

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

**STATE OF WEST VIRGINIA,**

**Appellee.**

**vs.**

**NO.: 34723**

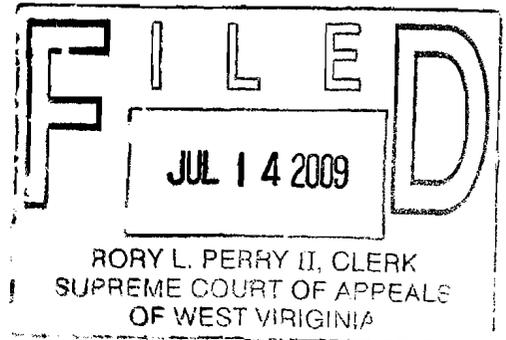
**MICHAEL DAVID DAY,**

**Appellant.**

**APPELLANT'S BRIEF**

**I.**

**Kind of Proceeding and Nature of  
Ruling in Lower Court**



This is an appeal of a criminal conviction filed by the Appellant, Michael David Day, (hereinafter known as “Appellant”) based upon a jury verdict from the Circuit Court of Cabell County (Alfred E. Ferguson, J.) finding the Appellant guilty of violation of West Virginia Code § 61-2-2 and West Virginia Code § 61-10-31.

The Appellant was indicted by Cabell County Circuit Court in January, 2003, on the charges of first degree murder (West Virginia Code § 61-2-2), malicious wounding (West Virginia Code § 61-2-9), and conspiracy (West Virginia Code § 61-10-31). With regards to these charges, Sunney Eugene Freeman, Jr. (hereinafter known as Freeman) and Jarrett R. Bailey (hereinafter known as Bailey) were co-defendants.

At the time the crime was committed, the Appellant was a minor, being seventeen years of age. A hearing conducted on or about August 18, 2002 was held to decide on the State of

West Virginia's (hereinafter referred to as "State" or "Appellee") motion to transfer the Appellant from the jurisdiction of juvenile court to the adult criminal division of the Circuit Court of Cabell County. On December 12, 2002, an Order transferring the Appellant to adult criminal division of the Circuit Court of Cabell County was entered due to the severity of the charge, the Appellant's age, and the Juvenile Petition (02-JD-10).

On February 26, 2003 a Motion to Dismiss Counts II and III was heard before the Circuit Court of Cabell County. As a result, Count II of the indictment was Ordered to be dismissed. On September 5, 2003, a plea agreement was reached between the State and the co-defendant Bailey. The terms of this plea agreement included a plea to the crime of voluntary manslaughter with a determinate sentence of three to fifteen years at the discretion of Judge Alfred E. Ferguson. Also included in the plea agreement was a plea to malicious wounding with a determinate sentence of two to ten years at the discretion of Judge Alfred E. Ferguson. In return, the State required Mr. Bailey's full cooperation and testimony in the prosecutions of the Appellant and the other co-defendant, Freeman.

A jury was selected and sworn. The trial of the Appellant commenced on September 9, 2003 in the Circuit Court of Cabell County. The jury returned a verdict on September 17, 2003. The jury found the Appellant guilty of first degree murder (West Virginia Code § 61-2-2) and of conspiracy (West Virginia Code § 61-10-31).

Post trial motions were filed with the Circuit Court of Cabell County seeking a new trial based upon the Trial Court's denial of the Appellants motion for a jury view of the alleged crime scene; Judge Alfred E. Ferguson allowing the Prosecuting Attorney to display photographs and images on an overhead projector during opening statements that had not been admitted into evidence "at his own risk"; those same photographs not being admitted later into evidence; the

“expert” testimony of Huntington Police Officer David Castle was offered without qualifying him as a “Reconstruction Expert”; the failure of the Prosecutor to provide prior notice to the Appellant of his intent to use Detective Castle as a “Reconstruction Expert”; the State’s violation of Rule 12 and Rule 16 of the West Virginia Rules of Criminal Procedure; the State’s violation of the Fourteenth Amendment of the United States Constitution due to the failure of the State to provide the Appellant with the statement of co-defendant, Bailey, which was offered at trial; the impermissible psychological evaluations of the Appellant to be read to the jury during the penalty phase; and juror bias. The Circuit Court of Cabell County denied all post trial motions over the objections of the Appellant.

On September 22, 2003, a La Rock hearing was conducted with the jury returning a recommendation for no mercy. On the same day, testimony was taken of alleged misconduct and bias of one of the jurors. On October 30, 2003, the Alfred E. Ferguson sentenced the Appellant to life in prison with no mercy.

## II.

### STATEMENT OF FACTS

On July 2, 2002, the body of Gerald King was discovered on the riverbank at about Thirteenth Street West in Huntington, West Virginia<sup>1</sup>. About this time, the Appellant was residing with his father at 1336 ½ Monroe Avenue, Huntington, West Virginia<sup>2</sup>. On the evening of July 1, the Appellant and his friends, Bailey and Freeman decided to go fishing and were taken to the river by the Appellant’s father. The Appellant and his friends encountered Gerald King on the River Bank that evening. The Appellant was fishing near a

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<sup>1</sup>See trial transcript pg. 239

<sup>2</sup>See trial transcript pgs. 1086-1087.

barge around 11:30 p.m. when Freeman informed the others that he was going to the restroom.

Approximately five minutes later, the Appellant heard Bailey say “Oh Shit” and then proceeded to run towards Gerald King’s campsite. Several minutes later the Appellant heard a loud boom and ran up the trail in the same direction Bailey ran<sup>3</sup>. While running up the trail not knowing what has happening, the Appellant picked up a stick. It was dark outside and the visibility was poor<sup>4</sup>. The Appellant heard Freeman say that he had been cut, and believed him to be injured due to his being bent over. Gerald King rose up from the ground<sup>5</sup>. A fight then began between Gerald King, William Porter, Bailey, Freeman, and the Appellant<sup>6</sup>. After the fight concluded the Appellant, Freeman and Bailey went to their previous location to resume fishing<sup>7</sup>. They then decided to leave the riverbank<sup>8</sup>.

### III.

#### QUESTION(S) PRESENTED

Whether the Circuit Court of Cabell County’s denial of the Appellant’s Motion for a Jury view would have permitted the jury to orientate itself to the physical, geographical and weather conditions present at the time of the alleged events.

Whether the Circuit Court of Cabell County’s allowance of photographs to be displayed by the Prosecuting Attorney during his Opening Statement denied the Appellant a fair trial and resulted in a verdict based on sympathy for the victim and/or prejudice against the Appellant.

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<sup>3</sup>See trial transcript pg. 1089.

<sup>4</sup>See trial transcript pgs. 1090-1091.

<sup>5</sup>See trial transcript, pg. 1090.

<sup>6</sup>See trial transcript, pgs. 1091-1099.

<sup>7</sup>See trial transcript, pg. 1099.

<sup>8</sup>See trial transcript, pg. 1100.

Further, these photographs were never admitted into evidence and were to be used “at his own risk” by the Prosecutor.

Whether the expert testimony of Huntington Police Officer David Castle was offered without qualifying Detective Castle as a “Reconstruction Expert.” Further, the State failed to provide notice prior to the Appellant that it intended to use Detective Castle as a “Reconstruction Expert.”

Whether Jennifer Bowles, a juror in the trial, had a verifiable and provable bias against the Appellant due to the fact that the Appellant has produced sworn testimony that Juror Bowles had made prejudicial remarks prior to the trial, and failed to disclose her bias during voir dire or before the start of the trial. Further, Juror Bowles credibility is diminished due to the fact that she informed the Court Bailiff that she recognized members of the Appellants immediate family.

#### IV.

#### POINTS AND AUTHORITIES

In State v. McCausland 82. W. Va. 525, 96 S.E. 938, 939 (1918). , the Court discusses physical evidence and compares the jury actually viewing the alleged scene of the crime with the introduction of physical objects as evidence at trial.

According to the trial transcript, page 94, the Trial Judge allowed the Prosecuting Attorney to display photographs to the Jury “at his own peril.” Later, those same photographs were later ruled inadmissible by the Court due to the fact they did not represent the crime scene at the time of the alleged acts.

The Court should have excluded the testimony of Huntington Police Officer David Castle because contrary to the prosecution’s claim, Detective Castle was never qualified to testify or give an opinion as a “Reconstruction Expert.” This violates the West Virginia Rules of Criminal Procedure Rule 16 (E) and Rule 16 (F).

The Court should have granted the Appellant a new trial due to a discovered bias of Juror Jennifer Bowles after the hearing. During trial, the Juror admitted she recognized two members of the Appellant’s family, but no action was taken by the Court Bailiff, to whom she disclosed this information.

#### V.

#### ARGUMENT

**A. The Circuit Court of Cabell County should have granted Appellant's Motion for a Jury view in order for the Jury to orientate itself to the physical, geogrphical, and weather conditions present at the time of the alleged events and to minimalize the effect of the inadmissible photographs being shown.**

The Appellant's Motion for a Jury View should have been granted in order for the jury to have a better understanding of the area where the alleged events took place. The jury would have been able to better put in perspective testimony given at trial as to the alleged events of July 1, 2002. The jury's understanding of a crime scene is vital to the defense of the Appellant. The Appellant's testimony was that he could not see the the initial altercation between Freeman and the Gerald King. By viewing the crime scene, the jury would have had a better understanding of the Appellant's view, when by his testimony he heard Freeman scream and could not see the actual altercation. The Jury would have been in a better position to understand the Appellant's perspective as well as offer scrutiny to the testimony offered by the prosecution's witnesses.

Neither the Court, nor the Jury would have been substantially inconvenienced by this Motion. The location where the alleged events occurred is in a relatively nearby proximity to the Cabell County Courthouse, The time during which the trial took place was similar to the time when the alleged events occurred providing comparable natural conditions. Any burden a Jury View would have caused the Court and/or the Jury would have paled in comparison to the Court to not allow the Appellant to have an adequate defense. This is true especially with regards to the pictures shown during the Prosecutor's Opening Statements of the victim's campsite that did not adequately depict the campsite at the time the alleged events occurred.

In **State v. McCausland**, 82 W.Va. 525, 96 S.E. 938, 939 (1918)., the Court discusses physical evidence and compares the jury actually viewing the alleged scene of a crime with the introduction of physical objects as evidence at trial. The Court states that just as objects are

brought into a court and admitted as evidence, in a homicide case the ground where the incident occurs can be “stronger and more convincing to the jury than the oral testimony of any witness could possibly be. With this weight placed on the physical evidence in a homicide case, it was error when the Court failed to use it’s discretion to allow the Jury to see the crime scene for themselves after seeing it as photographs presented by the Prosecutor.

**B. The Court should have granted the Appellant’s Motion for Mistrial when the Court, after warning the Prosecuting Attorney to use photographs “at his own peril” on an overhead projector during opening statements, excludes the photographs shown from evidence as they are not representative of what the Prosecutor purported them to represent.**

During his opening statement, the Prosecuting Attorney presented photographs of the crime scene to the Jury via an overhead projector. The Prosecuting Attorney was warned that when he published photographs of the area where the alleged events occurred during his opening statements that he was doing so at his “own peril” by the Trial Judge. Later during the trial, these photos were ruled as inadmissible because they did not represent the crime scene at the time of the alleged events. This event provided a bias towards the Appellant due to the sympathy for the victim and prejudice provided to the Jury by these photos. The Prosecutor was able to create an image of the crime scene into the minds of the Jury that was not representative of the area when the alleged events occurred.

The Prosecutor provided witnesses to testify as to the description fo the scene near the time of the alleged acts, he went forward with publishing the photographs. These photographs were not adequately investigated and probed as to the time in which they were taken. If in fact the Prosecutor was derelict in his investigation of the photographs as to not seek when they were taken, the Prosecutor’s “good faith” belief that they were more recent is not actually in good faith. Just as ignorance is no excuse for breaking laws, neither is it a ground for a “good faith”

belief. The Prosecutor did not preform his duty to research this photographic evidence that he intended to publish to the Jury during his opening statement. By allowing this “good faith” defense by the Prosecutor, it would reward the prosecution for failing to adequately research and investigate evidence they planned to use at trial. There is no incentive for making sure that evidence is correct, and encourages prosecutors to know fewer details of evidence collection so as not to create a mistrial.

**C. The Court should have excluded testimony of Huntington Police Officer David Castle because contrary to the prosecution’s claim, Detective Castle was never qualified to testify or give testimony as a “Reconstruction Expert.”**

Through the testimony of Huntington Police Officer David Castle, the State attempted to enter into evidence expert testimony regarding crime scene reconstruction; 1) without giving notice to the Appellant pursuant to West Virginia Rules of Criminal Procedure and 2) without first having Detective Castle qualified as a “Reconstruction Expert.”

The prosecution elicited scientific, technical, or specialized knowledge relating to crime scene reconstruction from Detective David Castle to assist the jury in understanding his version of the events of July 1, 2002. Detective Castle was never qualified as an expert in crime scene reconstruction. An opportunity to voir dire this witness as to his qualifications as a reconstruction expert was never afforded to Appellant’s counsel.

Without proper notice of the Prosecutor’s intent of calling Detective Castle as and expert, the Appellant was not afforded an opportunity to have counsel investigate Detective Castle’s “expertise.” Detective Castle did not undergo voir dire at to his “expertise” and therefore his

statements on how the crime occurred are inadmissible, and should be ruled as such. This caused a prejudice to the Appellant as a lack of notice and voir dire are a direct result of the Prosecutor's failure to notify Appellant's counsel of his intentions. This is a direct violation of West Virginia Rules of Criminal Procedure Rule 16 (E). Rule 16(E) states that "...the state shall disclose to the defendant a written summary of testimony the state intends to use under Rule 702, 703, or 705 of the Rules of Evidence during its case in chief at trial. The summary must describe the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications."

**D. The Court should have granted the Appellant a new trial based on discovered bias of Juror Jennifer Bowles.**

Juror Jennifer Bowles recognized immediate family members of the Appellant prior to or during the trial and did not notify the Trial Court. The Appellant offered testimony following the verdict to prove Juror. The Juror herself testified that she did recognize two members of the Appellant's family and notified the Court Bailiff of such. It is the testimony of Sergeant George Kisor that no such conversation took place. The Appellant proffered testimony of Heather Farnsworth (hereinafter known as Farnsworth) who the Appellant believes would have testified that she overheard the Juror discussing the case and the Appellant while visiting an inmate in jail. Farnsworth did not make it to Court to provide that testimony.

Whether the conversation between Juror Bowles and Sergeant Kisor actually took place is irrelevant Juror Bowles admits to having recognized members of the Appellant's immediate family. The Court was not informed of this. The Appellant was therefore prejudiced because he had no recourse for this bias on the jury. The potential for bias held by Juror Bowles is of great concern due to the composition of the jury was only twelve members, as the one alternate juror

was dismissed from service on the first day of the trial.

**VI.**

**Conclusion**

For all the foregoing reasons, the Appellant seeks a new trial as the decision of the Circuit Court of Cabell County clearly is flawed due to 1) The denial of the Appellant's Motion for Jury View so that the members of the jury may properly view the crime scene, 2) the publishing of inadmissible photographs to the jury by the Prosecuting Attorney without any action being taken once they were not allowed as evidence, 3) the lack of proper notice and voir dire of Detective Castle's qualifications as a "Reconstruction Expert", and 4) the bias of Juror Bowles due to her negligence in admitting she knew members of the Appellant's immediate family until after a verdict had been rendered. Therefore, the Appellant respectfully requests that a new trial be granted unto him and to any other relief which this Court deems appropriate.

**MICHAEL DAVID DAY,**

**By Counsel.**



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**CERTIFICATE OF SERVICE**

I, David R. Tyson, counsel for the Appellant, do hereby certify that the service of **Appellant's Brief** upon Dawn E. Warfield, Assistant Attorney General, by mailing a true copy thereof to the State Capitol Complex, Room 26-E, Office of the Attorney General, Charleston, West Virginia 25305, in the United States Mail, postage pre-paid, on this day, July 10, 2009.

  
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David R. Tyson