

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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STATE OF WEST VIRGINIA, :

Appellee, :

v. :

MICHAEL E. MARTIN, :

Appellant. :

-----x

No. 34709
Circuit Court of Raleigh County
No. 07-F-68-K

REPLY BRIEF FOR APPELLANT

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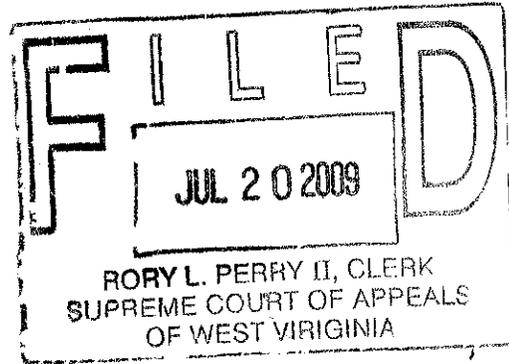


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ARGUMENT

POINT ONE: OVER OBJECTION, CAPT. VANMETER WAS PERMITTED TO TESTIFY THAT AS AN EXPERT ON WITNESS CREDIBILITY IN THIS CASE, HE KNEW THE STATE'S KEY WITNESSES WERE CREDIBLE AND BELIEVABLE. HE WAS ALSO PERMITTED TO TELL THE JURORS HE BELIEVED MR. MARTIN AIDED AND ABETTED THE SHOOTER, AND THAT THERE WAS ADDITIONAL EVIDENCE IN THE CASE THAT THE JURY WOULD NOT HEAR. (Responding to Appellee's Brief, 11-17)

The State's brief never quotes, or even mentions the substance of the testimony that requires reversal on this point. It might therefore be helpful for the Court to see exactly what happened during Capt. VanMeter's direct examination that caused the error:

Q: In your years of experience and – 22 years of experience and as a result of your training, have you – do you have familiarity with comparisons of witnesses' testimony?

A: Yes, I do

[DEFENSE COUNSEL]: Objection . . . T-V, 129.¹

THE COURT: I'll allow it. I'll preserve your exception . . . T-V, 131.

Q: Now as to your investigation of this case and coupled with your 22 years of experience as a law enforcement officer and captain of the State Police, from you entire investigation of this case, have you determined Officer Will Reynolds to be credible?

A: Yes.

[DEFENSE COUNSEL]: Objection. . . .

¹Pages in the trial transcript will be noted as T-Volume #, page #.

THE COURT: I am going to overrule the objection, but I'll preserve your exception.

Q: And based upon your investigation in this case and your years of experience and your present position with the West Virginia State Police, have you also determined Jasminda Gonzales to be credible and believable as to this case?

[DEFENSE COUNSEL]: Same objection. . . .

THE COURT: All right. And the same ruling.

A: Yeah. T-V, 132-133.

The State makes no argument that this was proper. The State cites no law that holds these questions to be proper. Of course, there is no such law. As explained in Mr. Martin's principal brief, it is the clearest of black letter law that no witness can testify to his opinion of the credibility of other-witnesses. Appellant's Brief, 22-24. Instead, the State's brief recites a litany of excuses for the misconduct, some of which are even inconsistent with the positions taken by the State when the issue arose during the trial.

The State begins by claiming that the prosecutor was "eliciting an historical account as to how [Capt. VanMeter] learned the details of the murder and what actions he should take in his investigation." Appellee's Brief, 11-12. There are two problems with this explanation:

(1) The questions the prosecutor asked have nothing to do with a historical account of anything – they explicitly call for an opinion about whether Capt. VanMeter believed the State's key witnesses were telling the truth in this case. And

(2) A statement of the prosecutor's intentions (even if they were part of the trial record, which they are not) is utterly irrelevant. The questions and answers were improper regardless of the State's intentions.

The State also characterizes the questions as merely “inartful,” or “inadvertent.” Id., 12, 15. Again, these assertions are completely irrelevant to the question of whether this was reversible error. Moreover, it is very difficult to understand how the questions could be “inadvertent” when the prosecutor, in response to defense counsel’s objections, engaged in a two page argument over their propriety, and even (incorrectly) cited two sections of the Rules of Evidence that she claimed justified the opinion testimony. T-V, 129-131, 131. The State seems to have abandoned its argument about the Rules of Evidence for this issue on appeal.

Nor does it matter, as the State claims, that the prosecutor did not explicitly refer to Capt. VanMeter as an “expert.” Appellee’s Brief, 12. An expert witness is simply one who by virtue of some specialized training or knowledge is permitted to give opinion testimony. 1 Franklin D. Cleckley, Handbook on West Virginia Evidence (2d ed. 1993), §7-2; W.Va. Rules of Evidence, Rule 702.

It is undisputed that the State asked Capt. VanMeter the questions about his experience that would qualify him to give opinion testimony. It is also beyond dispute that he gave opinion testimony. The issue is not what label the State put on that testimony, but whether the law permits such opinions. As extensively discussed in the briefs already submitted, it does not.

Finally, the state claims that the error was harmless. This claim rests on two factually incorrect arguments: (1) that the stories told by Officer Reynolds and Jasminda Gonzalez were virtually identical, Appellee’s Brief, 11, 13; and (2) that Mr. Martin’s statement was identical to those of Reynolds and Gonzalez. Id. Thus, the State contends that VanMeter’s improper testimony did no more than repeat the substance of Mr. Martin’s own statement.

This is incorrect because, as noted in Appellant’s Brief, 9-13, there were many

differences between Gonzalez's version of what happened, and Reynolds's. Even the State admits that Reynolds and Gonzalez differed over the important question of whether there was even an exchange of cocaine or money (or anything) before the shooting. Appellee's Brief, 11.

More important, there were significant differences between Mr. Martin's statement and that of the State's witnesses. For example, Mr. Martin said that the police approached him and asked him to sell them drugs. State's Exhibit 30, 21. The State's witnesses, on the other hand, swore that Mr. Martin made the first approach and offer to sell. T-IV, 127; T-III, 125, 144. This is an important difference in a case where entrapment was the only defense. Moreover, there were major differences between the way Mr. Martin, Officer Reynolds, and Ms. Gonzalez described the negotiations and agreement to sell drugs. Reynolds testified that they were approached by Mr. Martin, and both officers participated in the negotiations. T-III, 125-126, 143-144.

Gonzalez, on the other hand, testified that Mr. Martin and Officer Smith had a private conversation in the street while Officer Reynolds was still talking with Freda Lawson at her door. T-IV, 127-128. Mr. Martin's version was different from either of these, stating that he first said he would not get them drugs, and changed his mind when Smith offered him a hundred dollars. State's Exhibit 30, 21-22. According to Mr. Martin's statement, Officer Reynolds did not offer him anything, but was throwing an orange power line at Freda Lawson's window, and hitting her door. Id.

Perhaps the most important difference between Mr. Martin's statement and Officer Reynolds' was over the crucial question of whether there was an exchange of money or drugs (or anything else) before the shooting. The State places great emphasis on Reynolds's testimony that there was no exchange, and now argues this was evidence of a robbery. Appellee's Brief, 23-24.

Mr. Martin, on the other hand, insisted repeatedly in his statement that there had been an exchange. State Exhibit 30, 1, 4, 25, 26.

Given such divergent statements about the most crucial part of the alleged drug negotiations, and the homicide itself, Capt. VanMeter's expert testimony that the police were telling the truth played a major role in the jury's evaluation of everyone's credibility. The improper testimony therefore cannot be deemed harmless.

This claim also fails because the effect of the error is to substitute "expert" police opinion for the judgment of the jury. The reason why the law is so unanimous in prohibiting opinions about the credibility of other witnesses is that such opinions carry undue weight with jurors and in effect, take the ultimate decision in the case out of the hands of the jury. As noted by Chief Justice Benjamin during the oral presentation on the Petition in this case, there isn't much need for a jury (or judges, for that matter) if we are going to admit this kind of testimony.

In State v. McCoy, 179 W.Va. 223, 229, 366 S.E.2d 731, 737 (1988), this Court explained why such improper testimony is particularly harmful when it comes from an expert witness. In that case, a rape counselor testified that she believed the complainant was telling the truth. This Court reversed, holding that, "[h]er testimony amounted to a statement that she believed the alleged victim, and by virtue of her expert status she was in a position to help the jury determine the credibility of the most important witness in a rape prosecution." McCoy, 179 W.Va. at 229, 366 S.E.2d at 737. This is exactly what happened in Mr. Martin's case. Capt. VanMeter's testimony was an explicit statement that he believed Reynolds and Gonzalez were telling the truth, and by virtue of his twenty two years experience as an officer and investigator,

his opinion would help the jury determine the credibility of the State's most important witnesses. This is exactly what the prosecutor said she wanted VanMeter's testimony to do when she introduced it, explicitly stating that "[y]ou can rehabilitate [Reynolds's and Gonzalez's] credibility by another witness's opinion as to that witness's credibility." T-V, 131. We should take the prosecutor at her word, and accept that VanMeter's opinion testimony had the desired effect of convincing the jury that Reynolds and Gonzalez were credible.

The State has tried to distinguish McCoy by claiming that because the defendant in McCoy testified, while Mr. Martin did not, the McCoy case is somehow rendered inapposite. The opposite is actually true. In a case where the defendant does not take the stand, the jury's entire decision is focused on the credibility of the State's witnesses. In McCoy, the jurors at least heard the defendant's side of the story from the witness stand. In Mr. Martin's case, they did not. By improperly putting its thumb on the scale with VanMeter's opinion testimony, the State made sure that the jury could not fairly determine the only relevant issue – were Reynolds and Gonzalez credible.

The damage caused by Capt. VanMeter's opinions did not stop with his views of witness credibility. In response to a direct question, he told the jury that he believed Mr. Martin was "the aider and abettor." T-V, 125-126. The State has claimed that this was not an opinion, and has accused the defense of "misstating the evidence" about this. Appellee's Brief, 15. Here is the actual quote from the record:

Q: As the chief investigator in this case, what is the status of this defendant with Thomas Leftwich as the direct perpetrator?

A: He's the aider and abettor.

The State takes the position that by prefacing the question with the phrase, "as chief investigator in this case," VanMeter's opinion about the legal role Mr. Martin played in the crime somehow becomes admissible, and is no longer opinion testimony. Appellee's Brief, 16. This too is incorrect. VanMeter's opinion tracked the relevant legal language and assured the jurors that in his opinion, that element of homicide was satisfied.

The same holds true of VanMeter's opinions about whether Timothy Blackburn was involved in the crime, and his reference to other evidence that was gathered, but not shown to the jury. Capt. VanMeter may have reached those opinions in the course of his investigation of the case, but that does not make them either relevant or admissible. The phrase "in the course of your investigation" is not a talisman that makes the rules of evidence and admissibility vanish.

Mr. Martin's conviction should therefore be reversed as a result of the extensive improper opinion testimony of Capt. VanMeter.

POINT TWO: THE GRAND JURY ELECTED ON THE FACE OF THE INDICTMENT TO CHARGE MR. MARTIN WITH FELONY MURDER IN THE COURSE OF DELIVERING OR ATTEMPTING TO DELIVER A CONTROLLED SUBSTANCE. IT WAS THEREFORE ERROR FOR THE PROSECUTOR TO ARGUE AND THE JUDGE TO INSTRUCT THE JURY THAT THEY COULD CONVICT ON THE UNELECTED THEORY OF FELONY MURDER IN THE COURSE OF ATTEMPTED ROBBERY.
(Responding to Appellee's Brief, 18-19)

The State was incorrect when it characterized Mr. Martin's argument as an assertion that the indictment was defective. Appellee's Brief, 19. There was no defect in the indictment and Mr. Martin does not claim that there is. The error that requires reversal is that the trial court permitted the State to prosecute Mr. Martin on a charge not contained in the indictment.

Both sides agree that an indictment need not specify any particular form of murder, and need not specify any particular felony as the underlying predicate for a felony murder prosecution.

However, the grand jury is free, if it wishes, to vote an indictment that specifies a particular form of felony murder. And if it does so, that is the only form of felony murder on which the defendant may be prosecuted. That is what the grand jury did in Mr. Martin's case.

This is the text that appears on the face of the indictment:

COUNT 1: did unlawfully, feloniously, maliciously, willfully, deliberately and with premeditation, or in the commission of or attempt to commit a felony of delivering a controlled substance, slay, kill and murder one Charles E. Smith III.

Indictment 07-F-68-K, January 10, 2007, Raleigh County.

For whatever reason, the grand jury chose not to charge the general language that would

have covered all felony murder, but instead to specify that the only predicate felony it wished to charge Mr. Martin with was delivery of a controlled substance. Consequently, that is the only charge on which Mr. Martin could be tried.

The State's entire argument rests on its contention that "[t]he prosecutor's addition of the felony murder language was mere surplusage." Appellee's Brief, 18. This claim must fail because prosecutors do not vote indictments and do not add to or subtract from an indictment – grand juries do. The prosecutor did not add anything here. The grand jury considered the case, heard witnesses, and voted to indict on specific charges. That was its right. The prosecutor might wish that the grand jury had used different language, or voted a different charge, but that is irrelevant. "The words of the indictment must stand alone as the sole record of what the grand jury actually considered." 1 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure 666 (2d ed. 1993). The words of this indictment specify felony murder in the course of a drug deal.

The importance of Justice Cleckley's principle cannot be overstated. Were Appellee's Brief correct, the entire purpose of the Grand Jury Clause of the West Virginia Constitution (Article III, Section 4), and the Due Process Clauses of the United States and West Virginia Constitutions would be defeated. It wouldn't matter that the grand jury heard witnesses and made a decision to indict on a specific theory. The prosecutor would be a law unto herself, able to add new theories, even if the grand jury had rejected them, and even if the grand jury had never heard or considered them.

The State has also claimed that Mr. Martin "is disentitled (*sic*) to [appellate] review" of this issue because Rule 12(b) of the West Virginia Rules of Criminal Procedure require that

“defenses and objections based on defects in the indictment must be raised prior to trial.”

Appellee’s Brief, 19. The State’s argument and Rule 12(b) are irrelevant, though, because Mr. Martin is not alleging that there was a defect in the indictment . The indictment was fine. The error was that the trial court permitted the State to try Mr. Martin on a charge not contained in the indictment. That is a structural error that requires reversal pursuant to the Due Process Clauses of the United States and West Virginia Constitutions and the Grand Jury Clause of the West Virginia Constitution. Ex parte Bain, 121 U.S. 1, 10, 7 S.Ct. 781, 786 (1887); Syllabus Point 5, State v. McGraw, 140 W.Va. 547, 85 S.E.2d 849 (1955); Syllabus Point 2, State v. Pruitt, 178 W.Va. 147, 358 S.E.2d 231 (1987).

Finally, contrary to the State’s assertion, Appellee’s Brief, 19, the error cannot be cured by a guilty verdict, because the essence of the error is that the jury should not have been allowed to reach a verdict on the robbery theory at all.²

²One additional aspect of this point in the State’s Brief should be addressed here. The State explains that a reason it wanted the jury to consider felony murder in the course of a robbery is that it had reports from other prisoners that Mr. Martin admitted he and Leftwich tried to rob Officer Smith. Appellee’s Brief, 19. No such informants were ever produced or identified. No such statements were ever proffered or admitted. It is interesting that on page 19 of its brief, the State cites the statements of the jailhouse snitches as a reason the State raised the claim of felony murder in the course of attempted robbery, while on page 21 of the same brief, the State says that it did not call those witnesses because, “the prosecutor shares opposing counsel’s apparent skepticism as to the trustworthiness of convicts.” Finally, the State also claims on page 19 of its brief that a hostile witness, Paul Leftwich, said that he overheard his brother Thomas and Mr. Martin arguing about an attempted robbery of Officer Smith. This claim is factually untrue. Please see pages 9-12, infra, for the quotes and page cites refuting this claim.

POINT THREE: THERE WAS ABSOLUTELY NO EVIDENCE ADDUCED OF AN ATTEMPT TO ROB OFFICER SMITH. THUS, THE CONVICTION FOR FELONY MURDER MUST BE REVERSED AS LEGALLY INSUFFICIENT.
(Responding to Appellee's Brief, 20-24)

The State's factual argument on this point is based almost completely on its assertion that Paul Leftwich, both in his testimony at trial and in his written statement to Officer Duckworth, said that immediately after the shooting he overheard Michael Martin and the shooter/drug dealer Thomas Leftwich arguing about their plan to rob Officer Smith. Appellee's Brief, 21, 24. Had Paul Leftwich actually testified to this, the felony murder/attempted robbery charge would have been sufficient. However, Paul Leftwich never said the things the State claims. The State's characterization of Paul Leftwich's statements is objectively, factually, false. Due to the importance and the seriousness of this misrepresentation, it is necessary to set forth in detail exactly what Paul Leftwich testified to at trial, and what he said to Officer Duckworth.

This is what Paul Leftwich testified to about the conversation he overheard between his brother and Michael Martin about five minutes after the shooting. These questions and answers were on direct examination under the prosecutor's questioning:

Q: And what was your brother doing?

A: When I seen him, he was standing outside And he said that – I can't believe that you brought these white guys over here to rob me.³ I should shoot you and get out of here and don't ever come back around here no more. That's what he said to Martin.

Q: To Martin?

A: Yes.

³Leftwich and Martin are black. Officer Smith was white.

T-IV, 192-193.

Q: And it's your testimony that you heard your brother Thomas Leftwich five minutes after you heard the shots say, "I can't believe you brought this guy here to rob me," meaning Thomas Leftwich, right?

A: Uh-huh (The witness responds affirmatively).

Q: Okay. And then say, "I should shoot you," meaning that your brother was telling Martin he should shoot him?

A: Yes.

T-IV, 194.

Q: Now, you heard your brother say – you heard, you say, 20 gunshots. Then you hear your brother say that, I can't believe you brought this guy here to rob us?

A: No. Rob me. He was talking about himself.

Q: Okay, to rob him. . . .

T-IV, 195-196.

Q: OK. And did you tell the trooper – Trooper Duckworth that what you heard was this defendant or – excuse me – heard your brother, Thomas Leftwich arguing with some guy after you heard the shots –

A: Uh-huh (The witness responds affirmatively).

Q: – arguing about how Martin had brought some guy to Leftwich in order to rob him, meaning the guy, not your brother.

A: Meaning that the guy came to –

DEFENSE COUNSEL: Your honor, objection. I mean, I – we've got the

statement here –

PROSECUTOR: Your honor, I don't think that's proper argument. We have the trooper here.

DEFENSE COUNSEL: She's trying to lead him down the primrose path to reinterpret his statement. That statement –

THE COURT: Let's rephrase the question.

Q (by the prosecutor): What do you recall you told Sergeant Duckworth?

A: At that time I'm not – I believe I told him that – exactly what I just stated earlier, that my brother said that he can't believe that he brought these guys here to rob me and I should shoot you. You know, get out of here and don't come back around here.

T-IV, 200-201.

Thus, the trial record conclusively establishes that contrary to the claim in Appellee's Brief, Paul Leftwich never said that Michael Martin discussed or argued with Thomas Leftwich about robbing Officer Smith. In reality, the facts were exactly the opposite – Leftwich thought undercover Officer Smith was trying to rob him, and accused Martin of bringing Smith and Reynolds to the house so they could rob Leftwich.

It is notable that the prosecutor asked Paul Leftwich about this statement four times during his direct examination, and each time, he gave the same consistent answer – an answer that was the exact opposite of the way the State characterized it in its brief. It is also notable that the State never quotes any of the above exchanges, but simply makes the utterly false assertion that Paul Leftwich had said that his brother and Michael Martin had been arguing about robbing Smith. Appellee's Brief, 19, 21.

Paul Leftwich's statement to Trooper Duckworth also makes clear that Thomas Leftwich

and Michael Martin were arguing about Leftwich's belief that Officer Smith was trying to rob him;

I saw Thomas in the yard arguing with another man about bringing someone here to rob him. I knew something had happened, so I went back inside. The next conversation I had with Thomas in his bedroom. He was telling me and my parents that someone had tried to rob him and he had to shoot them. He said he aimed low and it was self defense.

State's Trial Exhibit #26, West Virginia State Police Statement of Paul Leftwich to Sgt. G.A. Duckworth.

When the State used this Exhibit to claim that "it was clear that Paul Leftwich's phrase "to rob him" referred to the robbery of Cpl. Smith," Appellee's Brief, 24, the State only quoted the phrase with the ambiguous pronoun "him" ("I saw Thomas in the yard arguing with another man about bringing someone here to rob *him*") [Emphasis added]. The State conveniently omitted the very clear statement "He was telling me and my parents that someone had tried to rob him." The State also failed to mention any of the trial testimony above, in which Paul Leftwich repeatedly told the court what had really been said.

The entire factual predicate for the State's claim regarding felony murder during an attempted robbery therefore rests on a gross factual misrepresentation of Paul Leftwich's testimony and statement. This leaves the record completely devoid of any evidence from which a juror might divine a plot to rob Officer Smith.

As a matter of law, the insufficiency of the felony murder/attempted robbery charge requires reversal of Mr. Martin's conviction.

Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491 (1991), and Stuckey v. Trent, 505 S.E.2d 417 (1998), establish that the State may allege multiple theories of prosecution under one count

of murder that simply tracks the language of the homicide statute. Mr. Martin does not contest this principle. However, if the State chooses to take that route, it runs a risk: The United States Supreme Court has made it equally clear that if the evidence is legally insufficient to establish one of the multiple theories on which the jury has been instructed, a general verdict of guilty on the homicide count must be reversed, because there is no way of knowing whether the verdict was based on the legally insufficient theory. This is true even if the evidence was legally sufficient to establish one or more of the other theories. See Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064 (1957); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931). Thus, the State is incorrect as a matter of law when it claims that the insufficiency of the evidence of attempted robbery is somehow cured by the sufficiency of the evidence of a drug sale. See Appellee's Brief, 21.

The trial court instructed the jurors that they could return a general verdict of guilty on the homicide count if they found that any of the three theories propounded by the State had been proven. Because the felony murder/attempted robbery theory was legally insufficient, it is impossible to say whether the guilty verdict resulted from the invalid count. The murder conviction must therefore be reversed.

POINT FOUR: THE EVIDENCE WAS INSUFFICIENT TO PROVE
MR. MARTIN COMMITTED PREMEDITATED MURDER
BECAUSE THE STATE PROVED NO MORE THAN THAT
MR. MARTIN WAS PRESENT AT THE SCENE OF THE
CRIME. (Responding to Appellee's Brief, 24-30)

The State's position on this issue seems to be that the evidence against Mr. Martin on the premeditated murder charge was legally sufficient because Mr. Martin "was present to commit the "enumerated felony" of aiding and abetting the delivery of a controlled substance. So even if Leftwich was the one who intended the premeditated murder of Cpl. Smith, Martin was guilty of first degree murder as an aider and abettor." Appellee's Brief, 25. This is incorrect because no matter how many theories of homicide the State advocates within a single count indictment, a juror may only vote guilty if he or she believes the defendant has satisfied all the elements of at least one of those theories. Satisfying a few, but not all elements of one theory, and a few, but not all elements of another theory, does not support a conviction.

For the evidence of premeditated murder against Mr. Martin to be legally sufficient (whether as a principal or as an aider and abettor), the State must introduce evidence that proves Mr. Martin at least was aware of Leftwich's intent to kill Officer Smith. Mere presence at the scene, even if that presence was to help make a drug sale, does not make Mr. Martin guilty of premeditated murder. Yet there was absolutely no evidence that would lead a juror to conclude that Mr. Martin knew of Leftwich's intent to kill, or shared it in any way. The State's claim that Martin's alleged intent to help Leftwich sell drugs somehow establishes guilt on a premeditated

murder theory is simply wrong.⁴

The reason this distinction is important is that (as mentioned at pages 12-13, supra), if the evidence is legally insufficient to establish one of the multiple theories on which the jury has been instructed, a general verdict of guilty on the homicide count must be reversed, because there is no way of knowing whether the verdict was based on the legally insufficient theory. This is true even if the evidence was legally sufficient to establish one or more of the other theories. See Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064 (1957); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931).

This means that even if the evidence was legally sufficient to establish that Officer Smith's death occurred during a drug deal, the conviction must be reversed because the evidence was insufficient to prove two of the other theories the State advocated in the single murder count, and there is no way to tell whether the jury based its verdict on one or both of the invalid theories.

⁴The State's brief goes to great lengths to insist that Mr. Martin recognized that Smith and Reynolds were police officers. Appellee's Brief, 27-30. This is pure speculation, and is in no way evidence that Mr. Martin shared Leftwich's premeditation of murder. More important, it is the exact opposite of what the prosecutor argued to the jury at trial, when she insisted that Mr. Martin's purpose was "to see to it that a transfer of crack cocaine between Thomas Leftwich and Officer Smith – *who he believed not to be a police officer* - would occur." T-VI, 122 (emphasis added). It is also the opposite of Mr. Martin's statement, which was introduced by the State, in which he repeatedly said he had no idea Smith was a police officer. State's Exhibit 30, 5, 14, 15.

POINT FIVE: THE TRIAL COURT COMMITTED PLAIN ERROR
WHEN IT FAILED TO GIVE ANY LIMITING
INSTRUCTION ABOUT THE JURY'S USE OF
PREDISPOSITION EVIDENCE INTRODUCED
BY THE STATE (Responding to Appellee's Brief, 30-39)

The State has argued that trial counsel made "a tactical decision" not to request a limiting instruction about evidence of his prior crimes and bad acts. Appellee's Brief, 33. Consequently, the State asserts that the court did not commit plain error when it failed to give a McGinnis instruction.

In most cases, appellate counsel and the court have no direct evidence of whether trial counsel made a tactical decision that failed, or simply neglected to do an important task that was plain to the court, and should have been done. In this case, however, such evidence exists, and conclusively establishes that there was no tactical decision.

In his opening statement, trial counsel explicitly told the jury that it was going to be instructed by the judge "that we can't convict Michael of this crime because he's got a prior criminal history per se." T-III, 47-48. This shows (1) that trial counsel was aware of the need for a McGinnis instruction, (2) that he expected the court to give the instruction, and (3) that he wanted the court to give the instruction. Why else would he tell the jury that the instruction would be coming? What happened at the end of the trial was that counsel simply neglected to ask for the instruction.

More importantly, trial counsel's opening statement also demonstrates that the court's failure to give the instruction fits squarely within the definition of plain error. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that

affects the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus Point 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). Counsel’s opening shows that early in the trial, the court was alerted to the need for the instruction. Moreover, the judge surely was aware of the extensive law that requires him to give the instruction. See Rule 404(b) of the West Virginia Rules of Evidence; State v. Hager, 204 W.Va. 28, 35, 511 S.E.2d 139, 146 (1998); Syllabus Points 1 and 2, State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994); State v. Houston, 197 W.Va. 215, 234, 475 S.E.2d 307, 326 (1996); State v. Dillon, 191 W.Va. 648, 661, 447 S.E.2d 583, 596 (1994); State v. Nelson, 189 W.Va. 778, 784, 434 S.E.2d 697, 703 (1993). Given these circumstances, and given this Court’s clear ruling in State ex rel. Caton v. Sanders, 215 W.Va. 755, 762 n.7, 601 S.E.2d 75, 82 n.7 (2004), that “today we make clear that such an instruction is mandatory,” it was plain error for the judge in Mr. Martin’s case to do nothing.

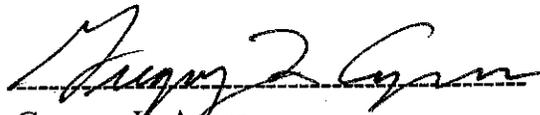
RELIEF REQUESTED

Michael Martin's convictions must be reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ira Mickenberg", written over a horizontal dashed line.

Ira Mickenberg
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A handwritten signature in black ink, appearing to read "Gregory L. Ayers", written over a horizontal dashed line.

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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STATE OF WEST VIRGINIA, :

v. :

MICHAEL E. MARTIN, :

Petitioner. :

No. 34709
Circuit Court of Raleigh County
No. 07-F-68-K

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, do hereby certify that on the 20 day of July, 2009, I served a copy of the attached Appellant's Reply Brief, by mail, upon:

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