
NO. 35529

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

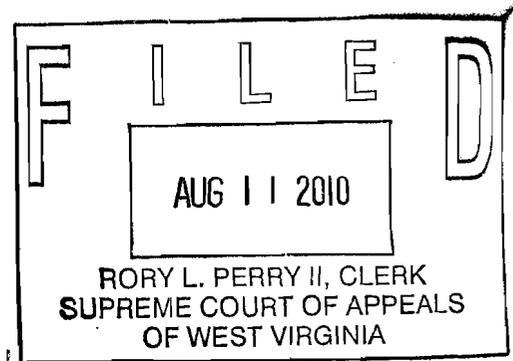
STATE OF WEST VIRGINIA,

Appellee,

v.

LARRY S. WHITE, II,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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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 Larry S. White (hereinafter “Appellant”) from the June 2, 2009, order of the Circuit Court of Jackson County (Evans, J.), which sentenced him to life with 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 and a term of not less than one nor more than five years in the State penitentiary upon his conviction by a jury of one count of conspiracy to commit a felony in violation of West Virginia Code § 61-10-31; both sentences 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 the murder of Mohamed Mahrous at the hands of Appellant on the evening of September 17, 2007, in Riverside Park in Jackson County. Appellant's commission of this murder is not in dispute, and his sole defense for the crime of first degree murder utilized at trial was diminished capacity, whereby his mental state rendered him incapable of premeditation with respect to the act. (Tr., 28-29, Dec. 17, 2008; Tr., 9, Dec. 18, 2008.) In fact, in a police statement given on September 19, 2007, Appellant admitted to following the victim and his wife in his vehicle and being in the park while they were there as well as to the murder of Mr. Mahrous. (Statement, 108, 132, 300-01, 303, 307, 310, 312, Sept. 19, 2007.) An audio recording of this statement was played to the jury during the trial. (Tr., 101, Dec. 18, 2008.)

During the police statement, Appellant made various allegations against the victim as motivation for the murder. However, it seems that the primary reason for this crime was that Appellant and the victim's wife, Roseann Osborne, had an extramarital affair. During the time leading up to the murder, Appellant and Ms. Osborne lived together in both Virginia and West Virginia and had a child together. (Statement, 12-13, 16, 18 and 21, Sept. 19, 2007.) Angelina Barney, a friend of Ms. Osborne's, testified that during a ten-month friendship, Appellant and Ms. Osborne lived together and she referred to him as her boyfriend. (Tr., 221, 226, Dec. 18, 2009.)

During this friendship, Angelina Barney testified that she heard Roseann and Appellant discuss killing Mohamed Mahrous. (*Id.* at 227-28.) She stated that this conversation occurred in her presence a few times; once where Appellant and Ms. Osborne discussed dropping the victim's body over an overpass. (*Id.* at 228.) Ms. Barney testified that when these conversations occurred,

Roseann would tend to goad Appellant into talking about these plans more and would get him “fired up” about the subject. (*Id.*) Earlier in the day on September 17, 2007, Ms. Barney said that she saw Appellant and Ms. Osborne together at the Cottageville Food Mart. During that encounter, she stated that she heard Appellant and Roseann Osborne discussing that the victim would be going to work and that the two of them would meet up later that evening. (*Id.* at 223, 227.)

Mr. Eric Tyrell, an employee of Sprint Nextel in Overland Park, Kansas, testified regarding the cellular telephone records of Appellant on the day in question. He testified that based on September 17, 2007 records, there were 59 telephone calls made between Appellant and Ms. Osborne. (Tr., 178, Dec. 17, 2008.) Roseann Osborne called 911 from a cell phone in a yellow truck belonging to her and Mr. Mahrous at approximately 10:22 that evening. (Tr., 35-37, Dec. 18, 2007.) Mr. Tyrell also testified that between 9:55 p.m. and 10:23 p.m. that evening, there were four telephone calls made between Ms. Osborne’s and Appellant’s cellular telephones. (Tr., 177-78, Dec. 18, 2008.) In Appellant’s statement to the police, he admitted to seven cellular phone calls between he and Roseann Osborne in less than an hour prior to Mohamed Mahrous being killed. (Statement, 147, Sept. 19, 2007.) Lieutenant Anthony Boggs testified that the 911 call made by Ms. Osborne was made from the cellular phone that belonged to the victim. (Tr., 203-04, Dec. 17, 2008.)

Leonard Ray Brown, a paramedic with Jackson County Emergency Medical Services, responded to the scene that evening. (Tr., 83, Dec. 17, 2008.) He testified that when he arrived at the scene, he saw part of the brain matter coming out of Mohamed Mahrous’ head. (*Id.* at 86-87.) Mr. Brown pronounced Mr. Mahrous dead on the scene. (*Id.* at 86.)

Lieutenant Boggs testified that when he arrived at the scene he observed that the victim had suffered from a trauma to the head. (*Id.* at 187.) He stated that upon arrival, he saw Mr. Mahrous lying face up in a pool of blood near a picnic table, and the latter appeared to be deceased. (*Id.*)

Corporal Brent Kieffer found a plastic Walgreen's bag with blood on it located approximately 75 feet down a hill from where the victim's body was found. (*Id.* at 94-96.) Eventually, a hammer was found by the use of a metal detector in the eastern bank of the river. (*Id.* at 74.) The hammer was in a bed of river grass approximately ten to fifteen yards from where the body was found. (*Id.* at 100.) Jason Hodges, a forensic analyst with the West Virginia State Police, was able to identify the victim's DNA from the blood on the plastic bag with the latter's blood card. (Tr., 167-68, Dec. 17, 2008.) Despite the fact that Appellant repeatedly claimed not to remember what happened on the night in question, he did say in his statement to the police that he thought the hammer was in a bag and that he hit the victim and threw the object. (Statement, 309, 312, Sept. 19, 2007.)

According to Ms. Osborne's 911 call and police statement, someone came up to her and the victim while they were sitting on a park bench, asked for a cigarette and lighter, and then proceeded to hit Mr. Mahrous with a hammer, killing him. (Tr., 29, 71, Dec. 18, 2008.)

Dr. Hamada Mahoud of the State of West Virginia Medical Examiner's Office conducted an autopsy on the victim. The medical examiner found two blows to the victim's head that remarkably resembled ones from a hammer. ((Tr., 139, Dec. 17, 2008.) He found laceration surrounded by contusion on Mr. Mahrous' head which resembled a hammer-head shape. (*Id.* at 141.) When he examined underneath, he found a skull fracture about the size of a quarter. (*Id.*) Dr. Mahoud testified that the strikes went into the brain area, and brain tissue had come out. (*Id.* at

142.) The blow that caused brain matter to escape was in the right temple. (*Id.* at 145.) He stated that the victim suffered from “raccoon eyes” whereby a linear fracture in the head causes blood to leak around both eyes. (*Id.* at 149-49.) Dr. Mahoud found no evidence of defensive wounds and determined that the blows caught the victim by surprise. (*Id.* at 145-47.) He stated that the blows to the head were fatal. (*Id.* at 145.) He concluded that the cause of death was multiple, powerful blows directly to the head and face with a blunt weapon that resembled a hammer, and the manner of death was homicide. (*Id.* at 139-40.)

Dr. Timothy Saar testified for the defense regarding Appellant suffering from diminished capacity. (Tr., 29-103, Dec. 19, 2008.) However, Dr. David Clayman, a clinical and forensic psychologist, discredited Dr. Sarr’s findings and testimony. Dr. Clayman testified, based on his examination of Appellant and a study of his history, that the latter suffered from no diminished capacity or emotional disorder. (*Id.* at 130.) He testified that, based on Appellant’s history, there was no sign of paranoia. (*Id.*) He stated that Appellant had strong feelings for Ms. Osborne which got him in trouble, but he was not delusional. (*Id.* at 131.) Dr. Clayman stated that he totally disagreed with Dr. Saar’s findings; in particular, that a psychological testing was done by the latter on Appellant to come up with the conclusion of diminished capacity, yet there was no forensic evaluation based on testing and external sources to make the conclusion. (*Id.* at 134-35.) Based on his forensic evaluation, Dr. Clayman concluded that there was no sign of delusion and that Appellant had the capacity of intent and premeditation. (*Id.* at 153-55.) Based upon the verdict, the jury obviously found Dr. Clayman’s findings and testimony more credible than Dr. Saar’s.

On September 20, 2008, the jury convicted Appellant of one count of murder in the first degree with a recommendation of mercy and one count of conspiracy to commit first degree murder. (Tr., 57, Dec. 20, 2008.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

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

- A. THE TRIAL COURT ERRED IN FAILING TO STRIKE TWO PROSPECTIVE JURORS FOR CAUSE, MICHELLE LEMON AND CASSIA SCOTT, UPON MOTION OF APPELLANT'S COUNSEL BASED UPON VARIOUS REASONS GIVEN BY THE PROSPECTIVE JURORS DURING VOIR DIRE.

The State's Response:

Despite some unique circumstances involving these two prospective jurors, they unequivocally made it apparent through their answers during the voir dire process that they could be free of any bias or prejudice; thus, the circuit court did not err in denying Appellant's motions to strike for cause.

- B. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR ACQUITTAL MADE AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND RENEWED FOLLOWING THE JURY'S VERDICT AS THE EVIDENCE ON WHICH THE JURY REACHED A VERDICT OF GUILT ON THE CHARGES OF MURDER IN THE FIRST DEGREE AND CONSPIRACY TO COMMIT A FELONY-MURDER IN THE FIRST DEGREE WAS INSUFFICIENT AS A MATTER OF LAW FOR A REASONABLE JURY TO FIND ANY CONSPIRACY EXISTED THAT THE APPELLANT ACTED WITH PREMEDITATION, DELIBERATION OR A SPECIFIC INTENT TO KILL THE ALLEGED VICTIM.

The State's Response:

There was sufficient evidence to convict Appellant of first degree murder and conspiracy to commit murder. He fails to meet the heavy burden to overturn the verdict, and the circuit court did not abuse its discretion.

- C. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT WAS FRUIT OF AN UNLAWFUL SEARCH OF A CELLULAR TELEPHONE OWNED BY THE APPELLANT, LARRY S. WHITE, II, AND ERRED IN ITS HOLDING THAT APPELLANT DID NOT MAINTAIN A LEGITIMATE, REASONABLE EXPECTATION OF PRIVACY IN THE ELECTRONIC DATA OF THE CELLULAR TELEPHONE. SAID UNLAWFUL SEARCH PRODUCED EVIDENCE THE [S/C] PROVIDED A FOUNDATION TO OBTAIN FURTHER INFORMATION INCLUDING SEARCH WARRANTS FOR APPELLANT'S CELLULAR PHONE ACCOUNTS. ABSENT INFORMATION OBTAINED FROM THE INITIAL UNLAWFUL SEARCH, TITLE, IF ANY, EVIDENCE WAS PRESENT SUPPORTIVE OF THE ISSUANCE OF A SEARCH WARRANT FOR APPELLANT'S CELLULAR TELEPHONE TOWER INFORMATION, POLICE AUTHORITIES COULD NOT HAVE BEEN ABLE TO MAKE CONTACT WITH APPELLANT'S OTHER PHONE FOR AN INITIAL TELEPHONE INTERVIEW AND THUS LITTLE EVIDENCE SUPPORTIVE OF THE CONVICTIONS FOR MURDER IN THE FIRST DEGREE OR CONSPIRACY TO COMMIT A FELONY-MURDER IN THE FIRST DEGREE.

The State's Response:

The circuit court did not err in admitting the cellular phone data. There was no unreasonable search issue with this data because the underlying search was based on the lawful granting of a search warrant.

- D. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE IN VIOLATION [OF] RULE 801(d)(2)(E) OF THE WEST VIRGINIA RULES OF EVIDENCE ABSENT A PROPER FOUNDATION FOR THE ADMISSION OF THE STATEMENTS OF ALLEGED CO-CONSPIRATOR.

The State's Response:

The State met its burden by a preponderance of the evidence by laying a foundation that a conspiracy existed in order to allow the admission of out-of-court statements from Rosann Osborne under West Virginia Rule of Evidence 801(d)(2)(E), and the circuit court did not err.

- E. THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S AMENDED RENEWED MOTION FOR NEW TRIAL FILED IN LIGHT OF POST-TRIAL DISCLOSURE TO DEFENDANT OF MATERIAL THAT SHOULD HAVE BEEN DISCLOSED TO DEFENDANT PRIOR TO TRIAL PURSUANT TO *BRADY v. MARYLAND*.

The State's Response:

There was no violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 193 (1963), by the State regarding the discovery issues with the video surveillance and the North Carolina domestic violence report, and the circuit court did not abuse its discretion in denying Appellant's renewed motion for new trial.

- F. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL AS THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUPPORT OF [S/C] MURDER IN THE FIRST DEGREE AND CONSPIRACY.

The State's Response:

As with the circuit court's denial of Appellant's motions for acquittal, the circuit court did not err in denying his motion for a new trial based on insufficient evidence to convict. Appellant fails to meet this heavy burden.

- G. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL AS CUMULATIVE ERROR PRESENT IN THE PRETRIAL, TRIAL AND POST-TRIAL PROCEEDINGS MANDATED THAT A NEW TRIAL BE GRANTED.

The State's Response:

No error occurred in the case at bar. Therefore, a new trial is not warranted.

IV.

ARGUMENT

A. **JURORS LEMON AND SCOTT, DESPITE UNIQUE CIRCUMSTANCES REVEALED THROUGH VOIR DIRE QUESTIONING, CLEARLY ESTABLISHED THAT THEY COULD REACH DECISIONS IN THE TRIAL FREE FROM ANY BIAS OR PREJUDICE. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT'S MOTIONS TO STRIKE FOR CAUSE.**

There was no error on the part of the circuit court in denying Appellant's respective motions to strike Juror Lemon and Juror Scott for cause. It is true that Juror Lemon stated that she knew Lieutenant Anthony Boggs' mother and that Juror Scott was an employee of the Jackson County Courthouse; yet both expressed that they could be free of any prejudice or bias in making decisions in the case. There was no abuse of discretion in the circuit court's decisions to deny Appellant's motions to strike them for cause.

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. 4, *State v. Miller*, *supra*; Syl. Pt. 1, *State v. Griffin*, *supra*.

2. **When the Record Is Examined, There Was No Abuse of Discretion on the Part of the Circuit Court in Denying Appellant's Motions to Strike the Prospective Jurors in Question. Despite Some Unique Circumstances, Both Prospective Jurors Expressed an Ability to Be Impartial and Free of Any Prejudice or Bias.**

Appellant wrongly contends that the circuit court erred in denying his motions to strike both Juror Lemon and Juror Scott for cause. Despite some unique circumstances revealed during these potential panelists individual voir dire questioning, they both clearly expressed an ability to be impartial in their decision-making. Both clearly stated that they could be free of any bias or prejudice.

The primary issue regarding Juror Lemon is that she stated that she was friends with Lieutenant Anthony Boggs' mother. During her voir dire, the following exchanges occurred:

Prosecutor: I don't believe that you raised your hand for hearing anything or reading anything in the paper, did you?

Juror Lemon: Other than kind of—on Tony [Lieutenant Anthony Boggs], just outside of his— for his mom, that's it.

Prosecutor: And so you don't know anything about this case from her or anything like that?

Juror Lemon: No, no.

Prosecutor: Would your relationship with his mother effect [*sic*] the way you would view his testimony at all?

Juror Lemon: *No.*

Defense: How long have you known Tony's mom?

Juror Lemon: Well, she lives at the end of my road, so I've been there, what, ten years or whatever. And I go there frequently, and haven't seen him over there—but haven't been over there for probably another year now, since I'm working another job, so.

(Tr., 137-38, Dec. 16, 2008; emphasis added.)

Regarding a relationship a juror has with a law enforcement employee and his or her ability to serve on a jury panel, this Court has 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). From her responses, it appears that there was absolutely no relationship between Juror Lemon and Lieutenant Boggs. In fact, there really does not seem to be much of a relationship with the potential panelist and the lieutenant's mother other than being neighbors. But even assuming, *arguendo*, that this exchange established a relationship between the prospective jury member and the police officer, the opportunity of voir dire questioning was given to determine any possible prejudice or bias, and none was shown. The circuit judge stated that any impact this relationship Juror Lemon had with Lieutenant Boggs' mother was speculative, and it was made evident that there would be no influence in her decision-making in the case when he denied Appellant's motion to strike for cause. (Tr., 139, Dec. 16, 2008.) Appellant cannot avoid the fact that this potential juror made it unequivocal that

she could make decisions in the case free from any bias or prejudice in accordance with *Miller, supra*, and *Griffin, supra*.

The primary issue regarding Juror Scott was her status as a Jackson County Courthouse employee. With respect to Juror Scott's employment at the courthouse, the following exchange took place during voir dire:

Court: Do you think you ought to be on this jury? Do you know too much about it?

Juror Scott: That was my concern, and I don't know particulars. That is why I didn't—you know, I was down there whenever stuff was coming in. They talk, and, you know, just things like that. I was there, I believe, the day that they brought him into court.

Court: You were in court that day?

Juror Scott: I was there with Keith.

Court: Okay?

Juror Scott: I'm almost positive. I mean, there was a lot that came through, so—

Court: Well, ma'am, that doesn't—you know, Keith Brotherton is not part of the prosecution, he is part of the court system, so.

Juror Scott: Right, *and I'm not saying I have a problem with it*, I just didn't know—

Court: Well. Answer my question then. The question was: Do you think you ought to serve on this jury. In other words, do you think that you can be fair and impartial to this man?

Juror Scott: *I feel that I can be fair and impartial to him.*

Court: What do you remember reading in the paper and hearing and seeing on television about the case?

Juror Scott: Exactly?

Court: Just generally.

Juror Scott: I know it was over in the park in Ravenswood. I know there was a dinner involved. I guess my perception is a sneak attack. And knew there was trauma to the head, I remember that, something, I don't recall what exactly, but I do remember that. I know there were children.

I don't know, and maybe I can't, *and not because I couldn't be fair*, but it is upsetting.

Court: You mean the nature of the event is upsetting?

Juror Scott: Right, right.

Court: Yeah.

Juror Scott: I mean, it is not a matter of guilty or not, it is just upsetting even, you know, once you start talking about it, you know, when it actually comes out of your mouth.

Court: If you were selected to be on the jury, would you able [*sic*] to put out of your mind what you had previously heard or read—

Juror Scott: Yeah, that doesn't concern me—

Court: —about the case?

Juror Scott: —at all, it is this right here, the emotional that concerns me.

(Tr., 130-33, Dec. 16, 2008; emphasis added.) In this respect, despite some understandable misgivings about sitting on a murder trial due to its sensitive nature, Juror Scott unequivocally stated that she could be free of bias or prejudice in the case.

Appellant also takes issue with her responses concerning her views and beliefs with respect to psychological evidence. Regarding this, the following exchange occurred:

Defense: Okay, and I'll try to phrase this question correctly: There is going to be some psychological evidence introduced in this case, okay, that Mr. White was suffering from a mental disease or defect at the time of the commission of the alleged crime, okay? Would you be able to consider that psychology testimony in the same manner that you would consider police testimony?

Juror Scott? Are you asking me if I would be able to believe it?

Defense: Consider it in the same way, with the same critical eye as you would police testimony.

Juror Scott: I mean, I would like to say yes, but I— I feel that I could, but— I don't know if there is a right answer, I feel— I mean, I don't know if I could— I think I could.

Defense: But are you just not sure?

Juror Scott: I'm not sure if I would believe it or not, that is what I don't know if I'm supposed to answer yes or no.

Defense: Okay, that's a different question.

Juror Scott: Yeah, I mean, I would consider it, of course, but I just don't know whether I would believe it or not.

Defense: Okay. Do you have any reason to cast a more critical eye towards psychological testimony than you would other testimony?

Juror Scott: *I don't think so. I don't believe so at all.* I mean I do truly believe that there is psychological things that happen, I just don't know that it's— if I'm going to believe it in this case or not. I just don't know.

(Tr., 235-37; emphasis added.) It is quite apparent in this exchange that this potential jury member seemed a bit confused at first, but eventually was firm in her belief that she would not have any bias or prejudice against the testimony of a psychologist. It is worth noting that even in her more confused state, she never once said that she could not be impartial or that she would have any prejudice or bias against psychological evidence or testimony. When the entire exchange is reviewed, it is evident that Juror Scott was referring to the credibility of a particular psychologist or psychiatrist when testifying rather than an inability to place any credibility on this type of evidence. The circuit court took note of her response that she would consider the testimony when Appellant's motion to strike for cause was overruled. (*Id.* at 138.) When a vague answer by a

prospective juror is given yet no real indication of bias or prejudice has been expressed, this Court has 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*, 223 W. Va. 843, 679 S.E.2d 675 (2009). That is exactly what happened here. Juror Scott gave some vague and confusing responses that were followed up by more questioning where her ability to be free of any bias or prejudice was revealed. Of course, the defense was not engaging in rehabilitative questioning. So when the totality of the circumstances is considered, Juror Scott stated her ability to be impartial, and the circuit court did not abuse its discretion here.

Regarding these ruling in general, this Court has also held the following:

The trial court is in the best position to judge the sincerity of a juror's pledge to abide by the court's instructions; therefore, its assessment is entitled to great weight. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias when it is left with a clear and definite impression that a prospective juror would have been unable faithfully and impartially to apply the law.

State v. Williams, 206 W. Va. 300, 304, 524 S.E.2d 655, 659 (1999) (citing *State v. Miller*, 197 W. Va. 588, 605, 576 S.E.2d 535, 552 (1996)). When this deferential standard is applied to both of

these prospective jury members, there is no indication that either would be unable to faithfully and impartially apply the law. No bias or prejudice was indicated in any of their responses, and the circuit court did not abuse its discretion in denying these motions.

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

B. THERE WAS SUFFICIENT EVIDENCE FOR A JURY TO CONVICT APPELLANT OF FIRST DEGREE MURDER AND CONSPIRACY TO COMMIT FIRST DEGREE MURDER, AND HE FAILS TO MEET THE HEAVY BURDEN OF PROOF TO HAVE THE VERDICT OVERTURNED.

There was sufficient evidence to convict Appellant of first degree murder and conspiracy to commit first degree murder. Despite what he told the police in his September 19, 2007, statement, he fails to meet the heavy burden in order to overturn the verdict. When the record is examined, a jury could have found him guilty of these offenses beyond a reasonable doubt. The circuit court did not err in its denial of his motions for acquittal.

1. The Standard of Review.

“In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error 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. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

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

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a

reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

2. **There Was Sufficient Evidence to Convict Appellant of Both First Degree Murder and Conspiracy to Commit First Degree Murder. The Circuit Court Did Not Abuse Its Discretion in Denying Appellant's Motions for Acquittal.**

Appellant contends that the circuit court erred in denying his motions for acquittal at the conclusions of the State's case-in-chief and the trial. However, there was sufficient evidence to convict him of these offenses, and no error occurred. When weighing all of the evidence in the light most favorable to the prosecution, it was sufficient to convict him on both charges.

According to West Virginia Code § 62-1-1, the offense of first degree murder entails the following:

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree. All other murder is murder of the second degree.

Despite Appellant's claims to have "blacked out" and not remembering what he did when questioned by the police, he did engage in a premeditated killing of the victim as defined by the statute. As was previously mentioned, Appellant followed Ms. Osborne and Mr. Mahous to the park, carried a hammer to where the latter two were sitting and repeatedly struck the victim with the object.

The time period of this murder was relatively short, but it was sufficient for Appellant to have premeditated the act. With respect to the time period required for premeditation to exist, this Court held, “Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design.” *Guthrie*, 194 W. Va. at 675, 461 S.E.2d at 182.

Additionally, this Court has held the following on this issue:

“In criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for a prior consideration. The duration of that period cannot be arbitrarily fixed. *The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intended, is sufficient to support a conviction for first degree murder.* To the extent that *State v. Schrader*, 172 W.Va. 1, 302 S.E.2d 70, (1982), is inconsistent with our holding today, it is expressly overruled.” Syl. Pt. 6, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 9, *State v. Hutchinson*, 215 W. Va. 313, 599 S.E.2d 736 (2004) (emphasis added).

So the time period from Appellant’s talking to Ms. Osborne during that day—or at least from the time he drove to the park—to the moment when he repeatedly struck the victim with the hammer was enough time to establish premeditation for first degree murder purposes.

Additionally, Dr. Clayman testified that, based on his analysis, Appellant had the ability to premeditate. It is accurate that Dr. Saar testified that Appellant suffered from diminished capacity, but as stated above, the jury obviously found Dr. Clayman’s testimony more credible.

From examining this, there was sufficient evidence for a jury to convict Appellant of first degree murder beyond a reasonable doubt. Appellant has failed to meet the burden that there was no evidence whereby a jury could find him guilty beyond a reasonable doubt of this offense. This is particularly true when examining this evidence in the light most favorable to the prosecution, as held in *Guthrie, supra*.

Regarding the offense of conspiracy, West Virginia Code § 61-10-31 defines it as follows: “It shall be unlawful for two or more persons to conspire (1) to commit any offense against the State or (2) to defraud the State, the state or any county board of education, or any county or municipality of the State, if, in either case, one or more of such persons does any act to effect the object of the conspiracy.”

While it is true that Appellant denied any discussion or agreement between he and Ms. Osborne to kill her husband, there was sufficient evidence to convict him of conspiracy to commit first degree murder. There was an agreement and an act to effect the crime, his murdering the victim.

Initially, Angelina Barney testified that she heard Appellant and Ms. Osborne discussing the victim’s demise on more than one occasion. The numerous phone calls between Appellant and Ms. Osborne on the day of the murder as well as the frequency of them immediately before and after the victim’s death gives evidence to a conspiracy to commit first degree murder. Granted, these phone conversations were not recorded and played for the jury, but doing so is unnecessary in establishing the elements of conspiracy. In *State v. Less*, 170 W. Va. 259, 294 S.E.2d 62 (1981), the West Virginia Supreme Court of Appeals held the following:

The agreement to commit an offense is the essential element of the crime of conspiracy—it is the conduct prohibited by the statute. The agreement may be inferred from the words and actions of the conspirators, or other circumstantial evidence, and the State is not required to show the formalities of an agreement. *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S. Ct. 1125, 90 L.Ed. 1575 (1946); *Interstate Circuit v. United States*, 306 U.S. 208, 59 S. Ct. 468, 83 L.Ed. 610 (1939); *State v. Wisman*, 94 W.Va. 224, 118 S.E. 139 (1923).

Less, 170 W. Va. at 265, 294 S.E.2d at 67. Therefore, even if Ms. Barney's testimony is removed, the circumstantial evidence presented at trial was sufficient to convict Appellant of conspiracy. This amounts to sufficient evidence for a jury to find him guilty of this offense beyond a reasonable doubt as well. The circuit court cited the circumstantial evidence presented in its denial of one of Appellant's motions for acquittal. (Tr., 20, Dec. 19, 2008.) In fact, *Guthrie, supra*, speaks to both direct and circumstantial evidence being reviewed in the light most favorable to the prosecution in determining this issue.

So the evidence was indeed sufficient for a jury to find Appellant guilty beyond a reasonable doubt, and the circuit court did not abuse its discretion in denying Appellant's motions.

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

C. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS THE CONTENTS OF APPELLANT'S CELLULAR PHONE. THE CONTENTS OF THE PHONE WERE RECOVERABLE UNDER THE LEGAL SEARCH THAT LED TO THE RECOVERY OF THE OBJECT ITSELF.

In this ground for error, Appellant argues that the contents of his cellular phone seized during a search of the victim's car pursuant to a written warrant should have been suppressed because the contents of the phone, separate and apart from the phone itself, are entitled to a reasonable expectation of privacy requiring either 1) that a separate written warrant be issued for the contents

or 2) circumstances are present that exempted the phone under one of the recognized exceptions to the Fourth Amendment protections from unreasonable searches and seizures.¹ However, this object was obtained through the acquisition of a proper search warrant, and the circuit court did not err in denying the motion to suppress.

1. The Standard of Review.

We have previously explained in Syllabus point one of *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996), as follows:

When reviewing a 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.

Further,

In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed de novo. Similarly, an appellate court reviews de novo whether a search warrant was too

¹In Syllabus Pt. 20 of *State v. Ladd*, 210 W. Va. 413, 557 S.E.2d 820 (2001), this Court explained as follows:

Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution--subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative. Syl. Pt. 1, *State v. Moore*, 165 W. Va. 837, 272 S.E.2d 804 (1980), *overruled in part on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991).

broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.

Syl. pt. 2, *Lacy, id.* We have also explained that "we review de novo questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action." *State v. Lilly*, 194 W.Va. 595, 600, 461 S.E.2d 101, 106 (1995).

State v. Bookheimer, 221 W. Va. 720, 656 S.E.2d 471, 476 (2007).

2. **While a Cellular Phone Is Entitled to a Reasonable Expectation of Privacy within the Meaning of the Fourth Amendment, the Contents of a Cellular Phone Do Not Require a Search Warrant Separate and Apart from an Otherwise Legal Search That Led to the Seizure of the Phone Itself.**

The reality of this issue is straightforward: this Court must decide if the *contents* of a cellular phone is separate and apart from the phone itself for purposes of the Fourth Amendment. The Appellant's argument regarding whether the contents of cellular phones are entitled to a reasonable expectation of privacy somewhat muddies the issue because it does not contemplate the perfectly legal circumstances under which the phone itself was recovered from Appellant herein.

In this case, law enforcement officers recovered Appellant's cellular phone after obtaining a search warrant for the victim's truck. (Tr., 56-59, Dec. 17, 2008.) After investigators seized the phone, they retrieved its contents and used the information to investigate and ultimately convict Appellant. Evidence obtained as a result of the search of the phone was introduced into evidence at trial after the circuit court denied trial counsel's motion to suppress the data as fruit of the poisonous tree. (R. 195-209.)

In support of this claim of error, Appellant argues that even though the cellular phone itself was seized pursuant to a legal search, he retained a reasonable expectation of privacy in its contents

sufficient to protect it from unreasonable search and seizure within the meaning of the Fourth Amendment: “Whether a defendant has standing to challenge a search under our Constitution depends upon two factors: (1) whether one demonstrated by his conduct a subjective expectation of privacy, and (2) whether society is prepared to recognize that expectation as reasonable.” *State v. Lopez*, 197 W. Va. 556, 569, 475 S.E.2d 227, 240 (1979), quoting *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220 (1979).

As noted by Appellant, this is a relatively new area of the law still hotly contested among and between the state and federal judiciary on a variety of levels. Cellular phone contents within the meaning of the Fourth Amendment has never been squarely addressed either by this Court or by the United States Supreme Court. But it is more settled on the set of facts present herein than would appear at first blush.

Lofty legal analysis aside, anyone who owns a cellular phone would in all likelihood argue unequivocally that they personally believe the contents of their phone are private. The capabilities of cell phones in today’s world are very nearly mind-boggling. Sophisticated “smart phones” contain everything from photographs, videos, text messages, voice mail messages, and e-mails to extensive financial information from bank accounts to credit card numbers stored for online account management, just to name a few functions; this aside from the most basic functions that include records of all in-going and out-going phone calls and contact information. In fact, the actual calling capability of a cellular phone has become an almost minor element of its functions. The law on this issue is still harkening back to analysis of the seizure of evidence within the context of “containers” such as locked boxes or briefcases. While the courts do indeed need to look at existing jurisprudence on what amounts to a search within a search to evaluate this issue, it is arguably time to distinguish

cellular phones within the context of their unique place in technology and role in the lives of their owners.

However, the issue to be explored here is not whether cellular phones create an expectation of privacy within the meaning of the Fourth Amendment but rather the issue in dispute here is whether or not the contents of a cellular phone are subject to distinct and separate protections under the Fourth Amendment in addition to the circumstances that led to the seizure of the phone itself. In other words, will the warrant that led to the recovery of the phone cover the contents. The State argues that it does.

The facts in this case are somewhat unusual. Appellant's cellular phone was not recovered during a search of his person, vehicle or home pursuant to a written warrant or a warrantless search under a recognized exception to the Fourth Amendment. Appellant's phone was recovered during the search of the truck belonging to the victim in this case under a written search warrant. Although the legality of the search underlying the seizure of Appellant's cellular phone is not in dispute, cases from other jurisdictions challenging the legality of searches that resulted in the seizure of cellular phone contents can offer some guidance

In the recent case of *Connecticut v. Boyd*, 992 A.2d 1071 (Conn. 2010), the Connecticut Supreme Court took up the issue of whether the contents of a cellular phone were recoverable under the automobile exception to the Fourth Amendment. The Court reasoned that the contents of cellular phones are covered part and parcel with the phone itself for purposes of the Fourth Amendment:

The defendant in the present case does not dispute that, on the basis of the evidence that the Mamaroneck police found in his apartment, they had probable cause to arrest him for drug offenses. The trial court found that the cell phone was visible on the

front seat of the defendant's car when he was arrested and that the Mamaroneck police consider cell phones to constitute drug paraphernalia and records because they are likely to contain information about drug transactions. Because the police had probable cause to believe that the defendant was selling drugs, because the defendant's cell phone was visible in the defendant's car when the police arrested him and because the police had probable cause to believe that the cell phone contained evidence of drug activity, we conclude that the police had probable cause to seize and search the contents of the cell phone under the automobile exception as applied in New York.

992 A.2d at 1071, 1090.

The Connecticut Court then found: "Accordingly, we conclude that the New York Court of Appeals would conclude that the seizure and search of the defendant's cell phone was valid under the automobile exception to the constitutional requirement for a warrant." *Id.*

More importantly, the Fourth Circuit has recently held that the contents of a cellular phone are recoverable pursuant to an otherwise lawful arrest without obtaining a warrant for its contents. In *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009), the court discussed its position on the contents of a cellular phone recovered during an otherwise lawful arrest:

Next, Murphy argues that the warrantless search of the contents of the cell phone was not lawful for two reasons. First, he argues that it was improper because there was no evidence of the volatile nature of the cell phone's information. Second, he argues that the search of the cell phone's contents was unlawful because it was not contemporaneous with his arrest.

Citing the "manifest need . . . to preserve evidence," this Court has held on at least two prior occasions, albeit in unpublished opinions, that officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest. See *United States v. Young*, 278 Fed. Appx. 242, 245-46 (4th Cir.2008) (per curiam) (holding that officers may retrieve text messages from cell phone during search incident to arrest), cert. denied, --- U.S. ----, 129 S.Ct. 514, 172 L.Ed.2d 377 (2008); *United States v. Hunter*, No. 96-4259, 1998 WL 887289, at *3 (4th Cir. Oct. 29, 1998) (holding that officers may retrieve telephone numbers from pager during search incident to arrest). Similarly, the Fifth Circuit and Seventh Circuit have held that the need for the preservation of evidence justifies the retrieval of call

records and text messages from a cell phone or pager without a warrant during a search incident to arrest. *See United States v. Finley*, 477 F.3d 250, 260 (5th Cir.), cert. denied, 549 U.S. 1353, 127 S.Ct. 2065, 167 L.Ed.2d 790 (2007).

Murphy, 552 F.3d at 411.

In finding that the arrest and search that led to the recovery of the phone was legal, the *Murphy* Court went on to find that the underlying search also provided authority for law enforcement to search the contents of the phone, finding: “once the cell phone was held for evidence, other officers and investigators were entitled to conduct a further review of its contents, as Agent Snedeker did, without seeking a warrant.” *Id.* at 412 citing *United States v. Edwards*, 415 U.S. 800, 803-04, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974). Although distinguishable from the instant case because the cellular phone in *Murphy* was seized from the defendant’s person during an arrest and initially searched with the defendant’s permission, the ultimate holding applies to the instant case in that the *Murphy* Court found no need for a separate warrant for the phone’s contents once it was legally seized.²

²*But see State v. Carroll*, 778 N.W.2d 1 (Wis. 2010), where the Wisconsin court held that exigency, while allowing a law enforcement officer to answer a drug dealer’s ringing cell phone, did not allow arresting officer to view images from the phone’s contents without a warrant holding that there was no danger that the contents of the phone would disappear before a warrant was obtained so long as the phone remained in possession of law enforcement by likening the contents of a cell phone to that of a locked container, entitled to a reasonable expectation of privacy. *Id.* at 11. However, in the case of *Carroll*, the phone was seized incident to an arrest and without a warrant of any kind. The contents were viewed without a warrant and a warrant was later issued on the basis of what the officer had viewed before he sought a warrant. The Court went on to find that designating a cell phone as a “container” for purposes of determining whether the evidence from the defendant’s phone should be suppressed: “We note, however, that that analogy is limited to circumstances like those presented here and should not be taken as a general holding that cell phones are to be treated as closed containers in all search contexts, such as, for example, a search incident to arrest or an inventory search.” *Id.* at n.6.

One of the cases relied on by the Fourth Circuit in arriving at its conclusion in *Murphy* was *United States v. Finley*, 477 F.3d 250, 260 (5th Cir. 2007). The *Finley* Court rejected the argument that a cellular phone was the equivalent of a closed container for purposes of the Fourth Amendment and found:

Finley concedes that the officers' post-arrest seizure of his cell phone from his pocket was lawful, but he argues that, since a cell phone is analogous to a closed container, the police had no authority to examine the phone's contents without a warrant. He relies on *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), for this proposition. *Walter*, however, is inapposite because in that case no exception to the warrant requirement applied, see *id.* at 657, 100 S.Ct. 2395, whereas here no warrant was required since the search was conducted pursuant to a valid custodial arrest, see *Robinson*, 414 U.S. at 235, 94 S. Ct. 467. Special Agent Cook was therefore permitted to search Finley's cell phone pursuant to his arrest. Cf. *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir.1996) (upholding retrieval of information from pager as search incident to arrest). The district court correctly denied Finley's motion to suppress the call records and text messages retrieved from his cell phone.

Id. at 260.

The *Finley* Court noted that in the case before them, as in the instant case, the search that led to the recovery of the phone was legal, unlike the search that was being examined in *Walter*. Several cases have held that a search warrant is required to search the contents of a cellular phone unless an exception to the warrant requirement exists. *United States v. Flores*, 122 F. Supp. 2d 491, 494-95 (S.D.N.Y. 2000) (cellular phone exempted from routine inventory search); see *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008) (contents of cellular phone are entitled to reasonable expectation of privacy), (citing *United States v. Finley*, 477 F.3d at 258-59); *United States v. Quintana*, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009) (cellular phone data entitled to reasonable expectation of privacy, citing *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008)). It has also been held that any challenge to the legality of a search must be rebutted by the

prosecution. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564 (1971); *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). But again, in every case where the courts have held that a cellular phone owner is entitled to a reasonable expectation of privacy in its contents, the issue was the legality of the underlying search under an exception to the Fourth Amendment.

Discussing this issue within the context of determining whether there is a reasonable expectation of privacy in the contents of a cellular phone is really somewhat of a legal red herring. The real issue is whether the initial proceedings--whether as part of an arrest, a warrantless search or a written warrant--leading to the recovery of the phone---extend to the contents without a separate warrant. What Appellant is really asking this Court to do is carve out a separate Fourth Amendment application to the contents of a cellular phone. Appellant's argument is problematic in many ways. Courts can hardly be required to create a whole new standard for probable cause to search an accused suspect's cellular phone distinct from the underlying probable cause that led to the arrest or underlying circumstances that produced the phone. Other than being in the possession of a suspect or accused, there would be little about a cellular phone, standing alone, to provide probable cause for a search warrant. Moreover, to create a separate privacy interest in the contents of a cellular phone would be to very nearly create a need to craft an entirely new and distinct body of law on what would justify a warrantless search given the inherently exigent nature of such an object. A cellular phone standing alone is not outwardly incriminating, unlike drugs, weapons or other evidence of a crime.

In support of this ground for error, Appellant cites to an appealing yet factually distinguishable case where the United States Supreme Court held that legal possession of containers

does not entitle law enforcement officers to search the contents without a separate warrant. In *Walter v. United States*, 447 U.S. 649, 653-655, 100 S. Ct. 2395 (1980), the court held that it was unlawful for the FBI to search boxes containing illegal materials accidentally delivered to the wrong address and subsequently opened by the unintended recipients who then turned the boxes over to the law enforcement agency after finding them full of pornographic material. Without a warrant the FBI investigators searched the boxes which ultimately led to the arrest and conviction of the defendant in the case based on the evidence seized from the boxes. The United States Supreme Court, in reversing, ultimately held that “[t]he fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents.” *Id.* at 655. Again, this is a compelling but problematic argument. *Walter* is distinguishable in many regards.

Law enforcement officers in the instant case did not stumble or happenstance upon Appellant’s phone. It was recovered from the vehicle of his victim pursuant to a properly issued search warrant. The proceedings that led to the underlying search that produced the phone was legal and within the protections of the Fourth Amendment. In *Walter* there was no legal search, no search warrant issued before the boxes were opened, no consent from the owners of the box nor were there any circumstances to suggest the boxes would have ultimately come into the possession of the FBI during an investigation of the crime. Instead, the boxes themselves triggered the investigation and ultimate conviction of the defendant. Appellant’s argument is irrelevant because Appellant’s cellular phone was in the victim’s truck, and it could have eventually come into the possession of law enforcement during the course of the investigation. Large boxes of evidence of a crime being delivered to the wrong address then being turned over to the FBI is simply too factually distinguishable irrespective of the underlying legal principles to apply to a technologically

sophisticated cellular phone seized from the possession of a murder victim pursuant to an otherwise legal search warrant.

With regard to any challenge to the acquisition of Appellant's cellular phone records as a result of the seizure of the phone, the law is well settled on this issue irrespective of the recent development of this technology. The United States Supreme Court has held that a telephone subscriber has no reasonable expectation of privacy in records of the numbers dialed from his telephone.³ *Smith v. Maryland*, 442 U.S. at 742. This Court has consistently held that individuals have no reasonable expectation of privacy to records held by third parties such as banks or other financial institutions. *See, e.g., United States v. Miller*, 425 U.S. 435, 442-43 & n.5, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976), in which the Court held that an accused has no right to prior notice within the Fourth Amendment of subpoenas issued to financial institutions. The Court has explained its reasoning on this issue by stating that "when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities." *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743, 104 S. Ct. 2720, 81 L. Ed. 2d 615 (1984).

If investigators had obtained a separate warrant for the contents of the phone, there also would be no issue before this Court. Therefore, the issue narrows to whether or not there exists a reasonable expectation of privacy in the contents of the phone sufficient to trigger the requirement

³In light of this holding, it is worth pointing out that phone numbers from Appellant's cellular phone were the only records admitted as evidence from this object that he is now claiming as error and a ground for reversal of his conviction; records that the United States Supreme Court has deemed to have no reasonable expectation of privacy.

that in order to seize its contents without a warrant, it must have been properly seized under one of the recognized exceptions to the Fourth Amendment.

Appellant cites *Ohio v. Smith*, 920 N.E.2d 949 (Ohio 2009), where the Supreme Court of Ohio held that there is a high expectation of privacy with a cellular phone, as opposed to a regular address book or pager, and law enforcement may not search the contents of the object incident to an arrest without first obtaining a warrant.⁴ *Id.* at 955. The Supreme Court of Ohio did depart from the various holdings mentioned by the state above. Of course, this opinion is merely persuasive rather than controlling; however, it is worth noting that a distinguishing factor from *Smith, supra*, in the present case is that the police, in fact, did have a lawful warrant when these phone records were discovered and later admitted as evidence in the trial.

As Appellant points out, the law is far from settled on this issue either among the state or federal courts. The Supreme Court of the United States has not taken up the issue nor has this Court. The Fourth Circuit, however, has and that is the federal jurisdiction here that controls on this issue. Likening a cellular phone to a container does not contemplate the technology, capabilities, sophistication and storage capabilities it possesses. Since the State obtained a lawful search warrant which resulted in the seizure of the cellular phone in question, it urges this Court to adopt the ruling of the Fourth Circuit and find no violation.

⁴It is worth noting that the Supreme Court of Ohio in *Smith, supra*, also rejected the argument that a cell phone was analogous to a closed container for Fourth Amendment purposes. *Id.* at 953. Appellant acknowledges this in his Appellant Brief, yet seems to rely on the cell phone being analogous to a closed container argument when he cites *Walter, supra*.

D. THE STATE WAS ABLE TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT A CONSPIRACY EXISTED IN ORDER TO ADMIT ROSEANN OSBORNE’S STATEMENTS UNDER RULE 801(d)(2)(E).

With both the statements from Ms. Osborne as testified by Ms. Barney and the police officers, there was proper foundation laid to establish a conspiracy by a preponderance of the evidence. The State met the standard of a prima facie case for conspiracy in order to have the statements admitted under West Virginia Rule of Evidence 801(d)(2)(E). The circuit court did not abuse its discretion in its ruling on this evidence.

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).

According to *State v. Fairchild*, 171 W.Va. 137, 144, 298 S.E.2d 110, 117 (1982), “evidence of acts or declarations of co-conspirators or co-actors is admissible only if a proper foundation, or prima facie case, is established The required foundation consists of: (1) proof of a conspiracy existing between the declarant and the defendant; and (2) proof that the act or declaration was made during and in pursuance of the conspiracy or joint enterprise. (Citation omitted.)” (FN7) See *Bourjaily v. U.S.*, 483 U.S. 171, 176-81, 107 S.Ct. 2775, 2779-82, 97 L.Ed.2d 144, 153-56 (1987) (holding the Fed.R.Evid. 801(d)(2)(E) requires proof of the conspiracy by a preponderance of the evidence and allows consideration of the offered declaration as part of the proof of the conspiracy); *State v. Nixon*, 178 W.Va. 338, 359 S.E.2d 566, 570 (1987).

State v. Miller, 195 W. Va. 656, 667, 466 S.E.2d 507, 517 (1995).

2. **The Circuit Court Did Not Abuse Its Discretion in Allowing the State to Admit Out-of-Court Statements of Roseann Osborne Because a Proper Foundation for Conspiracy Was Established.**

Despite Appellant's assertions, the out-of-court statements of Roseann Osborne to Ms. Barney and the police were properly admitted under West Virginia Rule of Evidence 801(d)(2)(E). This is because the proper foundation to establish conspiracy between her and Appellant by a preponderance of the evidence was laid in accordance with *Miller, supra*. According to West Virginia Rule of Evidence 801(d)(2),

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

....

(2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) *a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.*

(Emphasis added.) This was the category of non-hearsay, out-of-court statements that Ms. Osborne's fell under in order to be admissible in court. Additionally, the prosecution was able to establish a prima facie case that a conspiracy existed and that the statements in question were in furtherance of said conspiracy in accordance with *Miller, supra*.

Initially, Appellant contends that there was no foundation laid to admit the statements of Ms. Osborne through Ms. Barney's testimony regarding the conversations the latter heard between he and the victim's wife regarding a murder. In *Miller*, this Court held that statements by a defendant's brother that the defendant wanted to "do it" with the victim were admissible under an exception to

hearsay rule for a statement offered against party and made by co-conspirator during the course of and in furtherance of conspiracy, in light of the circumstantial proof of a conspiracy from the descriptions of alleged incidents of sexual assault of the victim who had been coerced by the brother. *Miller*, 195 W. Va. at 666, 466 S.E.2d at 517. As cited above, conspiracy may be established through circumstantial evidence. *See Less, supra*. As previously noted, the State was able to establish conspiracy through circumstantial evidence; thus, laying the proper foundation for the co-conspirator's out-of-court statements via Ms. Barney's testimony.

Appellant also asserts that the circuit court erred in granting the admission of the out-of-court statements by Ms. Osborne through the testimony of Officers Fox and Burnem through the 911 call and her statement after the crime. Yet, the foundation was laid for a prima facie case of a conspiracy here as well. In *State v. Ramsey*, 209 W. Va. 248, 545 S.E.2d 853 (2000), the West Virginia Supreme Court of Appeals held the following:

“Under Rule 801(d)(2)(E) of the West Virginia Rules of Evidence, a declaration of a conspirator, made subsequent to the actual commission of the crime, may be admissible against any co-conspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity.” Syl. Pt. 3, *State v. Helmick*, 201 W.Va. 163, 495 S.E.2d 262 (1997).

Syl. Pt. 6, *State v. Ramsey*. This is exactly what occurred with Ms. Osborne's statements to the police that an unknown assailant who attacked her husband at the park. This was made to conceal the identity of Appellant as well as their role in this offense.

So with both statements in question, the State was able to lay the foundation by a preponderance of the evidence that a conspiracy occurred and that they were made in furtherance of the same. The circuit court ruled accordingly when it granted the admission of these statements.

(Tr., 5-7, Dec. 18, 2008.) Thus, there was no abuse of discretion on the part of the circuit court regarding this ruling.

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

E. THERE WAS NO *BRADY* VIOLATION BY THE STATE REGARDING THE SURVEILLANCE VIDEO AND THE DOMESTIC VIOLENCE REPORT. THUS, THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S RENEWED MOTION FOR NEW TRIAL.

There was no *Brady* violation by the State regarding the video surveillance and the North Carolina domestic violence report on the victim. Regarding the domestic violence report, the State did not have nor could it reasonably have obtained possession or knowledge of it to turn over to Appellant. The surveillance video was made known to Appellant before the trial, yet he made the decision not to utilize it. In either instance, the items had no probative value, either as exculpatory or impeachment, and would not have reasonably been taken to put the whole case in such a different light as to undermine confidence in the verdict.

1. The Standard of Review.

“In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error 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. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

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

There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the

evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

Syl. Pt. 2, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007).

2. **There Was No Abuse of Discretion in the Circuit Court’s Denial of Appellant’s Renewed Motion for New Trial. There Was No Brady Violation, Primarily Because the Discovery Items in Question Were Not Material to Appellant’s Defense.**

Appellant claims that the State committed a *Brady* violation by not disclosing a surveillance video from an aluminum plant by the park where the murder occurred and a domestic violence report on the victim filed in North Carolina. On this basis, he filed a renewed motion for new trial which was denied by the circuit court. (R. at 244-56.) Despite Appellant’s claims, there was no *Brady* violation, and the circuit court did not err in denying his motion.

Appellant fails to meet the standard to establish a *Brady* discovery violation by the State in this case. In neither instance can it be established that the evidence was favorable to Appellant; that the State suppressed the evidence, willfully or even inadvertently or that it was material to his defense. Regarding *Brady* discovery violations, the United States Supreme Court set forth the various factors in determining whether or not one has occurred as follows:

“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). Appellant fails to satisfy any of these factors.

The video surveillance in question is a video containing a time-stamp from Ravenswood Specialty Metals Plant that showed footage of State Route 68, including the entrance of Ravenswood Riverfront Park. It is worth noting that the discovery provided by the State to Appellant made specific mention of this video surveillance material, yet the latter did not pursue the matter further. (R. at 250.) So it is highly dubious, at best, to even make the claim that this material was suppressed by the State. Regardless, the circuit court ruled that the video was not necessarily or even arguably favorable to Appellant because it was undisputed that he was at the scene the night of the murder and the video quality was such that one could not identify individuals or vehicles. (R. at 254-55.) Therefore, this material was not suppressed by the State, and it was not favorable to Appellant, either as exculpatory or impeachment evidence.

Regarding the domestic violence report of the victim that came out of North Carolina, the circuit court found that neither the prosecution nor any state law enforcement agency had possession or knowledge of its existence. (R. at 253.) Thus, there was no willful or inadvertent suppression by the state. Additionally, the circuit court ruled that the records had no relevance to Appellant’s defense, diminished capacity. (*Id.*) As mentioned previously, Appellant did not dispute the

commission of the murder, but rather based his defense on a psychological disorder which caused him not to be able to premeditate. The circuit court further ruled that Appellant did not use self-defense, defense of others or provocation; so a previous report of domestic violence would have little relevance. (*Id.*)

Based on all of this, the circuit court denied the motion. (R. at 256.) Appellant is unable in all of this to establish that this evidence was material, that it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict or that it was even suppressed by the State, willfully or inadvertently. Therefore, the circuit court did not abuse its discretion in denying his renewed motion for new trial.

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

F. AS IS THE CASE WITH THE CIRCUIT COURT'S DENIAL OF APPELLANT'S MOTIONS FOR ACQUITTAL, THERE WAS NO ERROR IN ITS DENIAL OF HIS MOTION FOR NEW TRIAL ON THE BASIS OF INSUFFICIENCY OF EVIDENCE.

Appellant wrongly contends that the trial court abused its discretion in denying his motion for new trial due to the evidence being insufficient to convict him of first degree murder and conspiracy to commit first degree murder. As with his argument regarding the circuit court's denial of his motions for acquittal discussed above, he fails to meet this heavy burden in order to have a new trial granted. The evidence was sufficient for a jury to convict him of these offenses beyond a reasonable doubt.

1. The Standard of Review.

“In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the

circuit court concerning a new trial and its conclusion as to the existence of reversible error 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. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

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

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *State v. Guthrie, supra*.

2. **There Was No Error On The Part Of The Circuit Court In Its Denying Appellant’s Motion for New Trial. There Was Sufficient Evidence For a Jury to Convict Appellant of Both Offenses Beyond a Reasonable Doubt.**

Just as with Appellant’s previous ground of error regarding the circuit court’s denial of his motions for acquittal, he has failed to meet the heavy burden that there was insufficient evidence to convict him of first degree murder and conspiracy to commit first degree murder, warranting the granting of his motion for a new trial. There is absolutely no difference in this argument and that for his second ground of error. Thus, the State need not make any additional argument than it did with respect to its response to Appellant’s above-mentioned ground for relief. As was previously

stated, there was enough time for Appellant to develop the requisite premeditation to commit first degree murder, and Dr. Clayman testified that he was capable of forming this state of mind. All of the evidence supported a finding of premeditation, despite his statement to the police that he “just snapped” and could not remember what he did. Additionally, there was sufficient evidence to establish that he was guilty of conspiracy—in the form of both direct evidence via the statements to which Ms. Barney testified and the circumstantial evidence. When examining the evidence in the light most favorable to the prosecution, it was sufficient for a jury to find him guilty beyond a reasonable doubt regarding both offenses, and the circuit court did not abuse its discretion in denying his motion for new trial.

Thus, Appellant’s argument fails on this ground.

G. NO ERROR OCCURRED IN THE CASE AT BAR; THEREFORE, A NEW TRIAL IS NOT WARRANTED.

Appellant contends that the cumulative effect of all of the claimed errors in this case had the result of a denial of a fair trial, and thus, warrants the grant of a new trial. Regarding cumulative error, this Court held the following:

Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.

Syl. Pt. 14, *State v. George W. H.*, 190 W. Va. 558, 439 S.E.2d 423 (1993).

As was set forth above, the State has established that no error occurred in this case—in the pretrial proceedings, the actual trial and in the post-trial proceedings—cumulative or otherwise. In light of this, Appellant is not entitled to a new trial.

V.

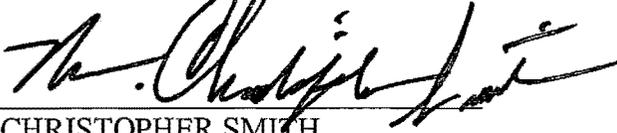
CONCLUSION

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

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

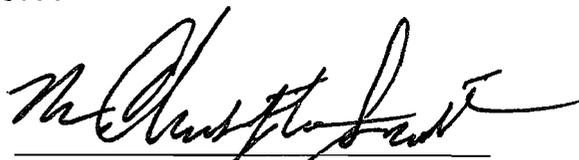
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CERTIFICATE OF SERVICE

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 11th day of August, 2010, addressed as follows:

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