

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia, Plaintiff Below,

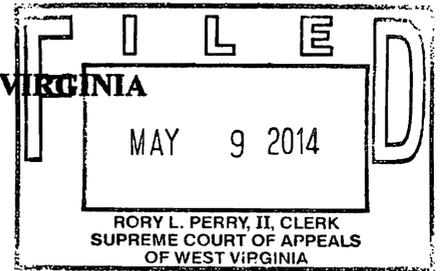
Respondent,

vs.

Docket No. 13-1264

Daniel L. Herbert, Defendant Below,

Petitioner.



PETITIONER'S REPLY BRIEF IN SUPPORT OF APPEAL

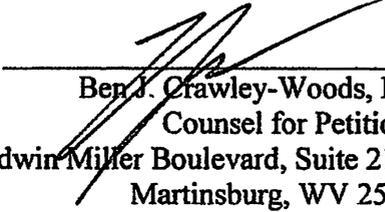

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Reply Argument

I. Respondent's arguments do not justify the trial court's failure to exclude, or alternatively, failure to properly instruct the jury, regarding a State witness's improper remarks about Petitioner exercising his constitutional rights.

Respondent argues the State witness's testimony that Petitioner was not cooperative with law enforcement does not amount to commentary on the Defendant's assertion of his rights. (See Response at p. 5) However, the State's witness – Detective Doyle – plainly said: “Mr. Herbert was not cooperating with us at the time.” See Trial Transcript, 9/3/13, at App. p. 397. It is difficult to discern how such a statement could be interpreted to mean anything other than Mr. Herbert was not willing to talk to law enforcement and not willing to submit to a search and gunshot residue testing.

Pursuant to *State v. Cozart*, 352 S.E.2d 152, 177 W.Va. 400 (1986), under certain circumstances, evidence of refusal to submit to certain testing (*e.g.* breathalyzer) may be admissible in a criminal trial, but only after in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. No such in camera hearing was held in this case.

After Detective Doyle testified about Mr. Herbert's non-cooperativeness, defense counsel properly objected, requested the testimony be stricken, and requested a cautionary jury instruction be given to the jury. (See Trial Transcript, 9/3/13, at App. p. 397.) The trial court overruled the objection and declined to give a cautionary instruction at that time. *Id.*

Petitioner does note in his initial brief that defense counsel did not submit a written cautionary instruction at the close of evidence or object to the written jury instructions after the close of evidence that did not include a cautionary instruction. (See Petitioner's Brief at p. 26 fn

8). To the extent this Supreme Court might find that an additional written request for a cautionary instruction or an additional objection to the jury charge without a cautionary instruction would have been necessary to preserve this error on appeal, Petitioner requests this Supreme Court notice plain error. *Id.*

However, it is unnecessary to resort to the plain error doctrine because defense counsel did object to the improper evidence, did request the testimony be stricken and did request a cautionary instruction be given at the time the evidence was introduced. The trial court's error in refusing to sustain the objection and strike the testimony, or alternatively, give a cautionary instruction at the time the improper evidence was introduced was clearly preserved. Defense counsel may have been reluctant to re-request a cautionary instruction at the close of evidence because – by that point – the unfairly prejudicial damage from the improper testimony had already been done. A strategic choice by defense counsel to not further compound the damage by bringing the issue back up at the close of evidence does not eliminate the violation that occurred during the State's case-in-chief.

In this case, evidence of Petitioner's exercise of his constitutional rights was used against him with no corrective measures taken by the trial court. "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." *State v. Blair*, 214 S.E.2d 330, 158 W.Va. 647 (1975). Such a showing cannot be made in this case. Although the State argues there was "an overwhelming amount of evidence presented against the Petitioner" (see Response at pp. 9-10), any such evidence was presented after the jury had already been unfairly prejudiced against Petitioner on the basis of impermissible evidence introduced via the State's very first witness.

II. Respondent's arguments that the trial court properly refused to permit the jury to see an alleged victim plead the 5th and refuse to testify are unavailing.

Respondent argues that *State v. Whitt*, 649 S.E.2d 258, 220 W. Va. 685 (2007) is clearly distinguishable from the present case and not supportive of Petitioner's claims. (See Response at pp. 11). Petitioner agrees the facts of *Whitt* are distinguishable from the present case in that the uncooperative witness at issue in *Whitt* was a co-defendant and the uncooperative witness in the instant matter was the alleged victim. But that distinction only heightens the importance of Petitioner's constitutional right to confront the witness against him and compel the witness in his favor! Petitioner acknowledges that victims may not always be available to be brought before the jury, but when they are available, their appearance before the jury (whether against or in favor of the defendant) is critically important for the purpose of a defendant exercising his or her 6th Amendment rights.

Respondent argues that the trial court "said it best when it found that there is 'no right to cross-examine someone who didn't testify.'" (See Response at p. 23 and App. 708.) The 6th Amendment guarantees the defendant the right to confront witnesses against him though, not just conduct cross-examination after the witness testifies. This Supreme Court has made clear that verbal testimony from a witness is not the only piece of evidence that a witness can provide or that the defendant is entitled to have considered by the jury. See *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980) (holding the constitutional right against self-incrimination does not extend to prevent the physical appearance of a witness at trial.)

Respondent further suggests the alleged victim was not "an accuser" for 6th Amendment purpose (See Response at p. 24), but it is unclear how the alleged victim, Gabriel McGuire, could

not be considered a witness against the Petitioner in this case. The State called Gabriel McGuire as a witness, indicating to the jury that the alleged victim was a witness against the Petitioner. (See trial transcript at App. p. 534, wherein the prosecutor stated “State would call Gabriel McGuire.”) The jury was then inexplicably¹ removed from the courtroom prior to Petitioner being afforded his constitutional right to confront the witness in the presence of the jury. (What possible procedural protection would the 6th Amendment provide if the right to confront witnesses could be satisfied outside the presence of the jury?)

Respondent goes on to argue that while this Supreme Court should find that the alleged victim was not a witness against Petitioner, the Court should simultaneously (but inconsistently) find that that the alleged victim was not a witness in favor of Petitioner either, thereby nullifying his 6th Amendment right to compulsory process. (See response at pp. 23-25.) The Respondent cannot have it both ways.

To the extent the Respondent concedes that the alleged victim would have been a witness in favor of the Petitioner in its response brief,² the Respondent argues alternatively that Petitioner’s 6th Amendment right to compel witnesses in his favor was satisfied by simply bringing the alleged victim into the courtroom outside the presence of the jury (See Response at p. 24). Respondent relies on *U.S. v. Griffin*, 66 F.3d 68 (5th Cir. 1995) for the proposition that “once a witness appears in court and refuses to testify, a defendant’s compulsory process rights

¹ Respondent attempts to support the procedure utilized by the trial court on the basis of possible threat to court security (see Response at p. 25), but even the trial court was doubtful of the security threat and thought any possible threat to the jury could be eliminated by placing the witness in a certain area of the courtroom. (See App. p. 712, wherein trial court stated “I was leaning towards bringing him in to this point here, not over by the jury, and I didn’t see from what I saw that he put up that much of a physical fight . . . There were two of them, and let the jury see that he refuses to testify . . . I don’t think that I’m required to put the jury in a place where it’s physically in danger, but I don’t think they would be physically in danger doing that . . .”) Additionally, Respondent cites no authority for the proposition that a possible security threat presented by a witness trumps the Petitioner’s 6th Amendment rights.

² The Respondent already made this concession at trial (See App. p. 541, wherein the prosecutor explained his objection to the jury seeing the alleged victim, stating “What happens on the witness stand is evidence, and this would be highly prejudicial to the state.”)

are exhausted.” *Id.* Petitioner believes “appears in court” must necessarily mean “appears in court *in front of the jury*”, or otherwise, the procedural protections guaranteed by the 6th Amendment would be nothing more than empty promises. (Again, what possible procedural protection would the 6th Amendment provide if the right to compel witnesses was only a right to compel witnesses to appear outside the presence of the jury?) And, as noted above and in Petitioner’s initial Brief, this Supreme Court has held in *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980) that a witness’s refusal to testify does not eliminate the need to have them appear before the jury, explaining “[b]y universal holding, one not an accused must submit to inquiry (including being sworn, if the inquiry is one conducted under oath) and may invoke the privilege [Fifth Amendment] only after the potentially incriminating question has been put. Moreover, invoking the privilege does not end the inquiry and the subject may be required to invoke it as to any or all of an extended line of questions.” 165 W.Va. at 504, 270 S.E.2d at 153 (quoting McCormick, Evidence § 136 (2d ed.1972).) (Emphasis added.)

The fact that the non-cooperative witness in this case was not an accused, but rather the alleged victim, is a distinction from the *Whitt* case that negates the discretion afforded to the trial court by *Whitt* to have the witness invoke the 5th outside the presence of the jury. When the non-cooperative witness is the alleged victim, this Court should hold that any invocation of the 5th or refusal to testify otherwise by such witness, must be done in the presence of the jury.

III. Respondent’s arguments that the trial court properly refused to give a negative inference instruction, regarding the lack of testimony or appearance of the alleged victim, are unavailing.

If this Supreme Court finds that the procedural protections afforded by the 6th Amendment to confront and compel witnesses can be satisfactorily exercised outside the presence of the jury, then there must necessarily be a mechanism preventing the non-appearance

of the alleged victim before the jury from unfairly prejudicing the defendant's case. If the defendant is not at fault for the material witness's non-appearance before the jury (and the non-appearance is due in part to the State requesting the jury not be allowed to see the material witness because it "would be highly prejudicial to the state"), then the jury must be instructed that:

The failure of the State to call an available material witness to appear before the jury gives rise to the inference that had that witness appeared and/or testified, then his/her appearance and/or testimony would have been adverse to the State's case.³

See *State v. James*, 211 W. Va. 132, 563 S.E.2d 797 (W.Va. 2002) (per curiam) and *McGlone v. Superior Trucking Co., Inc.*, 178 W.Va. 659, 363 S.E.2d 736 (1987).

Respondent argues that there is no authority for an adverse inference instruction in a criminal case (See Response at p. 26-27), but that is simply not true. It is a correct statement of law that there can be no adverse inference instruction against a defendant in a criminal case because the defendant is under no obligation to produce any evidence in a criminal case. See *State v. James*, 211 W. Va. 132, 563 S.E.2d 797 (2002) (explaining that the "missing witness" instruction approved by this Court in *McGlone v. Superior Trucking Co. Inc.*, 178 W.Va. 659, 363 S.E.2d 736 (1987) for use in civil cases was disapproved of by some other jurisdictions for use in criminal cases – but only to the extent the instruction allowed an adverse inference against the defense (i.e. impermissibly shifting the burden to the defense to produce evidence.) There is no such impediment to drawing the negative inference against the State. The *Whitt* Court agreed with the defendant's argument that he should not be denied the potential benefit of a witness's silence and was entitled to have the jury draw a negative inference from a witness's refusal to testify. 649 S.E.2d at 266, 270-271.

³ Or "Where a witness has no constitutional or statutory right to refuse to testify, jurors are entitled to draw a negative inference from witness' refusal to testify" as proposed pursuant to *Whitt* within Defendant's Proposed Jury Instructions (See App. pp. 104). Defense counsel's instruction as proposed would have only needed clarification that the negative inference can only be drawn against the State.

Respondent further suggests that the trial court alleviated any harm resulting from failure to instruct the jury on the negative inference by allowing defense counsel to argue that the jury should take a negative inference. (See Response at p. 27.) But arguing lawyers have nowhere near the power and effect of instructing judges. See *James*, 563 S.E.2d at 801 (noting “[a]ppellant persuasively argues that the effect of the presiding judge giving such an instruction likely has a far more substantial impact on the jury than would a similar comment offered in argument by [an] attorney.”)

IV. This Supreme Court must clarify the application of the doctrine of transferred intent.

Petitioner concedes that defense counsel did not object to the transferred intent instruction at trial; however, this Supreme Court must apply the plain error doctrine in this case because the doctrine of transferred intent was misapplied at trial and resulted in Petitioner being improperly convicted of two counts of attempted murder in the 1st degree (when Petitioner could only have legally been convicted of attempted murder in the 1st degree – with respect to Gabriel McGuire – and attempted murder in the 2nd degree with respect to minor, A.C.). Petitioner believes the doctrine is most likely being misapplied across the state as well, resulting in improper convictions and calling for this Court to provide clear guidance on the limits of the doctrine’s application

Petitioner’s argument in the midst of the seemingly complex doctrine is simple: The doctrine of transferred intent operates only to transfer the element of intent – nothing else. For example, if Petitioner had intentionally shot and killed Gabriel McGuire, but in the process a stray bullet struck, but only wounded minor A.C., could Petitioner have been convicted of murder of minor A.C. under the doctrine of transferred intent? Of course not, because the unintended victim did not die. The actual death of the victim is a separate element of the crime

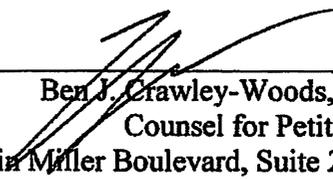
of murder that cannot be transferred. Likewise, premeditation is an entirely separate element of attempted murder in the 1st degree, which distinguishes that heightened offense from the lesser included offense of attempted murder in the 2nd degree (which merely requires malice and intent be proven without the separate element of premeditation). Thus, the premeditation element cannot be transferred to the unintended victim, minor A.C., to justify two convictions for attempted murder in the first degree.⁴

The Respondent does not argue that there was any independent evidence at trial that Petitioner premeditatedly attempted to kill minor A.C., so Petitioner's conviction of attempted murder in the 1st degree with respect to minor A.C. must be reversed.

Conclusion

Petitioner believes the errors addressed herein and discussed more fully in his initial brief, both individually and cumulatively, resulted in a constitutionally unfair and unreliable trial process. Petitioner prays this Supreme Court reverse his convictions and grant him a new trial, as well as any additional relief deemed necessary and proper.

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⁴ Notably, the case cited by Respondent, *State v. Hall*, 174 W.Va. 599, 328 S.E.2d 206 (W.Va. 1985) (wherein this Supreme Court upheld a murder conviction based on the doctrine of transferred intent) pertained only to a second, not first, degree murder conviction. See Response at p. 33.

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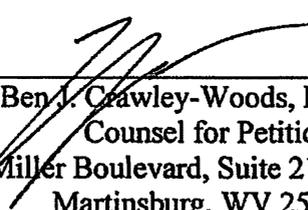
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CERTIFICATE OF SERVICE

I, Ben Crawley-Woods, counsel for Petitioner did serve the foregoing Petitioner's Reply Brief by mailing a copy of the same first class, to the following persons at the following address, on this 8th day of May, 2014:

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