

**IN THE SUPREME COURT OF APPEALS
OF THE
STATE OF WEST VIRGINIA**

APPEAL NO. 34721

FROM THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

FIFTH JUDICIAL CIRCUIT

CASE NO. 07-F-24

**RONNIE RUSH,
APPELLANT,**

vs.

**STATE OF WEST VIRGINIA,
RESPONDENT.**

APPELLANT'S BRIEF

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TABLE OF AUTHORITIES

West Virginia Cases:

State v. Robinson, 20 WVa. 713 (1882)

State v. Holland, 178 W.Va. 744, 364 S.E.2d 535 (1987)

State v. Waugh, 221 W.Va. 50, 650 S.E.2d 149 (2007)

I. PROCEEDINGS AND OPINIONS BELOW

Ronnie Rush was charged with two counts of First Degree Murder in Juvenile Delinquency action 03-JD-8.

By Order dated the 18th of May, 2004, the Calhoun County Prosecutor's Motion to Transfer the case to adult status in the Circuit Court of Calhoun County was granted and Ronnie Rush was moved to adult status.

Mr. Rush was later indicted and a trial was started on Dec. 13, 2004 and concluded on Dec. 21, 2004. The jury returned a verdict of guilty to two counts of voluntary manslaughter, a lesser included offense of murder, aggravated robbery, and daytime burglary.

The Defendant was sentenced to forty years in the penitentiary for the offense of Robbery, and two indeterminate sentences of fifteen to forty years in the penitentiary for the two offenses of Voluntary Manslaughter and ran the sentences consecutive to each other.

A Motion for a New Trial and a Motion for a Reduction of Sentence was denied.

The case was appealed to the West Virginia Supreme Court of Appeals on several grounds. The West Virginia Supreme Court of Appeals heard oral argument on the petition for appeal and the appeal.

The Supreme Court overturned Mr. Rush's conviction due to his right to prompt presentment being violated by the West Virginia State Police. The case was remanded back to the Calhoun County Circuit Court.

Upon return to the Circuit Court, Mr. Rush moved for a change of venue due to pre-trial publicity. The motion was granted and the venue was changed to Jackson County, West Virginia.

A trial was commenced on November 6th, 2007. During that trial, the State's lead investigator was caught having communications with at least four of the jurors during a lunchtime break, in front of the court house. The defense immediately moved for a mistrial. After a hearing, the motion was denied and the trial resumed.

On November 9th, 2007, the trial ended and the jury deliberated. The jury found Mr. Rush guilty on all counts.

On April 24th, 2008, a Motion for a New Trial was denied.

Due to this being a retrial, Mr. Rush could not be sentenced to more than he had been sentenced in the first trial. The jury in the first trial returned a verdict of guilty to two counts of the lesser-included offenses of Voluntary Manslaughter and guilty to the offense of First Degree Robbery.

At his first sentencing, the Court sentenced Mr. Rush to forty years in the penitentiary for the offense of Robbery, and two indeterminate sentences of fifteen to forty years in the penitentiary for the two offenses of Voluntary Manslaughter and the sentences are to be served consecutive to each other.

On April 24th, 2008, Ronnie Rush received the same sentence as before.

Motion for a Reduction of Sentence was denied .

The case is currently being appealed to the West Virginia Supreme Court of Appeals.

II. STATEMENT OF THE CASE

On the night of May 14, morning of May 15, 2003, Calhoun County 911 received a call reporting that two people had been shot. It was later confirmed that the Defendant, Ronnie Rush, had made the telephone call. During the call, Mr. Rush stated that he had been at the scene of the crime. Law enforcement officers responded to the scene, located on Little Bear Fork of Steer Creek, in Calhoun County, West Virginia. Upon their arrival, the officers discovered the bodies of two gunshot victims.

Two officers were sent to the home of Ronnie Rush to request his return to the scene of the crime. Mr. Rush agreed to return to the scene with the officers. This took place around 2:00 a.m.

Upon arrival at the scene, Mr. Rush was left sitting in the back of the officers' vehicle.

Later, Officer Carl Balangee returned to the vehicle to perform a gun residue kit. At approximately 3:30 a.m., Trooper Starcher gave Mr. Rush his Miranda warnings and proceeded to interview him. At Mr. Rush's trial, Trooper Starcher testified that he was very suspicious of the Defendant's answers during this interview.

Subsequently, Mr. Rush was taken to the Grantsville detachment of the West Virginia State Police. At approximately 6:00 a.m., another officer questioned Mr. Rush.

During the pre-interview session of the lie detector test, Mr. Rush requested counsel, and the lie detector test was halted. Before Mr. Rush was permitted to speak with counsel, a formal written statement from Mr. Rush was taken at the police barracks by Sergeant Cooper.

The Defendant was kept at the police detachment until approximately 8:00 p.m. Mr. Rush was formally arrested and taken to Calhoun County Magistrate Court. Mr. Rush was fed once during the estimated twelve hours he was at the police detachment.

Mr. Rush was charged with two counts of First Degree Murder in case number 03-JD-8. This case was subsequently transferred to the Circuit Court and adult status. A trial was held in Calhoun County on December 14th, 2004, concluding on December 21st, 2004. The jury returned a verdict of guilty to two counts of the lesser-included offenses of Voluntary Manslaughter and guilty to the offense of First Degree Robbery. At sentencing, the Court sentenced Mr. Rush to forty years in the penitentiary for the offense of Robbery, and two indeterminate sentences of fifteen to forty years in the penitentiary for the two offenses of Voluntary Manslaughter and ran the sentences consecutive to each other.

Mr. Rush made a motion to the Court for a new trial at sentencing, however, that motion was denied. Further, Mr. Rush made a motion to set aside the verdict on the first-degree robbery charge, this motion was also denied by the Court.

The case was appealed to the West Virginia Supreme Court of Appeals on several grounds. The West Virginia Supreme Court of Appeals heard oral argument on the petition for appeal and the appeal.

The Supreme Court overturned Mr. Rush's conviction due to his right to prompt presentment being violated by the West Virginia State Police. The case was remanded back to the Calhoun County Circuit Court.

Upon return to the Circuit Court, Mr. Rush moved for a change of venue due to pre-trial publicity. The motion was granted and the venue was changed to Jackson County.

A trial was commenced soon after. During that trial, the State's lead investigator and the person that was seated beside the Prosecutor during the entire trial, Corporal Doug Starcher was caught having communications with at least four of the jurors during a lunchtime break, in front of the court house. The defense immediately moved for a mistrial. The Court held a hearing on the matter.

During the hearing, Defense Counsel, Teresa Monk called co-counsel, Rocky D. Holmes to the stand to recount what was witnessed during that lunch hour break. Mr. Holmes stated that he and Ms. Monk decided to have lunch at the "Downtown" restaurant located directly across from the front of the Jackson County Courthouse. Upon entering the restaurant, Ms. Monk and Mr. Holmes saw several members of the jury eating lunch. Remembering the Judge's admonishment "that no one was permitted to speak to or have contact with any member of the jury", Ms. Monk and Mr. Holmes put their heads down and made no contact with the jury as they found a table located beyond sight and sound of the jury in the back of the restaurant.

After eating, Ms. Monk and Mr. Holmes exited the restaurant and started to walk across the street back to the Courthouse when Mr. Holmes noticed Corporal Doug Starcher talking with four members of the jury in front of the Courthouse. Mr. Holmes asked Ms. Monk to look. She asked Mr. Holmes if those four men were members of the jury and Mr. Holmes stated he was positive. Ms. Monk and Mr. Holmes walked across the street to the Courthouse. When Mr. Holmes passed by Corporal Doug Starcher he

asked the Corporal if he had a nice lunch and could hear the group commenting on the upcoming WVU/Louisville football game. The Corporal also made a comment about almost falling asleep the previous day during the trial because he had eaten a large lunch and the group of jurors laughed at the comment. Mr. Holmes and Ms. Monk found the Prosecutor and the Judge and moved for an immediate mistrial.

Corporal Starcher testified that he had gone to his car and "got me a chew of snuff." He stated that as he was walking back to the courthouse, he talked to a man working on a church nearby about an unknown animal. After that conversation, he talked with a lady about issues concerning her driver's license. He stated that when he had made his way to the front of the courthouse, he began to have conversations with members of the jury and that most members of the jury had walked by as he was talking to some members of the jury.

The four members of the jury that were seen having conversations with Corporal Starcher also testified. Juror Wallen stated that he talked with the Corporal for about 12 to 15 minutes. He also stated that he was the last one present. Juror Spencer testified. Juror Hoschar testified that they had talked for about 15 to 20 minutes with the Corporal.

Juror Reed testified. The Court asked, "Can you tell me what you recall being said by whom?" "Not really, sir. I just heard one person ask if he knew a certain officer, and he said yes, he's on the city police force or the governor's police force or something at Charleston. And I asked him if he knew Trooper John Miller, a good friend of mine that was stationed down in Lewisburg now." Juror Reed later testified that Juror Spencer was the other juror who had asked if the Corporal knew a certain officer.

All four jurors stated that they spoke about football and hunting. All four jurors also stated that the trial was not mentioned and their service as a juror was not mentioned.

After close of evidence on the matter, Ms. Monk argued to the Court that this goes beyond the look of impropriety. She stated "We were told not to have contact with jurors at all. You know, I was in the 'Downtown,' and we didn't even look at the jury. So then you have one side that is following the rules and not even looking at the jury, and one who is willing to stand there and talk about who they know in common. That has got to have some kind of influence in a juror's mind. I just can't see how it couldn't. I just don't want to take the chance."

After a recess, the Court ruled that the two jurors who asked if the Corporal knew other officers would be dismissed, because it would seem to bolster Corporal Starcher's testimony. The Court stated, "Was it a stupid thing for the trooper to do? Unquestionably . . . But it is incumbent upon the defense here to show prejudice to Ronnie Rush, and I do not believe that burden has been met . . ." The other two jurors remained on the jury and the two alternate jurors took the dismissed jurors place. The motion for a mistrial was denied and the trial continued.

The trial ended and the jury deliberated. The jury found Mr. Rush guilty on all counts, including two counts of First Degree Murder. The jury also found by special interrogatory that Mr. Rush did not use a gun in the commission of the crimes.

A Motion for a New Trial was filed shortly after Mr. Rush's conviction. The motion was based upon the same grounds as the previous motion for mistrial. The defense called Juror Lakrisa Rhodes to testify in an effort to set aside the verdict. She stated, "We all was kind of – we all were nervous. We thought we were all going to get

pulled in one by one, I remember that. None of us said anything about it, though. We all waited until we were allowed to talk about it . . . The one that got dismissed was angry, and the other one that was questioned was angry, yes. His face was red, and you could tell he was – he had an expression of anger.” The angry man was later determined to be the Jury Foreman.

Ms. Monk argued, “The jury was deciding upon first degree murder. Now it is true that he cannot be convicted of that because he was acquitted the first time, but it is still a capital offense placed upon the verdict.

And that is our argument, your Honor, that, you know, the stakes are higher and this officer knew better, had to have known better, and that this is just – it just looks improper. If someone outside of this courtroom read these fact, this looks improper in a case such as this.”

The Court disagreed with Ms. Monk stating that this was not a capital case, due this being a retrial. Furthermore, the Court stated, “There’s been no showing here of prejudice, no showing that the conversation was anything other than sports, what defense counsel is asking the Court to do is to reverse the verdict based on the fact that the trooper was in this, talking with and in this crowd of four jurors. I do not believe that alone is sufficient to grant the motion.” The Court denied Mr. Rush’s motion for new trial.

Due to this being a retrial, Mr. Rush could not be sentenced to more than he had been sentenced in the first trial. The jury in the first trial returned a verdict of guilty to two counts of the lesser-included offenses of Voluntary Manslaughter and guilty to the offense of First Degree Robbery.

At his first sentencing, the Court sentenced Mr. Rush to forty years in the penitentiary for the offense of Robbery, and two indeterminate sentences of fifteen to forty years in the penitentiary for the two offenses of Voluntary Manslaughter and the sentences are to be served consecutive to each other.

On April 24th, 2008, Ronnie Rush received the same sentence as before.

Motion for a Reduction of Sentence was denied.

The case is currently being appealed to the West Virginia Supreme Court of Appeals.

III. ASSIGNMENT OF ERROR

The Petitioner assigns as error the following grounds:

1. The Circuit Court abused its discretion in failing to grant a mistrial and finding that the defendant was not injured by the fact that Corporal Starcher had carried on lengthy conversations with members of the jury, when he was a critical witness for the State and seated by the Prosecuting Attorney throughout a First Degree Murder trial.
2. The Circuit Court abused its discretion in denying a post-conviction motion for new trial finding that the defendant was not injured by the fact that Corporal Starcher had carried on lengthy conversations with members of the jury, when he was a critical witness for the State and seated by the Prosecuting Attorney throughout a First Degree Murder trial and after a former juror testified that this had an emotional impact upon the jury.

IV. ARGUMENT

1. **The Circuit Court abused its discretion in failing to grant a mistrial and finding that the defendant was not injured by the fact that Corporal Starcher had carried on lengthy conversations with members of the jury, when Corporal Starcher was a critical witness for the State and seated by the Prosecuting Attorney throughout a First Degree Murder trial.**

In 1882, The West Virginia Supreme Court of Appeals decided a case of first impression involving jury misconduct. The Court looked at several decisions throughout history to decide how the Court should rule when the sanctity of an unadulterated jury has been broken.

In State v. Robinson, 20 WVa. 713 (1882), the West Virginia Supreme Court states, “We will now take a view of the authorities upon the misconduct and separation of the jury. As this is a new question in this State, we may be pardoned for this investigation, not-withstanding it makes the opinion a very lengthy one.” The Supreme Court cited the following cases, as well as others, in its’ investigation:

“The fact of the separation of the jury having been established by the prisoner the possibility that the jurors may have been tampered with exists and *prima facie* the verdict is vicious. This separation may be explained by the prosecution showing that the juror had no communication with other persons. In the absence of such explanation the mere fact of such separation is sufficient ground for a new trial. The affidavit of a juror who left the balance of the jurors that he had not been tampered with during his absence is not sufficient evidence that he had not been tampered with.” *Hines v. State*, 8 Humph. 597. See also *Keenan v. State*, 8 Wis. 132; *Rowan v. State*, 30 Wis. 129; *State of Minn. v. Parrant*, 16 Minn. 178; *State v. Frank*, 23 La. An. 213.

“If after a cause has been submitted in a capital case a jury receive any kind of evidence which can have the most remote bearing on the case, it will be fatal to their verdict, where in a capital case after the testimony was closed several of the members of the jury while walking out for exercise by leave of the court and in charge of an officer visited and examined the place where the homicide

occurred and in regard to which the witnesses had testified it was held to be sufficient reason for granting a new trial." *Eastwood v. People*, 3 Parker Rep. 25.

"After a jury had retired in the case of a prisoner indicted for murder, they were taken from the jury-room by consent of the prisoner to a neighboring hotel, where rooms were provided for them, and where they dined at the public table, an officer sitting between them and the other guests; and while they were at the hotel, a barber was admitted to their room to shave some of them, and was there more than an hour, and for a few minutes without the presence of the officer having them in charge; there was no proof of tampering with the jury either by the guests at the table or by the barber; on the contrary the officer stated, that he heard no one speak to them, on the subject of the trial, though the barber might have whispered to them, or delivered written communications on the subject; *Held*, that the prisoner was entitled to a new trial; it was not necessary for the prisoner to show, that the verdict was vicious; it was enough to show, that the common law rule had been violated, which prohibits the jury being spoken to by any one." *Boles v. State*, 13 Smedes & Mar. 398.

"A verdict will not be set aside on account of the misconduct or irregularity of a jury, even in a capital case, unless it be such as might affect their impartiality, or disqualify them from the proper exercise of their functions. If any ground whatever, appears for a belief, or even suspicion, that such a condition of things existed, a new trial ought to be freely granted." *State v. Cucuel*, 31 N. J. L. 249.

In *Wormley's Case*, 8 Gratt. 712, it appears that the prisoner had been convicted of murder in the first degree, and he moved for a new trial; and one of the grounds was misbehavior on the part of the officer and jury. The jury were sworn on Saturday; before any evidence was introduced on either side the court adjourned, and the jury was committed to the charge of the deputy sheriff. On the evening of the next day, Sunday, by invitation he went to the home of the clerk of the county court with the jury. On arriving the deputy sheriff and jury went into the parlors, and three gentlemen with them, the clerk, his son-in-law, and the guard of the jail. The sheriff went out of the room several times and left the jury, with the three other men in the parlor, but did not stay more than from five to ten minutes at any one time. The three gentlemen were examined, and they all said: "There was no conversation between either of them and any of the jurors in relation to the trial. They and the jury conversed freely together in the absence of the deputy sheriff, passing jokes and telling anecdotes, but there was no allusion to the trial." The court held, that where a sheriff, to whom a jury is committed in the progress of a criminal trial, walks with them to a neighboring house, and whilst there withdraws from the room, where they are, leaving them in company of three other persons, although these other persons swear there was no allusion by them to the trial during such absence of the officer, yet the verdict of the jury against the prisoner is to be set aside, and a new trial directed."

After analyzing the above authorities, the West Virginia Supreme Court in 1882 rules, “The reason why a jury is required to be kept together, deprived of social intercourse, not even allowed to visit their families without the attendance of an officer, is, because it is regarded to be absolutely necessary to the due administration of justice; that in a criminal trial where a man's life or his liberty is committed to the keeping of a jury of his peers, it is his right, that they shall be kept absolutely free from all outside influence, which might prejudice his case with the jury and do him injury. It is a most sacred charge, that the jury have in their keeping.” State v. Robinson, 20 WV. 713 (1882).

Robinson states that the right to have a jury free of outside influence is an absolute and fundamental right. The mere possibility of influence upon the jury may be enough to grant a new trial. Robinson has been cited seventy-eight times since it was written in 1882 and still remains as good law.

One hundred and five years later, Robinson's strong language has been eroded. In 1987, the West Virginia Supreme Court of Appeals heard State v. Holland, 178 W.Va. 744, 364 S.E.2d 535 (1987). A case that is almost on point with the facts of this case. In Holland, “The defendant contends that the trial court erred in denying his motion for acquittal or for a mistrial made on the grounds that Trooper McDonald conversed with several jurors out of the presence of the parties after the jury was impaneled. The record indicates that the conversation lasted approximately five minutes and occurred while the parties were engaged in *in camera* proceedings in the judge's chambers. Trooper McDonald testified that the subjects of the conversation included Calhoun County football games, deer hunting, and helicopter searches for marijuana. He testified that the

defendant's case was not discussed nor was reference made to the subject of drinking or driving under the influence of alcohol. Trooper McDonald also had coffee with one of the jurors on the morning of the trial, but he testified that it was before he knew who the jurors were and the case was not discussed.

Following the trooper's testimony and after hearing arguments of counsel, the court denied the defendant's motion for acquittal, or in the alternative, for a mistrial. The court also denied the defendant's motion for a new trial, which was based in part on the improper communication between Trooper McDonald and members of the jury.

In syllabus point 7, in part, of State v. Johnson, 111 W.Va. 653, 164 S.E. 31 (1932), we stated:

A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of.

See also, State v. Gilliam, 169 W.Va. 746, 289 S.E.2d 471 (1982).

We do not think that the trial court in this case abused its discretion in failing to find that the defendant was injured by the fact that the trooper carried on a short conversation with several members of the jury, when the conversation did not in any manner relate to the defendant's case. Although this type of communication is neither condoned nor approved, *see, W.Va.Code, 62-3-6 [1965]*, the trial judge heard evidence relating to the conversation and found that no prejudice resulted therefrom. It was within the judge's discretion to make this decision and there is nothing to show that there was an abuse of that discretion.”

In this case, the Trial Court cited Holland as it's reasoning for denying Mr. Rush's motion for mistrial and his post-conviction motion for a new trial. Upon first blush, Holland would seem to settle the issues in this case, however, Mr. Rush's case can be distinguished from Holland in four ways.

First, Holland involves misdemeanor driving under the influence. Mr. Rush's case involves First Degree Murder. At Trial, Ms. Monk argued, "The jury was deciding upon first degree murder. Now it is true that he cannot be convicted of that because he was acquitted the first time, but it is still a capital offense placed upon the verdict.

And that is our argument, your Honor, that, you know, the stakes are higher and this officer knew better, had to have known better, and that this is just – it just looks improper. If someone outside of this courtroom read these fact, this looks improper in a case such as this."

The Trial Court disagreed with Ms. Monk stating that this was not a capital case, due this being a retrial, even though the jury found Mr. Rush guilty of two counts of First Degree Murder. The Trial Court stated, "There's been no showing here of prejudice, no showing that the conversation was anything other than sports, what defense counsel is asking the Court to do is to reverse the verdict based on the fact that the trooper was in this, talking with and in this crowd of four jurors. I do not believe that alone is sufficient to grant the motion."

A second difference between this case and Holland, is that the Trial Court had to have had at least some "suspicion" that the Corporal's contact could have had an impact upon the jury based upon the action it took to remedy the situation.

Instead of calling a mistrial, the Trial Court dismissed two of the four jurors that conversed with Corporal Starcher. The two dismissed jurors were those two jurors who asked the Corporal if knew of certain officers. It should be noted also that this remedy has not been found in the case law. Courts will either deny motions and move ahead with the same jurors, or, call a mistrial and dismiss the jury as a whole.

In Robinson, the Supreme Court made reference to several capitol cases. A passage quoted in Robinson states, "A verdict will not be set aside on account of the misconduct or irregularity of a jury, even in a capital case, unless it be such as might affect their impartiality, or disqualify them from the proper exercise of their functions. If any ground whatever, appears for a belief, or even suspicion, that such a condition of things existed, a new trial ought to be freely granted." *State v. Cucuel*, 31 N. J. L. 249.

Lakrisa Rhodes, a juror who sat on Mr. Rush's trial was called by the defense for Mr. Rush's motion for a new trial. She testified, "We all was kind of – we all were nervous. We thought we were all going to get pulled in one by one, I remember that. None of us said anything about it, though. We all waited until we were allowed to talk about it . . . The one that got dismissed was angry, and the other one that was questioned was angry, yes. His face was red, and you could tell he was – he had an expression of anger." The angry man was later determined to be the Jury Foreman.

Based upon Juror Rhodes' testimony, the Trial Court was presented with at least a "suspicion" that the jurors who talked with Corporal Starcher could become impartial due to the "expression of anger." Furthermore, by trying to remedy the situation by dismissing two of the four jurors, the Trial Court further destroyed the sanctity of an

unadulterated jury. The only remedy available was to throw out the jury as a whole and start anew.

The third way this case can be distinguished from Holland is the length of time and the area that the conversation between Corporal Starcher and the jurors occurred in.

In Holland, the conversation lasted no longer than five minutes and was outside of the Courtroom with all the jurors.

In this case, the conversation that Corporal Starcher had with the four jurors could have lasted up to twenty minutes and was outside the Courthouse. The Corporal even testified that other jurors were walking by this group on their way back to the Courthouse. This conversation with the four jurors, plus having other jurors walking by seeing the conversation was ingratiating in nature and contributed to giving Corporal Starcher an “aura of credibility” when he took the stand and testified. The Trial Court called none of these other jurors to the stand to see if the Corporal had in fact gained an “aura of credibility.”

The only way to properly ensure that other jurors were not influenced would have been to dismiss the jury as a whole.

The last way this case can be distinguished from Holland, is by looking at State v. Waugh, 221 W.Va. 50, 650 S.E.2d 149 (2007). In Waugh, Appellant asserts that error was committed by allowing Deputy R.L. Bennett, who testified on behalf of the State, to escort jury members into the jury room and to operate the metal detector that was at the entrance to the courtroom. Immediately after the jury was impaneled, Appellant's trial counsel objected to the entire jury panel based on Deputy Bennett's contact with the jurors. The trial court held an *in camera* hearing to address the amount of contact Deputy

Bennett had with the jurors. In explanation of the extent of the contact, Deputy Bennett testified to the following:

Witness: I was told to set up the metal detector outside of the doors. So I set it up.

Court: Who told you to do that?

Witness: I think it was Danny Pearson said that it had been requested that I set up the metal detector.

Court: He didn't say who requested that?

Witness: No, he didn't. Not that I can recall.

Court: Did you set it at the entrance to this courtroom?

Witness: Yes, sir.

Court: Do you remember if any jurors passed through that detector?

Witness: No, sir. I didn't run any jurors through the detector.

Court: None at all?

Witness: Not through the detector.

Court: Well, I take it the jurors c[a]me to this courtroom while you had the detector?

Witness: They were sitting in the hallway.

Court: Did you tell them to sit in the hallway or did they just sit on the chairs?

Witness: They were sitting in the chairs there. It got to be quite a few of them. So I took them down there to the jury room.

Court: And left them?

Witness: Right. I took them to the jury room. And once it got filled, I put the rest in the law library.

Court: Is that the extent of what you did?

Witness: Yes, sir.

Court: Did you give them any orders or anything like that?

Witness: No, I just told them if they were jurors, to go down to the end of the hallway, last door on the right.

To support his contention that he was denied a fair trial as the result of Deputy Bennett serving as both witness and bailiff, Appellant relies on syllabus point three of *State v. Kelley*, 192 W.Va. 124, 451 S.E.2d 425 (1994), in which this Court held:

A defendant's constitutional rights to due process and trial by a fair and impartial jury, pursuant to amendment VI and amendment XIV, section 1 of the *United States Constitution* and article III, sections 10 and 14 of the *West Virginia Constitution**55 **154 are violated when a sheriff, in a defendant's trial, serves as a bailiff and testifies as a key witness for the State in that trial.

The issue of whether constitutional error occurred in this case is determined under *Kelley* by examining first, whether Deputy Bennett was serving as a bailiff while performing the duties described above, and second, whether the testimony he provided at trial was that of a key witness with regard to securing Appellant's conviction.

That the metal detection and escorting functions performed by Deputy Bennett are prototypical of actions performed by a bailiff cannot be disputed. What is disputed, however, is whether the amount of time Deputy Bennett was involved in these functions was significant enough to spark the concerns at issue in *Kelley*. Appellant argues that the contact that Deputy Bennett had with the jurors in escorting them down the hall to either the jury room or the library was ingratiating in nature and contributed to giving him an "aura of credibility" when he took the stand and testified. 192 W.Va. at 130, 451 S.E.2d at 431. Conversely, the State contends that the limited contact Deputy Bennett had with the jurors was not sufficient to raise constitutional concerns, as was the case in *Kelley*

where the officer involved served as bailiff throughout the entirety of the trial proceedings.

Given the unusual situation of having a witness also serve as the bailiff, the trial court instructed the sheriff in *Kelley* that he was not to converse with the jurors and that his contact with the panel was to be limited to escorting the jury members in and out of the courtroom and transporting messages between the jury and the court. Because the record failed to indicate that the officer acted other than as instructed, this Court found no *per se* constitutional violation based on the sheriff serving as the bailiff during the trial.

Of more concern to this Court was “the role of the sheriff in his capacity as a State's witness and the weight his testimony may have carried in obtaining a conviction.” 192 W.Va. at 129, 451 S.E.2d at 430. We viewed this issue as the “more critical stage of analysis because of the sheriff's role as an investigating officer in this case.” *Id.* at 129, 451 S.E.2d at 430.

In examining the role the sheriff occupied as a witness in *Kelley*, we looked to the extent of his involvement with the investigation of the case. As the first officer on the scene, the sheriff in *Kelley* obtained possession of the murder weapon and he attended to the victim. At trial, the sheriff's testimony included a description of the events at the scene, as well as the fact that the defendant twice confessed to the sheriff to shooting the victim. We determined in *Kelley* that the sheriff's testimony was corroborative and cumulative of other evidence presented at trial. Due to the scope and persuasiveness of his testimony, however, we could not conclude that the sheriff's testimony was that of a minor witness. 192 W.Va. at 129-30, 451 S.E.2d at 430-31.

During his direct testimony, Deputy Bennett testified that upon his arrival at the bar he immediately recognized the victim, having known him since he was a child. Deputy Bennett's testimony does not indicate whether the victim and the officer were close friends or merely acquaintances.

As was the case in *Kelley*, the officer involved in this case was the first officer who arrived on the scene. Deputy Bennett was there for fifteen to thirty minutes before Deputy Carl Peterson arrived and took over the investigation. Before Officer Peterson's arrival, Deputy Bennett secured the scene; called for an ambulance; took several Polaroid photographs of the crime scene; and retrieved one shell casing. He also took statements from two witnesses.

At trial, the most important piece of non-cumulative evidence that Deputy Bennett testified to was the chain of custody with regard to the shell casing. This issue, standing on its own, however, is not sufficient under the facts of this case to render Deputy Bennett a key witness under the reasoning of *Kelley*. In reaching our decision in *Kelley*, we discussed a number of both federal and state court decisions in which the impact of a prosecution witness also serving as bailiff was examined. One of those decisions was *Strickland v. State*, 784 S.W.2d 549 (Tx.App.1990), a case in which a sheriff who served as the bailiff at trial testified to the chain of custody of certain pieces of evidence. In concluding that no constitutional violations occurred, the Texas appellate court reasoned that the sheriff "could not be considered a key witness because his testimony was not a significant factor in arriving at a conviction." 192 W.Va. at 128, 451 S.E.2d at 429 (discussing *Strickland*).

As we emphasized in *Kelley*, there is no automatic requirement that mandates the reversal of a conviction whenever a witness for the State comes into contact with the jury. 192 W.Va. at 127, 451 S.E.2d at 428 (quoting *Gonzales v. Beto*, 405 U.S. 1052, 1054-55, 92 S.Ct. 1503, 31 L.Ed.2d 787 (1972)). Instead, what is required is a factual analysis that focuses on the length and degree of contact between the jury and the witness, as well as an inquiry into whether the witness provided testimony that was crucial to the conviction, or merely formal in nature. In those cases where the testimony involved was “ ‘confined to some uncontroverted or merely formal aspect of the case for the prosecution,’ ” the testimony is typically not viewed as crucial. 192 W.Va. at 127, 451 S.E.2d at 428 (quoting *Gonzales*, 405 U.S. at 1054-55, 92 S.Ct. 1503). Rather than being concerned with the “ ‘brief encounters’ ” that are “often inevitable” between witnesses and jury members, the type of contact that initially prompts inquiry into the issue of whether the defendant was provided a fair trial is present when the contact is close and sustained due to the bailiff being the “official guardian” of the jurors. 192 W.Va. at 127, 451 S.E.2d at 428 (quoting and discussing *Gonzales*, 405 U.S. at 1054-55, 92 S.Ct. 1503). And, to constitute an issue which rises to the level of constitutional significance, the bailiff/witness's testimony must be crucial to the conviction. 192 W.Va. at 127, 451 S.E.2d at 428.

As we explained in *Kelley*, the type of contact that raises constitutional flags exists where the jurors have a “close and continual association ... with key witnesses that le[a]d[s] to a relationship that fostered jurors' confidence and deprived the defendant of his constitutional right to trial by an impartial jury.” 192 W.Va. at 130, 451 S.E.2d at 431 (discussing *Gonzales*). We cannot conclude, under the holding and reasoning of *Kelley*,

that the limited contact that Deputy Bennett had with the jurors in this case resulted in the jury viewing him as their “official guardian.” *See id.* And, despite Deputy Bennett being the first officer on the scene, the subject matter of his testimony was corroborative and cumulative as Deputy Peterson, the investigating officer, testified to the scene of the crime and the events surrounding the investigation at trial. As far as the chain of custody testimony with regard to the single shell casing that Deputy Bennett retrieved, that testimony was essentially uncontroverted and constituted a formal aspect of the State's case. Because we conclude that the testimony of Deputy Bennett was not that of a key witness within the meaning of *Kelley*, we do not find that Appellant's constitutional rights were violated by virtue of Deputy Bennett's involvement in this case as both a prosecution witness and a bailiff.

In Mr. Rush's case, Corporal Starcher was the lead investigator, a key witness and, most importantly, he was seated beside the Prosecuting Attorney throughout the whole trial.

By having a twenty-minute conversation with four jurors, in front of the Courthouse, while other jurors were walking by, plus being the lead investigator, a key witness in the trial and being seated beside the Prosecuting Attorney throughout the trial would lead one to the conclusion that under Waugh, Mr. Rush would be entitled to a new trial due to Corporal Starcher's actions because “close and continual association ... with key witnesses that le[a]d[s] to a relationship that fostered jurors' confidence and deprived the defendant of his constitutional right to trial by an impartial jury” 192 W.Va. at 130, 451 S.E.2d at 431 (discussing), plus this contact would make Corporal Starcher seem he

was ingratiating in nature and contributed to giving him an “aura of credibility” when he took the stand and testified. 192 W.Va. at 130, 451 S.E.2d at 431.

If this Court upholds the Trial Courts decision, it will set a precedent that any contact with a jury is appropriate, as long as, it does not concern the case.

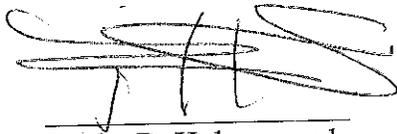
2. **The Circuit Court abused its discretion in denying a post-conviction motion for new trial finding that the defendant was not injured by the fact that Corporal Starcher had carried on lengthy conversations with members of the jury, when he was a critical witness for the State and seated by the Prosecuting Attorney throughout a First Degree Murder trial and after a former juror testified that this had an emotional impact upon the jury.**

See above argument.

PRAYER FOR RELIEF

WHEREFORE, the Petitioner prays that this Honorable Court reverse the decisions of the Jackson County Circuit Court and reverse the conviction. If reversal is not possible, the Petitioner asks the Court to reverse and remand this case for a new trial and further prays for such relief, as this Honorable Court deems appropriate.

RONNIE ALLEN RUSH
By Counsel



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CERTIFICATE OF SERVICE

Pursuant to the Rules for Appeal in West Virginia, the undersigned counsel for the Appellant hereby certifies that he did on the 10th day of April, deliver the original and nine copies of this document to the Clerk of the Jackson Circuit Court and serve the foregoing and hereto appended paper entitled "Petition for Appeal" by first-class mail of a true copy thereof to the following counsels of record:

WV Attorney General's Office
Appellate Division
1900 Kanawha Blvd. East
Room 26E
Charleston, WV 25305-9924

A true copy thereof was hand delivered on the above date to:

Shelly DeMarino, Esq.
Calhoun County Prosecuting Attorney.



Rocky D. Holmes
Counsel for Appellant