



IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

STATE OF WEST VIRGINIA,  
Appellee

VS.

W.Va. Supreme Court of Appeals No. 34770  
Raleigh County Circuit Court No. 04-F-285-H

DALLAS HUGHES,  
Appellant

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA,  
IN RESPONSE TO APPELLANT'S BRIEF

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**I. STATEMENT OF FACTS AND PRECEDINGS BELOW**

On June 12, 2004 at 5:38 a.m. Raleigh County Emergency Operations Center received a 911 call that Sacha Mitchell had been shot by Dallas Hughes, the Appellant (hereinafter "Hughes"). (TR. 1070-1071).<sup>1</sup> Sacha Mitchell was nineteen years old at the time and was five-feet-four inches tall and weighed 111 pounds. She was shot in the face at "intermediate range," with the bullet "enter(ing) the base . . . of the skull . . . heading toward the left side . . . of the brain," where it was recovered during autopsy. Sacha Mitchell had no other injuries to her body and she had consumed no alcohol or controlled substances prior to her death. (TR. 781-786, 791).

Lela Mitchell lived two doors down from Sacha Mitchell at Beckley West Apartments. Lela Mitchell testified at trial that on the morning of June 12, 2004, she heard "a commotion going on" in Sacha Mitchell's apartment. Lela Mitchell heard "a loud noise" and then looked out her window to see Hughes in front of Sacha Mitchell's apartment, shouting, "Why did you make me do this for?" A few moments later, Lela Mitchell saw Hughes throw into a garbage can what she "thought maybe had been the key" to Sacha Mitchell's apartment before Hughes sped off "at a high speed." (TR. 738-739, 742-746).

Neighbors then gathered outside because they heard Sacha Mitchell's five-month-old daughter "screaming at the top of her lungs" from inside Sacha Mitchell's apartment. Neighbors found that the front door of Sacha Mitchell's apartment was locked, so Lela Mitchell's husband broke out a back window. He then "opened the door and said she had been shot, call the police,

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<sup>1</sup> The Statement of Facts in Appellant's Brief lacks citations to the record and, accordingly, is disentitled to consideration. "Not only must the significant portion of the record . . . be identified, the precise part of the record must be designated." It is Appellant's "obligation to present this Court with specific references to the designated record. . . ." This Court, citing the Fourth Circuit, confirmed in this regard that "(j)udges are not like pigs, hunting for truffles buried in briefs (or somewhere in the lower court's files) . . ." *State v. Honaker*, 454 S.E. 2d 96, 101 n.4 (W.Va. 1994).

and he got the baby.” (TR. 746-747)). Lela Mitchell confirmed that Hughes had not lived with Sacha Mitchell, and that Sacha Mitchell “was wanting to leave (Hughes) at the time” of the killing. (TR. 741).

Natalie Cresce, Sacha Mitchell’s next door neighbor, testified that she heard “ a big loud noise” and then saw Hughes walking out of Sacha Mitchell’s door while saying “I’m not messing with you no more” and then locking the door to the apartment. (TR. 813-814). Hughes told Ms. Cresce that Sacha Mitchell had “hit” him. After Hughes drove off, Ms. Cresce tried to call Sacha Mitchell and no one answered. Ms. Cresce and another woman “looked through the window and (saw) the baby . . . laying in front of the TV underneath its toy, and Sacha’s foot was hanging off the stair step.” (TR. 815).

Sterling Mitchell testified that on the early morning of June 12, 2004 he “heard a big noise” and then went to Sacha Mitchell’s apartment:

I went over there. I heard the baby crying, reaching for -- reaching for her mom and stuff. And I tried to kick the door in and I couldn’t . . . because it was locked from the outside. (TR. 822-823).

Sterling Mitchell identified crime scene photographs and described how Sacha Mitchell’s baby was “reaching for her mama” as the baby was “laying on the floor” beneath a “baby gym” next to Sacha Mitchell’s feet. Sacha Mitchell’s body was at the bottom of the steps next to the front door of her apartment. (TR. 824-827). Sterling Mitchell described breaking the window with a cinderblock to rescue the baby, and then having to unlock the dead bolt, which had been locked from the outside, to let in neighbors to try to assist Sacha Mitchell. (TR. 828-829).

Thomas Williams, another neighbor, “checked her pulse, couldn’t find no pulse, checked her breathing. She wasn’t breathing.” (TR. 833-834). Paramedic Wilburn testified that Sacha Mitchell was dead on the scene and that her body was transported directly to the Medical Examiner’s Office. (TR. 668-671).

Raleigh County Sheriff's Department Deputy Price was the first responding officer.

Upon entering Sacha Mitchell's apartment he "saw the deceased . . . laying on the floor with a large gunshot wound to her head." (TR. 550). Deputy Price explained:

(S)everal first-hand witnesses came and said that they had seen her lover or boyfriend, Dallas Hughes, the defendant, leave the apartment and (go) over to the dumpster and throw possibly an object or a gun over into the woods behind the dumpster. And he came back and made some statements or screamed or something, and then he left in his car at a high rate of speed.

They also had mentioned that, as he was exiting the apartment, they could see him . . . actually locking the door behind him. (TR. 551-552).

A "BOL" issued for Hughes, driving a blue Cadillac, and responding officers began their search for the gun that witnesses had seen Hughes throw into the woods after the killing. (TR. 553-555). Raleigh County Sheriff's Department Lt. Tanner described the "urgency" in locating the gun, because "children play in that area." The Taurus .38 caliber revolver used to kill Sacha Mitchell finally was found "about 30 yards over the hill," with "one spent round and four live . . . rounds in that gun." (TR. 874-878). West Virginia State Police Criminal Identification Bureau analyst Matthew White testified that the bullet recovered from Sacha Mitchell's brain was "fired from the particular firearm" recovered by Lt. Tanner. (TR. 906-911). Lt. Tanner and Raleigh County Sheriff's Department Det. Canaday and Beckley Police Department Det. Shumate all explained to the jury that they did not attempt to recover latent fingerprints from the gun or the ammunition because such attempt would have produced nothing of "evidentiary value." (TR. 881-882, 963-964, 1023, 1082-1084).

Meanwhile, Beckley Police Department Sgt. Robinson spotted Hughes in the blue Cadillac. Sgt. Robinson testified that he knew Hughes resided on Prillerman Street in Beckley with Hughes' mother. (TR. 644-645). Sgt. Robinson and other police officers pursued Hughes through downtown Beckley, with blue lights and sirens, until Hughes finally pulled over and

then, as officers approached, Hughes "spinned his tires, threw (sic) gravel . . . (and) burned rubber taking off." Officers "lost sight of him," and Sgt. Robinson went back to retrieve a "Muncho" bag which Hughes had thrown out of the blue Cadillac during the pursuit. It contained \$9600.00 in cash. (TR. 643-650). The next that Sgt. Robinson saw of Hughes was when Hughes arrived at the Beckley Police Department lobby, "stating that he had been shot." Hughes was "hollering and screaming . . . a dry cry, like (he) was crying but no tears." (TR. 650-651).

Beckley Police Department Officer Cheri Mullens testified that she observed that Hughes' blue Cadillac was not at the police department and so she went looking for it. She found it several blocks away, at the "bottom of Piney Avenue" and "the driver's side window was broken out, the headlights were on, the car was not running." She located the car keys "about 15 feet away, and the keys were under the wheel well" of an abandoned truck. (TR. 660-665).

Hughes received repeated Miranda warnings (TR. 555-558, 651, 976-977, 1042-1043). He then gave recorded statements to Raleigh County Sheriff's Department Det. Canaday and to Beckley Police Department Det. Shumate. (TR. 1043-1048; Exh. Vol., State's Exh. 5, Exh. 6). Hughes immediately remarked that "(t)here's a couple of police reports" concerning his relationship with Sacha Mitchell, characterized by Hughes as "crazy as hell." (Exh. Vol., State's Exh. 5 at 1). Hughes complained that "she plays this police game all the time, telling me how she's going to call the police. When I'm fucking another female . . . she's playing this police game." Hughes confirmed that although he had "stayed with Sacha Mitchell before," his residence was "Prillerman Avenue with (his) mother." (Exh. Vol., State's Exh. 5 at 2).

When asked when he last saw Sacha Mitchell, Hughes claimed that it was around 4:00 a.m. on June 12, 2004, when:

She was on some nut shit talking about why I'm calling her at 4 in the morning . . . . She called me all day today telling about she was sick and she wanted me to take her to the hospital. I told her I wasn't going to take her . . . because . . . she was calling the damn police on me . . . over the broad Tamekia, telling me I'm going to fuck Tamekia every time she's going to fuck one of my homies in front of my face.

(Exh. Vol., State's Exh. 5 at 3).

Hughes claimed that he'd once had a key to Sacha Mitchell's apartment, but that she'd taken it back "a couple of weeks ago." (Exh. Vol., State's Exh. 5 at 4). He claimed that around 4:00 a.m., after he and Sacha Mitchell "had a big ruckus" over the phone, he then drove to her apartment, sat in his car and smoked "weed." (Exh. Vol., State's Exh. 5 at 5-6). The interview continued:

CANADAY: Did you see anybody in there besides her?

HUGHES: Yeah, I told you there was ole mother fuckin' nigger in there. . . . I told you she called the police on me . . . because she said I was fucking her friend . . . . The whole reason we even had that argument is because she was probably with some nigger named Jarrell from -- the nigger stays down in Fayette County . . . .

(Exh. Vol., State's Exh. 5 at 7)

Hughes then gave Det. Canaday a description of a "caramel" colored "husky" man who, he claimed, was with Sacha Mitchell at the time of the killing. Hughes asserted that the man he described as "(t)he mother fuckin' nigger" and "the faggot mother fucker" shot at Hughes and that in the course of a struggle with the man "the shit got crucial and I got my ass whopped (sic)." (Exh. Vol., State's Exh. 5 at 7-10). Det. Canaday observed that Hughes was entirely uninjured. (TR. 1053).

Hughes then claimed that during a "tussle" involving the man, Sacha Mitchell and himself, "Sacha brought the mother fucker (gun) down." Hughes said he did not "know if it was his or hers or what not." (Exh. Vol., State's Exh. 5 at 10). Hughes claimed he had no idea

whether the gun was a revolver or an automatic. (Exh. Vol., State's Exh. 5 at 11). He told police that he left and then returned to Sacha Mitchell's apartment:

. . . I remember going down (the) hill and the phone rang again . . . and I told her -- I backed up (and) went back over to (her) door the second time. I knocked on the window and she got to arguing, she opened the door and I pushed the day way open . . . . I told her I knew where there was a (unclear) mother fucker up there . . . . Got to arguing about that and she was giggling and shit like it was funny . . . .

(Exh. Vol., State's Exh. 5 at 11-12).

Hughes continued:

I don't want to go to jail for no domestic, that('s) the weakest shit to go to jail for, if I'm going to go to jail for something -- on some domestic type shit, this is crazy, man, crazy as fuck. *Anyway ya'll got my cell phone out there, there's messages on my phone, I'll let you . . . hear the messages . . . .*

(Exh. Vol., State's Exh. 5 at 13). (Italics added).

Hughes claimed that he finally left Sacha Mitchell's apartment -- never seeing her being shot -- and complained that he was "going through some shit with this bitch, man." He claimed that he drove off, smoked more marijuana and then went to "TT's" (Tayikah Bly's) house. Hughes identified Ms. Bly: "The little girl I was fucking." Despite having denied witnessing a shooting, Hughes claimed that he then ran into a cousin and said that he "was going to have to call the ambulance." (Exh. Vol., State's Exh. 5 at 15-16).

When confronted with the fact that witnesses had seen him throw something into the woods after the killing, Hughes feigned ignorance: "I ain't fucked around in no woods." (Exh. Vol., State's Exh. 5 at 17-18). Hughes went on to feign surprise that Sacha Mitchell had been shot and killed. He later would admit that he knew she was shot before he left her apartment. (Exh. Vol., State's Exh. 5 at 19-20, 27).

The nonsensical defense claim at trial -- repeated in Appellant's Brief (at 10-11) -- was that Hughes gave his first lying version, spewing malice toward Sacha Mitchell, because (he claimed) he had been told that she would survive. The claim is demonstrably false because,

after Det. Canaday confirmed during the tape-recorded interview that Sacha Mitchell was dead, Hughes continued to lie. In his second version, he claimed that after Sacha Mitchell was shot, he left her apartment with the "caramel colored" man. Hughes claimed in this version that the gun went off, Sacha was shot, and the caramel colored man threw the gun into the woods. (Exh. Vol., State's Exh. 5 at 28-32).

In his second interview, Hughes had yet another version:

After the second argument I pushed her down to the stairs and when she got back up she had the pistol in her hand . . . . And I got to laughing at her and got to playing (unclear) I tried to smack it out of her hand . . . I grabbed her by the wrist and laid her down on the step and she tried to get up, I pushed her back down, I don't know if I was pushing her I just remember the gun going off, so I didn't know what to do.

(Exh. Vol., State's Exh. 6 at 1).

Even after Det. Canaday assured Hughes that Sacha Mitchell was dead, Hughes could not contain his malice. He continued to characterize the deceased as "so fucked up," "really fucked up," and a "trashy little whore" who "pissed (him) off" and to whom he had shouted "fuck you bitch" because "that bitch was talking trash" immediately before the killing. (State's Exh. 5 at 20, 21).

Hughes finally confirmed that he knew that the firearm was a revolver. He demonstrated how, he claimed, Sacha Mitchell held the gun at the time it was fired. Hughes claimed that Sacha Mitchell, with the .38 revolver in her *left* hand, shot herself in the cheek in what the Medical Examiner testified was a "intermediate" range gunshot wound: the muzzle was no more than eighteen inches away from Sacha Mitchell's face. (Exh. Vol., State's Exh. 6 at 2-3, TR. 783, 791, 980-983, 1044-1045). Throughout his several versions of the killing of Sacha Mitchell, Hughes consistently reported that, after arguing with her by phone, he went to her apartment, she cracked open the door and he "pushed the door all the way in" and "pushed her down to the stairs" where she would die. (Exh. Vol., State's Exh. 5 at 8, 12; State's Exh. 6 at 1,

3). Despite the claim in Hughes' final version, that he and Sacha Mitchell were engaged in a life-or-death struggle over the loaded revolver when she was shot and killed, the Medical Examiner found not even a broken fingernail on Sacha Mitchell's body and Det. Canaday confirmed that Hughes had no injuries of any kind and that there were no signs of a struggle in Sacha Mitchell's apartment. (TR. 784, 1039, 1053).

Det. Canaday attempted to trace the .38 caliber revolver through ATF: the last known location of the gun was in another state on May 7, 2004, and the gun did not appear "on the radar" again until it was found two days after Sacha Mitchell's murder. (TR. 885-887; 12/28/04 Hearing at 16-17). Accordingly, it could not be traced to anyone as of June 12, 2004, except insofar as it was Hughes who threw it away after the murder. However, all witnesses -- except for one defense witness -- testified that Sacha Mitchell never in her life had owned or possessed a firearm. (TR. 676-677, 820, 843, 865, 1217). Even Hughes' own trial testimony confirmed that Sacha Mitchell "had never had a gun before." (TR. 1525). The one defense witness who testified that he once saw Sacha Mitchell "playing" with a gun testified that he did not know whether it was Sacha Mitchell's gun or Hughes' gun or whether it had any connection to Sacha Mitchell's murder. In any case, it could not have been the weapon used in the murder because, claimed the witness, he'd seen Sacha Mitchell with it "in April," when the ATF trace established that the murder weapon was out of state until May, 2004. (TR. 885-887, 1401 - 1402). On the other hand, several witnesses, including Hughes, testified that Hughes carried a firearm shortly before the killing. (TR. 677, 821-822, 849, 865, 1443-1444). Tijuana Mitchell, Sacha Mitchell's mother, testified without objection that she had seen Hughes "with a black gun before and a silver gun before" the killing: Det. Canaday described the murder weapon as "a silver-colored firearm with . . . a black-rubberized handle." (TR. 849, 1029).

The trial court, after "McGinnis" hearings, ruled that evidence of Hughes' prior violence against Sacha Mitchell, and of her reporting his narcotics dealings to police, were admissible to prove motive and absence of mistake or accident pursuant to Rule 404(b), W.V.R.E. and *State v. Miller*, 401 S.E. 2d 237, 243-244 (W.Va. 1990). The Court gave appropriate limiting instructions to the jury concerning this evidence, and Appellant's Brief makes no claim of error in this regard. (TR. 405-448; 755).

Sacha Mitchell's younger brother, Derrick Mitchell, was fourteen years old at the time of the murder. He often stayed with his sister in her apartment in the "four or five" months that she dated Hughes before the murder. (TR. 675-676). Derrick Mitchell testified that there was an incident outside of Stratton Elementary School in Beckley, when Sacha Mitchell "called the cops and told them (Hughes) was dealing drugs." Derrick Mitchell heard Hughes threaten: "If you call the cops on me, it'll be the last thing you ever do." (TR. 677-678).

Derrick Mitchell testified that Hughes had "punched (Sacha Mitchell) in the face, and pushed her over the couch" when Hughes "just took all his weight and pushed her over it, and it rolled back." Derrick Mitchell also witnessed Hughes and Sacha Mitchell "fighting over a gun" in the bedroom, and observed another incident in which, after Sacha Mitchell told Derrick Mitchell not to let Hughes into her apartment, "(Hughes) kicked in the door." (TR. 679-680). Derrick Mitchell testified that Sacha Mitchell tried to get Hughes to return the key to her front door lock "but he wouldn't, and she (said) she was going to get her locks changed." (TR. 680-681). In the days immediately before she was murdered, Sacha Mitchell confided to Derrick Mitchell that Hughes was supposed to be "coming over. . . to get his stuff, and she told (Derrick Mitchell) to come back down there and stay with her 'cause she didn't feel good . . . ." (TR. 682).

Derrick Mitchell confirmed that Sacha Mitchell had no weapon during the incident at Stratton Elementary School, and that the gun Hughes and Sacha Mitchell were fighting over in the bedroom was Hughes' gun. (TR. 690-692).

Lela Mitchell testified that she had witnessed arguments between Hughes and Sacha Mitchell prior to the murder and that "most of the arguments was her threatening to call the police for him selling drugs . . . ." (TR. 749, 754).

Tijuana Mitchell, Sacha Mitchell's mother, testified that two months before the murder:

A: Well . . . I went into my house, and Dallas was laying on the couch, and he asked Sacha to fix him something to eat, and she didn't want to and she didn't feel like it. And so he raised up on the couch and smacked her in front of me.

Q: And you say he smacked her? When (sic) did he smack her?

A: In her face.

Q: And how hard did he smack her?

A: Pretty hard.

(TR. 843-844).

Tijuana Mitchell confirmed her statement to Det. Canaday shortly after the murder, that "Dallas had kicked in (Sacha Mitchell's) door a couple of times and had beat on her" and that Sacha Mitchell was afraid of Hughes. Further, Tijuana Mitchell confirmed that Hughes said to Sacha Mitchell, "You don't know what the f (sic) I will do to you; then I would leave you for dead," and that Hughes had threatened that he would "beat the living daylights out of Sacha." (TR. 849-850).

Jessica Mitchell, Sacha Mitchell's sixteen-year-old sister, testified that on June 8, 2004 -- four days before the murder -- Hughes "kicked . . . in" the front door of Sacha Mitchell's apartment. (TR. 863-867). After Hughes kicked in the door, Jessica Mitchell watched as Hughes went upstairs to Sacha Mitchell's bedroom . Then:

A: He had her by her neck and he had pushed her up against the wall and was smacking her in the face.

Q: And, when you say he was smacking her, how did he do that. . . ?

A: It was like a little bit with open hand and he punched her once.

Q: Is that the only time you saw the defendant strike your sister?

A: No, ma'am.

(TR. 867-869).

Jessica Mitchell further testified to a telephone conversation she had with Hughes:

A: I told him that my sister said for him to call her, and he was like, "No, tell that bitch I'm not going to fucking call her because she called the cops on me and she already knew that I was hot and if she don't be careful, I'm going to come and kill her."

(TR. 870).

There is no dispute by Hughes that Sacha Mitchell left him a recorded phone message at 4:14 a.m. on June 12, 2004, in which she asked, "So you gonna shoot up my apartment with my child in here. . . ?" (Appellant's Brief at 45). The trial court, after listening to the 4:14 a.m. message, found that it was "res gestae," and part of the "ongoing connection between these two" and "the best evidence of what was going on that night." (TR. 465-466). The trial court further disputed the defense claim that Hughes had not retrieved the message, and ruled that "it's a question of fact for the jury as to whether he had knowledge of these messages." The trial court ruled:

(T)he 4:14 message is clearly an excited utterance . . . in response to a series of . . . communications that she received at or about 4:00 on Saturday morning, and I think its clear, by the 4:10 message, that she was attempting to get . . . someone to quit calling her telephone.

\* \* \*

(I)ts clear that the declarant is unavailable, and she is not available because of her death very shortly after these (recordings) were made. I believe they are not testimonial . . . and I therefore believe under the Ferguson case, that it falls outside of Crawford and is admissible evidence under . . . 803(2).

(TR. 466-467).

The trial court left it up to the defense to decide whether all of the recordings -- which included "cuss(ing) and threaten(ing)" messages left by another woman -- not by Sacha Mitchell -- would be heard by the jury. (TR. 466, 1011,1068,1499-1500). (The unofficial

transcript marked as State's Exhibit 2 erroneously identified this other woman's voice as "Mitchell").

Another recorded phone call heard by the jury was a mid-trial call from Hughes at the Southern Regional Jail to a witness first listed in discovery as a defense witness and then added to the State's witness list. The witness -- Takiyah "TT" Bly -- approached the prosecutor during trial, "visibly shaking," reporting that Hughes "wanted (her) to say something that wasn't true." After defense counsel claimed that the report of such a call was "quite a surprise" and that the defense was "shocked" by the allegation, the State obtained the jail recording of the call. (TR. 698-700, 723, 728-731). After listening to the recording, the trial court ruled that it was admissible as evidence of Hughes' attempt to induce false testimony. The trial court further found that Hughes had no expectation of privacy in making the call. (TR. 854-857, 946-947).

The Court read a limiting instruction at the time the recording was played for the jury. (TR. 997-998). Ms. Bly then testified that she had been "romantically involved" with Hughes while he was dating Sacha Mitchell, and that Hughes visited Ms. Bly twice on the early morning hours of June 12, 2004. (TR. 998-1003). Hughes first visited her around 3:00 a.m. Later, around 5:30 a.m., Hughes returned to ask for his "friend" known as "Face." Hughes "looked like he was upset" but told Ms. Bly he was "fine" before driving off in his blue Cadillac. Ms. Bly received a call "maybe (an) hour after that" telling her "that (Sacha) had been murdered." (TR. 1004-1005). Ms. Bly never heard from Hughes between that June 12, 2004 visit immediately after the murder and January 4, 2005, when he called from jail during the trial:

He had . . . his grandmother call me on three-way, and he began to ask me what did I tell the police, and I said, "I didn't tell the police anything. What did you tell the police?" I said, "I told them the truth, and he 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. 1006).

(TR. 1005-1006).

Hughes instructed Ms. Bly that she should falsely testify: "Just say that you seen me between 3 and 3:30." (TR. 1009).

After the State rested, the defense called a neighbor of Sacha Mitchell's, who testified that the relationship between Sacha Mitchell and Hughes was "terrible." He further testified that he never saw Sacha Mitchell "do anything violent towards Dallas Hughes" and that Sacha Mitchell was "a good woman who hadn't done anything bad." (TR. 1183; 1189-1191).

The defense called Beckley Police Department Det. Allard, apparently hoping to corroborate the defense version of the Stratton Elementary School incident – the version relayed, without citation to the trial transcript, in Appellant's Brief (at 8). A review of Det. Allard's testimony confirms that the claim in Appellant's Brief, that "officers. . . discovered that Sacha has assaulted Dallas with a knife . . . and Sacha then threw a glass beer bottle at Dallas, which lacerated his ankle" is simply false. Det. Allard testified that Hughes had "a very small cut on his ankle;" that officers did not know whether a knife found in a yard had been in the possession of Hughes or Sacha Mitchell; that there was no evidence to support any criminal charge against Sacha Mitchell; that Hughes required no medical treatment; that Hughes did not desire to prosecute Sacha Mitchell and that during this incident Sacha Mitchell "continued to scream that Mr. Hughes was a drug dealer." Det. Allard confirmed that "what started this incident" was that Hughes "had been . . . at Beckley West Apartments and had kicked her door in." (TR. 1197-1204).

The defense called Aaliyah Johnson, another woman dating Hughes while he was involved with Sacha Mitchell. Apparently this is the testimony which, without citation to the trial transcript, Appellant's Brief (at 7-8) misstates. Ms. Johnson testified that she saw Sacha Mitchell and Hughes arguing in a parking lot at some time before the murder. Ms. Johnson "told

him to get away from her,” and Sacha Mitchell said that if Hughes “left without her, she was going to tear the car up.” Ms. Johnson also overheard Sacha Mitchell say “if she couldn’t have (Hughes) nobody would have him.” Ms. Johnson confirmed her statement to Det. Canaday, that Sacha Mitchell did not have a bad temper and was never known to possess a firearm. Ms. Johnson confirmed that in addition to Ms. Bly and Ms. Johnson, Hughes also was seeing another woman named Stasha while he was involved with Sacha Mitchell. (TR. 1214-1217).

The defense called West Virginia Criminal Identification Bureau analyst Koren Powers, who explained that it is laboratory policy to decline to test for gunshot residue on a victim if the victim had been in close proximity to the gun when it was fired. She also testified that the absence of residue on Hughes’ samples did not indicate that he had not fired the fatal shot into Sacha Mitchell and that, in fact, lead particles found on Hughes’ samples “would be consistent with gunshot residue.” (TR. 1223-1224, 1232-1233; 1238-1239; 1246-1247). Despite Ms. Powers being a defense witness, Hughes’ counsel moved for a mistrial based on her testimony: the motion was denied. (TR. 1236-1238).

Next, the defense called a gunsmith who confirmed the testimony of the C.I.B. firearms and toolmarks examiner, that the .38 caliber Taurus used to kill Sacha Mitchell had an “about standard” trigger pull and could not accidentally discharge. (TR. 1259-1260). The defense witness also agreed that firing a gun inside a residence with an infant in the room posed “a substantial risk to that infant” because “you don’t know where the bullet is going to end up.” (TR. 1265-1267).

The defense then called an assistant professor from Mountain State University in Beckley, with no “on the job” experience, who opined that the muzzle of the revolver was “between three and twelve inches” from Sacha Mitchell’s face. (TR. 1276-1277, 1290-1291). The assistant professor thought that the investigating officers should have tried to get latent

fingerprints from the gun. (TR. 1287). He also confirmed that firing the .38 caliber revolver inside a residence would be unsafe "(b)ecause of ricochet -- I would be concerned with being injured." (TR. 1297). He testified that he had "no reason to dispute" that the manner of Sacha Mitchell's death was "homicide." (TR. 1307).

The defense called Amy Johnson Carey concerning an alleged incident, apparently referred to in Appellant's Brief (at 8), again without citation. Appellant's Brief claims that "Sacha called 911 . . . used an alias identity (and) Sacha's motive was to have Dallas pulled over by police." There was no evidence that Sacha Mitchell used an "alias" -- except Hughes' claim that he recognized her voice on a 911 call made during this supposed incident -- and no evidence concerning the "motive" of the deceased. (TR. 1726). Such misrepresentations, with no citations to the trial transcripts, resonate as the all too familiar excuses of defendants who have murdered their lovers or spouses. Appellant's Brief (at 7-8), with utterly no support in the record, invents the following:

Sacha would often question Dallas's love for her if he would not physically strike her.

\* \* \*

In fact, it was when Dallas would be away from Sacha that the fights normally began.

The testimony of Amy Johnson Carey was that Hughes was at her house "almost every day." Indeed, Hughes referred to Ms. Carey as "Mom." (TR. 1356, 1452). Ms. Carey claimed that on June 9, 2004, Sacha Mitchell circled Ms. Carey's house, shouting "she had a brand new shiny gun still in the box with his name on it." (TR. 1357). However, Ms. Carey confirmed that she never mentioned this alleged incident to police and only relayed it to the defense when Hughes' grandmother, who was observing the trial, visited Ms. Carey during the trial. The grandmother was accompanied by "Shelia," another courtroom observer, who Hughes later would identify as yet another woman he had "been with." (TR. 1362-1364;1500). Ms. Carey

also confirmed that she had "heard" that the murder weapon had been stolen from Country Inns and Suites. (TR. 1366). Ms. Carey's testimony included that she had a criminal record but that she didn't "know exactly what all." She confirmed that she had been convicted of "mail fraud." Raleigh County Juvenile Probation Officer Douglas Dyer, who had dealt with Ms. Carey for 25 years, testified that she was "unreliable, dishonest and immoral." (TR. 1373-1375; 1718-1720).

In an attempt to corroborate Ms. Carey's testimony, the defense called a "friend" of Hughes -- Willie Shelton -- who testified that for "20 or 30 minutes" Sacha Mitchell had circled Ms. Carey's house shouting that she "had a brand new shiny gun" and was going to kill Hughes. Mr. Shelton testified that he, too, was at Ms. Carey's house "just about every day," but that the first time that he ever mentioned the supposed June 9, 2004 incident was "two hours" before he was called to the witness stand during trial. He, also, had not called police at the time the alleged threats had occurred. (TR. 1433-1439).

Hughes then testified.<sup>2</sup> On direct examination he referred to the Stratton Elementary School incident apparently described in Appellant's Brief (at 8). He stated that the supposed cut on his ankle "wasn't a bad cut" and that he "really didn't see the knife" Sacha Mitchell supposedly had. He said, "I (was) laughing because I thought it was funny" and admitted that he was the one who threw a knife. (TR. 1447-1448). Hughes then described Takiyah "TT" Bly as a woman he didn't know "much" but that he "had a sexual relationship with her." He explained

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<sup>2</sup> Hughes probably "opened the door" to his documented history of violent offenses by his claim that Sacha Mitchell was the "first aggressor." He definitely "opened the door" to his prior conduct by claiming he'd previously owned only one gun and that he fled from police and lied to them because he was "scared" and "panicky." However, in an exercise of restraint the prosecutor refrained from seeking to cross-examine Hughes about his "Lansing, Michigan arrests for assault and battery, unarmed robbery . . . weapons offenses . . . felonious assault, delivery of cocaine, unlawful driving away in automobiles, furnishing false information to law enforcement officers . . . (and) . . . domestic assault." (11/10/04 Hearing at 14-15).

that he was "surprised" when she was listed as a State's witness, and that he had told Ms. Bly during his mid-trial telephone call to her that the prosecutor was "that woman (who) has it out for" him. (TR. 1448-1450).

Hughes relayed his version of the supposed June 9, 2004 incident. He testified that no one called the police, and that he "called (Sacha Mitchell) a name a couple of times." When police arrived, Hughes "went in the house." (TR. 1452-1455).

Hughes confirmed that he resided at his mother's house on Prillerman Avenue -- not at Sacha Mitchell's apartment -- at the time of the murder. (TR. 1460). He testified that during the hours before the murder he "shot the breeze" and drank gin in the parking lot of a Beckley nightclub with his friend "Face" and then went to visit Ms. Bly. (TR. 1462-1464). Hughes explained that, despite the fact that he and Sacha Mitchell were "arguing" over their cellular phones, he then drove to her apartment and smoked marijuana in his car. He confirmed that Sacha Mitchell was upset that he showed up at 4:00 a.m. (TR. 1466-1469). Hughes testified that the door to Sacha Mitchell's apartment was "cracked, so I opened the door the whole way and I shut the door." (TR. 1471). Hughes claimed that Sacha Mitchell was "playing" with a gun and "I smacked it, told her to quit playing." He claimed that he then grabbed both of her wrists and that he "just remember(ed) the gun going off." (TR. 1472-1476). He testified that Sacha Mitchell then "was like still" and that he kissed her knee and left, leaving behind her baby, knowing the infant had "a breathing problem" and required "breathing medications." (TR. 1491-1493).

Hughes testified that he then called his friend "Face" and arranged for "Face" to retrieve the \$9600.00 Hughes kept in the "Muncho" bag in a trash can outside his residence on Prillerman Avenue. (TR. 1478-1479). He testified that he lied to police, claiming a "caramel

colored nigger" had shot Sacha Mitchell, because "it's her fault," referring to the deceased. (TR. 1486).

Hughes admitted that he was "high" at the time of the murder, as he was "smoking (marijuana) pretty much the whole day." (TR. 1509-1511). Hughes' further admitted that he knew that Sacha Mitchell was shot in the face before he left the apartment:

Q: All right. Well, you knew she was shot. And you would know . . . when you shoot a person as close as you were to her and they are thereafter still that . . . one of two things is going to happen. Either they're going to get medical attention and maybe live, or they're not going to get medical attention and they're going to die; right?

A: I guess you can say it like that.

Q: I can't hear you.

A: I guess you can say it like that.

(TR. 1517).

Hughes testified concerning domestic violence: "(G)oin' domestic is weak. I'm not going to jail for putting my hands on a female." He opined that domestic violence is "not worth going to jail for," unlike if he had "hit a car." (TR. 1532-1533).

Hughes confirmed that he had done nothing to help Sacha Mitchell after he saw that she was shot in the face, and nothing to protect the baby, who he knew suffered breathing problems. (TR. 1493, 1551). Hughes also admitted -- contrary to the claim in Appellant's Brief (at 11) -- that he continued to tell police that the "caramel colored nigger" killed Sacha Mitchell even after he was told during his recorded interview that Sacha Mitchell was dead. (TR. 1555-1556).

Hughes reiterated that Sacha Mitchell objected to him showing up at her apartment at 4:00 a.m. (TR. 1557-1558). He admitted that his descriptions of Sacha Mitchell as a "trashy little

whore” and “f’ing bitch” were “expressions of hatred,” and that when he entered her apartment he “pushed her on the stairs.” (TR. 1562-1563).

Hughes’ absurd claim -- repeated in Appellant’s Brief (at 11) -- that he did not know Sacha Mitchell was dead when he locked her into her apartment with her baby was proven false by Hughes’ trial testimony:

Q: We agree, do we not, that by the end of your statement you admit repeatedly that you knew that Ms. Mitchell was shot when you left her and the baby in the apartment, we agree now with that, don’t we?

A: Yes, ma’am.

Q: And you state in your second statement, “Before I walked out that door and that little baby, I was thinking, ain’t got no mommy or nothing.” You told the police that, didn’t you?

A: Yes, ma’am.

Q: So, as you were walking out the door and you recognize that Sacha Mitchell is shot, you were also thinking to yourself, “that baby’s got no mommy anymore;” correct?

A: That was one of the many thoughts going through my head. I can say yes probably.

(TR. 1571-1572).

In rebuttal, the State called Raleigh County Emergency Operations Center Assistant Director Agee, who testified that the only call from the location of the residence of Ms. Carey on June 9, 2004 was from a Nicole Smith, reporting an assault by Hughes. When an officer arrived, “no one would come out and speak with him, so he ended up clearing the call.” (TR. 1702-1706).

On January 14, 2005 the jury returned its verdict finding Hughes guilty of first degree murder by use of a firearm, wanton endangerment with a firearm, fleeing from law enforcement officers in a vehicle and falsely reporting an emergency incident. (TR. 1879-1880).

Hughes' counsel had made no pre-trial motion for bifurcation and instead made an oral motion for bifurcation after trial had commenced. The prosecution objected on the basis of untimeliness, absence of notice and the failure of the defense to show a particular justification for bifurcation as required by *State v. LaRock*, 470 S.E. 2d 613 (1996). Nevertheless, the trial court granted the bifurcation motion. (TR. 502-506).

After the jury returned its verdict, the prosecution offered to forego pursuing a "no mercy" verdict on the condition that, if the conviction later would be reversed, Hughes would waive his right to be immune from such a verdict upon retrial. Hughes' trial counsel accepted the prosecution's offer. After a colloquy between the trial court and Hughes, the trial court found that Hughes had made a voluntary personal waiver of any right to be convicted of no more than first degree murder with mercy in the event of a reversal and retrial. (TR. 1888-1893). Accordingly, Hughes was sentenced upon his first degree murder conviction to life imprisonment with parole eligibility after serving fifteen years. Additionally, the trial court sentenced him to five years in the penitentiary for wanton endangerment with a firearm, one year in the Southern Regional Jail for fleeing in a vehicle from law enforcement officers and six months in the Southern Regional Jail for falsely reporting an emergency incident. The two jail sentences were ordered to run concurrently with one another but consecutively with the two penitentiary sentences for first degree murder by use of a firearm and wanton endangerment. These two penitentiary sentences also were ordered to run consecutively with one another. (3/18/05 Sentencing Hearing at 30-32).

On August 11, 2006 the trial court entered an "Order Denying Motion in Arrest of Judgment, Denying Motion for Post-Judgment Verdict of Acquittal, . . . Denying Motion for a New Trial, Order Appointing Appellate Counsel and Resentencing Defendant." The trial court found that "on the date in question in the very early morning hours, Dallas Hughes arrived a(t)

the house of . . . Sacha Mitchell and . . . forced his way into the home, engaged in an altercation . . . and shot her in the face (while) Ms. Mitchell's infant child was present in the near proximity . . . ." The trial court found that Hughes "left the premises, locking the door behind him, leaving the infant child in the same room with her now deceased mother." The trial court found that after Hughes retrieved his \$9600.00 from the garbage can, Hughes "refus(ed) to stop, pursuant to the lawful demands of . . . officers" and then "told an employee of the Beckley Police Department that he had been shot by Sacha Mitchell." The trial court, in addressing Hughes' grounds for relief, specifically referred to defense counsel's voir dire of the jury as being "designed to confuse jurors and (to) elicit from those jurors disqualifying responses." Further, the trial court found "that there was no constitutional denial of notice to the Defendant" regarding felony murder.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

A. Pursuant to W.Va. Code §61-2-1, the indictment was sufficient to support a conviction of either premeditated murder or felony murder, and there was (and is) no "strong, particularized showing of prejudice" resulting from the trial court's refusal to order the State to elect between the two forms of first degree murder.

B. The trial court did not abuse its discretion in refusing to strike a juror whose only supposed "bias or prejudice" was that she understood that criminal charges are based upon probable cause: by definition, "bias" or "prejudice" cannot be shown by a juror's correct understanding of the law. The appellate complaint concerning another juror was not preserved, as there was no defense motion to strike her based upon the grounds first raised on appeal. Further, the trial court repeatedly found that defense counsel's voir dire was designed to confuse, and to thereby disqualify, otherwise qualified jurors.

C. As there were no trial errors -- not even harmless errors -- there can be no cognizable claim of "cumulative error."

### III. DISCUSSION OF LAW

#### A. FELONY MURDER

Appellant's Brief (at 13) complains that "Hughes had no notice of the felony murder charge because the indictment returned against (him) charged him with premeditated murder but did not charge him with felony murder."

The record belies the claim that the defense was surprised. Hughes' statements to police after the murder, recited above, included repeated admissions to angrily pushing in the door of Sacha Mitchell's apartment and assaulting her by pushing her onto the stairs where she died. Indeed, there is no appellate claim of insufficiency of the evidence of felony murder, and no claim that the prosecution withheld disclosure of such evidence in discovery. As the evidence, disclosed in discovery, was sufficient to support a conviction of felony murder, the defense could not have been surprised by the admission of such evidence.

This Court repeatedly has held that there is no distinct charge of felony murder. Rather, pursuant to W.Va. Code §61-2-1, "it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused. . . ." Accordingly, within every West Virginia murder indictment, there is notice of felony murder, and there exists no requirement that the defense be spoon-fed further notice. *Ford v. Coiner*, 196 S.E. 2d 91 (W.Va. 1972); *State v. Bragg*, 235 S.E. 2d 466 (W.Va. 1977); *State v. Young*, 311 S.E. 2d 118 (W.Va. 1983); *State ex rel. Levitt v. Bordenkircher*, 342 S.E. 2d 127 (W.Va. 1986); *State v. Justice*, 445 S.E. 2d 202 (W.Va. 1994); *State v. Satterfield*, 457 S.E. 2d 440 (W.Va. 1995).

Hughes was represented by four attorneys. (TR. 539). The trial court recognized that lead counsel, William R. Wooton, was "an experienced attorney (who), for a number of years, was a prosecutor. He knows the process . . ." (TR. 505). The prosecutor in opening remarks outlined the evidence of felony murder:

Under Count 1 . . . there are two alternative means (by) which a person can be guilty of first degree murder. We don't have to prove both ways; but, upon the evidence in this case, we believe we will prove the defendant guilty of first-degree murder by both of these two ways.

The first is your standard premeditated, malicious homicide, first-degree murder.

The alternative means . . . is called felony murder, and we will be introducing evidence to prove the defendant's guilt in this manner of first-degree murder in this case.

\* \* \*

To prove felony murder, we need to prove only two things, first of all that the defendant was either committing or attempting to commit a burglary and that, either during the commission of the burglary or at some . . . close-in-point . . . time, the defendant . . . caused the death of the victim

\* \* \*

The defendant says he is on the phone with the victim at this time. The defendant states that he decides to go to Ms. Mitchell's apartment. The defendant consistently states that she opened the door, and that he pushed the door open. The defendant states that, after he pushed the door open and went inside, he knocked her to the stairs.

The one consistency has been the defendant's admission to burglary as (it) is defined by law, and, of course, there will be no dispute that Ms. Mitchell died in the course of this burglary. That is first-degree murder.

(TR. 519-520, 522, 535-536).

*There was no defense objection to the prosecutor's opening statement.* Indeed, defense counsel stood up, introduced his three co-counsel, and proceeded to give his opening statement. (TR. 519-539). Further, there was no objection and no claim of "surprise"

throughout the trial testimony of the first responding officer, Deputy Price. (TR. 548-570). Only after the jury was excused for a lunch recess did defense counsel move for a mistrial, claiming for the first time that "(t)he defendant was not charged with burglary (and) the indictment clearly does not encompass felony murder. . . about which the defendant had no prior notice." (TR. 570). The prosecutor reminded the trial court of the pre-trial hearing during which the prosecutor declined to "elect on theories." (TR. 571-572; 12/28/04 Hearing at 18).

The trial court ruled:

The case law in . . . West Virginia . . . requires that there be a general allegation of murder pursuant to the statute. The case law likewise provides that the State can prove the means and method of that murder and does not have to elect.

\* \* \*

There's no requirement that the precipitating underlying felony be charged. . . for the State to use it as the precipitating felony for felony murder.

(TR. 572-573).

Appellant's Brief (at 21) claims that Hughes unfairly was prejudiced by evidence of felony murder because the defense had "to scramble to defend new allegations." Importantly, defense counsel never moved for a continuance in order to respond to the purported "surprise" of felony murder. By such "failure to make a motion for a continuance and a proper record on this issue . . . the defense waived any error" regarding felony murder. *State v. Hardesty*, 461 S.E. 2d 478, 484 (W.Va. 1995). Further, this Court has held that a defendant's claim of "surprise" concerning felony murder will be rejected when, as here, "the State clearly announced, in its opening statement, its intent to prove that the killing occurred as a result of (a predicate felony)." *State v. Bragg*, 235 S.E. 2d 466, 472 (W.Va. 1977). Alternatively, when, as here, "information divulged . . . during . . . discovery conveyed to defense counsel" evidence of felony murder, "it cannot be seriously contended that the appellant had no notice of the State's intention to present (such) evidence . . . at trial." *State v. Young*, 311 S.E. 2d 118, 135 (W.Va.

1983). And when, as here, evidence of felony murder, is “discernible from the appellant’s confession,” the claim of unfair prejudice by the absence of notice of evidence of felony murder is without merit. *Levitt v. Bordenkircher*, 342 S.E. 2d 127, 136 (W.Va. 1986).

The only other way in which, according to Appellant’s Brief (at 22-23), Hughes unfairly was prejudiced by evidence of felony murder is a troubling admission that Hughes’ version of the facts would have varied, depending on whether the prosecution introduced evidence of felony murder or of premeditated murder:

To defend the charge of premeditated murder, defendant sought to *minimize* the volatile nature of his romantic relationship with the decedent (and) 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 the defendant *exploit* the violent nature of his relationship with the decedent to establish . . . (that) fighting and physical altercation was a common and spontaneous occurrence between the two. Also in defense to felony murder, defendant would want to establish that he *did in fact have continuous access* to the apartment. . . . (Italics added).

A criminal defendant cannot be unfairly prejudiced by the frustration of his intent to falsify the essential “facts” of his defense depending upon what evidence of the “manner or means” of first degree murder is presented to the jury. Appellant’s Brief does not present an argument that the injection of felony murder created a dilemma concerning legitimate trial tactics: rather, Hughes’ complaint is that he was thwarted in his illegitimate intention to fabricate evidence. Surely, this is not the “strong, particularized showing of . . . prejudice( )” required to convince a trial court to order an election. *State v. Walker*, 425 S.E. 2d 616, 622, Syl. Pt. 2 (W.Va. 1992).

Appellant’s Brief (at 16, 20) contends that because the indictment included the surplusage of “with premeditation,” the §61-2-1 provision that the “manner or means” of murder need not be set forth is inapplicable here. However, the word “deliberately” under §61-2-1 and in the instant indictment is synonymous with “premeditatedly.” *State v. Miller*, 476 S.E. 2d 535, 547 (W.Va. 1996), *State v. Bragg*, 235 S.E. 2d 466, 472 (W.Va. 1977). Nevertheless,

Raleigh County indictments for first degree murder always specify the element of premeditation, although such specificity is surplusage. Indeed, following the reasoning in Appellant's Brief, if "premeditation" had not been included in the indictment, the defendant no doubt would claim that he had no notice that the prosecution would introduce evidence of this essential element of first degree murder. That was precisely the claim made in *Miller*, (at 544-547), cited above and in Appellant's Brief (at 29). As provided by W.Va. Code §62-2-10, "No indictment . . . shall be . . . deemed invalid . . . for the . . . insertion of any other words of . . . surplusage." Indeed, defense counsel at trial never claimed that the words "with premeditation" in the indictment were the cause of defense counsel's purported failure to anticipate evidence of felony murder. As this court held in the same *Miller* opinion (at 544): (I)f any principle is settled . . . it is that . . . legal theories not raised properly in the lower court cannot be broached for the first time on appeal."

Appellant's Brief (at 24-28) next claims that the trial court "abused its discretion" by declining to order that the prosecution elect between felony murder and premeditated first degree murder. The first citation in Appellant's Brief on this point is not to a defense motion for election, but rather to one of the continuous defense motions for mistrial. (TR. 733-734). Defense counsel did not move for an election until after the close of the evidence, although counsel earlier had claimed that "absent election" the defense was "at a disadvantage." (TR. 805-807; 1592-1593). In fact, defense counsel argued:

I think that clearly (the prosecutor's) correct; the State could not be compelled to elect early on; but, at the conclusion of all of the evidence, the Court clearly can require under Walker the State to elect. We think that the interest(s) of justice require that the State at this time be forced to elect to ensure that this defendant gets a fair trial.

(TR. 1594).

Defense counsel conceded that case law “did indicate that it was within the Court’s discretion” to order an election. The trial court, upon the evidence adduced at trial, “decline(d) to exercise that discretion” and refused to order an election. (TR. 1595). The claim in Appellant’s Brief (at 27-28), that this refusal of the trial court to order an election unfairly prejudiced Hughes, is inconsistent with the previous complaint that Hughes was unfairly prejudiced because he was “surprised” by evidence of felony murder. If election had been ordered, the prosecution may well have elected to proceed only upon felony murder, which would have done nothing to mitigate the feigned defense surprise by such evidence. And since Hughes already had testified, if election then had been ordered he would have had no opportunity to edit his testimonial script according to which manner or means of first degree murder the prosecution may have elected.

At the time of Hughes’ trial, the trial court based its ruling concerning election upon *Stuckey v. Trent*, 505 S.E. 2d 417 (1998), which cited *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed. 2d 555 (1991), holding that the prosecution need not elect between the manner or means of murder and that the jury need not specify whether the guilty verdict is upon the evidence of premeditated murder or upon the evidence of felony murder. More recently, citing *Stuckey v. Trent*, this Court reiterated that felony murder and premeditated murder are but “two forms of the *same* offense.” *State v. Kent*, 678 S.E. 2d 26, 31 (W.Va. 2009). (Italics in original).

Finally, Appellant’s Brief (at 27-28) contends that Hughes was unfairly prejudiced because burglary “is a crime counterintuitive to laymen and lawyer alike.” Appellant’s Brief notes that burglary “require(s) only that one enter the home of another with the intent to commit a crime, *any crime* therein.” (Italics in original). Appellant’s Brief -- contradicting all prior argument -- now claims that “even if Dallas Hughes had been provided proper notice of

. . . felony murder, it would have been difficult if not impossible to ascertain burglary as the underlying felony.”

Really? The defense had a copy of Sacha Mitchell’s 4:14 a.m. message, referred to by Hughes in his interviews after the murder, confirming that Hughes had threatened to “shoot up” her apartment with her baby inside. The defense had Hughes’ admissions that after repeated early morning phone arguments with Sacha Mitchell, he parked outside her apartment, smoked marijuana, pushed her door open and shoved her down onto her stairs. The defense long had notice of the fact that after Sacha Mitchell was shot in the face and died on those stairs Hughes locked the baby inside next to Sacha Mitchell’s body, threw away the murder weapon, fled from police and then claimed that a “caramel colored nigger” had killed Sacha Mitchell. Despite all this, Appellant’s Brief contends that Hughes’ four (retained) attorneys would have found an underlying burglary -- entering with the intent to assault Sacha Mitchell -- “impossible to ascertain.” This “cannot be seriously contended.” *State v. Young*, 311 S.E. 2d 118, 135 (W.Va. 1983).

In the midst of the argument concerning felony murder, Appellant’s Brief (at 23) makes the troubling assertion “that 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.” These were *sequestered witnesses*, subject to recall after their initial trial testimony upon defense counsel’s repeated requests. (TR. 349, 377, 754, 817-818, 832, 838, 1013, 1258). Appellant’s Brief offers no explanation as to why these sequestered State’s witnesses -- disclosed to the defense long in advance of trial -- were sought out for defense interviews only after they had testified at trial. If Hughes was prejudiced by the failure to conduct pre-trial witness interviews, it was self-induced prejudice.

Appellant's Brief (at 23) continues with a very serious -- and seriously false -- accusation that "(a)lthough defense counsel attempted to contact these individuals repeatedly *after their testimony*, the prosecuting attorney had already advised each witness not to speak to defense counsel." (Italics added). Appellant's Brief then charges that "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." The citations included in this section of Appellant's Brief contradict the accusation of prosecutorial misconduct.

Because defense counsel had moved to hold several State's witnesses for recall under sequestration, the prosecutor requested that counsel "could exercise the courtesy of letting these people go back to work or wherever else and contact them." Defense counsel agreed to advise the sequestered witnesses when to return to be recalled by the defense. (TR. 853-854). Defense counsel then complained that the prosecutor, informing the witnesses that they needed to get contact information to the defense, said, "You don't have to talk to him" except to provide such information. Appellant's Brief omits the prosecutor's response and the trial court's finding:

MS. KELLER: Your Honor, these are our witnesses, including the cousin and the mother and the sister, who had earlier advised me . . . that (they) did not want to talk to counsel. What I have told them and tell all witnesses is, "It's completely up to you, and, as Mr. Wooton said, I am not telling these witnesses not to talk to you (sic).

\* \* \*

THE COURT: (Y)our representation, Mr. Wooton -- is that she told them -- what she told them is factual. How they interpret it is up to them. But it is factual. They are not required to talk to anybody, including the State.

(TR. 861-862).

Appellant's Brief next cites the testimony of Takiyah "TT" Bly, who had been excused by both the State and the defense until, at some point after she left the courthouse, defense

counsel wanted her to be recalled. The defense had failed to subpoena her, but the trial court directed that the bailiff "try and catch Ms. Bly and tell her that she's going to be recalled. . . ." (TR. 1010; 1013-1015). When Ms. Bly was located and recalled by defense counsel, she testified as follows:

Q: Ms. Bly, did you talk to me just a moment ago about coming back to Court?

A: Yes, I did.

Q: Did you tell me that you weren't going to come because - - -

A: I said I wasn't going *to your office* because I thought I was released and I had talked to Ms. Keller and she said I didn't have to talk to her, you or anybody else.

Q: And I told you that you needed to come to Court because you're still under subpoena?

A: You told me I needed to come *to your office* to talk to you, to listen to the tape.

\* \* \*

A: And you didn't say to (come to) Court. *You said come to your office.*  
(TR. 1165-1166). (Italics added).

Appellant's Brief (at 23) then cites an accusation by defense counsel that the prosecutor during trial told Det. Canaday that he did not "have to talk" to defense counsel, but fails to add that "Det. Canaday . . . did continue to talk with" defense counsel. (TR. 1397). Next, Appellant's Brief misrepresents the record in claiming that Deputy Harold was to be "available for recall." Deputy Harold never testified. Appellant's Brief erroneously asserts that there was a "subpoena issued by the defense for Deputy Harold." There were no valid defense subpoenas, as none were issued by the Circuit Clerk as required by Rule 17, W.Va. R. Crim. Pro. Instead, during trial Deputy Harold, who was off duty, "got a call from the defense investigator asking him to meet him somewhere to serve him, which Deputy Harold declined to do, as he has every right to

decline.” (TR. 1326-1327). Hughes’ counsel “apologized” for “using the wrong process for issuing subpoenas.” (TR. 1327). The prosecutor informed the trial court that she “did never tell (Deputy Harold) he didn’t have to (appear).” She had read Deputy Harold Rule 17 but did *not* tell him to ignore the defense “subpoena” despite the fact that it was invalid. (TR. 1326-1331). Obviously, if there had been any reason to believe that the prosecutor had acted improperly, the defense would have moved for a mistrial or other remedy on this ground or the trial court would have made a finding of prosecutorial misconduct and imposed an appropriate sanction. None of these events occurred because, as the record confirms, no prosecutorial misconduct occurred.<sup>3</sup>

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## B. JURY SELECTION

Appellant’s Brief (at 28), again with no citation to the record, claims that “several prospective jurors indicated a predisposed bias . . . against criminal defendants.” However, Appellant’s Brief identifies only two prospective jurors -- Ms. Alpaugh and Ms. Diehl -- who purportedly disclosed disqualifying bias or prejudice.

Appellant’s Brief (at 31-33) misstates the record by indicating that defense counsel’s motion to strike Ms. Alpaugh was based upon her belief that, although a person who is charged

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<sup>3</sup> The accusation of prosecutorial misconduct in this regard demonstrates a certain *chutzpah*. The record reveals that after the trial court ordered the prosecutor to “step back” and return to her seat during what defense counsel had claimed would be a bench conference limited solely to defense witnesses’ scheduling, the following occurred:

MR. WOOTON: *I apologize if this question is improper. . . . I have a recorded statement of (witness) D.C. Woodson, and I definitely don’t want to furnish that to the State. I’m going to call him . . . and I don’t want to announce this in open court, because it’s going to cause them to go talk to him.*

\* \* \*

Mr. WOOTON: Can you (make a Rule 26.2, W.V.R.Crim. Pro. ruling) before my calling the witness, because it affects whether I have the witness or not.

THE COURT: *I can’t do that . . . .*

(TR. 1379-1388). (Italics added).

with a crime is not necessarily guilty, there must be a finding of probable cause before a person is charged. In fact, the record confirms that defense counsel made no motion to strike Ms. Alpaugh on the basis of those responses, but only because she knew a potential witness, Officer Bailey. The prosecution then “cured the . . . issue” by withdrawing Officer Bailey as a witness. (TR. 164-165). Accordingly, it is apparent that defense counsel did not construe Ms. Alpaugh’s responses, quoted in Appellant’s Brief, as indicating a disqualifying bias or prejudice. Further, during collective voir dire Ms. Alpaugh gave no disqualifying responses and confirmed that “if the State failed to prove beyond a reasonable doubt that Mr. Hughes (was) guilty” she would not “hesitate to return a verdict of not guilty.” (TR. 40-41).

Similarly, Ms. Deihl gave no disqualifying responses during collective voir dire, but only indicated that her religious beliefs would make it “hard” for her to sit in judgment of a defendant. (TR. 174-175). Appellant’s Brief quotes just a portion of Ms. Diehl’s individual voir dire and omits the fact that Ms. Diehl answered “yes” when defense counsel asked if she believed that “when someone is charged, they’re more likely than not guilty” only because she understood that probable cause was required for the issuance of an arrest warrant. (TR. 178).

The trial court found that Ms. Diehl’s responses were distinguished from the prospective juror’s in *State v. Griffin*, 566 S.E. 2d 645, 647-648 (W.Va. 2002), because the *Griffin* juror based her beliefs upon her experience as a criminal grand jury coordinator for the U.S. Attorney General’s Office. Further, Ms. Deihl repeatedly responded that she would base her verdict on the facts of the case and that she had no bias and that she knew nothing about the case. (TR. 175-177). Accordingly, “(a) complete reading of the record reveals that the juror . . . could serve without prejudice.” *State v. Cowley*, 672 S.E. 2d 319, 325 (W.Va. 2008). (Trial court did not abuse its discretion by refusing to remove a prospective juror who believed she might have a “flashback” to her own victimization).

Appellant's Brief (at 29) cites *State v. Miller*, 476 S.E. 2d 535, 551-553 (W.Va. 1996), although this Court in *Miller* found no abuse of discretion in the trial court's refusal to strike three prospective jurors. One of the three "believed a person could not be charged without being guilty" and the other "indicated that homosexuals may be more . . . criminally inclined than heterosexuals" and the third "did not believe alcohol should be used as an excuse." This Court held that "the possession of such views expressed by these jurors does not immediately translate into an unwillingness to abide by the oath (of) a juror."

Appellant's Brief also relies upon *State v. Bennett*, 382 S.E. 2d 322, 325 (W.Va. 1989), which is wholly inapplicable to the instant case. There were two prospective jurors in *Bennett* who should have been removed for cause. One "was reluctant to be a juror (and) believed that he would have difficulty setting his prejudices *against Bennett* aside" while the other prospective juror was married to a member of the prosecutor's staff. (Italics added).

Finally, Appellant's Brief (at 31) erroneously claims that Ms. Diehl's factually correct responses caused her to be "disqualified by law" and that the subsequent inquiry concerning her understanding of probable cause was impermissible "rehabilitation" pursuant to *O'Dell v. Miller*, 565 S.E. 2d 407 (W.Va. 2002). However, as this Court confirmed in Syllabus Point 4 of *O'Dell*, "(i)f a prospective juror makes an inconclusive . . . statement during voir dire . . . indicating the possibility of a disqualifying bias or prejudice, further probing into the facts and background related to such bias or prejudice is *required*." (Italics added). And, as this Court confirmed in Syllabus Point 5 of *O'Dell*, it is only when a prospective juror makes a "clear statement . . . indicating . . . a disqualifying prejudice or bias" that further inquiry constitutes impermissible "rehabilitation." The trial court in the instant case did not abuse its discretion in finding that Ms. Diehl had indicated no such disqualifying bias or prejudice against Hughes. (TR. 182).

Indeed, as Justice Davis observed in her dissenting opinion in *Griffin* (at 649-650):

. . . I do not believe that the average person in the State of West Virginia believes that the majority of people who are indicted are innocent. Our criminal justice system would indeed be flawed if most people who are indicted are innocent.

If an understanding of the concept of probable cause is a disqualifying bias or prejudice, then we will stock our jury boxes only with jurors who are wholly ignorant of our system of justice or who suffer the delusion that our criminal laws and procedures permit the arrest of any innocent citizen, at any time, for no reason.

The record confirms that the trial court repeatedly admonished Hughes' counsel that the voir dire patterned after *Griffin* was causing jurors to be "confused" and was designed by the defense "to elicit a response that will lead to their disqualification." (TR. 92-93, 121, 125, 127; See also 8/11/06 Order Denying Motion for Post-Judgment Verdict of Acquittal . . . .).

Accordingly, the trial court did not abuse its discretion in denying the defense motions to strike Ms. Alpaugh and Ms. Diehl

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### **C. CUMULATIVE ERROR**

Appellant's Brief (at 33-48) claims that assorted "harmless errors" constituted "cumulative error."

First, Appellant's Brief erroneously claims that the jury "deliberated in open court" and that the "State was permitted to . . . censor" portions of the recording of Hughes' telephone conversation with Ms. Bly, urging her to edit her testimony. Appellant's Brief fails to disclose that the so-called "censorship" was for Hughes' protection, to redact comments that could have reflected upon his possible future failure to testify and comments potentially insulting to jurors.

Defense counsel agreed that these certain portions of the recording should be redacted: "I think that would be prejudicial to play that." (TR. 936-939). In fact, the State offered to refrain from playing the recording at all and to have Ms. Bly simply testify, but defense counsel argued that "the tape has to be played if she's going to come in here and testify." (TR. 940). The State then offered to forego calling the jail administrator, Lt. Bunting, before the jury to authenticate the recording, and to omit any mention of the fact that it was a jail recording, but the defense "concluded that it (was) in (Hughes') best interest to let the jury be advised that . . . he's an inmate at the Southern Regional Jail." (TR. 949-950, 954).

Appellant's Brief (at 33-37) asserts that the jury was "required to conduct portions of its deliberation in open court." This never happened. Rather, during deliberations the jury requested to listen again to the recorded message from Sacha Mitchell before the murder and to Hughes' mid-trial call to Ms. Bly. (TR. 1872-1874). Since the trial court had ordered redactions, the trial court suggested that the jury should listen to the recordings in open court. When the bailiff suggested that new tapes could be made, so that the jury could listen to the redacted recordings in the jury room, defense counsel stated that he did not object to the jury listening to the redacted recordings in open court and added "let's just go ahead and do it." (TR. 1874-1875). "Failure to raise claims in an appropriate and timely manner generally bars review by . . . direct appeal." *State v. Reed*, 674 S.E. 2d 18, 28 (W.Va. 2009). (Citation omitted).

There were no "deliberations" in open court: the jury came into the courtroom, listened to the recordings without comment from anyone and then returned to the jury room. (TR. 1877-1878). Appellant's Brief cites no authority whatsoever for the claim that such procedure constituted error. Indeed, in *State v. Dietz*, 390 S.E. 2d 15, 28-29 n. 14 (1990), when the appellant claimed that it was error for the jury to have a recording in the jury room during

deliberations, this Court noted that there is no difference whether a recording is brought into the jury room or played “in the courtroom, under the trial court’s supervision.”

\* \* \*

Next, Appellant’s Brief (at 37-39) complains that evidence that Hughes’ possessed a handgun while he was dating Sacha Mitchell “had absolutely no . . . relevance to the State’s theories of the case.” Appellant’s Brief refers to *State v. Walker*, 425 S.E. 2d 616 (W.Va. 1992), which is clearly distinguishable because in *Walker* there was no claim by the appellant that it was the victim who possessed the murder weapon. Appellant’s Brief errs in asserting that the witnesses all testified that it was a nine-millimeter handgun that Hughes carried during the few months that he was involved with Sacha Mitchell. Only Derrick Mitchell described Hughes’ gun as being different from the murder weapon. Further, there was no defense objection to the testimony of Derrick Mitchell or Jessica Mitchell or Tijuana Mitchell in this regard. Only when Sterling Mitchell testified did defense counsel object, but not on the basis of relevancy. Sterling Mitchell testified that he knew Hughes to carry a gun during the “last couple of months” before Sacha Mitchell’s murder. When Mr. Mitchell then began to explain where he saw Hughes with the gun, the defense finally objected, claiming such evidence was a “prior bad act.” The trial court overruled the objection, noting that carrying a firearm is “not necessarily” a bad act. (TR. 821-822). Indeed, the trial court instructed the jury that “citizens have the constitutional right to keep and bear arms. . . .” (TR. 1773). As this Court repeatedly has confirmed:

Rule 103(a) of the West Virginia Rules of Evidence states that “(e)rror may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection . . . appears of record, stating the specific grounds of objection . . . It is a fundamental proposition of law that an appellate court generally will not entertain an alleged trial error unless it has been properly preserved at trial. *State v. Marple*, 475 S.E. 2d 47, 51 (W.Va. 1996).

The State's evidence -- and Hughes' testimony -- was that Sacha Mitchell never owned or possessed a firearm. The defense claim was that at the time of the killing it was Sacha Mitchell who -- for the very first and very last time in her life -- produced a firearm. The evidence that, in the few months that Hughes dated Sacha Mitchell, it was Hughes who carried a firearm was relevant evidence tending to show that, as between Hughes and Sacha Mitchell, it was more likely that Hughes rather than Sacha Mitchell had possessed the murder weapon that Hughes then threw into the woods.

Accordingly, there was no error in the admission of evidence that Hughes carried a firearm prior to the murder.

\* \* \*

Appellant's Brief (at 39-44) next reiterates complaints about the admission into evidence of Hughes' recorded mid-trial call to Ms. Bly.<sup>4</sup> However, after the defense claimed to be "shocked" by Ms. Bly's report of the call, defense counsel then demanded that the recording be played for the jury. (TR. 940). Appellant's Brief complains that the recording "exposed the defendant as being incarcerated" when, as discussed above, it was defense counsel who insisted that "the jury be advised that . . . he's an inmate." Finally, Appellant's Brief again complains of "censorship" of the recording when, as discussed above, the redactions were made upon defense counsel's request. (TR. 936-941). The trial court ruled that the recording was admissible as evidence tending to show Hughes' consciousness of guilt pursuant to *State v. Gilbert*, 399 S.E. 2d 851 (W.Va. 1990) and *State v. Weissengoff*, 109 S.E. 707 (W.Va. 1921).

Appellant's Brief (at 40) misstates this Court's holdings in both *Gilbert* and *Weissengoff* by claiming that in "both (cases) it was irrefuted and no question remained that the defendant

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<sup>4</sup> Although Appellant's Brief (at 41) claims "Transcript of Phone Conversation attached," the Appellee was not served with any such attachment and no transcript is contained in the Exhibit Volume of the record.

therein was attempting to solicit false testimony." To the contrary, in *Gilbert* the appellant claimed error in the trial court's instruction that "if the jury believed that the defendant had attempted to persuade a witness to testify falsely . . . that circumstance could be considered as . . . indicating his consciousness of guilt." There was no reference to "irrefuted" evidence, but rather that "there was evidence that the defendant had asked (a witness) to testify that she did not know anything and to deny that he had ever called her." *Gilbert* at 859. This Court held that evidence of such a conversation -- nearly identical to Hughes' conversation with Ms. Bly -- justified the giving of the instruction which also was identical to the instruction given in the instant case. Likewise, in *Weissengoff* there was not "irrefuted evidence" but rather "an alleged conversation (which) seem(ed) to have been regard(ed) as involving solicitation (of) perjured testimony . . . . A jury could interpret it . . . if they believed the suggestion as to money, which the accused denied." This Court continued:

An attempt to prevent a fair trial by corruption of a witness is admissible evidence against the party resorting to it. (Citations omitted). Vagueness of this evidence detracts from its value, (but) . . . is not the test of admissibility. *Weissengoff* at 709.

Appellant's Brief contends that Hughes' attempt to induce Ms. Bly to deny that he visited her after the murder had "no relation to either the State's or the defendant's respective cases, (so) the probative value of such testimony is very slight." It is apparent from the recording that Hughes believed that it was important that the jury not learn that he visited Ms. Bly after the murder, looking for "Face." In his statement to police after the murder, in which he referred to Ms. Bly as "(t)he little girl (he) was fucking," Hughes' claimed he went to her apartment but she wasn't home -- a claim contradicted by Ms. Bly. (Exh. Vol., State's Exh. 5 at 15; TR. 1000-1005). Whether the false evidence Hughes sought to elicit was objectively important is immaterial: it is the fact that Hughes deemed the truth to be damaging enough

that he would seek to induce a witness to withhold such truth that is indicative of his consciousness of guilt.

Next, Appellant's Brief (at 44) erroneously contends that the trial court made no Rule 403, W.V. R. E. analysis concerning Hughes' call to Ms. Bly. There is no claim that the admission of Ms. Bly's *testimony* concerning Hughes' call was in error, except that Appellant's Brief claims that Ms. Bly misinterpreted Hughes' remarks. Appellant's Brief asserts that the defendant merely "was attempting to find out if investigators had questioned her regarding their relationship, whether defendant owned a gun and prior violent acts exhibited by defendant." If this had been so, then playing the recording of the call for the jury could not have prejudiced Hughes. However, after the trial court took a recess to listen to the recording and to "make a 403 analysis" the trial court ruled the recording admissible because, if the jury found that Hughes was attempting to induce Ms. Bly's false testimony, the jury could consider such evidence as tending to show Hughes' consciousness of guilt. (TR. 726, 854-857).

Accordingly, there was no error in the trial court's admission into evidence of the recording of Hughes' call to Ms. Bly.

\* \* \*

Lastly, Appellant's Brief (at 45-48) asserts that it was error -- although harmless error -- for the trial court to admit the 4:14 a.m. message from Sacha Mitchell, in which she referred to Hughes' threat to "shoot up" her apartment with her baby inside. The evidence at trial, considered as required in the light most favorable to the State, was that less than one hour and twenty-four minutes after Sacha Mitchell left that message, Hughes shot and killed her in her apartment with her baby at her feet. *State v. Guthrie*, 461 S.E. 2d 163, Syl. Pt. 3 (W.Va. 1995).

Appellant's Brief erroneously contends that the 4:14 a.m. message was not an excited utterance under Rule 803(2), W.V.R.E. Appellant's Brief contends that the trial court made no

Rule 403, W.V.R.E. evaluation of the message. In fact, the trial court found that it was "res gestae," showing the "ongoing connection between these two" and "the best evidence of what was going on that night." Additionally, the trial court after listening to the message found that it was "clearly an excited utterance . . . in response to a series of communications" from Hughes. (TR. 465-467).

Appellant's Brief (at 47) argues that there was no evidence of a "triggering event" preceding the 4:14 a.m. message, and that, accordingly, "the trial court abused its discretion in allowing the voice message to be entered into evidence." There was no defense objection on this grounds at trial, as required by Rule 103(a), W.V.R.E. In any case, the trial court found, "upon all the testimony, in camera and otherwise," that the 4:14 a.m. message was "sufficiently tied" to Sacha Mitchell's subsequent killing. Nevertheless, the trial court ruled that if the message was "not tied up whenever you (the prosecutor) play the defendant's statement . . . I'm going to strike it." (TR. 1036).

Det. Canaday then was questioned, without objection:

Q: Detective, I believe you testified that the defendant, during your interview with him, mentioned that there were messages from the victim right before her killing, and just answer yes or no. Did the defendant's counsel confirm the same in a conversation with you a few days later?

A: Yes, ma'am.

\* \* \*

Q: From all of the evidence in this case, including the representations of the defendant and his counsel, are these recordings of . . . conversations between the defendant and the deceased, Sacha Mitchell, leading right up to . . . 4:14 before her death?

A: Yes, ma'am.

(TR. 1037, 1068).

After the prosecution played the recording of Hughes' statements to police after the murder, the trial court permitted the jury to hear the recorded messages on Hughes' phone, including the 4:14 a.m. message. (TR. 1047-1052; 1063-1069). In addition to Hughes' reference to the phone messages during his interview with police after the murder, the State introduced Exhibit 29, which was:

(T)he court order that . . . came about because Mr. Wooton called Detective Canaday. . . representing that there were phone messages that the victim had left on the defendant's phone right before the killing.

That was from Mr. Wooton's mouth, and that's how the order came about. The defendant then did not object to us obtaining those records . . . (TR. 1035; Exh. Vol., State's Exh. 29).

Hughes' counsel did not disagree with the prosecutor's representations concerning the order to obtain Hughes' phone messages and did not object to Det. Canaday's testimony concerning the fact that it was Hughes' counsel who notified Det. Canaday that Sacha Mitchell had left a message for Hughes immediately before the murder.

The trial court and the jury heard Hughes tell Det. Canaday in his interview following the murder that "after voicing on the phone I ended up going over there, to Sacha Mitchell's apartment." Hughes confirmed: "(Y)'all got my cell phone out here, there's messages on my phone. I'll let you read the messages, I'll let you hear the messages on my phone man." Specifically, Hughes complained that Ms. Bly was "the whole fuckin' time telling me what I'm doing to her baby." (Exh. Vol., State's Exh. 5 at 8, 13). Accordingly, Appellant's Brief (at 47) errs in claiming that there was "no additional evidence regarding the triggering event" preceding the 4:14 a.m. call. As the trial court found, the evidence -- including Hughes' statements to police -- established that by 4:10 a.m. on June 12, 2004, Sacha Mitchell was asking Hughes to stop calling her and that the 4:14 a.m. message was "clearly an excited utterance . . . in response to a series

of messages or communications that (Sacha Mitchell) received at or about 4:00" on the morning of her murder. (TR. 464-467). Further, the trial court's determination that the message was "res gestae" triggered the application of Rule 803(1), W.V.R.E.

The present sense impression exception is an outgrowth of the common law *res gestae* . . . exception and a cousin to the excited utterance.

\* \* \*

(I)t is within a trial court's discretion to admit an out-of-court statement under the present sense impression exception if: (1) the statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event . . . was within (the) declarant's personal knowledge. Additionally, it is appropriate for a trial court to weigh the corroboration of an event . . . in evaluating the trustworthiness of the statement. *State v. Phillips*, 461 S.E. 2d 75, 82-83, Syl. Pts. 4, 5 (W.Va. 1995). (Italics in original).

The evidence established that the "event" Sacha Mitchell was describing in her 4:14 a.m. call to Hughes was a threat from Hughes as the two argued on the morning of the murder. The unassailable corroborating evidence was that, less than one hour and twenty-four minutes after Sacha Mitchell's 4:14 a.m. call, Hughes did, indeed, shoot and kill her in her apartment with her baby at her feet.

Accordingly, there was no error in the trial court's refusal to suppress Sacha Mitchell's 4:14 a.m. message to Hughes.

## **CONCLUSION**

As there were no errors in Hughes' trial or sentencing, he is disentitled to appellate relief and his conviction and sentence should be affirmed.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing *Brief of the Appellee, State of West Virginia, In Response to Appellant's Brief* has been served upon the defendant herein by *MAILING* a true copy thereof to John Mize, Counsel for Appellant, 106 ½ S. Heber Street, Beckley, West Virginia 25801, by United States Mail, postage pre-paid, this *27<sup>th</sup>* day of August, 2009.



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