
NO. 35339

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

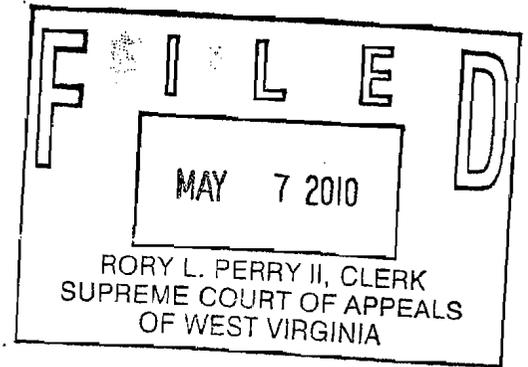
STATE OF WEST VIRGINIA,

Appellee,

v.

RICHARD LEWIS MORRIS,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

R. CHRISTOPHER SMITH
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7269
State Capitol, Room E-26
Charleston, West Virginia 25305
304-558-2021

Counsel for Appellee

TABLE OF CONTENTS

	Page
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
II. STATEMENT OF FACTS	2
III. RESPONSE TO ASSIGNMENTS OF ERROR	5
IV. ARGUMENT	6
A. THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE CIRCUIT COURT'S ALLOWING THE TESTIMONY OF DEPUTY SHERIFF VINCENT TIONG REGARDING THE PLACEMENT OF BRUISES ON APPELLANT. THE TESTIMONY WAS EITHER NOT HEARSAY OR, AT WORST, HARMLESS ERROR	6
1. The Standard of Review	6
2. The Circuit Court Did Not Abuse Its Discretion in Allowing the Testimony of Deputy Sheriff Tiong Regarding the Nurse Telling Him Where Appellant's Bruises Were Located	7
B. THERE WAS NO ERROR ON THE PART OF THE CIRCUIT COURT IN ALLOWING DAVID BENNETT TO TESTIFY REGARDING THE BRUISING SUFFERED BY APPELLANT	9
1. The Standard of Review	9
2. There Was No Abuse of Discretion on the Part of the Circuit Court in Allowing David Bennett's Testimony. He Was Not an Expert Witness, and It Was an Appropriate Application of West Virginia Rule of Evidence 701	10
C. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION IN LIMINE REGARDING THE VEHICLE HE DROVE ON THE NIGHT OF THE ACCIDENT, AND HIS DUE PROCESS RIGHTS WERE NOT VIOLATED. THIS IS BECAUSE NO DISCOVERY VIOLATION OCCURRED ON THE PART OF THE STATE	12

1.	The Standard of Review	13
2.	There Was No Abuse of Discretion on the Part of the Circuit Court in Its Denial of Appellant's Motion In Limine Regarding the Vehicle He Was Driving on the Evening of the Accident. There Was No Discovery Violation by the State	14
D.	NO RECORD HAS BEEN ESTABLISHED REGARDING APPELLANT'S MOTION FOR RECONSIDERATION, AND THIS COURT HAS NO JURISDICTION TO HEAR THE MATTER AT THIS TIME	16
1.	The Standard of Review	16
2.	There Has Been No Lower Court Ruling on Appellant's Motion, and This Court Has No Jurisdiction to Hear This Matter at This Time	17
V.	CONCLUSION	18

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 193 (1963)	12, 15
<i>State ex rel. McGraw v. Telecheck Services, Inc.</i> , 213 W. Va. 438, 582 S.E.2d 885 (2003)	17
<i>State v. Guthrie</i> , 205 W. Va. 326, 518 S.E.2d 83 (1999)	6, 9, 12, 13
<i>State v. Helmick</i> , 201 W. Va. 163, 495 S.E.2d 262 (1997)	8
<i>State v. Hinchman</i> , 214 W. Va. 624, 591 S.E.2d 182 (2003)	13
<i>State v. Louk</i> , 171 W. Va. 639, 301 S.E.2d 596 (1983)	6, 9, 13
<i>State v. Nichols</i> , 208 W. Va. 432, 541 S.E.2d 310 (1999)	10, 12
<i>State v. Osakalumi</i> , 194 W. Va. 758, 461 S.E.2d 504 (1995)	13, 14, 15
<i>State v. Peyatt</i> , 173 W. Va. 317, 315 S.E.2d 574 (1983)	6, 9, 13
<i>State v. Phelps</i> , 197 W. Va. 713, 478 S.E.2d 563 (1996)	8
<i>State v. Wood</i> , 194 W. Va. 525, 460 S.E.2d 771 (1995)	10, 12
<i>Youngblood v. West Virginia</i> , 547 U.S. 867, 126 S. Ct. 2188 (2006)	16
STATUTES:	
W. Va. Code § 17(C)-5-2(a)(2)	1
W. Va. Code § 17(C)-5-2(a)(3)	1
W. Va. Code § 58-5-1	17
OTHER:	
W. Va. R. Crim. P. 16(a)(1)(E)	10, 12

W. Va. R. Evid. 801 7

W. Va. R. Evid. 701 11

NO. 35339

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

RICHARD LEWIS MORRIS,

Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

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

This is an appeal by Richard Lewis Morris (hereinafter "Appellant") from the January 21, 2009, order of the Circuit Court of Jefferson County (Sanders, J.), which sentenced him to a term of not less than two nor more than ten years in the State penitentiary upon his conviction by a jury of one count of driving under the influence causing death in violation of West Virginia Code § 17(C)-5-2(a)(3) and one year in a regional jail for each of two counts of driving under the influence causing injury in violation of West Virginia Code § 17(C)-5-2(a)(2); each term to be served consecutively. On appeal, Appellant claims that the circuit court committed various errors, denying him a fair trial.

II.

STATEMENT OF FACTS

This case involves a fatal car accident that occurred on September 20, 2007, on Route 340 in Jefferson County, West Virginia. That night, Deputy Sheriff Vincent Henry Tiong responded to a call of a vehicular accident with people still entrapped. (Tr. 100.) When he arrived at the scene, he observed a white car in the left lane of the intersection of Route 340 and Halltown Road and a red car on its rooftop on the shoulder. (*Id.*) The first vehicle he observed in the left lane was a Nissan Maxima that was registered to Tammie Green-Morris, then wife of Appellant. (*Id.* at 101-02.) The deputy sheriff immediately saw both she and Appellant at the accident scene. (*Id.* at 101.)

Deputy Sheriff Tiong testified that when he arrived Cynthia Hose was in the red vehicle that was on its rooftop. David Weiss, the other person in the red car, was receiving medical attention from Emergency Medical Services (EMS) employees at the time. (*Id.* at 103-04.) Ms. Hose was the driver of this red vehicle that was overturned. (*Id.* at 103.)

At this point, Deputy Sheriff Tiong spoke with Appellant about the accident. The police officer noted that Appellant's eyes were glassy and there was a strong odor of alcohol on his breath. (*Id.* at 106.) When discussing the accident with Appellant, Deputy Sheriff Tiong said that the latter appeared to be laughing. (*Id.*) The deputy sheriff asked what Appellant was laughing about and he replied that nothing was funny but later said, "the accident." (*Id.* at 107.) Deputy Tiong also noticed that Ms. Green-Morris had a strong smell of alcohol on her breath, suffered from bloodshot eyes and had slurred speech. (*Id.*)

The deputy sheriff determined the causes of the accident to be speed and failure to maintain control. (*Id.* at 108.) In his investigation, Deputy Sheriff Tiong discovered that Ms. Hose had severe internal injuries due to this accident. Ms. Hose eventually died as a result of blunt force trauma due to the vehicular accident. (*Id.* at 110-11.)

Paula Bryant, the medical technologist at Jefferson Memorial Hospital, performed a toxicology test on Appellant's blood. The result was a blood alcohol count of .20 grams deciliter, which is above the legal limit for operating a motor vehicle. (*Id.* at 129.)

David Bennett, the phlebotomus at the hospital, drew blood from Appellant. He noted bruising on Appellant's chest. (*Id.* at 137.) He testified that the bruising he observed on Appellant's chest resembled that from a seat belt going from his left shoulder to his right hip. (*Id.*) This manner of bruising would indicate that Appellant was the driver of the vehicle that crashed into the red car driven by Ms. Hose. Mr. Bennett also testified that Appellant appeared intoxicated and acted in a combative manner. (*Id.* at 138.)

According to Tammie Green-Morris, Appellant was driving the Nissan Maxima that night. (*Id.* at 145-46.) She testified that she and Appellant had been drinking the majority of the day before the accident occurred that evening. (*Id.* at 145.) She stated that Appellant was driving 120 m.p.h., according to the speedometer. (*Id.* at 146.) She testified that she pleaded with him to slow down and began yelling out of the car window for people to call the police because she was scared. (*Id.*) After this, the impact with the red vehicle occurred. Ms. Green-Morris testified that after the impact, Appellant asked her to run from the scene. (*Id.*) She was transported to Jefferson Memorial Hospital as well, and then later taken to Winchester Medical Center. (*Id.* at 147.) Ms. Green-Morris testified that she also suffered from chest bruising; an injury from her right shoulder to underneath

her left breast, which would indicate that she was the passenger in the car. (*Id.* at 148.) She also stated that she repeatedly asked Appellant to pull over the vehicle and let her drive because he was going at such a high rate of speed. (*Id.* at 152.) Ms. Green-Morris was eventually convicted of knowingly permitting driving under the influence. (*Id.* at 151.)

David Weiss, the passenger in the red vehicle that was struck, remembered turning onto Route 340 from Shepardstown Pike, and the next thing he recalled was hearing someone say they saw someone moving in the car and his being upside down in it. (*Id.* at 168.) He testified that he saw Cynthia Hose underneath the steering wheel when he got out, and knew that he was not able to help her escape. (*Id.* at 168-69.) An ambulance then took him from the scene, followed by a helicopter for Ms. Hose. (*Id.* at 169.) Both were taken to INOVA Fairfax in Falls Church, Virginia. (*Id.*) He suffered multiple lacerations on his arms, three broken ribs, and a contusion on his spine. (*Id.* at 170.) According to Mr. Weiss, Ms. Hose suffered from a severed spinal cord and brain damage before she died. She also had her spleen removed and lost massive amounts of blood as a result of the accident. (*Id.*)

Two witnesses, Stacey Tothill and Jim Lewis, testified that the Nissan Maxima sped past them at a very high rate of speed and then they saw the accident scene later. (*Id.* at 120-31, 141-42.) Mr. Tothill testified that he estimated the Nissan Maxima was traveling more than 20 m.p.h than was the speed limit, and Mr. Lewis stated that it passed him at a speed of more than 100 m.p.h. (*Id.* at 133, 141.)

On October 8, 2008, the jury found Appellant guilty of one count of driving under the influence causing death and two counts of driving under the influence causing injury. (*Id.* at 214.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

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

- A. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE HEARSAY TESTIMONY THAT APPELLANT'S BRUISES INDICATED HE WAS DRIVING.

The State's Response:

There was no abuse of discretion on the part of the circuit court regarding Deputy Tiong's testimony of Appellant's bruising. It was either not hearsay or, at worst, harmless error.

- B. WHETHER THE CIRCUIT COURT COMMITTED PLAIN REVERSIBLE ERROR BY FAILING TO RULE ON APPELLANT'S MOTION IN LIMINE REGARDING STATE'S WITNESS DAVID BENNETT AND SUBSEQUENTLY ALLOWING HIM TO TESTIFY.

The State's Response:

There was no abuse of discretion by the circuit court in admitting the evidence of David Bennett regarding Appellant's bruising. This was not expert testimony but rather proper observational testimony based on West Virginia Rule of Evidence 701.

- C. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE UNDER *OSAKALUMI* AND *BRADY* MAKING HIS TRIAL FUNDAMENTALLY UNFAIR AND IN VIOLATION OF HIS STATE AND FEDERAL DUE PROCESS RIGHTS.

The State's Response.

There was no discovery violation on the part of the State, and the circuit court did not abuse its discretion in denying this motion.

- D. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO RULE ON APPELLANT'S MOTION FOR RECONSIDERATION.

The State's Response:

There was no circuit court ruling on this motion, and this Court has no original jurisdiction on this matter.

IV.

ARGUMENT

A. THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE CIRCUIT COURT'S ALLOWING THE TESTIMONY OF DEPUTY SHERIFF VINCENT TIONG REGARDING THE PLACEMENT OF BRUISES ON APPELLANT. THE TESTIMONY WAS EITHER NOT HEARSAY OR, AT WORST, HARMLESS ERROR.

There was no abuse of discretion regarding the circuit court allowing Deputy Sheriff Tiong to testify as to what was said by the nurse, Brenda Engle, to him with respect to the placement of bruises on Appellant when the accident occurred. It is highly questionable as to whether this statement could be considered hearsay at all, but rather testimony regarding how the police officer came about arresting Appellant. At worst, if this is considered hearsay, it is harmless error,

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).

2. **The Circuit Court Did Not Abuse Its Discretion in Allowing the Testimony of Deputy Sheriff Tiong Regarding the Nurse Telling Him Where Appellant's Bruises Were Located.**

Appellant contends that the circuit court erred in allowing Deputy Sheriff Vincent Tiong to testify regarding a statement made by Brenda Engle, a treating nurse on the night of the accident, detailing bruising found on his chest; thus, violating his constitutional right to confront witnesses. However, there was no abuse of discretion in the handling of this testimony.

Initially, it is worth noting that this testimony by Deputy Sheriff Tiong is not even hearsay evidence. West Virginia Rule of Evidence 801 defines hearsay as follows:

Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted.*

(Emphasis added.) The exchange during Deputy Sheriff Tiong's testimony with which Appellant takes issue was the following:

Prosecutor: Corporal Tiong, why did you charge Mr. Morris with driving the automobile that caused this accident?

Tiong: I received information from the nurse from marks she observed from him.

Prosecutor: What kind of marks?

Tiong: She observed that there was what appeared to be seat belt marks going up the left area down to the lower right area which showed the possibility of wearing a seat belt in the driver's side.

(Tr. 114; emphasis added.) It is true that Ms. Engle was supposed to testify. (*Id.* at 113.) Appellant correctly points out that she did not. However, according to the State, Ms. Engle defied a subpoena and did not show up for the trial. (*See* Response to Petition for Appeal at 10.) However, this testimony was not to prove the truth of the matter asserted, but rather an explanation as to why the

police officer arrested Appellant and to give background regarding his investigation. In fact, the State asserts the same when Appellant objected to the deputy sheriff's testimony. (Tr. 113.) This was not a statement by Ms. Engle that Deputy Tiong testified to such as, "He [Appellant] was driving." This Court held in *State v. Phelps*, 197 W. Va. 713, 478 S.E.2d 563 (1996), that testimony by police officers involving matters they learned from other persons offered merely to explain prior conduct in carrying out the investigation is not hearsay. *Id.* at 572. This is no different than Deputy Tiong's testimony regarding the marks on Appellant in the case at bar. Therefore, this does not constitute hearsay evidence, and Appellant's right to confront witnesses was not violated.

If this is considered hearsay evidence—which the State does not concede its being so—its admission was harmless error. With respect to harmless error in the admission of hearsay evidence, this Court has held, "An error in admitting hearsay evidence is harmless where the same fact is proved by an eyewitness or other evidence that clearly establishes the defendant's guilt." Syl. Pt. 4, *State v. Helmick*, 201 W. Va. 163, 495 S.E.2d 262 (1997). David Bennett, a phlebotomist at the hospital who drew blood from Appellant, testified for the State. He testified that he noted trauma to Appellant's chest in the form of bruising that was a result of a seat belt. (Tr. 137.) He stated that the bruising went from Appellant's left shoulder to his right hip. (*Id.*) This translates into a bruising caused by a driver's side seat belt, establishing that Appellant was driving the vehicle in question during the night of the accident. If the statement of Brenda Engle given at trial by Deputy Sheriff Tiong is deemed to be hearsay, it is harmless error in accordance with *Helmick*.

Further, if the seat belt testimony given by Deputy Tiong is to be equated with a statement going to the truth of the matter asserted (i.e., "Appellant was driving" testimony), Appellant's wife also testified in the State's case-in-chief that he was the driver. (*Id.* at 146.) So it could be argued

that Tammie Green-Morris' testimony that Appellant was driving also goes to the Deputy Tiong's testimony in question being harmless error if considered impermissible hearsay evidence.

In light of all of this, there was no abuse of discretion on the part of the circuit court, and no error occurred. Thus, Appellant's argument fails on this ground.

B. THERE WAS NO ERROR ON THE PART OF THE CIRCUIT COURT IN ALLOWING DAVID BENNETT TO TESTIFY REGARDING THE BRUISING SUFFERED BY APPELLANT.

Appellant contends that the circuit court erred in allowing the testimony of David Bennett, the phlebotomus who drew blood from him the night of the accident. Specifically, Appellant contends that the admission of testimony Mr. Bennett concerning the bruising Appellant suffered violated the West Virginia Rules of Criminal Procedure and his Due Process rights. His contention is that Mr. Bennett gave expert testimony, yet no notice of this was given and no foundation for his expertise was laid. However, there was no violation, and Mr. Bennett's testimony regarding this was merely based on his observation.

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 action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of

discretion.” Syl. Pt. 6, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

Syl. Pt. 1, *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999).

“ “ “ “Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.” Syl. Pt. 5, *Overton v. Fields*, 145 W.Va. 797 [117 S.E.2d 598 (1960)]. Syl. Pt. 4, *Hall v. Nello Teer Co.*, 157 W.Va. 582, 203 S.E.2d 145 (1974).” Syl. Pt. 12, *Board of Education v. Zando, Martin & Milstead*, 182 W.Va. 597, 390 S.E.2d 796 (1990). Syl. Pt. 3, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).” Syl. Pt. 5, *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994).

Syl. Pt. 4, *State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771 (1995).

2. **There Was No Abuse of Discretion on the Part of the Circuit Court in Allowing David Bennett’s Testimony. He Was Not an Expert Witness, and It Was an Appropriate Application of West Virginia Rule of Evidence 701.**

Appellant wrongly contends that the circuit court erred in allowing the testimony of David Bennett regarding the bruising he suffered from the accident; thus, violating West Virginia Rule of Criminal Procedure 16(a)(1)(E) and his Due Process rights. This is not the case, however.

West Virginia Rule of Criminal Procedure 16(a)(1)(E) states the following:

(E) Expert Witnesses. Upon request of the defendant, the state shall disclose to the defendant a written summary of testimony the state intends to use under Rule 702, 703, or 705 of the Rules of Evidence during its case in chief at trial. The summary must describe the witnesses’ opinions, the bases and reasons therefor, and the witnesses’ qualifications.

The problem with Appellant’s argument is that Mr. Bennett was not an expert witness, but rather was merely giving testimony with respect to the bruises on Appellant as an observation while

he had the task of drawing blood from him.¹ This testimony was all based on what Mr. Bennett observed that night. His testimony concerning the bruises was lay testimony rather than that from an expert. The admission of this testimony is covered under West Virginia Rule of Evidence 701.

West Virginia Rule of Evidence 701 states the following:

Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

As previously mentioned, David Bennett testified, based upon his observation while taking blood from Appellant in the hospital, that the latter had a bruise on his chest from the left shoulder to the right hip, resembling a seat belt. (Tr. 137.) Mr. Bennett had no medical or scientific expertise regarding this; it was just an observation. Based on his observation, he also testified that Appellant appeared intoxicated and combative. (*Id.* at 138.) It was all based on his opinion and inferences from the perceptions he made on the night in question given in order to help obtain a clear understanding of the determination of a fact at issue as dictated by the rule

Additionally, this Court held the following with respect to lay testimony:

In order for a lay witness to give opinion testimony pursuant to Rule 701 of the West Virginia Rules of Evidence (1) the witness must have personal knowledge or perception of the facts from which the opinion is to be derived; (2) there must be a rational connection between the opinion and the facts upon which it is based; and (3) the opinion must be helpful in understanding the testimony or determining a fact in issue.

¹It is worth noting that Appellant had notice that testimony regarding his bruising would be given by Brenda Engle through the discovery process and an August 15, 2008, pretrial hearing on the matter, despite her failure to appear in court. (*See* Response to Petition for Appeal at 11; R. at 49-50.) So the assertion that he was surprised and caught off guard by such testimony is inaccurate.

Nichols, supra, at Syl. Pt. 2. All of these factors are satisfied regarding Mr. Bennett's testimony of the bruises he observed on Appellant's chest. In light of this, Rule 701 allows for this lay testimony and West Virginia Rule of Criminal Procedure 16(a)(1)(E) is inapplicable. Further, Appellant's Due Process rights were not violated. In accordance with *Wood, supra*, allowing this testimony was within the discretion of the circuit court. In accordance with the standards established in *Wood* as well as *Nichols, supra*, and *Guthrie, supra*, there was no abuse of discretion on the part of the circuit court.

Appellant takes issue with the fact that there was no ruling on his motion in limine by the circuit court on this matter. It is true that Appellant filed a motion in limine regarding this testimony on September 26, 2008. (R. at 72-74.) It does appear that there was no ruling on this issue. However, Appellant never raised the issue again, nor did he object when the State elicited this testimony from Mr. Bennett. Thus, it appears that Appellant has no recourse at this time regarding the absence of a ruling on this and should raise an ineffective assistance of counsel issue later in a habeas claim.

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

C. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION IN LIMINE REGARDING THE VEHICLE HE DROVE ON THE NIGHT OF THE ACCIDENT, AND HIS DUE PROCESS RIGHTS WERE NOT VIOLATED. THIS IS BECAUSE NO DISCOVERY VIOLATION OCCURRED ON THE PART OF THE STATE.

Appellant contends that the circuit court committed reversible error in denying his motion in limine regarding the Nissan Maxima driven on the night of the offenses. However, there was no abuse of discretion on the part of the circuit court. There was no violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 193 (1963). Additionally, Appellant fails to meet the standard established in

State v. Osakalumi, 194 W. Va. 758, 461 S.E.2d 504 (1995). Thus, Appellant was not denied his Due Process rights in this matter.

1. **The Standard of Review.**

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” Syl. Pt. 2, *Walker v. West Virginia Ethics Comm’n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

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

“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. at 332, 518 S.E.2d at 89, quoting *State v. Louk*, 171 W. Va. at 643, 301 S.E.2d at 599, citing Syl. Pt. 2, *State v. Peyatt*, *supra*.

When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant’s request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State’s breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.

Syl. Pt. 2, *State v. Osakalumi*, *supra*.

2. **There Was No Abuse of Discretion on the Part of the Circuit Court in Its Denial of Appellant's Motion In Limine Regarding the Vehicle He Was Driving on the Evening of the Accident. There Was No Discovery Violation by the State.**

Appellant wrongly contends that the State committed violations of *Brady, supra*, and *Osakalumi, supra*, in its not turning over Ms. Green-Morris' Nissan Maxima that was involved in the accident on the night the offenses occurred. Additionally, he contends that the circuit court committed reversible error when it denied his motion in limine with respect to this vehicle. This is not the case, however. In particular, Appellant fails to meet the *Osakalumi* standard.

Appellant's primary assertion is that the State did not produce the Nissan Maxima. However, the State did provide thirty-seven photographs of the accident scene and the vehicle in question. (*See* Response to Petition for Appeal at 13.) It is highly questionable, at best, that the State had a duty to preserve the vehicle or that said duty was breached. As the prosecution points out and was cited by the circuit court in its denial of Appellant's motion, the vehicle was towed by a private towing company and was not in the possession of the State. (*See id.*; R. at 50.)

Supposedly, there was a red substance on the driver's seat which *could have been* Ms. Green-Morris' blood rather than Appellant's. But as the prosecutor pointed out, even if that substance was Ms. Green-Morris' blood, that in no way proves that Appellant was not the driver; thus, it was not exculpatory. (Tr. 184-85.) This was an automobile accident, and blood being found in a vehicle is a probable outcome. Yet, again as the State pointed out, even if it was Tammie Green-Morris' blood, she was in the vehicle during the accident and its placement could have been a result of the placement of her hand after touching her head or from her removing herself from the car. (*Id.* at 195.) This brings out the problem in Appellant's argument: Even if he were able to establish that the State had a duty to preserve and produce the vehicle, he still fails to meet the

burden of *Osakalumi, supra*. In particular, he cannot establish the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remained available (the numerous photographs) and the sufficiency of the other evidence produced at the trial to sustain the conviction (the testimony of Mr. Bennett regarding Appellant's bruising resembling a driver's side seat belt and Ms. Green-Morris' testimony that he indeed was the driver). Additionally, in light of the fact that the Nissan Maxima was in private storage at a towing company and not in the possession of the State, any bad faith or negligence in the vehicle not being produced for Appellant seems very dubious.

Regarding a *Brady* violation, The United States Supreme Court has 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). The State complied with this holding by its turning over of the numerous photographs of the vehicle in question and accident scene.

Appellant also takes issue with the fact that various items in the car were not turned over such as a beer can and cell phones. Yet, there is no exculpatory or impeachment value in these items. It was already determined that drinking had occurred with Appellant and his wife, and Appellant does not even say what the potential value of the cell phones would be. Therefore, there was no *Brady* violation with these items as well.

Thus, there was no abuse of discretion on the part of the trial court in denying Appellant’s motion in limine. In light of all of this, Appellant’s argument fails on this ground.

D. NO RECORD HAS BEEN ESTABLISHED REGARDING APPELLANT’S MOTION FOR RECONSIDERATION, AND THIS COURT HAS NO JURISDICTION TO HEAR THE MATTER AT THIS TIME.

Appellant makes the claim that the circuit court committed reversible error by failing to rule on his motion for reconsideration. However, there has been no record established in this matter. Therefore, this Court currently has no jurisdiction. At most, this must be remanded to the circuit court in order for it to issue a ruling on the motion.

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. **There Has Been No Lower Court Ruling on Appellant’s Motion, and This Court Has No Jurisdiction to Hear This Matter at This Time.**

In light of the fact that there was no lower court ruling on Appellant’s motion for reconsideration, there has been no record established on the matter. Regardless of any merits of this claim or lack thereof, this Court has no original jurisdiction on this issue due to there being no ruling by the circuit court, in accordance with *Telecheck Services, Inc.*

Additionally, regarding appeals of criminal convictions, West Virginia Code § 58-5-1 states, in pertinent part, the following:

The defendant in a criminal action may appeal to the supreme court of appeals from a final judgment of any circuit court in which there has been a conviction or which affirms a conviction obtained in an inferior court.

Since there was no ruling from the circuit court that affirmed the conviction (i.e., denying the motion for reconsideration), this Court has no jurisdiction to rule on this matter at this time. At most, this should be sent back to the circuit court for a ruling. If it is denied by the circuit court, Appellant may then file an appeal to this Court.

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

V.

CONCLUSION

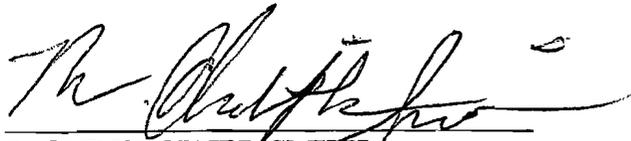
For the foregoing reasons, the judgment of the Circuit Court of Jefferson County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

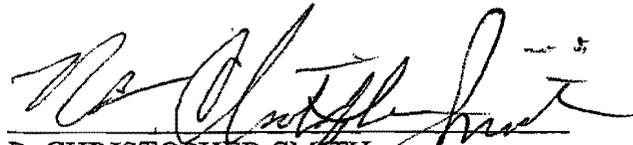
A handwritten signature in cursive script, appearing to read "R. Christopher Smith", written over a horizontal line.

R. CHRISTOPHER SMITH
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7269
State Capitol, Room E-26
Charleston, West Virginia 25305
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 day of 7th day of May, 2010, addressed as follows:

To: John P. Adams, Esq.
Public Defender Corporation
313 Monroe Street
Martinsburg, WV 25404



R. CHRISTOPHER SMITH