

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

No. 34268

STATE OF WEST VIRGINIA,

Appellee/ Respondent,

VS.

Underlying Proceeding Below

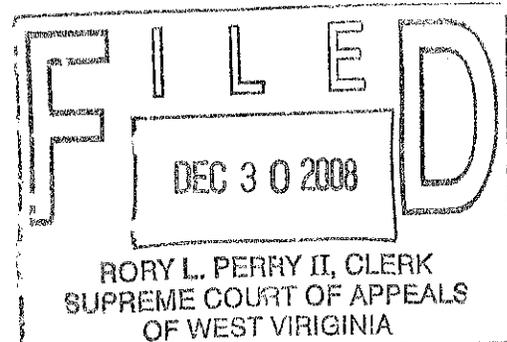
Case No. 05-F-044

Cabell County Circuit Court

(Alfred E. Ferguson, Judge)

TANYA D. HARDEN,

Appellant/ Petitioner.



**REPLY BRIEF ON BEHALF
OF APPELLANT/PETITIONER
TANYA D. HARDEN**

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TABLE OF AUTHORITIES

Rodgers v. Rodgers, 184 W. Va. 82, 399 S.E. 2d 664 (1990) 5

State v. Derr, 192 W. Va. 165, 451 S.E. 2d 731 (1994) 4

State v. Hinkle, 200 W. Va. 280, 489 S.E. 2d 257 (1996) 7

State v. Mongold, 220 W. Va. 259, 647 S.E. 2d 539 (2007) 3

State v. Osakalumi, 194 W. Va. 758, 461 S.E. 2d 504 (1995) 7

State v. Paynter, 206 W. Va. 521, 526 S.E. 2d 43 (1999). 8

State v. Shingleton, ___ W. Va. ___, ___ S.E. 2d ___ (11/19/08). 7

PREFATORY STATEMENT

In this Reply Brief, the Appellant will not burden the Court with a laborious refutation of each and every disputed issue. The Briefs previously filed herein appear to adequately address the key points of contention.

However, the Appellant would point out the following issues wherein some clarification is deemed necessary.

ARGUMENT

GRUESOME PHOTOGRAPHS

The Appellee does not appear to be contesting the gruesome nature of the referenced photographs. Thus, the only issue for the Court is the question of whether the trial court abused its discretion by permitting the admission and duplicative use of the photos.

Contrary to the Appellee's assertion, the Appellant is not asking for a *per se* "head wound" rule. Such photos may be necessary in cases where there is serious dispute as to particular facts of consequence regarding the cause of death. (See *State v. Mongold*, 220 W. Va. 259, 647 S.E. 2d 539 (2007)). However, it is abundantly clear that such a dispute is not present in this case. Further, this Honorable Court's previous rulings demonstrate a particular sensitivity and recognition of the especially graphic nature of photographs depicting head wounds.

The Appellee also notes that defense counsel used the photographs during their cross-examination of Sgt. Dave Castle. Any use of or reference to these photographs by the Appellant's counsel came only after a vigorous attempt to prohibit their admission. Once admitted and made a part of a gruesome multimedia slide-show, defense counsel cannot be expected to completely ignore relevant cross-examination issues featured in the photos.

The photographs were more prejudicial than probative, and as such violate *State v. Derr*, 192 W. Va. 165, 451 S.E. 2d 731 (1994) and its progeny.

FAILURE TO REMOVE PROSPECTIVE JUROR SCOTT

The Appellee attributes Juror Scott's statement that he planned to "run over there today" to a potential meeting between Juror Scott and the officer conducting the investigation into his son's murder. However, the record shows that this contemplated meeting was not with the officer, but with the prosecuting attorney:

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?

THE COURT: Mr. Chiles, yes, he just walked into the room. (Tr. Transcript, 26).¹

These statements indicate an unmistakable desire on the part of a prospective juror to meet with and discuss his son's unsolved murder with the prosecuting attorney. Refusing to dismiss Scott for cause presents a situation that evidences a clear appearance of impropriety and is overtly improper.

ADMISSION OF HABIT EVIDENCE OF DECEDENT'S SLEEPING POSITION

The Appellee correctly states that the trial court must conduct a balancing test to determine whether the probative value of potential habit evidence is outweighed by its prejudicial effect. (*Rodgers v. Rodgers*, 184 W. Va. 82, 399 S.E. 2d 664 (1990)).

It is clear from the record, however, that the trial court did not apply the proper balancing test to the proffered evidence. After hearing the testimony of the decedent's father during an *in-camera* hearing, the trial court stated:

THE COURT: Okay. Is that all you wanted to ask him?

(Assistant Prosecuting Attorney): Yes.

THE COURT: Okay. I think that's a question for the jury. I will let him testify to that.

(Defense Counsel): Your Honor, I want to note my objection to the ruling because he has clearly informed the Court that he would sleep on his side sometimes.

¹ Scott's statement, "I was going to speak today but I didn't get a chance to," made while both he and the prosecutor were in the courtroom, further shows that the prosecutor was the subject of his statement.

THE COURT: I know.

(Defense Counsel): He hasn't been home in eleven years to sleep.

THE COURT: That's why I'm saying this is a question for the jury.

(Defense Counsel): That's just speculation.

THE COURT: I know I have a position I sleep on. Sometimes I will sleep on my back, but most of the time I sleep on my side. That's something for the jury to consider. (Tr. Transcript, 282-283).

The trial court's statements clearly indicate that the issue of the disputed testimony was evaluated solely as a matter of weight to be accorded to the evidence and not as a matter of its admissibility. The record shows no reference by the court as to any potential prejudice from this evidence, so it must be assumed that the court made none.

It is also clear that the Appellant has adequately preserved this issue for appeal. The Appellant filed a pretrial Motion in Limine to prohibit the State from submitting evidence regarding the decedent's "alleged sleeping habits" (Trial Record, # 0070); received an in-camera hearing on the Motion (Tr. Transcript 279-283); objected to the trial court's ruling permitting the testimony; and asserted the alleged error in both her Motion for New Trial and her Notice of Intent to Appeal (assigned as "Error #2" in each). Under these circumstances, it is difficult to see how "rais[ing] the remoteness issue during cross examination of the [decedent]" could have more fully preserved this issue.

THE OSAKALUMI ISSUE

The Appellee's Brief indicates that the proper standard of review for this issue is the abuse of discretion standard enunciated in Syllabus Point 1 of *State v. Hinkle*, 200 W. Va. 280, 489 S.E. 2d 257 (1996). However, the application of this standard of review to this issue would be erroneous.

After hearing argument regarding various items from the crime scene which were not photographed or otherwise preserved, the trial court properly determined that a "missing evidence" instruction was necessary. This decision was not contested by the prosecution.

Accordingly, the relevant issue here is not whether jury *should* have been instructed, but whether the jury was *properly* instructed. Recently, the Honorable Court cited *Hinkle* and quoted syllabus point 1 in its entirety:

"As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. *By contrast, the question of whether a jury was properly instructed is a question of law, and is reviewed de novo.*" [emphasis added].

State v. Shingleton, ___ W. Va. ___, ___ S.E. 2d ___ (November 19, 2008).

A *de novo* review of the instruction provided by the trial court clearly shows that the trial court removed the crucial "inference" provision, effectively overruling *State v. Osakalumi*, 194 W. Va. 758, 461 S.E. 2d 504 (1995) and *State v. Paynter*, 206 W. Va. 521, 526 S.E. 2d 43 (1999). As such, the jury was improperly instructed.

Having decided to give the “missing evidence” instruction, the trial court apparently believed that it was necessary for the defendant to prove that the missing evidence would have been in favor of the Appellant:

THE COURT: But you are inferring from that paragraph that it was probably evidence in favor of the defendant. And that’s –

~~(Defense Counsel): Well, that’s what has to be inferred. According to the case law –~~

THE COURT: I don’t –

(Defense Counsel): -- *State v. Osakalumi* clearly indicates that that would be the permissible inference to be made. And so that is why I drafted this based upon that case and based upon the language found in that case the jury is to decide it –

THE COURT: All right.

(Defense Counsel): I would object to the Court’s ruling to delete that –

THE COURT: All right. (Tr. Transcript, 969).

TRIAL COURT’S ADMONITION TO REFRAIN FROM OBJECTING

The Appellee notes that the trial court must have been “clearly exasperated” at the point that defense counsel was ordered to refrain from further objection. Whether the trial judge was exasperated, frustrated, angry or bored does not alter the fact that defense counsel has a legal obligation to object on behalf of his or her client, at all stages of the trial, and the trial court has an equally sacrosanct duty to rule upon these objections.

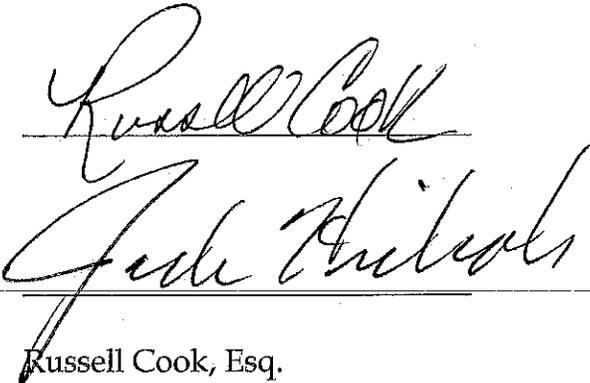
Of the objections made by defense counsel during closing argument and noted by the Appellee, the first resulted in an admonishment by the trial court to the prosecutor to refrain from giving her personal opinion to the jury (Tr. Transcript, 992-993). Each of the remaining objections by counsel received a cautionary warning from the trial court that objections were unwelcome during closing argument (“this is closing argument” [Tr. Transcript, 1002]; “this is just argument. She is -this is argument” [Tr. Transcript, 1002]; “this is final argument” [Tr. Transcript, 1011]; “this is argument to the jury. Don’t interrupt the counsel.” [Tr. Transcript, 1012]).

Ironically, the Appellee cites defense counsel’s failure to object as a waiver of this issue. This presents counsel in a unique and somewhat dizzying position – having been expressly directed, in the presence of the jury, to refrain from further objections, should counsel have made yet another objection?

**CONCLUSION AND
PRAYER FOR RELIEF**

For the reasons cited in her Brief, the Appellant would pray that the Honorable Court reverse the Appellant’s first degree murder conviction.

TANYA D. HARDEN,
By Counsel

Handwritten signatures of Russell Cook and J. L. Hickok, each written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Russell S. Cook, do hereby certify that I have served this **REPLY BRIEF**
ON BEHALF OF APPELLANT/PETITIONER, TANYA D. HARDEN, on the
30th day of DECEMBER, 2008, by first-class United States mail, postage
prepaid, to the following persons:

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