
NO. 34808

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

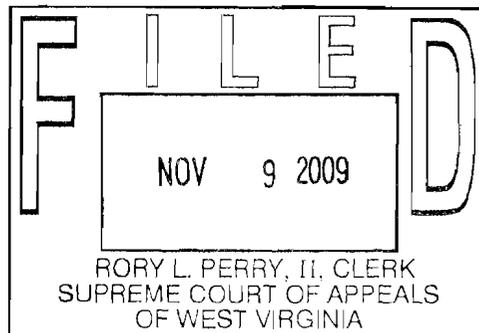
STATE OF WEST VIRGINIA *ex rel.*
VERNON H. DUNLAP, SR.,

Appellant,

v.

THOMAS McBRIDE, Warden,

Appellee.



BRIEF OF APPELLEE

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I.

STATEMENT OF THE CASE

Vernon H. Dunlap, Sr., Petitioner below (hereafter Appellant), appeals the October 1, 2008 (Hab. R. 440-47), order of the Circuit Court of Jefferson County (Step toe, J.), denying his petition for post-conviction relief. The Appellant's petition challenged the constitutionality of his incarceration following his April 2005 conviction for first degree murder without mercy. This Court refused the Appellant's direct appeal on May 10, 2006.

On July 20, 2006, Appellant filed a *pro se* petition for post-conviction relief with the Circuit Court of Jefferson County. (Hab. R. 1.) By order entered January 10, 2007, the court appointed Eric S. Black defense counsel. (Hab. R. 148-49.) Counsel submitted an amended petition for relief

on May 1, 2007. (Hab. R. 161.) The court convened an omnibus evidentiary hearing on April 3, 2008, at which the Appellant submitted his *Losh* checklist. The Appellant called one witness, defense trial counsel Craig Manford. By final order (hereinafter “order”) entered October 1, 2008, the state habeas court denied Appellant’s request for relief in its entirety. (Hab. R. 447.)

The Appellant appeals the state habeas court’s final order.

II.

STATEMENT OF THE FACTS

A reasonable juror could find that sometime between the late evening of February 18, 2004, and the early morning February 19, 2004, the Appellant murdered Jennifer Leah Dodson by slashing her throat from ear to ear. The murder occurred in the living room of the victim’s second-story apartment in Shepherdstown, Jefferson County, West Virginia. (R. 51.) State Medical Examiner Zia Sabat opined that Ms. Dodson died from a loss of blood caused by an incision wound running from the top of her left ear across her neck to just above her right ear. (Tr. 187, 206-07, Apr. 7, 2005.) The doctor also found an abrasion around the front of the victim’s neck consistent with a necklace she was wearing. (*Id.* at 207.) Death was not instantaneous. Dr. Sabat testified that Ms. Dodson might have lived anywhere from 20 to 30 minutes after the Appellant slashed her throat. (*Id.*)

In the early morning hours of February 19, 2004, Jamie Sisk came to Ms. Dodson’s apartment to pick up her son.¹ Although she could hear the children inside, Ms. Dodson did not respond to her repeated knocks. (Tr. 159, Apr. 5, 2005.) After several attempts, Ms. Sisk located

¹Ms. Sisk worked night shift and Ms. Dodson worked days. Since both had children, they switched off babysitting duties. (Tr. 159, Apr. 5, 2005.)

the victim's sister Crystal and Crystal's boyfriend Kenneth Robinson. (Tr. 162, Apr. 5, 2005.) Upon entering the victim's apartment they found Ms. Dodson in her living room lying face down on a blood-saturated pillow underneath a blanket. (*Id.* at 163; Tr. 35, April 6, 2005.) Although both children were present, neither was harmed.

Earlier that morning Jefferson County paramedic Donald Hough responded to a call regarding an unconscious man slumped over in a white pickup truck parked at the Shepherdstown boat ramp. (*Id.* at 76.) Upon Mr. Hough's arrival he discovered that the unconscious man was the Appellant, who had taken an overdose of his father's medication. (*Id.* at 79; Tr. 233, April 6, 2005.) The Appellant was transported to City Hospital where he remained for several days. (*Id.* at 80.)

Jefferson County Sheriff's Deputy Michael Dumer was also dispatched to the boat ramp. He arrived at approximately 8:00 a.m. (*Id.* at 83.) Upon his arrival he found the Appellant sitting, unconscious, in his truck. The truck's windows were closed and the doors locked. The deputy was only able to get inside the truck by taking the back window off. A search revealed two knives: One knife had a serrated edge and the other's handle was broken off. He placed both inside the truck's bed.² (*Id.* at 85-88.) Approximately one and one-half to two hours after finding the Appellant at the boat ramp, Deputy Dumer was dispatched to the victim's apartment. While taking a statement from Ms. Sisk, Deputy Dumer discovered that the man he had found in the truck was the victim's boyfriend. (*Id.* at 94.) At that point Deputy Dumer impounded the Appellant's truck and drove to City Hospital.

²Deputy Dumer did not recognize the significance of these knives until he discovered that the Appellant was the victim's boyfriend.

Despite recovering physical evidence from the crime scene including a section of carpet containing a bloody handprint, bloody footprints left on the kitchen floor, and bloody saliva from the victim's bathroom sink, the State failed to connect any of it to the Appellant. Indeed, before trial, the State stipulated that there was no physical evidence connecting the Appellant to the crime scene.

Four witnesses testified that the Appellant confessed to them. The Appellant's daughter, Tabitha Sanders, visited the Appellant at City Hospital the day after he had attempted to kill himself. (Tr. 186, Apr. 6, 2005.) While there Ms. Sanders asked the Appellant why he did it. (*Id.* at 205.) The Appellant told her that Ms. Dodson had said something that made him mad.³ (*Id.*) The State also called Danielle and Troy Kelican.⁴ Both testified that they visited the Appellant in jail. When both asked the Appellant why he had done it, he responded, "I don't know." (Tr. 169, 179, Apr. 6, 2005.) The Appellant also confessed to fellow inmate Scott Marshall while both were housed in the same pod of the Eastern Regional Jail. (Tr. 109, 112, Apr. 7, 2005.)

Several other State witnesses testified that Ms. Dodson had told them she wanted to split with the Appellant around the time she was murdered.⁵ Jamie Sisk testified that Ms. Dodson had told her that the Appellant was getting too serious, and that Ms. Dodson wanted to end the relationship. (Tr. 166, 171, Apr. 5, 2005.) Co-worker Tammy Stanley testified that the Appellant's job performance tailed off around the time his relationship with Ms. Dodson began deteriorating.

³Although defense counsel attempted to justify the Appellant's statement as a product of his medical condition, Dr. Ernesto Agbayani, Appellant's treating physician at City Hospital, testified that by the afternoon of the 20th, the Appellant was alert and oriented. (Tr. 238, Apr. 6, 2005.)

⁴Troy worked with the Appellant; Danielle was Troy's wife. (Tr. 166, 175, Apr. 6, 2005.)

⁵The Appellant was 45 years old; Ms. Dodson was 20.

He spent an inordinate amount of work time telephoning the victim at her job, and became more interested in getting off early than in completing his work. (Tr. 130-31, 144-45, Apr. 6, 2005.) A couple of days before her death, Ms. Dodson changed her telephone number. Ms. Stanley testified that the Appellant became very upset when Ms. Dodson refused to give him the new number.⁶ (*Id.* at 129-30, 134, 135, 145.) Megan Butler, Ms. Dodson's former co-worker, testified that on February 17 the victim told her she was breaking off her relationship with the Appellant that evening. (Tr. 99, Apr. 7, 2005.) Co-worker Cody Shockey testified that the Appellant was heartbroken when Ms. Dodson broke off the relationship. He also testified that the Appellant spent an inordinate amount of time on the telephone and that his work habits trailed off just before Ms. Dodson was found dead. (Tr. 155, Apr. 6, 2005.) Appellant's daughter spoke with the Appellant two or three days before he murdered Ms. Dodson. She described the Appellant as depressed. (*Id.* at 225.)

The State also proved that the Appellant was the last person to see Ms. Dodson alive. The evening of the 18th Ms. Dodson invited her sister Crystal Dodson and Crystal's boyfriend Kenny Robinson to her apartment to look at some pictures. Upon their arrival, the Appellant, who was parked outside Ms. Dodson's apartment, followed them in. When Ms. Dodson saw him, she became quiet. (Tr. 29, Apr. 6, 2005.) Crystal and Kenny left Ms. Dodson's apartment sometime between 9:30 and 10:00 p.m. The Appellant did not leave with them. (*Id.* at 30.) Ms. Sisk testified that she dropped her son off at about 10:45. When she came to the door, Ms. Dodson appeared to be angry. (Tr. 165, Apr. 5, 2005.)

⁶Ms. Dodson spoke with the Appellant just prior to the murder during which he compared his relationship with Ms. Dodson to that of his first wife. This comment so concerned Ms. Stanley she contemplated calling Ms. Dodson but chose not to. (Tr. 146, Apr. 6, 2005.)

Pursuant to West Virginia Rule of Evidence 404(b), the State also called Appellant's former wife Betty Yates.⁷ Her testimony proved that the Appellant, faced with rejection from another woman, used the same method he would later use on Ms. Dodson. Ms. Yates testified that she was married to the Appellant from 1980 to 1994. The day after she left him,⁸ the Appellant attempted to slit her throat with a pairing knife. When he was not successful, he repeatedly stabbed her throat with the knife. The Appellant subsequently pled to one count of malicious wounding, and served two years. While he was on bond for the malicious wounding charge, he was also charged with harassing and stalking his wife. These charges were dismissed as part of the plea agreement.

Over the defense's objection, the court granted the State's motion to bifurcate Appellant's trial. (Tr. 85, 93, Apr. 8, 2005.) At the mercy phase the State recalled Betty Yates.⁹ (Tr. 4, Apr. 13, 2005.) Ms. Yates testified to years of abuse at the Appellant's hands. After suggesting the Appellant get counseling he broke up everything in their house. He threw their television outside, and threw a big glass ashtray that almost hit their son. When the children attempted to leave, the Appellant told them that if they returned their mother would be dead. (Tr. 6, Apr. 13, 2005.) On another occasion the Appellant knocked Ms. Yates to the floor, sat on top of her and choked her. The couple's daughter Stephanie witnessed this. (*Id.*) On another occasion the Appellant set a telephone book on fire and laid it on top of their eight-year-old son while he was sleeping. (Tr. 6-7,

⁷The trial court found that Ms. Yates' testimony was relevant to the issue of identity because of Appellant's use of a similar method in both offenses.

⁸There was a protection from abuse order in place at the time the Appellant assaulted his wife. (Tr. 22, Apr. 13, 2005.)

⁹Although defense counsel objected to bifurcation, he did not object to Ms. Yates taking the stand during the penalty phase of the trial nor did he move to strike her testimony in its totality or in part. (Tr. 4, Apr. 13, 2005.)

Apr. 13, 2005.) Once he held his 15-month-old son over a lit stove burner. (*Id.* at 8.) Ms. Yates also witnessed the Appellant stab his brother with a kitchen knife. (*Id.* at 9.) After seeing his wife speaking with a male co-worker, the Appellant ordered her to quit her job. (*Id.* at 34-35.)

The State then called Berkeley County State Trooper Kevin Plumer. (Tr. 50, Apr. 13, 2005.) Trooper Plumer testified Ms. Yates came into his office on October 2, 1995,¹⁰ alleging that the Appellant was making harassing telephone calls and stalking her. (*Id.* at 51.) After listening to audiotaped telephone conversations between the Appellant and Ms. Yates, Trooper Plumer swore out a criminal complaint charging the Appellant with stalking and intimidation of a State's witness. (*Id.* at 52.) The charges were later dismissed as part of the Appellant's plea agreement with the State. (*Id.* at 53.)

Upon the completion of the State's case, counsel for the Appellant informed the court that they had several no-show witnesses. (*Id.* at 60.) Counsel did not request a continuance, but did ask the court to recess the proceedings until their expert, Dr. Bernard Lewis, came into town. The trial court granted defense counsel's request. (*Id.* at 61.)

The defense called forensic psychologist, Dr. Bernard Lewis. Dr. Lewis testified that the Appellant suffered from a significant neuropsychological impairment resulting from physical trauma he suffered at six. (*Id.* at 66.) Consequently, the Appellant suffered from poor impulse control, a below average IQ, and an inability to think things through. (*Id.* at 72.)

The jury did not return a recommendation of mercy.

¹⁰The Appellant was out on bond set for his malicious wounding charge which was still pending.

III.

ARGUMENT

A. DEFENSE COUNSEL'S CONDUCT WAS TACTICAL; THUS, IT DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE.

1. The Standard of Review.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

"The burden that *Strickland* imposes on a defendant is severe." *Procter v. Butler*, 831 F.2d 1251, 1255 (5th Cir. 1987). In order to satisfy the deficiency prong of the *Strickland* test for example, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness by prevailing professional standards. *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir. 1986). Given the almost infinite variety of possible trial techniques and tactics available by counsel, we must be careful not to second guess legitimate strategic choices which may now seem ill-advised and unreasonable. We have stressed that "great deference is given to counsel, 'strongly presuming that counsel has exercised reasonable professional judgment.'" *Id.* at 816 (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1279 (5th Cir. 1986)). See also *Sawyer v. Butler*, 848 F.2d 582, 588 (5th Cir. 1988).

In evaluating whether counsel's alleged errors prejudiced the defense, '[i]t is not enough for the defendant to show that errors had some conceivable effect on the outcome of the proceeding.' *Strickland*, 466 U.S. at 693. Rather the defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Id.* at 694. 'It is not [the habeas court's] role to assume the existence of prejudice.' *Czere v. Butler*, 833 F.2d 59, 64 (5th Cir. 1987). On the contrary *Strickland* requires that the defendant affirmatively prove prejudice. Therefore if [defendant] fails to demonstrate prejudice, the alleged deficiencies in [counsel's] performance need not even be considered. See *Strickland*, 466 U.S. at 698-699; *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir. 1984).

Sawyer v. Butler, 848 F.2d at 588-89. See also *Herring v. Blankenship*, 662 F. Supp. 557, 567 (W.D. Va. 1987) ("[P]etitioner has a heavy burden of showing that he was prejudiced by counsel's conduct.").

2. **Defense Counsel's Decision Not to Seek Additional Forensic Testing Was Tactical.**

Appellant first argues that defense counsel had an affirmative obligation to seek testing of certain pieces of physical evidence recovered but not tested by the State. This evidence included a bloody handprint found near the victim, bloodstains on the apartment stairs and the adjoining room, blood from a saliva sample found in the sink, and bloody footprints on the bathroom floor.

The defense's theory of the case was mistaken identity. Simply put, the Appellant sought to convince the jury that they had arrested and charged the wrong person. (Hab. R. 459 at 6, 10.) Although the crime scene was bloody, the State was unable to produce a single piece of physical evidence connecting the Appellant to the crime. Defense counsel logically argued reasonable doubt. As he testified during the omnibus hearing:

Q: Okay. Now is it fair to say then that you just relied and the defense just relied on the State's testing of whatever items they tested prior to trial?

A: Well, yes. What I did at trial was, I went through, see, the State didn't present any evidence at all. So I went through and presented – went through each bit of evidence and had the officer admit on the stand that there was no connection between any of that evidence and Vernon whatsoever. That was, I guess out defense was more a strategy for exclusion.

They had no forensic evidence whatsoever that pointed to Vernon, and it was all this —, what's the term, jilted lover situation, fatal attraction. Fatal attraction theory on Vernon's point of view.

(Hab. R. 458 at 28-29.)

Again, during the second day of hearings defense counsel explained:

A: Well, first of all as to the knives—well, I'll just go through that. We weren't sure if there was blood on them to begin with. They weren't in evidence. I could really argue that the state, you know, dropped the ball. There's somebody else involved. I was afraid of—one of the fears is you have them tested, you find your defendant's DNA on them, or you find a link to the defendant and there was no link whatsoever to link Vernon Dunlap to this killing. I really didn't want to go out and try to manufacture any.

(Hab. R. 459 at 55.)

Counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations were unnecessary. *Strickland*, 466 U.S. at 691. Counsel's decision not to test the evidence, given his trial strategy, was eminently reasonable. *See Rice v. Hall*, 564 F.3d 523, 525-26 (1st Cir. 2009) (“Defense counsel had to consider the likelihood that further forensic testing on items found in the apartment would have provided a link to Rice, thus supplying the missing forensic link. Counsel's judgement in situations like this is accorded great respect.”).

Even if this Court were to find that counsel's conduct fell below *Strickland's* objectively reasonable standard, the outcome would be the same. There is no evidence of prejudice. Apart from faulting defense counsel for not conducting these tests, the Appellant failed to offer the habeas court

any evidence suggesting that these tests would have resulted in exculpatory evidence. Prejudice may not be based upon speculation. The absence of concrete proof renders this claim fatally flawed.

3. Counsel's Investigation of Appellant's Case Was Objectively Reasonable.

Appellant next claims that defense counsel failed to adequately prepare his case for trial. In *Wiggins v. Smith*, 539 U.S. 510, 527 (2003), the Supreme Court held, “[i]n assessing the reasonableness of an attorney’s investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.”

Appellant again points to defense counsel’s decision not to conduct independent forensic testing. This matter has been addressed above. Appellant also claims that defense counsel failed to investigate the alibi of the father of the victim’s daughter, Steve Fogle. According to Deputy Dumer, Mr. Fogle was staying at a shelter in North Carolina the day of the murder. Dumer corroborated his finding with copies from the sign-in sheets from this shelter. (Tr. 109-12, 116, Apr. 6, 2005.) Although defense counsel called North Carolina, he could not recall whether he spoke with the person responsible for providing the documentation. (Hab. R. 459 at 33.)

Given his defense strategy, defense counsel’s decision to leave well enough alone was reasonable. The State failed to produce Mr. Fogle at trial, nor were they permitted to introduce the sign-in sheets from North Carolina. (Tr. 115-16, Apr. 6, 2005.) Consequently, defense counsel was able to claim that the State had failed to adequately investigate Fogle’s potential role in the murder.¹¹

¹¹Ms. Dodson’s friend Sharon McDonald testified that Mr. Fogle did not bother the victim after October 1994. (Tr. 43, 47, Apr. 7, 2005.)

Even if this Court were to find that defense counsel's conduct fell below an objectively reasonable standard, the outcome would be no different. Once again, the Appellant has failed to offer this Court any evidence remotely suggesting that Fogle's alibi was phony. Again he faults defense counsel for not checking this alibi, but does no checking of his own. Thus, the Court is left to speculate. Speculation does not equal proof of actual prejudice.

Next, Appellant points to a undated letter allegedly written by State's witness Scott Marshall or "Shotgun" stating the following:

Hey Dunlap,

This is shotgun. I'm back here with Brian Walls. He said that someone told you that I was going to testify against you. You don't ever have to worry about that because I don't even know anything about you. Someone else is just trying to start some rumors.

Your friend,

Shotgun.

(Hab. R. at 186.)

In fact, Scott Marshall did testify against the Appellant. Although defense counsel had a copy of the letter, he did not use it to impeach Mr. Marshall. The state habeas court found:

With regard to the issue pertaining to the Scott Marshall letter and the Wells', the Court is concerned that trial counsel did not confront Marshall with the same for impeachment purposes, although the Court concedes that trial council had done a pretty good job of impeaching Marshall by exploring his own crime and possible hopes of leniency if he cooperated with the State. Nevertheless, even if the Court considers this to be deficient performance, there is absolutely no evidence of any reasonable probability that, but for such performance, the result of the trial would have been different, especially since three other witnesses testified that Petitioner had confessed the crime to them.

(Hab. R. 443.)

The habeas court's decision was reasonable. Even if this Court were to find that defense counsel failed to perform in an objectively reasonable fashion, there is no evidence of prejudice. Counsel's effectively cross-examined Mr. Marshall. During cross-examination defense counsel brought out the fact that Marshall was in jail for shooting his wife's leg off with a shotgun--hence the nickname "Shotgun." (Tr. 117, Apr. 7, 2005.) In return for his testimony, the State agreed not to pursue several other charges including illegal possession of a firearm, domestic battery, and retaliation against a witness. (*Id.* at 116, 118, 128.) The State had also promised not to prosecute Mr. Marshall's mother if he cooperated. (*Id.* at 118.)

Mr. Marshall's testimony was corroborated by other State witnesses. The Appellant had told Marshall that he slit Ms. Dodson's throat from the back and laid her down on the floor. (Tr. 122, Apr. 7, 2005.) Dr. Sabat found an abrasion running along the front of Ms. Dodson's neck which matched the necklace she was wearing. (*Id.* at 192, 196.) Three other witnesses, including the Appellant's own daughter, testified that the Appellant confessed to them. Even if the jury discounted Mr. Marshall's testimony, the effect on the State's case would have been negligible.

4. **Counsel's Decision Not to Request a Change of Venue Was Tactical.**

Appellant next claims that counsel should have requested a change of venue due to pretrial publicity. Although he claims that this publicity was pervasive, he does not offer this Court an ounce of concrete proof of its existence. His claim faults counsel for not hiring a Community Sentiment Survey, but utterly fails to prove that one was needed.

"Due process requires that a trial court grant a defendant's motion for a change of venue when the trial court is unable to seat an impartial jury because of prejudicial pretrial publicity or an

inflamed community atmosphere. However, failure to change venue is not ineffectiveness of counsel unless the failure to do so affects the fairness of the trial.” *Brown v. Nevada*, No.3:03-cv-300-RCJ-RAM, 2009 WL 1067213, at 12 (D. Nev. 2009).

There is no evidence from the record that Appellant’s trial was adversely affected by a biased jury. The trial court called in a jury panel of 130 people. (Tr. 3, Mar. 31, 2005.) The court afforded both sides the opportunity to voir dire the potential jurors about their exposure to press coverage of the case. Both sides were able to pick a jury without exceptions. In fact, defense counsel testified, “We had no trouble impaneling a jury.” (Hab. R. 459 at 42.)

Counsel has no obligation to make meaningless motions on behalf of his client.

5. Counsel Spent Sufficient Time with His Client.

Appellant next claims that defense counsel failed to, “address evidentiary issues with him, and failed to properly advise Petitioner of his various defense options.” Appellant utterly fails to support his claim with citations to the record. This Court would be forced to speculate as to which “evidentiary issues,” “defense strategies” or “plea bargains” he is talking about. “A skeletal ‘argument,’ really nothing more than an assertion does not preserve a claim; judges are not like pigs hunting for truffles buried in briefs.” *Cooper v. City of Charleston*, 218 W. Va. 279, 290, 624 S.E.2d 716, 727 (2005).

At the omnibus hearing defense counsel testified that, had the Appellant wanted any of the physical evidence tested, he would have done so. (Hab. R. 459 at 28.) After consulting his vouchers, defense counsel stated that he met with the Appellant at least a dozen times. (Hab. R. 459 at 43.) Counsel described these meetings:

Q: Okay. What would you – what was the protocol for those types of meetings, Craig, what would you seek to discuss and what was your purpose in having those meetings?

A: Well, discuss the case; discuss strategies; go over the discovery; meet with my client; represent him.

(Hab. R. 459 at 43, 63.)

In addition to the dozen or so face-to-face meetings, counsel also had approximately six telephone consultations with the Appellant. (Hab. R. 459 at 64.) There is no evidence that the Appellant was unable to convey information to defense counsel because defense counsel refused to communicate with him. Nor is there evidence that defense counsel failed to keep the Appellant apprised of every development in his case.

B. THE TRIAL COURT'S DECISION TO GRANT THE STATE'S MOTION TO BIFURCATE WAS WELL WITHIN THE BOUNDS OF ITS DISCRETION.

“A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.” Syl. pt. 4, *State ex. rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979). A trial court’s decision whether or not to bifurcate a trial is neither mandated nor prohibited by the State or Federal Constitutions. *See State v. LaRock*, 196 W. Va. 294, 313, 470 S.E.2d 613, 632 (1996) (“A bifurcated proceeding may be preferable (although we think not); but it is not constitutionally imperative. A unitary jury trial under W. Va. Code, 62-3-15 is constitutional.”) A bifurcated trial is not constitutionally mandated. Bifurcation is a court-constructed trial management tool lying within the trial court’s discretion. *State v. Rygh*, 206 W. Va. 295, 297 n.1, 524 S.E.2d 447, 449 n.1 (1999). “A trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy.” Syl. pt. 4, *State v. LaRock*, 196 W. Va. at 299, 470 S.E.2d at 617.

“The motion to bifurcate may be made either by the prosecution or the defense.” *Larock*, 196 W. Va. at 314, 470 S.E.2d at 623.

This Court has listed some factors a trial court should consider when decided whether to bifurcate:

Although it is virtually impossible to outline all factors that should be considered by the trial court, the court should consider when a motion for bifurcation is made: (a) whether limiting instructions to the jury would be effective; (b) whether a party desires to introduce evidence solely for sentencing purposes but not on the merits; (c) whether evidence would be admissible on sentencing but would not be admissible on the merits or vice versa; (d) whether either party can demonstrate unfair prejudice or disadvantage by bifurcation; (e) whether a unitary trial would cause the parties to forego introducing relevant evidence for sentencing purposes; and (f) whether bifurcation unreasonably would lengthen the trial.

Syl. Pt. 6, *State v. LaRock*, 196 W. Va. at 299, 470 S.E.2d at 617.

In the case at bar, the State first moved for bifurcation immediately before calling Appellant’s ex-wife, Betty Yates.¹² (Tr. 151-57, Apr. 7, 2005.) Over the State’s objection the trial court denied the motion as untimely. The State renewed its motion for bifurcation after Ms. Yates’ testimony. The trial court again denied the motion ruling it was not timely. (*Id.* at 168.) After reviewing the case law, and upon consideration of counsel’s arguments, the trial court granted the State’s motion. (Tr. 86-89, 93, Apr. 8, 2005.) The trial court did not grant the State’s motion to bifurcate until they had called their last rebuttal witness. (*Id.* at 93.) To afford the defense an opportunity to prepare, the trial court recessed the proceedings for three days. (*Id.* at 93-94.)

At the omnibus hearing defense counsel testified:

Well, first of all it was a scramble to get any witnesses we could together on it. We had talked to family members and some family members were going to come in and told me they would come in and didn’t show, okay, some family members did

¹²Ms. Yates was the State’s third from last witness of its case-in-chief.

come in. I didn't have an opportunity to really-well, prepare them as I'd like to and by that I mean go over all their testimony, all the good and bad, and make decisions about whether we could ask certain areas of inquiry or not. We had to put—I remember driving from that hearing on the phone to [Dr.] Bernie Lewis trying to get a hold of him to get him over there and told him, begging him, I need you here, Doc, we've got to have this. What else, I forgot what you asked me.

(Hab. R. 459 at 52.)

Although the defense claimed that the trial court's decision resulted in compelling prejudice, the record does not bear them out. The trial court did not grant the State's motion until both sides had rested; thus, the guilt/innocence phase of the trial was unaffected. The defense also claims that the State sandbagged them, introducing Ms. Yates' testimony without prior notice. As noted above, the trial court recessed the proceedings for three days affording the Appellant ample opportunity to interview Ms. Yates.

Defense counsel's cross-examination of Ms. Yates consumes 27 pages of transcript.¹³ (Tr. 19-46, Apr. 13, 2005.) Defense counsel effectively explored Ms. Yates' biases against his client.¹⁴ Counsel established that, despite the horrific allegations Ms. Yates leveled against her ex-husband, she never contacted the police, filed for a restraining order, or contacted children's services.¹⁵ The couple was married for 14 years. Some of the abusive incidents occurred years before she left him.

¹³The State identified Ms. Yates as a potential witness and supplied the defense with her home address, and home and work telephone numbers as part of their discovery responses dated November 4, 2004. (R. 41.)

¹⁴After repeatedly stabbing Ms. Yates, the Appellant pled to one count of Malicious Wounding and received a two-year sentence. Ms. Yates believed that her former husband's sentence was too lenient.

¹⁵During their 14 years of marriage, notwithstanding her husband's abuse, Ms. Yates only sought one restraining order. At the time she had moved from the family home with the children and was staying with her future husband's daughter. Shortly after her move she married her present husband, Steven Yates. (Tr. 22, Apr. 13, 2005.)

(Tr. 23, 24, Apr. 13, 2005.) Although afforded ample opportunity to do so, the Appellant has not suggested specific areas of inquiry effectively precluded by the trial court's decision to bifurcate.

Nor is there evidence that the Appellant would have called other witnesses during the penalty phase. Apart from generalized statements, the Appellant has not produced a single piece of concrete evidence in support of this claim. When several witnesses failed to appear counsel did not request a continuance, nor did he call these alleged witnesses during the omnibus hearing. (Tr. 60-61, Apr. 13, 2005.)

The trial court's decision was a reasonable exercise of its discretion under *Larock*. It ruled that evidence of prior bad acts not falling under West Virginia Rule of Evidence 404(b) was not admissible in a unitary trial. (Tr. 85-87, Apr. 8, 2005.) The State had additional evidence relevant to mercy. The trial court ruled that introduction of this evidence during the guilt/innocence phase would render the trial unfair. Given this, it constructed a remedy which took into account both the State and defense's interests: it bifurcated the trial, and recessed it for three days. Its ruling was in harmony with both the letter and the spirit of *LaRock*.

C. EVIDENCE INTRODUCED DURING THE PENALTY PHASE OF THE APPELLANT'S TRIAL WAS NOT SUBJECT TO WEST VIRGINIA RULE OF EVIDENCE 404(b).

The Appellant next contends that the trial court admitted impermissible character evidence during the penalty phase of his trial. He also claims that the court admitted this evidence without holding a *McGinnis* hearing. *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). West Virginia Rule of Evidence 404(b) states, in part, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person *in order to show that he or she acted in conformity*

therewith.”¹⁶ (Emphasis added.) Evidence of prior bad acts may not be introduced as substantive evidence of guilt unless there is a logical connection between the acts in question and the instant offense. The danger of unfair prejudice is self-evident in such a case. But, that is not what happened in the case at bar.

The evidence in question was not introduced to establish Appellant’s guilt. The State introduced the evidence because it was relevant to the issue of mercy. Thus, the evidence was not restricted by Rule 404(b). It is axiomatic that a defendant’s past behavior is relevant to sentencing. *See State v. Finley*, 219 W. Va. 747, 639 S.E.2d 839 (2006) (“In order to make a recommendation regarding mercy, the jury is bound to look at the broader picture of the defendant’s character - examining the defendant’s past present and future according to the evidence before it - in order to reach its decision regarding whether the defendant is a person who is worthy of the chance to regain freedom.”); *People v. Adkins*, 242 N.E.2d 258 (Il.1968) (Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. . . . A sentencing judge, however is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.”); *People v. LaPointe*, 431 N.E.2d 344, 349 (Il. 1981) (judge in determining character and extent of punishment not limited to evidence admissible during guilt/innocence stage, it may look to facts of crime and may search anywhere

¹⁶*See* W. Va. R. Evid. 404(a).

Evidence of a person’s character or a trait of character is not admissible for the purpose of proving that he or she acted in conformity therewith *on a particular occasion*

(Emphasis added.)

within reasonable bounds for other facts which may aggravate or mitigate the sentence.”); *State v. Brooks*, 541 So. 2d 801, 808 (La. 1989) (as sentencing portion of proceeding focuses on the character or propensities of the murder defendant, jury may consider convictions presently on appeal as aggravating circumstances); *Stobble v. United States*, 91 F.2d 69 (7th Cir. 1937) (upon finding of guilt proper for court to acquire any available information concerning defendant which would enable it to determine the proper punishment).

D. THE APPELLANT HAS NOT PROVEN AN ACTUAL CONFLICT OF INTEREST.

Appellant next claims that two of his defense attorneys, neither of whom represented him at trial, operated under a conflict of interest. The Appellant was arrested and charged by criminal complaint on February 25, 2004. (R. 7.) Appellant was first represented by Jefferson County Public Defender Thomas Delaney. (R. 10.) Because of a conflict of interest Mr. Delaney withdrew on April 8, 2004. That same day the trial court appointed Aaron Amore. (R. 13, 19.) At Mr. Amore’s request, the trial court appointed James Kratovil co-counsel on April 20, 2004. (R. 21.) Mr. Kratovil represented the Appellant at a June 7, 2004, bond reduction hearing. (R. 29.)

On August 31, 2004, counsel for the State contacted Mr. Amore and informed him that the Appellant had confessed to fellow inmate, and Kratovil client, Scott Marshall. She also told Mr. Amore that Mr. Marshall would be a prosecution witness. On September 1, 2004, Kratovil and Amore moved to withdraw from their representation of the Appellant due to a conflict of interest. On September 2, 2004, the court granted Kratovil’s and Amore’s motion to withdraw and appointed Craig Manford counsel. Despite previously representing the Appellant, Mr. Kratovil continued to represent Mr. Marshall, negotiating an agreement with the State whereby Mr. Marshall would testify

against the Appellant. (R. 307.) The Lawyer Disciplinary Board found that both Mr. Amore and Mr. Kratovil violated their duty of loyalty to the Appellant. The Board did not find that either Mr. Amore or Mr. Kratovil breached their duty of confidentiality.

Notwithstanding, there is no evidence suggesting that Mr. Kratovil took confidential information gleaned from his meetings with the Appellant and communicated it to Mr. Marshall. (Tr. 104-05, Apr. 7, 2005.) The Appellant's allegations are wholly speculative. At the habeas evidentiary hearing Appellant had every opportunity to put on evidence supporting this claim. Presumably, Appellant has no evidence to support the assertion and, certainly, no such evidence is before the Court. The state habeas court found: "There appears to be no evidence of the sharing of sensitive information, because none was presented by Petitioner at the evidentiary hearing." (Hab. R. 446.)

Appellant is inviting this Court to imagine that there is such evidence and the nature of the evidence. Appellant attempts to sway the Court with the pathetic fallacy, *i.e.*, because of A, Kratovil and Amore were admonished by the State Bar for their continued representation of Scott Marshall; therefore, B, Kratovil and Amore violated their duty to keep all communications with the Appellant confidential.

IV.

CONCLUSION

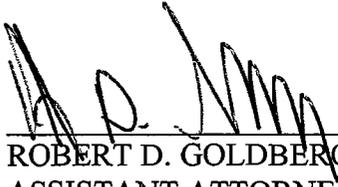
For the foregoing reasons, the judgment of the Circuit Court of Jefferson County should be affirmed by this Honorable Court.

Respectfully submitted,

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By counsel

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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 9th day of November, 2009, addressed as follows:

To: Eric S. Black, Esquire
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ROBERT D. GOLDBERG