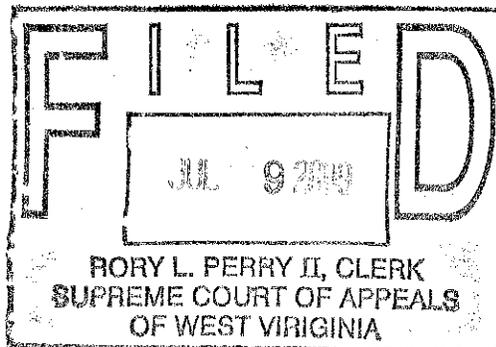


IN THE SUPREME COURT OF APPEALS

OF  
WEST VIRGINIA



STATE OF WEST VIRGINIA,  
Appellee

VS.

W.Va. Supreme Court of Appeals No. 34709  
Raleigh County Circuit Court No. 07-F-68-K

MICHAEL MARTIN,  
Appellant

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA,  
IN RESPONSE TO APPELLANT'S BRIEF

Kristen Keller  
Raleigh County Prosecuting Attorney  
Counsel for Appellee  
112 N. Heber Street  
Beckley, West Virginia 25801  
PH: 304-255-9148  
W.Va. State Bar # 1992

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## STATEMENT OF FACTS AND PROCEEDINGS BELOW

On August 29, 2006 Beckley Police Department narcotics officer Cpl. Charles E. "Chuck" Smith, III, aged twenty-nine years, died as a result of multiple gunshot wounds while attempting to conduct an undercover narcotics operation.<sup>1</sup> Thomas Leftwich (hereinafter "Leftwich") has been convicted as the direct perpetrator of this first degree murder by use of a firearm without mercy and of conspiring with the Appellant, Michael Martin, (hereinafter "Martin") to commit the murder of Cpl. Smith. On December 7, 2007, Martin, the aider and abettor, was convicted of first degree murder without mercy, and of conspiring with Leftwich to commit the murder of Cpl. Smith. On January 18, 2008, Raleigh County Circuit Court Judge H.L. Kirkpatrick, III sentenced Martin to life imprisonment without eligibility for parole and to a consecutive sentence of one-to-five years in the penitentiary for conspiracy. (T.Vol. 7 at 11-15; 1/18/08 Sentencing Hearing).

Appellant's Statement of Facts (at 7-12) purports to describe the salient facts of this case but until the last paragraph of page 12 never discusses the killing of Cpl. Smith. Appellant's Statement of Facts ignores the most important facts of the case -- such as, for example, that Martin confessed to first degree murder. (State's Exh. 30; T.Vol. 5 at 33-50). Another example of evidence ignored by Appellant's Brief is the statement of Leftwich's brother, Paul Leftwich, who although entirely hostile to the State conceded that he'd heard Martin and Leftwich arguing about robbery immediately after the murder. (State's Exh. 26; T.Vol. 4 at 190-216).

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<sup>1</sup> Trial Transcripts are cited as "T" with the volume number. As the record is not in chronological order, hearings, motions and orders are identified by the hearing date or the date of filing or entry. Martin's tape-recorded confession, introduced at trial as State's Exh. 29, was transcribed and marked as State's Exh. 30. It is in the record, along with some of the State's other exhibits, following the transcript of the 1/18/08 Sentencing Hearing. Martin's confession will be cited as "State's Exh. 30."

Appellant's Statement of Facts distorts the record in multiple respects, including in the very first sentence, by asserting that Cpl. Smith's murder "began with . . . bar-hopping by two off-duty Beckley officers." The trial testimony was that as a narcotics officer Cpl. Smith was "always on duty." (T.Vol. 3 at 117; Vol. 4 at 98, 117-118). More importantly, the trial court had ruled that the purported "facts " recited in Appellant's Statement of Facts were admissible only insofar as the defense claimed that such facts would be connected to the defense of entrapment. Further, the trial court ruled that evidence of Cpl. Smith's postmortem B.A.C. of .07 was admissible only because "counsel for the defendant asserts that evidence of intoxication herein is crucial to establishing the chain of events up to the *alleged inducement of the offense.*" (11/30/07 Pre-Trial Order). (Italics added). Defense counsel at trial never did make a connection between such conduct evidence and an entrapment defense. And although Appellant's Statement of Facts focuses almost entirely on conduct evidence that was ruled admissible only as it related to entrapment, Appellant's Brief makes utterly no such connection.

So as these purported "facts" have nothing to do with Martin's conspiracy with Leftwich and his aiding and abetting Cpl. Smith's murder, there is no need for a response except as to a couple of egregious misstatements.

For example, Appellant's Brief (at 7), noting that Cpl. Smith had not planned any undercover work with Cpl. Reynolds on the night of the murder, overlooks the testimony of Cpl. Smith's supervisor, Sgt. Montgomery, confirming that Cpl. Smith and Sgt. Montgomery had engaged in just such a discussion on the night of the murder. (T.Vol.4 at 91, 105). And Appellant's Brief (at 7) points out that "Reynolds was not a narcotics officer" at the time of the murder, but omits the fact that Cpl. Reynolds at that time was the K-9 officer who regularly assisted Cpl. Smith and other narcotics officers in drug investigations, including undercover operations. (T.Vol. 3 at 107-121).

Appellant's Brief (at 8) erroneously claims that the "trial judge precluded defense counsel from questioning Mr. Gonzales" about her prior employment with the Beckley Police Department.<sup>2</sup> Appellant's Brief (at 11) erroneously claims that "(d)efense counsel made an offer of proof that Reynolds urinated . . . but the trial judge refused to permit counsel to ask any questions about this."

Defense counsel never was "precluded" from inquiring about Ms. Gonzales' prior employment, and in fact did cross-examine State's witnesses about it without limitation. (T.Vol. 3 at 181-182; Vol.4 at 35-36, 138). All that the trial court "precluded" was defense counsel's entirely unfounded and immaterial proposed questions about Ms. Gonzales' "relationship (with) Officer Smith, how he might have used her . . . if she was along in the vehicle to help induce people to cooperate in drug deals, or something to that effect." (T.Vol. 4 at 173). Defense counsel then stated, in what falls far short of the "offer of proof," claimed in Appellant's Brief, that "our client has indicated -- or we have information . . . that Will Reynolds urinated on Freda Lawson's door and -- when he was acting out." When the trial court asked how, as Martin did not claim to have been induced by Ms. Gonzales or by alleged urination, such questions would "interplay" with the claim of entrapment, defense counsel responded only that these areas of inquiry were "concerns for (the) client." (T.Vol. 4 at 173-175).

The trial court correctly ruled that "it has absolutely nothing to do with the defense of entrapment," so defense counsel tried one last attack:

MR. LORENSEN: Well, I have to say that our client wishes us to ask this witness if she ever smoked crack cocaine with the victim. And I hesitate to state that, but I feel like I need to state what our client's concerns are.

THE COURT: Well, and I understand that he has asked you to do these things. But as an attorney and as the judge presiding over this case, we know that it has

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<sup>2</sup> Ms. Gonzales is identified as Ms. Curran in the record, because she had married prior to trial. This brief will be consistent with Appellant's Brief, and will refer to her by her maiden name, Ms. Gonzales.

to be relevant and has to relate to the defense raised, and I don't see how that does.

(T.Vol. 4 at 176-177).

It is axiomatic that when defense counsel at trial or appellate counsel after conviction focuses almost exclusively on alleged imperfections of the murder victim, which imperfections constitute no justification, excuse or provocation for the murder, the purpose is to diminish the deceased in the eyes of the jury or the appellate court.<sup>3</sup>

The trial judge, after considering all of the evidence, found:

(N)arcotics officers cannot appear as choir boys. They cannot appear as suits and as professional people. They must blend in with the element that they are working with. They must exhibit an attitude and an appearance to facilitate their work.

And the Court believes in the instance at hand, that's what Officer Smith was doing. He did nothing to discredit the Police Department. In retrospect, as I say, perhaps things would have been done differently if they weren't rushed up and if things didn't happen so quickly. The Court observes that the outcome was indeed a tragedy.

\* \* \*

In other words . . . the Court finds expressly that the alleged improper conduct (by Cpl. Smith and Cpl. Reynolds) is not repugnant to this Court's sense of justice at all. It appears that the officer was acting as best he could, as best as he could determine, and within the latitude allowed for narcotics officers. (T.Vol. 6 at 40-42).

Finally, Appellant's Statement of Facts (at 9) contends that "the stories told by Will Reynolds and Jasminda Gonzales (were) radically different." Appellant's Brief details differences in their recollections of events in which, according to Appellant's Brief, "Martin played no part," and which, accordingly, had nothing to do with Martin's participation in Cpl. Smith's murder. The attack upon the credibility of Cpl. Reynolds and Ms. Gonzales is of no moment in this appeal, because:

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<sup>3</sup> In plea negotiations, during which Martin was offered a plea to first degree murder with mercy, defense counsel cautioned the State that Cpl. Smith's family would be "embarrassed" by evidence adduced by the defense at trial.

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.*

*State v. Guthrie*, 461 S.E. 2d 163, Syl. Pt. 3 (W.Va. 1995)  
(Italics added).

The facts of this case demonstrate that on August 29, 2006 Cpl. Smith succeeded in targeting two local criminals who had evaded law enforcement's and parole authorities' radar. Sgt. Montgomery testified that on the night of August 28, 2006 Cpl. Smith received a call "reference to a drug investigation" and that Cpl. Smith and Sgt. Montgomery discussed "a suspect who was going to a local restaurant here in Beckley." (T.Vol. 4 at 91, 105). A few hours later, Cpl. Smith was at Pikeview Lounge in Beckley with Cpl. Will Reynolds and Ms. Gonzales. While at Pikeview Lounge Cpl. Smith advised Cpl. Reynolds that a man at the lounge -- Timothy Blackburn -- claimed that he "was going to purchase some drugs from Jelly Bread," a criminal well known to narcotics officers. (T.Vol. 3 at 127-129; Vol. 4 at 143). Cpl. Smith in his Jeep followed Blackburn as Blackburn drove to an apartment complex in which a woman named Alfreda Lawson lived. Cpl. Smith and Cpl. Reynolds, acting undercover, initially were told by Ms. Lawson that she would "hook up" Cpl. Smith with drugs. Ms. Lawson led Cpl. Smith to a spot known as "drug alley," around the corner from her residence. (T.Vol. 3 at 130-134). Ms. Lawson gave Cpl. Smith her house keys as a "security deposit." Cpl. Reynolds, then driving the Jeep, with Ms. Gonzales as the passenger, picked up Cpl. Smith. (T.Vol. 3 at 134-136). Thereafter, the officers pulled over a car that they had observed speeding away from "drug alley." (T.Vol. 3 at 136-137).

Raleigh County Emergency Operations Center Assistant Director Agee played for the jury the EOC radio transmission from Cpl. Smith, who had called in a license check on Blackburn's vehicle at Pikeview Lounge, and from Cpl. Reynolds, who later also called in a license check,

reporting that the officers had pulled over the car from "drug alley." (T.Vol. 3 at 84-85, Vol. 4 at 143).

As Cpl. Smith still had Ms. Lawson's keys, he drove back to her residence to return them. Shortly thereafter, Martin "just come(s) up from the sidewalk there in front of the apartment complex." In his later confession, Martin divulged that he heard Ms. Lawson shouting "Ya'll look like police." (State's Exh. 30 at 25; T.Vol. 3 at 132-140). Martin approached Cpl. Smith and Cpl. Reynolds, asking if they were "looking," meaning "looking to purchase drugs." Martin said "he would hook us up. He had a boy, need(ed) to make a phone call." (T.Vol. 3 at 125-126). Martin used Cpl. Smith's cell phone, and phone records introduced into evidence established that Martin's first call to Leftwich was at 4:13 a.m. (T.Vol.4 at 80-82). Martin then got into Cpl. Smith's Jeep and, while repeatedly demanding "the money," directed Cpl. Smith to drive across town to a small parking lot on Willow Lane, next to Leftwich's residence. Cpl. Reynolds was "very familiar" with that location because "of drug trafficking in the area (and) (s)hots fired calls frequently." (T.Vol. 3 at 146-147).

Martin walked to the bottom of a long concrete stairway leading up to Leftwich's residence at the top of a hill. Cpl. Reynolds described what Martin did next:

He goes over to the bottom of the steps, looks up the steps towards the house. Waves his arms or something with his hands and comes back and says, I need to use your phone again. And he uses the phone again.

(T.Vol.3 at 148).

Martin's side of the conversation was "(s)ame as before, yes. Yes. Yes," or "just agreeing with" whatever Leftwich was saying on the other end. (T.Vol. 3 at 148-149). This second call was at 4:18 a.m. (T.Vol. 4 at 80-82).

Martin again repeatedly demanded "the money" and Cpl. Smith walked with Martin back to the bottom of the concrete stairway. Martin ordered Cpl. Reynolds to stay behind. Cpl. Reynolds directed Ms. Gonzales to "pick your phone up and dial 911. . . in case something

happens. " Cpl. Reynolds was beginning to radio EOC when he saw Cpl. Smith and Martin, standing off to the side of Cpl. Smith, look up the stairway at someone. Cpl. Reynolds saw Cpl. Smith "reach down into his pocket (and) pull his badge out." Cpl. Reynolds "knew that something had gone wrong," as it was not Cpl. Smith's intention to make an arrest or to disclose his identity as a narcotics officer. (T.Vol. 3 at 150-155). Cpl. Reynolds heard "a quick confrontation of words" right before Cpl. Smith "pulled the badge and then, the shot rings out." Leftwich fired four rounds, but Cpl. Smith never had a chance to return fire. After Cpl. Smith collapsed and Martin and Leftwich fled, Cpl. Reynolds' concern was to get Cpl. Smith "out of the way of the fire," so he managed to move Cpl. Smith to a lower location on Willow Lane and then to move the Jeep so that it blocked Cpl. Smith, who was on the pavement. Cpl. Reynolds explained: "I pulled the Jeep down against us . . . (so) . . . if there was going to be any more fire that I could check him physically without having . . . bullets coming down on me. . . ." (T. Vol. 3 at 155-158). Jurors heard the EOC recordings of Cpl. Reynolds' 4:21 a.m. "officer down" call and the EOC calls from Ms. Gonzales, frantically describing the shooting and begging of Cpl. Smith: "Talk to me . . . talk to me . . . ." (T.Vol. 3 at 86-87).

Although law enforcement officers and ambulances immediately arrived on the scene, there was nothing that could have saved Cpl. Smith, who was transported to the emergency room "without vital signs," having died in Cpl. Reynolds' arms. Cpl. Smith officially was pronounced dead at 4:59 a.m. on August 29, 2006, forty-six minutes after Martin's first call to "hook up" Cpl. Smith with Leftwich. (T.Vol. 3 at 95-98, 102-106, 158-160).

Although Appellant's Brief (at 7-8) details whatever drinks Cpl. Reynolds had consumed earlier in the night, the witnesses who spoke with him at the scene of the murder confirmed that he was not intoxicated. (T.Vol. 4 at 61-62, 72-73, 98-99).

Based upon Cpl. Reynolds' information, Beckley Police Department Sgt. Montgomery went to Ms. Lawson's residence. Ms. Lawson identified Martin as the person who had left with Cpl. Smith and Cpl. Reynolds, and Ms. Lawson showed Sgt. Montgomery where Martin lived. (T.Vol. 4 at 99-101). Also based upon Cpl. Reynolds' information, Raleigh County Sheriff's Office Det. Canaday obtained a search warrant for Leftwich's residence. As officers executed the search warrant, Leftwich led Det. Canaday to a .357 caliber revolver hidden in a crawl space, and the C.I.B. firearms examiner later identified this revolver as the murder weapon. Leftwich "confessed to killing Cpl. Smith." (T.Vol 4 at 62, 65-68, 75, 178-188). Det. Canaday described some of the evidence seized from Leftwich's bedroom:

There were a bunch of weapons; both assault and handguns. There were photographs of Mr. Leftwich and others -- and video of Mr. Leftwich and others shooting, firing. There was . . . an eight-by-ten rendition of a police officer that was found there that had bullet holes in it (and) . . . target markings; you got so many points . . . for a head shot and . . . so many points for a chest shot. There was a white substance there that appeared to be crack cocaine. I don't know that it turned out to be that way." (T.Vol 4 at 79).

After Ms. Lawson disclosed Martin's identity to Sgt. Montgomery, officers found Martin in his home, asleep in bed. (T.Vol. 5 at 31-32). After being advised of his Miranda warnings, Martin gave a recorded confession to first degree murder, claiming that he led Cpl. Smith to Leftwich in order to participate in Leftwich's delivery of cocaine. (State's Exh. 30; T.Vol. 5 at 33-50).

Martin did not testify or offer any evidence at trial, despite the fact that he claimed an entrapment defense. As discussed below, defense counsel did not object to the introduction of evidence of Martin's criminal predisposition, conceding that when a defendant claims entrapment, the prosecution then must "prove beyond a reasonable doubt that the defendant was otherwise predisposed to commit the offense." *State v. Houston*, 475 S.E. 2d 307, 320 (W.Va. 1996). (Citations omitted). Specifically, there was no objection to the introduction of

Martin's parole records or to the testimony of former West Virginia Division of Corrections Parole Officer Stanley Workman, establishing that after Martin's 2005 parole release he continued to consume cocaine and was arrested in October 2005 and again in March 2006 for narcotics-related parole violations. Officer Workman further testified that despite a parole revocation hearing on July 13, 2006, Martin was released on house arrest, to be placed on electronic home monitoring. By August 29, 2006, the electronic monitoring still had not been put into place. (T.Vol. 5 at 89-109).

At the close of the evidence the trial court correctly found that "the defense has to present something more than what has been adduced already in terms of the evidence" in order to claim that Martin was "induced" into leading Cpl. Smith to Leftwich. (T.Vol. 5 at 188). The defense never offered anything more, so Martin was given latitude to claim an entrapment defense to which he was disentitled by law. The trial judge, relying on defense counsel's pre-trial representations and opening statement, correctly prevented any possibility of error that would have been claimed if the defense of entrapment had been disallowed. As Justice Cleckley noted in his concurring opinion in *Houston, supra* at 325, "In most cases, reversible error is committed by the trial court only where it fails to submit the entrapment issue to the jury."

Appellant's Brief must fail because it ignores the fact that Martin confessed to every element of felony murder: "(1) the commission of, or attempt to commit, one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; and (3) the death of the victim as the result of injuries received during the course of such commission or attempt." (State's Exh. 30; T.Vol. 6 at 92). *State v. Wade*, 490 S.E. 2d 724, Syl. Pt. 1 (W.Va. 1997). (Citations omitted).

## **RESPONSE TO ASSIGNMENTS OF ERROR**

**Response to "Point One."** Captain Van Meter was characterized by the defense -- not the State -- as an expert, and the State asked two "historical" questions concerning his investigative assessment of two witnesses: if these two questions were in error, such error was wholly harmless, as (1) the witnesses' statements were substantially identical to Martin's; (2) Captain Van Meter's testimony was entirely "neutralized" on cross-examination; (3) the State never referred to Captain Van Meter's testimony in this regard; (4) the two questions were inadvertent and isolated within a trial characterized by prosecutorial restraint; and, removing those two questions and answers from the trial, the verdict necessarily would have been the same.

**Response to "Point Two."** There was no grand jury "election" to add the surplusage of felony murder to the indictment, and pursuant to W.Va. Code §61-2-1, the indictment was sufficient to permit the jury to consider any "manner or means" of first degree murder, including murder resulting from attempted robbery.

**Response to "Point Three."** Reviewing all the evidence in the light most favorable to the prosecution, and crediting all inferences and credibility assessments in favor of the prosecution, the evidence was more than sufficient for the jury to find that Leftwich murdered Cpl. Smith in a failed robbery attempt for which Martin, pursuant to the concerted action principle, was equally responsible.

**Response to "Point Four."** Reviewing all the evidence in the light most favorable to the prosecution, and crediting all inferences and credibility assessments in favor of the prosecution, the evidence was more than sufficient for the jury to find that Leftwich committed the premeditated first degree murder of Cpl. Smith, for which Martin, pursuant to the concerted

action principle, was equally responsible: indeed, at trial the defense conceded that Leftwich committed premeditated first degree murder.

**Response to "Point Five."** There can be no plain error because the defense waived the giving of a cautionary instruction, and the jury was instructed in the purpose of predisposition evidence. The State, while required to prove predisposition beyond a reasonable doubt, introduced but a fraction of Martin's criminal history, and did so without objection: further, Rule 405(a), W.V.R.E. permits reputation and opinion evidence when "evidence of . . . a trait of character . . . is admissible."

#### ***DISCUSSION OF LAW***

##### **I. THE TESTIMONY OF CAPTAIN VAN METER DID NOT CONSTITUTE REVERSIBLE ERROR**

Defense counsel's cross-examination of Cpl. Reynolds and of Ms. Gonzales included counsel's repeated confrontations of each of the two witnesses with statements made by the other. (T.Vol. 3 at 187; Vol. 4 at 8-9, 14-16, 152-154, 158-159). The only real difference in their testimony concerning the murder itself was that Ms. Gonzales -- who was still in the Jeep -- "figured" Cpl. Smith handed Leftwich money, while Cpl. Reynolds -- who was outside the Jeep, closer to Cpl. Smith -- was "confident" that no such transaction took place. (T.Vol. 4 at 21, 134). Both of these witnesses' pre-trial statements were substantially the same as Martin's confession. The prosecutor intended to inquire of Captain Van Meter, the lead investigator in the case, how the three nearly identical descriptions of the murder factored into his investigation and charging decisions and how the variations in details provided by the eyewitnesses factored into his investigation and charging decisions. The prosecutor was eliciting

"an historical account as to how he learned" the details of the murder and "what actions he should take" in his investigation. *State v. Wood*, 460 S.E. 2d 771, 779 (W.Va. 1995).

Defense counsel explicitly approved of Captain Van Meter's assessment of the credibility of one State's witness: "If he wants to call Paul Leftwich a liar, he can do that." (T.Vol. 5 at 130). The prosecutor did not attempt to qualify Captain Van Meter as an expert and there was no objection on this basis at trial, as required by Rule 103(a), W.V.R.E. (T.Vol. 5 at 129-133). The prosecutor went about the intended course of examination inartfully and the two questions cited in Appellant's Brief (at 20) should not have been phrased as they were. However, on cross-examination it was the defense which characterized Captain Van Meter as an expert and elicited the testimony sought by the State on direct examination: that discrepancies in witnesses' recollections do not necessarily mean dishonesty. (T.Vol. 5 at 138-145).

Assuming for the sake of argument that the trial court erred in permitting the two questions concerning witness credibility, "after stripping the erroneous evidence from the whole, the remaining evidence was independently sufficient to support the verdict and the jury was not substantially swayed by the error:"

(T)he United States Supreme Court has recognized that given 'the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial.'

*State v. Guthrie*, 461 S.E. 2d 163, 190(W.Va. 1995),  
citing *U.S. v. Hasting*, 461 U.S.499, 508-09, 103 S. Ct.  
1974, 1980, 76 L. Ed. 2d 96, 106. (1983).

The cases cited in Appellant's Brief (at 22-24) involved allegations of sexual assault or abuse in which the defendants denied committing the acts of which they were accused by the alleged victims. Accordingly, in *State v. McCoy*, 366 S.E. 2d 731, 737 (W.Va. 1988), reversible error was found when an expert of questionable credibility testified that she believed the victim's claim that she had been raped. The defendant had testified that the sex acts had been

consensual, so the expert's "conclusion that she believed that (the victim) had been raped 'encroach(ed) too far upon the exclusive province of the jury . . . ." (Citation omitted). In *State v. Wood*, 460 S.E. 2d 771, 781-783 (W.Va. 1995), this Court declined to find reversible error although the State's witness offered testimony including, "it was a very credible statement to me . . . ." The Court found that, as in the instant case, such violation of Rule 608(a), W.V.R.E. was "neutralized" by cross-examination and by the trial court's instruction concerning expert witnesses. In *State v. Edward Charles L.*, 398 S.E. 2d 123, 141 (W.Va. 1990), this Court held that an expert in a child sexual abuse case may state an opinion that the child was, in fact, sexually abused but may not give an opinion as to whether the expert believes the child on the issue of whether the defendant was the perpetrator. Obviously, in a case in which the defendant as well as the child both agreed that the defendant was the perpetrator of sexual abuse, an expression of opinion as to the child's credibility in identifying the defendant, although running afoul of Rule 608(a), would not constitute reversible error. This would be analogous to the circumstances of the instant case because Martin's confession was substantially identical to the statements of Cpl. Reynolds and Ms. Gonzales concerning Martin's conduct.

Similarly, in *State v. James B.*, 511 S.E. 2d 459, 466-467 (W.Va. 1998), this Court declined to find plain error after the State's expert witness "stated not only that the children had been sexually abused, but also that the Appellant committed the crime," because "the cross-examination of the psychologist had a 'neutralizing' effect on her testimony . . . ." Captain Van Meter's "Yes" and "Yeah" responses to the prosecutor's two offending questions were "neutralized" entirely by cross-examination:

Q: Okay, And the other person watching the same event may focus on something different from the first person; is that correct?

A: That's correct. What --- I've seen that, you know, people usually focus on things that are important to them.

Q: They might miss the big picture or other elements of the big picture?

A: They might miss the elements. I don't know if they miss the big picture.

\* \* \* \*

Q: If there are actors, for example. Let's call them A,B,C. One person may be watching Actor C, for example, and miss what happens with Actors A and B?

A: They may.

\* \* \* \*

Q: Okay . . . I know that in some cases after a traumatic event, people try to reconstruct their memories; is that correct?

A: They may.

Q: And they may go back and try to figure out what happened in their mind?

A: They could.

Q: And take elements and maybe put them back in the wrong order . . . and it's scrambled because the event was traumatic?

A: I guess that could happen.

(T.Vol. 5 at 141-144).

In addition to the "neutralization" thoroughly accomplished by cross-examination, the trial court repeatedly instructed the jury that only the jury was the judge of the credibility of the witnesses and that the jury could accept or reject expert testimony and that "the testimony of law enforcement officers (was) entitled to no special or exclusive sanctity or weight." (T.Vol. 3 at 78; Vol. 6 at 86-88, 113). Further, the State made no reference to the two offending questions or answers during closing argument. (T.Vol. 6 at 118-228, 145-157).

Applying *Guthrie*, the "scope of the objectionable comments" was miniscule in "relationship to the entire proceedings." Consideration of "any curative instruction given

or that could have been given but was not asked for," another of the *Guthrie* factors, was satisfied by the trial court's instructions, cited above, as well as by the fact that defense counsel never requested a curative instruction. Finally, the *Guthrie* consideration of the strength of the "error-free" evidence of Martin's guilt unquestionably was satisfied in this case. The defendant confessed to first degree murder as felony murder. His sole defense was entrapment, but he offered no evidence in support of such defense. Indeed, by his confession following the murder, he admitted his criminal predisposition, disentitling him to an entrapment defense:

TFC DAVIS: What was you sitting (sic) the deal up for?

MARTIN: It was for some crack.

TFC DAVIS: Crack?

MARTIN: Yeah.

TFC DAVIS: How much, did he?

MARTIN: The guy (Cpl. Smith) told me . . . he didn't say no amount at first. Then I had to ask him. He was like, he wanted a hundred. And um, that was all that as far as what they said. He said, I give you a hundred dollars if you just hook me up. I was like, I'm thinking. You know, who going to pass that up.

(State's Exh. 30 at 3).

The remainder of this brief will expand upon the overwhelming evidence of Martin's guilt. Further, it will describe the repeated occasions during trial when the State -- far from "overreaching" -- exercised extraordinary restraint, establishing that the two offending questions of Captain Van Meter were inadvertent, isolated, inconsequential and wholly harmless. Undoubtedly, upon this record, Martin's "conviction would have been obtained notwithstanding the asserted error." *Guthrie, citing Hasting, supra.*

Appellant's Brief (at 5, 20-21) relies upon a misstatement of the evidence to assert that two more answers by Captain Van Meter were "opinion evidence." Captain Van Mater never "assured the jury that he believed Mr. Martin aided and abetted

Thomas Leftwich in killing Officer Smith," as claimed in Appellant's Brief. Captain Van Meter simply testified that in his investigation Leftwich was the direct perpetrator and Martin's status was as an aider and abettor. The defense objection to this question was overruled because the State was not asking for an opinion, but only an explanation of how Captain Van Meter's investigation proceeded. Furthermore, the defense already had asserted to the jury that Martin's participation in Cpl. Smith's murder was that Martin was present "to facilitate a drug sale" that resulted in Leftwich's murder of Cpl. Smith. (T.Vol. 3 at 44-45). So there was no dispute that Martin's role was as an aider and abettor, although Martin claimed he was entrapped into the role. Finally, the trial court thoroughly instructed the jury as to what the State was required to prove in order for Martin to be convicted as an aider and abettor. These instructions included "that an alternative means by which the defendant, Michael Martin, stands indicted for first degree murder is as an aider and abettor . . . ." (T.Vol. 6 at 94, 97, 100-103).

Appellant's Brief (at 21, 24) complains about testimony of Captain Van Meter to which there was no objection. There was no objection because there was no dispute between the State and the defense concerning this aspect of Captain Van Meter's investigation. Captain Van Meter never "assured the jurors" and never "guaranteed" anything to the jury, as claimed in Appellant's Brief. Rather, as Timothy Blackburn's name had been mentioned during trial, Captain Van Meter simply was asked if "from your investigation (he) has any involvement in this case . . .?" And Captain Van Meter answered without objection, "He was (sic) not." Next, Captain Van Meter simply was asked if "there (was) anything in your interview or investigation of Mr. Blackburn that was inconsistent with Officer Reynolds' and Ms. Gonzales' description of Mr. Blackburn's involvement?" Again, with no objection, Captain Van Meter responded,

"No, there wasn't." No one -- not the State, not Martin, not Leftwich -- ever has claimed that Mr. Blackburn was a participant in Cpl. Smith's murder. Appellant's Brief makes no attempt to explain how such testimony, to which no one objected, possibly could constitute error -- much less plain error. (T.Vol. 5 at 128).

The same analysis applies to another bit of testimony by Captain Van Meter -- again being testimony to which the defense did not object. Captain Van Meter was asked whether the prosecution had introduced all of the evidence that had been collected in the "separate case of State versus Thomas Leftwich" and Captain Van Meter answered "No, we have not." (T.Vol. 5 at 127). This was but one of many examples of prosecutorial restraint. During pre-trial hearings defense counsel noted that the defense had "been served with a tremendous amount of discovery" concerning Leftwich. Defense counsel expressed concern that the State with such "tremendous" evidence against Leftwich would "put Mr. Leftwich on trial at Mr. Martin's expense." The State responded: "We only intend to put on the evidence of Leftwich and his conduct insofar as we have to prove the first degree murder by the principal before we can prove the defendant's guilt as an aider and abettor." ( 10/30/07 Motions Hearing at 49-53). The State introduced in Martin's trial a very small portion of the evidence later introduced in Leftwich's trial. The defense did not object to the question and answer of Captain Van Meter in this regard because of the State's restraint in introducing minimal evidence of Leftwich's guilt and because the defense position was that Leftwich was "a very dangerous man" who murdered Cpl. Smith with premeditation. (T.Vol. 6 at 131, 137). Apparently, Martin still maintains this position regarding his co-defendant's culpability, describing Leftwich as " as a depraved drug dealer." (Appellant's Brief at 7).

Accordingly, there was no reversible error in the State's examination of Captain Van Meter.

**II. THE INDICTMENT WAS SUFFICIENT TO PERMIT THE JURY TO CONSIDER FELONY MURDER BASED UPON ATTEMPTED ROBBERY**

Appellant's Brief (at 5, 25-28) erroneously contends that there was an "election" by the grand jury to add felony murder, based upon the attempted or actual delivery of a controlled substance, to the approved statutory indictment language charging that Martin "did unlawfully, feloniously, maliciously, willfully, deliberately and with premeditation . . . slay, kill and murder one Charles E. Smith, III."

There is no such thing as a grand jury "election." The prosecutor's addition of the felony murder language was mere surplusage. As this Court repeatedly has held, reciting W.Va. Code §61-2-1: "In an indictment for murder, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased." *Ford v. Coiner*, 196 S.E. 2d 91 (W.Va. 1972); *State v. Bragg*, 235 S.E. 2d 466 (W.Va. 1977); *State v. Young*, 311 S.E. 2d 118 (W.Va. 1983); *State ex rel. Levitt v. Bordenkircher*, 342 S.E. 2d 127 (W.Va. 1986); *State v. Justice*, 445 S.E. 2d 202 (W.Va. 1994); *State v. Satterfield*, 457 S.E. 2d 440 (W.Va. 1995). The defense complaint in some of these cited cases has been that the approved statutory language of §61-2-1 fails to put the defendant on notice of felony murder. Despite the universal rejection of such defense claim, the prosecutor in the instant case, because of the confessions of Martin and Leftwich, added the surplusage of felony murder resulting from the attempted delivery of a controlled substance. However, based upon the eyewitness evidence of

Cpl. Reynolds -- that there was no drug transaction -- and the absence of any cocaine at the murder scene or in co-defendant Leftwich's residence, and based upon reports from Martin's cellmates, that Martin was boasting that he and Leftwich were attempting to rob Cpl. Smith, and based upon the statement of a hostile witness, Paul Leftwich, that immediately after the murder Martin and co-defendant Leftwich argued about the attempted robbery of Cpl. Smith, and based upon Martin's status as an admitted cocaine addict who was unemployed at the time of the murder and repeatedly demanding money from Cpl. Smith, the State gave pre-trial notice to the defense that the State would introduce evidence of first degree murder by felony murder in the attempt to commit robbery. Once again, the prosecutor gave the defense more than the State by law is required to give.

The defense made a pre-trial motion to require the State to elect the "manner or means" of murder, and the trial court conducted a hearing upon such motion. (10/30/07 Motions Hearing at 36-47). Based upon *Stuckey v. Trent*, 505 S.E. 2d 417 (W.Va. 1998), citing *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed. 2d 555 (1991), the trial court denied the motion. The same motion was renewed and rejected at the close of the evidence. ( T.Vol. 6 at 51-55). There never was any motion or any objection made during trial on the grounds first raised in this appeal -- that the State was "stuck" with one form of felony murder. Rule 12(b), W.Va. Rules of Criminal Procedure, mandates that "(d)efenses and objections based on defects in the indictment" *must* be raised prior to trial. The claim that there was a defect in the instant indictment is disentitled to review because it is raised for the first time on appeal. Further, even if the State had been required to specify in the indictment felony murder by attempted robbery -- which it was not -- any such "defect" would have been "cured by (the) verdict" pursuant to W.Va. Code §62-2-11.

**III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT A FIRST DEGREE MURDER CONVICTION BY EITHER "MANNER OR MEANS" OF FELONY MURDER -- ATTEMPTED DELIVERY OF A CONTROLLED SUBSTANCE OR ATTEMPTED ROBBERY**

Appellant's Brief (at 5, 28-29) contends that the trial court erred in instructing the jury in the alternative means of felony murder, being a killing in the course of an attempted robbery. Appellant's Brief claims that there was insufficient evidence to support giving an instruction concerning this "manner or means" of first degree murder.

The trial court properly instructed the jury that:

Under the law of felony murder, a person who participates in either an actual or attempted transfer of a controlled substance or an actual or attempted robbery is guilty of first degree murder when a killing occurs even by another person, and even unintentionally, accidentally or unexpectedly in the course of such actual or attempted transfer of a controlled substance or robbery or attempted robbery, or when the killing occurs as the participants flee from the scene to prevent detection or to escape (T.Vol. 6 at 93).

The Court also instructed the jury on the law of aiding and abetting, and there is no claim in Appellant's Brief that such instruction was erroneous, as it accurately recited the law of aiding and abetting and the concerted action principle as set forth in *State v. Fortner*, 387 S.E. 2d 812, 823-826 (W.Va. 1989).

It is not, therefore, necessary for the State to prove that the defendant did any particular act constituting any part of the crime in order to prove the defendant's guilt as an aider and abettor, so long as he was present at the scene of the crime and the evidence is sufficient to show that he was acting together with another who directly committed the killing.

\* \* \* \*

The State must demonstrate that the aider and abettor shared the criminal intent of the direct perpetrator. However, the State is not required to prove that the aider and abettor intended the particular crime committed by the direct perpetrator. . . .

(T.Vol 6 at 100-104).

Appellant's Brief argues insufficiency of the evidence to support the alternative "manner or means" of first degree murder, but there is no claim that the evidence was insufficient to support the conviction of first degree murder by felony murder in the course of Martin's participation in the attempted delivery of cocaine. Accordingly, pursuant to *Stuckey v. Trent* and *Schad v. Arizona, supra*, the claim of insufficiency of the evidence as to felony murder based upon attempted robbery is disentitled to review.

Nevertheless, the insufficiency of evidence claim as to attempted robbery briefly will be addressed. Appellant's Brief (at 28) argues: "Not a single witness testified to hearing anyone plan, discuss or threaten a robbery," despite the testimony of Paul Leftwich and the introduction of his statement to W.Va. State Police Sgt. Duckworth. (State's Exh. 26; T.Vol. 190-216). The absence of additional direct evidence of Martin's planning or threatening robbery does not diminish the inescapable proof that if Cpl. Smith was not killed in the course of the attempted delivery of cocaine, then he necessarily was killed either in the course of an attempted robbery or in a premeditated, malicious murder. Pursuant to W.Va. Code §61-2-1 and the case law cited above, the "manner or means" by which Cpl. Smith was murdered is not an element of this first degree murder. As Martin confessed that he was present with Leftwich to aid and abet the underlying felony of delivery of a controlled substance, Martin was guilty of first degree murder even if jurors believed that only Leftwich had attempted to rob Cpl. Smith.

Appellant's Brief (at 28) blames "jailhouse snitches" for the State's pre-trial notification to the defense that evidence of felony murder based on attempted robbery would be introduced at trial. The State called no such "snitches" at trial because the prosecutor shares opposing counsel's apparent skepticism as to the trustworthiness of convicts. Even omitting the "snitches," there was overwhelming evidence from which the jury reasonably could have found that Leftwich and Martin conspired to rob Cpl. Smith, with his murder resulting.

According to Martin's confession, Martin brought a woman to Leftwich to buy cocaine earlier in the night before Cpl. Smith's murder. Martin claimed he had no idea who Leftwich was, and his explanation for how he knew that Leftwich was a cocaine dealer was: "That's the life of drugs. That's the life of drugs." Martin claimed that he was a "crack" cocaine user but that he smoked "not everyday" because he worked at Plaza Dry Cleaners. (State's Exh. 30 at 15-19). The State proved that the defendant had not worked at the dry cleaners since his parole arrest in March, 2006, and that "crack" cocaine is a "very expensive" habit. (T.Vol. 5 at 26, 137). So even without predisposition evidence, the jury had undisputed proof that at the time of Cpl. Smith's murder, Martin was an unemployed cocaine addict acting as a middleman to support his "very expensive" narcotics habit.

The reason no one believed Martin's claim that he was not a criminal conspirator with the "deranged drug dealer" is that immediately upon offering to get cocaine for Cpl. Smith, Martin used Cpl. Smith's cell phone to call Leftwich. Martin's first call to Leftwich lasted 29 seconds. Martin's second call to Leftwich -- after Martin led Cpl. Smith to the murder scene -- was five minutes later, at 4:18 a.m., and lasted 22 seconds. (T.Vol. 4 at 81-82). Cpl. Reynolds' "officer down" call was three minutes later, at 4:21 a.m. (T.Vol. 3 at 86). The undisputed evidence of Martin's side of his phone "conversations" with Leftwich was relayed by Cpl. Reynolds and Ms. Gonzales, and established that Martin was "just agreeing" and "(j)ust basically . . . he was being talked to." (T.Vol 3 at 148-149; Vol. 4 at 133).

As Martin directed Cpl. Smith to the murder scene, Martin repeatedly asked "Do you have the money? Do you got it?" (T.Vol. 3 at 146). And during the drive Martin "made reference to money . . . . At one point, he asked Chuck to go ahead and give him the money and Chuck refused. At one point, he asked how much money we all had." (T.Vol. 4 at 129-130). Once Martin led Cpl. Smith to the murder scene, Martin "(g)ot out of the Jeep, asked for the

money. He (Cpl. Smith) said, no." (T.Vol. 3 at 148). Cpl. Reynolds was adamant that there was no drug transaction between Cpl. Smith and Leftwich, but only "a quick confrontation of words" before Cpl. Smith identified himself as a police officer and Leftwich began shooting:

Q: So you never saw an exchange, right?

A: There was no exchange made.

Q: Okay. Any you're confident that had an exchange occurred, you would have seen it?

A: I am very confident if I would have seen an exchange I would have known.  
(T.Vol. 4 at 21).

In Martin's confession to police Martin "guessed" that Leftwich "handed the guy something and uh . . . he showed him his badge." And Martin claimed, "I said, this guy tried to rip this dude off for his drugs. . . ." (State's Exh. 30 at 4-5).

Cpl. Reynolds, at the time of the murder a K-9 officer who regularly assisted narcotics officers, could have made matters far simpler for the prosecution. He could have testified that he observed a narcotics transaction between Cpl. Smith and Leftwich, making a felony murder conviction by delivery of a controlled substance clean and easy. Instead, Cpl. Reynolds truthfully and definitely testified that there was no such transaction: applying the *Guthrie* standard, then, there was no narcotics transaction. But there was proof that Martin knew Leftwich well enough to have Leftwich's number memorized; proof that Martin was an unemployed cocaine addict and middleman for narcotics transactions; proof that Martin was roaming the same location where he'd dealt with Leftwich just a couple of hours before the murder; proof that Martin repeatedly demanded money of Cpl. Smith and of Ms. Gonzales; proof that Martin led Cpl. Smith to the murder scene, got out and beckoned toward Leftwich's residence; proof that Martin had two seconds-long phone conversations with Leftwich; proof that Martin insisted that only Cpl. Smith could meet Leftwich; proof that Martin stood by as there was "a brief confrontation of words" and as Cpl. Smith pulled his badge and was murdered, with Martin with

Leftwich then fleeing. (T.Vol. 3 at 160; T.Vol. 4 at 137). And there was evidence from a hostile State's witness, Paul Leftwich, whose statement was introduced without objection as State's Exh. 26. This statement included:

I heard several gun shots . . . . I saw Thomas in the yard arguing with another man about bringing someone here to rob him.

Paul Leftwich identified Martin as the person arguing with co-defendant Leftwich about robbery immediately after the murder. (T.Vol. 4 at 194). Although W. Va. State Police Sgt. Duckworth, who interviewed Paul Leftwich, was disallowed from testifying that it was clear that Paul Leftwich's phrase "to rob him" referred to the robbery of Cpl. Smith, the defense had no objection to "let(ing) the jury interpret it." (T.Vol. 4 at 212-216). Applying the *Guthrie* standard to this evidence, it would be impossible to find that "the record contains no evidence, regardless of how it is weighed, from which the jury could find . . . beyond a reasonable doubt" that Martin aided and abetted the attempted robbery of Cpl. Smith, resulting in the murder.

#### **IV. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT BASED UPON MARTIN'S AIDING AND ABETTING PREMEDITATED MURDER**

Appellant's Brief (at 5, 30-31) again pretends to be uninformed as to the law of aiding and abetting and the concerted action principle and felony murder. As the jury was instructed in this case, if Martin intended "merely" a cocaine sale but Leftwich intended the premeditated murder of Cpl. Smith, then Martin was guilty of first degree murder. There is no appellate claim that such instructions were erroneous.

Appellant's Brief (at 30) misstates the facts in claiming that "the parties agree that Michael Martin and Officer Smith met by chance. They had not previously known each other." The State never entered into such agreement. The State does have wildly conflicting statements by Martin and Leftwich as to their relationship with one another, as Leftwich claimed he knew Martin by name and had dealt repeatedly with him in the past, "running the

drug spots." (Leftwich's statement has been provided this Court in his appeal and, of course, the State made no attempt to introduce it in Martin's trial). The State and its surviving witnesses have no knowledge of what Cpl. Smith knew of Martin because murder is the ultimate and eternal despoliation of evidence -- in this case, being the critical testimony of Cpl. Smith. (T.Vol 3 at 191-192).

The claim in Appellant's Brief (at 30), that Martin was "merely present during the shooting" fails because Martin confessed that he was present to commit the "enumerated felony" of aiding and abetting the delivery of a controlled substance. So even if only Leftwich was the one who intended the premeditated murder of Cpl. Smith, Martin was guilty of first degree murder as an aider and abettor.

Appellant's Brief does not argue that the trial court's instructions concerning the elements of premeditated, malicious murder and aiding and abetting were erroneous. These instructions included:

The State must demonstrate that the aider and abettor shared the criminal intent of the direct perpetrator. However, the State is not required to prove that the aider and abettor intended the particular crime committed by the direct perpetrator, but only that he intended to assist or encourage or facilitate the design of the direct perpetrator. The requirement of a shared criminal intent is relaxed where there is a substantial physical participation in the crime by the aider and abettor. (T.Vol. 6 at 97-103).

But there is more. The un rebutted evidence at trial was that Cpl. Smith was a "very aggressive" narcotics officer who often worked undercover with the Beckley Police Department, the W.Va. State Police Bureau of Criminal Investigations and the F.B.I. (T.Vol. 3 at 110-112; Vol. 4 at 91-92; Vol. 5 at 22-23, 155). Shortly before the murder, Martin appeared at Ms. Lawson's building, just as she was yelling "Ya'll are the police" to Cpl. Smith and Cpl. Reynolds.

Martin was given an opportunity to explain how he knew Leftwich's phone number and to disclose what was said in the 4:13 a.m. and 4:18 a.m. phone conversations between Martin and Leftwich:

SGT. PIOCH: I mean you got his phone number and he's going to ask you who this is, right? You tell him who it is when you talked to him on the telephone?

MARTIN: No. I mean he knew. I guess he recognized my voice. He knew what I was calling for. I guess that's what the phone was used for, I don't know.

\* \* \* \*

AGENT SCHWARTZ: Then when you called that number, did you say . . . how did you address him when you called that number from the cell phone?

MARTIN: I just said, hey yo.

AGENT SCHWARTZ: Did you say this is so and so?

MARTIN: No, I didn't say no name. I mean I don't get into names on the street like that.

(State's Exh. 30 at 6, 10).

Applying *Guthrie*, the credibility assessment for the jury in determining the relationship between Martin and Leftwich would have led to the inescapable conclusion that Martin was untruthful concerning his prior association with Leftwich. Further, Martin's repeated claims that he knew no identifying characteristics that could assist police in apprehending Leftwich reasonably could be considered as evidence that Martin continued to offer "protection of the perpetrator." (State's Exh. 30 at 6-9). As this Court held in *Fortner, supra*, citing *State v. Haines*, 192 S.E. 2d 879 (W.Va, 1972): "merely witnessing a crime, without intervention, does not make a person a party to its commission . . . unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator." (Italics added).

Applying *Guthrie*, the same assessment would apply to Martin's claim that he was a stranger to Ms. Lawson, who had offered to lead Cpl. Smith to a cocaine "buy" immediately before Martin appeared outside her apartment:

AGENT SCHWARTZ: Do we know this girl that we are talking about at the apartment?

MARTIN: I don't know.

\* \* \*

AGENT SCHWARTZ: Did they identify themselves?

MARTIN: No. I even ask them, I say ya'll police. Even that . . . even that girl say, ya'll, ya'll look like the police. They was doing stuff like that. I'm like no. I say, are ya'll really police. He was like, man come on. They was doing stuff like that so I . . . well.

\* \* \*

AGENT SCHWARTZ: How about the girl, did she tell ya her name?

MARTIN: No. Wasn't no names involved in this . . . in the conversation.

(State's Exh. 30 at 21-22, 25-26).

Martin's credibility problem concerning his relationship with Ms. Lawson included the fact that Ms. Lawson identified Martin by name and led Sgt. Montgomery to Martin's residence. (T.Vol. 5 at 31-32). Applying the *Guthrie* standard, once it was proven that Martin was untruthful about his knowledge of the identity of Leftwich and of Ms. Lawson, the reasonable inference was that he was untruthful when he claimed that he had no knowledge of the true identity of Cpl. Smith at the time of the murder.

The jury view at trial included jurors' inspection of Cpl. Smith's Jeep and the clearly visible police equipment inside. (T.Vol. 3 at 74-77). Ms. Gonzales testified that when Martin entered the Jeep immediately after his 4:13 a.m. call to Leftwich, the light went on and Martin "looked towards the console, which had the police radio that faced the back seat." Ms. Gonzales did "the best that (she) could" to cover up the police equipment with her purse and a

bag. (T.Vol. 4 at 130-131). Applying the *Guthrie* standard, the State established that less than eight moments before Cpl. Smith was murdered, Martin looked inside the Jeep and saw what the jurors saw: that Cpl. Smith was driving a police vehicle. After directing Cpl. Smith to the murder scene, Martin ordered Cpl. Reynolds to stay back while Martin led Cpl. Smith to the stairway. Martin made his second call to Leftwich at 4:18 a.m.: Cpl. Reynolds' "officer down" call was at 4:21 a.m., so Leftwich arrived immediately on the stairs after Martin's second call. Despite the fact that Cpl. Smith had no plan to make an arrest even if a narcotics transaction occurred or to "blow his over" and identify himself as a police officer, he took out his badge and extended it, palm up, to Leftwich. (T.Vol. 3 at 148-155). Applying the *Guthrie* standard, if jurors already were not convinced that Martin and Leftwich knew Cpl. Smith was a police officer before Leftwich murdered him, then any doubt was removed when Martin's tape-recorded statement was played for the jury. This is because Martin repeatedly admitted that Cpl. Smith extended his badge to Leftwich. (State's Exh. 30 at 4-5, 11-12, 14-15, 25). That Cpl. Smith identified himself as a police officer immediately before the murder was further confirmed by the fact that his narcotics badge was found where it fell from his hand onto the pavement. (T.Vol. 5 at 120-121). Additionally, the Medical Examiner testified that gunpowder stippling on Officer Smith's left forearm was consistent with Cpl. Reynolds' testimony that Cpl. Smith extended his badge "palm up" immediately before Leftwich began firing. (T.Vol. 5 at 13-14).

The defense at trial conceded that Leftwich committed the premeditated, malicious first degree murder of Cpl. Smith:

First, we know -- we have acknowledged -- I told you from the onset of this case, that Charles Smith was killed in a senseless tragic violent sudden act.

\* \* \*

And, unfortunately, Michael led them to a very dangerous man. . . (and) that man was Thomas Leftwich. And finally -- of course, we know that in the end it

was Thomas Leftwich, that was the man that without warning, without any threat, fired those fatal shots.

\* \* \*

Now, premeditation -- you know, I don't bicker with Thomas Leftwich's premeditation. Premeditation can be in the law fairly instantaneous. Now, you don't have to deliberate on something for, you know, a set period of time. But all of the premeditation was on Thomas Leftwich's part. From the time Thomas Leftwich for whatever reason reached for his gun, I would guess he intended on using it.

(T.Vol. 6 at 129, 131, 137).

In addition to the evidence that Cpl. Smith had no intention of identifying himself as a police officer or to make an arrest when he followed Martin to the stairway where Leftwich would descend and begin firing, Cpl. Reynolds testified that Cpl. Smith's last words were "I'm in. I'm out," meaning Cpl. Smith would "meet the guy and then he would be right back." Cpl. Reynolds explained that the procedure employed in undercover narcotics investigations precluded an immediate arrest under the circumstances, as the undercover "buy" was just the beginning of an "ongoing process" of investigation. (T.Vol. 3 at 114-115; Vol. 4 at 23). Applying the *Guthrie* standard to this evidence, the jury reasonably inferred that Cpl. Smith deviated from his plan and from procedure in extending his badge to identify himself as a police officer because he saw that Leftwich was armed with the .357 caliber revolver. (T.Vol. 3 at 155).

There is no claim that the trial court erred in instructing the jury that in order to "avoid criminal responsibility for the ultimate crime" the aider and abettor "must show that he disavowed . . . the criminal purpose . . . and that he communicated to the direct perpetrator his disapproval. . . ." (T.Vol. 6 at 103).

The defense at trial conceded that Leftwich committed premeditated malicious murder and that Martin was present at the time and place of such murder for the purpose of aiding and

abetting Leftwich's delivery of a controlled substance. Thus, the reliance upon *State v. Mayo*, 443 S.E. 2d 236 (W.Va. 1994) in Appellant's Brief (at 31) is misplaced, as this Court repeatedly emphasized in *Mayo* that there was "no common design to commit a criminal offense" in that case. In the instant case Martin's own confession included his claim that he and Leftwich shared a "common design" to commit one of the "enumerated felonies" upon which felony murder is based.

Applying *Guthrie*, the evidence was more than sufficient for the jury to conclude that Martin aided and abetted Leftwich's first degree murder of Cpl. Smith. The evidence established that Martin was a criminal associate of Leftwich and also an associate of Ms. Lawson, who accused Cpl. Smith of being "the police" in the presence of Martin. Martin claimed that he was suspicious that Cpl. Smith was "the police." (State's Exh. 30 at 25). Martin, in a substantial act of "physical participation", directed Cpl. Smith to the murder scene, after seeing that Cpl. Smith was driving a police vehicle. Martin signaled to Leftwich at the murder scene, and phoned him a second time, causing Leftwich's immediate appearance. Martin stood by, saw Cpl. Smith identify himself as a police officer by extending his badge, and watched as Leftwich fired into Cpl. Smith. Martin said and did nothing to express his "disapproval." Martin fled and went home and fell asleep, after telling his step-father, who asked Martin "how you doing?" that he was "okay." (T.Vol. 4 at 50).

The "depraved drug dealer" fled. Martin, the admitted narcotics middleman, fled. The narcotics officer was dead in the street. There was more than sufficient evidence that Martin was present as an aider and abettor acting together with Leftwich, who directly committed the first degree murder of Cpl. Smith.

**V. THE CLAIMED INSTRUCTIONAL ERROR WAS WAIVED AND CANNOT CONSTITUTE PLAIN ERROR, AND THE STATE'S PREDISPOSITION EVIDENCE PROPERLY WAS INTRODUCED TO DISPROVE ENTRAPMENT**

Martin never requested a Rule 404(b), W.V.R.E. limiting instruction, despite being twice directed by the Court to review the charge and to suggest any additions. (T.Vol. at 76-80). The failure of the trial court to give a limiting instruction concerning evidence admitted under Rule 404(b), "does not warrant reversible error (when) (t)he record indicates that the appellant never requested cautionary instructions on this issue at any time during the trial." *State v. Horton*, 506 S.E. 2d 46, 57 (W.Va. 1998).

The single instruction offered by defense counsel was an entrapment instruction, (T.Vol.6 at 50), which included an explanation of the purpose of evidence of Martin's predisposition to engage in drug-related criminal activity. (T.Vol. 6 at 107-110). Such instruction included that the purpose of predisposition evidence was to show "a state of mind that readily responded to the opportunity furnished by the officer . . . to commit the offense charged" and that "the State (had) the burden of proving beyond a reasonable doubt that the defendant had a predisposition to commit the crime." The trial court, upon the State's suggestion, made clear in its instructions that predisposition evidence was offered for the limited purpose of the jury's consideration of felony murder in the course of the attempted delivery of a controlled substance. (T.Vol. 6 at 72-73).

In *State v. Miller*, 459 S.E. 2d 114, 128-129 (W.Va. 1995), cited in Appellant's Brief (at 33 n.8), the appellant claimed "plain error" by the failure of the trial court to instruct on self-defense. Appellant's Brief omits the fact that this Court in *Miller*, citing with approval *U.S. v. Rojo- Alvarez*, 944 F.2d 959, 971 (1<sup>st</sup> Cir. 1991) and *U.S. v. Lakich*, 23 F. 3d 1203, 1207 (7<sup>th</sup> Cir. 1994), *rejected* the claim of plain error because this Court found that "the defendant voluntarily waived any right she had to have the jury instructed on self-defense." This Court held that when defense counsel was given time to review the Court's charge and agreed to it -- as in the instant case -- the omission of an instruction never requested by the defense could not

constitute plain error. As the Court of Appeals in *Lakich* (an entrapment case), held: "This is so because *if there has been a valid waiver, there is no error for us to correct.*" (Italics added).

Appellant's Brief (at 34) errs in asserting that the trial court "ignored the plain import of *McGinnis*" by not giving a limiting instruction when it was clear that no such instruction was desired by Martin's two trial lawyers. This Court in *McGinnis* held: "a trial court is not obligated to give a limiting instruction unless requested" but that "we strongly recommend that one be given." *State v. McGinnis*, 455 S.E. 2d 516, 525 (W.Va. 1994). Later, in *State ex rel. Caton v. Sanders*, 601 S.E. 2d 75, 82 n.7 (W.Va. 2004), this Court in dictum stated "today, we make clear that such an instruction is mandatory." However, nothing alters the *McGinnis* rule that in the event the defendant does not want a limiting instruction, "his request to not give the instruction should normally be honored." *McGinnis* at 525, n.12, citing with approval *State v. Dorisio*, 434 S.E. 2d 707, 711-712 (W.Va. 1993). *Dorisio* does not recite a defense objection to a limiting instruction, but rather recites a record merely indicating that it was "apparent" that the defense for tactical reasons "did not really want a limiting instruction that might tend to magnify the incident in the minds of the jurors." On this basis, the conviction in *Dorisio* was affirmed. In the instant case, in addition to two defense lawyers declining the trial court's repeated invitations to add to the court's charge, the defense made no attempt to "have ready some limiting instructions or cautionary instructions to read to the jury," as directed by the trial court. (11/15/07 *McGinnis* Hearing at 23). Further, although the State made no mention of Martin's criminal predisposition during its opening statement, defense counsel in his opening remarks informed the jury that Martin had been a "crack addict" for "a good chunk of his adult life;" that "in that lifestyle" Martin "had trouble with the law"; that the defendant had prior convictions; that he'd gone to prison and subsequently to jail from March of 2006 to July 2006. Defense counsel told the jury that the judge was "going to tell you that we can't convict Michael of this

crime because he's got a prior criminal history, per se." (T.Vol 3 at 47-48). Accordingly, it is apparent from the record that the defense was cognizant of Martin's right to a limiting instruction but made a tactical decision -- as was made in *Dorisio* -- that "the defense did not really want an instruction that might tend to magnify the incident(s) in the minds of jurors."

This is especially apparent because, contrary to the claim in Appellant's Brief, the State exercised extraordinary restraint in introducing only a very limited portion of Martin's criminal history. Appellant's Brief (at 34) mischaracterizes as "massive" the amount of predisposition evidence introduced at trial, when the State introduced only a molehill of Rule 404(b) evidence in contrast to the mountain of such evidence available to the State.

During the November 15, 2007 *McGinnis* Hearing (at 35-36), after the court asked defense counsel if the defendant (a) had any objections to the proffered predisposition evidence and (b) agreed that this evidence proved predisposition and (c) agreed that the prior criminal acts were committed by Martin, the Court then added:

We've got the witnesses here and we can interrogate them, if you wish. They are all here. Ms. Keller has them available to testify and we can go one by one. But if there's no need to do that, if there's no real contest or dispute, let's don't take the time.

And defense counsel responded:

Exactly, Your Honor. And I agree with that. I'll give you -- with respect to the convictions, supporting police statements, statements to the parole officers regarding drug activity, drug addiction, we don't contest those, Judge. I think that his prior drug activity -- and to the extent that that drug activity motivated the criminal conduct of those cases is going to be admissible for predisposition purpose (sic).

The trial court found that Martin voluntarily waived a full-blown *McGinnis* hearing, and defense counsel responded:

Your Honor, these are the types of things that, you know, the record needs to be made and I applaud Ms. Keller's efforts to nail

that down. (11/15/07 McGinnis Hearing at 41).

Thus, the same prosecutorial conduct which trial counsel applauded now is condemned in Appellant's Brief as "overreaching" allegedly "sanctioned" by the trial court.

When the trial court specifically asked if there were any objections to the testimony of Martin's parole officers, defense counsel answered, "We believe that would be a relevant predisposition issue that we would be hard pressed to resist." Defense counsel added, in response to Det. Shumate's proffered testimony concerning Martin's drug-related "burglaries and B & Es, we would not have any objection . . . ." Defense counsel reiterated that "drug related activity and the . . . consequences of that drug-related activity . . . would be relevant with respect to the issue of predisposition." Defense counsel added an express waiver of "the necessity of . . . requiring the Court to find a preponderance of the evidence . . . and that those matters will and can be heard by the jury." (11/15/07 McGinnis Hearing at 42- 44).

Appellant's Brief (at 34) complains that the predisposition evidence "rendered an impartial verdict on the issues of guilt and mercy virtually impossible." The record negates such claim concerning the mercy issue. After initially filing a bifurcation motion, Martin withdrew the motion. (10/30/07 Motions Hearing at 67). The State then filed a conditional motion for bifurcation, in case Martin withdrew his entrapment defense. Defense counsel responded: "I think bifurcation is kind of unnecessary in this case because of the anticipated defense of entrapment. *Basically a lot of character and conduct is going to come out.*" (11/15/07 McGinnis Hearing at 45). (Italics added). The State agreed that "if the predisposition evidence -- even limited to drug activity -- comes in the course of trial, that gives the jury enough character evidence, I believe -- the State believes on the issue of mercy/no mercy if we get that far. If it is withdrawn and the jury has none of that evidence . . . we do believe we would be entitled to bifurcation. Hopefully that will be a non-issue and they'll stay with

entrapment." Defense counsel responded, "I agree with that." (11/15/07 *McGinnis* Hearing at 46). The trial court agreed that if the entrapment defense was withdrawn, the State's bifurcation motion would be granted. Since Martin did proceed with an entrapment defense, permitting predisposition evidence to be heard by the jury, and since defense counsel agreed that such evidence properly could be considered by the jury on the question of mercy, there is no valid complaint that the predisposition evidence improperly influenced the jury's decision not to recommend mercy. Indeed, Martin was disentitled to any instruction as to how the jury should consider predisposition evidence in regard to mercy, because the jury had the "unfettered discretion of making the determination of mercy based solely on their impression of the defendant and the circumstances of the case." *State v. Miller*, 363 S.E. 2d 504, 507-508 (W.Va. 1987), citing with approval *Hicks v. State*, 27 S.E. 2d 307, 309 (Ga. 1943).

Appellant's Brief (at 34) also mischaracterizes the trial testimony in claiming that only two witnesses testified about the murder of Cpl. Smith and that seven witnesses testified only about Martin's criminal predisposition. Actually, the State called twenty-two witnesses, with only three Charleston police officers, one Beckley detective and Martin's parole officer being primarily predisposition witnesses. Appellant's Brief includes Captain Van Meter as a predisposition witness, although he offered no such evidence. Appellant's Brief (at 34-35) complains that Martin's stepfather, Onnie Cook, testified about Martin's drug-related criminal history, but Mr. Cook's more powerful testimony was that, immediately after the murder, Martin walked home, said he was "okay" and fell asleep, leaving Mr. Cook to learn from the morning news that Cpl. Smith had been murdered. (T.Vol. 4 at 39-51). And despite the fact that the State strictly limited Mr. Cook's predisposition evidence to Martin's drug-related criminal history, defense counsel then "opened the door" to Martin's general character, inquiring about Martin's childhood character and conduct: whether Martin had been a "good kid" and whether

Mr. Cook "knew him to be a troublemaker" as a child. Not only did the State not take the opportunity to walk through the defense-opened door, but it was the State which intervened to warn, "Your Honor, I'm not objecting but I need the defense counsel to understand he's opening up general character beyond predisposition." (T.Vol. 4 at 52-53). Even after that warning, defense counsel continued to inquire beyond drug-related criminal disposition, asking Mr. Cook about Martin's ownership of weapons and "propensity towards firearms" and whether Mr. Cook knew Martin "to get into any fights of any sort." (T.Vol. 4 at 53-54). Again, the State exercised more restraint than Martin deserved in declining to introduce general character evidence even after the defense repeatedly elicited such evidence.

The defense opened the same door to general character evidence during Parole Officer Workman's testimony, asking: "And I take it Mike must have had some positive qualities that impressed you . . . ?" Again, the State declined to walk through that door. (T.Vol. 5 at 108-109).

Appellant's Brief (at 34-36) then mischaracterizes as "rumor and unsubstantiated . . . opinion evidence" the Rule 405(a), W.V.R.E. reputation evidence -- introduced only through one witness, Sgt. Palmer -- and the opinion evidence introduced through officers with personal knowledge of Martin, including his repeated and corroborated confessions to narcotics-related crimes, especially thefts.

Justice Cleckley, citing *United States v. Wright*, 921 F.2d 43, 45 (3<sup>rd</sup> Cir. 1990), repeatedly has referred to "the character or reputation of the defendant, including any criminal record," as evidence admissible to prove predisposition. As to the proper "methods the prosecution may use to prove predisposition," Justice Cleckley has identified the "classes of evidence" as: (1) reputation, (2) past convictions and (3) specific criminal acts.

And:

It would also appear that this evidence is admissible under Rule 405(b). If self-defense evidence is admissible under this rule (citation omitted), predisposition evidence should also be admitted. *Under Rule 405(b (sic), reputation, opinion*

*and specific instances evidence is allowable. Cleckley, F.D., Handbook on W.Va. Criminal Procedure 2<sup>nd</sup> Ed., Vol. I, 1-569 – 1-571 (Italics added).*

There was no objection to such Rule 405(a) testimony at trial. (T.Vol. 5 at 69-71, 75-76, 83-84, 104). There was no objection to any predisposition evidence, including Rule 405(a) evidence, but during the testimony of Martin's step-father, Onnie Cook, the defense asked to approach the bench with a "concern," and this quasi-objection was renewed when Sgt. Palmer began to testify. (T.Vol. 4 at 41-45; T.Vol. 5 at 65).

This "objection" was not to Rule 405(a) reputation or opinion evidence, but rather was a clear expression of the defense trial tactic:

MR. DANIEL: I've got a concern about delving into Martin's criminal history really prior to either his testifying or our -- you know, our commission (sic) to a defense of some sort. You know, I realize -- you know, in the opening, you know, I made a brief mention of it in anticipation of a possible defense, but that was prefaced of course by the fact that, you know, we may not, you know, do that. I'm not . . . (T.Vol. 4 at 41).

After further bench conference, the following occurred:

THE COURT: So, you're saying you may well abandon this defense --

MR. DANIEL: It's, you know --

THE COURT: -- depending on the evidence?

MR. DANIEL: Depends on whether Mr. Martin opts to testify. I mean, that's -- you know, if he were to opt not to testify, then . . .

MS. KELLER: Well, it has to be done now --

MR DANIEL: Yeah.

MS. KELLER: -- because you've already got in what you wanted. You've made this argument to the jury. That's why it has to come in now. So there will be no defense to offer. And all of this is in front of the jury and now the defense is saying --

THE COURT: See, that makes sense to me because the State won't have an opportunity to put this evidence on. I mean, you can say, well, we elect not to testify, we are not going to pursue the entrapment. We're -- I note your concern, but I'm going to allow the State to go forward based upon what you have indicated to the Court all along in terms of your defense and what you have indicated in your opening statement and tenure of your questioning.

MR. DANIEL: Right.

(T.Vol. 4 at 44-45).

The trial court was referring to long pre-trial proceedings and the defense cross-examination of Cpl. Reynolds and Ms. Gonzales, concerning conduct of Cpl. Smith which the Court had ruled was relevant only because the defense had represented that it was related to an entrapment defense. The trial court's Pre-Trial Order entered November 30, 2007 confirmed that "the defendant's defense to be asserted at trial before the jury is that of entrapment." The Order further provided: "The defense shall be permitted to adduce pertinent testimony pertaining to the conduct of the victim, Officer Charles Smith, and Officer Will Reynolds, *directly related to the defense of entrapment.*" (Underlying in original; italics added).

So, based upon defense counsel's promise of an entrapment defense, the defense was permitted to elicit evidence concerning otherwise irrelevant pre-murder conduct of Cpl. Smith. Such conduct evidence had no probative value except, the trial court found, insofar as the defense promised to tie it into an entrapment defense. Once the conduct evidence was before the jury, defense counsel claimed that the defense of entrapment was dependent upon whether Martin would "opt" to testify. Of course, he opted not to testify or to offer any evidence, and there is no claim in Appellant's Brief that it was error for the trial court to disallow this defense tactic and to permit the State's introduction of predisposition evidence.

Appellant's Brief (at 34) mischaracterizes the predisposition evidence as "excessive." The record confirms that the State had available, and had disclosed to the defense, an arsenal of predisposition evidence which, in the absence of prosecutorial restraint, could have been introduced. This included the entirety of Martin's Charleston Police Department criminal records, which numbered approximately 172 pages; the entirety of Martin's Supplementary Charleston Police Department Incident Reports; Martin's prior Pre-Sentence Investigation (including his admissions to narcotics-related felonies); transcripts of Martin's prior felony guilty pleas and allocution at sentencing in Raleigh County Circuit Court, (including similar admissions);

Martin's written and recorded voluntary confessions to prior narcotics-related crimes; the entirety of Martin's criminal history, confirming "multiple prior *capias* warrants (and) multiple prior felony convictions, including violent crimes" cited by the trial court in its Order entered December 15, 2006, denying bail. Further, during the pre-trial *McGinnis* hearing, the State had the following law enforcement officers ready to present predisposition evidence: Charleston Police Department Sgt. Palmer, Det. Eggleton, Officer Henderson, "along with other Charleston officers", Officer Randle, Officer St. Clair, South Charleston Police Department Chief Rhinehart, Detective J.S. Shumate; West Virginia Parole (now Probation) Officer Workman and West Virginia Parole Officer Flint. The State also had under subpoena Martin's Raleigh County Probation Officer, Walter Harper. (11/15/07 *McGinnis* Hearing at 27-32). Of these officers, the State called only four before the jury.

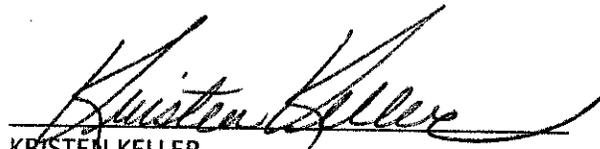
There was no objection to the limited testimony of these officers because, after defense counsel accepted the State's proffer and waived a full-blown *McGinnis* hearing, defense counsel advised the court that he would "take the itemized list (of predisposition evidence) that Ms. Keller provided in court today . . . . I will try to go back and will try to discern which of these events she is trying to introduce to (sic) evidence. *If we get beyond any of that at trial, we will make our objections.*" (11/15/07 *McGinnis* Hearing at 38). (Italics added). Obviously, the State never went "beyond any of that," as there were no objections to the limited predisposition evidence offered at trial. The State, cognizant of its burden to prove Martin's criminal predisposition beyond a reasonable doubt, nevertheless limited its introduction of Rule 404(b) and Rule 405(a) evidence to that necessary to prove that, throughout the decade up to and including Cpl. Smith's murder, Martin was predisposed to committing narcotics-related crimes.

## CONCLUSION

There being no reversible error entitling Martin to a new trial, his conviction and sentence should be affirmed.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing *Brief of the Appellee, State of West Virginia, In Response to Appellant's Brief* has been served upon the defendant herein by *MAILING* a true copy thereof to Ira Mickenberg, Counsel for Appellant and Gregory L. Ayers, Counsel for Appellant, Kanawha County Office of the Public Defender, PO Box 2827, Charleston, West Virginia 25330, by United States Mail, postage pre-paid, this      day of July, 2009.

  
KRISTEN KELLER  
Raleigh County Prosecuting Attorney  
Counsel for Appellee  
112 N. Heber Street  
Beckley, West Virginia 25801  
PH: 304-255-9148  
State Bar # 1992