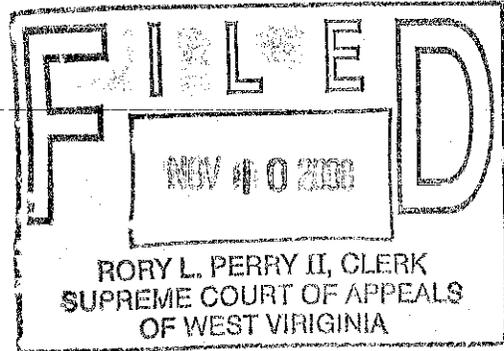


IN THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

NO. 34268



STATE OF WEST VIRGINIA,  
Appellee,

v.

UNDERLYING PROCEEDING  
CASE NO. 05-F-044  
CABELL COUNTY CIRCUIT COURT  
(Alfred E. Ferguson, Judge)

TANYA D. HARDEN,  
Appellant.

**BRIEF ON BEHALF OF APPELLANT**  
**TANYA D. HARDEN**

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TANYA D. HARDEN,  
Appellant.

BRIEF ON BEHALF OF APPELLANT

INTRODUCTION

On the night of September 4, 2004, Danuel Harden Jr. attacked his wife Tanya, and over the course of several hours beat her so badly with his fists and a loaded 12-gauge shotgun that she suffered a broken nose, blackened eyes, and other cuts and bruises, including a puncture wound of her forearm. During the lengthy attack, Danuel Harden repeatedly threatened to kill Tanya, her children and a child visiting the home that night, assuring her that "nobody was going to walk out of the house that night."

Dissatisfied with simply badly beating his wife, Danuel Harden sexually assaulted her and then reclined on a sofa, while continuing to threaten to kill Tanya and the children in the home. He advised his wife that he would kill her, the children, and

then himself. Faced with her own death and the imminent murder of three children, Tanya reacted by seizing the shotgun and firing a single shot into her husband's head. Tanya Harden now stands convicted of the premeditated, deliberate and malicious murder of Danuel Harden.

I.

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

On September 5, 2004 Tanya Harden was charged in the Magistrate Court of Cabell County with second-degree murder in connection with the shooting death of her husband. On September 15, 2004 she waived her preliminary hearing and was released on a \$30,000 bond.

Ms. Harden was indicted for first-degree murder on January 7, 2005. Various pretrial proceedings occurred over the next two years, during which time she remained free on bond. The jury trial began on May 8, 2007, and after several days of testimony the jury began its deliberations on May 14, 2007.

On May 16, 2007 the jury returned its verdict, finding Ms. Harden guilty of murder of the first degree. After consulting with the decedent's immediate family, the State agreed to a recommendation of mercy. The trial court immediately sentenced Ms. Harden to a term of life imprisonment with a recommendation of mercy.

Trial counsel filed a Motion for New Trial on May 25, 2007. On June 18, 2007 the trial court held a hearing and denied the motion, and trial counsel filed a Notice of Intent to Appeal on July 13, 2007. On July 24, 2007 the trial court appointed the

Appellate Advocacy Division of West Virginia Public Defender Services to represent Ms. Harden in her appeal.

Trial counsel had filed a written request for the trial transcripts when Ms. Harden was sentenced on May 16, 2007. On August 15, 2007 the trial court granted appellate counsel's Motion for Extension of Time to File Appeal.

Appellate counsel subsequently requested that Ms. Harden be re-sentenced to permit additional time to perfect this appeal. The circuit court re-sentenced Ms. Harden on November 6, 2007. The petition for appeal was filed on March 4, 2008 and on September 3, 2008 the Honorable Court voted unanimously to accept Ms. Harden's appeal petition for full appellate review.

## II.

### STATEMENT OF FACTS

In the late evening hours of September 5, 2004, at their home in a remote rural area of Cabell County, Danuel Harden became violently drunk and subjected his wife, Tanya Harden, to several hours of what can only be described as domestic terror. In the presence of their children, he brutally beat her with his fists and with the butt and barrel of a 12-gauge shotgun. During this beating, Tanya suffered a broken nose, had both eyes blackened, a puncture wound of her right forearm, and bruises and cuts on her arms and chest (Tr. Transcript, 862). While beating her, he repeatedly assured Tanya that he would kill her and the children in the home. Later in the night, Mr. Harden held a loaded shotgun to his sleeping son's head and threatened to kill him as

well. Mr. Harden assured Tanya that "nobody was going to walk out of the house that night". (Tr. Transcript, Pg. 887-88).

After sexually assaulting his wife, (Tr. Transcript, Pg. 884), Mr. Harden reclined on a couch in the couple's living room. Mr. Harden continued to threaten to kill Tanya Harden and the children in the home. Fearing for her life and the lives of her children, Tanya grabbed the same shotgun and discharged a single shot into Mr. Harden's head.

Tanya Harden took the children from the house and went to the nearest home, which happened to belong to Mr. Harden's parents. Fearful of their reaction to the news that she had shot their son, she advised them that Danuel Harden had shot himself. (Tr. Transcript, Pg. 887).

After the authorities arrived, Tanya Harden repeated this statement to one of the first officers who arrived on the scene. Shortly thereafter, she told the lead detective the accurate account of the shooting.

Although initially charged with second-degree murder, Tanya Harden was indicted for first-degree murder. During voir dire, Ms. Harden's trial counsel requested that the court dismiss for cause prospective juror George Scott, on the basis of Mr. Scott's statement that only the day before, he had visited the Cabell County Prosecuting Attorney's Office and discussed the unsolved murder of his own son with Cabell County Prosecuting Attorney Christopher Chiles. He also indicated that he hoped to have another conversation with Mr. Chiles on the same day of jury selection in Ms. Harden's trial. The trial court denied the defendant's motion to strike Mr. Scott for cause and the Defendant exercised her first peremptory challenge to remove Mr. Scott.

During the state's case-in-chief, the trial court permitted the decedent's father, Danuel Harden, Sr., to testify that the position in which his son's body was found was his son's usual sleeping position. This testimony was the only evidence to support the state's claim that the decedent was shot while asleep on the sofa. The Defendant objected to this testimony as pure speculation, noting that the decedent had not resided with and slept in the same home as his father for eleven years. (Tr. Transcript, Pg. 280-283).

During the testimony of Sgt. Mike McCallister, the State submitted a number of gruesome photographs of the decedent's body. The trial court admitted a number of these photographs into evidence, including several close-range color photographs of Mr. Harden's graphic facial wound. These highly gruesome photographs were irrelevant to the case, because it was never disputed that Ms. Harden had shot her husband while he was on the sofa.

The State presented similar gruesome photographic evidence of Mr. Harden's gunshot wound throughout the remainder of its case-in-chief. During the testimony of deputy medical examiner Dr. Hamada Mahmoud, the witness displayed a vivid close-up color photograph of the gunshot wound to the jury (State's Exhibit #50), despite the fact that the photograph had not been entered into evidence and ignoring an earlier caution from the trial court not to display the picture prior to admission. (Tr. Transcript, Pg. 564).

The most gratuitous and disturbing use of gruesome photographs in the trial occurred during the testimony of the State's crime scene expert Sgt. David Castle <sup>1</sup>. At the State's request, the trial court permitted the witness to utilize a "PowerPoint" multimedia presentation of the scene of the shooting. This presentation exacerbated the admission of the previous irrelevant gruesome photographs, in that both the previous photographs and a number of additional photographs of Mr. Harden's gruesome injury were projected and displayed to the jury in vivid color on a large projection screen.

Counsel for the Appellant later questioned the crime scene examiners as to several items of evidence which were not preserved for examination, including the couch, blankets and sheets surrounding the decedent's body. At the close of evidence, counsel requested a standard "missing evidence" instruction. The trial court gave the submitted instruction (titled "Defendant's Jury Instruction No. 2") but deleted the crucial final paragraph, removing the language that missing or destroyed evidence could permit the jury to infer that the missing evidence was against the State's interest.

During the State's closing argument, the prosecuting attorney made two statements deemed objectionable by trial counsel. In response to defense counsel's objections, the trial court directed counsel to refrain from objecting further, on the basis that objections were impermissible during closing argument. (Tr. Transcript, Pg. 1011-1012).

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<sup>1</sup> As a side note, Sgt. Castle's mother had recently retired as the trial judge's long-time personal secretary. (Tr. Transcript, Pp. 669).

III.

ASSIGNMENTS OF ERROR

- A. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING AND PERMITTING THE DISPLAY OF NUMEROUS IRRELEVANT AND GRUESOME PHOTOGRAPHS OF THE DECEDENT.
- 
- B. THE TRIAL COURT ERRONEOUSLY FAILED TO EXCUSE FOR CAUSE A PROSPECTIVE JUROR WHO WAS CONSULTING WITH THE PROSECUTING ATTORNEYS OFFICE REGARDING THE UNSOLVED MURDER OF THE JUROR'S SON.
- C. THE STATE FAILED TO REBUT THE APPELLANT'S CLAIM OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.
- D. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING SPECULATIVE HABIT EVIDENCE AS TO THE DECEDENT'S SLEEPING POSITION.
- E. THE TRIAL COURT GAVE AN IMPROPER JURY INSTRUCTION UNDER STATE V. OSAKALUMI AS TO LOST OR DESTROYED EVIDENCE.
- F. THE TRIAL COURT IMPROPERLY ORDERED COUNSEL FOR THE APPELLANT TO REFRAIN FROM OBJECTING DURING THE STATE'S CLOSING ARGUMENT.

#### IV.

#### POINTS AND AUTHORITIES

- A. The admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence. Syllabus Point 8, *State v. Derr*, 192 W. Va. 165, 451 S.E. 2d 731 (1994).
- B. Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether *logically* relevant is necessarily *legally* relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence. Syllabus Point 9, *State v. Derr*, 192 W. Va. 165, 451 S.E. 2d 731 (1994).
- C. Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative of a fact of consequence in the case. The trial court must then consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse. Syllabus Point 10, *State v. Derr*, 192 W. Va. 165, 451 S.E. 2d 731 (1994).

D. 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. Syllabus Point 4, State v. Miller, 197 W. Va. 588, 476 S.E. 2d 535 (1996).

E. When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror. State v. Schermerhorn, 211 W. Va. 376, 566 S.E. 2d 263 (2002), citing Syl. Pt. 3, O'Dell v. Miller, et al., 211 W. Va. 285, 565 S.E. 2d 407 (2002).

F. The language of W.Va. Code, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error. Syllabus Point 8, State v. Phillips, 194 W. Va. 569, 461 S.E. 2d 75 (1995).

F. Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense. Syllabus Point 8, State v.

*Whittaker*, 221 W. Va. 117, 650 S.E. 2d 216 (2007), citing Syllabus Point 4, *State v. Kirtley*, 162 W. Va. 249, 252 S.E. 2d 374 (1978).

G. Before evidence of a person's particular habit is admitted pursuant to Rule 406, the trial court must subject the evidence to the balancing test of Rule 403 to determine whether the probative value of the evidence outweighs its' prejudicial effect. Syllabus Point 16, *Rodgers v. Rodgers*, 184 W. Va. 82, 399 S.E. 2d 664 (1990).

H. An instruction offered by the defense should be given if the proposed instruction: (1) is substantively correct, (2) is not covered substantially in the charge actually delivered to the jury, and (3) involves an important issue in the trial so the trial court's failure to give the instruction seriously impairs the defendant's ability to effectively present a defense. *State v. Derr*, 192 W.Va. 165, 180, 451 S.E.2d 731, 746 (1994); *State v. Hinkle*, 200 W. Va. 280, 489 S.E. 2d 257 (1996).

I. Counsel shall not be interrupted in argument by opposing counsel, except as may be necessary to bring to the court's attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection. Trial Court Rule, Rule 42.04(b) (1999).

## V.

### ARGUMENT

#### A. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING AND PERMITTING THE DISPLAY OF NUMEROUS IRRELEVANT AND GRUESOME PHOTOGRAPHS OF THE DECEDENT.

The Court established the legal standard to be employed in evaluating the usage and admission of gruesome photographs in *State v. Derr*, 192 W. Va. 165, 451 S.E. 2d 731

(1994). In separate syllabus points in Derr, the Court held (1) that the admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence; (2) that while Rules 401 and 402 encourage the admission of as much evidence as possible, Rule 403 requires a balancing of interests to determine whether *logically* relevant evidence is necessarily *legally* relevant evidence, and further provides that relevant evidence may be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence; and (3) that the trial court must then consider whether the probative value of the evidence is substantially outweighed by the counter-factors listed in Rule 403.

The Derr opinion thus established that the admission of gruesome photographs must be evaluated in the light of (1) whether the photograph is logically and legally relevant to the fact in issue in the case, and (2) whether the probative value of the photograph is outweighed by unfair prejudice, confusion or undue delay.

The Derr opinion clearly contemplated the hazards associated with the use of gruesome photographs in situations where the probative value of the photographs is minimal. In footnote #14, the Derr Court stated:

“[O]ur decision to change the method of analysis in resolving gruesome photograph objections should not be construed by prosecutors, lawyers, and trial judges of this State as an indication that we are adhering to a “lesser” admissibility standard. To the contrary, *factors such as whether the photograph was black and white, whether there was blood and gore, or whether there was a mangled and distorted face or body are still to be considered under Rule 403.* When gruesome photographs are offered with only slight probative value and because of their prejudicial nature are likely to arouse passion and anger, they should be

excluded by the trial judge. Otherwise, on appeal, this Court will not hesitate to reverse." (*emphasis added*).

Since the adoption of the Derr standard in 1994, the Court has examined numerous cases involving the use of gruesome photographs. While the Court has generally held such photographs admissible in the majority of these cases, the Court has consistently adhered to the Derr standard that such photographs must be logically and legally relevant, and *must* have a probative value exceeding their prejudicial effect.

In State v. Carey, 210 W. Va. 651, 558 S.E. 2d 650 (2001), the Court affirmed the admission of a series of crime scene photographs of the victim of a homicide. The victim in the Carey opinion sustained a series of gunshot wounds, including a close-range gunshot wound to the head. While the Court held that the photographs were admissible, the Court noted that the victim's "massive head wound is not visible as the victim's upper body is covered with a sheet". Carey, 210 W. Va. at 655, 558 S.E. 2d at 654.

The Carey Court also observed:

"We also note that the State did not attempt to admit into evidence any of the photographs which show the top of the victim's head blown away. Rather, *the prosecutor carefully selected photographs which were not gruesome or cropped out the head shots in an effort to not unduly prejudice the jury.*" Carey, 210 W. Va. at 657, 558 S.E. 2d at 656. [*emphasis added*].

In State v. Copen, 211 W. Va. 501, 566 S.E. 2d 638 (2002), the Court held that sixteen photographs of numerous gunshot wounds inflicted on the victim of a homicide were admissible to show the defendant's malice and intent to kill the victim. (The

defendant testified that he had fired numerous shots meaning only to “scare” the victim.) The Court noted, however, that:

“[M]ost of the photographs do not show particularly shocking wounds with detached or plainly revealed internal body parts, and most do not show badly torn flesh or even substantial amounts of blood. Instead, most show small red circles or spots where bullets entered the body.”

Copen, 211 W. Va. at 505, 566 S.E. 2d at 642.

The dissent in Copen noted that the photographs were unnecessary to the presentation of the State’s case. The dissent noted that the photos showed “a close-up of the disfigured face of the victim, and also show her nude body on a morgue slab, front and back. The photos had no independent evidentiary purpose, *because there was no dispute whatsoever as to the location, number and nature of the wounds on the victim’s body.*” (*emphasis added*). Copen, 211 W. Va. at 508, 566 S.E. 2d at 645 (Starcher, J. with Albright, J., dissenting).

The dissenting Justices in State v. Waldron, 218 W. Va. 450, 624 S.E. 2d 887 (2005), in discussing the probative value of the photographs of a homicide victim, similarly noted:

“There was no question that the victim was deceased and that she had been shot by Doug Mullins while the Appellant served as a lookout. The position of the victim was not in question; angles of bullet wounds were not in dispute; and the identity of the shooter had been established. Rather, it appears from the record that the sole contested issue in the trial was the Appellant’s level of participation in the homicide[.]”.

Waldron, 218 W. Va. at 461, 624 S.E. 2d at 898 (Albright, C. J., joined by Starcher, J., dissenting).

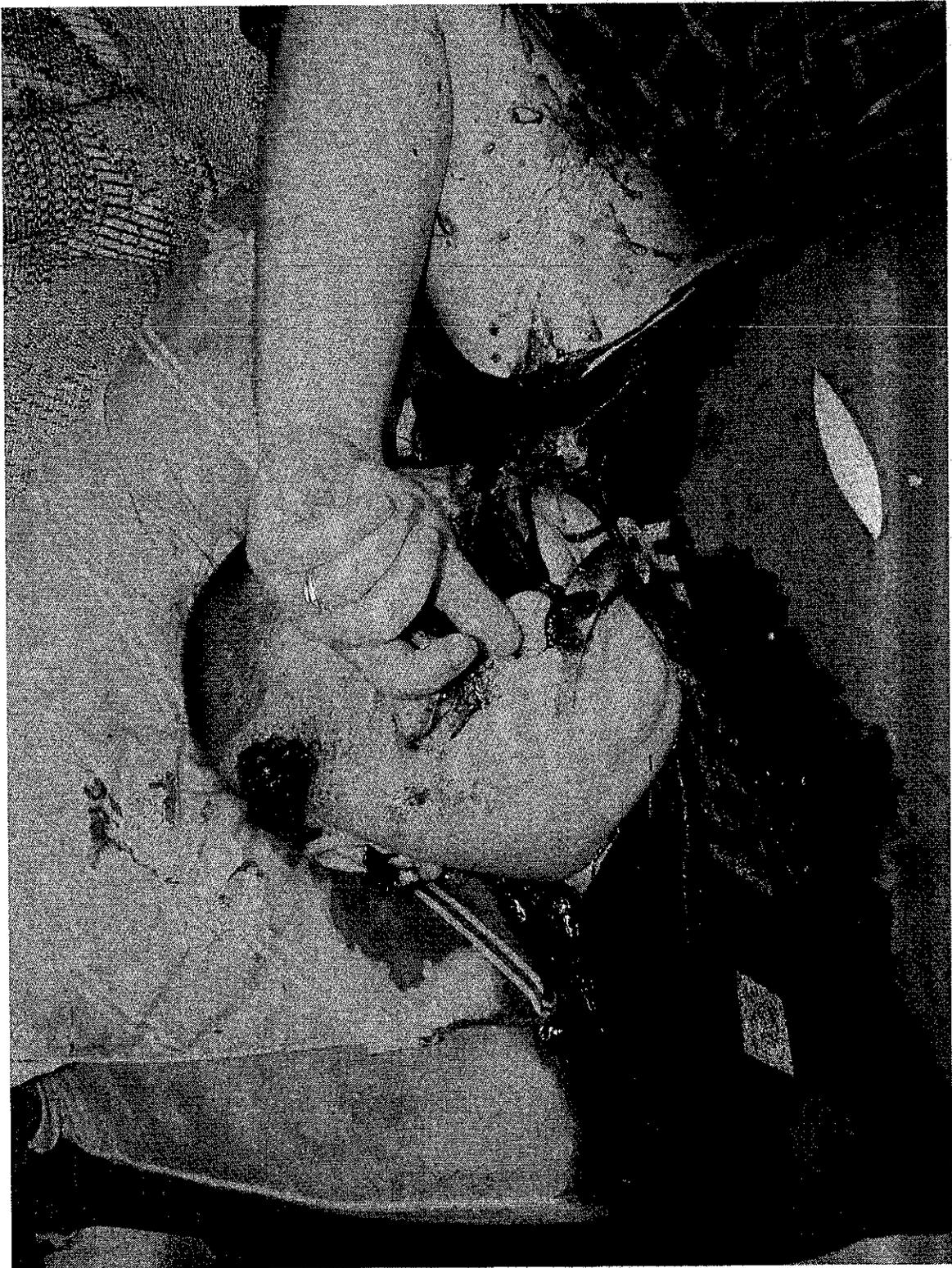
Recently in *State v. Mongold*, 220 W. Va. 259, 647 S.E. 2d 539 (2007), the Court affirmed the use and introduction of autopsy photographs in a case involving the death of a child. *Mongold* may be distinguished from the present case, however, on three grounds: (1) the cause of the child's death was vigorously disputed; (2) the photographs were presented in black-and-white format; and (3) the Court noted that the autopsy photos had been "cropped so as to minimize showing the full skull." None of these factors apply in Ms. Harden's case, as (1) the cause of death was stipulated, (2) the photos were all in color, and (3) no cropping was done to any of the photos to minimize the blood or gore.

Ms. Harden's trial evidenced a clear pattern by the State of West Virginia of presenting highly gruesome photographs to the jury in an effort to inflame and prejudice the jury. There was no dispute that Ms. Harden had fired a single fatal shot into her husband's head; there was no dispute as to the distance and angle of the shot. The only issue in dispute was whether Mr. Harden was asleep at the time of the fatal shot. The admission of numerous gruesome photographs clearly constitutes reversible error.

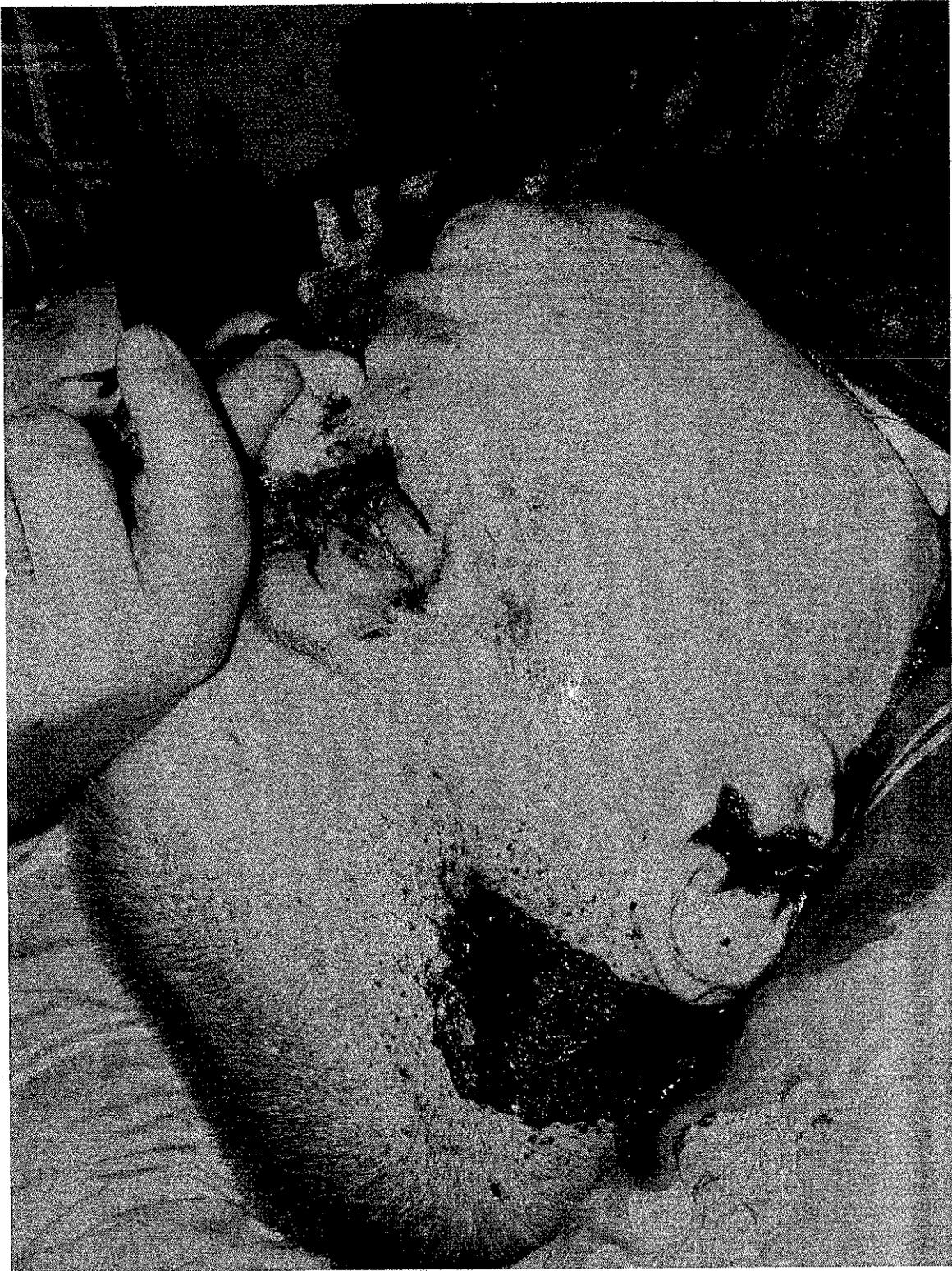
The appellant deems it necessary at this juncture to present the photographs admitted by the trial court.



STATE'S EXHIBIT # 4



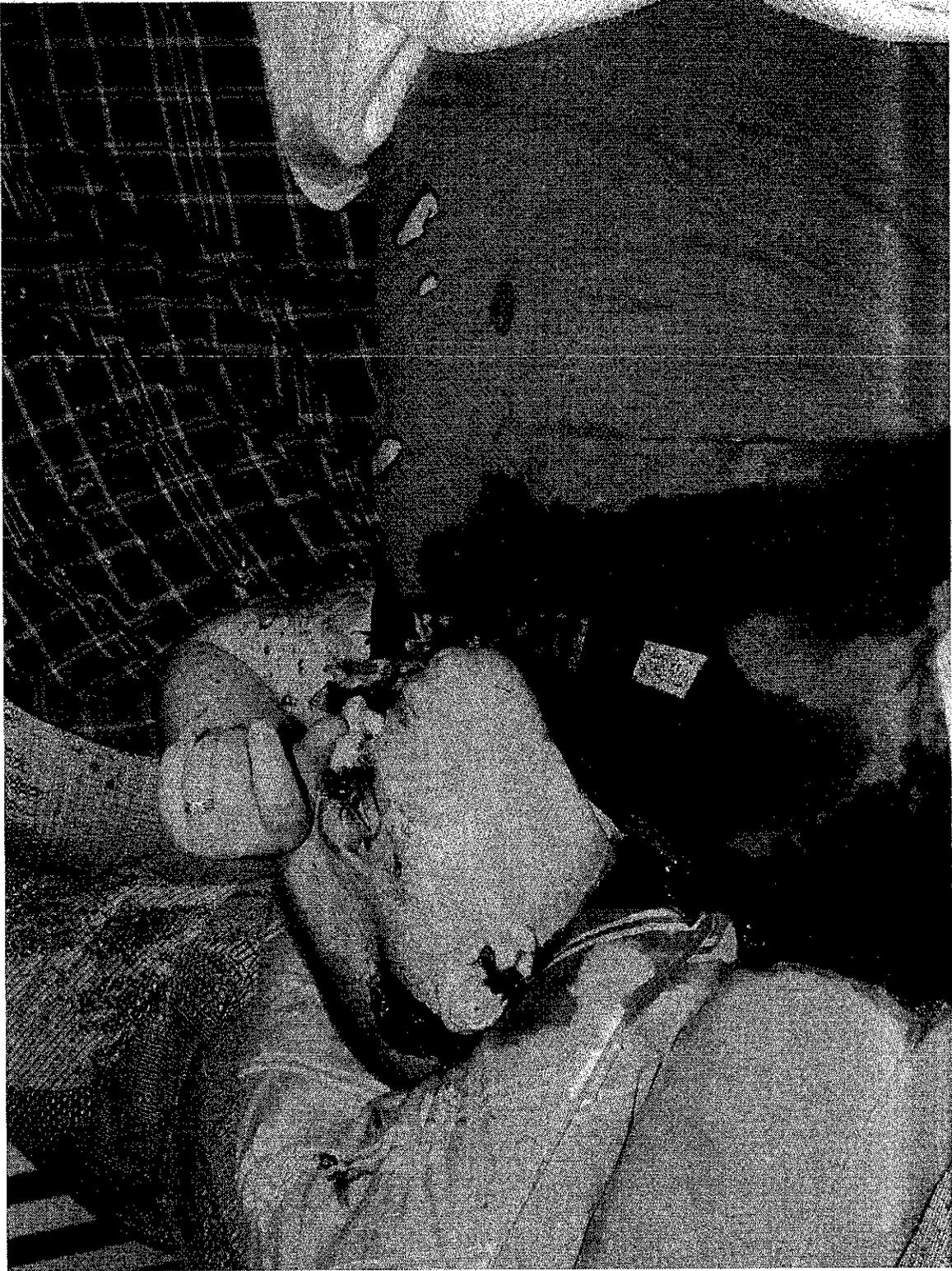
STATE'S EXHIBIT # 10



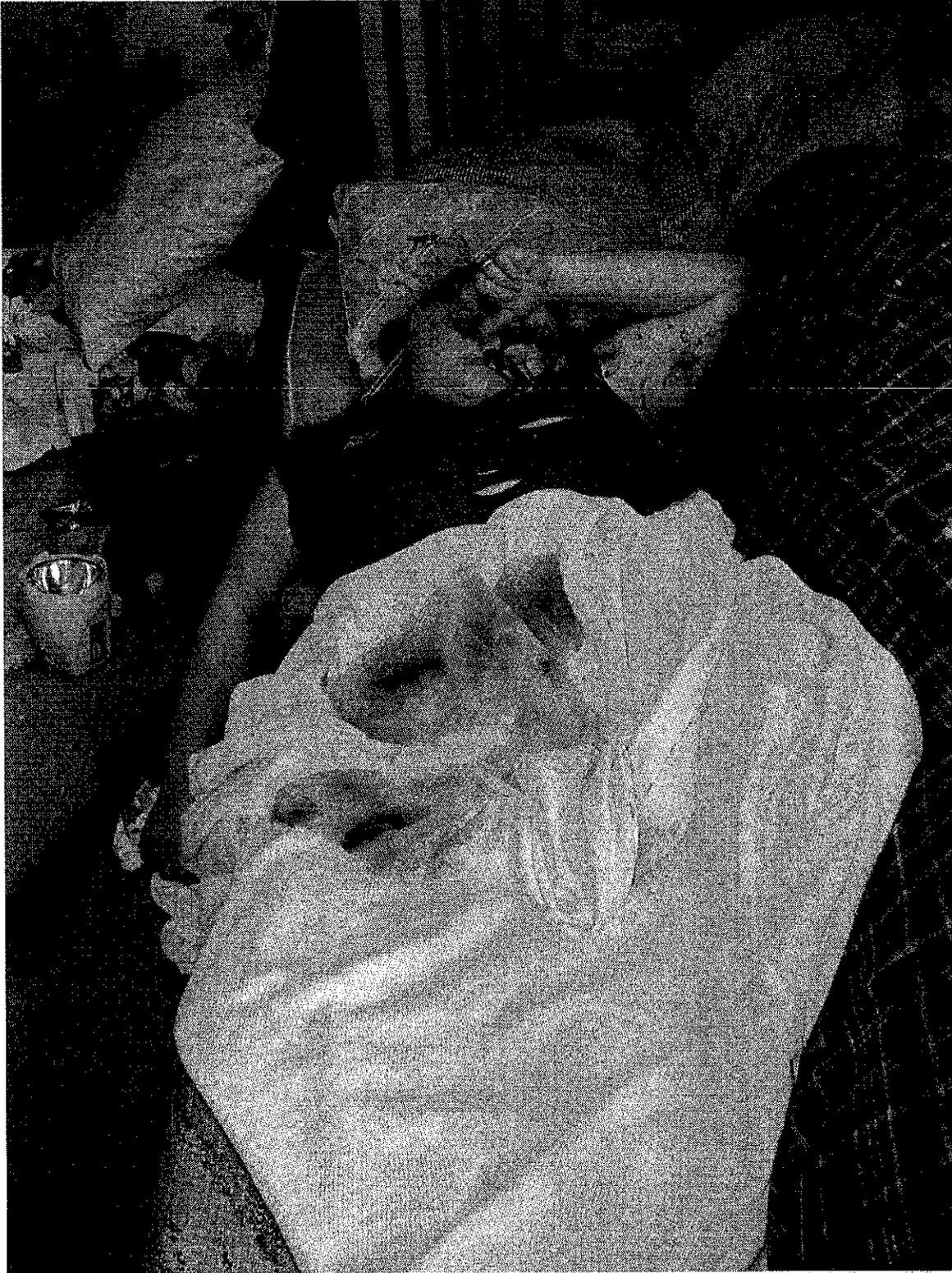
STATE'S EXHIBIT #23



STATE'S EXHIBIT # 20



STATE'S EXHIBIT # 16



STATE'S EXHIBIT # 21

The use of gruesome photos was an issue on three separate occasions during the trial.

(1). **The trial court's initial admission of the crime scene photographs.**

Prior to the testimony of Sgt. Mike McCallister, the trial court conducted an *in-camera* hearing regarding a series of photographs of the decedent. The State initially sought to admit into evidence a considerable number of photographs of the decedent's injuries. While excluding some of the photos as duplicative, the trial court nonetheless admitted into evidence several gruesome photographs which, in light of the numerous uncontested issues surrounding the shooting, had no relevance to any fact in issue.

Specifically, the trial court admitted State's Exhibits # 4, 20, 21, and 23 into evidence.<sup>2</sup> These photographs served no valid purpose in this proceeding other than permitting the jury to view a horrendous gunshot injury.<sup>3</sup>

Unlike the photographs discussed in *State v. Carey, supra*, the photographs used in Ms. Harden's case clearly show the "massive head wound" inflicted on Mr. Harden. In *Carey*, the Court noted the State's careful selection of photographs which did not "show the top of the victim's head blown away" and further noted that the prosecutor had carefully selected and/or cropped the photos in an effort to not prejudice the jury.

This careful and meticulous approach did not occur in Ms. Harden's trial. Rather, the State clearly attempted to utilize as many photographs of Mr. Harden's horrific injury as the circuit court would permit.

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<sup>2</sup> State's Exhibits #10 and # 16 were later admitted into evidence as part of a PowerPoint presentation.

<sup>3</sup> See also State's Exhibits 9, 18, 22 and 24 for further examples.

Similarly, the photos used in Tanya Harden's trial display "shocking wounds with detached or plainly revealed internal body parts", along with "badly torn flesh...[and] substantial amounts of blood", the absence of which was noted in *Copen, supra*.

Because the underlying facts of the shooting were undisputed, the photographs had no probative value to the circumstances surrounding Mr. Harden's death. The photos represent only a grisly display offered by the State in order to counter Ms. Harden's injuries at the hands of her husband. The admission of these photos clearly constitutes an abuse of discretion.

**(2) The deputy medical examiner's display of a gruesome photograph prior to the admission of the photograph into evidence.**

The circuit court also erred in denying Tanya Harden's motion for a mistrial when the medical examiner, Dr. Hamada Mahmoud, displayed a close-up photograph of the entry wound to the decedent's skull before it was admitted into evidence.

Prior to Dr. Mahmoud's testimony, the circuit court conducted a brief *in-camera* hearing as to three photographs taken at the medical examiner's office. Counsel for Ms. Harden objected to one of the photos, which depicted a vivid close-up of the shotgun entry wound (State's Exhibit #50). The State noted that the photo was relevant to the cause of death, at which time Ms. Harden's counsel stipulated to the cause of death as being from a shotgun wound. (Tr. Transcript, 563-564).

The trial court informed the State that the medical examiner could not display the photograph to the jury until he had made a ruling on the photo's admissibility (Tr.

Transcript, Pg. 564.). The assistant prosecuting attorney also directed Dr. Mahmoud not to display the photograph to the jury (Tr. Transcript, Pg. 573). Disregarding these warnings, Dr. Mahmoud promptly displayed the photograph to the jury a few moments later (Tr. Transcript, Pg. 583), before the trial court ruled on its admissibility.

There is no relevance whatsoever in State's Exhibit #50 to any fact at issue.

Counsel for the Appellant stipulated to the cause of death, the manner of death and the distance of the fatal shot. Under these circumstances, the photograph had no probative value, should not have been displayed to the jury before it was ruled admissible, and should not have subsequently been admitted into evidence.

**(3) The trial court permitted a "PowerPoint" presentation of a number of gruesome photographs, some of which had been previously deemed inadmissible by the trial court.**

During its' case-in-chief, the State presented the testimony of Huntington Police Sgt. David Castle. As part of his testimony, Sgt. Castle used a "PowerPoint" multimedia presentation, which permits the projection of digital color photographs and other documents on a large screen.

The trial court held an *in-camera* hearing on the photographs to be used in Sgt. Castle's presentation because a substantial number of the photographs depicted Mr. Harden's graphic injury. The State noted that omitting any of the photos was a "problem", because all of the photos from the crime scene were included in the PowerPoint presentation. (Tr. Transcript, Pg. 641).

The trial court noted that there were a number of photographs in the presentation that had previously been deemed inadmissible because of their duplicative and gruesome nature. (Tr. Transcript, Pg. 644).<sup>4</sup> In discussing the removal of the photos from the PowerPoint slides, the court noted that, "I don't want to exclude anything that you feel is absolutely necessary from these photographs from your opinions[.]" (Tr. Transcript, Pg. 646.) The witness later complained, "[T]hese remaining five photographs that I have in my hand are what the bulk of the PowerPoint contains. If I was to -- if I couldn't use these, I might as well not use the PowerPoint." (Tr. Transcript, Pg. 648).

At this point, the trial court admitted State's exhibits # 10, 11 and 16, which the court had previously indicated were not admissible,<sup>5</sup> and indicated that they could be used as part of the PowerPoint display. This ruling is particularly troubling in light of the fact that State's exhibit #10 presents a more gruesome display of the shotgun injury than those exhibits previously admitted, displaying a vivid image of Mr. Harden's face, split apart in death, his left eye lying on his upper chest.

The admission of these photos exacerbates the earlier error of the admission of the crime scene photos. Sgt. Castle's clinical discussion of entry wounds, blood spatter and blood flow patterns may have been interesting, but it was not probative of the ultimate fact at issue in the case. While there was some discussion during cross-examination about whether Mr. Harden may have been seated slightly higher on the

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<sup>4</sup> These photographs were numbered as States Exhibits # 9, 10, 11, 16, and 24.

<sup>5</sup> The trial court had earlier conducted an *in-camera* hearing and apparently selected a series of photographs that were potentially admissible. State's exhibits 10, 11 and 16 were not included in this group. (Tr. Transcript, 397-98).

sofa at the time of the fatal shot, the negligible variance of a few inches does not justify the use of multiple gruesome photographs.

Sgt. Castle's use of these photos must also be considered in the context of the manner of their display to the jury. The photos were presented in bright vivid color on a large screen several feet in dimension. Under such circumstances, the prejudicial effect of gruesome photos is amplified. It would have been next to impossible for any juror who had seen quite enough of the Mr. Harden's blood, brain matter and detached left eye to avoid staring at the gruesome display.

In permitting the duplicative and unnecessary use of a series of graphic and gruesome photographs, some which the trial court had earlier deemed inadmissible because of their gruesome nature, the trial became less of a fair adversarial proceeding and more of the proverbial "parade of horrors". While it is one thing for jurors to see a relevant photograph of a deceased body in a case where the pertinent facts of the shooting (number of shots, location of shots, position of body) are being vigorously disputed, it is entirely different to continually rub the juror's collective noses in bloody photographs featuring brain matter and gore.

**B. THE TRIAL COURT FAILED TO EXCUSE FOR CAUSE A PROSPECTIVE JUROR WHO WAS CONSULTING WITH THE PROSECUTING ATTORNEYS OFFICE REGARDING THE UNSOLVED MURDER OF THE JUROR'S SON.**

In State v. Miller, 197 W. Va. 588, 476 S.E. 2d 535 (1996), the Court discussed the test to be utilized by a trial court in determining whether to excuse a potential juror for bias. The Court held in Syllabus Point 4:

"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."

The Miller Court also stated, in Syllabus Point 5:

~~"Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed."~~

In the present case, prospective juror George Scott indicated during voir dire that he had been the victim of a violent crime. During an *in camera* hearing, Mr. Scott advised that his 22-year old son, Shawn Scott, had been shot to death in Cabell County in 2003. The prosecuting attorney of Cabell County, Chris Chiles (who was not participating in the Appellant's trial), appeared on the record at this point and advised that he had spoken with Mr. Scott the prior afternoon. Mr. Chiles advised the court that, "I have a suspect, but we don't have any evidence that I can charge him with". (Tr. Transcript, 22-24).

While Mr. Scott professed his ability to fairly base his decision on the evidence, a further review of the *in-camera* hearing reveals that he was actively involved with the prosecuting attorney's office in attempting to solve his son's murder:

THE COURT: But are you satisfied with the way the Prosecutor's Office has handled your case so far?

PROSPECTIVE JUROR SCOTT: Well, we are going to pursue it. When I got to speak to the man, they told me they knew about the person supposedly that had done it. I just hadn't got to them. *I was going to speak today but I didn't get a chance to. Maybe when I leave here maybe I can run over there today.* He called me yesterday and left a couple of names for me to call. So, I believe it would be taken care of.

(Counsel for the Defendant): Your Honor, can the record be clear the person that Mr. Scott is referring to is Mr. Chiles? (Tr. Transcript, 26). (*emphasis added*).

During an ensuing discussion, Mr. Chiles stated that he discussed the name provided to him by Mr. Scott with the detective in the case, who verified that the person was "one of the main suspects" in the killing of Mr. Scott's son.

At this stage of Ms. Harden's trial, the following indisputable facts were known about prospective juror Scott: (1) his young son was the victim of an unsolved murder in Cabell County; (2) he was consulting with Chris Chiles, the Cabell County prosecuting attorney, about the case; (3) a name he had provided Mr. Chiles just the day before was the name of the prime suspect in his son's killing; (4) there was insufficient evidence to charge this person with the killing, and (5) he intended to pursue the investigation and intended to "run over there today" to follow up on the discussions with the prosecuting attorney.

In short, prospective juror Scott was actively working with (and beholden to) the Cabell County prosecuting attorney in the investigation of the unsolved shooting death of his son at the time of Ms. Harden's trial. Despite all protestations of fairness, it is inconceivable that a person in such circumstances could fairly and impartially participate as a juror in another homicide case prosecuted by the Cabell County prosecuting attorney's office.

Doubts as to whether to excuse a prospective juror should be resolved in favor of the removal of the juror. In State v. Schermerhorn, 211 W. Va. 376, 566 S.E. 2d 263 (2002),

the Court, citing Syllabus Point 3 of O'Dell v. Miller, et. al., 211 W. Va. 285, 565 S.E. 2d 407 (2002), stated:

“When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror.”

In State v. West, 157 W. Va. 209, 200 S.E.2d 859 (1973), the Court further stated:

“[W]hen the defendant can demonstrate even a tenuous relationship between a prospective juror and any prosecutorial or enforcement arm of State government, defendant's challenge for cause should be sustained by the court. A defendant is entitled to a panel of twenty jurors who are free from exception, and if proper objection is raised at the time of impaneling the jury, it is reversible error for the court to fail to discharge a juror who is obviously objectionable.”

Although Mr. Scott was removed from the jury panel by the Appellant as her first peremptory removal, she should not have been forced to use one of limited peremptory challenges to remove Mr. Scott. The Court held in Syllabus Point 8 of State v. Phillips, 194 W. Va. 569, 461 S.E. 2d 75 (1995):

“The language of W.Va. Code, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.”

Mr. Scott's removal via peremptory challenge does not cure the error in permitting his inclusion on the jury panel. Under the “totality of the circumstances” test as set forth in Schermerhorn and O'Dell, it is evident that Mr. Scott could not have served as a fair and unbiased juror in Ms. Harden's trial. Mr. Scott was beholden to the Cabell County Prosecuting Attorneys' Office, greatly needing their assistance to solve and

prosecute what was undoubtedly one of the most tragic events in Mr. Scott's lifetime. The Appellant was entitled to a jury panel free of bias or prejudgment. The failure to remove Mr. Scott from the panel constitutes reversible error.

**C. THE STATE FAILED TO REBUT THE APPELLANT'S CLAIM OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.**

Thirty years ago, the Court set forth the following test regarding the burden of proof in self-defense cases:

"Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense."

Syllabus Point 4, *State v. Kirtley*, 162 W. Va. 249, 252 S.E. 2d 374 (1978); cited in Syllabus Point 8, *State v. Whittaker*, 221 W. Va. 117, 650 S.E. 2d 216 (2007). It is therefore incumbent upon the prosecution, once a defendant has established self-defense, to prove beyond a reasonable doubt that the accused did not act in self-defense.

In *State v. Whittaker, supra*, a case with facts similar to those in the present case, the Court reviewed the appellant's claim that the State had failed to rebut, beyond a reasonable doubt, the appellant's assertion of self-defense. The Court noted that the appellant's claim amounted to a challenge to the sufficiency of the State's evidence and evaluated the evidence under the standards of *State v. Guthrie*, 194 W. Va. 657, 461 S.E. 2d 163 (1995):

"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 viewing 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.

"A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled."

*Guthrie, Syllabus Points 1 & 3, supra.*

From Tanya Harden's arrest to her sentencing, the State has never disputed an essential fact - that the decedent threatened to kill his wife and children and used his fists and a shotgun to brutally beat his wife just before he died. The injuries suffered by Tanya Harden, including facial fractures, were preserved on photographs taken the day of her arrest and made a part of the record in this case, and were attested to by the State's own witnesses.

It is also essentially undisputed that at least some of Tanya Harden injuries were inflicted with a deadly weapon. During the state's case-in-chief, Tanya's son Brytain Harden testified that he had heard his father tell his mother that he was going to "get the gun and shoot you", and that he watched as his father beat his mother with the "back end" of the gun. (Tr. Transcript, pg. 224-225).

Tanya Harden's testimony is more detailed on these issues. Tanya Harden testified that the beating continued for some time, and that the decedent's actions were coupled with numerous repeated threats to kill her and his children. (Tr. Transcript, Pg. 879-881).

What is crucial about this testimony, apart from establishing Tanya Harden's very real and justifiable fear of death for her and her children, is that it was not contradicted by the State. The State did not rebut this testimony: in fact, the State presented no rebuttal testimony whatsoever.

The essence of the State's case centers on the contention that the "fight" between the couple was long over, and that for reasons unknown Tanya Harden crept surreptitiously up to her sleeping husband and ambushed him with a single shot to the head. The State based this theory on two key facts: (1) the decedent's position on the sofa, and (2) the testimony of the decedent's father as to his sleeping position when they resided together some years earlier.

It is difficult to call what happened at the Harden home a "fight" (See State's Closing Argument, Tr. Transcript Pg. 993), as the word "fight" implies mutual combat. What transpired can be more properly classified as a vicious one-sided beating, the aggressor using his fists and a shotgun to viciously beat the mother of his children.

Tanya Harden testified that once her husband had sexually assaulted her and taken up his position on the sofa, he continued to threaten to kill her, his children, and then himself (Tr. Transcript, Pg. 889). Faced with this threat, made after a beating and

sexual assault at the hands of a drunken aggressor, Tanya Harden took the only action she reasonably believed was available to her at the time.

The State failed to present sufficient evidence to rebut Tanya Harden's assertion of self defense.

**D. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING SPECULATIVE HABIT EVIDENCE AS TO THE DECEDENT'S SLEEPING POSITION.**

Prior to trial, counsel for the Appellant filed a Motion *in Limine* to preclude the State from offering testimony as to the alleged sleeping habits of the decedent. The trial court conducted a brief *in-camera* hearing just prior to the testimony of the decedent's father, Danuel Harden, Sr., and ruled that the father could testify to his son's customary sleeping position.

The State proffered that the position in which the decedent's body was discovered was, according to Danuel Harden, Sr., "always the way he slept." (Tr. Transcript, Pg. 278.). This testimony was critical to the State's allegation that the decedent was asleep on the sofa at the time of the fatal shot. The Appellant objected to this testimony as pure speculation, noting that the decedent had not lived with his father in over eleven years and the father's testimony that his son often slept in other positions. (Tr. Transcript, Pg. 280-283).

The testimony offered by Mr. Harden constitutes "habit" evidence. Rule 406 of the West Virginia Rules of Evidence provides,

"Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

"Habit" has been defined as a "person's regular practice of responding to a particular kind of situation with a particular kind of conduct." J. Strong, *McCormick on Evidence*, § 195 (4<sup>th</sup> Ed 1992). In *Rodgers v. Rodgers*, 184 W. Va. 82, 399 S.E. 2d 664 (1990), the Court noted that in order for habit evidence to be admissible, the evidence "must be shown to be a regularly repeated response to similar factual situations. The trustworthiness of habit evidence lies in its regularity, so that the act or response is shown to be almost semiautomatic." *Rodgers*, 184 W. Va. at 93-94, 399 S.E. 2d at 675-676.

Before habit evidence is admitted pursuant to Rule 406, the trial court must subject the evidence to the balancing test of Rule 403 to determine whether the probative value of the evidence outweighs its' prejudicial effect. Syllabus Point 16, *Rodgers, supra*.

In *Alexander ex rel. Ramsey v. Willard*, 208 W. Va. 736, 542 S.E. 2d 899 (2000), the Court cited with approval the language of *Wilson v. Volkswagen of America, Inc.*, 561 F. 2d 494 (4<sup>th</sup> Circ. 1977):

"It is only when the examples offered to establish such pattern of conduct or habit are "numerous enough to base an inference of systematic conduct" and to establish "one's regular response to a repeated specific situation" or, to use the language of a leading text, where they are "sufficiently regular or the circumstances sufficiently similar to outweigh the danger, if any, of prejudice and confusion," that they are admissible to establish a pattern or habit. In determining whether the examples are "numerous enough" and "sufficiently regular," the key criteria are "adequacy of sampling and uniformity of response[.]" *Alexander*, 208 W. Va. at 745, 542 S.E. 2d at 908.

The testimony of the decedent's father as to his son's sleeping position fails the test of Rule 403 and 406 for two reasons. First, the evidence regarding the decedent's sleeping position was too remote to be reliable, as it was based on Mr. Harden's recollections from over eleven years before his son's death. Second, by his own statements, his son occasionally slept in other positions, which renders the testimony accepted by the trial court outside the definition of "habit" as accepted by this Court.

The trial court did not refer to either Rule 403 or Rule 406 in determining that Mr. Harden could testify to his son's sleeping position. In fact, the trial court offered no legal rationale whatsoever for permitting the testimony, opining only that such matters were "a question for the jury". (Tr. Transcript, 282-283).

It must be emphasized that this testimony was not offered by the State as to a collateral issue, but to the two key elements of first-degree murder. Mr. Harden's testimony is the *only* evidence offered by the State supporting its theory that the decedent was asleep at the time of the fatal shot. This testimony went directly to the elements of premeditation and malice, as the prosecutor noted during her closing argument:

"We called an expert during this trial. We called that expert to prove to you that he was lying on that couch because it goes to premeditation, it goes to deliberation, it goes to malice." <sup>6</sup>

(Tr. Transcript, Pg. 1011).

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<sup>6</sup> It is uncertain why the State brought in an "expert" to prove that the decedent was lying on a couch when shot, as this fact was entirely undisputed.

Uncorroborated speculation regarding long-ago "habits" should not be permitted to stand as the State's primary evidence of the material elements of premeditation and malice, and the testimony should not have been permitted.

**E. THE TRIAL COURT GAVE AN IMPROPER JURY INSTRUCTION UNDER STATE V. OSAKALUMI AS TO LOST OR DESTROYED EVIDENCE.**

During the cross-examination of Cpl. Robert McQuaid, the Appellant established that the State had failed to preserve numerous items of evidence from the crime scene. Specifically, Cpl. McQuaid testified that the couch upon which Mr. Harden died was destroyed by the decedent's father (Tr. Transcript, Pg. 365-66); that no one had collected a throw blanket lying on the sofa behind Mr. Harden's body (Tr. Transcript, Pg. 365); that no photographs were taken of the sofa after the removal of the decedent's body (Tr. Transcript, Pg. 366); that the sheet covering the decedent's body was destroyed at the medical examiner's office (Tr. Transcript, Pg. 366); and that the police made no effort to recover shotgun pellets from the sofa (Tr. Transcript, Pg. 380). Cpl. McQuaid also testified that the investigators did not prepare measured diagrams of the sofa and bloodstains. (Tr. Transcript, 372-73).

The importance of this testimony to the Appellant is clear. The essence of the State's case was that the decedent was asleep, in full repose, upon the sofa at the time of the fatal shot. The Appellant contended that the decedent was awake, uttering threats and seated slightly higher on the sofa at that time.

The State's failure to take the most fundamental steps in evidence and crime scene preservation deprived the Appellant of the opportunity to establish the decedent's precise position on the sofa. The trial court recognized this problem and agreed to provide the jury with a "missing evidence" instruction; however, the trial court removed a crucial portion of the instruction and effectively overruled prior decisions of this Court in the process.

In State v. Osakalumi, 194 W. Va. 758, 461 S.E. 2d 504 (1995), the Court addressed, *inter alia*, a defendant's recourse when evidence crucial to his or her defense has been lost or destroyed by the State. In Osakalumi, the Court set forth the test to be applied when the State has lost or destroyed evidence of importance to the defendant in a criminal trial.

The facts in Osakalumi are similar to the facts in this case. The State introduced evidence from a couch upon which the decedent had been killed. The State had seized the couch and other evidence several months after the death as part of an ongoing criminal investigation. However, the couch was subsequently destroyed with the consent of the prosecuting attorney because it emitted an "unpleasant odor" in the police storeroom. The State failed to take accurate measurements of an alleged bullet hole found in the couch and did not properly photograph the couch before its destruction.

At trial, the State presented testimony from the state medical examiner who testified on direct examination that the victim's death was a homicide. This conclusion

was based on a diagram of the couch that one of the detectives had drawn from memory, and which had been lost prior to the appellant's trial.

The Court held that the following jury instruction regarding the missing evidence was insufficient to protect the appellant's due process rights:

The Court instructs the jury that the State has introduced evidence gleaned from a couch which no longer exists. The reason this couch no longer exists is because the officers of the Bluefield City Police Department destroyed it after conferring with the Prosecuting Attorney's Office.

In considering this evidence, you should scrutinize it with great care and caution. This destruction of evidence occurred before the defendant could examine it. This destruction of the couch may very well have deprived the defendant of evidence crucial to his defense and which may in fact have exculpated him.

In Ms. Harden's case, the trial court provided the following instruction (See "Defendant's Jury Instruction No. 2"):

The Court instructs the jury that the State has introduced evidence gleaned from a couch, pillows, throw, sheet and blanket which no longer exist. The reason these items no longer exist is that the officers of the Cabell County Sheriff's Department and the State Medical Examiner's Office allowed it to be destroyed.

In considering any evidence and testimony concerning these items you should scrutinize it with great care and caution. This destruction of evidence occurred before the defendant could examine it. This destruction of these items may very well have deprived the defendant of evidence crucial to her defense and which may in fact have exonerated her.

The Court instructs the jury that the State includes, but is not limited to, members of law enforcement, their agents and employees, the members of the crime lab, and the medical examiners office.

The Osakalumi court noted with approval, in footnote 14, the rationale of Justice Stevens in Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333 (1988):

*"In his concurring opinion in Arizona, Justice Stevens found significant the fact that the trial court instructed the jury that if they found that the State had "allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest.' As a result, the uncertainty as to what the evidence might have proved was turned to the defendant's advantage."* [emphasis in original].

In State v. Paynter, 206 W. Va. 521, 526 S.E. 2d 43 (1999), the Court re-affirmed the holding of Osakalumi and the language in Justice Steven's Arizona v. Youngblood concurrence. The Court discussed the State's failure to preserve gunshot residue samples taken from the decedent in a murder case, and held that the cautionary instruction provided by the trial court was sufficient. The instruction contained the following language:

*"In this case, gunshot residue samples were taken from the left hand of the decedent, Thea Renee Taylor. However, the State of West Virginia failed to test those samples. Furthermore, those samples were lost or destroyed by the State before the Defendant was given the opportunity to test those samples.*

*Because of these facts, this Court instructs the jury that you may assume as a fact of evidence - just as if someone had testified to it - that gunshot residue was present on Ms. Taylor's left hand."*

From a reading of Osakalumi and Paynter, it is clear that if a defendant is entitled to a cautionary instruction on missing evidence, the instruction must be advise the jury that it is entitled to the inference that the facts contained in such evidence are against the State's interest.

The Appellant requested that the trial court provide the jury with a missing evidence instruction, and submitted a proposed instruction. This instruction fully advised the jury of the proper legal standard under Osakalumi and Paynter for providing a jury instruction on missing or destroyed evidence.

However, the trial court chose to modify the instruction by eliminating the final paragraph, which included the inference that may be made against the State in missing evidence cases. The trial court's sole reason for removing the paragraph was, "I don't believe the last paragraph applies in this particular case." (Tr. Transcript, {Pg. 968}). In removing this paragraph, the trial court completely negated the effect of a missing evidence instruction and essentially overruled the holdings of Osakalumi and Paynter. The trial court's modification of this instruction provided the jury with an instruction that is virtually identical to the instruction that the Court expressly disapproved in Osakalumi, and therefore did not protect the Appellant's due process rights.

**F. THE TRIAL COURT IMPROPERLY ORDERED COUNSEL FOR THE APPELLANT TO REFRAIN FROM OBJECTING DURING THE STATE'S CLOSING ARGUMENT.**

During the State's rebuttal closing argument, the following exchange occurred:

(Counsel for the State): Furthermore, I would submit to you, we had all that rigmarole about .22, whether it was breath or blood or whatever. He had a BAC of .22. I would submit he was passed out drunk -

(Counsel for the Defendant): Objection, Your Honor. There was no evidence that he was passed out, and the Medical Examiner could not testify for the proper conversion of the blood alcohol.

THE COURT: This is argument to the jury. Don't interrupt the counsel. Overruled. (Tr. Transcript, Pg. 1012).<sup>7</sup>

After this directive from the trial court, made in the presence of the jury, counsel made no further objections during the remaining moments of the State's argument.

Traditionally, the Court looked upon objections made during closing argument with some disfavor. This approach placed trial counsel in the precarious *catch-22* position of either making valid objections in order to safeguard the rights of his or her client and preserving the "raise or waive" rule, or incurring the wrath of the trial judge in the presence of the jury.

However, trial counsel must occasionally object during closing arguments. The Court has repeatedly held that trial counsel's failure to make timely objections to remarks made in the presence of a jury constitutes a waiver of the right to raise the issue on appeal. Syl. Pt. 6, *Yuncke v. Welker*, 128 W. Va. 299, 36 S.E. 2d 410 (1945). See also *State v. Adkins*, 209 W. Va. 212, 544 S.E. 2d 914 (2001), (Court declined to review the appellant's assertion regarding prosecutorial misconduct during closing argument on the grounds that counsel had failed to object); Syl. Pt. 5, in part, *State v. Grubbs*, 178 W. Va. 811, 364 S.E. 2d 824 (1987) ("[i]f either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard [the] remarks");

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<sup>7</sup> The trial court also told defense counsel, "This is final argument", when counsel objected to the State's characterization of their expert's testimony as "uncontroverted" a few moments earlier. (Tr. Transcript, Pg. 1011).

State v. Davis, 205 W. Va. 569, 519 S.E. 2d 852 (1999) (counsel's failure to object to prosecutor's remarks made during closing argument prohibited appellate review).

The appropriate manner of making objections during an opposing parties' closing argument in criminal cases is codified in Rule 42.04(b) of the West Virginia Trial Court Rules. The Rule provides that, "[c]ounsel shall not be interrupted in argument by opposing counsel, except as may be necessary to bring to the court's attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection." This approach was referenced and adopted in State v. Walker, 207 W. Va. 415, 533 S.E. 2d 48 (2000) ("[o]ur decision is supported by West Virginia Trial Court Rule 23.04(b), which discourages objections by counsel during closing arguments").<sup>8</sup>

It is clear that counsel for the Appellant made a valid contemporaneous objection to an improper misstatement by the prosecutor. The objection having been made, it was incumbent upon the trial court to either sustain or overrule the objection.

The trial court overruled the objection, but the trial court's admonishment to counsel to refrain from objecting was wholly inappropriate. Trial counsel must be free to make valid, contemporaneous and meritorious objections when necessary, at *any* stage of the trial, without fear of reprimand in the presence of the jury. Failing to do so may greatly prejudice the client's right to assert error at a later stage in the proceedings. The trial court's actions essentially sent a signal to the jury that trial counsel had acted

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<sup>8</sup> It is unclear why the Walker opinion failed to reference Rule 42.04(b), the criminal counterpart to the civil rule noted in Rule 23.04(b).

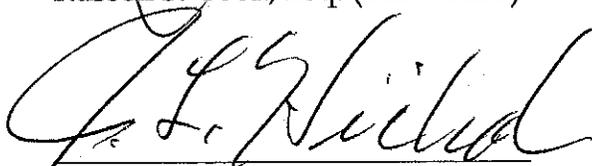
improperly by objecting, when in fact counsel had done nothing more than lodge a valid objection against an assertion by the prosecutor of unsupported facts.

VI.  
CONCLUSION

In order to counter the natural sympathy that a jury might feel towards a victim of a vicious domestic attack, the State presented numerous gruesome photographs of the decedent. Because the underlying circumstances of the shooting were not contradicted by the Appellant, these photographs served no legal or logically relevant purpose. The admission of these photographs, along with the presence on the jury panel of a bereaved father investigating his son's unsolved murder; the State's failure to present sufficient evidence to rebut the Appellant's assertion of self-defense; the erroneous admission of speculative sleeping habit evidence as proof of malice and premeditation; an improperly modified "missing evidence" instruction; and an improper admonishment to defense counsel to refrain from objecting during closing argument, effectively deprived the Appellant of a fair trial.

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CERTIFICATE OF SERVICE

I, Russell S. Cook, Counsel for the Appellant herein, do hereby certify that I have served this BRIEF OF APPELLANT, TANYA D. HARDEN on the 10<sup>th</sup> day of NOVEMBER, 2008, by first-class United States mail, postage prepaid, to the following persons:

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