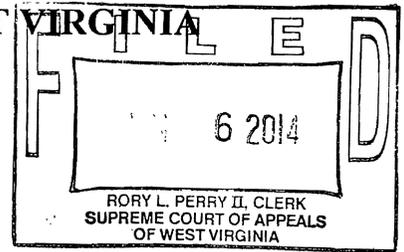


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0778



STATE OF WEST VIRGINIA,
RESPONDENT,

V.

CHRISTOPHER D. COX,
PETITIONER.

Appeal from a final order of
the Circuit Court of Fayette
County (12-F-77)

PETITIONER'S BRIEF

Counsel for Petitioner, Jason D. Parmer
Assistant Public Defender
Kanawha County Public Defender's Office
PO Box 2827
Charleston, WV 25330
Jason.D.Parmer@wvdefender.com
WV Bar ID 8005

TABLE OF CONTENTS

Assignments of Error 1

Statement of the Case 1

Summary of Argument 3

Statement Regarding Oral Argument and Decision 3

Argument

 I. The trial court abused its discretion by requiring defense witnesses to testify by videoconference, because no statute or rule allows video testimony at trial.

 A. No statute or rule allows the court to take trial testimony by video. 3

 B. The Court had no inherent authority to require Cox’s witnesses to testify by video. 4

 II. The Court committed plain error when it allowed defense witnesses to testify in shackles..... 6

Conclusion 8

TABLE OF AUTHORITIES

CASES

<u>Gable v. Kroger Co.</u> , 186 W.Va. 62, 410 S.E.2d 701 (1991)	5
<u>Smith v. State of Arkansas</u> , 143 S.W.2d 190 (Ark. 1940)	5
<u>State of Arizona ex rel. Romley v. Superior Court In and For County of Maricopa</u> , 909 P.2d 418 (Ariz. Ct. App. 1996)	5
<u>State of Iowa v. Iowa District Court for Polk County</u> , 464 N.W.2d 244 (Iowa 1990) ..	5
<u>State of West Virginia v. Allah Jamaal W.</u> , 209 W.Va. 1, 543 S.E.2d 282 (2000)	ibid
<u>State of West Virginia v. Gary F.</u> , 189 W.Va. 523, 432 S.E.2d 793 (1993)	5
<u>State of West Virginia v. Miller</u> , 194 W.Va. 3, 459 S.E.2d 114 (1995)	7
<u>State of West Virginia ex rel. McMannis v. Mohn</u> , 163 W.Va. 129, 254 S.E.2d 805 (1979)	6, 7
<u>Williams v. State of Alaska</u> , 629 P.2d 54 (Alaska 1981)	8

STATUTES/RULES

West Virginia Code § 62-6B-1 et seq.	4
West Virginia Code § 62-6B-3	4
West Virginia Code § 62-6B-4	4
West Virginia Code § 62-8-5	4
West Virginia Code § 62-8-6	4
West Virginia Rules of Criminal Procedure, Rule 26.	3
West Virginia Rules of Evidence, Rule 611	5
West Virginia Trial Court Rules, Rule 14.03	4

OTHER

Thaxton, Injustice Telecast: The Illegal Use of Closed Circuit Television Arraignments and Bail Bond Hearings in Federal Court, 79 Iowa L. Rev. 175 (1993) 5

ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by requiring defense witnesses to testify by videoconference because no statute or rule allows video testimony at trial.
2. The Court committed plain error when it allowed defense witnesses to testify in shackles.

STATEMENT OF THE CASE

On September 24, 2011, petitioner Christopher D. Cox was an inmate Mount Olive Correctional Center. On that day, there was a physical altercation between Cox and another inmate, Joseph Braddock. Braddock ultimately died as a result of the physical assault. A.R. 176-77. Cox and Braddock were both in the recreational yard together with several other inmates when the altercation occurred. It is notable that correctional officers are not allowed on the yard during the inmates' recreational time. A.R. 101-02.

Cox was charged with and convicted of first degree murder, with a recommendation of no mercy. A.R. 2, 326-28. The State presented the testimony of correctional officers Andrew Ward, Daniel Cherry, Joshua Hypes, and Michael Elkins who were working at Mount Olive on the day in question. A.R. 88, 108-09, 115-16, 127. Ward was in the cage area at the entrance to the recreational yard, and he testified that he saw Braddock and Cox facing each other, and then Cox attacked Braddock and ignored verbal commands to stop. A.R. 96-98. Cherry was in the tower, and he also testified that he thought that Cox was the initial aggressor, based upon his observations. A.R. 110. Neither Hypes nor Elkins saw the start of the incident. However, they testified that they did not see Braddock throw any punches or fight back. A.R. 118-19. The State also presented evidence from Dr. Kimble Knackstedt and forensic pathologist Dr. James Kaplan; both physicians testified that Braddock's fatal injuries were the result of a physical assault. A.R. 152, 177.

The defense witnesses present on the scene in the recreational yard, however, described a different scenario. Charles Brannon testified that he saw Braddock spit on Cox, “and then they started scuffling.” A.R. 187. Quinton Peterson also testified that he saw Braddock spit on Cox, which set off mutual combat between the two. A.R. 196. Zachary Shreves testified that “Mr. Braddock had a grudge against Mr. Cox.” A.R. 204. Shreves testified that he knew this to be the case because Braddock offered Shreves money to kill Cox. Id. Keith Lowe also testified that Braddock offered him five thousand dollars (\$ 5,000) to kill Cox. A.R. 213-14. Lowe stated that although Braddock had paid him in the past “to beat up another inmate,” Braddock never came through with the money he offered to kill Cox. A.R. 214.

Cox also explained the incident at trial. Prior to the altercation, Cox testified that he had heard that he might be in physical danger. Cox testified that he wanted to do his time in peace, so he attempted to talk through any problem that Braddock might have with him. A.R. 226. Braddock’s response was to ask Cox if he wanted “to eat metal,” meaning did Cox “want to get stabbed.” A.R. 227. Braddock then spat in his face. Id. Cox then saw Braddock “grab for something,” so Cox attacked Braddock. A.R. 235, 238. Cox recounted that there had been four stabbings “in the last two months in the same rec area.” A.R. 238. Cox further explained that inmates cannot count on guards to protect them from threats, and that often conflicts must be resolved between the inmates without involving prison staff. A.R. 229.

Of particular concern to this case are that the Court ordered, over defense objection, that all of the defense witnesses aside from Cox testify by video from Mount Olive. A.R. 10-14. When the witnesses testified on the video screen in front of the jury, they were shackled. A.R. 202-03, 212.

SUMMARY OF ARGUMENT

The trial court abused its discretion when it did not allow any defense witnesses other than Cox to appear in person to testify at trial. The trial court had no authority to require video testimony and this requirement placed the defense at an unfair disadvantage.

The trial court also committed plain error when it allowed five defense witnesses to testify in shackles. The physical appearance of the defense witnesses seriously affected the fairness of Cox's trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner Cox requests a Rule 19 oral argument because this case involves a trial court's unsustainable exercise of discretion where the law governing that discretion is settled. Petitioner further believes that a memorandum decision would not be appropriate in this case.

ARGUMENT

I. The trial court abused its discretion by requiring defense witnesses to testify by videoconference, because no statute or rule allows video testimony at trial.

A. No statute or rule allows the court to take trial testimony by video.

In this case, the trial court abused its discretion when it ordered that Cox's defense witnesses testify via video, because it had no authorization to do so by either statute or by the rules of this Court. It is the general rule that "in all trials the testimony of witness shall be taken orally in open court, unless otherwise provided by" the Rules of Criminal Procedure, the Rules of Evidence, or other rules adopted by this Supreme Court. West Virginia Rules of Criminal Procedure, Rule 26. There are exceptions to this rule, but none of them apply to this case.

For example, Rule 14.03(a) of the West Virginia Trial Court Rules allows videoconferencing to be used in non-evidentiary pretrial proceedings. This rule also allows the video recording of "the testimony of a prospective witness for use at trial." Such a situation may arise when a police officer is unable to attend a trial because he has been called to active duty in

the armed forces. However, nothing in this rule suggests that live videoconferencing may be used to take witness testimony during a criminal trial.

Moreover, West Virginia has statutes that allow a child to testify during a trial by video, but only if a psychiatrist or psychologist finds that the child will suffer severe emotional harm, will not be able to testify solely because of the defendant's physical presence in the courtroom, and if the child witness does not show signs of "undue influence or coercion." W.Va. Code § 62-6B-3(d). Further, if a child witness is allowed to testify by video, "the view of the child witness available to those persons in the courtroom shall include a full body view." W.Va. Code § 62-6B-4(b)(1). All of these statutory prerequisites to allowing a child to testify by video clearly demonstrate the Legislature's recognition of the importance of a live witness in the courtroom so the jury may accurately assess the witness' credibility.

Further, the legislature has prescribed a procedure for the prosecution of an inmate charged with a criminal offense. See W.Va. Code § 62-8-5. This statute requires a judge to bring an inmate's evidentiary witnesses to court, even if the witnesses are incarcerated.¹ Also, the legislature requires that trials of convicts shall be the same as trials in any other case. See W.Va. Code § 62-8-6. Both of these statutes were last amended in 1923, and the trial court violated these legislative pronouncements by requiring all Cox's witnesses to testify by video.

In sum, the trial court had no authorization to create an exception to Rule 26 of the Rules of Criminal Procedure and W.Va. Code §§ 62-8-5,6 that require trial testimony to be given in open court. Therefore, the trial court abused its discretion by requiring Cox's witnesses to testify by video.

B. The Court had no inherent authority to require Cox's witnesses to testify by video.

¹ West Virginia Code § 62-8-5 provides that when an indictment is found against an incarcerated person, the judge "shall issue a warrant to the warden of the penitentiary to bring him before the court, as well as any other persons confined in the penitentiary who are required as witnesses on either side."

In addition, the Court had no inherent authority to allow the admission of the televised testimony. If this is not the case, then it would be unnecessary for the Legislature to enact statutes regulating the admission of televised testimony. See W.Va. Code § 62-6B-1 et seq.; State ex rel. Romley v. Superior Court In and For County of Maricopa, 909 P.2d 418 (Ariz. Ct. App. 1996); State of Iowa v. Iowa District Court for Polk County, 464 N.W.2d 244 (Iowa 1990).

Although a court has the authority to “exercise reasonable control over the mode and order of interrogating witnesses,” it must balance the fairness to both parties when doing so. Syllabus Point 2, in part, Gable v. Kroger Co., 186 W.Va. 62, 410 S.E.2d 701 (1991); West Virginia Rules of Evidence, Rule 611(a). The fact that all the defense witnesses, other than Cox, were required to testify by videoconference placed Cox on an uneven playing field, since all of the State’s witnesses were allowed to testify in the physical presence of the jury. The fact that Cox’s witnesses were treated differently adversely impacted Cox’s opportunity to put on an effective defense because it is more difficult for a jury to make credibility determinations and to judge demeanor when it is watching a witness testify by videoconference. See Thaxton, Injustice Telecast: The Illegal Use of Closed Circuit Television Arraignments and Bail Bond Hearings in Federal Court, 79 Iowa L. Rev. 175 (1993).

In an analogous case, this Court has held that allowing an otherwise available accuser to testify by telephone at a juvenile transfer hearing violates the confrontation clause. See Syllabus Point 3, State v. Gary F., 189 W.Va. 523, 432 S.E.2d 793 (1993). Justice Workman noted in this case that the presence of a live witness in the courtroom allows the fact finder “to obtain the elusive and incommunicable evidence of a witness’ deportment while testifying, and a certain subjective moral effect is produced on the witness.” Id at 530, 800, quoting Smith v. State, 143 S.W.2d 190, 192 (Ark. 1940).

Because of the importance of live witness testimony and the unequal treatment of State and defense witnesses in this case, the Court abused its discretion when it ordered Cox's witnesses to appear via video because personal appearance before a jury is so important to determine credibility.

II. The Court committed plain error when it allowed defense witnesses to testify in shackles.

Petitioner Cox was denied a fair trial when the trial court required his witnesses to appear in shackles while testifying by video from Mount Olive Correctional Center. A.R. 202-03, 212. In general, a "criminal defendant has no constitutional right to have his witnesses appear at trial without physical restraints or in civilian attire." Syllabus Point 3, in part, State ex rel. McMannis v. Mohn, 163 W.Va. 129, 254 S.E.2d 805 (1979). However, this Court also recognizes that in certain situations, requiring a "defendant's witnesses to testify in physical restraints [or prison attire] may create sufficient prejudice that reversible error will occur. McMannis, 163 W.Va. at 140, 254 S.E.2d at 811. This court's review of whether Cox's witnesses should be physically restrained or required to wear prison attire while testifying before a jury" is subject to an abuse of discretion standard. Syllabus Point 3, State v. Allah Jamaal W., 209 W.Va. 1, 543 S.E.2d 282 (2000).

This court recognizes the danger of prejudice if a trial judge permits an incarcerated defense witness to appear at trial in the distinctive attire of a prisoner. See Syllabus Point 4, Allah Jamaal W. In recognition of this danger, a trial judge should not allow an incarcerated defense witness to be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to prevent escape, provide safety, or maintain general order. Syllabus Point 5, Id. Further, when a defense witness appears before a jury in prison

attire or shackles, “the judge should instruct those jurors that such attire or restraint is not to be considered in assessing the evidence and determining guilt.” Syllabus Point 6, Id.

In this case, Cox’s witnesses appeared in shackles during their testimony. A.R. 202-03, 212. Given that these witnesses were testifying by video from Mt. Olive, it was not necessary to physically restrain the witnesses in view of the jury. Further, the trial court failed to give a cautionary instruction to the jury regarding the physical appearance of the defense witnesses. Id.

Unfortunately, trial counsel did not timely object to the physical appearance of the incarcerated defense witnesses, nor did he request a cautionary instruction. See Syllabus Point 3, McMannis v. Mohn, 163 W.Va. 129, 254 S.E.2d 805 (1979). However, in this case, since all of Cox’s witnesses were incarcerated, it had quite a cumulative prejudicial effect on Cox’s defense to allow them to appear before the jury in shackles. In this case, the prejudice suffered to Cox’s defense amounts to plain error.

In order “[t]o trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus Point 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). If this court finds that the error is “plain,” this court must then determine whether the error was prejudicial enough to the defendant to affect the outcome of the proceedings in circuit court. Syllabus Point 8, Id.

The State may argue in this case that the error is harmless because it was obvious to the jury that the witnesses were incarcerated since the crime happened at Mount Olive, and the trial court instructed the jury as follows:

If I could have your attention, ladies and gentlemen of the jury. We have now reached the point where certain evidence is going to be presented to you by way of video, on the TV screen. As I indicated to you earlier, you are to consider this evidence as if this witness was sitting right here in this jury box testifying before

you personally. Make no distinction in the way that you treat the testimony of this witness from any other witness that has testified in the matter. Because of the circumstances in this particular case, we're taking this by way of video rather than personally. A.R. 184-85.

However, this instruction does not address the physical appearance of the defense witnesses testifying from Mt. Olive. In Allah Jamaal, this court rejected the State's argument that the allowing defense witnesses to be "paraded before the jury in prison uniforms and wearing shackles" was harmless error, noting that

The prejudice to a defendant from requiring one of his witnesses to testify in handcuffs lies in the inherent psychological impact on the jury, not merely in the fact that the jury may suspect that the witness committed a crime.... [T]he jury is necessarily prejudiced against someone appearing in restraints as being in the opinion of the judge a dangerous man, and one not to be trusted even under the surveillance of officers.

209 W.Va. at 7, 543 S.E.2d at 288, quoting Williams v. State, 629 P.2d 54, 57-58 (Alaska 1981).

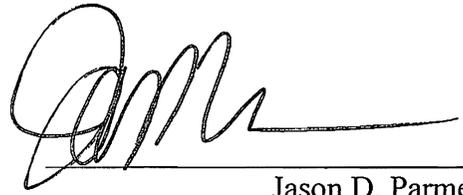
In this case, the judge not only required the defense witnesses to testify in shackles, but he did not even let them come to the courthouse. There could not be a much clearer message from the judge that the defense witnesses are dangerous and not to be trusted.

The only witnesses to the altercation between Cox and Braddock were guards and prisoners. It is inherently unfair and a miscarriage of justice that all of the State's witnesses were allowed to testify in person, but all of the defense witnesses other than Cox were shackled and testified via video. Therefore, the court committed plain error when it allowed defense witnesses to testify in shackles.

CONCLUSION

Petitioner Cox prays that this Court will find that the trial court committed prejudicial error in this case, reverse Cox's conviction and remand for a new trial.

CHRISTOPHER D. COX,
BY COUNSEL

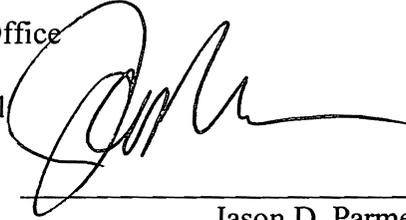
A handwritten signature in black ink, appearing to read 'J. Parmer', written over a horizontal line.

Jason D. Parmer
Assistant Public Defender
Kanawha County Public Defender's Office
PO Box 2827
Charleston, West Virginia 25330-2827

CERTIFICATE OF SERVICE

I, Jason D. Parmer, hereby certify that I have delivered the foregoing petition for appeal by first class mail on the 6th day of January, 2013 to:

Laura Young, Esq.
West Virginia Attorney General's Office
812 Quarrier St., 6th Floor
Charleston, West Virginia 25301



Jason D. Parmer