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NO. 34723

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

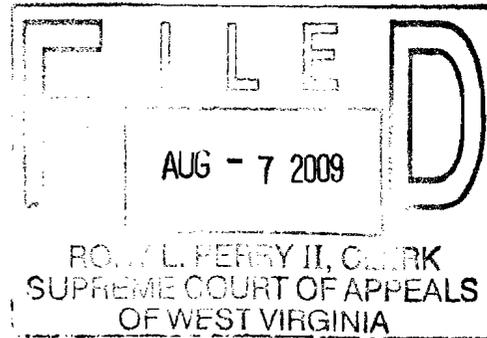
STATE OF WEST VIRGINIA,

Appellee,

v.

MICHAEL DAVID DAY,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

This is an appeal by Michael David Day (hereinafter "Appellant") from the March 1, 2004, order of the Circuit Court of Cabell County (Ferguson, J.), which sentenced him to life without mercy in the State penitentiary upon his conviction by a jury of one count of first degree murder in violation of West Virginia Code § 61-2-1, and a term of one year to five years in the State penitentiary upon his conviction by a jury of one count of conspiracy to commit a felony offense in violation of West Virginia Code § 61-10-31, the terms to be served concurrently. On appeal, Appellant claims that the circuit court committed various errors, denying him a fair trial.

II.

STATEMENT OF FACTS

This case surrounds the events of the murder of a homeless veteran named Gerald King (who was also commonly known by his nickname, “Chickie Bird”) on June 30, 2002, who lived at a campsite near a riverbank in Huntington. On the day in question, Jason Scarberry and his wife, Desiree, were riding on a four-wheeler and came upon Mr. King’s campsite around dusk. (Tr., 153-54, Sept. 9, 2003.) While there, Mr. Scarberry noticed three young males sticking their heads in Gerald King’s tent and snooping around as if they were attempting to steal some of his possessions. (*Id.* at 165.) Mr. Scarberry went over to where the young men and Mr. King were because he feared there might be trouble. (*Id.* at 167.) At one point, one of the young males threw a beer bottle in the weeds. In response, Gerald King asked if they could throw the beer bottles in trash cans he had at the campsite. (*Id.* at 168.) In response, the person who threw the beer bottle replied, “F— you. You ain’t nothing but a bum. This ain’t nothing but the f---ing riverbank. What the f— are you going to do about it.” (*Id.*) At this point, Mr. Scarberry stepped in to calm things down and restore order. One of the co-defendants, Jarrett Bailey attempted to calm things down at this time as well. (*Id.*) Then the three males went back to the riverbank and continued fishing and drinking beer. (*Id.* at 169.) Shortly after this, Mr. Scarberry and his wife left. Later that night, Jason Scarberry went back to the riverbank because he had a bad feeling after the earlier encounter with the three males. He came back and found the place wrecked with trash strewn everywhere, trash cans knocked over and a mailbox on the ground. (*Id.* at 172.) Eventually, Mr. Scarberry found Mr. King lying near the water and discovered that the latter was dead. (*Id.* at 173-74.) Once Jason Scarberry found the victim had died, he left and called 911 assistance. (*Id.* at 174.)

Ms. Desiree Scarberry was able to identify all three of the males in a photo line-up, including Appellant. She was able to identify all three of them again during her testimony at trial. (*Id.* at 191-94.)

Jarrett Bailey, a co-defendant, testified at trial that he, Appellant and Sunney Freeman went fishing on the night in question. (Tr., 247, Sept. 10, 2003.) He also testified that he met Mr. and Ms. Scarberry and the victim at the campsite. He stated that there was an altercation concerning a beer bottle being thrown by either Appellant or Mr. Freeman. (*Id.* at 251-53.)

At some point after the Scarberrys left and fishing resumed, Appellant started jumping up and down and said, "Let's go kick his a--." (*Id.* at 356.) Once Appellant said this, Mr. Bailey testified that both he and Mr. Freeman responded affirmatively. (*Id.* at 357.) At this point, all three co-defendants went back to Gerald King's campsite. (*Id.*)

Once the three got to Mr. King's tent, Sunney Freeman hit the victim in the face with his fist, knocking him to the ground. (*Id.* at 169-70.) Then Jarrett Bailey put Mr. King in a headlock, and Sunney and Appellant started kicking him repeatedly. (*Id.* at 361-63.) Sunney Freeman then took a bottle and hit the victim in the head with it. (*Id.* at 363-64.) When this happened, Mr. King again went down to the ground. Jarrett Bailey and Sunney Freeman continued to kick the victim, while Appellant obtained a stick and started hitting him repeatedly in the sides and arms. (*Id.* at 367, 370.) According to Mr. Bailey, he saw Appellant hit Gerald King with the stick approximately six times. (*Id.* at 366.) Mr. Bailey hit Mr. King about four times with an aluminum pole that might have been a mop handle. (*Id.*) Mr. Bailey then testified that Sunney Freeman stabbed Mr. King in the leg with a knife. (*Id.* at 370.)

Jarrett Bailey testified that he noticed another man, Mr. Porter, coming toward him. Mr. Porter took a swing at Jarrett Bailey, but Mr. Bailey avoided the impact and hit him in the face. (*Id.* at 377.) Mr. Porter had a stick in his hand, and Mr. Bailey took it from him and hit him with it. (*Id.* at 377-78.) Jarrett Bailey testified that after this happened he turned around to see Appellant hitting Mr. King in the head with a stick that appeared to be a tree branch. (*Id.* at 378-79.) He testified that he saw Appellant hit Gerald King at least twice with this stick. (*Id.* at 379.) Mr. Bailey stated that he heard a breaking sound at this point that he attributed to either the branch or the bones in Mr. King's face being broken. (*Id.* at 380.) According to Mr. Bailey's testimony, Sunney Freeman took a two-by-six board and hit Mr. Porter in the head with it. (*Id.*) Jarrett Bailey then admitted in his testimony that he grabbed the stick he took from Mr. Porter and hit the latter with it. (*Id.* at 383.)

After this encounter with Mr. Porter, Jarrett Bailey testified that he walked down to the river embankment where he witnessed Appellant kicking the victim in the face and head. (*Id.* at 385.) He stated that this occurred at least three times where Appellant was basically jumping up and down on Mr. King. (*Id.* at 386.) Overall, Mr. Bailey testified that he witnessed Appellant beat the victim with a stick in the sides, kick him, hit him in the head with a stick and stomp on him. (*Id.* at 388.)

After the beating of Mr. King and Mr. Porter took place, the three co-defendants picked up their belongings, left the river area and started back to Jarrett Bailey's house. (*Id.* at 391-92.) Jarrett Bailey had given his shirt to Sunney Freeman to wrap around the latter's hand because it was bleeding. Eventually, they burned all three of their shirts because there was blood on them. (*Id.* at 395-96.)

Linda Miles was with a group of people in a parking lot lighting fireworks that night when she encountered the three co-defendants after they left the riverbank area. She testified that all three

had blood on their clothes and said that they had been in a fight. (Tr., 1003-04, Sept. 12, 2003.) She testified that Appellant had told her that he hit someone with a stick. (*Id.* at 1004.) She stated that the three co-defendants were bragging about the fight, talking about kicking someone and mentioning a knife. (Tr., 1005, Sept. 12, 2003.) She testified that while Appellant was bragging, he stated, “I think we might have killed that one dude.” (*Id.* at 2006.) Another woman, Mary Ann Travis, was also in this parking lot and saw the three co-defendants. She also testified that all three males were bloody and said that they had been in a fight. (Tr., 1018-20, Sept. 12, 2003.) Ms. Travis said that Appellant was doing most of the talking and was “hyped up.” (*Id.* at 1021.) She testified that she heard Appellant say, they had been in a fight at the riverbank and that they “f—ed them boys up pretty bad,” and “[w]e may have killed that one dude.” (*Id.* at 1022.)

On July 9, 2002, Linda Miles went to Detective Chris Sperry of the Huntington Police Department based on what she observed and heard the evening she saw the three co-defendants. (Tr., 262, Sept. 10, 2003.) From this information, the detective initially interviewed Sunney Freeman. (*Id.* at 264.) As a result of Mr. Freeman’s statement, Detective Sperry arrested him. (*Id.*)

From this information, the Huntington Police Department brought Appellant into the dispatch. Detective Sperry read Appellant his Miranda rights, went over the form with him and arrested him. (*Id.* at 274-77.) Although Appellant downplayed the event and actually stated that he beat Mr. Porter, he gave a statement where he admitted a beating occurred. (Tr., 281-302, Sept. 10, 2003.) However during cross-examination, Appellant admitted to hitting the victim with a stick and kicking him. (Tr., 1126-31, Sept. 16, 2003.)

Dr. Hamada Mahmoud, Deputy Chief Medical Examiner for the State of West Virginia conducted an autopsy on the victim and testified at trial. He testified that Mr. King manifested

injuries all over his head, neck and trunk. (Tr., 550, Sept. 11, 2003.) On Mr. King's right arm, multiple abrasions, contusions and lacerations were found. (*Id.* at 551.) He also found a laceration at Gerald King's left elbow joint. (*Id.* at 559, 570.) The left arm was more injured than the right showing lacerations, abrasions, and an incised wound caused by a sharp object. (*Id.* at 559-60.) Dr. Mahmoud also found bruises and contusions on Mr. King's left hand, which he attributed to being defensive wounds where he was trying to avoid blows to his head and body. (*Id.* at 574.) He testified that he found a 0.2 centimeter stab wound in Gerald King's right leg. (*Id.* at 575-76.) The medical examiner found blunt force wounds from the left thigh area to the buttocks, which he also attributed to defensive wounds in trying to protect his body. (*Id.* at 580-91.) There were also contusions found from the left hip all the way down to the foot. (*Id.* at 582.) There was also discovered a cut near Mr. King's right eye, as well as laceration on his forehead near the left eye. (*Id.* at 587-89.) The medical examiner also discovered that the victim had some loose teeth that he attributed to trauma to the face. (*Id.* at 582-93.)

Regarding internal injuries, Dr. Hamada Mahmoud testified that he discovered subgaleal hemorrhage in the right side of the head, underneath the scalp. (*Id.* at 604.) There was also a hemorrhage in the pariet-occipital, the parietal region of the scalp. (Tr., 605, Sept. 11, 2003.) There were significant injuries to Mr. King's right and left temples and the top part of the back of his head all the way to his back. (*Id.* at 606.) There was also subdural hemorrhaging in his skull which was due to veins rupturing. (*Id.* at 609-10.) In addition, arachnoid hemorrhaging in the victim's head was discovered. (*Id.* at 616.) Dr. Mahmoud also testified that he discovered edema, which is swelling of the brain which was caused by blunt force trauma to the head. (*Id.*) The thyroid bone in Mr. King's neck was broken with hemorrhage surrounding it. (*Id.* at 618.) The thyroid cartilage

in this area was also broken. Dr. Mahmoud testified that this was strangulation that occurred as a result of a blow to the neck. (*Id.* at 622-23.) The medical examiner concluded that the cause of death was blunt and sharp force trauma with strangulation. (*Id.* at 629-30.)

Sergeant David Castle of the Huntington Police Department Crime Scene Unit testified at the trial. He conducted a crime scene reconstruction and went step-by-step through his testimony with various aspects as the disheveled tent, instruments used in the beating, and bloodstains to establish the State's theory of the crime committed by the three co-defendants, which was consistent with the testimony of Jarrett Bailey. (*Id.* at 702-808.)

The jury convicted Appellant of first degree murder and conspiracy on September 17, 2003. (R. at 87-88; Tr., 1363-55, Sept. 17, 2003.) On September 22, 2003, the jury handed down a verdict recommending no mercy for Appellant, giving him a life sentence for his conviction of first degree murder. (R. at 145; Tr., 1512, Sept. 22, 2003.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's responses:

- 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, GEOGRAPHICAL AND WEATHER CONDITIONS PRESENT AT THE TIME OF THE ALLEGED EVENTS AND TO NEUTRALIZE THE EFFECT OF INADMISSABLE PHOTOGRAPHS AND IMAGES BEING SHOWN TO THE JURY DURING THE PROSECUTION'S OPENING STATEMENT.

State's Response:

There was no plain error in the circuit court's denial of Appellant's motion for a jury view of the crime scene. This was a decision properly made within the court's sound discretion, and there was no abuse of discretion.

- B. THE COURT SHOULD HAVE GRANTED THE APPELLANT'S MOTION FOR MISTRIAL WHEN THE COURT, AFTER WARNING THE PROSECUTOR THAT HE PROCEEDS AT HIS OWN PERIL IF HE PUBLISHES PHOTOGRAPHS ON THE OVERHEAD SCREEN DURING HIS OPENING THAT ARE NOT SUBSEQUENTLY ADMITTED INTO EVIDENCE, EXCLUDED THE PHOTOGRAPHS FROM EVIDENCE AS NOT REPRESENTATIVE OF WHAT THE PROSECUTOR PROPORTED THEM TO REPRESENT.

State's Response:

This decision by the circuit court was also within its sound discretion and was not an abuse of discretion. At most, the State's use of these photographs during its opening statement was harmless error.

- C. 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".

State's Response:

Appellant waived any rights he had on this issue by explicitly agreeing to Sergeant Castle's qualifications as an expert. In light of everything, this was a decision properly made within the circuit court's sound discretion.

- D. THE COURT SHOULD HAVE GRANTED THE APPELLANT A NEW TRIAL BASED ON THE DISCOVERED BIAS OF JUROR BOWLES.

State's Response:

Juror Bowles had absolutely no relationship with the relatives of Appellant that she stated that she recognized, and she indicated she made her decisions free of any bias. Therefore, the circuit court did not err in denying this motion.

IV.

ARGUMENT

- A. **THE DECISION TO DENY APPELLANT'S MOTION FOR A JURY VIEW OF THE CRIME SCENE WAS WITHIN THE CIRCUIT COURT'S SOUND DISCRETION, AND NO ABUSE OF DISCRETION OCCURRED. THIS DID NOT AMOUNT TO PLAIN ERROR.**

Appellant contends that the circuit court erred in denying his motion for a jury view of the crime scene. However, this in no way amounted to plain error. A jury view would have contributed very little, if anything, in light of the photographs, articles of evidence, scene reconstruction testimony and witness testimony presented at trial. There was no abuse of discretion, and the denial was within the circuit court's discretion.

1. **The Standard of Review.**

To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

"Concerning our standard of review of the circuit court's exclusion of the evidence at issue, we note that "[r]ulings on the admissibility of evidence are largely

within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.”””

State v. Guthrie, 205 W. Va. 326, 332, 518 S.E.2d 83, 89 (1999), quoting *State v. Louk*, 171 W. Va. 639, 643, 301 S.E.2d 596, 599 (1983), citing Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

2. **There Was No Plain Error in the Circuit Court Decision to Overrule Appellant's Motion for a Jury View. This Did Not Meet the Standard to Establish Plain Error and Was Within the Circuit Court's Sound Discretion.**

Appellant filed a motion for a jury view which was denied by the circuit court. (R. at 62; Tr., 810-11, Sept. 11, 2003.) He makes the argument that taking the jury panel to the murder scene would have allowed it to better evaluate the physical area where the offense occurred and to orient itself to the surroundings. He also asserts that it would have allowed the jury to be able to put in perspective the testimony presented at trial. (*See* Appellant Brief at 6.) However, there were numerous photographs admitted by both parties, physical evidence, expert testimony in the form of scene reconstruction and witness testimony that enabled the jury to reach a verdict in this case. It seems puzzling that Appellant makes this argument that the jury needed to see this riverbank area more than a year after June 30, 2002; yet, later in his brief, he argues that the trial court erred in denying his motion for mistrial where the State showed photographs of the crime scene discovered to have been taken a significant time before the offense occurred.

Appellant further contends that the circuit court committed plain error in its decision. (*See id.* at 7.) However, there is absolutely no possibility that denying a motion to have the jury view the crime scene affected substantial rights and seriously affected the fairness, integrity, or public reputation of the judicial proceedings as was established in *Miller, supra*. With all of the evidence

provided by both parties, including photographs and a reconstruction expert, there is no way that the denial of taking the jury members to the scene more than a year after the crime occurred could meet the *Miller* standard. Appellant gives no authority in support of his argument that a denial of a jury view amounts to plain error. In fact, Appellant only cites the fairly antiquated case of *State v. McCausland*, 82 W. Va. 525, 96 S.E. 938, 939 (1918), where the Court held that in a homicide case, the ground where the incident occurred *can* be stronger and more convincing to the jury than the oral testimony of any witness could possibly be. (See Appellant Brief at 7; emphasis added.) However, this case does not hold that a denial of a jury view amounts to plain error nor does it give a mandate for the same when a party moves for one.

At the trial, Appellant based his motion on the fact that the State took Jarrett Bailey along with a police officer and two prosecutors to the scene the day before to take a measurement. (Tr., 811, Sept. 11, 2003.) The circuit court stated that the defense could take the same measurements at the scene that evening and ruled that there was absolutely no reason for a jury view. (*Id.* at 810-11.) This ruling was within the circuit court's sound discretion and was not an abuse of discretion, the standard established in *Guthrie, supra*.

Although not articulated by the trial judge, this ruling could have been made on the basis of West Virginia Rule of Evidence 403. According to Rule 403,

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, *or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.*

(Emphasis added.)

In light of all of the evidence presented, a jury view at the scene more than a year after the commission of the crime could very well be denied on the basis of it being an undue delay or a waste of time.

In light of all of this, Appellant's argument fails on this ground.

B. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR MISTRIAL ON THE BASIS THAT THE STATE SHOWED PHOTOGRAPHS IN AN OVERHEAD PROJECTOR THAT WERE EVENTUALLY DEEMED INADMISSIBLE. AT MOST, THE STATE'S SHOWING THESE PICTURES AMOUNTED TO HARMLESS ERROR.

The trial court did not err in denying Appellant's motion for mistrial based on the State's showing pictures to the jury that were later deemed inadmissible. These pictures were ruled inadmissible to the jury because it was later discovered that they were taken more than a year prior to the crime. They merely showed the victim's campsite in virtually the same condition as it was just prior to his beating and death. The State did not know until after showing them to the jury and the photographer testifying to when they were taken that they were that dated. There was no prejudicial impact by their being shown to the jury. If anything, it was harmless error to show them to the jury, and the circuit court so ruled.

1. The Standard of Review.

The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a "manifest necessity" for discharging the jury before it has rendered its verdict.

State v. Williams, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983) (citations omitted). *See also State v. Winebarger*, 217 W. Va. 117, 127, 617 S.E.2d 467, 477 (2005); *State v. Lowery*, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008).

“Concerning our standard of review of the circuit court’s exclusion of the evidence at issue, we note that “[r]ulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.””

State v. Guthrie, 205 W. Va. at 332, 518 S.E.2d at 89, quoting *State v. Louk*, 171 W. Va. at 643, 301 S.E.2d at 599, citing Syl. Pt. 2, *State v. Peyatt*, *supra*.

“Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State’s case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant’s guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.” Syllabus point 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).

Syl. Pt., *State v. Ferrell*, 184 W. Va. 123, 399 S.E.2d 834 (1990).

2. **The Circuit Court Acted Within Its Sound Discretion in Its Rulings on the Photographs in Question and the Motion for Mistrial, and No Error Occurred. At Most, the State’s Showing these Pictures to the Jury Amounted to Harmless Error.**

Appellant wrongly asserts that the circuit court erred in overruling his motion for a mistrial based on pictures shown to the jury that were later ruled inadmissible as evidence. It is true that the State showed photographs on an overhead projector of the victim’s campsite taken by Mr. Greg Behan during its opening statement. The pictures were taken when Mr. Behan was working for the Cabell County Public Defender’s Office. (Tr., 131, Sept. 9, 2001.) Mr. Behan moved to Grafton, but contacted the Cabell County Prosecutor’s Office and gave them the photographs when he had heard that the victim had been killed. (*Id.* at 137.) During Mr. Behan’s testimony, it was discovered that he took these pictures in March of 2001, and then had them developed in June of 2003. (*Id.* at 138, 141.) Appellant’s counsel objected to the admission of these pictures into evidence and the

circuit court eventually sustained the motion when it was renewed, having initially withheld the ruling. (*Id.* at 144, 156-57, 161.)

However, when Appellant moved for a mistrial due to the showing of these photographs of the campsite, the circuit court overruled the motion. (*Id.* at 215-16.) When Appellant moved for a mistrial, the prosecutor stated that he did not know the pictures were taken at that earlier date. (*Id.* at 216.) This was a significant part in the reasoning behind the circuit court's ruling. When utilizing the standard established in *Ferrell, supra*, there was ample evidence to find Appellant guilty beyond a reasonable doubt when the photographs are removed in light of all the testimony and evidence. The testimonies of Jarrett Bailey, the Scarberrys, Linda Miles, and Mary Ann Travis, as well as the crime scene investigation, medical and reconstruction evidence presented were indeed sufficient to convict Appellant of these offenses.

Further applying the standard of *Ferrell, supra*, this evidence was not prejudicial. There is no way that it was meant to shock the jury or plant a fixed image in their minds that would cause them to unfairly convict Appellant. These were merely pictures that were fairly similar to the condition of the victim's campsite before the murder took place. This is made evident through the testimony elicited by the State from Mr. Behan and Mr. Scarberry that the victim always kept his campsite neat. (Tr., 142, 156, Sept. 9, 2003.) At trial, the prosecutor stated the following:

Yes, and obviously, Your Honor, yesterday we submitted testimony from two different witnesses as to how neat [Mr. King] kept his campsite; and we can elicit testimony from others to that, if necessary. We used a photograph in opening to demonstrate that, and the picture was evidently taken a year earlier than what I thought and was under the impression of. However, when I offered that picture in evidence, both through Mr. Behan and again through Mr. Scarberry, we offered it not to show that is how the campsite appeared on June 30th, 2002, but to show how he generally maintained his camp in a neat and tidy fashion.

We have testimony, both Mr. Behan and Mr. Scarberry, covering that he indeed kept his campsite neat, clean and tidy. This picture looks like what we thought is clearly the best evidence on that.

We are not offering that to say exactly how it appeared at that time, just to let the jury see that it was neat and the pride he took in the campsite generally.

(Tr., 213-14, Sept. 10, 2003.)

The trial judge ruled this was harmless error and did not amount to something to stop the trial and declare a mistrial. (*Id.* at 216.) There is no doubt that this was harmless error, at most.

In applying the standards established in *Guthrie, supra*, and *Williams, supra*, the rulings on this evidence and the motion for mistrial were both within the sound discretion of the circuit court and not an abuse of discretion. In light of all of this, Appellant's argument fails on this ground.

C. IN LIGHT OF EVERYTHING, THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTIONS TO SERGEANT DAVID CASTLE'S TESTIMONY. APPELLANT WAIVED ANY RIGHTS HE HAD ON THIS ISSUE.

Appellant wrongly asserts that Sergeant David Castle was not qualified as a crime scene reconstruction expert. Yet that is clearly what occurred during his testimony when the State questioned him regarding his educational background and professional responsibilities, to which Appellant explicitly assented. Any problems that may have taken place regarding notice of an expert testimony summary were waived by Appellant's explicit assent and his failure to object during extensive testimony of this witness. The ruling of the circuit court was an exercise of its sound discretion.

1. The Standard of Review.

“The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.” Syl. pt. 6, *Helmick v. Potomac Edison Co.*, 185 W.Va.

269, 406 S.E.2d 700, cert denied, 502 U.S. 908, 112 S.Ct. 301, 116 L.Ed.2d 244 (1991)

Syl. Pt. 3, *State ex rel. Jones v. Recht*, 221 W. Va. 380, 655 S.E.2d 126 (2007).

Under the “plain error” doctrine, “waiver” of error must be distinguished from “forfeiture” of a right. *A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined* . By contrast, mere forfeiture of a right -- the failure to make timely assertion of the right -- does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is “plain.” To be “plain,” the error must be “clear” or “obvious.”

Syl. Pt. 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (emphasis added).

2. **Appellant Waived Any Rights He Had to Object to the Qualifications of Sergeant David Castle as a Reconstruction Expert in His Overt Agreement to the Same.**

Despite Appellant’s assertions, Sergeant David Castle was extensively questioned about his qualifications as a crime scene re-constructionist by the State, both detailing his educational and professional backgrounds and credentials. (Tr., 702-05, Sept. 11, 2003.) At the conclusion of the questioning on this, the State moved that Sergeant Castle be qualified as an expert in crime scene investigation and crime scene reconstruction. Once this occurred, Appellant’s counsel stated the following:

Based upon his experience and training and many times being qualified, I have absolutely no objection to his qualifications as a crime scene expert.

(*Id.*) This is clearly a knowing and intentional relinquishment or abandonment of a known right as established in *Miller, supra*. The circuit judge pointed out this waiver in that Appellant had a chance to voir dire David Castle regarding his expertise but chose not to do so when he later made an objection. (Tr., 906-07, September 12, 2003.)

It is true that West Virginia Rule of Criminal Procedure 16(a)(1)(E) requires that a party is to disclose the expert's qualifications when it plans on calling the particular person to testify. Specifically, Rule 16 (a)(1)(E) states the following:

(E) Expert Witnesses. Upon request of the defendant, 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.

Although the State did supply the name of David Castle and his being with the Huntington Police Department upon a request for discovery by Appellant, there was nothing found in the record that a summary of the sergeant's testimony and qualifications were given. (R. at 27, 59.) However, Appellant did not raise this issue at all when the State began to question this expert witness. When Appellant later objected saying he did not get a chance to voir dire Sergeant Castle on his qualifications, he merely stated that there was a *Brady* issue and a Rule 16 violation, without stating which provision of this rule was violated or elaborating on how there was such. (Tr., 805, Sept. 12, 2003.)

At the conclusion of the trial, Appellant again objected to the testimony of David Castle. (Tr., 22, Sept. 22, 2003.) Appellant did mention in passing that there was no notice. (*Id.*) However, this is all in the context that Sergeant Castle was not qualified as a crime scene reconstruction expert rather than any deficiency by the State regarding discovery. Regardless, Appellant explicitly waived his rights regarding this issue by his knowing and intentional relinquishment of the same as mentioned above.

This does not meet the standard of being a matter of fundamental fairness to be deemed a plain error issue in accordance with *Miller, supra*. However, Appellant does not even raise the issue of plain error.

In light of all of this, the decision concerning expert testimony was within the sound discretion of the circuit court as held in *Jones, supra*, and it was not clearly wrong. Thus, Appellant's argument fails on this ground.

D. JUROR BOWLES SHOWED ABSOLUTELY NO SIGN OF PREJUDICE AND EXPRESSLY STATED THAT NO BIAS OCCURRED IN HER DECISIONS DESPITE RECOGNIZING MEMBERS OF APPELLANT'S FAMILY. THERE WERE NO GROUNDS TO STRIKE HER, AND HER PRESENCE ON THE PANEL WAS NO REASON TO GRANT A NEW TRIAL.

Despite Juror Bowles' stating that she recognized some of Appellant's family members in the courtroom, she had absolutely no relationship with them. Therefore and as she testified, her decisions were totally free of any prejudice or bias. Due to her ability to be free of any bias, there was no reason for her to be stricken from the panel, and the circuit court did not err in denying a new trial on this ground.

1. The Standard of Review.

In reviewing the qualifications of a jury to serve in a criminal case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court.

State v. Nett, 207 W. Va. 410, 412, 533 S.E.2d 43, 45 (2000).

2. **Although Juror Bowles Said That She Recognized Family Members of Appellant Once the Trial Commenced, She Did Not Know Them Nor Had Any Relationship with Them. She Stated That Her Recognition of These People Would Not Cause Her to Have Any Prejudice or Bias; and Thus, There Was No Need to Grant a New Trial.**

Appellant wrongfully contends that he should be granted a new trial because one juror stated that she recognized a couple of Appellant's relatives who were sitting in the courtroom, despite the fact that this person had absolutely no relationship with them. When this was brought to the circuit court's attention, Juror Bowles was questioned extensively by Appellant, the prosecutor and the circuit judge.

During Juror Bowles' testimony, she stated that she recognized Appellant's wife because they both worked at Client Logic. (Tr., 1521, Sept. 22, 2003.) The juror testified that she did not realize this until the trial commenced. (*Id.*) Regardless, Juror Bowles also testified that she had no relationship with this person. (*Id.*) Juror Bowles further testified that she recognized Appellant's cousin because she saw her when she was also visiting someone at the regional jail. (*Id.*) However, she stated that she had no conversations with this person. (*Id.* at 1521-22.) Regarding Appellant's cousin and others at the regional jail, the juror stated that she had no idea who they were going to see. (*Id.* at 1523.) No conversations took place with Appellant's cousin and others who were visiting; in particular, none regarding the victim or this case. (*Id.* at 1525.) Most pertinent to this issue, Juror Bowles testified that nothing outside of the trial affected her decisions in the case whatsoever. (*Id.* at 1522.) Based on this, the circuit court denied the motion for a new trial. (Sent. H'rg., 36, Oct. 20, 2003.)

In using the standard established in *Nett, supra*, there was no abuse of discretion in denying Appellant's motion for a new trial based upon this juror's qualifications. With respect to juror qualifications and the decision as to whether or not to strike for cause, this Court has also held the following:

The trial court is in the best position to judge the sincerity of a juror's pledge to abide by the court's instructions; therefore, its assessment is entitled to great weight. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias when it is left with a clear and definite impression that a prospective juror would have been unable faithfully and impartially to apply the law.

State v. Williams, 206 W. Va. 300, 304, 524 S.E.2d 655, 659 (1999) (citing *State v. Miller*, 197 W. Va. 588, 605, 576 S.E.2d 535, 552 (1996)). The circuit court did a thorough job in determining if Juror Bowles could be free of bias in making decisions in this case. From her testimony upon questions from Appellant, the prosecutor and the trial judge, it was well established that she could faithfully and impartially apply the law.

In light of the circuit court's determination that Juror Bowles was qualified due to her ability to be free of any bias, the ruling passes the three-pronged test established in *Nett, supra*. There was no abuse of discretion. Therefore, Appellant's argument fails on this ground.

V.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "R. Christopher Smith", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 7th day of August, 2009, addressed as follows:

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A handwritten signature in black ink, appearing to read "R. Christopher Smith", written over a horizontal line.

R. CHRISTOPHER SMITH