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NO. 35297

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

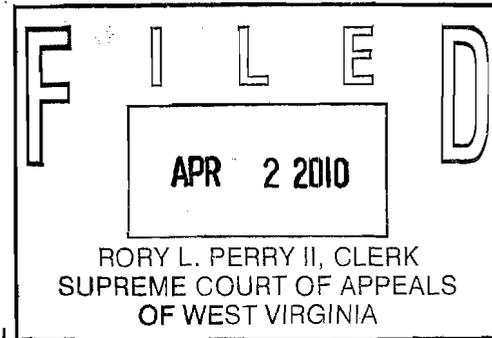
STATE OF WEST VIRGINIA,

*Appellee,*

v.

MARK GILMAN,

*Appellant.*



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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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*Appellant.*

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

Mark Gilman, defendant below (hereafter "Appellant"), was convicted of one count of Second Degree Murder pursuant to West Virginia Code § 61-2-1, following a jury trial ending on July 31, 2008, in the Circuit Court of Logan County, West Virginia, the Honorable Roger Perry presiding. By order entered September 18, 2008, the court sentenced the Appellant to forty years. (R. at 406-07.) This appeal is predicated upon this order.

II.

STATEMENT OF FACTS

On January 5, 2006, Barney Lee Shephard and his brother, Bill Lucas, were looking for firewood in a deserted area of Logan County called Pine Creek, when they found the charred remains of Mary Pelfrey (hereinafter "Ms. Pelfrey" or "victim"). (Tr. vol. II, 97-98.) The victim's body was covered with straw and, apart from her legs, was unrecognizable. Upon finding the body

Mr. Shephard drove to a Chevron in Omar and called the Logan County Detachment of the West Virginia State Police. (Tr. vol. II, 99.) State Troopers Frye, Toney, Sgt. Brown, and First Sgt. Nelson were dispatched to the Chevron where they met Mr. Shephard and accompanied him to the crime scene. Upon their return to the scene, Shephard noted that someone had re-covered the body with more straw and placed an old grill and a piece of tin on top of it. (Tr. vol. II, 62-63, 84, 100.)

Chief Medical Examiner Dr. James Kaplan testified that the victim's body was completely burned.<sup>1</sup> (Tr. vol. III, 9.) Ms. Pelfrey could only be identified by the fingerprint of the fourth digit of her right hand which was severed and sent to the latent print section of the state crime lab. (Tr. vol. III, 10.) An examination by Assistant Medical Examiner Dr. Louri Boiko revealed that someone had struck the victim three times on the left side of her head with a blunt object. (Tr. vol. III, 13.) The first blow was sufficient to kill her. (*Id.*) Dr. Boiko extracted a vaginal swab which was later sent to the State Police Crime Laboratory. (Tr. vol. III, 16.)

Upon finding the body Troopers C.R. Holbert, J.J. Lester, and Boone County Deputy Sheriff Chad Barker were dispatched to canvas the area. (Tr. vol. II, 115.) The Appellant's home was the closest to the crime scene.<sup>2</sup> (Supp. Hr'g at 14; Tr. vol II, 120.) As the officers arrived they saw the Appellant standing in his driveway near a white Chevy Astrovan.<sup>3</sup> (Tr. vol II, 139, 141.) The officers, who were in plain clothes, identified themselves as police. (Tr. vol II, 140.) Trooper Holbert approached the Appellant and asked him if he had seen anything unusual coming up or

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<sup>1</sup>Dr. Kaplan did not perform the autopsy and was testifying from autopsy notes written by Dr. Louri Boiko.

<sup>2</sup>The area was sparsely populated. Appellant's nearest neighbor lived a mile away. (Tr. vol. III, 152.)

<sup>3</sup>When the officers first arrived the Appellant went inside the van. (Tr. vol. I, 141.)

down the road in the last couple of days. (Tr. vol. II, 118.) The Appellant responded, "Well, you guys are here for the burnt girl." (Tr. vol. II, 122, 149.) None of the officers had mentioned why they were there. As they surveyed the Appellant's home, Trooper Holbert and Deputy Barker noticed two large five or six gallon empty gas cans setting in the middle of the driveway. (Tr. vol. II, 120-22, 152.) The Appellant claimed he had not been off of the property that day. When confronted with tire tracks going off the property and up the road, the Appellant admitted that he had left. (Tr. vol. II, 140.) The officers also found the same sort of straw used to cover the victim's body at the Appellant's home.<sup>4</sup> (Tr. vol II, 154.)

In a signed statement to Trooper Holbert the Appellant said that he had seen smoke coming from the place where "everybody parties" last time he'd been there, that he had not hauled any straw<sup>5</sup> up there, and had nothing to do with the body being there. (Tr. vol. II, 116.)

Later that evening the Appellant voluntarily accompanied Troopers R.R. Johnson and Frye to the Logan detachment where he spoke to Trooper Perdue. (Tr. vol. II, 164, 186.) Before questioning him, the trooper read the Appellant his *Miranda*<sup>6</sup> rights and informed him that he was not under arrest and was free to leave at any time. (Tr. vol II, 166-67.) The interview lasted approximately twenty minutes. (Tr. vol. II, 170.) Trooper Perdue described Appellant's demeanor as relaxed, although he would become tense when the trooper spoke about Pine Creek or Ms. Pelfrey. (Tr. vol II, 171.)

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<sup>4</sup>The Appellant lived with an elderly couple who ran a farm.

<sup>5</sup>The fact that the body was found covered in straw was not revealed to the Appellant before he gave his statement.

<sup>6</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

The Appellant's answers to Trooper Perdue's questions were inconsistent. At first he denied being at Pine Creek, then he said he had been there, then said he thought he had been there. (Tr. vol. II, 173.) Finally, the Appellant placed his head in his hands and said that he had "done it." (Tr. vol. II, 169, 188.) When asked what he had done, he quickly recanted the admission. (Tr. vol. II, 170.) When asked again, the Appellant said that he was half responsible for Ms. Pelfrey's death. (Tr. vol. II, 175.) Once the interview ended the Appellant was free to leave the detachment. (Tr. vol. II, 176.)

On January 10, 2006, the Appellant returned to the Logan detachment in order to recover two confiscated knives.<sup>7</sup> (Tr. vol. IV, 7.) While there, he was interviewed by State Police Sgt. Christopher Casto.<sup>8</sup> Before taking his statement Trooper Casto verbally advised the Appellant that he was not under arrest and was free to leave at any time. Trooper Casto then *Mirandized* the Appellant.<sup>9</sup> (Tr. vol. III, 24.) Because the Appellant could not read, Trooper Casto went through each of the Appellant's *Miranda* rights line-by-line, getting him to initial each line. The form stated that Trooper Casto wished to question the Appellant about a homicide, that he was not under arrest and that he could leave at any time. (Tr. vol. III, 26-27.) After reviewing his rights, the Appellant voluntarily executed a waiver. (Tr. vol. III, 29.)

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<sup>7</sup>The Appellant was accompanied by co-worker Dennis Crum. (Tr. vol. IV, 6-7.) Mr. Crum testified that they arrived at the Logan detachment at 4:00 p.m. Mr. Crum did not see the Appellant again that night, but was given a ride home by a trooper at approximately 10:30 p.m. (Tr. vol. IV, 11.)

<sup>8</sup>Trooper Casto was called to the Logan detachment to administer a polygraph exam to the Appellant. (Supp. Hr'g at 3.)

<sup>9</sup>According to the form, Trooper Casto began to review Appellant's *Miranda* rights with him at 5:15 p.m. (Tr. vol. III, 40.) Trooper Vance took his final statement at 11:50 p.m. (Tr. vol. III, 94.)

Initially, the Appellant denied knowing anything about the crime scene. As the interview progressed, the Appellant changed his story saying he could not recall if he saw Ms. Pelfrey's body or not. Later he told Trooper Casto that he had seen the body covered with a piece of tin and straw. (Supp Hr'g at 12-13; Tr. vol. III, 31.) At one point in the interview the Appellant claimed that he, Ms. Pelfrey, and two other men went to Pine Creek. Shortly thereafter, the Appellant passed out.<sup>10</sup> When he woke the victim's lifeless body was lying next to him. (Supp. Hr'g at 15.)

The Appellant then asked Trooper Casto if he was going to get a lawyer. (Supp. Hr'g at 15.) Trooper Casto told the Appellant that since he was not under arrest, he was not entitled to court-appointed counsel. Trooper Casto then stopped the interview and gave the Appellant the opportunity to call counsel using one of the phones in the detachment. (Tr. vol. III, 33.) As the trooper got up to leave the room, the Appellant said that he did not want counsel and was still willing to talk but only to Trooper Vance.<sup>11</sup> (Supp. Hr'g at 16.) Trooper Casto got Trooper Vance and left the interview room.

Trooper Vance testified that he and the Appellant went through Appellant's statement several times before committing it to writing. (Tr. vol. III, 69.) The Appellant was cooperative. He did not appear to be under the influence of drugs or alcohol, understood the questions, and was able to cogently respond. (Tr. vol. III, 70.) He did not claim that he was too tired to speak, although he asked for something to eat and drink. The Appellant never asked Trooper Vance for an attorney. (*Id.*)

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<sup>10</sup>He speculated that someone had spiked his beer. (Supp. Hr'g at 15.)

<sup>11</sup>Trooper Vance had previously arrested the Appellant on another charge. According to the trooper they had developed some sort of rapport during that time. (Tr. vol. III, 65, 85.)

According to the Appellant's statement, he and Ms. Pelfrey went up Pine Creek to engage in sexual intercourse. (Tr. vol. III, 74.) Once they arrived Ms. Pelfrey asked the Appellant to take his clothes off. As he started to disrobe Ms. Pelfrey laughed. When the Appellant asked her what she was laughing about she responded that it was none of his business. (Tr. vol. III, 74.) The Appellant slapped her across the face. When she told him that the slap did not hurt, the Appellant grabbed a stick and hit her four or five times in the face causing her death. (Tr. vol. III, 75.) After he had killed her, the Appellant poured gas on her body and lit it. (*Id.*) When he discovered that her body had not completely burnt, the Appellant covered it with straw and a piece of tin. (Tr. vol. III, 75.)

At the close of the State's case counsel for the defense moved for a judgment of acquittal arguing that the State failed to provide sufficient evidence to show the Appellant had any involvement in Ms. Pelfrey's death. (Tr. vol. III, 99.) The trial court denied counsel's motion. (Tr. vol. III, 100.)

The defense's case consisted of three prongs: (1) convince the jury that the Appellant's confession was false; (2) alibi; and (3) that another individual, Ada Sloane, had actually killed Ms. Pelfrey. At the close of the defense's case, the State called two rebuttal witnesses. The defense again moved for a judgment of acquittal which was denied by the trial court.

### III.

#### ARGUMENT

##### A. THE STATE PROVED THE *CORPUS DELICTI* OF THE OFFENSE.

###### 1. The Standard of Review.

This Court has held:

In syllabus point 4 of *State v. Hall*, 172 W. Va. 138, 304 S.E.2d 43 (1983), this Court established the criteria necessary to prove *corpus delicti*: “To prove the *corpus delicti* in a case of homicide two facts must be established: (1) the death of a human being and (2) criminal agency as its cause. While the former need be proven by either direct evidence or presumptive evidence ““of the strongest kind,”” the latter “may be established by circumstantial evidence or by presumptive reasoning from the adduced facts and circumstances.” *Hall*, 172 W. Va. at 144, 304 S.E.2d at 249 (citations omitted).

*State v. Garrett*, 195 W. Va. 630, 640, 466 S.E.2d 481, 491 (1995), citing *State v. Hall*, 172 W. Va. 138, 304 S.E.2d 43 (1983).

We review *de novo* a trial court’s determination of whether the State met its burden under the *corpus delicti* rule. *State v. Pineda*, 992 P.2d 525 (Wash. App. 2000).

## 2. Discussion.

A conviction in a criminal case is not warranted by the extrajudicial confession of the accused, alone. The confession must be corroborated in a material and substantial manner by evidence *aliunde* of the *corpus delicti*. The corroborating evidence, however, need not of itself be conclusive; it is sufficient if[,] when taken in connection with the confession, the crime is established beyond a reasonable doubt.

Syl. pt. 1, *State v. Blackwell*, 102 W. Va. 421, 135 S.E. 393 (1926).

The Appellant first contends that the State’s conviction rests solely upon his uncorroborated confession without proof of the *corpus delicti*:

The Prosecuting Attorney presented no corroborating evidence to back up the statement given by the defendant. The prosecutor merely presented evidence of the scene where the body was discovered through the testimony of various police officers who investigated the death, and proved that Mr. Gilman made a statement to the State Police.

Appellant’s Brief at 6.

The Appellant also points to the lack of corroborating forensic evidence linking the Appellant with the victim’s body or the crime scene. “There was no evidence presented by the State

that linked any evidence or DNA between Mark Gilman, his vehicle, home, and the victim's body and the crime scene." Appellant's Brief at 6.

The Appellant understates the quantity and nature of corroborative evidence adduced by the State at his trial. Under the *corpus delicti* rule the evidence need only suggest that Ms. Pelfrey is dead and that her death was caused by the criminal act of another. *Johnson v. State*, 299 S.W.3d 491 (Tex. App. 1999). The corroborating evidence "need not be sufficient to support a conviction, but it must provide *prima facie* evidence of the crime" or support a "logical and reasonable inference that the crime occurred." *State v. Brockob*, 150 P.3d 59, 68 (Wash. App. 2006).

Proof of the identity of the perpetrator of the act or crime is not part of the *corpus delicti* of the crime. Rather, it is sufficient to show that someone committed the crime. *People v. Konrad*, 536 N.W.2d 517, 520 (Mich. App. 1995); *Watkins v. Commonwealth*, 385 S.E.2d 50, 54-55 (Va. 1989); *State v. Edwards*, 767 N.W.2d 784 (Neb. 2009). The position that the *corpus delicti* of a crime includes the identity of the perpetrator is "too absurd indeed to be argued with, because it would require that the entire crime be proved before a confession could ever be admitted." *Konrad*, 536 N.W.2d at 520.

The State proved both prongs of the murder's *corpus delicti*. While looking for firewood in a rural and deserted part of Logan County, Barney Shephard found the charred remains of the victim covered in straw. (Tr. vol. II, 98.) Upon returning to the crime scene with the police, Mr. Shephard noticed that someone had again covered the body with straw, and placed a piece of tin and metal grill on top. (Tr. vol. II, 99-100.) Shephard testified that he was gone approximately an hour. (Tr. vol. II, 100.) The Appellant's home was the closest to the crime scene. (Tr. vol. II, 120.)

Medical Examiner James Kaplan testified that Ms. Pelfrey died from blunt force trauma caused by three powerful blows to the left side of her head. He opined that the victim had been murdered and that the cause of death was homicide. (Tr. vol. III, 15.) Her body was so badly burnt that she was identified by the fingerprint of the fourth digit of her right hand. (Tr. vol. III, 10.) During his canvass Trooper Chris Holbert noticed two empty large five or six gallon gas cans setting in the middle of the Appellant's driveway. (Tr. vol. II, 120-22.)

The most direct connection between the Appellant and the victim's murder came from the Appellant's own mouth. While at the Logan detachment he confessed that he picked up the victim at Cora in Logan County and drove her up to Pine Creek. The victim asked him to take his clothes off. Once he had disrobed she laughed. The Appellant grabbed a stick and hit her four or five times causing her to drop to the ground. When he could not find a heartbeat, the Appellant panicked and returned to his house. He returned an hour later with a gas can and some straw. After pouring the gasoline over her body he set it on fire. An hour later, after discovering that the victim's body had not completely burnt, the Appellant covered it with straw and a piece of tin and left. (Tr. vol. III, 74-75.)

Before obtaining the Appellant's confession the investigating officers also investigated two of the victim's roommates, Patty Maynard and Ada Sloane. (Tr. vol. II, 73-76.) The officers took statements from all of the victim's roommates, and examined stains on a mattress alleged to be blood. (Tr. vol. II, 75.) The roommates bought the mattress used, and although it had bloodstains on it, they pre-dated the murder. (Tr. vol. II, 75.)

The record clearly demonstrates that the State corroborated the Appellant's confession with sufficient evidence of the *corpus delicti*. During the investigation of the victim's murder the

Appellant confessed. His confession was consistent with the physical evidence recovered by the officers. The victim was killed by repeated blows to the head. The Appellant admitted hitting the victim several times with a blunt object. The victim's body was covered with straw, and a piece of tin. The victim admitted covering the victim's body with straw and tin. The victim's body was badly charred when found. The Appellant admitted setting the victim's body on fire. Trooper Holbert found two empty gas cans setting in the victim's driveway.

The Appellant's assignment of error is without merit and should be summarily denied.

**B. THE EVIDENCE SUPPORTING APPELLANT'S CONVICTION WAS SUFFICIENT AS A MATTER OF LAW.**

**1. The Standard of Review.**

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syl. pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

**2. Discussion.**

The Appellant next claims that the State failed to adduce constitutionally sufficient evidence in support of his second degree murder conviction. Appellant's assignment of error is so insufficiently pled this Court should dismiss it as a matter of course. Without specifying what they may be, the Appellant claims that the State's case has many loopholes. Appellant's Brief at 8. The Appellant also claims that the victim was seen with quite a few individuals shortly before and shortly after her death. He never specifies who these individuals were.

This Court has held that “[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” *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

Even if this Court were to consider the substance of the Appellant’s claim, the outcome is the same. Murder in the Second Degree is the unlawful, intentional killing of another, with malice, but without deliberation and premeditation. *State v. Slonaker*, 167 W. Va. 97, 102, 280 S.E.2d 212, 215 (1981). *See also* W. Va. Code § 61-2-1. The Appellant murdered Ms. Pelfrey by repeatedly striking her with a large stick. Dr. Kaplan testified that she died from four to five blows from a blunt instrument. The Appellant attempted to dispose of the body by burning it and then covering it with straw. Barney Lee Shephard found the victim’s charred body on Pine Creek, the same place the Appellant admitted to taking the victim before murdering her. While canvassing the scene Trooper Holbert found two empty gas cans in the Appellant’s driveway. When he asked to speak with him, the Appellant responded, “You guys aren’t here for the burnt girl.” (Tr. vol. II, 122.) That same day the Appellant spoke with Trooper A.S. Perdue at the Logan detachment. (Tr. vol. II, 164.) During questioning the Appellant said that he did it. (Tr. vol. II, 169.) He quickly retracted that statement only to confess to Trooper Vance later that week. (Tr. vol. II, 170.)

Given the quantity and quality of the State’s evidence, particularly the Appellant’s confession, a reasonable juror looking at the totality of the record could have found the Appellant guilty of murder.

### **C. THE APPELLANT’S CONFESSION WAS ADMISSIBLE.**

#### **1. The Standard of Review.**

“It is axiomatic in West Virginia jurisprudence that the prosecution must show by ‘affirmative evidence’ as a condition precedent to its admissibility that the voluntariness of the

confession is established by a preponderance of the evidence.” *State v. Farley*, 192 W. Va. 247, 252, 452 S.E.2d 50, 55 (1994), quoting *State v. Zaccario*, 100 W. Va. 36, 129 S.E. 763 (1925).

“A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.” Syl. pt. 1, *State v. Farley* (citations omitted).

This Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.

*Id.*, Syl. pt. 2.

When ruling on a motion to suppress an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court’s factual findings are reviewed for clear error.

Syl. pt. 1, *State v. Lacy*, 203 W. Va. 9, 12, 506 S.E.2d 46, 49 (1998).

## 2. Discussion.

The Appellant next claims that the trial court erred in not suppressing his confession. Initially, the Appellant claims that his *Miranda* waiver was not knowing and intelligent because the investigating officers failed to inform him of the nature of the charges before obtaining the waiver. Appellant’s Brief at 8. See *State v. Goff*, 169 W. Va. 778, 784 n.8, 289 S.E. 2d 473, 479 n.8 (1982) (“We believe that some information should be given to the defendant as to the nature of the charge in order that he can determine whether the intelligently and voluntarily exercise of waive his *Miranda* rights.”).

In *Miranda v. Arizona*, *supra*, the United States Supreme Court prescribed a set of “procedural safeguards” designed to protect persons suspected of criminal wrongdoing from what the Court viewed as the inherent compulsion of custodial interrogation, and thereby to enable such persons freely to exercise their privilege against compelled self-incrimination.<sup>12</sup> *Miranda* did not prohibit all custodial interrogation, it established a specific procedure by which a suspect could waive his privilege and answer questions posed by the police.

The first inquiry in evaluating a *Miranda* waiver is whether the suspect knowingly and intelligently waived his rights. The Nebraska Supreme Court has concisely defined this requirement: A defendant has intelligently waived his *Miranda* rights when “at the time of the waiver, the suspect possessed the capacity to understand and act in response to the *Miranda* warning given by the interrogating officer.” *State v. Norfolk*, 381 N.W.2d 120, 127 (Neb. 1986) *citing* 1 W. LaFare & J. Israel, *Criminal Procedure* § 6.9(b) (West 1984). An intelligent waiver does not necessarily mean a prudent one. *See Collins v. Brierly*, 492 F.2d 738 (3d. Cir. 1974) (“It is not in the sense of shrewdness that *Miranda* speaks of an ‘intelligent’ waiver, but rather in the tenor that the individual must know of his available options before deciding what he thinks best suits his particular situation.

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<sup>12</sup>“These procedural safeguards require that a suspect be warned, prior to custodial questioning:

1. that he has the right to remain silent.
2. that anything he says can be used against him in a court of law.
3. that he has the right to an attorney.
4. if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.
5. if he indicates in any manner that he does not wish to be further interrogated or wishes counsel to be present during the interrogation the police must cease questioning the suspect.”

*Miranda*, 384 U.S. at 444-45.

In this context intelligence is not equated with wisdom.”) (*citing United States v. Hall*, 369 F.2d 841 (4th Cir. 1968)).

A waiver must also be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986). If the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension, a court may properly conclude that a suspect has waived his *Miranda* rights. *See Fare v. Michael C.*, 442 U.S. 707, 724-725 (1979); *Moran*, 475 U.S. at 421-22.

In addition to the “intelligent, knowing, and voluntary” requirements adopted by the United States Supreme Court in *Miranda* and its progeny, this Court has held that the self-incrimination clause to the State Constitution affords suspects additional protection. *See W. Va. Const. art. 3, § 5*. As part of the totality of the circumstances, this Court will consider whether a suspect knew the nature of the charge against him before waiving his rights. *State v. McDonough*, 178 W. Va. 1, 3, 357 S.E.2d 34, 36 (1987) (“In *Goff*, we stated our belief ‘that *some information* should be given to the defendant as to the nature of the charge in order that he can determine whether to intelligently and voluntarily exercise or waive his *Miranda* rights.’”) (*quoting State v. Goff*, 169 W. Va. 778, 784 n.8, 289 S.E.2d 473, 477 n.8 (1982)).

This Court has repeatedly stated that it will examine the totality of the circumstances when making its determination. *See Goff*, 169 W. Va. at 784, 289 S.E.2d at 477 (information given to suspect by police as to nature of charge only one factor which the Court should consider in the totality of the circumstances); *see also Beasley v. United States*, 512 A.2d 1007, 1013 (D.C. 1986) (extent of suspect’s understanding of the thrust of the interrogation is only one factor in the totality

of the circumstances surrounding the making of a confession) (*citing Goff*). Nor is the State required to prove that the police informed the appellant of each and every crime under investigation in order to prove that he knowingly and intelligently waived his *Miranda* rights. *See Goff*, 169 W. Va. at 784 n.8, 289 S.E.2d at 477 n.8 (suspect should be given “some information” as to the nature of the charge); *see also Commonwealth v. Dixon*, 379 A.2d 553, 556 (Pa. 1977) (if state has not provided suspect with information regarding the nature of the *investigation*, it may still prove knowing and intelligent waiver of *Miranda* in any number of ways including “the establishment of the circumstances attending the interrogation, such as prior statements of the suspect, or that the interrogation follows hard upon the criminal episode and there is no circumstance lending ambiguity to the direction and purpose of the questioning.”); *Commonwealth v. Travaglia*, 467 A.2d 288, 293 (Pa. 1983), *overruled on other grounds by Lesko v. Lehman*, 925 F.2d 1527 (3d. Cir. 1991) (this Court has held that a suspect must have “an awareness of the general nature of the transaction giving rise to the investigation . . . .”) (citations omitted).

In the case-at-bar the Appellant, who had previously been questioned by Troopers Holbert and Perdue<sup>13</sup> regarding Ms. Pelfrey’s homicide, voluntarily came to the Logan Police Detachment at approximately 4:00 p.m. to recover two knives. (Supp. Hr’g at 7.) While at the station the Appellant agreed to submit to a polygraph exam. (Supp. Hr’g at 8.) The exam began at approximately 5:15 p.m. (Supp. Hr’g at 4.)

Before administering the polygraph exam Trooper Casto advised the Appellant, both orally and in writing, that he was not under arrest and was free to leave at any time. Trooper Casto clearly told him that he was being questioned about a homicide. (Supp. Hr’g at 7; Tr. Vol. III, 26.) He then

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<sup>13</sup>Indeed, the Appellant had told Trooper Perdue that “he did it.”

*Mirandized* the Appellant, advising him of each his rights both verbally and in writing. (Supp. Hr'g at 8; Tr. vol. III, 22.) The Appellant acknowledged receiving each one by placing his initials next to it. (Tr. vol. III, 25.) Trooper Casto described the Appellant as coherent and sober. (Supp. Hr'g at 5; Tr. vol. III, 26.)

Nor was the Appellant in custody when he confessed. The United States Supreme Court held the following regarding determining whether an interrogation is custodial:

“Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”

*Yarborough v. Alvarado*, 541 U.S. 652, 663, 124 S. Ct. 2140, 2149 (2004) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 465 (1995)). In Syl. pt. 2, *State v. Middleton*, 220 W. Va. 89, 93, 640 S.E.2d 152, 156 (2006), this Court held the following:

The factors to be considered by the trial court in making [a determination of whether a custodial interrogation environment exists], while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest.

(quoting *State v. Preece*, 181 W. Va. 633, 641-42, 383 S.E.2d 815, 823-24 (1989), *overruled on other grounds by State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 82 (1999)).

The objective circumstances of the interrogation, not the subjective intentions of the interrogating officer or the subjective understanding of the person being questioned, are evaluated in determining whether the person was in custody. “A policeman’s unarticulated plan has no

bearing on the question whether a suspect was 'in custody' at a particular time"; rather, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). Both this Court and the United States Supreme Court have made it clear that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming the suspicions remain undisclosed) is not relevant for purposes of determining custody. *State v. Potter*, 197 W. Va. 734, 744, 478 S.E.2d 742, 752 (1996); *Stansbury v. California*, 511 U.S. 318, 320 (1994).

The United States Supreme Court has defined a "reasonable person" as a "reasonably innocent person." *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (emphasis added); *A.M. v. Butler*, 360 F.3d 787, 796 (7th Cir. 2004) (Actions of police officers towards defendant who voluntarily came to the police station, was treated well, not handcuffed, photographed or fingerprinted did not give rise to circumstances which would lead a reasonable, innocent person to believe he was under arrest.).

An unambiguous statement from a police officer that an individual is not under arrest and free to go is powerful evidence that a reasonable innocent person would not consider himself under arrest "if the individual being questioned were innocent, and was told directly he might leave, in the absence of evidence to the contrary the interrogation was non-custodial as a matter of law." *United States v. Muegge*, 225 F.3d 1267, 1271 (11th Cir. 2000). See also *United States v. Czichray*, 378 F.3d 822, 826 (8th Cir. 2004) (Statement by officer that individual not in custody powerful evidence that a reasonable person was free to terminate the interview.); *United States v. Collins*, 972 F.2d 1385, 1405 (5th Cir. 1992) (finding defendants not in custody when they were told "explicitly and repeatedly" that they were not under arrest and were free to leave.).

The Appellant was not transported to the detachment by law enforcement; he came voluntarily with a friend to recover his knives.<sup>14</sup> When asked to submit to a polygraph, he agreed. Before the exam the Appellant signed a *Miranda* waiver form advising him that he was not under arrest and could leave the detachment at any time. (Supp. Hr'g at 6-7.) None of the troopers used promises, threats or coercion to extract Appellant's cooperation. During his post-examination interview with Trooper Casto, the Appellant asked to speak with Trooper Vance. Trooper Casto accommodated him.

Trooper Vance stopped the interview several times so that the Appellant could get something to eat and drink. (Tr. vol. III, 70.) No other officers were present when he took the Appellant's statement. (Tr. vol. III, 83.) Although the Appellant testified that he confessed to a murder he did not commit because he was told it was the only way the investigating officers would allow him to leave the detachment,<sup>15</sup> apart from his own self-serving testimony, there is no evidence corroborating his claim. Clearly the jury rejected his testimony.

Nor was the Appellant denied his right to counsel. Trooper Casto testified that the Appellant asked him if he was going to give him a lawyer. (Supp. Hr'g at 15.) Casto responded that he could not arrange for appointed counsel because the Appellant was not under arrest, but if the Appellant wanted to contact counsel he could use one of the phones in the detachment. The Appellant then told Trooper Casto that he wanted counsel. Trooper Casto ended the interview, and got up to leave

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<sup>14</sup>In fact, he returned a second time after the officer at the detachment failed to locate his knives.

<sup>15</sup>In fact, the investigating officers previously questioned the Appellant at the detachment and, absent any inculpatory statements, drove him home.

the room. As he was leaving the Appellant withdrew his request for counsel and asked to speak with Trooper Vance. (Supp. Hr'g at 15-16.)

The trooper's assessment of Appellant's situation was correct. In *State v. Bradshaw*, 193 W. Va. 519, 530, 457 S.E.2d 456, 467 (1995), this Court held that a suspect has no right to counsel pursuant to *Miranda* unless he is subjected to custodial interrogation:

[T]he *Miranda* right to counsel has no applicability outside the context of custodial interrogation. Therefore, until the defendant was taken into custody, any effort on his part to invoke his *Miranda* rights was, legally speaking, an empty gesture. We believe the "window of opportunity" for the assertion of *Miranda* rights comes into existence only when that right is available.

See also Syl. pt. 3, *State v. Middleton, supra* ("A police officer may continue to question a suspect in a noncustodial setting, even though the suspect has made a request for counsel during the interrogation, so long as the officer's continued questioning does not render statements made by the suspect involuntary.").

Nor was Appellant's statement involuntary. This Court has held that "[t]he State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case." Syl. pt. 5, *State v. Starr*, 158 W. Va. 905, 906, 216 S.E.2d 242, 244 (1975). "Whether an extrajudicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the totality of the circumstances." Syl. pt. 2, *State v. Bradshaw*, 193 W. Va. at 523, 457 S.E.2d at 460.

In the case-at-bar the defense called Dr. Robert Miller, an expert forensic psychiatrist specializing in false confessions.<sup>16</sup> Dr. Miller evaluated the Appellant on November 13, 2006, and prepared a report on November 15, 2006.<sup>17</sup> (Supp. Hr'g at 4.) Dr. Miller claimed there were twenty-five variables<sup>18</sup> and factors associated with persons prone or liable to make false confessions. (Supp. Hr'g at 6.) Of these twenty-five, Dr. Miller opined that the Appellant possessed fourteen. (*Id.*) Dr. Miller relied almost entirely on self-reporting as a basis for his opinion. (Supp. Hr'g at 25-26; Tr. vol. III, 118-19, 128.) These included sleep deprivation,<sup>19</sup> marijuana use,<sup>20</sup> and an IQ of

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<sup>16</sup>By his own admission, Dr. Miller's testimony had nothing to do with the voluntariness of the Appellant's confession. According to Dr. Miller a voluntary confession obtained from an individual possessing certain qualities may be false:

In other words, typically what I'm asked to do is jury education. To be here in front of a jury to discuss that when false confessions occur they occur commonly, that they're highly prejudicial and that certain people are more likely to do them than others on what those factors may be. Whether or not this particular individual fits that profile or not, and if that is all that exists, then there may be a greater burden placed upon the facts of the case in order to reach the threshold beyond reasonable doubt.

(Supp. Hr'g at 51.)

<sup>17</sup>Approximately ten months after the murder. (Tr. vol. III, 120.)

<sup>18</sup>When asked where these twenty-five variables originated, all Dr. Miller could say was that they came from a text book called the Psychology of False Confessions. He could not recall the author's name, nor could he describe the methodology used to come up with these twenty-five factors. (Supp. Hr'g at 26-27.)

<sup>19</sup>*United States v. Casal*, 915 F.2d 1225 (8th Cir. 1990) (confession made by suspect who had not slept in five days admissible as suspect was able to intelligently converse with the police).

<sup>20</sup>*See State v. Young*, 552 P.2d 905, (Kan. 1976) (mere evidence of marijuana use absent evidence that drug actually impaired suspects mental faculties to point suspect unable to knowingly and voluntarily confess not sufficient); *United States v. Banks*, 282 F.3d 699, 706 (9th Cir. 2002) (confession made in a drug or alcohol induced state still voluntary if remains product of rational intellect or free will).

83.<sup>21</sup> The doctor described the Appellant as a functional illiterate reading at a third grade level, and spelling at a first grade level. (Tr. vol. III, 105.) Dr. Miller described the Appellant as possessing a subnormal intellect, submissive to authority. (Supp. Hr'g at 14.)

The State called Clinical Psychologist David A. Clayman, Ph.D. as a rebuttal witness. (Tr. vol. III, 171.) Dr. Clayman was present for Dr. Miller's testimony. He also reviewed Dr. Miller's report. He found Dr. Miller's methodology fundamentally flawed. Dr. Clayman opined that, although Dr. Miller's conclusions, might have served as good starting points, the lack of corroboration, and his reliance on self-reporting, substantially weakened his conclusions. (Tr. vol. III, 181, 189.)

Q: In short, [Dr. Miller] didn't go far enough to be able to make that opinion in your opinion; is that correct?

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<sup>21</sup>The State's rebuttal witness, Dr. David Clayman, testified that 83 constitutes a low-average score. (Tr. vol. III, 180-81.) This relevance of this factor is further weakened by the lack of corroborative evidence such as school records. (*Id.*)

In *State v. Adkins*, 170 W. Va. 46, 53-54, 289 S.E.2d 720, 727 (1982), this Court held:

It is the general rule that the intelligence of a person making a confession is but one factor to be considered in determining whether a waiver of rights was voluntary. The intelligence of the person confessing is not a controlling factor giving rise to a *per se* rule.

\* \* \*

[W]e hold that where a person of less than normal intelligence does not have the capacity to understand the meaning and effect of his confession, and such lack of capacity is shown by evidence at the suppression hearing, it is error for the trial judge not to suppress the confession. However, where the defendant's lower than normal intelligence is *not shown clearly to be such as would impair his capacity to understand the meaning and effect of his confession, said lower than normal intelligence is but one factor to be considered by the trial judge in weighing the totality of the circumstances surrounding the challenged confession.* (emphasis supplied.)

A: I believe that there's not sufficient data to even render a preliminary opinion, except to say these variables have been associated with people that might be coerced and it would be worthwhile to investigate it further. That's all I would do.

(Tr. vol. III, 190.)

Trooper Casto informed the Appellant of his rights under *Miranda*. The Appellant did not appear to be under the influence of any intoxicants and answered all of the officer's questions coherently. (Supp. Hr'g at 5.) He did not appear to be tired, anxious or nervous. (Supp. Hr'g at 28; Supp. Hr'g at 15.) The Appellant was not handcuffed nor did he suffer actual or threatened physical abuse. (Supp. Hr'g at 8, 18.) He was afforded the opportunity to use a telephone, and was given food and drink. (Supp. Hr'g at 15, 30-31.) Not only did the Appellant have prior exposure to the criminal justice system, he was acquainted with the trooper who took his statement.

**D. JUROR VANCE'S CONTINUED PRESENCE ON THE JURY DID NOT PREJUDICE THE APPELLANT.**

**1. The Standard of Review.**

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

*State v. Miller*, 197 W. Va. 588, 600-01, 476 S.E.2d 535, 547-48 (1996).

It is within the sound discretion of the court in the trial of a felony case, if a juror, at any time after he is sworn, and before verdict, becomes from any cause, unable to discharge his duties as such juror, to discharge such juror, and substitute another qualified juror in his place[.]

Syl pt.1, in part, *State v. Davis*, 31 W. Va. 390, 7 S.E. 24 (1888).

2. **Discussion.**

Appellant next claims that the trial court erred when it allowed a juror, who unwittingly presided over the victim's funeral, to remain on the jury until deliberation. The juror, Juror Vance, was a preacher who had officiated over the funeral of Mitchell Dowden. (Tr. vol. I, 51.) Because Mr. Dowden's family could not afford a burial plot, Juror Vance's church donated one. (Tr. vol. I, 52.) According to counsel for the State Mr. Dowden's sister died at about the same time Mr. Dowden died. Her body was cremated and the ashes were buried with her brother. (Tr. vol. I, 52.) Mr. Dowden's sister was Ms. Pelfrey. (*Id.*)

The first day of trial, during a lunch break just prior to opening statements, Juror Vance was approached by an unidentified teenage boy who asked him if he had presided over Mr. Dowden's funeral. (Tr. vol. I, 52.) At that point Juror Vance recalled Mr. Dowden's sister name as Mary. (Tr. vol. I, 53.) Juror Vance did not know that Mary was the victim. (*Id.*) He immediately reported this contact to the trial court bailiff who informed the court. (Tr. vol. I, 51.) After discussing the matter with counsel, the court called the juror back to chambers. (Tr. vol. I, 52.)

Juror Vance told that court that his prior experience would not affect his ability to remain neutral. (*Id.*) Defense counsel, out of an abundance of caution, moved to strike the juror for cause. (Tr. vol. I at 57.) In light of defense counsel's objection, the trial court took this issue under advisement. (Tr. vol. I, 57.) Defense counsel did not object. At the close of the State's rebuttal, the court struck Juror Vance and replaced him with an alternate. (Tr. vol. V, 3.)

There is no evidence that the trial court abused its discretion. Juror Vance unequivocally stated that he could remain neutral. Although defense counsel moved to strike the juror for cause, she did not object when the trial court reserved judgment. Had she been worried about a tainted jury

that would have been the time to do so. Once the trial court learned of Juror Vance's contact with a third party, it instructed him not to speak to the other jurors. (Tr. vol. I, 56.) Out of an abundance of caution the court granted defense counsel's motion and struck the juror before deliberations began.

**E. COUNSEL FOR THE STATE'S SUMMATION WAS PROPER.**

**1. 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).

**2. Discussion.**

Appellant next claims that counsel for the State misled the jury during his summation. Counsel mentioned that the Appellant graduated from Chapmanville High School during his rebuttal. (Tr. vol. V, 46.) Counsel for the defense did not object. This Court has held, "[a]s a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears on the record, and errors assigned for the first time in appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there." Syl. pt. 17, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974).

Clearly, the Appellant has waived this assignment of error.

IV.

CONCLUSION

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

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Appellee,*

By counsel

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'R.D. Goldberg', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Appellee's Brief* was mailed to counsel for the Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 2nd day of April, 2010, addressed as follows:

To: Susan J. Van Zant, Esq.  
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ROBERT D. GOLDBERG