
NO. 35271

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

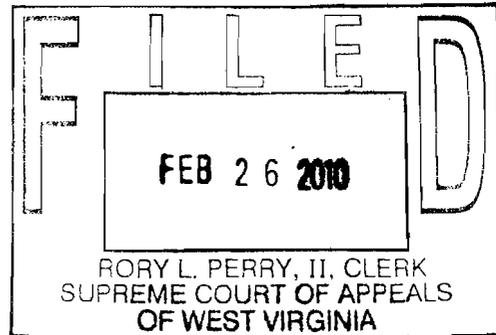
STATE OF WEST VIRGINIA,

Appellee,

v.

RICHARD ALAN POORE,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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NO. 35271

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

RICHARD ALAN POORE,

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

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

This is an appeal by Richard Alan Poore (hereinafter “Appellant”) from the January 13, 2009, order of the Circuit Court of Pleasants County (Holland, J.), which sentenced him to life without mercy in the State penitentiary upon his conviction by a jury of one count of first degree murder in violation of West Virginia Code § 61-2-1. On appeal, Appellant claims that the circuit court committed various errors, denying him a fair trial.

II.

STATEMENT OF FACTS

This case involves the murder on the part of Appellant of his three-month-old son, Richard Poore, Jr., due to fatal injuries caused by violent shaking of the infant on April 13, 1981. After this infant’s death, the office of Dr. James Frost, the medical examiner at the time, closed due to his

retirement, and several autopsy reports were unfinished. (Tr., 186-87, June 16, 2008.) After a subsequent review of autopsy notes and photographs of the deceased infant, Dr. James Kaplan, current Chief Medical Examiner of the State of West Virginia, amended the death certificate to reflect this. (*Id.*) At the time of the incident, Appellant was living with his wife, Jerri Williams; his four stepchildren, Heather, Laura, Allen and Chuckie and their son, the deceased Ricky, Jr. (*Id.*) They were all living in a trailer on Morgan Avenue in St. Marys. (*Id.*) On the morning in question, Heather and Allen had gone to school, and Appellant fed breakfast to Laura and Chuckie. (*Id.* at 138.) After this, Appellant ordered Laura and Chuckie to go back to bed. (*Id.*) When Laura said she did not want to, Appellant repeatedly kicked her from the living room to her bedroom and helped her get into the bed. (*Id.* at 139.)

At this point, Ricky, Jr. started crying. Chuckie Hinton testified that he saw Appellant pick the victim up and forcefully bounce him onto a bed. (*Id.* at 140.) Ricky, Jr. stopped crying momentarily but then resumed doing so. In response, Appellant picked him up and shook him repeatedly. (*Id.*) Chuckie Hinton testified that Ricky, Jr.'s head was flipping around, and then he stopped crying. (*Id.* at 140-41.) Then Appellant laid the baby down and screamed for someone to call an ambulance. (*Id.* at 141.) Chuckie Hinton ran out of the trailer and told the next door neighbor to call an ambulance because Appellant killed Ricky, Jr. (*Id.*)

Tammy Matson, Jerri Williams' niece, heard about the ambulance call on a scanner. She and her mother, Janice Cornell, recognized the address and went to the Morgan Avenue trailer. (*Id.* at 144-45.) She went in the trailer and noted that the baby looked "bluish-gray" with his mouth drawn down. (*Id.* at 147-48.) The baby did not appear to be breathing or show any signs of life. (*Id.* at 148.) Ms. Matson checked for breathing and a pulse but found none. Upon this revelation, she

immediately performed CPR on Ricky, Jr. (*Id.* at 149.) She performed CPR until the emergency squad arrived and took over. (*Id.* at 150.) Janice Cornell testified that when they arrived, she immediately saw Chuckie and Laura outside. She testified that Chuckie said he had to tell her something. Upon bending down to listen to Chuckie, he said, “Aunt Janice, Rick [Appellant] killed Ricky.” (*Id.* at 153.) She also stated that, upon entering the trailer, Ricky, Jr. appeared to be lifeless. (*Id.*) Appellant was stooped down looking at the victim at the time. (*Id.*)

Heather Dunn testified that on that morning she broke from her normal routine of picking up Ricky, Jr. when he was crying and taking him to the babysitter because Appellant got out of bed naked and scared her. (*Id.* at 129.) She received a call at school and was told she was to get her brother, Allen, and take him to their aunt’s house. She testified that was the time she saw her brother, Ricky. (*Id.*)

From the unfinished autopsy report, Dr. Kaplan discovered bruising on Ricky, Jr.’s ears and forehead, which he attributed to assault rather than an accidental injury. (*Id.* at 193-94, 197.) He testified that the injury to the ears indicated a pulling and squeezing type of assault. (*Id.* at 197.) He found severe bilateral retinal hemorrhages. (*Id.* at 192-93.) The medical examiner also discovered subarachnoid hemorrhaging between the skull and brain. (*Id.* at 180.) Based on the child’s history, other than some flu-like symptoms at an earlier time, he was feeding properly and behaving correctly when his mother left, indicating that any sort of trauma occurring days before the incident causing death would be ruled out. (*Id.* at 204.) He concluded from the autopsy report that there were no natural causes for the victim’s death. (*Id.* at 206.) Dr. Kaplan concluded that the cause of death was a fatal assault due to injury from shaken baby syndrome. (*Id.* at 200.)

Ricky, Jr. was originally taken to Marietta Memorial Hospital in Marietta, Ohio. Then he was transported to West Virginia University Medical Center in Morgantown. (*Id.* at 118.) He was on a respirator at this time. (*Id.*) During Dr. Kaplan's testimony, he stated that respiratory failure was a symptom of being a victim of shaken baby syndrome. (*Id.* at 182.) The baby's head swelled to the point that it was unrecognizable. (*Id.* at 119.) The day after the injury, the doctors at West Virginia University Medical Center took Ricky, Jr. off the respirator and pronounced him dead. (*Id.* at 119-20.)

On June 18, 2008, the jury convicted Appellant of first degree murder. (Tr., 465, June 18, 2008.) The jury then found Appellant guilty of first degree murder without a recommendation of mercy. (*Id.* at 467.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

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

- A. THE JURY IN THIS MATTER WAS BIASED, NOT IMPARTIAL AND FILLED WITH INDIVIDUALS WHO WERE NOT PROPERLY VETTED TO DETERMINE WHETHER ANY BIAS, PREJUDICE OR RELATIONSHIP TO THE PARTIES INVOLVED CAUSED THEM NOT TO BE ABLE TO PERFORM THEIR DUTIES AS JURORS.

State's Response:

The circuit court did not abuse its discretion in the handling of voir dire. When potential jurors indicated bias during questioning, they were removed for cause when so moved. Those that remained on the panel showed no indication of bias or prejudice.

- B. THE PROSECUTOR'S OPENING AND CLOSING STATEMENTS WERE SO IMPROPER THAT IT POISONED THE JURY'S MIND AGAINST THE DEFENDANT, UNFAIRLY PREJUDICED THE DEFENDANT BY THE CONDUCT AND VIOLATED THE DEFENDANT'S FIFTH AMENDMENT'S RIGHT AGAINST SELF-INCRIMINATION.

State's Response:

The State's opening and closing statements were not improper or prejudicial. Additionally, Appellant waived any right to have this issue reviewed.

- C. THE STATE WAS PERMITTED TO INTRODUCE SIGNIFICANT AMOUNTS OF 404(b) EVIDENCE INCLUDING, THROUGH THE TESTIMONY OF WITNESSES, ALLEGATIONS OF DOMESTIC VIOLENCE AGAINST VARIOUS FAMILY MEMBERS ALL OF WHICH WERE PRIOR BAD ACTS, HAD NO RELEVANCE TO THE ALLEGED MURDER, WHOSE PREJUDICIAL EFFECT FAR OUTWEIGHED THEIR PREJUDICIAL VALUE AND THAT HAD NO ALTERNATIVE THEORY OF ADMISSIBILITY (SUCH AS MOTIVE, INTENT, OPPORTUNITY, ETC.) THE DEFENDANT, THEREBY, WAS CONVICTED IN LARGE PART BECAUSE THE PROSECUTOR WAS ABLE TO LABEL HIM AS A "MONSTER" RATHER THAN WHETHER THE DEFENDANT ACTUALLY COMMITTED THE CRIME.

State's Response:

The circuit court did not abuse its discretion in admitting this West Virginia Rule 404(b) evidence in the form of past acts of domestic violence which was introduced to show a lack of, mistake or accident on Appellant's part regarding the victim's murder from shaken baby syndrome. Additionally, he waived any right to have this issue reviewed by this Court.

- D. COUNSEL'S PERFORMANCE WAS DEFICIENT UNDER AN OBJECTIVE STANDARD OF REASONABLENESS; AND THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT.

State's Response:

Appellant fails to establish that he was denied effective assistance of counsel. However, he has selected the wrong forum to have this claim heard.

- E. THE STATE WITHHELD EXCULPATORY EVIDENCE VIOLATING THE DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS UNDER *BRADY v. MARYLAND*.

State's Response:

No record has been established regarding these claims asserted by Appellant, and this Court has no original jurisdiction in this matter.

- F. THE STATE KNOWINGLY USED FALSE TESTIMONY DURING THE GRAND JURY PROCEEDINGS AND TRIAL TO OBTAIN A CONVICTION.

State's Response:

Appellant only cites grand jury testimony that could be characterized as inaccurate, but there is no evidence that any false testimony was utilized during the trial. Therefore, any error was corrected during the trial and no reversal is warranted.

- G. THE DELAY AND PASSAGE OF TIME BETWEEN THE ALLEGED COMMISSION OF THE CRIME HEREIN AND THE ARREST OF THE DEFENDANT WARRANTS A DISMISSAL OF THIS CASE.

State's Response:

In spite of a lengthy delay from the time the offense occurred until the indictment was handed down and the trial took place, Appellant fails to establish that his Due Process rights were violated.

IV.

ARGUMENT

A. THERE WAS NO ABUSE OF DISCRETION IN THE CIRCUIT COURT'S HANDLING OF DECISIONS REGARDING STRIKING JURORS FOR CAUSE. THOSE PERMITTED TO SIT ON THE PANEL SHOWED NO INDICATION OF BIAS OR PREJUDICE, AND THOSE THAT DID WERE STRUCK FOR CAUSE.

There was absolutely no abuse of discretion in the circuit court's handling of voir dire in this case. Appellant cites issues where he felt members were not properly vetted. However, the circuit judge gave initial questions to the panel which was followed by in-depth voir dire inquiries of individual panelists by both parties. Whenever a particular potential juror indicated any bias or prejudice, they were removed for cause upon such a motion. Those jury members that remained showed no indication of any bias or prejudice in their decision-making. Thus, the members were able to perform their duties as jurors, and no error occurred.

1. The Standard of Review.

"We review the trial court's decision on [striking a juror] under an abuse of discretion standard." *State v. Johnston*, 211 W. Va. 293, 294, 565 S.E.2d 415, 416 (2002), quoting *State v. Wade*, 200 W. Va. 637, 654, 499 S.E.2d 724, 741 (1997).

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

Syl. Pt. 2, *State v. Griffin*, 211 W. Va. 508, 566 S.E.2d 645 (2002).

The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of

impartiality should not be credited if the other facts in the record indicate to the contrary.

Syl. Pt. 1, *State v. Griffin, supra*.

2. **The Circuit Court Did Not Abuse Its Discretion in the Handling of Voir Dire. When Potential Jurors Indicated Bias During Questioning, They Were Removed for Cause When So Moved. Those That Remained on the Panel Showed No Indication of Bias or Prejudice.**

Appellant wrongly contends that the circuit court committed error by allowing jurors to sit on the panel who indicated bias, prejudice or a relationship toward the parties involved. Yet, through extensive questioning during voir dire by initial inquiries from the trial judge, followed by extensive and thorough follow-up questions by both the prosecutor and Appellant's counsel, the jury panel consisted of members who indicated they could make decisions free of any prejudice or bias.

As previously stated, this Court reviews a trial court's decisions with respect to striking a juror through an abuse of discretion standard in accordance with *Johnston, supra*. Additionally, this Court has held the following regarding a juror's ability to serve:

“The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court.’ *State v. Wilson*, (207 W.Va. (174) (decided July 23, 1974).”

Syl. Pt. 1, *State v. Kilpatrick*, 158 W. Va. 289, 210 S.E.2d 480 (1974). With respect to this test for juror qualifications, this Court further held the following:

When a prospective juror makes a clear statement of bias during voir dire, the prospective juror is automatically disqualified and must be removed from the jury panel for cause. However, when a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias or prejudice exists. Likewise, an initial response by a prospective juror to a broad or general question during voir dire will not, in and of itself, be sufficient to determine whether a bias or prejudice exists. In such a situation, further inquiry by the trial

court is required. Nonetheless, the trial court should exercise caution that such further voir dire questions to a prospective juror should be couched in neutral language intended to elicit the prospective juror's true feelings, beliefs, and thoughts--and not in language that suggests a specific response, or otherwise seeks to rehabilitate the juror. Thereafter, the totality of the circumstances must be considered, and where there is a probability of bias the prospective juror must be removed from the panel by the trial court for cause.

Syl. Pt. 8, *State v. Newcomb*, 2009 WL 1835022 (2009). This is exactly the procedure that took place in the case at bar.

During the first day of trial, voir dire commenced, beginning with preliminary questions posed by the circuit judge. (Tr., 18, June 16, 2008.) It is unclear from the trial transcript, but according to Appellant, these initial questions posed by the circuit judge were submitted by both parties. (See Appellant Brief at 11.) It is worth noting that the circuit judge asked both the State and Appellant's counsel if they wished for the court to ask these questions of the potential jurors, and both parties responded affirmatively. (Tr., 18, June 16, 2008.)

As Appellant points out, the circuit judge started the voir dire process with numerous initial questions to the entire pool of potential jurors. (*Id.* at 18-45.) This was followed by individual questioning of potential jurors by both parties based on these initial questions from the circuit judge. (*Id.* at 45-87.) Various potential jurors were struck for cause upon motion of Appellant when his counsel questioned them individually, delving deeper into the initial inquiries: Juror Harold Parker¹ was struck for indicating some opinion about the case and Juror Stephanie Colvin was struck because she was a victim of domestic violence. (*Id.* at 50 and 76.) The circuit judge struck Juror

¹Juror Parker was actually found to have not really held an opinion about the case based on prior knowledge due to newspaper articles, television coverage and word-of-mouth where, upon being asked if these things would cause him to form an opinion about it, he stated, "Probably not." However, he did say that such alleged incidents concerning babies "make him sick," so the circuit judge granted Appellant's motion to strike for cause.

Steven Satterfield for cause when the latter stated that reading about the case in the newspaper would probably result in his forming an opinion about the case; this decision to strike being made before Appellant's counsel even so moved. (*Id.* at 87.) These decisions by the circuit court were all consistent with *Newcomb, supra*, and *Griffin, supra*.

The circuit judge also struck Deborah Bailey for cause upon motion by the State where her brother was prosecuted recently.² (*Id.* at 54-55.) This is an example where, although she said she could be free of bias, facts were to the contrary which led to the granting of the motion to strike for cause in accordance with *Griffin, supra*.

Appellant takes issue with the fact that various jurors raised their hands about things that could potentially have an impact on decision-making. However, in all of these instances, in-depth, individual questioning subsequently occurred based on the initial inquiries where the potential jurors unequivocally stated that there would be no impact on their ability to be free of bias: Juror Tracy Bartrag (read about the case), Freda Northrop (read about case and had grandchildren), Russell Park (nephew employed at regional jail and read about case), Fred Brookover (prior DUI conviction and read about case), Rebecca Parks (read and heard about case), John Trunk (related to the sheriff and read about case), James Clovis (read and heard about case) and Carrie Butterfield (fiancee employed as correctional officer, had child and read about case). (Tr., 46-48, 49-51, 57-68, 59-60, 63-65, 67-69, 73-74 and 77-78.) Toward the conclusion of this individual voir dire process, the circuit judge went even further and questioned the remaining potential jurors regarding possible bias and prejudice in light of the issues previously raised, inquiring, "When we were out there this morning were you all able to hear the different questions we asked of the prospective jurors in the box? If

²Her brother's case ended in a mistrial that January term, and he was going to be retried.

there were any of you in the panel, would you have raised your hand up that would have affected you?" (*Id.* at 79-86.) All of these potential jurors indicated an ability to be free from bias or prejudice in their decision-making when pressed by the circuit judge on these various issues.

Appellant goes through numerous exchanges between the circuit judge with the initial questions asked and the respective answers from potential jurors given in an attempt to show juror bias. He also gives various sums of potential jurors that answered affirmatively to the initial inquiries which do not necessarily seem to be clearly indicated from the trial transcript. One response from a potential jury member cited by Appellant is Juror Trunk who stated that the prosecutor, Mr. Timothy Sweeney, had previously represented him in a legal matter. (*Id.* at 23.) However, when the circuit judge asked Juror Trunk further about this matter, the latter responded, "Years ago [Mr. Sweeney's legal representation]. I don't remember what the case was; I think something about property." (*Id.*) A couple other potential jurors said that Mr. Sweeney did some other minor legal work for them such as work on a deed, a right-of-way contract, and a will. (*Id.* at 24.) All of these matters seem very remote and very dubious indications of bias, at best.

Appellant also takes issue with the fact that some panelists stated that they had relatives in law enforcement such as Juror Butterfield who had said that her fiancée was a corrections guard. (*Id.* at 22.) But as mentioned previously, she unequivocally said that this would not cause her to be biased in her decisions when further probed about this later during the voir dire proceeding. Regarding potential jurors being related to law enforcement employees, this Court held the following:

A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a

party has a right to obtain individual voir dire of the challenged juror to determine possible prejudice or bias arising from the relationship.

Syl. Pt. 6, *State v. Beckett*, 172 W. Va. 817, 310 S.E.2d 883 (1983) (emphasis added). This is exactly what occurred in voir dire, and no juror that remained on the panel indicated any bias.

Regardless of Appellant's various assertions of bias, he cannot escape the fact that numerous jurors were questioned individually by both parties and also examined by the circuit judge based on the initial inquiries. All of the jurors who were not struck for cause indicated they could be free of any bias or prejudice. Those few that showed indications of bias were struck for cause. With respect to this, this Court also held the following in *Newcomb*:

“Jurors who on voir dire of the panel indicate possible prejudice should be excused, or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse.” Syl. Pt. 3, *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978).” Syl. Pt. 2, *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002).

Syl. Pt. 4, *Newcomb, supra*. Again, this is exactly what took place in this case. Appellant fails to establish that any abuse of discretion occurred here as established in *Johnston, supra*. Therefore, no error occurred.

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

B. NO PREJUDICIAL REMARKS WERE MADE DURING THE STATE'S OPENING AND CLOSING STATEMENTS THAT WOULD WARRANT A REVERSAL. ADDITIONALLY, APPELLANT WAIVED ANY RIGHT TO ASSERT THIS CLAIM.

Appellant makes numerous claims without merit that the State's opening and closing statements were filled with prejudicial remarks. All of his claims are very dubious, at best. Additionally, he cites no authority as to how or why the various remarks were prejudicial. Regardless, he waived any right to have this matter examined by this Court.

1. The Standard of Review.

“Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.” Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

Syl. Pt. 4, *State v. Keesecker*, 222 W. Va. 138, 663 S.E.2d 593 (2008).

“If either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks.” Syl. Pt. 5, in part, *State v. Grubbs*, 178 W.Va. 811, 364 S.E.2d 824 (1987).

Syl. Pt. 10, *State v. Davis*, 205 W.Va. 569, 519 S.E.2d 852 (1999).

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

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

Assuming that an error is “plain,” the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pts. 7, 8, and 9, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (emphasis added).

2. **The State's Opening and Closing Statements Were Not Improper or Prejudicial. Additionally, Appellant Waived Any Right to Have This Issue Reviewed.**

Appellant incorrectly asserts that the opening and closing statements made by the prosecutor were prejudicial and “poisoned the jury’s mind against him.” This is not the case, however. Like his previous ground of error, Appellant picks away at numerous parts of these proceedings and contends that he was prejudiced by them. Appellant takes various statements made by the State and complains of a prejudicial impact: the explanation as to why the case took so long to bring against him, the fact that the victim was three months old when he died, the detailed evidence brought out through West Virginia Rule of Evidence 404(b),³ a video presentation’s account of the medical evidence and the statement that the victim came into the world crying and left doing the same. Yet, Appellant cites no authority or analogous cases to establish that these statements and actions were prejudicial. This appears to be no different than any other opening statements made during a murder trial, depending on various fact patterns.

Appellant utterly fails to meet the prejudicial standard established in *Keesecker, supra*. In particular, he fails to show that the remarks were meant to mislead the jury. Additionally, he fails to establish that they were deliberately placed before the jury to divert attention to extraneous matters. This is because virtually everything mentioned in the State’s statements was later brought out in its case-in-chief to establish Appellant’s guilt. Absent the remarks, there was ample evidence to convict Appellant of this offense from extensive medical evidence and testimony to the eyewitness account of the victim’s brother, Chuckie.

³The evidence based on West Virginia Rule of Evidence 404(b) was not prejudicial and will be addressed in the following argument in response to Appellant’s ground of error.

Appellant takes issue with the prosecutor’s remark, “I submit that he [Ricky, Jr.] came into this world crying and this is how he went out.” (*See* Appellant Brief at 19.) Yet, this statement was directly referring to the circumstances surrounding Ricky, Jr.’s death according to the testimony of his brother, Chuckie. (Tr., 140-41, June 16, 2008.) As this Court has held, “Virtually all evidence is prejudicial or it isn’t material. The prejudice must be ‘unfair.’” *State v. Winebarger*, 217 W. Va. 117, 125, 617 S.E.2d 467, 475 (2006), quoting *Dollar v. Long Manufacturing, N.C., Inc.*, 561 F. 2d 613, 618 (1978). In light of the fact that this remark was based on testimony presented in the State’s case-in-chief that was in the form of an eyewitness account of the offense, this was not unfair prejudice.

Appellant also cites as prejudice the fact that the State continually made reference to evidence that was “not contradicted”. He somehow equates this with an improper reference to a defendant not taking the stand, a right Appellant chose to exercise. (*See* Appellant Brief at 22-23.) But to equate these statements regarding the State’s evidence to a reference to Appellant’s not taking the stand to testify is a stretch, to say the very least. Regarding such improper statements referring to a defendant not taking the witness stand, this Court held the following:

“Remarks made by the State’s attorney in closing argument which make specific reference to the defendant’s failure to testify, constitute reversible error and defendant is entitled to a new trial.” Syl. Pt. 5, *State v. Green*, 163 W. Va. 681, 260 S.E.2d 257 (1979).

Syl. Pt. 5, *State v. Murray*, 220 W. Va. 725, 649 S.E.2d 509 (2007). Appellant fails to meet this standard.

Even if improper prejudicial statements were made—which is not the case here—Appellant waived any right to raise this issue. This is because his counsel failed to object to any remarks made during opening and closing statements by the State. Appellant even admits as much in his Appellant

Brief. (See Appellant Brief at 30.) As established in *Miller, supra*, this constitutes a knowing and intentional abandonment or relinquishment of a known right. Since all of these remarks of which Appellant complains were based on evidence the State was going to and did present, and Appellant cites no authority where similar statements and practices were ruled to be unfairly prejudicial; it does not rise to the level of those that affect substantial rights, and no plain error analysis need be conducted. As was held in *Davis, supra*, when Appellant believed that improper, prejudicial remarks were made, he was to object and request an instruction for the jury to disregard the same. He failed to do this.

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

C. THE CIRCUIT COURT DID NOT ERR IN ADMITTING PRIOR BAD ACTS OF DOMESTIC VIOLENCE ON THE PART OF APPELLANT. THIS ADMISSION WAS WITHIN THE AUTHORITY OF WEST VIRGINIA RULE OF EVIDENCE 404(b) TO ESTABLISH ABSENCE OF MISTAKE OR ACCIDENT IN THE VICTIMS MURDER. ADDITIONALLY, HE WAIVED ANY RIGHT TO ASSERT THIS CLAIM.

Appellant incorrectly asserts that the circuit court improperly admitted evidence of prior bad acts on the part of Appellant. However, this was properly admitted under West Virginia Rule of Evidence 404(b) to establish lack of mistake or accident in the murder of Ricky, Jr. A proper 404(b) hearing was held on this matter, and the circuit judge granted the State's motion to admit this evidence. There was no abuse of discretion on the part of the circuit court. Additionally, Appellant did not object to the admission of this evidence during the motion hearing nor during the State's case-in-chief where various witnesses testified to Appellant's prior acts of domestic violence. Thus, Appellant has waived his right to assert this claim.

1. **The Standard of Review.**

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

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

The standard of review for a trial court’s admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court’s factual determination that there is sufficient evidence to show the other acts occurred. Second, we review de novo whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court’s conclusion that the “other acts” evidence is more probative than prejudicial under Rule 403.

State v. Mongold, 220 W. Va. 259, 264, 647 S.E.2d 539, 544 (2007).

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

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

Assuming that an error is “plain,” the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pts. 7, 8, and 9, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (emphasis added).

2. **The Circuit Court Did Not Abuse Its Discretion in Admitting this Rule 404(b) Evidence in the Form of Past Acts of Domestic Violence Which Was Introduced to Show a Lack of Mistake or Accident on Appellant's Part Regarding the Victim's Murder from Shaken Baby Syndrome. Additionally, He Waived Any Right to Have This Issue Reviewed by This Court.**

Appellant incorrectly asserts that the evidence of prior bad acts of domestic violence were improperly admitted. However, this evidence was properly admitted under West Virginia Rule of Evidence 404(b). As Appellant correctly outlines in his brief, evidence of past physical abuse and domestic violence was admitted into evidence during the State's case-in-chief through the testimony of Jerri Williams, Heather Dunn and Chuckie Hinton. (Tr., 111-13, 126-27 and 134-36.) Appellant states that this evidence was not brought in with a proper reason elicited by the prosecutor, and the circuit judge did not exercise his gate-keeping task with it. With respect to this, this Court has held the following:

“When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.” Syl. Pt. 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

Syl. Pt. 19, *State v. Ladd*, 210 W. Va. 413, 557 S.E.2d 820 (2001). This was exactly what was done in this case. The State moved to have the prior bad acts of domestic violence admitted under Rule 404(b) in order to show absence of mistake or accident since Appellant was asserting that Ricky, Jr.'s injuries were unintentional and a result of attempts to resuscitate, which was outlined in the motion. ®. at 368.) A thorough hearing on this matter took place on April 11, 2008. ®. at 398.) The circuit judge ruled in an order filed May 22, 2008, that the evidence could be admitted on this

basis. ®. at 400-01.) The circuit judge gave this limiting instruction based on Rule 404(b) during the charge to the jury. (Tr., 402, June 19, 2008.)

In *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), this Court upheld the admission of prior acts of domestic violence by the defendant against his son on the basis of Rule 404(b) when he was convicted of murder and further held that it was more probative than prejudicial. *LaRock*, 194 W. Va. at 311, 470 S.E.2d at 631. Appellant contends that this admission was improper due to the prejudicial impact, yet this is not the case when applying *LaRock*. As previously stated, according to *Winebarger, supra*, virtually all evidence is prejudicial. It just cannot be unfairly so. This is the case with this Rule 404(b) evidence as well. This testimony of prior bad acts of domestic violence went to the heart of the eyewitness account of the shaken baby syndrome murder detailed on the stand by Chuckie Hinton where Appellant's actions were not a mistake or accident.

Additionally, as in the previous argument, Appellant never objected to the admission of this evidence, either at the motion hearing or during the testimony of the witnesses at trial. Again, this is a knowing and intentional relinquishment or abandonment of a known right in accordance with *Miller, supra*. If this evidence were unfairly prejudicial and improper—which the State does not concede it being so—Appellant waived the right of this Court's reviewing this matter. The admission of these bad acts in accordance with Rule 404(b) do not fall under the category of affecting substantial rights of the Appellant, and no plain error analysis need take place.

Appellant details other complaints regarding this matter such as the evidence being old, the presence of contradictory statements by the witnesses and the fact that his counsel did not cross-examine adequately. Yet no authority is cited as to how these things amounted to the admission being improper.

Appellant fails to show how this admission of 404(b) evidence amounted to the circuit court committing error. The circuit court in no way abused its discretion with this admission.

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

D. APPELLANT FAILS TO MEET THE STANDARD TO ESTABLISH AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. ADDITIONALLY, HE HAS CHOSEN THE WRONG FORUM TO RAISE THIS CLAIM.

Appellant asserts that his counsel's representation during his trial fell below an objective standard of reasonableness, and it was ineffective; yet, he fails to meet the standard to establish this claim. Although he makes various complaints about this representation, it does not fall below this standard of effective counsel. Additionally, Appellant has chosen the wrong forum to raise this issue.

1. The Standard of Review.

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Syl. Pts. 5 and 6, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

"It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed

record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.” Syl. Pt. 10, *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992).

Syl. Pt. 10, *State v. Hutchinson*, 215 W. Va. 131, 599 S.E.2d 736 (2004).

2. **When Applying the Standard Established in *Strickland v. Washington*, [466 U.S. 668 (1984)], and *Miller, Supra*, Appellant Fails to Establish That He Was Denied Effective Assistance of Counsel. However, He Has Selected the Wrong Forum to Have This Claim Heard.**

Contrary to Appellant’s assertion, his attorney did not fail to provide effective assistance of counsel. When examining the record using the standard established in *Miller, supra*, his original counsel’s performance did not fall below an objective standard of reasonableness, and the outcome of the trial would not have been different but for this representation. Appellant goes through virtually every aspect of his counsel’s performance during his trial and finds fault with the representation. He argues that no opening statement was made by his defense counsel. That is not even factually accurate. An opening statement did occur; although, it took place after the State’s case-in-chief ended and before any defense witnesses were called. (Tr., 240, June 18, 2008.) This may be a bit unconventional, but an opening statement by the defense did take place. Appellant also contends that his counsel did not move to strike for cause jurors “who had relationships with the State or the prosecuting attorney.” But again, as was established above, a through process of individual voir dire questioning took place; and where potential panelists indicated bias or prejudice for any particular reason, the defense counsel moved to strike for cause, and said motions were granted. Appellant finds fault with his defense counsel’s handling of the witnesses who provided Rule 404(b) testimony, yet Jerri Williams was cross-examined. Additionally, Appellant’s defense counsel may have determined that attacking these children’s credibility on this issue would have

been counterproductive to his case. Appellant takes issue with the fact that no expert was called to challenge his children's ability to remember some events occurring when they were at a young age. (See Appellant Brief at 31.) Yet he cites absolutely no authority where calling such an expert is the standard. The overall problem with Appellant's argument here is that he is picking apart at every tactic used by his defense counsel that could have been handled differently to establish that he was given ineffective assistance. As was held in *Miller, supra*, regarding ineffective assistance analysis, courts must refrain from engaging in hindsight or second-guessing of trial counsel's strategic decisions.

If one does not engage in such hindsight, the fact is that Appellant's counsel's representation was not outside the broad range of professionally competent assistance. Other than Ricky, Jr.'s two siblings that testified, Appellant's counsel cross-examined the State's witnesses. His counsel called five witnesses to testify on his behalf. Two witnesses testified extensively with the purpose of refuting the medical testimony of Dr. James Kaplan who had diagnosed Ricky, Jr.'s death being a result of shaken baby syndrome—David Meyerburg, an attorney and former pediatrician, and Dr. John Galaznik, a pediatrician who testified as an expert in the field.

In addition to Appellant failing to meet the test that his counsel's performance was deficient under an objective standard of reasonableness, he also cannot show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. There was ample witness and expert medical testimony to establish that he was guilty beyond a reasonable doubt of this offense.

Regardless of this, Appellant has chosen the wrong forum to raise an ineffective assistance of counsel claim. As this Court held in *Hutchinson, supra*, these claims are not to be brought before

this Court on direct appeal. Appellant is to first raise this issue at the state habeas level. If he does not get the desired result, Appellant may then appeal the habeas decision to this Court once it can then review a fully developed record.

For all of these reasons, Appellant's argument fails on this ground.

E. APPELLANT RAISES CLAIMS OF A *BRADY* VIOLATION AND NEWLY-DISCOVERED EVIDENCE; YET NO RECORD HAS BEEN ESTABLISHED ON THESE CLAIMS AND THIS COURT IS UNABLE TO RULE ON THE ISSUES.

Appellant asserts that the lower court erred regarding a *Brady* violation in that the State withheld evidence from him. He also seems to raise a claim that he should be granted a new trial based on newly-discovered evidence. However, there is absolutely no record on the lower court ruling on these matters. It is somewhat unclear as to whether this evidence was ultimately withheld by the State and as to when Appellant obtained it. In essence, this Court has no original jurisdiction to rule on these matters.

1. The Standard of Review.

“The Supreme Court of Appeals has original jurisdiction in cases of habeas corpus, mandamus and prohibition and appellate jurisdiction in all other cases mentioned in Article VIII, Section 3, of the Constitution of this State and in such additional cases as may be prescribed by law[.]” Syl. Pt. 10 (in part), *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

Syl. Pt. 1, *State ex rel. McGraw v. Telecheck Services, Inc.*, 213 W. Va. 438, 582 S.E.2d 885 (2003).

2. No Record Has Been Established Regarding These Claims Asserted by Appellant, and This Court Has No Original Jurisdiction in This Matter.

Appellant contends that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), by withholding exculpatory or impeachment evidence, primarily in the form of a police investigatory report issued by then West Virginia State Police Officer Pete Lake.

Appellant filed a motion for discovery which included this investigatory report, and the State objected. (R. at 234-36, 237-41.) It appears this matter was taken up by the circuit court during the April 11, 2008, Motion Hearing where it asked the State to hand over the report to it, and all exculpatory material would eventually be given to Appellant. (Mot. Hr'g, 29, April 11, 2008.) From the trial transcript it appears that Appellant was given a redacted version of this report, yet it is unclear as to when this was given to him. (Tr., 161-62, June 16, 2008.) Appellant correctly states that both a redacted and un-redacted version of the police report are in the appellate record, yet that still does not clear up when exactly it was in his hands, in either form.

During the direct testimony of Corporal Michael Bauso of the West Virginia State Police, the State attempted to use an un-redacted version of the report which was refused by the circuit judge. (*Id.*) During this exchange in the trial, it becomes clear that Appellant was given a redacted version at some point. (*Id.*)

With respect to a *Brady* violation, the United States Supreme Court held the following:

“A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. *See* 373 U.S. at 87, 83 S.Ct. 1194. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is “known only to police investigators and not to the prosecutor,” *Kyles [v. Whitley]*, 514 U.S. [419] at 438, 115 S.Ct. 1555. *See id.*, at 437, 115 S.Ct. 1555 (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”). “Such evidence is material ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,’” *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *Bagley, supra*, at 682, 105 S.Ct. 3375 (opinion of Blackmun, J.)), although a “showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal,” *Kyles*, 514 U.S., at 434, 115 S.Ct. 1555. The reversal of a conviction is required upon a “showing that the favorable evidence

could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.*, at 435, 115 S.Ct. 1555.

Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S. Ct. 2188, 2190 (2006). None of these issues were dealt with or ruled on by the lower court.

It also appears that Appellant is making a claim of a new trial based on newly-discovered evidence. With respect to this, this Court held the following:

“A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.” Syllabus, *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979).

Syl. Pt., *State v. Davis*, 217 W. Va. 93, 616 S.E.2d 89 (2004). Again, none of these issues have been raised or ruled upon by the circuit court. There is absolutely no record established as to the merits of this claim.

In accordance with *Telecheck Services, supra*, this Court does not have original jurisdiction to rule on these issues at this time. At most, this should be remanded to the circuit court for a ruling on these matters.

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

F. APPELLANT CITES NO FALSE TRIAL TESTIMONY USED BY THE STATE BUT ONLY THAT USED DURING THE GRAND JURY. THUS ANY POTENTIAL ERROR IN THE GRAND JURY WAS CURED DURING THE TRIAL.

Appellant contends that the State utilized false testimony during grand jury proceedings and the trial in order to obtain a conviction. There is absolutely no evidence that the State used false testimony during the trial, and Appellant cites nothing to show this is the case. It appears that some inaccurate testimony may have been given during the grand jury proceedings, and this is all that is cited in Appellant's claim of error. Thus, any error that may have occurred during the grand jury proceedings was cured during the trial. Thus, Appellant is not entitled to a reversal on this ground.

1. The Standard of Review.

If anything improper is given in evidence before a grand jury, it can be corrected in the trial before a petit jury. *See, e.g., Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 408-09, 100 L.Ed. 397, 402 (1956). Thus, any evidentiary errors in the prosecution's case before the grand jury were not cause for reversal, where the errors were not repeated before the petit jury.

State v. Clements, 175 W. Va. 463, 472, 334 S.E.2d 600, 610 (1985).

2. Appellant Only Cites Grand Jury Testimony That Could Be Characterized as Inaccurate, But There Is No Evidence That Any False Testimony Was Utilized During the Trial. Therefore, Any Error Was Corrected During the Trial and No Reversal Is Warranted.

Appellant asserts that the State knowingly used false testimony during grand jury proceedings and the trial to obtain a conviction. However, the State used no false testimony during the trial, and there is absolutely no evidence to establish that this was done. All the errors cited by Appellant in his brief are from the grand jury proceedings. If one examines this testimony given during the grand jury cited by Appellant, there may have been some inaccuracies. However, this was not repeated during the trial or to the petit jury. In accordance with *Clements, supra*, any

evidentiary errors during the grand jury proceedings were not repeated and thus were corrected at the trial stage. Since there is no proof of the State using any false testimony during the trial to obtain a conviction, any error during the grand jury was cured, and Appellant is not entitled to a reversal.

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

G. WHILE THERE WERE A NUMBER OF YEARS THAT ELAPSED FROM THE COMMISSION OF THE CRIME TO THE INDICTMENT AND TRIAL OF APPELLANT, THE DELAY WAS ON REASONABLE GROUNDS AND NO PREJUDICE OCCURRED.

Despite the fact that there was a substantial amount of time that elapsed from the commission of this murder until there was an indictment and trial, no speedy trial violation occurred. This is because the delay was for a legitimate reason; namely, the medical examination was never completed until 2006, and the gathering of evidence against Appellant was not obtainable until such findings were made. Additionally, no prejudice occurred in the delay.

1. The Standard of Review.

“A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial.” Syl. Pt. 2, *State v. Foddrell*, 171 W.Va. 54, 297 S.E.2d 829 (1982).

Syl. Pt. 6, *State v. Hinchman*, 214 W. Va. 624, 591 S.E.2d 182 (2003).

“The Due Process Clause of the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution require the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the State's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.” Syl. Pt. 2, *Hundley v. Ashworth*, 181 W.Va. 379, 382 S.E.2d 573 (1989).

Id. at Syl. Pt. 7.

2. **In Spite of a Lengthy Delay from the Time the Offense Occurred Until the Indictment Was Handed Down and Trial Took Place, Appellant Fails to Establish That His Due Process Rights Were Violated.**

Although there was a substantial amount of time that elapsed from the commission of the offense and the indictment and trial, Appellant fails to meet the standard that his Due Process rights and a right to a speedy trial were violated. The main factor regarding speedy trial that Appellant fails to establish in asserting a violation is the second one of *Hinchman, supra*: the reason for the delay being improper. The reason for the delay in handing down an indictment was beyond the control of the State, and there was no bad faith. There was indeed a substantial amount of time that elapsed, but the reason was that it was impossible to bring forth enough evidence to indict Appellant until 2006. As was established through the testimony of Dr. James Kaplan, the current chief medical examiner for the State when the trial occurred, there was a tremendous amount of unfinished autopsy reports once then-chief medical examiner Dr. James Frost had retired. (Tr., 186-87, June 16, 2008.) One of these unfinished autopsy reports was that of Ricky Poore, Jr. (*Id.*) Based upon the notes from Dr. Frost prior to his retirement, photographs of Ricky, Jr. and medical data, Dr. Kaplan issued an amended death certificate and concluded that the baby had died as a result of an assault, specifically shaken baby syndrome. (*Id.* at 187-206.) So the evidence-gathering process was incomplete due to the backlog in Dr. Frost's office upon retirement, and the State was unable to build a case against Appellant for purposes of an indictment until Dr. Kaplan conducted his analysis and amended the death certificate.

Additionally, there was no prejudice to Appellant, the fourth factor in the speedy trial analysis established in *Hinchman, supra*. Again, the State concedes that an unusual amount of time elapsed from the incident until indictment and trial. However, there was still no prejudice because

the key witnesses in this case were available and testified. Appellant cites various Emergency Medical Service (EMS) personnel and others that were unavailable, yet the key witnesses did testify. Appellant cites that his mother could not be called as a witnesses, but her value as one is highly suspect given the facts of the case, and any prejudice due to her absence is highly dubious, at best. Chuckie Hinton, who was an eyewitness to the murder, testified in the State's case-in-chief and could have been cross-examined by Appellant's counsel. The investigating officer at the time of the offense, West Virginia State Police Officer Pete Lake, testified *as a defense witness* based on the investigatory report he produced at the time. Even Dr. Frost was called as a defense witness and testified during this trial. So despite the long delay, the argument for prejudice against Appellant on this basis is lacking.

Additionally there was no Due Process violation, based on the reasoning stated above, Appellant cannot prove that the State's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense as is the standard established in *Hinchman*. There was no bad intent by the State in the delay to obtain an advantage and no actual prejudice was shown. Regarding Due Process rights, this Court held the following in *State v. Carrico*, 189 W. Va. 40, 427 S.E.2d 474 (1993):

As we held in *State ex rel. Leonard v. Hey* [269 S.E.2d 394]: It is the government's duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial. If it fails to do so after discovering sufficient facts to justify indictment and trial, it violates this due process right.

Carrico, 189 W. Va. at 43-44, 427 S.E.2d at 477-78. Appellant has not shown that the State failed to use reasonable diligence in the investigation and preparation for arrest, indictment and trial once sufficient evidence was found against him.

For all of the reasons outlined above, Appellant's argument fails on this ground.

V.

CONCLUSION

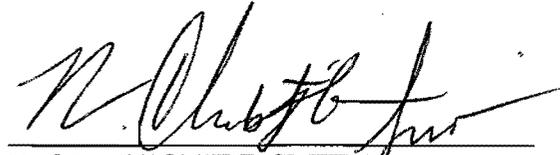
For the foregoing reasons, the judgment of the Circuit Court of Pleasants County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

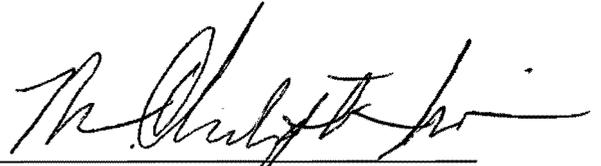
A handwritten signature in cursive script, appearing to read "R. Christopher Smith", written over a horizontal line.

R. CHRISTOPHER SMITH
ASSISTANT ATTORNEY GENERAL
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304-558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 26th day of February, 2010, addressed as follows:

William B. Summers, Esq.
3301 Dudley Avenue
Parkersburg, WV 26104

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

R. CHRISTOPHER SMITH