

NO. 34268

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

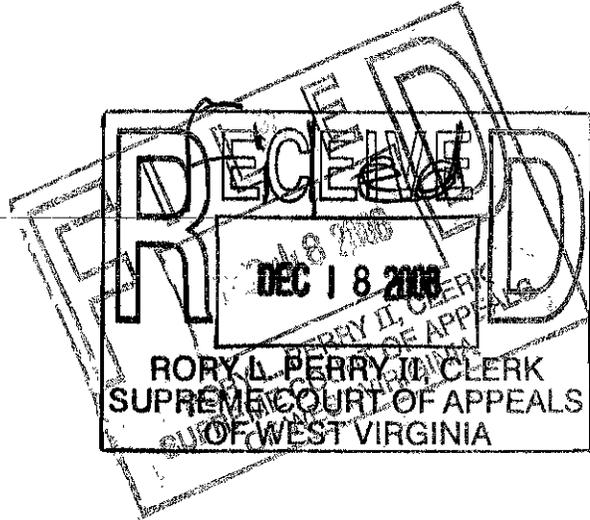
STATE OF WEST VIRGINIA,

*Appellee,*

v.

TANYA A. HARDEN,

*Appellant.*



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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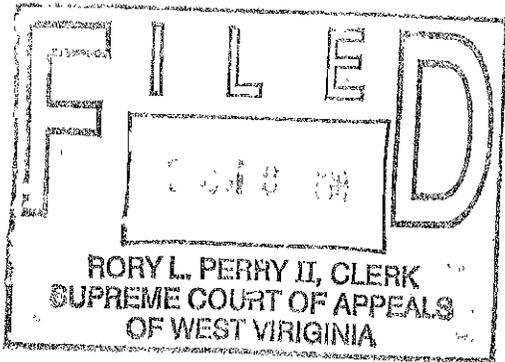


TABLE OF CONTENTS

	<b>Page</b>
I. KIND OF PROCEEDING AND NATURE OF RULING BELOW .....	1
II. STATEMENT OF FACTS .....	2
III. ARGUMENT .....	5
A. THE COURT'S DECISION TO ADMIT THE PHOTOS WAS NOT AN ABUSE OF DISCRETION .....	5
1. The Standard of Review .....	5
2. The Photos Were More Probative than Prejudicial .....	6
3. Appellant's Case Law Is Not Dispositive .....	9
B. THE TRIAL COURT HAD NO REASON TO EXCUSE JUROR SCOTT .....	12
1. The Standard of Review .....	12
2. Juror Scott Did Not Have an Ongoing Relationship with the Prosecutor .....	12
C. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUSTAIN A MURDER CONVICTION .....	15
1. The Standard of Review .....	15
2. A Reasonable Juror Could Have Found That the Appellant Was Not Acting in Self-defense When She Shot Her Husband .....	16
D. THE TRIAL COURT'S DECISION TO ADMIT TESTIMONY REGARDING THE VICTIM'S ORDINARY SLEEPING POSITION WAS NOT AN ABUSE OF DISCRETION .....	21
1. The Standard of Review .....	21
2. Any Objections Interposed by the Defense Went to the Weight, and Not the Admissibility of the Evidence .....	21

E.	OSAKALUMI DOES NOT APPLY TO THE FACTS OF THE CASE AT BAR .....	23
1.	The Standard of Review. ....	23
2.	The Appellant Failed to Establish Duty or Breach under <i>Osakalumi</i> .....	23
F.	BY FAILING TO INTERPOSE A CONTEMPORANEOUS OBJECTION, APPELLANT WAIVED THIS ISSUE .....	25
1.	The Standard of Review. ....	25
2.	Defense Counsel Did Not Object to the Trial Court's Admonition .....	26
IV.	CONCLUSION .....	27

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>CASES:</b>	
<i>Bowling v. Commonwealth</i> , 942 S.W.2d 293 (Ky. 1997) .....	13
<i>Funk v. Commonwealth</i> , 842 S.W.2d 476 (Ky. 1992) .....	6
<i>Garrett v. State</i> , 622 S.E.2d 323 (Ga. 2005) .....	13
<i>Holdren v. Legursky</i> , 16 F.3d 57 (4th Cir. 1994) .....	24
<i>Hughes v. State</i> , 735 So. 2d 238 (Miss. 1999) .....	8
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) .....	15
<i>Johnson v. Pittman</i> , 731 F.2d 1231 (5th Cir. 1984) .....	24
<i>Jones v. State</i> , 947 S.W.2d 339 (Ark. 1997) .....	6
<i>Kubsch v. State</i> , 784 N.E.2d 905 (Ind. 2003) .....	6
<i>Lee v. State</i> , 735 N.E.2d 1169 (Ind. 2000) .....	6
<i>O'Dell v. Miller</i> , 211 W. Va. 285, 565 S.E.2d 407 (2002) .....	12
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997) .....	8
<i>People v. Memro</i> , 700 P.2d 446 (Cal. 1985) .....	22
<i>Rodgers v. Rodgers</i> , 184 W. Va. 82, 399 S.E.2d 664 (1990) .....	21
<i>State v. Boggess</i> , 204 W. Va. 267, 512 S.E.2d 189 (1998) .....	23
<i>State v. Calloway</i> , 207 W. Va. 43, 528 S.E.2d 490 (1999) .....	21
<i>State v. Carey</i> , 210 W. Va. 651, 558 S.E.2d 650 (2001) .....	9, 10
<i>State v. Copen</i> , 211 W. Va. 501, 566 S.E.2d 638 (2002) .....	10
<i>State v. Derr</i> , 192 W. Va. 165, 451 S.E.2d 731 (1994) .....	5, 6, 7, 10, 11

<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995) .....	15, 23
<i>State v. Hinkle</i> , 200 W. Va. 280, 489 S.E.2d 257 (1996) .....	23
<i>State v. Kennedy</i> , 162 W. Va. 244, 249 S.E.2d 188 (1978) .....	26
<i>State v. Kirtley</i> , 162 W. Va. 249, 252 S.E.2d 374 (1978) .....	16
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996) .....	5
<i>State v. Matthews</i> , 464 So. 2d 298 (La. 2003) .....	16
<i>State v. McMillion</i> , 104 W. Va. 1, 138 S.E. 732 (1927) .....	16
<i>State v. Mongold</i> , 220 W. Va. 259, 647 S.E.2d 539 (2007) .....	15
<i>State v. Osakahumi</i> , 194 W. Va. 758, 461 S.E.2d 504 (1995) .....	23-24, 25
<i>State v. Sette</i> , 161 W. Va. 384, 242 S.E.2d 464 (1978) .....	5
<i>State v. Warledo</i> , 190 P.3d 937 (Kan. 2008) .....	89
<i>State v. Waldron</i> , 218 W. Va. 450, 624 S.E.2d 887 (2005) .....	10, 11
<i>State v. Whittaker</i> , 211 W. Va. 117, 650 S.E.2d 216 (2007) .....	16, 19, 20, 21
<i>United States v. Jones</i> , 608 F.2d 1004 (4th Cir. 1979) .....	13
<i>Wallace v. State</i> , 725 N.E.2d 837 (Ind. 2000) .....	8
<i>Weil v. Seltzer</i> , 873 F.2d 1453 (C.A.D.C. 1989) .....	22
<i>Westbrook v. State</i> , 658 So. 2d 847 (Miss. 1995) .....	6
<b>STATUTES:</b>	
W. Va. Code § 61-2-1 .....	1

**OTHER:**

Cleckley, Franklin D., *Handbook on Evidence for West Virginia Trial Lawyers*,  
vol. 1 (3d ed. 1994) ..... 22

W. Va. R. Evid. 403 ..... 11

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**BRIEF OF APPELLEE STATE OF WEST VIRGINIA**

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**I.**

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

Following a six-day jury trial in the Circuit Court for Cabell County (Ferguson, J.), Tanya Harden, defendant below (hereinafter "Appellant"), was convicted of First Degree Murder in violation of West Virginia Code § 61-2-1. The jury recommended mercy. By order of the circuit court dated May 16, 2007, (Record, hereinafter "R.," at 148-50), Appellant received a sentence of life with mercy.

Appellant's brief assigns the following errors: improper admission of gruesome photographs of the victim; juror bias; insufficiency of the evidence; improper admission of speculative habit evidence; failure to gather and preserve potentially exculpatory evidence; and the court's admonition to defense counsel to refrain from further objections during the State's summation.

## II.

### STATEMENT OF FACTS

On September 5, 2004, the Appellant shot her husband with a Mossberg 500 shotgun.<sup>1</sup> (Tr. 583.) The entrance wound was just above his right ear. The shotgun shell entered the victim's head traveling downwards and to the left, leaving a gaping wound on the left side of the victim's face, and spattering shotgun pellets, blood and brain tissue on the wall behind him. (Tr. 325-26, 587, 607-10.) Death was instantaneous. (Tr. 590.) The victim's father found his son's body in his customary sleeping position; flat on his back with his left hand resting over his left brow. (Tr. 280.)

It is undisputed that the victim violently abused the Appellant earlier that same evening; breaking her nose, puncturing the skin on her forearm, and causing multiple contusions to her face, chest and arms. (Tr. 862-63.) The Appellant first claimed that the victim had killed himself and then contended that, in an intoxicated rage,<sup>2</sup> he repeatedly beat her with his fists and the butt end of his shotgun leaving her with no choice but to shoot him. (Tr. 478-95.)

The couple had been married for eleven years. Although Mr. Harden had been verbally abusive in the past, the Appellant conceded that she had never seen her husband this violent. Nor did she claim that he had a violent temper. She attributed his behavior to his drinking which allegedly began earlier that day.

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<sup>1</sup>The force of the blast left 25 pellets and part of the shotgun shell's wadding inside the victim's brain. (Tr. 589-90.)

<sup>2</sup>The victim's blood alcohol level, as determined by blood, and not breath, was .22 at the time of his autopsy. (Tr. 594.)

That evening the Appellant, her husband, the couple's nine-year old son, B.H.<sup>3</sup>, their ten-year old daughter A.H., and her daughter's nine-year-old friend, K.B., were at the couple's home. (Tr. 191.) K.B., who was spending the night, was trying to sleep when she heard noises coming from outside A.H.'s bedroom. She woke A.H. and asked her if her parents were fighting. (Tr. 195.) A.H. said that her parents sometimes wrestled for fun and she should not worry about it. (Tr. 195.)

The couple's son B.H. testified that he was sleeping in the living room when his parents started arguing. (Tr. 233.) He woke up when he heard his father say, "I am going to go get the gun and shoot you." (Tr. 224, 225.) As his father left to retrieve the gun from a back room, B.H. sat on his mother's lap and asked her what was wrong. She told him to go back to sleep. (Tr. 228.) B.H. then saw his father hit the Appellant's arms and shoulders with the butt end of the shotgun.<sup>4</sup> (Tr. 224, 234.)

Later that evening things "settled down." B.H. saw the Appellant and the victim sitting around the kitchen table and heard them speaking softly to each other. (Tr. 226, 232.) He also saw his father unload the shotgun. (Tr. 226.) After things had cooled off, B.H. went back to sleep. (Tr. 227.) As he was dreaming, he heard a pop. Although he thought it was part of a dream he was having about hunting; the pop was the sound of the Appellant shooting her husband. (Tr. 228.)

After killing her husband, the Appellant, her children, and K.B. went to her in-law's home.<sup>5</sup> (Tr. 165-66, 228-229.) She told her children and the victim's parents that her husband had

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<sup>3</sup>Given the sensitive nature of the case and the children's age, the Appellee will refer to them by their initials.

<sup>4</sup>The victim kept his guns in a back room. (Tr. 225.) B.H. saw his father bring the gun into the living room. (Tr. 225.)

<sup>5</sup>The grandparents trailer was 50 feet away from the Harden's home. (Tr. 286.)

committed suicide. (Tr. 230, 290.) The victim's father ran to the Appellant's home to check on his son. He found him on a couch in the living room, lying flat on his back with his left hand resting over his left brow. (Tr. 292, 338.) The shotgun was on another couch adjacent to the victim.<sup>6</sup> (Tr. 291.)

Corporal Fred Mosky of the Cabell County Sheriff's Department was the first law-enforcement officer to arrive. After viewing the victim he requested the Department send a detective. Given the angle and nature of the victim's wound, he found the Appellant's claim that her husband had committed suicide dubious. (Tr. 307.) A visual inspection of the couple's living room revealed the shotgun lying on the floor next to the victim.<sup>7</sup> (Tr. 308-10, 333.)

Later that morning Detective James McCallister took a statement from the Appellant. She claimed that her husband had been drinking heavily that day; something he had never done before. (Tr. 479-80.) He became angry when she asked him to go to sleep, and began "fussing" with her. (Tr. 479, 481.) He punched her face, and pushed the butt end of the shotgun into her chest. (*Id.*) The victim kept pushing the gun into her hands, and hitting her in the face until she pulled the trigger. (Tr. 488-89.)

The State called Huntington Police Officer and blood spatter expert David Castle who opined that the wound traveled from right to left, that the victim's body did not move after he was shot, and that the shooter was standing one to five feet behind, and above the victim when she pulled the

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<sup>6</sup>The first officer to arrive testified that he found the shotgun on the floor next to the couch on which the victim was found. (Tr. 310.) The detective responsible for processing the crime scene later found it in the same position. (Tr. 342.) He found a spent round in the chamber and four rounds in the magazine tube. (Tr. 343, 350.)

<sup>7</sup>Blood spatter expert David Castle testified that the pattern of blood beneath the shotgun indicated that it had been moved at some point. (Tr. 687-88.)

trigger. (Tr. 689, 692.) He found high velocity blood and tissue spatter along the back side of the sofa, the blanket covering the victim, the curtains above the sofa, and the victim's left bicep. (Tr. 683-84.) He also found transfer blood stains on the victim's left bicep indicating that some of the tissue struck it with such force that it ricocheted and landed on the blanket and the back of the couch. (Tr. 684.) There were also blood pools on the pillow beneath the victim's head, and on the carpet next to the sofa. (Tr. 687.)

### III.

#### ARGUMENT

#### A. THE COURT'S DECISION TO ADMIT THE PHOTOS WAS NOT AN ABUSE OF DISCRETION.

##### 1. The Standard of Review.

The trial court has inherent discretionary power to admit evidence. This discretionary power extends to the admission of photographic evidence. *State v. Derr*, 192 W. Va. 165, 168, 451 S.E.2d 731, 734 (1994). An abuse of discretion occurs when "a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake weighing them." *State v. LaRock*, 196 W. Va. 294, 307, 470 S.E.2d 613, 626 (1996); Syl. pt. 10, in part, *State v. Derr* (Rule 403 balancing test is essentially a matter of trial conduct trial court's discretion will not be overturned absent a showing of clear abuse).

In *State v. Derr*, 192 W. Va. at 168, 451 S.E.2d at 734, this Court moved away from the traditional "gruesomeness" test articulated in cases such as *State v. Sette*, 161 W. Va. 384, 242 S.E.2d 464 (1978), towards a balancing approach under Rules 401 and 403 of the West Virginia

Rules of Evidence. Syl. pt. 6, *Derr*. The decision placed West Virginia jurisprudence in line with other jurisdictions which have adopted the same evidentiary rules. See *Jones v. State*, 947 S.W.2d 339, 340 (Ark. 1997) (admission and relevancy of photographs within the sound discretion of the trial court); *Funk v. Commonwealth*, 842 S.W.2d 476, 479 (Ky. 1992) (“The general rule is that a photograph, otherwise admissible, does not become inadmissible simply because it is gruesome and the crime is heinous.”); *Westbrook v. State*, 658 So. 2d 847, 849 (Miss. 1995) (photographs are said to have evidentiary value when (1) they aid in describing the circumstances of the killing or the corpus delicti (2) when they describe the location of the body and the cause of death (3) where they supplement or clarify witness testimony).

Although the trial court’s discretion is not limitless, “Even the most gruesome photographs may be admissible if they tend to shine light on any issue, or if they are essential in proving a necessary element of a case, are useful to enable a witness to testify more effectively, or enable the jury to better understand the testimony.” *Jones*, 947 S.W.2d at 341.

Each case rises or falls upon its facts. Syl. pt. 8, in part, *Derr*. Photographs depicting matters that a witness describes in testimony are generally admissible as are photographs depicting the victim’s injuries or the position of the victim’s body. See *Lee v. State*, 735 N.E.2d 1169, 1172 (Ind. 2000); *Kubsch v. State*, 784 N.E.2d 905, 923 (Ind. 2003).

**2. The Photos Were More Probative than Prejudicial.**

Instead of focusing on the trial court’s application of the *Derr* test, the Appellant makes the fatal flaw of comparing the photographs admitted in this case with those admitted in other reported cases. Such an approach ignores the law. A photo may be admissible in one case, but not in another. Gruesomeness alone does not preclude the introduction of relevant and probative photographs. The

issue in this case is whether the trial court properly applied the *Derr* test. The trial court's decision was not an abuse of discretion. Indeed, the photos were so useful that the defense showed them to the jury again during its cross examination of Officer Castle. (Tr. 694-97, 701-13.) The court accurately applied the *Derr* test. (Tr. 648.) It only admitted what it believed to be a cross-section of photographs, so as to give the jury a complete picture of the scene. It excluded other photographs which it deemed cumulative. (Tr. 645-46.) The Court told the State that it did not want to admit too many photos of the body, fearing they would be unduly prejudicial. (Tr. 647.)

The medical examiner used several photos to illustrate his testimony. (Tr. 573, 575-578, 581, 585.) The trial court reviewed, *in camera*, pictures the State intended to introduce as part of Officer David Castle's powerpoint presentation. Previously, the trial court had excluded six of these photos. (Tr. 643-44.) After hearing testimony from the officer, and argument from the State and the defense, the trial court instructed Officer Castle to cut photos from his presentation the court deemed cumulative.<sup>8</sup> (Tr. 649-50, 656, 659-60.) Officer Castle used these photos to illustrate his blood spatter testimony.<sup>9</sup> (Tr. 682-92.)

From these photos Officer Castle was able to determine the direction of the force, (Tr. 683, 685-86, 688-90), the victim's body position, (Tr. 684, 686-88), the degree of force--used in part to demonstrate where the shooter was standing when she pulled the trigger (Tr. 683, 684), His testimony also suggested that the shotgun was moved sometime after the victim's death. (Tr. 688.)

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<sup>8</sup>The court ordered Officer Castle to take out two of the photos from his powerpoint, to incorporate one, already admitted, photo which the defense had previously objected to, and to leave three other photos, not previously admitted, in his powerpoint presentation. (Tr. 659-60.)

<sup>9</sup>The State used Officer Castle's blood spatter testimony as evidence of the victim's body position before he was shot, and whether the wound could have been self-inflicted. (Tr. 683.)

Officer Castle's examination of the crime scene photos corroborated the Medical Examiner's opinion that the shotgun shell entered the victim's head from the right, and exited on the left side. (Tr. 685-86.) From the blood pooling he was also able to testify that the victim was stationary as he was bleeding. (Tr. 687.) From a photo of the entrance wound Officer Castle was able to identify stippling.<sup>10</sup> (Tr. 689.) See *Wallace v. State*, 725 N.E.2d 837, 839 (Ind. 2000) (Admission of postmortem photograph depicting a gunshot wound to the victim's left eyelid admissible to prove nature of the wound, and to illustrate the pathologist's testimony about the stippling pattern near the wound).

Taking into consideration the wound path and the fact that the victim did not move after he was shot, Officer Castle opined that the Appellant must have been behind the victim's head when she pulled the trigger. (Tr. 689-90.)

Appellant's willingness to stipulate to certain facts did not render the photographs irrelevant. (Tr. 583-84.) The prosecution is entitled to prove its case by evidence of its own choice. *Old Chief v. United States*, 519 U.S. 172, 186 (1997), citing *Parr v. United States*, 255 F.2d 86, 89 (5th Cir. 1958) ("A party is not required to accept a judicial admission of his adversary but may insist on proving the fact."); *Hughes v. State*, 735 So. 2d 238, 263 (Miss. 1999) (each party guides the presentation of its own case). The State's decision to show the jury pictures was well within its discretion. See *State v. Warledo*, 190 P.3d 937, 951 (Kan. 2008) (State has burden of proof on all elements of offense and may use photos to prove elements including fact, and manner of death, and violent nature of crime even if the cause of death is not contested.).

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<sup>10</sup>Stippling is the presence of small, dry, reddish orange abrasions caused by unburned powder and small metal fragments touching and abrading the skin. (Tr. 581, 689.)

### 3. Appellant's Case Law Is Not Dispositive.

Reversals due to the admission of gruesome photographs are few and far between. Indeed, the Appellant has not cited this Court to a single case in which a guilty verdict was overturned on this ground. Instead, she cites this Court to case law supporting the admission of photographs, and then makes the legally irrelevant argument that the photos in question were not as gruesome as the photos in the case at bar. That is not the issue. The issue is, given the facts of the particular case, were the photos more probative than prejudicial.

In *State v. Carey*, 210 W. Va. 651, 558 S.E.2d 650 (2001) (*per curiam*), the defendant was convicted of First Degree Murder after shooting the victim once in the head, and once in the chest with a shotgun.<sup>11</sup> One photo of the victim was taken after a blanket was put over her head. The defendant objected to its admission as cumulative, and unduly prejudicial. The trial court balanced the probative value of the photo against the danger of unfair prejudice and ruled in favor of admission. This Court found that the trial court had correctly applied the *Derr* tests to the photos in question. The photo showed the victim's body in the context of the crime scene, where the defendant left the murder weapons, and corroborated his flight from the scene without his shoes and underwear.

In the case at bar, the photos had a different evidentiary purpose thus distinguishing the probative/undue prejudice balance from the one present in *Carey*. The second batch of photos were introduced to illustrate the State's blood spatter expert's testimony. The State needed the photos to demonstrate the path of the bullet, the location of the entrance wound, and how each affected the

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<sup>11</sup>The defendant also stabbed the victim four times.

blood spatter pattern. In order to effectively present their case, the State had to show the entrance wound. The same was not true in *Carey*.

The defense would have this Court adopt a “head wound” rule, prohibiting the introduction of photos illustrating severe head wounds. Such a cut and dried rule cannot be harmonized with Syl. pt. 8, *State v. Derr* (inquiries are fact-specific).

In *State v. Copen*, 211 W. Va. 501, 505, 566 S.E.2d 638, 642 (2002) (*per curiam*), the defendant fired eleven rounds from his weapon, striking the victim with eight. At trial the defendant claimed that he had no intent to kill, only an intent to frighten the victim. Defense counsel objected to photographs depicting the eight gunshot wounds. This Court did not find the photos overly gruesome; thus, upholding the trial court.

This Court, applying *Derr*, also ruled that gruesomeness alone does not justify the exclusion of photographs. Exclusion is only justified if the probative value of the pictures is outweighed by the danger of unfair prejudice. *Id.* Since the victim claimed he was trying to shot around, and not at, the victim, this Court found that he had placed the issues of intent and malice in play. Consequently, the State had the right to introduce probative evidence on the nature and location of the victim’s wounds. The photos satisfied this requirement. Justices Starcher and Albright found the pictures revolting and cumulative, claiming they had not “independent evidentiary value.” *Copen*, 211 W. Va. at 508, 566 S.E.2d at 645.

In *State v. Waldron*, 218 W. Va. 450, 624 S.E.2d 887 (2005) (*per curiam*), Justices Albright and Starcher once again dissented from this Court’s majority opinion. The defendant was allegedly part of a murder for hire scheme concocted by his co-defendant. Notwithstanding his substantial cooperation, the State charged and convicted him of First Degree Murder. The photos in question

depicted the victim when she was alive, and lying dead on a morgue table, The circuit court, in advance of trial, conducted a hearing and undertook the balancing test contemplated by Rule 403. Of the ten photographs objected to by defense counsel, the trial court excluded five.

This Court held that the trial court had not abused its discretion by admitting the five photos. It found that the photos did not depict excessive amounts of blood and gore, and were not “hideous, ghastly, horrible, or dreadful.” *Waldron*, 218 W. Va. at 458, 624 S.E.2d at 895.

The dissent once again contended that the photos had no independent evidentiary value, and that the trial court had failed to apply the *Derr* standard on the record. *Waldron*, 218 W. Va. at 461, 624 S.E.2d at 898. The photos, Justice Albright claimed, had no connection to any “fact of consequence.”<sup>12</sup>

There was no question that the victim was deceased and that she had been shot by Doug Mullens 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.

*State v. Waldron*, 218 W. Va. at 461, 624 S.E.2d at 898 (Albright, J., dissenting).

In the case at bar the angles of the bullet wounds, if not disputed, constituted a substantial part of the State’s case. Blood spatter expert David Castle and State pathologist, Dr. Mahmoud, used the photos to more effectively illustrate their testimony. The defense did dispute whether the victim was asleep when the Appellant shot him. (Appellant’s brief at 18.) Over the objection of the defense, the victim’s father testified that he first found the victim in his usual sleeping position. The

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<sup>12</sup>To claim that a photo of a dead victim depicting the manner of death had no impact on a “fact of consequence” is simply wrong. The evidence is clearly relevant. All relevant evidence is admissible unless the trial court finds it unduly prejudicial. See W. Va. R. Evid. 403 (*relevant evidence deemed inadmissible if the probative value is outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence.*).

Appellant claimed the victim was awake when she shot him. Photos demonstrating the position of the victim's body went to the heart of the matter; whether there was an imminent threat of serious bodily injury or death when the Appellant pulled the trigger.

**B. THE TRIAL COURT HAD NO REASON TO EXCUSE JUROR SCOTT.**

**1. The Standard of Review.**

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 full inquiry, to examine those circumstances and to resolve any doubts in favor of excusing the juror. Syl. pt. 3, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002).

It is now well settled that the standard of review for deciding juror disqualification issues based on bias and prejudice is abuse of discretion. *Id.*

**2. Juror Scott Did Not Have an Ongoing Relationship with the Prosecutor.**

During *voir dire* prospective juror Scott testified that the Cabell County prosecuting attorney's office was investigating the murder of his 22-year-old son, Shawn Scott. (Tr. 22-23, 25.) The murder occurred in 2004. (Tr. 23.) Upon hearing juror Scott's testimony, the trial court ordered individual *voir dire* in chambers. (Tr. 22.)

During individual *voir dire* prospective juror Scott testified that, the day before trial, both he and his wife had spoken with Cabell County Prosecuting Attorney Chris Chiles<sup>13</sup> about their son's murder. (Tr. 23, 25.) This was not a pre-planned meeting: Mr. Chiles ran in to them at the court

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<sup>13</sup>Mr. Chiles had no role in the Appellant's trial, and left after prospective juror Scott's *voir dire*. He did not know that prospective juror Scott was a potential member of Appellant's jury when he spoke to him about his son's murder. (Tr. 28-29.)

house. (Tr. 25, 28-29.) Prosecuting Attorney Chiles told the trial court that they had a suspect, but had yet to make an arrest. (Tr. 24.)

When asked what he thought of the State's handling of the case, Juror Scott testified:

Well, we haven't -- like he said, I spoke to him yesterday because I was up here and my wife and I -- we just hadn't really pursued it -- we came down one time and someone told us a name. And it upsets me when I try to -- so I just didn't really press it; but when I was up here yesterday I run into him, mentioned it to him.

(Tr. 25.)

The Appellant lists several "undisputable facts" about potential juror Scott. First, she claims that the juror's young son was murdered four years before the Appellant's trial. Clearly, this is true, but there is no case law declaring relatives of crime victims, or victims themselves categorically exempt from jury duty. *Bowling v. Commonwealth*, 942 S.W.2d 293, 299 (Ky. 1997) (mere fact that potential juror was victim of similar crime is insufficient to mandate a challenge for cause.); *United States v. Jones*, 608 F.2d 1004 (4th Cir. 1979) (no disqualification of prospective juror whose daughter-in-law had been the victim of a similar crime); *Garrett v. State*, 622 S.E.2d 323, 324-25 (Ga. 2005) (prospective juror in homicide case who had been victim of armed robbery, despite expression of reservations, did not have a fixed and definite opinion that could not set aside).

Appellant next claims that prospective juror Scott was "consulting" with Chris Chiles and the Cabell County Prosecuting Attorney's Office about the case. There is no factual basis for this claim. The record does not demonstrate an ongoing relationship between Mr. Chiles and Mr. Scott. In fact, their meeting was by chance. According to the record, they had met once before, six months after the juror's son's murder. (Tr. 29.) During *voir dire* Mr. Scott told the court that he had not pressed the issue before running into Mr. Chiles. (Tr. 25.) During this brief meeting, they discussed

the juror's son's murder investigation. Juror Scott testified that he provided the name of a suspect to Mr. Chiles. (Tr. 27.) Mr. Chiles called the investigating officers and provided them with the name. One officer told him they already had the name. Later that day Mr. Chiles called the juror's home and left a number on the machine which the juror could use to contact the investigating officers. (Tr. 28.)

Appellant next infers bias from something juror Scott had yet to do. When asked if he was satisfied with the prosecutor had handled his case, he claimed that he planned to speak with the investigating officer that day. (Tr. 26.) If he had the time, he was going to "run over there today." (Tr. 26.) Even if this meeting were improper, which it was not, it had not happened at the time the juror was questioned. Indeed, there is no evidence that the meeting ever took place.

There is no evidence that juror Scott was anything other than a concerned parent who had obtained a piece of information he wanted to communicate to the prosecutor. Appellant's contention that he was "actively working with (and beholden to) the Cabell County Prosecuting Attorney" lacks foundation. Mr. Chiles took the name Mr. Scott gave to him and ran it past the investigating officer. When the officer told him he already knew about the suspect, Mr. Chiles communicated that information by phone message to Mr. Scott. The next day, Mr. Scott told the judge that he was going to follow up with the investigating officer when he had a chance.

Apart from one meeting over three years ago, and a brief meeting the day before *voir dire*, there is no evidence that Mr. Scott played any role in his son's murder investigation or the case at bar. The State had the name of a suspect, but had yet to make an arrest. Mr. Scott was not "beholden" to them; it is not rational to believe that the State would refuse to investigate, or make an arrest, in his son's murder case unless Mr. Scott voted to convict the Appellant.

Additionally, the Appellant is attempting to argue a point of law not raised at trial. The only objection interposed by the defense to Mr. Scott questioned his ability to remain neutral given the nature of the case at bar, and its similarity to his son's case. (Tr. 30.) Objections are limited to the grounds asserted at trial and may not serve as a jumping off point on appeal. *State v. Mongold*, 220 W. Va. 259, 272 n.16, 647 S.E.2d 539, 552 n.16 (2007).

**C. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUSTAIN A MURDER CONVICTION.**

**1. The Standard of Review.**

In *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), this Court adopted the federal standard of review for sufficiency of the evidence as set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979): a verdict of guilty will not be set aside due to insufficiency of the evidence if, reviewing the evidence in the light most favorable to the prosecution, the appellate court finds that "any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." 194 W. Va. at 667, 461 S.E.2d at 173 (quoting *Jackson*). The Court made it clear that the burden is on a defendant to overturn the presumption of correctness in a jury's verdict, and that the State is entitled to all inferences in favor of that verdict.<sup>14</sup> The Appellant has not met that burden.

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<sup>14</sup> "[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."

*Guthrie*, 194 W. Va. at 659, 461 S.E.2d at 175.

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. Syl. pt. 4, *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978).

It is particularly within the province of the jury to weigh the evidence upon the question of self-defense, and the verdict of a jury adverse to that defense will not be set aside unless it is manifestly against the weight of the evidence. Syl. pt. 5, *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927); Syl. pt. 2, *State v. Whittaker*, 221 W. Va. 117, 650 S.E.2d 216 (2007) (*per curiam*) quoting *McMillion*.

2. **A Reasonable Juror Could Have Found That the Appellant Was Not Acting in Self-defense When She Shot Her Husband.**

Almost a century ago this Court held:

Under his plea of self-defense, the burden of showing the imminency of the danger rests upon the defendant. No apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time the defendant fired the fatal shot.

*State v. McMillion*, 104 W. Va. 1, 138 S.E. 732, 733 (1927); *see also* R. at 145.

“When the defendant challenges the sufficiency of the evidence in such a case, the question becomes whether, viewing the evidence in a light most favorable to the prosecution, *any rational trier of fact* could have found beyond a reasonable doubt that the homicide was not committed in self defense.” *State v. Matthews*, 464 So.2d 298, 299 (La. 2003) (emphasis added).

It is the Appellant’s position that the State failed to adduce any evidence rebutting her claim of self-defense. Appellant’s position is untenable. The record proves that the Appellant, albeit after an evening of physical and sexual abuse, shot her unarmed husband while he was lying on his couch.

Both blood spatter expert David Castle, and State Pathologist Hamada Mahmoud testified that the shotgun shell traveled from right to left, with a downward trajectory. (Tr. 587, 684, 685.) Stippling was found around the entrance wound of the right temple suggesting the Appellant was standing one to five feet away from her husband when she shot him.<sup>15</sup> (Tr. 581-82.) The medical examiner removed 25 shotgun pellets and a part of the shell's wadding from the victim's brain also indicating that the shot came from close range. (Tr. 588-89.) Officer Castle found both high and low velocity blood spatter indicating that the victim was on his back when he was shot. (Tr. 683-84, 686, 689-90.) Blood pooling present on the carpet beneath the victim, and the pillow under his head also indicated that he was lying flat on his back, and remained stationary after he was shot. (Tr. 687.) Although the investigating officers found the shotgun on the floor next to the victim, blood pools suggested that the gun was moved sometime after the victim was shot. (Tr. 687-88.)

The Appellant claimed that she and her husband began arguing at approximately 11:00 the previous evening when she asked Mr. Harden to go to bed.<sup>16</sup> (Tr. 877, 878.) Kaycee Beckett later told Detective McCallister that their arguing was loud enough to keep her up. (Tr. 181.) As the victim retrieved his shotgun from the back of the trailer, he told the Appellant that he was going to kill her. (Tr. 878-79.) Upon his return he began beating the Appellant's face and chest with the gun. (Tr. at 880.) Appellant claimed the abuse, and the threats on her life went on for hours.<sup>17</sup> (Tr.

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<sup>15</sup>A fact the Appellant stipulated to. (Tr. 583, 585.)

<sup>16</sup>Appellant's daughter testified that the family had been out all day, and had returned home at about 8:00 p.m. (Tr. 203.)

<sup>17</sup>At one point the victim left the room to get more beer. While he was out of the room the Appellant's son sat on the Appellant's lap, put his arms around her and asked what was going on. The Appellant told him to get back to bed. (Tr. 880.)

881.) At some point during the evening, the victim also sexually assaulted the Appellant. (Tr. 884.) Although she later claimed that the victim put the barrel of the gun against his own son's head neither she nor her son mentioned this to the investigating officers the night of the incident. (Tr. 881, 894.) When asked how she felt when the victim threatened her son with the gun she replied, "I knew that none of us was going to walk out of the house." (Tr. 882, 887.)

Appellant's described her version of the events just before the shooting:

Q: Tell me what led up to the shooting?

A: First he was hitting me, and he kept telling me do it. He told me to shoot him, and he told me repeatedly to do it, do it, do it. And he hit me again.

Q: What did he hit you with?

A: His fist.

Q: What happened next?

A: (Crying). He kept telling me to shoot him. He told me over and over and over that if I didn't do it he was going to kill me. (Crying). He said he was going to kill me and the kids and then himself.

Q: Did you believe him?

A: Yes.

Q: Did you do anything after he did that?

A: (Crying). Yes.

Q: What did you do, Tanya?

A: (Crying loudly). I shot him.

Q: Why did you shoot him?

A: I was in fear for my life and my children's and the other little girl.

Q: Did you have a choice?

A: No.

Q: Why didn't you believe you had a choice?

A: (Crying loudly). Because he said if I didn't do it he was going to kill me and the three kids.

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(Tr. 889-90.)

Appellant's testimony was vague, and inconsistent with the physical evidence. The shot entered the victim's head from his right temple. If he was punching the Appellant immediately before she shot him, the Appellant would have to have been facing him. Appellant testified that the victim was in a position to punch her just before the shooting. The physical evidence proved that the victim was lying down when he was shot. The Appellant testified that she was facing the victim when she shot him. The physical evidence proved that she was standing behind the victim.

Appellant's son testified that he saw the Appellant and the victim sitting at the kitchen table, talking quietly to each other before the shooting. He also saw the victim unload the shotgun. After observing this he went back to sleep. The next sound he heard was the shotgun.

As Justice Maynard stated in his concurring opinion in *State v. Whittaker*, 211 W. Va. 117, 650 S.E.2d 216 (2007):

The record in this case shows that Ms. Whittaker shot and killed an unarmed man. After she killed him, she went to another room and retrieved a shotgun. She then placed the shotgun in the dead man's hands and put the finger on the trigger. Next, the appellant called the police and repeatedly lied about what happened. She lied when she told the police that Mr. Mills had the shotgun in his hands and was threatening to kill her *when she shot him*. She told this false story in two separate recorded statements. Only after further questioning did the appellant finally admit

that she had lied and that Mr. Mills was actually unarmed at the time she shot him. At trial, the appellant curiously claimed *for the first time* that Mr. Mills had mistreated their child immediately before she killed him, *a story she never told in any of her many prior statements.*

*Whittaker*, 211 W. Va. at 138, 650 S.E.2d at 237 (Maynard, J., concurring) (emphasis added).

In the case at bar, the Appellant's own testimony showed that she had been beaten, sexually assaulted, and verbally abused by the victim before shooting him. The victim had, in effect, dared her to shoot him; thus, suggesting a period of deliberation. The Appellant knew the gun was loaded when she pulled the trigger. The forensic evidence proved that the victim was lying on the sofa, in his customary sleeping position when she shot him from behind at a distance of one to five feet.

Although the victim's conduct towards the Appellant was inexcusable, the evidence viewed in a light most favorable to the State suggests that the victim was sleeping when the Appellant shot him. Unlike the defendant in *Whittaker*, the Appellant's judgment was not clouded by years of living with a physically or emotionally abusive spouse. The victim hadn't violated an outstanding domestic violence protective order, he had never forced the victim out of the marital home into a battered woman's shelter or the home of a relative. The Appellant testified that the victim's behavior that evening was aberrant.

Like the defendant in *Whittaker*, the Appellant lied to the victim's father and the police, telling them both that he had committed suicide. At trial she claimed for the first time, that her husband had threatened her children's lives; something she left out of her contemporaneous statements to the police.<sup>18</sup>

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<sup>18</sup>Appellant's credibility on this issue is further compromised by her failure to request a jury instruction on defense of others.

A reasonable juror, dispassionately reviewing the evidence adduced at trial, could very well find that the Appellant did not fear for her life before she pulled the trigger. See *Whittaker*, 221 W. Va. at 127, 650 S.E.2d at 226:

Although the events leading up to Mr. Mills' death could suggest that Ms. Whittaker was acting in self-defense. . . , the evidence presented a question as to whether she apprehended danger at the time she shot Mr. Mills insofar as she admitted that Mr. Mills did not have a gun in his hand at that moment and that she later placed one in his hand to bolster her self-defense claim. The evidence presented by the State could be construed as indicating a premeditated intent to kill Mr. Mills as a sudden intentional killing with a deadly weapon by one who is not in any way at fault in immediate resentment of gross provocation.

**D. THE TRIAL COURT'S DECISION TO ADMIT TESTIMONY REGARDING THE VICTIM'S ORDINARY SLEEPING POSITION WAS NOT AN ABUSE OF DISCRETION.**

**1. The Standard of Review.**

The action of a trial court in admitting or excluding evidence will not be disturbed on appeal absent a showing of a manifest abuse of discretion. Syl. pt. 1, *State v. Calloway*, 207 W. Va. 43, 528 S.E.2d 490 (1999). Before the admission of habit evidence under West Virginia Rule of Evidence 406, the court must conduct a balancing test to determine whether the probative value is substantially outweighed by the danger of unfair prejudice. *Rodgers v. Rodgers*, 184 W. Va. 82, 399 S.E.2d 664 (1990).

**2. Any Objections Interposed by the Defense Went to the Weight, and Not the Admissibility of the Evidence.**

Appellant next claims that the trial court erred by allowing the victim's father to describe his son's ordinary sleeping position. Appellant claims that the evidence was too remote, and not sufficiently probative to allow its admission. The State alleged that the victim was asleep when the victim shot him, thus negating her defense of self-defense. The father's testimony supported the

State's theory. The court denied the defense's *Motion In Limine* and admitted the evidence as evidence of habit under Rule 406.

During an *in camera* hearing Mr. Harden, Sr. testified that he was the victim's father, that his son had left home when he was 23, and had been living on his own for the past eleven years. (Tr. 280-81.) Most of the time the victim, according to his father, slept flat on his back with one arm up on his forehead. On some occasions he slept on his side. (Tr. 280).

The defense objected to the admission of this evidence, claiming it was "pure speculation" since Mr. Harden was not present when the victim was shot. The court overruled the objection finding the evidence admissible habit evidence. It ruled that Appellant's objections went to the weight of the evidence and not its admissibility. (Tr. 282-83.)

Habit evidence refers to "the type of nonvolitional activity that occurs with invariable regularity. It is the nonvolitional basis of the activity that makes it probative." *Weil v. Seltzer*, 873 F.2d 1453, 1460 (C.A.D.C. 1989). It is proven by repeated instances of similar, nonvolitional responses to similar situations. *See People v. Memro*, 700 P.2d 446, 462 n.22 (Cal. 1985).

Cleckley, in his *Handbook on West Virginia Evidence*, suggested a five-pronged criteria for differentiating habit from character evidence:

- (1) How often has the individual been observed performing the same conduct?
- (2) How similar is the past conduct with the conduct sought to be proved?
- (3) How unique is the conduct?
- (4) How uniformly or consistently has the conduct been performed?
- and (5) Does the conduct appear to be virtually automatic rather than discretionary in nature?

1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Trial Lawyers* § 4-6(A) (3d ed. 1994).

The Appellant's father testified that he had lived with his son for 23 years. (Tr. 281.) The victim's body was found prone, with his left hand and forearm resting on the left side of his face; the very same position his father described as his normal sleeping position. (Tr. 280, 292.) The defense was free to cross-examine the victim's father about the remoteness of the evidence: they chose not to. (Tr. 299.)

The trial court's decision to admit the evidence was well within the bounds of its discretion. Although he objected to the remoteness of the evidence during the *in camera* hearing, the Appellant failed to raise the remoteness issue during cross-examination of the victim before the jury. Thus, even if this Court were to find the lower court's decision erroneous, the Appellant waived this assignment of error.

**E. OSAKALUMI DOES NOT APPLY TO THE FACTS OF THE CASE AT BAR.**

**1. The Standard of Review.**

The refusal of a trial court to give an instruction is reviewed for abuse of discretion. Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). A trial court is under no obligation to give instructions that are incorrect as a matter of law. Syl. pt. 4, *State v. Guthrie, supra*. Nor is it required to give instructions that are duplicative or irrelevant. *State v. Boggess*, 204 W. Va. 267, 273, 512 S.E.2d 189, 195 (1998).

**2. The Appellant Failed to Establish Duty or Breach under *Osakalumi*.**

Appellant next claims that the trial court's instruction relating to evidence never gathered by the police, and subsequently destroyed by its owners, was incorrect as a matter of law. The court gave the following instruction:

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 exculpated 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.

*State v. Osakalumi*, 194 W. Va. 758, 768, 461 S.E.2d 504, 514 (1995)

The court deleted the following paragraph from the Appellant's proposed instruction:

The Court further instructs the jury that if you believe that the State allowed to be destroyed any evidence whose content or quality are in issue, you may infer that the true facts are against the State's interest. As a result, the uncertainty as to what the evidence might have proved is turned to the defendant's advantage.

*Id.*

The case at bar may be distinguished from *Osakalumi*. In *Osakalumi* the State took the evidence into custody, and destroyed it. In the case at bar, the State, after photographing the couch numerous times, and turning those photographs to the defense, left the couch with its original owners. The owners then destroyed it. See *Holdren v. Legursky*, 16 F.3d 57 (4th Cir. 1994) (negligent failure to gather evidence not due process violation in federal court.); *Johnson v. Pittman*, 731 F.2d 1231, 1233-34 (5th Cir. 1984) (police have no constitutional obligation to pursue every possible avenue of investigation under *Brady*).

There is no evidence that the State had a duty to preserve evidence photographed numerous times. Clearly, failure to gather this evidence was not done in bad faith. Had this been the case, the

officers would not have photographed it. Nor can it be said that the failure was negligent. *See* Syl. pt. 2, *State v. Osakalumi* (factors to be considered under state constitution are: (1) whether the requested material if in the possession of the state would have been discoverable; (2) duty to preserve evidence, and (3) breach).

In the case at bar, the experts used by the State testified from the photographs taken at the scene. They did not base their conclusions on evidence and then destroy it. *See Osakalumi*, 194 W. Va. at 767, 461 S.E.2d at 513 (The police not only destroyed the couch, they failed to take any measurements of it or of the bullet hole in relation thereto. The police further failed to *properly photograph* it.).

The Appellant has not set forth sufficient facts by which this Court could infer a duty, beyond the extensive photographs taken by the officers at the scene, to preserve the evidence in question. Even if there were a duty, the consequences of the breach were minimal. The defense had the same evidence the State had.

**F. BY FAILING TO INTERPOSE A CONTEMPORANEOUS OBJECTION, APPELLANT WAIVED THIS ISSUE.**

**1. The Standard of Review.**

“Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury.” Syl. pt. 2, *State v. Kennedy*, 162 W. Va. 244, 249 S.E.2d 188 (1978).

2. **Defense Counsel Did Not Object to the Trial Court's Admonition.**

Appellant next contends that the trial court inappropriately ordered counsel for the defense to refrain from further objections during counsel for the State's summation. The record demonstrates that defense counsel objected five times during the State's closing arguments--three times during their opening argument, and twice during rebuttal. (Tr. 992-93, 1001-02, 1011, 1012.) A clearly exasperated trial court overruled defense counsel's final objection, and instructed them not to interrupt counsel's summation again. (Tr. 1012.) Defense counsel did not object to the trial court's instruction. The State's closing argument went on for another two and one-half pages of transcript. (Tr. 1013-15.)

The Appellant does not claim that counsel for the State engaged in any further objectionable argument. She does not argue that the prosecutor's comments constitute plain error. Thus, even if this Court were to find the trial court's comments improper, there is no evidence suggesting prejudice. Moreover, counsel's failure to object to the trial court's comments waived any objections they may have on appeal.

IV.

CONCLUSION

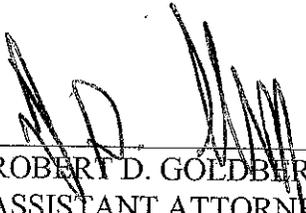
For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Appellee,*

By counsel

DARRELL V. McGRAW, JR.  
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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 18<sup>th</sup> day of December, 2008, addressed as follows:

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