

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

No. 34770

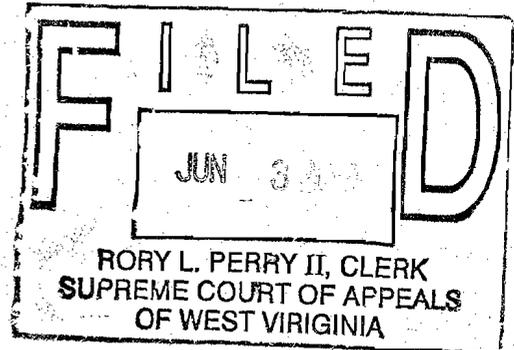
STATE OF WEST VIRGINIA,

Plaintiff Below – Respondent,

VS.

DALLAS HUGHES,

Defendant Below – Petitioner.



CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA
CASE NO. 04-F-285-H

BRIEF OF APPELLANT

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I.

KIND OF PROCEEDINGS AND NATURE OF RULINGS BELOW

On June 12, 2004, Dallas Hughes was charged in the Magistrate Court of Raleigh County with second-degree murder in connection with the shooting death of his girlfriend, Sacha Mitchell. Defendant was immediately detained. Defendant moved to have bond set on June 16, 2004. Such motion for bond was summarily denied. On

June 28, 2004, a preliminary hearing was held before a Raleigh County Magistrate. The Magistrate determined that probable cause existed to proceed with the criminal charges levied against the defendant. Defendant was again refused a bond at that time and was remanded to the custody of the Southern Regional Jail, where he would remain in solitary confinement until and throughout his criminal trial.

Defendant moved the Circuit Court to set bond on two separate occasions, the first motion for bond was heard by the Honorable H.L. Kirkpatrick, III on August 5, 2004 and was denied by written order on August 27, 2004. The second motion for bond was heard before the Honorable John A. Hutchison on November 10, 2004 and was denied by written order on November 29, 2004. During the August 5, 2004 hearing on defendant's motion for bond, the court relied upon defendant's juvenile criminal history supplied by the State of Michigan.

Dallas Hughes was indicted on September 14, 2004 for the crimes of: Count 1: premeditated first degree murder, Count 2: the use or brandishment of a firearm, Count 3: wanton endangerment, Count 4: fleeing an officer, and Count 5: filing a false emergency report. Defendant moved the trial court to change venue on January 3, 2005. The court reserved ruling on the motion until it could be determined if a fair and impartial jury could be seated. The criminal trial of Dallas Hughes began on January 4, 2005. After a lengthy *voir dire*, the court denied defendant's motion to change venue and the trial commenced. Following several days of testimony, the jury began deliberations on January 14, 2005.

Late on January 14, 2005, after 9:00 o'clock p.m., the jury returned its verdict, finding Dallas Hughes guilty of all Counts. After the jury rendered its verdict, the State

entered into an agreement with the defendant whereby the defendant would receive a "mercy" sentence. In exchange, if the defendant were to ever appeal his conviction, the State would seek a finding of "no-mercy". Defendant was sentenced to a term of life imprisonment with mercy on Count 1 of the indictment immediately. The matter was set for sentencing on March 18, 2005 in regard to the remaining convictions.

On March 18, 2005, defendant was sentenced to 5 years on Count 3: wanton endangerment, 1 year on Count 4: fleeing and 6 months on Count 5: filing a false report. The court ordered that Counts 1 and 3 were to be served consecutively, while Counts 4 and 5 would run concurrently with each other but consecutive to Counts 1 and 3.

Defense counsel filed several Post-Trial Motions on April 8, 2005, including a Motion in Arrest of Judgment, Motion for Post-Verdict Judgment of Acquittal or in the Alternative Motion for a New Trial. On July 21, 2005, the trial court held a hearing on defendant's Post-Trial Motions. After considering the arguments of counsel, the trial court denied the motions more than one year later, on August 11, 2006. Defense counsel filed a Notice of Intent to Appeal on April 28, 2005. On August 11, 2006, the trial court appointed Sante Boninsegna to represent Dallas Hughes in his appeal and the defendant was resentenced at that time so as to extend the period of time to effect an appeal on defendant's behalf. Mr. Boninsegna moved the court for an extension of time to file the appeal on November 30, 2006. The court granted such extension on December 19, 2006. Defendant was resentenced again on February 28, 2007, May 24, 2007, and July 12, 2007. On February 22, 2008, the trial court appointed John Mize to represent Dallas Hughes in his appeal. John Mize then requested that the trial court re-sentence Dallas Hughes to permit additional time to perfect this appeal. The trial court

re-sentenced Dallas Hughes on June 30, 2008. On or about July 22, 2008, defendant moved the Circuit Court for disclosure of the Grand Jury Transcripts. The Circuit Court granted such motion on that day. The State did not provide defendant with such transcripts until on or about November 6, 2008. Accordingly, defendant was re-sentenced for a final time on November 12, 2008. The Petition for Appeal was filed on or about January 13, 2009.

II.

STATEMENT OF FACTS

On June 11, 2004, Dallas Hughes and Sacha Mitchell spent much of the day arguing with each other, as was typical of their four month relationship. Sacha was not feeling well and had visited her Doctor's office. Sacha had left a voice message on Dallas's cell phone, asking if he would drive her to the doctor. Dallas did not return Sacha's phone call until after she had went to the doctor and she was upset. Sacha left additional messages, asking if Dallas would come "home" to her apartment. Again, Dallas did not return Sacha's phone call for some time and the phone messages then became more belligerent. Clearly, there was an ongoing argument between Dallas and Sacha Mitchell on the afternoon of June 11, 2004, and the morning of June 12, 2004.

Such arguments were commonplace during the approximately four months the couple had been dating. During those four months, Sacha and Dallas had what most would refer to as a tumultuous relationship. At times, both Dallas and Sacha would even push, smack or shove the other. Sacha would often question Dallas's love for her if he would not physically strike her. Despite the stormy relationship, Dallas had lived with Sacha in her apartment during much of the relationship. In fact, it was when Dallas

would be away from Sacha that the fights normally began. Sacha continuously wanted Dallas in her presence. On one occasion, Sacha attempted to prevent Dallas from leaving by throwing his car keys into the woods. Sacha had remarked to friends that if she could not have Dallas, no one would.

Approximately two months prior to the shooting death of Sacha Mitchell, she and Dallas were involved in an altercation in front of Stratton Elementary School. When officers arrived to the scene, they discovered that Sacha had assaulted Dallas with a knife, which was later thrown into the weeds, and Sacha then threw a glass beer bottle at Dallas, which lacerated his ankle when it shattered.

During yet another argument, Sacha went into the upstairs bedroom of her apartment and retrieved a black nine-millimeter automatic weapon from the closet where Dallas kept it. Dallas struggled with Sacha in an attempt to free the gun from her hand. Sacha's little brother, Derrick, was also present at the time and released the clip from the gun as Dallas and Sacha struggled over it. The following day, Dallas removed the gun from the apartment and sold it to prevent any similar occurrence in the future.

Only a few days before her death, Sacha Mitchell located Dallas at a friend's house. As Dallas sat out on the porch, Sacha drove up and down the street repeatedly, cursing at Dallas loudly and stating that she had a bright, shiny, new gun with his name on it. After hours of the barrage of insults, Dallas got in his own vehicle to leave. As he did, Sacha called 911 from her own cell phone, used an alias identity, and reported that Dallas had committed an assault and battery and was leaving the scene. Sacha's motive was to have Dallas pulled over by police.

In light of this past behavior, the argument between Dallas and Sacha Mitchell on June 11, 2004, seemed the same as any other. Meanwhile, Dallas was also involved in a dispute with his mother on June 11, 2004, regarding financial issues. Because Dallas had refused to lend or give money to his mother, she had packed up Dallas's belongings, placed them outside her home, and asked him to leave. After visiting some friends throughout the evening of June 11 and the morning of June 12, Dallas drove to Sacha Mitchell's apartment located at Beckley West Apartments. Once he arrived at Beckley West Apartments, Dallas sat in his car and smoked some marijuana while talking on the phone with Sacha. After speaking with Sacha on the phone, Dallas proceeded to go to Sacha's apartment. He was met at the door by Sacha, who unlocked and opened the door for Dallas to enter. Because Dallas had been kicked out of his mother's home hours earlier, Dallas entered Sacha's apartment to go to bed and get some rest. Once inside, the two talked briefly and then began to argue and Dallas went to the upstairs bedroom to go to sleep. Upstairs the argument continued.

As the argument escalated, Sacha began to throw some of Dallas's clothing out of the apartment. Dallas took the items of clothing to his car. Sacha continued to throw Dallas's belongings out of her window. Dallas returned to the apartment. Again, Sacha opened the door and Dallas entered. Once inside, the argument continued and Dallas turned to leave the apartment. Sacha grabbed Dallas's shirt to prevent him from leaving. When Dallas turned back to face Sacha, he noticed that she had a gun in her hand. As he had done on previous occasions, Dallas attempted to wrestle the weapon from the hand of his girlfriend, Sacha Mitchell. During the struggle, the two were thrown to the ground, landing on the stairway, when the gun suddenly fired.

In a state of panic and shock from what had occurred, Dallas removed the gun from Sacha's hand and proceeded to throw the weapon into the wooded area adjacent to Beckley West Apartments. Dallas closed Sacha's apartment door, leaving inside Sacha's five month old child. After leaving the apartment, Dallas traveled to his mother's house where he retrieved some cash he had deposited in an outdoor trashcan. After collecting the money, Dallas left his mother's driveway and, unbeknownst to him, he was quickly followed by a member of the Beckley City Police Department. As Dallas traveled toward downtown Beckley, he discarded a potato chip bag out of his car window. It would later be discovered that the potato chip bag contained the cash he had just recovered from his mother's residence, some \$9,600 in cash that Dallas had earned selling sports jerseys and other merchandise.

Finally, an officer trailing Dallas activated his lights and Dallas pulled his vehicle over to the side of the road. As Dallas waited for the officer to come to his window, two additional police cruisers surrounded Dallas, lights and sirens activated. In fear of what may happen, Dallas drove away before having an opportunity to speak to the officers. After speeding away from the officers, Dallas drove straight to Piney Avenue, where he parked his car and proceeded to walk one-and-a-half blocks to the Beckley Police Department. Within minutes of the shooting, Dallas walked into the Beckley City Police Department and announced that a shooting had occurred at Beckley West Apartments.

After some confusion regarding whether Dallas had been shot, he was Mirandized and questioned by police. The first several minutes of the police interrogation went unrecorded, as the tape recorder malfunctioned. Police informed Dallas that Sacha had been shot, but had survived. After being told that Sacha would

be okay, Dallas, in a lapse of judgment, decided to misinform police that a third person, a caramel-colored man, was present at the time of the shooting. Dallas maintained that Sacha had been having an affair with the caramel-colored male and that all three of them were involved in the struggle for the handgun. At some point during the interrogation, officers finally informed Dallas that Sacha, in fact, had not survived. After being given the news of Sacha's death, Dallas had an obvious emotional outburst. Struggling to deal with his emotions, Dallas finally gave police an accurate account of what had occurred at Sacha's apartment. Despite his fabrication of the third-party caramel-colored man, Dallas never wavered on the fact that the handgun belonged to and was brandished by Sacha Mitchell.

Although Dallas informed police that the shooting was accidental and that the .38 caliber gun involved did not belong to him, he was still charged and arrested for the shooting death of Sacha Mitchell. A preliminary hearing was set for June 22, 2004, whereby defendant would be charged with second-degree murder. Defendant appeared for such hearing only to learn that the State dismissed the original arrest warrant and obtained a new warrant charging him with premeditated first degree murder. The preliminary hearing was then held on June 28, 2004, and probable cause was determined. Dallas was placed in solitary confinement at the Southern Regional Jail, as authorities were concerned for Dallas's safety, inasmuch as Sacha Mitchell was a relative or acquaintance of several inmates at the jail.

Ultimately, Dallas was indicted on charges of premeditated first degree murder, the use or brandishment of a firearm in the commission of a crime, wanton endangerment, fleeing police officers, and making a false report of emergency.

Because Dallas was living his life in solitary confinement at the Southern Regional Jail, he was naturally desirous of having his trial conducted as soon as possible. Within seven months of the incident causing the death of Sacha Mitchell, the trial began.

Defense counsel moved the court to try the case in a different venue, in light of the publicity the case had garnered in the local news media. The trial court reserved ruling on the motion until the court had an opportunity to determine if a fair and impartial jury could be seated in the local forum. Despite the best efforts of the court, many jurors had previously learned of important details of the case through the news media. Many of these jurors were struck by the court when the court perceived that such jurors had been tainted or biased by the information they had previously learned.

Irrespective of those rulings, the court did allow several other jurors who exhibited a different type of bias to remain on the panel. Several jurors indicated during individual *voir dire* that it was their belief that a defendant was most likely guilty by virtue of being charged with the crime. Because many of these biased jurors remained on the panel, defense counsel was not enabled to use preemptory strikes on each and every person who had displayed such prejudice. As a result, two jurors, Dorothy Alpaugh and Amy Diehl, were permitted to serve on the jury and sit in judgment of defendant, Dallas Hughes, although both had disclosed that they believed defendant to be most likely guilty before evidence was taken.

Once the trial began, defendant would be faced with another insurmountable hurdle almost immediately. During the State's opening statement, the State, for the first time, charged the defendant with committing the offense of felony murder. Defense counsel moved for a mistrial due to the unexpected allegation or, at the very least, to

have the State elect between the alternate theories. Both motions were denied and defense efforts failed. Dallas was convicted of first degree murder, though it is impossible to determine if the jury believed it to be felony or premeditated murder.

III.

ASSIGNMENTS OF ERROR AND THE MANNER IN WHICH THEY WERE DECIDED

A. THE DEFENDANT WAS REQUIRED TO DEFEND AGAINST BOTH FELONY MURDER AND PREMEDITATED MURDER EVEN THOUGH DEFENDANT HAD NO NOTICE OF THE FELONY MURDER CHARGE BECAUSE THE INDICTMENT RETURNED AGAINST DEFENDANT CHARGED HIM WITH PREMEDITATED MURDER BUT DID NOT CHARGE HIM WITH FELONY MURDER.

(1). The defendant was not provided with fair and adequate notice that he would be required to defend a charge of felony murder because the indictment charged the defendant with premeditated first degree murder only.

(2). The trial court abused its discretion by not granting defendant's motion to have the State elect between premeditated and felony murder either during the trial or at the close of evidence when the defendant made a particularized showing of the prejudice that would result from a failure to elect.

B. THE TRIAL COURT FAILED TO STRIKE CERTAIN JURORS FOR CAUSE ONCE IT BECAME OBVIOUS THAT THOSE JURORS WERE POSSESSED OF PREJUDICE AND BIAS AGAINST THE DEFENDANT.

C. THE CUMULATIVE EFFECT OF NUMEROUS ERRORS COMMITTED DURING THE TRIAL PREVENTED THE DEFENDANT FROM RECEIVING A FAIR TRIAL.

(1). The jury was required to conduct portions of its deliberation in open court because the State failed to provide the jury with the complete and accurate evidence admitted during trial.

(2). The State was permitted to enter irrelevant evidence of defendant's possessing a handgun, even though the handgun was not the same handgun alleged by the State to be the weapon which killed Sacha Mitchell.

(3). The trial court erred by admitting an audio recorded phone conversation between the defendant and a witness when the phone conversation had no relevance, but exposed defendant as being incarcerated.

(4). The State was permitted to admit cellular telephone voice messages left by Sacha Mitchell, on defendant's cellular phone as an excited utterance, although no evidence existed regarding any triggering traumatic event.

IV.

POINTS AND AUTHORITIES

A. It is well established that a defendant has a right under the Grand Jury Clause of Section 4 of Article III of the West Virginia Constitution to be tried only on felony offenses for which a grand jury has returned an indictment. Syllabus Point 1, State v. Adams, 193 W.Va. 277, 456 S.E.2d 4 (1995).

B. An indictment has two constitutional requirements as promulgated in Hamling v. United States, 418 U.S. 87 (1974). First, the indictment must contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend. Second, the indictment must enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. Id at 117, see also Syllabus Point 6, State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999).

C. Relying upon Article III Section 14 of the West Virginia Constitution, Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure was devised to ensure that an indictment include a definite written statement of the essential facts of the offense charged.

D. In State v. Walker, the Court articulated that "the State need not elect whether it will proceed on premeditated murder or felony murder until the close of all evidence; however, a defendant may make a motion to force an earlier election if he can make a strong, particularized showing that he will be prejudiced by further delay in electing." Syllabus Point 2, State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992).

E. Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair. Syllabus Point 5, O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002).

F. Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error. Syllabus Point 5, State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972).

G. Upon appeal, the Court determined that many West Virginians have guns and ammunition in their houses. In addition, the Court held that there was no probative value whatsoever in admitting testimony concerning Mr. Walker's firearms. The Court iterated that the only purpose of such testimony was to create the impermissible inference that the defendant must be a dangerous person solely because he possessed guns and ammunition, notwithstanding that the right to keep and use arms is guaranteed to every citizen by the West Virginia Constitution, Article III, § 22.

H. In order to qualify as an excited utterance under West Virginia Rules of Evidence 803(2): (1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition. Syllabus Point 7, State v. Sutphin, 195 W.Va. 551, 466 S.E.2d 402 (1995).

V.

ARGUMENT

A. THE DEFENDANT WAS REQUIRED TO DEFEND AGAINST BOTH FELONY MURDER AND PREMEDITATED MURDER EVEN THOUGH DEFENDANT HAD NO NOTICE OF THE FELONY MURDER CHARGE BECAUSE THE INDICTMENT RETURNED AGAINST DEFENDANT CHARGED THE HIM WITH PREMEDITATED MURDER BUT DID NOT CHARGE THE HIM WITH FELONY MURDER

(1). The defendant was not provided with fair and adequate notice that he would be required to defend a charge of felony murder because the indictment charged the defendant with premeditated first degree murder only.

The indictment returned against the defendant, Dallas Hughes, is a five count indictment charging the defendant with making a false report of an emergency incident, fleeing from law enforcement officers, wantonly endangering another, committing a crime with the use of a firearm, and first degree murder. Dallas Hughes was not charged in the indictment with committing the felony of burglary or with felony murder. Specifically, Count 1 of the indictment charged defendant with the premeditated killing of Sacha Mitchell. The exact language of Count 1 of the indictment is as follows: "COUNT 1: did unlawfully, feloniously, maliciously, willfully, deliberately and with premeditation slay, kill and murder one Sacha Mitchell." *emphasis added*. There is no language in the indictment charging the defendant with having committed the crimes of burglary or felony murder. To the contrary, Count 1 does contain clear and explicit language which charges defendant with premeditation. The indictment was returned on the 14th and 15th day of September, 2004.

The criminal trial of Dallas Hughes began on January 4, 2005. During the State's opening statement on January 6, 2005, the State mentioned for the first time the charge

of felony murder, with an underlying felony of burglary. To be sure, the State did not charge defendant with such crimes as felony murder or burglary either during an arrest, in any criminal complaint, in a preliminary hearing before a Magistrate or Circuit Judge or before the Grand Jury in September, 2004. As of January 6, 2006, the probable cause of a charge of felony murder had not been tested by securing an arrest warrant, nor by a probable cause determination by any magistrate after a preliminary hearing, nor had probable cause been determined by a Grand Jury on such a charge. It is well established that a defendant has a right under the Grand Jury Clause of Section 4 of Article III of the West Virginia Constitution to be tried only on felony offenses for which a grand jury has returned an indictment. Syllabus Point 1, State v. Adams, 193 W.Va. 277, 456 S.E.2d 4 (1995).

Not only was the charge of felony murder untested as to probable cause, it was likewise unknown to defendant until trial, at which time the prosecutor conjured the charge during her opening statement. Accordingly, defense counsel moved for a mistrial based upon the lack of notice and unfair surprise of this charge from the State. Tr. Transcript Pg 570, lines 9-17. As evidence began to develop and the defendant was forced to meet such evidence unprepared, defense counsel continued throughout the entire trial to object to the State's pursuit of a conviction of felony murder and moved the court repeatedly for a mistrial to no avail.

Article III, Section 14 of the West Virginia Constitution guarantees an accused the right to a fair trial. Among the Constitutional guarantees contained therein is the guarantee that, "In all... trials, the accused shall be fully and plainly informed of the character and cause of the accusation... and shall have... a reasonable time to prepare

for his defence.” Unquestionably, the period of time between the State’s opening statement and the opening of the defense is not a reasonable period of time to prepare a defense. Accordingly, those charged with committing a crime must be notified of the crime which they must defend far in advance of trial. The manner in which an accused is customarily informed of the charges against him is by way of indictment.

An indictment has two constitutional requirements as promulgated in Hamling v. United States, 418 U.S. 87 (1974). First, the indictment must contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend. Second, the indictment must enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. Id at 117, see also Syllabus Point 6, State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999). It is not sufficient that the indictment merely set forth the criminal statute under which the accused is being prosecuted, an indictment must also set forth each element of the crime it charges. Almendarez-Torres v. United States, 523 U.S. 224 (1998). This Court too has held that in order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment. Syllabus Point 1, Combs v. Boles, 151 W.Va. 194, 151 S.E.2d 115 (1966).

While some criminal statutes are straightforward in nature, clearing establishing exactly what conduct is prohibited, the West Virginia murder statute is not as plain. West Virginia Code, §61-2-1, enumerates three broad categories of homicide constituting first degree murder: (1) murder by poison, lying in wait, imprisonment, starving; (2) by any willful, deliberate and premeditated killing; (3) in the commission of, or attempt to commit, arson, rape, robbery or burglary. Syllabus Point 6, State v. Sims,

162 W.Va. 212, 248 S.E.2d 834 (1978). Because each of the three manners of first degree murder is distinct, the statute sets forth distinct elements for each manner by which the crime may be committed.

Section 61-2-1 of the Code goes on to state that "in an indictment for murder and manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased." While this defendant would agree with the mandate of §61-2-1 that it is not necessary for the indictment to set forth that death was caused by use of a firearm, knife, motor vehicle or any such device, defendant cannot agree that §61-2-1 relieves the State of the burden of informing a defendant when the charge he must defend is felony versus premeditated murder. The indictment must, at the very least, provide the essential elements of the crime charged pursuant to the Rules of Criminal Procedure, Rule 7(c)(1) and Combs, supra. Such requirement cannot be relaxed by the language of §61-2-1.

Relying upon Article III, Section 14 of the West Virginia Constitution, Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure was devised to ensure that an indictment include a definite written statement of the essential facts of the offense charged. Obviously, the essential facts of a charge of felony murder are vastly different from a charge of premeditated murder. To the extent that §61-2-1 is interpreted to establish a minimum of information required to be contained in an indictment for murder, this Court held in Wallace, "the West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this

jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect.” Syllabus Point 5, State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999).

Although felony murder and premeditated murder each exist under the same section of the Code, each has separate and distinct elements which must be proven to constitute the crime. Accordingly, a criminal defendant must be informed under the indictment as to which elements of the statute he must answer. Failure to adequately inform a defendant of the essential elements of the charges against him in the indictment not only violates the West Virginia Constitution and longstanding caselaw such as Wallace and Combs, it likewise violates Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure as well as working a most severe prejudice on the defendant.

The indictment returned against Dallas Hughes charged in Count 1 that Dallas “did unlawfully, feloniously, maliciously, willfully, deliberately and with premeditation slay, kill and murder one Sacha Mitchell.” *emphasis added*. At first blush, the language in the indictment appears to follow the guise of §61-2-1, that the indictment need only charge that the defendant “did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased.” Notwithstanding the similarities of the two, the indictment in this case adds one additional term that is very distinct. Because the indictment includes the terminology “and with premeditation”, the State has narrowed the charge against Dallas Hughes from simple and generic murder to a very specific charge of premeditated murder. In essence, the State made an election between the three types of murder as recognized by this Court in Sims, supra. The indictment made no mention of felony murder. Consequently, the defendant was

severely prejudiced when he was charged with felony murder for the first time in the State's opening statement.

In State v. Adams, supra, the Court defined prejudice as surprise or lack of adequate notice of the charge against the accused. 193 W.Va. at 282. In addition to the element of unfair surprise, the Court has set forth other factors which may be considered for the purpose of determining whether or not a defendant has suffered actual prejudice due to the prosecution's belated injection of an alternative theory upon which a conviction may be based. These additional factors include (1) whether or not the defendant can show that he or she might have framed his or her defense differently in light of the alternative theory; (2) whether or not the defense presented was sufficient to defend against both alternative theories; and (3) whether or not the defendant took steps to remedy the prejudice by, for example, requesting a continuance or asking that witnesses be recalled. State v. Legg, 2005 W.Va. 32500 (2005).

In the matter at bar, defendant Dallas Hughes was charged in an indictment with the premeditated first degree murder of Sacha Mitchell. Defendant was never apprised of the fact that he would later have to defend not only premeditated murder at trial, but also a charge of felony murder. As articulated by defense counsel throughout the trial, defendant Dallas Hughes was placed in solitary confinement while housed at the Southern Regional Jail and found it extremely difficult to prepare a defense for those charges contained in the indictment. Having to scramble to defend new allegations presented during the State's opening statement proved both prejudicial and insurmountable for the defendant and his attorney.

Defendant suffered clear prejudice as a result of the State's pursuit of both felony murder and premeditated murder convictions. Not only was defendant prejudiced by the lack of time to defend the new charge, but defendant soon discovered that evidence and arguments put forth in defense of premeditation often conflicted with and were countervailing to any defense to the alleged burglary and hence felony murder.

Defendant's original defense centered upon the facts concerning the alleged murder weapon. Because defendant was forced to rebut the premeditation element charged in the indictment, defendant spent considerable time and effort before and during trial attempting to establish that the alleged murder weapon did not belong to this defendant but rather belonged to the victim. To this end, defendant sought out experts to conduct significant testing on the weapon as well as attempted to determine its owner and origin by interviewing countless witnesses. Defendant and his counsel worked extensively in an effort to determine if latent prints could be obtained from the weapon, or cartridges contained within, in an effort to determine ownership of the weapon. These efforts would prove wasted and meaningless in defense of a charge of felony murder.

To defend the charge of premeditated murder, defendant sought to minimize the volatile nature of his romantic relationship with the decedent. Defending against premeditation would also require defendant to disavow his access to the decedent's apartment by means of his own key. In the alternative, defending the charge of felony murder required that defendant exploit the violent nature of his relationship with the decedent to establish that he did not enter her apartment on the eve of her death with the intention of fighting with her, but rather, fighting and physical altercation was a common and spontaneous occurrence between the two. Also in defense of felony

murder, defendant would want to establish that he did in fact have continuous access to the apartment in an effort to establish that he could not burglarize his own home.

Finally, defendant would be required to have some time to investigate the charge of felony murder and determine what evidence or witnesses defendant would have available in defense of that charge. Without any time to prepare an adequate defense, defendant attempted to contact many of the State's witnesses after the State had called them in its case-in-chief. Only by interviewing these witnesses could the defendant determine if additional facts or information existed to rebut the charge of felony murder. Although defendant attempted to contact these individuals repeatedly after their testimony, the prosecuting attorney had already advised each witness not to speak with defense counsel. Tr. Transcript Pages 861, 1166, and 1397.

Not only did the prosecution stymie defense counsel's efforts in speaking with many of the State's key witnesses, the State also ensured that Deputy Harold would not be available for recall by advising Deputy Harold that he did not have to answer a subpoena issued by defense counsel. Defense counsel tried for two days continuously to no avail to secure Deputy Harold to testify as to a gun shot residue collection performed by Deputy Harold on the deceased. Tr. Transcript Pages 1323 et seq.

During trial, the State argued that the defendant had fair notice of a pending felony murder charge, despite its absence in the indictment, inasmuch as the charge, according to the State, clearly stems from information contained in the defendant's statements given to officers on the day that Sacha Mitchell died. The State's exact argument as it appears on page 570 of the trial transcript is as follows:

"MS. KELLER: Your Honor, the defense has most certainly had prior notice. They have had the confessions of this defendant since last fall. I find this

impossible, but I will respond... The defense has had, for months and months and months the defendant's confession, which is and contains the admissions to exactly the burglarious acts that the State just described. Of course, he is not charged with the underlying burglary. If he was charged with the underlying burglary, then the State would have to elect because you can't convict both of the burglary and the felony murder."

First, the prosecutor's argument makes a very bold assumption, not only that the defendant understands the meaning of burglary, but also believes himself guilty of burglary. If the defendant does not believe his actions constitute burglary, he has no reason to be on notice that he may be charged with burglary, or even worse, as was the case, charged with felony murder with an underlying felony of burglary. Second, the State too was in possession of the defendant's statements given to police long before the State pursued an indictment against the defendant. Notwithstanding the clear evidence the State claims exists in the statements, the State did not seek to present charges of burglary or felony murder to the grand jury.

There can be no doubt that the defendant would have been provided fair notice of the charges he would have to defend if the indictment were to recite charges of either burglary or felony murder. The State cannot make any showing as to how presentment of the charge of burglary or felony murder to the grand jury would in any way prejudice or harm the State. To the contrary, failing to present these charges to the grand jury, but instead raising them for the first time at trial, resulted in unfair surprise and significant prejudice to the defendant. Under the circumstances, the State should not be permitted to benefit from its own dereliction, and at the defendant's expense, when it is the defendant who is facing a possible lifetime of incarceration.

(2). The trial court abused its discretion by not granting defendant's motion to have the State elect between premeditated and felony murder either during the

trial or at the close of evidence when the defendant made a particularized showing of the prejudice that would result from a failure to elect.

After the State charged defendant with the crime of felony murder for the first time during its opening statement, defense counsel moved for a mistrial citing unfair surprise and lack of notice. Tr. Transcript Page 571. The trial court summarily denied the motion and the trial continued with the defendant attempting to defend both charges of premeditated and felony murder. Defendant soon became overwhelmed attempting to defend both charges. Defense counsel moved the trial court to require the State to elect between felony and premeditated murder. The defendant cited State v. Walker in support of a forced election and articulated the difficulties he was having, and would continue to have, if forced to defend both charges. Tr. Transcript Page 734.

In response to the defense motion to force an election, the State cited Stuckey v. Trent, 202 W.Va. 498, 505 S.E.2d 417 (1998), in arguing that the State need not ever elect the manner in which it pursues a conviction of first degree murder. The trial court erroneously agreed with the State, failing to recognize well-established case law which sets forth when a trial court may require the State to elect between felony and premeditated murder. In State v. Walker, the Court articulated that "the State need not elect whether it will proceed on premeditated murder or felony murder until the close of all evidence; however, a defendant may make a motion to force an earlier election if he can make a strong, particularized showing that he will be prejudiced by further delay in electing." Syllabus Point 2, State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992). According to Walker, a defendant has a right to move for an election when prejudice exists. Id at page 667.

During the course of the trial, defense counsel made a motion early in the trial to have the State elect between felony and premeditated murder. In support of that motion, defense counsel articulated the extreme prejudice caused by the lack of notice and utter surprise of the felony murder charge. In addition, defense counsel recanted the difficulties he was facing in trying to adequately defend each charge. Despite this recitation of the prejudice faced by the defendant, the trial court determined, contrary to the holding in Walker, that the State need not ever make an election. *emphasis added*. Such a determination by the trial court was an abuse of discretion, inasmuch as the trial court was unwilling to recognize the right of the defendant as articulated in Walker.

Even more astounding, defense counsel made a motion to have the State elect between premeditated and felony murder at the close of all evidence and was again denied such an election by the trial court. Tr. Transcript Page 1592. The syllabus point in Walker clearly states that the State need not elect until the close of all evidence unless a particularized showing of prejudice can be made. Any reasonable interpretation of the statement indicates that absent a showing of prejudice, the State must not make an election until the close of all evidence, at which time it must then elect. The trial court, persuaded by the State's argument based on Stuckey v. Trent, denied defendant's motion to have the State elect even at the close of evidence.

The State represented to the trial court that the ruling in Stuckey establishes that the State need not ever elect between the two alternative theories of felony and premeditated murder. This account, however, is incorrect, inasmuch as Stuckey relied upon and did not alter the well-established holding in State v. Walker. Walker clearly established that a defendant is entitled to an election when there has been a

particularized showing of prejudice to the defendant. In Stuckey, the trial court determined that the defendant could make no showing of prejudice as his defense to both felony murder and premeditated murder was the same defense of alibi. Moreover, the trial court in Stuckey stated that the evidence of Mr. Stuckey's guilt was overwhelming, especially in light of the confession given by Mr. Stuckey. Upon appeal, the Court in Stuckey relied upon the well-reasoned and long-established holding in State v. Walker in upholding the trial court.

Although the defendants in Stuckey and Walker could not make a particularized showing of prejudice, defendant Dallas Hughes did present to the trial court a particularized view of the prejudice he would suffer if the State were not required to elect. Unlike both Mr. Stuckey and Mr. Walker who were indicted on charges of *both* premeditated and felony murder, defendant Dallas Hughes was not indicted for felony murder. Rather, the felony murder charge was not made known to Dallas Hughes until the State's opening statement to the jury. Moreover, the underlying felony in both Stuckey and Walker was a charge of arson. It was easily anticipated that those defendants would be charged with arson in light of the fatal conflagration in each case.

Unlike the well defined and easily determined charge of arson, defendant Dallas Hughes was charged with the far more amorphous crime of burglary. The existence of a fire is a good indication that one might be charged with arson. Burglary, on the other hand, is a crime counterintuitive to laymen and lawyer alike. A burglary can occur under a vast array of scenarios, requiring only that one enter the home of another with the intent to commit a crime, *any crime*, therein. Considering the nearly impalpable nature of the crime of burglary, even if defendant Dallas Hughes had been provided proper

notice of an accusation of felony murder, it would have been difficult if not impossible to ascertain burglary as the underlying felony.

Having to defend against the additional underlying burglary charge required Dallas Hughes to defend against two distinct accusations of intent; first, that he intended to carry out the premeditated killing of Sacha Mitchell and, second, that he intended to commit a crime upon entering into her apartment. Unlike Mr. Stuckey, defendant Dallas Hughes was unable to provide one singular defense to both charges. To the contrary, Dallas Hughes' defense of one charge was hampered by any defense he may have to the additional charge. This divergence was the exact type of prejudice envisioned by Walker that establishes when a trial court should require the State to elect between felony and premeditated murder. The trial court's failure to require the State to elect in the present matter constitutes an abuse of discretion and is reversible error, entitling defendant Dallas Hughes to a new trial.

B. THE TRIAL COURT FAILED TO STRIKE CERTAIN JURORS FOR CAUSE ONCE IT BECAME OBVIOUS THAT THOSE JURORS WERE POSSESSED OF PREJUDICE AND BIAS AGAINST THE DEFENDANT, TWO OF WHICH SERVED ON THE JURY CONVICTING THE DEFENDANT

During individual *voir dire*, several prospective jurors indicated a predisposed bias or prejudice against criminal defendants. Many jurors candidly admitted that it was their opinion that a defendant who was charged and indicted was more likely guilty than not. Defense counsel moved the trial court to strike each juror who admitted to having such a predisposition. In many cases the trial court determined that the prospective juror had been rehabilitated by further questioning by the State and had indicated that they could in fact follow the court's instructions and render a fair verdict. Two such

jurors, Amy Diehl and Dorothy Alpaugh, survived defense counsel's motions to strike for cause and served as jurors during the trial.

In West Virginia, jurors who during *voir dire* of the panel indicate possible prejudice should be excused, or, in the alternative, should be questioned individually by the court or by counsel to determine precisely if prejudice or bias exists which would require excuse. Syllabus Point 3, State v. Pratt, 161 W.Va. 530, 244 S.E.2d 227 (1978). The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary. Syllabus Point 4, State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair. Syllabus Point 5, O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002).

In the case of State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002), the following exchange occurred between the court and a prospective juror upon *voir dire*.

THE COURT: Do you believe that when somebody has been indicted, they are most likely to be guilty than not, based on your experience with grand juries?

JUROR YOUNG: Probably.

The juror was not struck for cause by the trial court. Upon appeal, the defendant, Mr. Griffin, asserted that the trial court erred by failing to strike juror Young for cause in light

of the above response. In support of his argument, Griffin cited this Court's holding in State v. Bennett, 181 W.Va. 269, 382 S.E.2d 322 (1989), wherein the Court held that it was error for a trial court not to strike a juror for cause after the following exchange: "Do you think that there's a probability or greater chance that [the defendant] did it than didn't do it?" to which the prospective juror responded, "Yeah."

Based upon its ruling in Bennett, the Court in Griffin determined that the exchange between the trial court and the prospective juror clearly indicated that the juror was possessed of such prejudice or bias that failing to strike the juror for cause was reversible error.

eerily similar to the exchange in Griffin is the exchange between defense counsel in the instant case and prospective juror Amy Diehl on page 178 lines 2-6 of the transcript of trial.

MR. WOOTEN: Do you believe that, when someone is charged, they're more likely than not to be guilty?

PROSPECTIVE JUROR DIEHL: Yes.

MR. WOOTEN: You do believe that?

PROSPECTIVE JUROR DIEHL: Yes, I believe that.

The exchange between the prospective juror Amy Diehl and Mr. Wooten is strikingly similar to that in the Griffin case. In fact, the response was so similar that Mr. Wooten moved the trial court to strike Ms. Diehl for cause, citing the Griffin case. The trial court refused to strike Ms. Diehl and she ultimately wound up serving as a juror in the trial of the defendant, Dallas Hughes.

Similarly, prospective juror Dorothy Alpaugh gave the following exchange on page 162 lines 5-19, indicating a clear prejudice against the defendant in this case.

MR. WOOTEN: Let me ask you this: The fact that someone was charged with the killing, would you be inclined to believe that he's probably guilty if he was charged?

PROSPECTIVE JUROR ALPAUGH: Well, I wouldn't say necessarily guilty. There's probable cause, I would say, or he wouldn't be charged.

MR. WOOTEN: So you think there would have been at least probable cause or he wouldn't be charged?

PROSPECTIVE JUROR ALPAUGH: Sure.

MR. WOOTEN: But not necessarily guilty?

PROSPECTIVE JUROR ALPAUGH: Right.

MR. WOOTEN: But probably guilty?

PROSPECTIVE JUROR ALPAUGH: Well, yeah, I would think so. If they didn't have any evidence, they wouldn't charge you at all; would they?

Again, defense counsel moved the trial court to strike prospective juror Alpaugh to no avail, and again prospective juror Alpaugh served on the jury that convicted the defendant Dallas Hughes.

Although the prosecuting attorney went on to attempt to rehabilitate both prospective jurors Diehl and Alpaugh, each juror was already disqualified as a matter of law and could no longer, at that point, be rehabilitated by further questioning, retractions or promises to be fair. See Syllabus Point 5, O'Dell v. Miller. For each prospective juror, defense counsel made a motion to strike based upon the syllabus point in Griffin.

In response to defense counsel's motion to strike prospective juror Ms. Diehl, the trial court responded at page 182 lines 16-24:

"And the -- I don't believe that, and this is a per curiam decision, as well, and the footnote or the headnote that you're citing is the headnote that is based upon what I believe to be clear law whenever they -- when they have stated a definite bias. This lady did not state a definite bias against this particular defendant, and

I'll overrule your objection to her. Let's move on with that one. So Ms. Diehl will be seated."

What the trial court here fails to realize is that the bias found to be present in Griffin was determined to exist based purely on a question of the court and response of the prospective juror that occurred almost verbatim in the present case. The Court in Griffin made no such distinction as a "definite bias". Moreover, in the Griffin case, the prospective juror's response was "probably" whereas in the instant matter, prospective juror Diehl answered an unequivocal "yes".

In response to defense counsel's motion to strike prospective juror Alpaugh, the trial court, again referring to Griffin at page 166 lines 1-5 stated:

"That same case, Mr. Wooton, as I recall, indicates, and I know the syllabus point to which you were referring, but that same case indicates that if a juror is equivocal in a response, that further questioning that seems to firm up the fact she is not disqualified is permissible."

Notwithstanding the ruling of the trial court, Griffin establishes that prospective juror Alpaugh exhibited a clear bias or prejudice which would merit excusal from the panel. Moreover, Miller firmly established that contrary to the trial court's ruling, prospective juror Alpaugh was disqualified as a matter of law and could not be rehabilitated by further questioning. O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002).

Based upon the holdings of Griffin, Miller and Bennett, prospective jurors Diehl and Alpaugh should have been struck by the trial court for cause. Rather, each juror was allowed to remain on the panel and ultimately wound up sitting as jurors in the trial of Dallas Hughes; both electing to convict Dallas Hughes, in accord with their bias as exhibited earlier in *voir dire*. Allowing either of these jurors to set in judgment of the

defendant in light of their express bias prevented this defendant from receiving a fair trial and constitutes reversible error.

C. THE CUMULATIVE EFFECT OF NUMEROUS ERRORS COMMITTED DURING THE TRIAL PREVENTED THE DEFENDANT FROM RECEIVING A FAIR TRIAL

Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error. Syllabus Point 5, State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972).

(1). The jury was required to conduct portions of its deliberation in open court because the State failed to provide the jury with the complete and accurate evidence admitted during trial.

During the trial, the State admitted audio recordings of a phone conversation between defendant and T.T. Bly, State's Exhibit 16, and phone messages left to defendant by Sacha Mitchell, State's Exhibit 30. Also included on each of the recordings was extraneous material that was determined by the court to be impermissible and ordered to be redacted out of the recording. To address the situation of the extraneous material, a representative of the State was permitted to edit out or censor the extraneous portions of the recording as it was being played to the jury during trial. The censorship was performed by merely turning the volume down so that the jury could not hear those portions deemed improper. Neither recording was ever modified or duplicated in an effort to delete the offending portions of audio.

After eight days of testimony, the jury was given the case for deliberation late on January 14, 2005. After some deliberation, the jury presented a question to the trial court, requesting the equipment necessary to listen to the audio recordings admitted into evidence. Tr. Transcript Page 1872. The trial court informed both the prosecutor and defense counsel of the question and the dilemma of how best to handle audio exhibits which had been edited or censored while being played to the jury in open court. In determining exactly how the jury would have access to the evidence, the following exchange occurred, beginning on page 1873 of the trial transcript:

THE COURT: But it's on the same disk. That's the problem. There's track 1, track 2, that kind of thing. So what I'm suggesting is, is we can do one of two things. When they hear it, we can bring them back and play -- do it the same way we did, or we can make a copy that contains only the information that was admitted.

MS. KELLER: Which one is quicker and easier? And is a copy just as good, sound-wise.

THE COURT: Well, a copy is going to be the same except that the only problem we have with the copy on the January 4th phone call is, is that part of track 1, which is what we would copy over, we also edited out part of track 1 and I can't edit that.

MS. KELLER: I guess my preference would be to play it in court if they ask -- they say they want to listen to those.

THE COURT: All right. Then I'm going to send a message back that they can listen, that we'll provide them equipment to listen to everything else. When they want to listen to these two, which are the phone call between T.T., the three-way call, and the recorded phone messages, that we'll have -- because of other things that are on the disk that we can't edit, we'll have to bring them in and let them listen to them in here. All right. Having said that, go convey that. Take that tape box in case because there's the EOC tape, and then he's got a microcassette player for you right back there. Now, do you want me to bring the jury in and tell them that, or do you want him to deliver that message?

MR. WOOTON: Your Honor, I'm curious, if they ask to listen to some tapes here but not others, that might give some tape -- the tapes they can take back there greater emphasis.

...
THE BAILIFF: Benny's got a suggestion.

THE COURT: What?

DEPUTY HALSTEAD: We can take a cassette tape, we can play it and record, pause and record when there's stuff you don't need on the tape. I've got blank tapes.

MR. [sic] COURT: Do you object to that?

MR. WOOTON: Well, I don't object to the procedure that you've got, let's just go ahead and do it.

THE COURT: All right. We're not going to do it -- we're going to do it the way we first said. We're going to bring them back in here and play it for them once we get -- if they need to hear it. We're off the record.

Thereupon, the jury was ushered back into the courtroom to listen to the recorded conversations in the presence of the defendant, and all others present. The recordings were played once, from start to finish with the same or similar censorship as was presented during trial. After the recordings were played for the jury, the judge inquired if the jury would like to hear the recordings a second time. The court offered to play each recording a second time from start to finish and indicated that it would not be possible to "skip" to specific areas of interest on the recording. The jury made no response and was then taken back into the jury room to complete deliberation.

As a result of the procedure utilized by the court, the jury was required to conduct part of its deliberation in open court. Such procedure denied the jury an integral part of the deliberative process. In American jurisprudence, the sanctity of the jury's deliberative process has always occurred behind closed doors. In the normal course of events, jurors would be permitted to listen to audio recordings entered into evidence in a manner far removed from that which occurred in the present case.

The typically private deliberative process would allow jurors to stop, fast-forward, rewind and focus in on portions of the recording that may be the subject of debate or of particular interest. While focusing in on certain portions of the recordings, jurors would be expected to discuss, question and even argue the meaning of such evidence and then perhaps even reference the recordings again after discussion or debate. By requiring the jury to listen to State's Exhibits 16 and 30 in open court, the deliberation process was fatally contaminated, and the ability to fully consider critical pieces of evidence was denied. Jurors were not permitted to focus their questions and concerns and debate issues to reach resolution in regard to this evidence. This was the very concern voiced by defense counsel when the court announced its decision to present the evidence in this manner.

Remarkably, the entire scenario could likely have been avoided, had the State taken the necessary measures to provide the jury with the proper evidence. Both exhibits in question were State's exhibits which contained extraneous materials. Once the trial court determined exactly what portions of the audio was extraneous and not permissible, the State had the burden to prepare such evidence for the jury's final deliberation by redacting out those portions not allowed. The rules of evidence have long provided for methods whereby one may enter only a portion of a document into evidence. Written documents can be easily, and are routinely, redacted immediately upon the court's determination as to which portions are irrelevant.

Although more difficult, an audio recording too can be redacted quite simply, as proven by the extemporaneous suggestion of Deputy Halstead at trial. Tr. Transcript Page 1875. Notably, the State had Exhibit 30 in its possession prior to the start of trial

and had Exhibit 16 in its possession since the third day of trial on January 6, 2005. Although the State had each of these items for no less than eight days prior to the last day of trial, the State made no effort to redact or otherwise modify the audio recordings so that they may be accessed by the jury during private deliberations. The result of the State's dereliction was that the jury would only have access to this evidence in open court. Forcing the jury to deliberate in open court denied defendant his constitutional rights of due process and rights to a fair trial.

(2). The State was permitted to enter irrelevant evidence of defendant's possessing a handgun, even though the handgun was not the same handgun alleged by the State to be the weapon which killed Sacha Mitchell.

During the trial of defendant, the State solicited testimony from multiple witnesses that the defendant owned or possessed a handgun other than that involved in the death of Sacha Mitchell. The evidence that the defendant possessed a different handgun had absolutely no relation or relevance to the State's theories of the case.

In State v. Walker, the Court was presented with a similar scenario. In Walker, the State introduced evidence of a handgun owned by the defendant that was not alleged to be the weapon used in the crime alleged, along with various and sundry ammunition. Upon appeal, the Court determined that many West Virginians have guns and ammunition in their houses. In addition, the Court held that there was no probative value whatsoever in admitting testimony concerning Mr. Walker's firearms. The Court iterated that the only purpose of such testimony was to create the impermissible inference that the defendant must be a dangerous person solely because he possessed

guns and ammunition, notwithstanding that the right to keep and use arms is guaranteed to every citizen by the West Virginia Constitution, Article III, § 22.

During the defendant's trial, the State solicited evidence of defendant's possessing a black, semi-automatic, nine-millimeter handgun. The State solicited testimony regarding the gun from four different witnesses; Derrick Mitchell, the brother of Sacha Mitchell; Sterling Mitchell, Sacha Mitchell's cousin; Tijuana Mitchell, Sacha Mitchell's mother; and Jessica Mitchell, Sacha Mitchell's sister. The testimony of each of these witnesses occurred as follows:

STATE: In the period of time that you knew the defendant or Dallas Hughes, did you know if he had a gun?

DERRICK MITCHELL: Yes.

STATE: And tell the jury, where did you see him with the gun?

DERRICK MITCHELL: In his car wrapped up in a white towel.

STATE: Do you know what kind of a gun you saw him with?

DERRICK MITCHELL: It was a black nine-millimeter.

Tr. Transcript Page 677.

STATE: Do you know whether or not the defendant carried a gun?

STERLING MITCHELL: Yes.

STATE: And where did you see the defendant's gun?

STERLING MITCHELL: I seen it when he had it in the car—

...Objection by defense counsel, overruled...

STATE: I believe you were answering my question where I said, "Where did you see the defendant's gun?"

STERLING MITCHELL: Yes. I seen it in the car. The when he'd get out of the car, he'd have it, trying to show it off or whatever.

Tr. Transcript Page 821.

STATE: And did you also tell Detective Canaday that you had seen the defendant with a black gun before and a silver gun before?

TIJUANA MITCHELL: Yes.

Tr. Transcript Page 849.

STATE: Had you seen the defendant – whether or not the defendant carried a gun, Dallas Hughes carried a gun?

JESSICA MITCHELL: I seen him with a gun before.

Tr. Transcript Page 866.

After soliciting the testimony, the State made no further mention of the black nine-millimeter. The State's solicitation of such testimony was impermissible and irrelevant, as articulated in Walker. Beyond even the Walker analysis, the dissimilarities between the semi-automatic, black nine-millimeter and the silver, chrome .38 caliber revolver are so significant as to render the evidence of the nine-millimeter completely irrelevant. The only possible use of such evidence by the State is that exact use prohibited by Walker - to show that defendant was a dangerous person.

(3). The trial court erred by admitting an audio recorded phone conversation between the defendant and a witness when the phone conversation had no relevance, but exposed defendant as being incarcerated.

On the third day of trial, the State informed the trial court that the defendant had placed a three-way telephone call from the Southern Regional Jail, by and through his grandmother, in an attempt to speak with Takiyah "T.T." Bly. The State alleged that the defendant attempted to secure false testimony from Ms. Bly. The State contended that this alleged attempt to solicit false testimony was evidence of defendant's

consciousness of guilt. By the morning of the fourth day of trial, the State produced an audio recording of the conversation and sought to have it entered into evidence.

Defense counsel objected to the introduction of the audio recording, citing its irrelevance and the prejudice that the defendant would suffer as a result of the jury learning of defendant's incarceration. The trial court ruled that it would have to listen to the tape to determine if it was relevant, and, if so, the court would then analyze the tape pursuant to Rule 403. Tr. Transcript Page 726. The State argued that the recorded conversation was admissible as consciousness-of-guilt testimony pursuant to State v. Gilbert, 184 W.Va. 140, 399 S.E.2d 851 (1990), and State v. Weissengoff, 89 W.Va. 279, 109 S.E. 707 (1921).

In both Gilbert and Weissengoff, the Court dealt with an undisputable attempt to secure false testimony. In Gilbert, there was direct evidence that the defendant, Mr. Gilbert, had specifically asked a witness to testify that she did not know anything and to deny certain facts. In Weissengoff, a witness testified that Mr. Weissengoff attempted to secure false testimony that the victim had been drinking and was intoxicated at the time of the incident. The same witness testified that Mr. Weissengoff remarked that money was no object to him and that he wanted to get out of the charges.

Contrary to the State's assertions, the recorded discussion between Dallas Hughes and T.T. Bly is far removed from that in Weissengoff and Gilbert. In both Weissengoff and Gilbert, it was irrefuted and no question remained that the defendant therein was attempting to solicit false testimony. To the contrary, whether this defendant, Dallas Hughes, was attempting to secure false testimony cannot so easily be determined. The defendant herein did not ask the witness, T.T. Bly, to make any

specific statement, testify in any specific manner, or to omit any testimony whatsoever. Transcript of Phone Conversation attached.

Accordingly, because defendant's intent is susceptible to interpretation, the trial court must first determine the probative value of the phone conversation. The court must then, under Rule 403, weigh that probative value against whatever prejudicial effect may result. According to the State, defendant wanted T.T. Bly to lie about having seen the defendant on a second occasion on the morning of Sacha Mitchell's death. To properly assess the probative value of such an allegation, the court must determine if having the witness deny a second visit will refute the State's evidence or strengthen that of the defense.

At trial the State made no attempt to prove the relevance of the alleged false testimony. The State could not show how such false testimony would tend to disprove any of the State's legal theories. Moreover, the State could not show how defendant would benefit from such false testimony. In short, the State provided the court with no motivating factor whatsoever regarding why defendant would seek to have T.T. Bly testify falsely. While the State may not be required to make such a showing when the intent of the defendant is explicit, clear and unambiguous, such is not the case under the present facts. Because the phone conversation is not clear and is susceptible to interpretation regarding defendant's intent, a motive to solicit false testimony is critical.

The State proceeded with two distinct theories of defendant's guilt; first, that defendant premeditated and planned out the killing of Sacha Mitchell and then carried out that plan, and second, that defendant planned to enter into the home of Sacha Mitchell and assault her and that during that assault, Sacha Mitchell was killed. The

State never alleged that defendant had an accomplice to either crime. Moreover, the State entered no evidence of premeditation other than previous arguments and threats made against Sacha Mitchell. Accordingly, whether defendant visited T.T. Bly on a second occasion, in close proximity to, but before Sacha Mitchell's death, has no tendency to prove that defendant planned to shoot and kill Sacha Mitchell. Similarly, the occasion of a second visit has no tendency to prove that defendant planned to enter the apartment of Sacha Mitchell and commit an assault or battery upon her, the basis for the felony murder charge. Accordingly, the alleged false testimony sought by defendant would do nothing to rebut either of the State's legal theories.

Defendant's own theory of defense asserted that the death of Sacha Mitchell was an accident. Defendant explained that he and Sacha Mitchell were embroiled in an oral argument when she produced the weapon. According to the defendant, once Sacha Mitchell produced the weapon a physical struggle ensued. It was during that struggle that the weapon accidentally discharged, delivering a fatal shot into Sacha Mitchell. Whether defendant visited with T.T. Bly on an occasion in close proximity to, but before Sacha Mitchell's death, does not make the likelihood that the shooting was accidental either more or less probable. Notably, the State did not and could not indicate any motive that the defendant may have for attempting to solicit the alleged false testimony.

Because the alleged false testimony that defendant did not visit T.T. Bly on the second occasion bears absolutely no relation to either the State's or the defendant's respective cases, the probative value of such testimony is very slight. Conversely, the prejudicial effect is significant. First, by allowing the jury to listen to the recorded phone conversation, the jury will discover that the defendant was either incarcerated or that his

phone conversations were being recorded for some other reason, both of which prejudice the defendant. Secondly, if permitted, the State is empowered to argue that the mere occurrence of the phone call is evidence that defendant is conscious of his own guilt. Finally, T.T. Bly was permitted to testify regarding her opinion that defendant was seeking to have her testify falsely.

While testifying in camera, T.T. Bly testified that Dallas Hughes "wanted [her] to say something that wasn't true". Tr. Transcript Page 703. When asked what words defendant used to ask her how to testify falsely, T.T. Bly responded that defendant told her "you tell them that you seen me at this time; you didn't see me at that time." Id. T.T. Bly then testified again, before the jury, that defendant "said that he wanted me to say I didn't see him later on that night, that morning; I had just seen him after the club." Tr. Transcript Page 1006. A thorough review of the recorded conversation and attached transcript clearly indicates that defendant did not ask T.T. Bly to testify that she had not seen him at a later time.

Not only was the testimony of T.T. Bly prejudicial, it was also misleading and inaccurate. A thorough examination of the recorded phone conversation and accompanying transcript clearly shows that defendant never asked T.T. Bly to say that she only saw him one time on the earlier occasion and that she did not see him on a second occasion. During the phone conversation, defendant repeatedly asked T.T. Bly what she had told the police. Throughout the conversation, T.T. Bly told the defendant that she only informed the police about the second visit. In response, defendant stated several times that he had seen her on an earlier occasion as well. Defendant did not

ask T.T. Bly to deny the second visit. T.T. Bly testified at trial that she did, in fact, see defendant on two separate occasions on the morning of Sacha Mitchell's death.

The inaccuracies of T.T. Bly's testimony in relation to the tape recorded conversation were certainly exacerbated when the audio was played to the jury and portions of the same were turned down to prevent the jury from hearing what was being said. Such censorship, when coupled with the inaccuracies of the testimony undoubtedly permitted the jury to speculate as to what was being said during the censored portions of the conversation.

A complete review of the audio recording indicates that defendant was aware that police investigators had questioned many of his former acquaintances regarding his ownership of a gun or his prior alleged violent demeanor. As defendant repeatedly asked T.T. Bly what she had told the police, it became evident that defendant was attempting to find out if investigators had questioned her regarding their relationship, whether defendant owned a gun and any prior violent acts exhibited by defendant.

The totality of the entire recorded phone conversation clearly establishes that defendant had no motivation to encourage the witness, T.T. Bly, to testify falsely. In light of such minuscule probative value, the prejudicial effect far outweighed the probative value. Accordingly, the evidence should have been disallowed by the trial court's gate-keeping function under Rule 403. Notably, upon ruling that the evidence was admissible, the trial court made no determination upon the record that the recorded phone conversation was relevant. The trial court likewise failed to weigh whatever probative value the recording may have against the resulting prejudicial effect it would have on the defendant. Tr. Transcript Page 854-855. Such failure to conduct a proper

analysis is a clear abuse of the trial court's discretion and resulted in the admission of otherwise inadmissible evidence, thereby denying defendant a fair trial.

(4). The State was permitted to admit cellular telephone voice messages left by Sacha Mitchell, on defendant's cellular phone as an excited utterance, although no evidence existed regarding any triggering traumatic event.

At trial, the State sought to enter into evidence voice messages retrieved from defendant Dallas Hughes's cellular phone. The voice messages were left on defendant's phone by the alleged victim, Sacha Mitchell. According to the cellular device, the messages were "new" messages that had not yet been listened to by the defendant or anyone else. In general, the messages centered upon apparently ongoing arguments between the defendant and Sacha Mitchell. One such message left by Sacha Mitchell was inquiring of the defendant, "So you gonna shoot up my apartment up with my child in here, fuck you. You ain't shit and you won't get shit the fuck up outta here, how about that?" The State sought to enter the phone message as an excited utterance. The trial court entered the evidence as an excited utterance over the strong objection of defense counsel.

In order to qualify as an excited utterance under West Virginia Rules of Evidence 803(2): (1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition. Syllabus Point 7, State v. Sutphin, 195 W.Va. 551, 466 S.E.2d 402 (1995). To determine whether a statement was made while under the stress or excitement of an event and not from reflection and fabrication, several factors must be considered,

including: (1) the lapse of time between the event and the declaration; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements. State v. Thomas, 187 W.Va. 686, 421 S.E.2d 227 (1992).

An alleged spontaneous declaration must be evaluated in light of the following factors: (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact and not a mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation; and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made. Syllabus Point 2, State v. Young, 166 W.Va. 309, 273 S.E.2d 592 (1980).

Under the existing caselaw, an analysis of whether a statement is an excited utterance must begin with a thorough examination of the alleged event which triggered the excited utterance. The court must determine that the event did occur, that the declarant actually experienced the stress or excitement of the event, that the statement or utterance was made spontaneously as a result of the event and that the declarant

had no time to reflect or deliberate upon such event. In the matter at bar, the State presented no evidence of any event triggering the voice message left by Sacha Mitchell.

While the message itself may be considered circumstantial evidence that some event did occur, the court's analysis requires some additional detail regarding the alleged event. Because the State entered no additional evidence regarding the triggering event, the court could not possibly determine whether an event even occurred, let alone begin an analysis of the duration of time that had passed between the alleged event and the statement of Sacha Mitchell, whether she had time to reflect and deliberate, or whether her statement was made while she was still under the stress of the alleged event. Accordingly, because there was no evidence regarding the triggering event upon which to make a determination, the trial court abused its discretion in allowing the voice messages to be entered into evidence as an excited utterance.

Even if the trial court was correct in determining that the voice messages qualified as an excited utterance, West Virginia Rules of Evidence 401 and 403 require that the evidence be disallowed. Rule 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The State presented two theories under which the defendant could be found guilty of first degree murder. The first theory relied upon by the State was that the defendant premeditated the killing of Sacha Mitchell. The second theory relied upon by the State was that the defendant entered into the home of Sacha Mitchell with the intent to batter her and that Ms. Mitchell was killed during the process of that burglarious act.

The State entered no evidence that the defendant had possession of a gun prior to entering the apartment of Sacha Mitchell. Moreover, neither of the State's two legal theories alleged that the defendant had the intention of "shooting up" the apartment of Sacha Mitchell, nor did the evidence suggest that the defendant intended to "shoot up" the apartment of Sacha Mitchell. In fact, the evidence at trial indicates that only one shot was fired during an altercation between the defendant and Sacha Mitchell. Therefore, the voice message left by Sacha Mitchell suggesting that Dallas Hughes threatened to "shoot up" her apartment does not have any tendency to make the existence of any fact regarding the State's theories of murder more or less probable. At the very least, the minimal probative value of such a statement is certainly outweighed by its extreme prejudicial effect, and should have been denied pursuant to Rule 403. Accordingly, the trial court abused its discretion when it determined that the statement qualified as an excited utterance when there was no evidence of a triggering traumatic event. Likewise, the trial court's failure to conduct a proper Rule 403 analysis was an abuse of discretion entitling defendant to a new trial.

VI.

CONCLUSION

Dallas Hughes is currently serving a 21-year prison sentence in Mount Olive Correctional Facility. After four years of incarceration, Dallas still does not know exactly what crime he is serving a life sentence for. Dallas does not know if the jury found him to be guilty of premeditated murder or felony murder. It very well may be that the jury determined him to be a little guilty of both, but not completely guilty of either. In West Virginia it is not required that the jury verdict form delineate between the two types of

murder. In fact, it is not even required that the jury agree unanimously that a defendant is guilty of one or the other. Accordingly, it is possible that some jurors found Dallas Hughes guilty of premeditated murder, while others may have found him guilty of felony murder. This means that there is some possibility, if not probability, that certain jurors convicted Dallas for a charge that did not appear in the indictment and that Dallas did not have a reasonable time to prepare a defense for. Because Dallas was never informed that he would have to defend a charge of felony murder until after the trial began, any conviction based even in part on felony murder is a denial of defendant's constitutional rights to a fair trial and entitles defendant to a new trial.

Beyond even the shortcomings of the indictment, Dallas was not provided a fair and impartial jury. At least two members of the jury that convicted Dallas Hughes admitted prior to trial during *voir dire* that they believed Dallas was most likely guilty simply because he was charged with the crime. It is the most fundamental legal proposition that criminal defendants are presumed to be innocent, until proven guilty. Dallas Hughes was not presumed to be innocent and was made to prove his own innocence once biased jurors were permitted to sit in judgment of him.

Additional cumulative errors resulted in Dallas Hughes being forced to explain irrelevant evidence. Dallas was required to take the stand to deny that he asked a witness to lie. Dallas was forced to defend his legal ownership of a weapon that had no relation to the death of Sacha Mitchell. Dallas was made to explain cellular phone messages that he had never heard prior to trial. Although all of this evidence was irrelevant to the issues being tried, the State was permitted to enter the evidence in an

attempt to paint Dallas Hughes as a dangerous and evil person. Finally, the jury was not provided with the complete evidence to consider during its deliberation.

As evidenced by the foregoing argument and legal analysis, defendant Dallas Hughes did not receive a fair trial on January 4, 2005. Accordingly, Dallas Hughes is entitled to a new trial.

VII.

REQUEST FOR RELIEF

Wherefore, the defendant respectfully requests that this Honorable Court reverse his convictions, remand his case for a new trial on all counts and grant such other and further relief as shall be determined to be just and proper.

Respectfully Submitted
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By Counsel,



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IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

Case No. 04-F-285-H

DALLAS HUGHES,

Defendant.

CERTIFICATE OF SERVICE

I, John J. Mize, counsel for Dallas Daron Hughes, do hereby certify that a copy of the attached **BRIEF OF APPELLANT** was served upon the State, by hand delivering a true and correct copy of the same to the Office of the Prosecuting Attorney, this the 2nd day of June, 2009.



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