

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

STATE OF WEST VIRGINIA,
Appellee

VS.

W.Va. Supreme Court of Appeals No. 35501
Raleigh County Circuit Court No. 07-F-15-B

RODNEY JASON BERRY,
Appellant

BRIEF OF APPELLEE

Respectfully submitted by:

Kristen Keller
Raleigh County Prosecuting Attorney
Counsel for Appellee
112 N. Heber Street
Beckley, West Virginia 25801
PH: 304-255-9148
W.Va. State Bar # 1992

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

**STATEMENT OF FACTS
AND PROCEEDINGS BELOW** 1

RESPONSE TO ASSIGNMENTS OF ERRORS 11

I. There was no basis for the disqualification of the trial court judge in this case, and defense counsel made no recusal motion. Further, in a prior unrelated case in which defense counsel moved for the same judge’s disqualification on the same grounds as alleged in the instant appeal, this Court refused to order recusal. 11

II. The record reveals no factual support for the conclusory claim that Berry was not allowed “a full and complete defense” after the defense withdrew its bifurcation motion prior to trial and then orally moved for mid-trial bifurcation of the unitary trial. 12

III. There is no appellate dispute that Berry committed the first degree murders of two victims by means of premeditated, malicious killings, and the prosecution is not required to prove him guilty of both the premeditated, malicious first degree murders and first degree murders by the alternative means of lying in wait. Nevertheless, there was more than sufficient evidence for the jury to find that Berry, acting in secrecy from his victims, waited and watched before the victims’ arrival and then immediately began firing over a dozen bullets into their vehicle and into their bodies. 12

IV. There is no showing that the trial court clearly abused its discretion in finding that the probative value of the photographs introduced at trial outweighed the unfair prejudice -- if any -- caused to Barry’s case: the claim that the photographs were “unnecessary” demonstrates a misapprehension of the Rule 403, W.V.R.E. test for admissibility. 12

V. The accusation of prosecutorial misconduct is without merit: indeed, appellate counsel concedes that no reversible error resulted from the conduct of the prosecutor about which counsel complains. 12

DISCUSSION OF LAW 12

I. **JUDICIAL DISQUALIFICATION** 12

II. **“HISTORICAL” RELATIONSHIP EVIDENCE
AND BIFURCATION** 16

III. **LYING IN WAIT** 21

IV.	THE PHOTOGRAPHS	26
V.	THE PROSECUTOR'S CONDUCT	32
	CONCLUSION	35
	APPELLEE'S EXHIBIT 1	

TABLE OF AUTHORITIES

1. *Arizona v. Fulminate*, 499 U.S. 279, 111 S.Ct. 1246, 113 L. Ed. 2d 302 (1991)
2. *Lawyer Disciplinary Board v. Turgeon*, 557 S.E. 2d 235 (W.Va. 2000)
3. *Ford v. Coiner*, 196 S.E. 2d 91 (W.Va. 1972)
4. *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)
5. *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991)
6. *State ex rel. Levitt v. Bordenkircher*, 342 S.E. 2d 127 (W.Va. 1986)
7. *State v. Allison*, 257 S.E. 2d 417 (N.C. 1979)
8. *State v. Bragg*, 235 S.E. 2d 466 (W.Va. 1977)
9. *State v. Carey*, 558 S.E. 2d 650 (W.Va. 2001)
10. *State v. Copen*, 566 S.E. 2d 638 (W.Va. 2002)
11. *State v. Derr*, 451 S.E. 2d 731 (1994)
12. *State v. DeWeese*, 582 S.E. 2d 786 (W.Va. 2003)
13. *State v. Gray*, 619 S.E. 2d 104 (W.Va. 2005)
14. *State v. Grimes*, _____ S.E. 2d ____, W.Va. 34735, 11/16/09
15. *State v. Guthrie*, 461 S.E. 2d 163 (W.Va. 1995)
16. *State v. Harper*, 365 S.E. 2d 69 (W.Va. 1987)
17. *State v. Honaker*, 454 S.E. 2d 96 (W.Va. 1994)
18. *State v. Hughes*, 691 S.E. 2d 813 (W.Va. 2010)
19. *State v. Joseph*, 590 S.E. 2d 718 (W.Va. 2003)
20. *State v. Justice*, 445 S.E. 2d 202 (W.Va. 1994)
21. *State v. LaRock*, 470 S.E. 2d 613 (W.Va. 1996)
22. *State v. Leroux*, 390 S.E. 2d 314 (N.C. 1990)

23. *State v. Mongold*, 647 S.E. 2d 539 (W.Va. 2007)
24. *State v. Rowe*, 259 S.E. 2d 26 (1979)
25. *State v. Satterfield*, 457 S.E. 2d 440 (W.Va. 1995)
26. *State v. Simmons*, 309 S.E. 2d 89 (W.Va. 1983)
27. *State v. Waldron*, 624 S.E. 2d 887 (W.Va. 2005)
28. *State v. Walker*, 381 S.E. 2d 277 (W.Va. 1989)
29. *State v. Young*, 311 S.E. 2d 118 (W.Va. 1983)
30. *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532 (1931)
31. *Stuckey v. Trent*, 505 S.E. 2d 417 (W.Va. 1998)
32. *Tennant v. Marion Health Care Foundation, Inc.*, 459 S.E. 2d 374 (W.Va. 1995)
33. *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064 (1957)
34. *W.Va. Code §51-2-8*
35. *W.Va. Code §61-2-1*
36. *W.Va. Rules of Criminal Procedure, Rule 12*
37. *W.Va. Rules of Criminal Procedure, Rule 12.2*
38. *W.Va. Rules of Criminal Procedure, Rule 26.2*
39. *W.Va. Rules of Evidence, Rule 401*
40. *W.Va. Rules of Evidence, Rule 402*
41. *W.Va. Rules of Evidence, Rule 403*
42. *W.Va. Trial Court Rules, Rule 17*

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The victims in this double murder case were Martha Mills and Zackary Worthington. Ms. Mills was employed as a J.C. Penney's manager and was 25 years old when she was shot in the face and killed at approximately 1:00 a.m. on December 2, 2006 outside of her apartment in Bradley, West Virginia. Zackary Worthington was 31 years old and was employed at two restaurants and also as a wrestling coach when he died alongside Ms. Mills as a result of fourteen gunshot wounds to his arms, hands, chest, face and head. T. 817, 892-893, 1063-1067, 1071-1085. There was no dispute at trial, and there is none on appeal, that the Appellant, Rodney Jason Berry, (hereinafter "Berry") was the person who fired over a dozen bullets into the two victims with his 9mm semi-automatic handgun. T. 1493-1495. By Berry's own admissions during trial, both Ms. Mills and Mr. Worthington "were completely innocent victims" who were doing "nothing" in provocation: indeed, Berry agreed that all Mr. Worthington did was "cower" as Berry attacked. T. 1499, 1511, 1519, 1534-1535, 1538. Berry confirmed that he had driven to Ms. Mills' apartment at the time of the murders to "surprise her," and that secrecy is an essential element of surprise. T. 1507, 1519-1520. Berry also confirmed that the killings were deliberate acts. T. 1538-1540.

A thirteen year old child, Angela Canaday, witnessed the murders. From the window of her apartment directly across the parking lot from Ms. Mills' apartment, Angela Canaday observed Berry:

(H)e was pacing back and forth in front of Ms. Mills' apartment for like five minutes and then they pulled up and he started shooting whenever they pulled up, and she (Ms. Mills) had jumped out of the car, I guess to try to stop him, and he shot her, and he reached back in the vehicle and shot the guy three more times and jumped in his vehicle and left. T. 791.

Angela Canaday confirmed that Berry began shooting at Ms. Mills and Mr. Worthington "(a)s soon as they pulled up." T. 792. She described hearing "pow, pow, pow, pow, pow, pow, pow, pow" as Berry first fired into the windshield of the occupied truck. Angela Canaday described Berry's actions after he fired multiple rounds through the windshield:

After he shot into the truck . . . he shot Martha (and) he reached back in the truck to make sure the guy was dead and he shot him like two or three times.

Q: Okay. And so I'm clear, you said you saw and heard the pow, pow, pow, pow, pow, pow, pow, pow and that would be the first shooting into the truck, right?

A: Yes.

Q: And then he shoots Martha, right?

A: Yes.

Q: And then you saw him reach into the passenger side of the truck and (he) fires about how many times?

A: Two or three more times. I did not hear no screaming whatsoever.

T. 794.

Angela Canaday described how Berry then stepped over Ms. Mills' body as it "was laying in-between the two vehicles" -- the Toyota driven by Berry and the truck in which Mr. Worthington slumped, mortally wounded. Angela Canaday testified that Berry drove away so fast that she was "surprised he did not wreck." T. 794. On cross-examination, defense counsel elicited from the child her thoughts as she witnessed this double murder: "Who would be that cold-hearted to shoot somebody that many times." T. 809.

Sonya Norman was the residential manager of the Bradley apartment complex in which Ms. Mills resided in # 502. Around 1:00 a.m. on December 2, 2006 Ms. Norman heard what sounded like "firecrackers and you put one off and it just continuously goes off." She then saw the yellow Toyota, driven by Berry, "coming off the hill at excessive speed." T. 767-768. Ms. Norman and several tenants attempted to render aid to Ms. Mills and Mr. Worthington and jurors heard the Raleigh County 911 Center recordings of Ms. Norman and the other tenants, desperately calling for an ambulance for the two victims. T. 748-750, 770-

772, State's Exh. 99. Ms. Norman confirmed that, given the layout of the apartments and the parking area, Berry would not have been visible to the victims as they drove up to Ms. Mills' apartment. (T. 772-773).

Jurors also heard the call placed by Berry to the Fayette County 911 Center shortly after Ms. Norman and others called for emergency medical assistance.¹ Berry was calling from the Fayette County home he shared with his parents. T. 1188-1195, State's Exhs. 4, 173. In a tone devoid of emotion Berry stated:

. . . I'm calling for a confession so you may need to tell somebody to come and get me. Okay?

* * *

. . . I'll tell you it's my responsibility, I'm in sound mind, I snapped. I went over to see my girlfriend and I caught her with another guy and I shot 'em both.

* * *

EOC: Did you injure them?

BERRY: I believe I killed 'em both, ma'am.

* * *

BERRY: I know I sound like a brutal murderer, but I am very sorry.

State's Exh. 4 at 1-3, Exh. 173.

Fayette County Detective Chapman was the first to respond to Berry's residence. When Detective Chapman arrived he "needed to secure the residence for safety," so he placed Berry in the cruiser while he conducted a safety check. T. 1198-1201. Detective Chapman advised Berry of his *Miranda* rights and noted that Berry was "very calm." T. 1202, 1207. Within "15 to 20 minutes" after Detective Chapman's arrival at the Berry residence, Raleigh County Sheriff's Deputy Kade arrived on the scene. T. 1207-1209. Detective Chapman stayed behind and recovered two 9mm semi-automatic handguns from Berry's bedroom. One -- later identified as the murder weapon -- had "two rounds in the magazine and one round in

¹ The recording of the call (State's Exh. 173) was introduced into evidence, while the transcript of the recording (State's Exh. 4) was provided for the jury as the recording was played, but was not introduced into evidence. This procedure was followed whenever transcribed recordings were played for the jury.

the chamber," and was still cocked. The second 9mm semi-automatic handgun -- later identified as Berry's "back up" weapon -- was fully loaded with eighteen live rounds. T. 1221-1224, 1511-1512. C.I.B. firearms examiner Matthew White testified at trial that casings recovered from the crime scene were fired from Berry's handgun. T. 1175.

Deputy Kade testified about his conversation with Berry once the deputy arrived at Berry's residence:

(W)e spoke and he wanted to advise law enforcement of the events that had taken place, and I advised him that he was not under arrest . . . if he wanted to go back to the sheriff's office, I'd take him or him drive (sic), and he chose to ride with me. . . .

Q: Did you have any conversation with him during transport?

A: No.

* * *

Q: Now, was it your idea to have the defendant talk or did he want to give you his version?

A: He wanted to give his version of events.

T. 1247.

While awaiting the arrival of Detective Bare at the Raleigh County Sheriff's Office, Deputy Kade swabbed Berry's hands and face for a gunshot residue kit. T. 1248-1250. Later C.I.B. testing would confirm the presence of gunshot residue on these samples. T. 987-988.

Once Detective Bare arrived, Berry for the second time was advised of his *Miranda* rights and Berry confirmed that "he fully understood each and every one." Berry's demeanor was "extremely calm . . . and he was very cold and callous." T. 1250-1252. Berry advised Detective Bare that he and Ms. Mills "(l)ately had been trying to get back together and you can see the results." He claimed that at around 11:20 p.m. on December 1, 2006, Ms. Mills spoke with him by phone and told him she was going to sleep, but he decided to "go surprise her." T. 1282-1286, State's Exh. 3 at 3, Exh. 177. Berry claimed that when he arrived at Ms. Mills' apartment she was not at home and that he then drove around until returning to her

apartment "near the time of the incident." Berry stated that "she pulled up with another guy in the truck" and:

I had talked to her just, you know, just before I came over and she told me, you know, I was like are you going to sleep or something and she was like yeah, you know,. By the way of their face(s) you could tell what they had been doing that's about, you know, that's all I can say. She got out of the car and I was like who is that, she said a friend, you know, just by the facial expression, that's when I pulled my gun out and snapped.

State's Exh. 3 at 4, Exh. 177.

Berry stated that he then fired at Mr. Worthington through the windshield and that he could "remember opening the door and firing at him inside" the truck. He claimed that Ms. Mills then "rushed up and I turned and fired and she fell. I remember the little blood splatter on dad's Toyota." State's Exh.3 at 5, Exh. 177. That "little" spray of Ms. Mills' blood is depicted in the photographs introduced at trial as State's Exhibits 108-110. Berry also confirmed that when he shot Ms. Mills he aimed "like high shoulder or higher level" and that after the fatal assault he fled "immediately." State's Exh. 3 at 5, 14, Exh. 177.

Berry advised Detective Bare that he was "completely guilty of the crime" and that he was "completely sane up to that point" and apologized for the "mess" he'd left behind at the scene. State's Exh. 3 at 9, Exh. 177.

At trial Berry testified that he and Ms. Mills had "split in July" and had been only "quasi dating" at the time of the murders. He testified about what he told his mother when he arrived home after the murders:

. . . I said, "I caught Martha fucking a guy" -- fucked another guy, fucking around with another guy, I don't remember exactly what I said, "and I shot them both."

T. 1479.

Berry was asked how, exactly, he had "caught Martha fucking a guy:"

Q: What did you catch her doing?
A: Nothing.
Q: What?
A: Nothing.
Q: Nothing. Coming home?
A: Yes.

T. 1499.

Berry explained that his reference to "brutal murder" when he called 911 was "(f)or killing two people," thereby confirming his knowledge that he'd "hit the targets" after firing "13 or 14 rounds." T. 1500, 1513. Berry also confirmed that Ms. Mills had no knowledge that he would be waiting outside of her apartment.

Q: So (Ms. Mills) has told you she's going to sleep, you've called her twice in the middle of the night, she's not answering her phone, so you decide it's a good idea to go surprise her, correct?
A: That's correct.

T. 1507.

Berry admitted that he told Detective Bare three times that his purpose in going to Ms. Mills' apartment was to "surprise" her. T. 1519; 1533. He confirmed his motivation in firing those "13 to 14 rounds:"

Q: Her being with another man who she identified (as) a friend when you and she were quasi-dating was enough to make you kill them both, correct?
A: That's correct.

T. 1514.

Berry also confirmed that Mr. Worthington was a random victim:

Q: It was because he was there, because he was alive and he was a male, then he's dead, right?
A: That's what happened.
Q: And for all you knew at the time, he could have been a friend, he could have been a long lost cousin, he could have been somebody whose car broke down who'd be dead?
A: That's true, yes. Could have been anyone.

T. 1535.

Berry agreed that, in fact, there was no precipitating event outside of Ms. Mills' apartment that caused him to begin firing:

Q: So you had no reason to kill them both, did you?

A: No.

Q: And you used the deadly weapon, the 9mm against these two people without justification, excuse or provocation, didn't you?

A: That's correct.

T. 1537-1538.

* * *

Q: . . . (D)id you accidentally fire eight rounds through the windshield?

A: It didn't happen by accident, no.

* * *

Q: And you didn't accidentally open the passenger door and fire three more rounds into Mr. Worthington, did you?

A: No, I did not.

Q: And if it's not accidental, it's deliberate, isn't it?

A: Yes.

* * *

Q: And the gun, likewise, did not accidentally go off when you shot Martha Mills through the face, did it?

A: It couldn't have accidentally went off by itself, no.

Q: And if it wasn't accidental, it's deliberate, correct?

A: Again, in that context, yes.

T. 1538, 1540.

Berry also agreed that Ms. Mills and Mr. Worthington, "were completely innocent victims." T. 1519.

The Statement of Facts in Appellant's Brief repeatedly cites not evidence introduced at trial, but rather defense counsel's remarks made during pre-trial hearings and opening statements. (Appellant's Brief at 4-5, citations to "Tr. 710," "Tr. 309-11," "Tr. 313," "Tr. 303-13," Tr. 303," "Tr. 710," "Tr. 715.") Appellant's Brief fails to disclose that the other "facts" asserted therein were rebutted by the State's evidence and by evidence elicited on cross-examination of Berry and his two witnesses -- his mother and Richard Plumb. As required by Syll. Pt. 3, *State v. Guthrie*, 461 S.E. 2d 163 (W.Va. 1995), this Court must "review all the

evidence . . . in the light most favorable to the prosecution and must credit all inferences and credibility assessments . . . in favor of the prosecution.”

Fredric Mills -- the victim’s brother -- testified that at the time of the murders Ms. Mills was engaged to be married to Mr. Worthington. T. 892. He testified that Mr. Worthington lived with Ms. Mills, except that Mr. Worthington would stay with his family when visiting with his young child. T. 894. Mr. Mills testified that Berry called Ms. Mills’ mother’s home “20 (or) maybe more times” within the month before December 2, 2006, asking for Ms. Mills, and:

I repeatedly told him that she didn’t live here anymore, that she had her own place, to stop calling. I’d also told him that she was staying with her boyfriend at the apartment most of the time.

T. 896-897.

The claim in Appellant’s Brief (at 6) that Ms. Mills telephoned Berry “around 11:30 p.m.” before the murders was contradicted by Fredric Mills, who was with Ms. Mills and Mr. Worthington as they visited with Ms. Mills’ mother from 10:30 p.m. to 11:30 p.m. on December 1, 2002. T. 898-899. The claim in Appellant’s Brief (at 6-7) that Berry had just returned to Ms. Mills’ apartment when she pulled up with Mr. Worthington is contradicted by the testimony of Angela Canaday, discussed above, describing how Berry paced in front of Ms. Mills’ apartment for five minutes before Ms. Mills pulled up and Berry immediately began firing. The claim in Appellant’s Brief (at 7) that there was even a brief exchange of words also was contradicted by the testimony of Angela Canaday, that it was only after Berry began firing that Ms. Mills was able to step out of the truck. T. 791-793. The claim in Appellant’s Brief (at 7) that “the way that Martha was acting and her response caused him to snap” was rebutted by Berry’s own trial testimony, recited above, that Ms. Mills did “nothing” and said “nothing” to cause him to begin shooting. T. 1499. The claim in Appellant’s Brief (at 6) that Berry “typically had two guns on him” was contradicted by the testimony of Berry’s mother:

Q: Was it -- is it your testimony that it was your son's habit to carry fully loaded 9 mm handguns whenever he went out?

A: He would take it -- like I said, he had a permit, so he would take some sometime and then -- then, you know, a lot of times he would take it with him to --

Q: He would take a gun?

A: He would take that or . . . when he was working up on the mountain . . . he had two. In case somebody would take one, he would have the other, just --

Q: Working . . . as a security guard?

A: Yes.

Q: He was not working as a security guard when he left on -- right before the shootings, was he?

A: No, no, no.

Q: He was unemployed then, wasn't he?

A: Yes. Yes

T. 1390-1391.

In order to avoid redundancy, this Brief will address remaining inaccuracies in Appellant's Statements of Facts under the Discussion of Law, below. However, brief mention here is made of a few additional claims made in Appellant's Brief that are contradicted by the record.

Appellant's Brief (at 1, 5) charges that the trial court judge "arbitrarily set a timeframe within which the defendant could discuss (the) relationship" between Ms. Mills and Berry and that the "court ruled that the defense could only discuss the last 60 days of the relationship."

The record reflects that rather than "arbitrarily ruling," the trial court first repeatedly invited defense counsel to explain how evidence of what occurred in past years between Berry and Ms. Mills was relevant and admissible under Rule 403, W.V. R. E. in determining the issue of Berry's conduct on December 2, 2006. Defense counsel stated that it was "just . . . to show the historical context of the relationship." The trial court asked defense counsel how, hypothetically, the historical "ups and downs" in a relationship would "have anything to do with state of mind at the time of the . . . alleged crime?" Defense counsel answered:

MR. FRASHER: The hypothetical does not include things which may have happened which are things that the relationship's been told perhaps in the past it's over and then it resumes, and that could hypothetically happen on more than one occasion, by more -- and could have happened either way.

T. 310-313.

Apparently unswayed by the explanation, the trial court's initial ruling was:

So I'll arbitrarily give you . . . a date here and then tell me if there's something beyond that date that you think is critical to you. Sixty days before the event. . . I'm just throwing it out at you. . . .

T. 313.

The trial court then repeated: "(F)rom the Defendant's point of view, what do you need that's older than 60 days, if anything?" Defense counsel responded that "this may be determined by what the State does." The trial court then ruled:

THE COURT: All right. I can-- let's not -- *let's not fix a date then*, but let's fix the principle, that . . . the Court intends not to go so far back in time as to enter into an irrelevant period, and "irrelevant" means something that would not reasonably be expected to have an effect on the Defendant's state of mind at the time of the -- of the events alleged.

T. 314. (Italics added).

There was no objection to this ruling.

Another misstatement occurs when Appellant's Brief (at 4) -- although claiming no error -- discusses the jury's deliberations. After the jury began deliberations at 3:31 p.m., the trial court at 3:40 p.m. informed counsel that the bailiff was going to allow the jurors "to call their families and tell them they're going to be late and to take a smoke break." Although the record reads "At 3:40 p.m., a break was taken until 5:08 p.m.," this does not mean that the jury had not returned from their break to resume deliberations during that period: there was no "smoke-and-phone break" of one hour and twenty-eight minutes. Defense counsel made no claim in this regard after the jury returned its verdict. In fact, during post-trial motions defense counsel contended that "the jury in this case was out . . . approximately one hour . . ." -- not the "eleven minutes" asserted in Appellant's Brief. (7/31/09 Post Trial Motions Hearing at 6-7).

....” -- not the “eleven minutes” asserted in Appellant’s Brief. (7/31/09 Post Trial Motions Hearing at 6-7).

Another muddling of the facts occurs when Appellant’s Brief (at 5) quotes defense witness Richard Plumb’s testimony that Ms. Mills and Berry behaved “like a boyfriend and girlfriend” but ignores the impeachment of Mr. Plumb. On direct examination Mr. Plumb had assured the jury that he did not “observe any problems in the relationship” between Ms. Mills and Berry. T. 1420-1421. On cross-examination Mr. Plumb admitted that within two weeks of the murders Berry feared that Ms. Mills “was seeing somebody else” and that Berry was troubled by her behavior. T. 1452-1453. Defense counsel at trial conceded that “Mr. Plumb said some things that are harmful to the Defendant’s case.” T. 1809.

On May 22, 2009 the jury returned its verdict, finding the defendant guilty of the first degree murder of Martha Mills (count 1) and guilty of the first degree murder of Zackary Worthington (count 3). The jury found that both murders were committed by the use of a firearm, as charged in counts 2 and 4 of the indictment. The jury declined to add a recommendation of mercy to either count of first degree murder. T. 1836-1837. There was no defense objection to the trial court’s announcement that it would proceed with sentencing, and Berry declined to exercise his right of allocution. The trial court sentenced Berry to two consecutive life sentences without the possibility of parole. T. 1843-1845.

RESPONSE TO ASSIGNMENTS OF ERROR:

I. There was no basis for the disqualification of the trial court judge in this case, and defense counsel made no recusal motion. Further, in a prior unrelated case in which defense counsel moved for the same judge’s disqualification on the same grounds as alleged in the instant appeal, this Court refused to order recusal.

II. The record reveals no factual support for the conclusory claim that Berry was not allowed “a full and complete defense” after the defense withdrew its bifurcation motion prior to trial and then orally moved for mid-trial bifurcation of the unitary trial.

III. There is no appellate dispute that Berry committed the first degree murders of two victims by means of premeditated, malicious killings, and the prosecution is not required to prove him guilty of both the premeditated, malicious first degree murders and first degree murders by the alternative means of lying in wait. Nevertheless, there was more than sufficient evidence for the jury to find that Berry, acting in secrecy from his victims, waited and watched before the victims’ arrival and then immediately began firing over a dozen bullets into their vehicle and into their bodies.

IV. There is no showing that the trial court clearly abused its discretion in finding that the probative value of the photographs introduced at trial outweighed the unfair prejudice -- if any -- caused to Berry’s case: the claim that the photographs were “unnecessary” demonstrates a misapprehension of the Rule 403, W.V. R.E. test for admissibility.

V. The accusation of prosecutorial misconduct is without merit: indeed, appellate counsel concedes that no reversible error resulted from the conduct of the prosecutor about which counsel complains.

DISCUSSION OF LAW

I. JUDICIAL DISQUALIFICATION

What Appellant’s Brief (at 9) assigns as “(t)he most shocking error” in Berry’s trial is a spurious attack upon the integrity of a member of the judiciary. Appellant’s Brief (at 15, 22) mentions in passing the pivotal fact that “*Berry’s counsel did not request that the judge recuse himself from this trial.*” (Italics added).

Berry's appellate counsel either knows or had a duty to discover that this issue was settled in 2006. Appellee's Exhibit 1, attached hereto, includes Judge Burnside's response to a 2006 motion to recuse him. It confirms that by March, 2006 Chief Public Defender Joseph Noggy had agreed to Judge Burnside's presiding over criminal cases arising from alleged crimes occurring after January 31, 2006. Appellant's Brief (at 21, n. 20), asserts for the first time and without any factual support that defense counsel had not informed Berry of Judge Burnside's prior marriage: if this is true, it only demonstrates that counsel had no concerns about the judge's impartiality.²

The vacuous speculations contained in Appellant's Brief (at 15, 16, 20, 22), that Judge Burnside may have had some interest in the "reputation and livelihood" of the prosecutor, that "many people who are divorced still carry on a relationship," that there "are numerous issues that can take years to resolve (including) financial connections," all are proven untrue here. As Judge Burnside's December 12, 2006 memorandum letter confirms (at 4):

As of January 31, 2006, there exists no relationship between Ms. Keller and myself that would support disqualification

* * *

. . . Ms. Keller and I have no children together, and we never had jointly owned property or shared financial interests. No support obligations survive the marriage and there is no residual personal relationship

The claim in Appellant's Brief (at 14, n.13) that there is "an ongoing issue" of Judge Burnside's participating in criminal cases also is demonstrably false. The "issue" was settled by

² Appellant's Brief (at 16) speculates about whether the instant case was the first "major" criminal case over which Judge Burnside presided after his divorce. Due inquiry -- such as a call to the Raleigh County Public Defender's Office -- would have disclosed that the first such case over which Judge Burnside presided and in which his former wife was the prosecutor was *State v. Billy James "Bo-Bo" Fleming, No. 07-F-44-B*, in which a first degree murder charge was dismissed because Judge Burnside suppressed collateral crimes evidence essential to the State's case.

the Order of this Supreme Court of Appeals entered December 13, 2006, refusing to order recusal. Judge Burnside has presided over scores of criminal cases since that date with no motion to recuse him made by any member of the Raleigh County Public Defender's Office or by any other attorney retained or appointed in criminal cases.

The cases cited in Appellant's Brief (at 17-23) concerning judicial disqualification are inapplicable here because not one concerns a criminal trial in which the defense, fully informed of the prior relationship between the trial judge and the prosecutor, made no claim of judicial disqualification until the appeal. In the instant case, not only was there no pre-trial motion for disqualification as required by Rule 17, W.V. T.C.R., there was no claim of error in this regard by defense counsel in post-conviction motions or even in the Notice of Intent to Appeal. Accordingly, this claim, first raised on appeal, is barred by the "raise or waive" rule:

Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights. Recently, we stated . . . "The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their piece." (Citation omitted). *State v. LaRock*, 470 S.E. 2d 613, 634-635 (W.Va. 1996).

The "raise or waive" rule is incorporated into W.Va. Code §51-2-8, recognized in Appellant's Brief (at 18) as "the disqualification statute." §51-2-8 omits any mention of former spouses. Further, the statute expressly provides that, even when a disqualifying relationship exists, *no judgment or decree rendered or pronounced by any such judge shall be invalidated by reason of such relationship unless the same appear of record in such suit or proceeding.* (Italics added).

Appellate's Brief (at 22) makes the entirely conclusory claim that, even in the absence of a motion to recuse, Judge Burnside's participation in the instant case constituted "a structural defect affecting the framework within which the trial proceed(ed)." Appellant's

Brief cites *Arizona v. Fulminate*, 499 U.S. 279; 310; 111 S. Ct. 1246, 1265; 113 L. Ed. 2d 302, 331 (1991), which concerned a coerced confession and only included in dicta a citation to a case in which the judge was "not impartial." The other citation is to *Neder v. United States*, 527 U.S. 1, 8; 119 S. Ct. 1827, 1833; 144 L. Ed. 2d 35, 46 (1999), which concerned a harmless error analysis of instructional error and only included in dicta the obvious fact that there is "structural error" -- or plain error -- when it is established that a trial judge actually is biased. This claim-in-passing of "structural error," lacking factual support or applicable citations of law, cannot warrant appellate review:

(T)he defendant raises some half-hearted assignments that were not fully developed and argued in the appellate brief. Although we liberally construe briefs . . . issues which are . . . mentioned only in passing but are not supported with pertinent authorities, are not considered on appeal.

La Rock, supra at 621.

There is, however, pertinent authority that "a claim of an appearance of impropriety does not rise to the level of a fundamental defect in due process requiring a new trial." *Tennant v. Marion Health Care Foundation, Inc.* 459 S.E. 2d 374, 385-389 (W.Va. 1995).

In *Tennant*, this Court by Justice Cleckley held:

(T)he United States Supreme Court described the standard for recusal as whether a *reasonable* and objective person *knowing all the facts* would harbor doubts concerning the judge's impartiality. (Italics added).

* * *

Also important, however, is the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. (Citations omitted).

* * *

The objective standard is essential when the question involves appearance: "(W)e ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person." (Citations omitted). The objective standard requires a *factual basis* for questioning the judge's impartiality. (Italics added).

Lacking any factual basis for the accusation that Berry was denied a "fair and impartial tribunal," Appellant's Brief (at 23) then makes the circuitous claim that some of the judge's rulings "were legally incorrect and (are) assigned as errors . . . call(ing) into question the Judge's impartiality." A claim of judicial error, made by every appellant in every case, is evidence of neither trial court bias nor "appearance of impropriety." Finally, the unsupported claim in Appellant's Brief (at 23) that "Berry's conviction is not reliable" is ironic, as Appellant's Brief (at 1) describes this trial as "an open and shut case for the prosecution" and Appellant's Brief (at 39) complains that Berry "should have been arrested" for the first degree murders of Ms. Mills and Mr. Worthington more promptly than he was.

II. "HISTORICAL" RELATIONSHIP EVIDENCE and BIFURCATION

(a). "HISTORICAL" RELATIONSHIP EVIDENCE

As discussed above, the trial court did not preclude the defense from presenting any evidence shown to be relevant to Berry's state of mind at the time of the murders. Although Appellant's Brief (at 24-25) claims that communications between Ms. Mills and Berry from years before the murders were "crucial evidence for the defense," the following is the explanation offered in support of such assertion:

Counsel argued that the older stuff was necessary to demonstrate that there had been tough times in the relationship before just like they were going through at the time of the murders.

* * *

Without the previous letters to demonstrate the full context of the relationship, essential to establishing a pattern, the State was able to present Mr. Berry as a crazed stalker not willing to take no for an answer, when in fact the situation was much different.

Appellant's Brief contains no citation to any statement by the prosecutor that Berry was "a crazed stalker who couldn't take no for an answer." Indeed, it was defense counsel in

opening remarks who informed the jury that Berry was “obsessed in his love for Martha Mills” and “had an obsession with guns as well.” T. 707-711. And in closing argument defense counsel again reminded the jury that Berry “was obsessed with Martha and his love was . . . an obsessive love. His other obsession was guns.” T. 1804. Appellant’s Brief (at 4) agrees with defense counsel that Berry “was obsessed with” Ms. Mills.

Appellant’s Brief (at 25) cites no authority for the claim that a history of “ups and downs” and “mixed signals” in the relationship between murderer and victim constitutes a defense of any kind. Further, this claim entirely ignores the fact that Mr. Worthington was a random victim of Berry’s ambush. “(I)ssues which are . . . not supported with pertinent authorities are not considered on appeal.” *LaRock, supra* at 621.

(b). BIFURCATION

Appellant’s Brief (at 25-26) misstates the record in claiming that defense counsel proposed to offer evidence of Berry’s purported childhood anxiety, his school records, his immaturity and his father’s PTSD as “mitigation evidence” solely on the issue of mercy. This evidence initially was identified by the defense in relation to a diminished capacity defense in the unitary trial the defense desired after withdrawing its bifurcation motion. T. 325.

Trial began on May 12, 2009. In February 2007 the State filed its motions for discovery, including requests for Rule 12.2(b) W.V. R. Crim. Pro. disclosure of any defense of mental condition. There was no response from the defense until May 7-8, 2009, when the defense first disclosed the names of various records custodians. T. 319. The State objected to such evidence both on the grounds of late disclosure and on the grounds that it was intended to support a diminished capacity defense without the requisite expert testimony. T. 318-322. Citing *State v. Simmons*, 309 S.E. 2d 89 (W.Va. 1983) and *State v. Joseph*, 590 S.E. 2d 718 (W.Va. 2003), the State asserted that the diminished capacity defense “is designed to permit a

defendant to *introduce expert testimony* regarding his impaired mental condition to show that he was incapable of forming a specific criminal intent.” (T. 319-322). (Italics added).

There is no claim in Appellant’s Brief that the trial court erred in agreeing that expert psychiatric or psychological testimony is required to assert a diminished capacity defense. The defense at trial had no such expert testimony to offer. Indeed, only when Berry testified did the prosecution learn that, while incarcerated, he had been evaluated by psychologists or psychiatrists at West Virginia University. T. 1545. The prosecution never has seen the report of such evaluation and defense counsel declined to call the evaluating expert or experts at trial. When the trial court ruled that the pertinent case law required expert testimony in order for Berry to rely upon a diminished capacity defense, the following took place:

MR. FRASHER: Well, we’re not making a -- a claim of pure diminished capacity. It’s to explain the overall workings of how the Defendant’s mind operated so that the jury --

THE COURT: Okay.

MR. FRASHER: -- be informed on whether they felt he formed the requisite intent, the requisite malice, the requisite premeditation. T. 325.

This, of course, is precisely a diminished capacity defense, requiring the expert testimony which the defense declined to offer. When defense counsel -- having withdrawn the bifurcation motion -- then argued that diminished capacity evidence without expert testimony should be allowed on the issue of mercy in a unitary trial, the trial court invited the defense to renew the bifurcation motion:

THE COURT: I understand there was a motion to bifurcate that issue that the Defendant withdrew.

MR. GRIFFITH: We did, Your Honor, and -- and I guess that’s why we’re still trying to, you know, get it all done in one hearing

THE COURT: Well . . . but wouldn’t bifurcation solve that problem? () But would bifurcation solve that problem . . . that this evidence

might be admissible . . . on the question of . . . mercy as distinguished from the question of . . . guilt --

* * *

MR. FRASHER: . . . (B)ecause we are doing it all together, we should be able to put some information in front of the jury that can answer some of the questions --

THE COURT: Why should you? Why should you be allowed to do that?

MR. GRIFFITH: Because they'll be making a determination as to mercy at the same time they make a determination as to guilt, Your Honor.

* * *

THE COURT: All right. The Defendant has elected the strategy of withdrawing the motion for bifurcation and that carries with it certain results, and one of the results is that we will not mix into questions of issues of guilt . . . evidence associated with the question of mercy except to the extent permitted in an unbifurcated trial.

T. 327-331.

The prosecution, pursuant to *Simmons, supra*, informed the defense that in case the defense intended to use just-disclosed evidence of Berry's mental condition, the prosecution had arranged for Dr. David Clayman, a forensic psychologist, to evaluate Berry. Defense counsel then agreed that such "psychological stuff" would not be admissible in a unitary trial "because it is in violation of another rule of evidence or . . . criminal procedure T. 331-334.

After the jury was sworn and opening statements were made and the prosecution called four witnesses there was a recess from Thursday until the following Tuesday. During this recess the State received no notice that the defense would make a new motion for bifurcation of this unitary trial. After trial resumed, defense counsel made an oral bifurcation motion. T. 872-877. The prosecution objected, noting that the mid-trial motion came on the Tuesday following the scheduled Friday evaluation of Berry by Dr. Clayman, an evaluation that never took place because there was to be no evidence of diminished capacity in the unitary

trial. T. 877-880. The trial court allowed the defense yet another opportunity to sustain its burden of persuading the court that bifurcation was needed:

MR. GRIFFITH: . . . I don't know for sure but I would suspect that there may be some desire to not expose himself to cross-examination in the case in chief and yet, at the mercy stage, to try to show the jury what type of person he was.

The events that led up to this although they may not be relevant to the exact events that happened that night, had a bearing on what state of mind he had

* * *

MR. GRIFFITH: (W)e have mainly some older school records that show his difficulties in social interactions (and) a doctor that was treating him for hormonal difficulties

T. 884-885.

Citing *LaRock, supra*, the trial court ruled that the defense had not shown a reason why the court should grant a mid-trial motion for bifurcation after the pre-trial motion had been withdrawn. The court found that the defense was proposing to elicit evidence of diminished capacity "without the required elements of the diminished capacity evidentiary basis." The court found "significant" prejudice to the prosecution in the "mid-trial assertion of the motion" to bifurcate but held that "the primary reason for rejecting the motion . . . is that counsel have not demonstrated that the issues that would be presented at the subsequent sentencing phase are of a nature that justify a separate phase for that purpose." T. 887-890. Nevertheless, the trial court invited defense counsel during trial "on any bit of evidence" to show the Court that such evidence "might be admissible for one purpose and not for another and that a limiting instruction could be used" T. 890. Defense counsel never took the trial court up on its invitation.

Appellant's Brief (at 28) claims that the trial court's ruling "stripped Mr. Berry of the right to present a meaningful defense and to address the issue of mercy" Berry could have introduced evidence of a "meaningful defense" of diminished capacity if he had offered

expert testimony as required by *Simmons* and *Joseph, supra*. The State then would have had Berry submit to a psychological evaluation. The fact that Berry did, indeed, have an evaluation by a defense expert and then declined to present the expert's testimony in support of either a diminished capacity defense or an appeal for mercy leads a reasonable observer to conclude that the defense expert could not have provided a "meaningful defense" or mitigation evidence.

The defense also could have pursued the pre-trial motion for bifurcation, but instead withdrew it and declined repeated pre-trial invitations by the trial court to renew it. Appellant's Brief offers no authority for the contention that a defendant who expressly declines to move for bifurcation has a right to a mid-trial transformation of a unitary proceeding into a bifurcated one. Further, Appellant's Brief makes no showing of "compelling prejudice" resulting from this unitary trial: even when a timely bifurcation motion is denied, "this Court will grant relief only if the appellant can show prejudice amounting to fundamental unfairness." *LaRock, supra* at 634.

III. LYING IN WAIT

There is no claim on appeal that the evidence was insufficient to convict Berry of the first degree murders of Ms. Mills and Mr. Worthington, as there is no claim that the evidence was insufficient to prove that Berry committed the premeditated and malicious killings of these two people by use of a firearm. As this Court repeatedly has made clear, *W.Va. Code* §61-2-1 provides that it is "not. . . necessary to set forth the manner in which, or the means by which, the death of the deceased was caused." Further, this Court repeatedly has held that the §61-2-1 indictment language used in this case is sufficient to sustain a conviction for any "manner or means" of first degree murder. *State v. Hughes* 691 S.E. 2d 813 (W.Va. 2010); *State v. Satterfield*, 457 S.E. 2d 440 (W.Va. 1995); *State v. Justice*, 445 S.E. 2d 202 (W.Va. 1994);

State ex rel. Levitt v. Bordenkircher, 342 S.E. 2d 127 (W.Va. 1986); *State v. Young*, 311 S.E. 2d 118 (W.Va. 1983); *State v. Bragg*, 235 S.E. 2d 466 (W. Va. 1977); *Ford v. Coiner*, 196 S.E. 2d 91 (W.Va. 1972). Nevertheless, in order to preclude a claim of lack of notice such as was raised by the defendant in *Hughes, supra*, the prosecution in the instant case included the §61-2-1 first degree murder language in the indictment and added lying in wait as an alternative "manner or means" of Berry's commission of these murders. As there is no claim that the evidence was insufficient for the jury to have found the essential elements of first degree murder by the "manner or means" of premeditated, malicious murder, the claim of insufficiency of evidence as to the "manner or means" of lying in wait must fail. *Guthrie, supra*.

Appellant's Brief (at 32) erroneously contends that even when there is sufficient evidence to prove first degree murder by one "manner or means", the conviction "must be reversed" if the evidence is insufficient to prove the alternative "manner or means." Appellant's reliance upon *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064 (1957) and *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532 (1931) is erroneous. Neither *Yates* nor *Stromberg* addressed evidentiary insufficiency. Rather, *Stromberg* held that when an unconstitutional "clause of the statute (was) invalid on its face, the conviction of the appellant, which . . . may have rested upon that clause exclusively, must be set aside." And *Yates* concerned a conviction resulting from an indictment which included as an alternative charge an offense barred from prosecution by a statute of limitations. In both *Stromberg* and *Yates*, the concern of the United States Supreme Court was that the defendants may have been convicted under an unconstitutional statutory clause or a clause barred by a statute of limitations.

There are no such concerns here. Rather, Berry's argument is that although he was proven guilty of the first degree murders of Ms. Mills and Mr. Worthington, the convictions

should be reversed because, he claims, the evidence was insufficient to convict him of the alternative "manner and means" of committing first degree murder by lying in wait.

There is no assertion on appeal that the following instruction was in error:

Therefore, under this indictment for first degree murder the State is not required to prove both first degree murder by lying in wait and by a premeditated and malicious killing. Rather, these forms of first degree murder are in the alternative, and if the jury finds beyond a reasonable doubt that the Defendant is guilty of either . . . then the jury may find the Defendant guilty of first degree murder as charged in the indictment.

T. 1755.

There also is no appellate claim that the trial court erred in declining to require the jury to specify on the verdict form the "manner or means" upon which the jury found Berry guilty. Such specification is not required because first degree murder is but one crime which may be committed by several methods, and the method employed by the murderer does not equate to a separate offense. Syll. Pt. 2, *Hughes, supra*; *Stuckey v. Trent*, 505 S.E. 2d 417 (1998); *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).

Accordingly, Appellant's Brief errs in arguing that, unless the evidence proved Berry guilty of *both* two premeditated, malicious first degree murders and two first degree murders by lying in wait, his convictions should be reversed. Nevertheless, in this case the evidence was more than sufficient to prove both two premeditated, malicious murders and two first degree murders by lying in wait.

Appellant's Brief (at 30) also errs in arguing that there "was no testimony that Mr. Berry hid in concealment." There is no requirement that the murderer must "hide in concealment" in order to establish lying in wait. Rather, it must be proven "that the accused was waiting and watching with concealment *or* secrecy for the purpose of or with the intent to kill or inflict bodily harm upon a person." *State v. Harper*, 365 S.E. 2d 69 (W.Va. 1987); *State v. Walker*, 381 S.E. 2d 277 (W.Va. 1989). (*Italics added*).

Courts have elaborated upon the elements of lying in wait set forth in *Harper* and

Walker:

Murder perpetrated by lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush . . ." (Citation omitted). The assassin need not be concealed, nor need the victim be unaware of his presence. "If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute lying in wait." (Citation omitted). *State v. Leroux*, 390 S.E. 2d 314, 320-321 (N.C. 1990).

* * *

Certainly one who has lain in wait would not lose his status because he was not concealed at the time he shot his victim. The fact that he reveals himself or the victim discovers his presence will not prevent the murder from being perpetrated by lying in wait. Indeed, a person may lie in wait in a crowd as well as behind a log or a hedge. (Citation omitted). *State v. Allison*, 257 S.E. 2d 417, 425 (N.C. 1979).

Angela Canaday, the young eye-witness, testified that Berry paced in front of Ms. Mills' apartment for five minutes and that "as soon as they pulled up," Berry began shooting inside the truck in which Ms. Mills and Mr. Worthington were located. Angela Canaday confirmed that the slaughter began "(a)s soon as they pulled up, it was just so fast." T. 791-793. Angela Canaday testified that it "was very dark outside" and that Berry wore "a dark coat" and that Ms. Mills "wouldn't have been able to see" Berry's father's Toyota "till she had already got into the parking lot." T. 808, 811. Further, the apartment manager confirmed that Berry, standing in front of Ms. Mills' apartment, would not have been visible to Ms. Mills and Mr. Worthington as they pulled into Ms. Mills' parking spot. T. 772-773. And Appellant's Brief ignores the testimony of Detective Sgt. James Bare:

Q: From your investigation and your familiarity with the crime scene, at what point, if Mr. Berry was waiting in front of 502, would he become visible to a driver who drove in and parked where Martha Mills parked right before the killing?

A: With the vehicles parked in the parking lot, probably not until she started pulling into her spot.

* * *

Q: And did any . . . witness . . . disclose to you . . . whether Martha Mills or Zack Worthington even knew that the Defendant's father had recently purchased that Toyota?

A: Not to my knowledge.

Q: And . . . it was registered to the father, correct --

A: Yes.

Q: -- not the Defendant?

A: That's correct.

T. 1273-1274.

Even if Ms. Mills had recognized Berry's father's Toyota, once she drove into Berry's vicinity, escape was impossible. This was established by the fact that the bullet Berry fired into Ms. Mills' face exited the rear of her head, pierced an apartment's front window and exited through the back door. T. 1277-1279.

Appellant's Brief (at 30-31) then invents the following:

(Berry) had every reason to think that she would be at her apartment and would let him in. Mr. Berry had no way of knowing, nor any reason to suspect that Ms. Mills would be with Mr. Worthington when he arrived. Therefore, there was no opportunity to plan to lie in wait or secretly hide in order to carry out an ambush.

First, such argument misstates the necessary elements of lying in wait. Next, there is no reference to the record in support of the claim asserted: this Court has "serve(d) notice on counsel that . . . (it) will take as non-existing all facts that do not appear in the designated record . . ." *State v. Honaker*, 454 S.E. 2d 96, 101 n. 4 (W.Va. 1994). Further, such claim is proven untrue by the testimony, discussed above, that Berry had been informed by Fredric Mills that Ms. Mills was living in the apartment with her "boyfriend" and by the testimony of defense witness Richard Plumb, that Berry suspected Ms. Mills of being involved with another man. T. 897, 1452-1453.

Finally, Appellant's Brief pretends that Berry's cross-examination never happened:

Q: In your statement . . . to the Raleigh County Sheriff's Department, you told sheriff's deputies three times that you went to Martha's . . . apartment, immediately before the killings to "surprise" her, didn't you?

A: Yes, I did.

* * *

Q: If you want to surprise somebody, you keep it a secret. Otherwise, there's no surprise, correct?

A: Correct.

T. 1519-1520.

* * *

Q: And you told the sheriff's department that your plan was . . . that you would go surprise her

A: That is correct.

Q: And you told . . . the police one, twice, three times that you were going to surprise her in the middle of the night, correct?

A: That's correct.

T. 1532-1533.

Again, Appellant's Brief makes no claim that the evidence was insufficient to prove that Berry acted with premeditation and malice in committing the first degree murders of Ms. Mills and Mr. Worthington. Although it was not necessary for the prosecution additionally to prove that Berry accomplished the murders by lying in wait, the prosecution did so.

IV. THE PHOTOGRAPHS

Appellant's Brief (at 32, 37) revs up the hyperbole by asserting that "an unbelievable and overwhelming amount of photos" and a "parade of horrors" were introduced in this trial, and that the fact that seventy-six photographs were introduced "alone is enough to require reversal." Appellant's Brief cites no authority for this proposition, and no such claim was made by defense counsel at trial. Indeed, of one group of twenty-five crime scene photographs offered, fourteen were admitted with no defense objection. T. 939-957. Appellant's Brief (a 32-37) repeatedly mischaracterizes the photographs in this case as "gruesome." This Court has recognized that photographs which depict blood or wounds but

are not "hideous, ghastly, horrible or dreadful" by definition are "not gruesome" photographs. *State v. Waldron*, 624 S.E. 2d 887, 895 (W.Va. 2005).

Berry in his trial testimony acknowledged that he was well aware of the condition in which he left his victims:

Q: You told Detective Bare . . . "I'm sorry you had to see that, because I'm sure it was a mess" So you're aware (that) what you left behind was a mess, wasn't it?

A: I figured it was difficult to see, yes.

Q: Why would it be difficult to see?

A: Because two people had been shot.

Q: And you knew from what a 9mm can do, especially to the face and the head, there's going to be an enormous amount of blood. Isn't that --

A: That's correct.

* * *

Q: So when you apologized for the mess, what you were apologizing for was the condition in which you left the two corpses of Martha Mills and Zack Worthington, correct?

A: I was referencing to the scene as a whole.

Q: Including the corpses of these two human beings?

A: That would be at the scene, yes.

T. 1547-1549

There is no appellate claim that the trial court erred in instructing the jury as follows:

The Court instructs the jury that evidence of the nature or degree of injury inflicted upon the deceased may be considered by the jury on the issue of the Defendant's intent to kill.

The Court instructs the jury that, if the jury finds that there is evidence of the Defendant's lack of concern for the victims at the scene of the alleged crimes, that such lack of concern may be used as evidence of the Defendant's intent to kill. T. 1766.

Accordingly, photographs of the "nature or degree of injury inflicted" by Berry upon his victims and of the condition in which he left them at the scene carried probative value outweighing any alleged "unfair prejudice." A gunman can reduce the number of photographs introduced by the prosecution at his trial by shooting each victim only once or twice, instead of

making Berry's admitted choice to fire "thirteen or fourteen rounds" into his human "targets."
T. 1513.

Of the photographs introduced by the prosecution, one was of the victims when they were alive and several were of the interior of Berry's home. There were photographs depicting the exterior of Berry's residence and his several automobiles, including his father's yellow Toyota, spattered with Ms. Mills' blood. Other photographs depicted the front door and window of the apartment next door to Ms. Mills' residence, showing the bullet hole that entered that apartment and exited out of the back after passing through Ms. Mills' face and head. T. 1277-1279. Approximately thirty-one photographs depicted the location of multiple casings and bullet fragments -- both on the parking lot and inside Ms. Mills' truck -- as well as the shattered windshield of the truck and overviews of the crime scene. Although blood was visible in some of these photographs, no mature observer could find them "hideous, ghastly, horrible or dreadful." There were photographs of Mr. Worthington in the ambulance, depicting some of the fourteen gunshot wounds inflicted by Berry but not showing the defensive wounds to Mr. Worthington's hands or the fatal entry and exit wounds to his head. Mr. Worthington's face and body were not contorted. Photographs later taken by the Medical Examiner showed the multiple defensive gunshot wounds to Mr. Worthington's hands and five Medical Examiner's photographs depicted the gunshot wounds to Mr. Worthington's head. No photographs were introduced of Mr. Worthington during or after any autopsy procedures were performed upon his body. Furthermore, the prosecution did not move for the admission into evidence of any of the several available photographs of Ms. Mills' body and the fatal injuries to her face and head. The photographs of Mr. Worthington's injuries illustrated the testimony of Chief Medical Examiner Kaplan, who explained that the wounds inflicted upon Mr. Worthington were "too numerous to count." T. 1071. Dr. Kaplan described

fourteen gunshot wounds depicted on the photographs of Mr. Worthington, one or two of which may have been re-entry wounds, representing from eight to fourteen separate shots fired into Mr. Worthington's body. T. 1071-1072, 1137. Dr. Kaplan explained that many of the gunshot wounds were "atypical," meaning that they "struck something before striking the victim." These atypical gunshot wounds, depicted in the photographs, were consistent with the eight shots Berry fired through the truck windshield while Mr. Worthington remained trapped inside. T. 1069-1072. Several of the gunshot wounds, were "defensive wounds," seen when the victim "tries to shield himself from . . . bullet material." Dr. Kaplan explained that one can infer by these defensive wounds that Mr. Worthington was aware of what was happening to him at the time of the fatal assault, as "the array of gunshot wounds that we noted to Mr. Worthington very strongly suggest that he was trying to shield himself from the -- from the fusillade that was released upon him." T. 1070-1071.

In addition to the multiple "atypical" gunshot wounds, Dr. Kaplan identified other "typical" wounds, also depicted in the photographs, which were inflicted by the bullets that Berry fired directly into Mr. Worthington after firing into him through the windshield and then opening the truck door. T. 1077-1081. One was from a through and through bullet that entered the back of Mr. Worthington's head and exited out the front, causing "fatal injuries to his brain. . . ." T. 1078-1080. Dr. Kaplan confirmed that his findings, illustrated by the photographs, were "consistent with the gunman firing eight rounds through the windshield of a truck where Zackary Worthington was seated in the passenger side, and the gunman then opening the passenger side truck door and firing three more rounds into Zackary as he sat inside the truck." T. 1148. Such testimony and photographic evidence corroborated Angela Canaday's testimony that Berry opened the passenger door and fired "to make sure the guy was dead." T. 793.

The trial court conducted several suppression hearings, during which the prosecution marked but refrained from seeking to introduce into evidence some thirty-six available photographs. T. 227-251, 939-957, 992-1004, 1090-1095. The trial court considered each photograph pursuant to Rules 401 through 403, W.V.R.E. and *State v. Derr*, 451 S.E. 2d 731 (W.Va. 1994). The trial court found that the photographs were "not duplicative to an objectionable degree of other photographs or testimony, in particular with respect to their . . . association with the medical aspects of . . . this case." T. 1095. The "medical aspects" included Dr. Kaplan's conclusion that both Ms. Mills and Mr. Worthington died as a result of "a firearm assault in the setting of domestic violence." T. 1104. The photographs corroborated such finding. T. 1100-1103. Insofar as some of the crime scene photographs depicting the location of casings and bullet fragments also showed a sheet over Ms. Mills' body, such photographs corroborated the testimony of Angela Canaday, that Berry had to step over the body in order to flee. Dr. Kaplan's testimony confirmed that Ms. Mills' body was located where she was fatally shot:

Ms. Mills suffered a gunshot wound to her face. . . that . . . passed through her head, severing the brain and stopping her respirations

....

Ms. Mills also showed evidence . . . which tells me that the barrel of the gun was close to her face at the time that the weapon was discharged.

* * *

Q: From your medical training and experience, can you tell us with a reasonable degree of medical certainty, would we expect that Ms. Mills essentially fell where she was shot?

A: Yes, ma'am.

T. 1064-1066.

Despite the violence of this double murder, no "gruesome" photographs were

introduced into evidence. The trial court repeatedly performed the requisite analysis under Rules 401 through 403, W.V. R.E. Accordingly, there is no “showing of clear abuse” by the trial court such as would warrant a finding of error in the admission of the photographs. Syll. Pt. 10, *State v. Derr*, 451 S.E. 2d 731 (W.Va. 1994); Syll. Pt. 3, *State v. Carey*, 558 S.E. 2d 650 (W.Va. 2001); Syll. Pt. 2, *State v. Copen*, 566 S.E. 2d 638 (W.Va. 2002); Syll. Pt. 7, *State v. Waldron*, 624 S.E. 2d 887 (W.Va. 2005); Syll. Pt. 6, *State v. Mongold*, 647 S.E. 2d 539 (W.Va. 2007).

As this court recently noted:

Although we find that the autopsy photographs may be characterized as gruesome, we do not believe that these photographs were unduly prejudicial. As we noted in *Derr*, “(g)ruesome photographs simply do not have the prejudicial impact on jurors as once believed ‘The average juror is well able to stomach the unpleasantness of exposure to the facts of murder without being unduly influenced (G)ruesome or inflammatory pictures exist more in the imagination of judges and lawyers than in reality.’” (Citations omitted). *Mongold* at 553.

Finally, Appellant’s Brief (at 36) erroneously argues that the photographs should have been suppressed because “Berry did not advance any theory of defense that *required* the State’s use of the photos.” (Italics added). This is the “essential evidentiary value” test of *State v. Rowe*, 259 S.E. 2d 26 (1979), which was overruled by *Derr, supra*. Further, the “theory of defense” advanced by Berry was described in defense counsel’s closing argument, echoing Berry’s claim that he had “snapped:”

There was no lying in wait with a plan, there was no premeditation and deliberation . . . and premeditatively thinking I’m going to . . . kill somebody. He reacted. His emotions overcame him and he reacted.

* * *

There are a lot of holes in the windshield . . . but the significance of the whole event is that this whole event took ten seconds, at most, Bang, bang, bang, bang, bang, bang, bang, bang, bang, bang. That’s

how . . . little time there was to, as the State would have you believe, reflect on what I'm doing.

T. 1803, 1807.

Accordingly, as there is no "showing of clear abuse" regarding the photographs, Berry is entitled to no relief in this regard.

V. THE PROSECUTOR'S CONDUCT

Appellant's Brief (at 37-38) descends into spurious accusations of prosecutorial misconduct: to paraphrase Cicero, "if you have no basis for argument, abuse the prosecutor." The claim that the prosecutor "advanced outrageous and legally incorrect arguments to deny Mr. Berry his fundamental right to present a defense and to present evidence of mitigation" is unsupported by any citation to the record. As discussed above, this was a unitary trial because the defense made a tactical decision to withdraw the pre-trial motion for bifurcation, despite repeated trial court invitations to renew the motion before the unitary trial commenced. Appellant's Brief fails to explain how the defense decision to withdraw its own bifurcation motion becomes grounds for an accusation of prosecutorial misconduct.

Appellant's Brief labels as "misconduct" the fact that the prosecutor "tried Mr. Berry in front of the Honorable Judge Burnside." Appellant's Brief fails to explain how any attorney, with no good faith basis upon which to certify a recusal motion, ethically can do so. Indeed, appellate counsel appears unacquainted with ethical obligations to refrain from making spurious accusations of judicial misconduct. *Lawyer Disciplinary Board v. Turgeon*, 557 S.E. 2d 235, 242-243 (W.Va. 2000).

Appellant's Brief (38) claims that the prosecutor "denied Mr. Berry due process" by using "an unnecessary number of gruesome photographs." Appellant's Brief forgets that it is the trial court judge -- not the prosecutor -- who determines which exhibits will be admitted

into evidence. Appellant's Brief cites no authority to support the claim that it is "misconduct" for any trial counsel -- including a prosecutor -- to seek to introduce evidence which counsel deems relevant and admissible.

Next, Appellant's Brief (at 38) claims that "this Court should also consider" two claims against the prosecutor "*that (are) not alleged as error.*" (Italics added). As there is no claim of error concerning these accusations, Berry is entitled to no relief concerning them, and so the following response will be brief.

Appellant's Brief (at 39) concedes that the admission into evidence of Berry's statement to Detective Bare was "harmless" and that Berry was "given his Miranda Warnings (twice)," but accuses the prosecutor of making "insulting" arguments and of "abus(ing) her power" by presenting proof that Berry was not under arrest when he was driven from his Fayette County home to the Raleigh County Sheriff's Office., Appellant's Brief ignores the undisputed evidence of: Fayette County Detective Chapman, who testified that he did not have sufficient information or authority to arrest Berry; Deputy Kade, who testified that the initial investigation was "chaotic" and that he lacked authority to place Berry under arrest and that he advised Berry that he was not under arrest; Detective Bare, who testified that he initially questioned the authenticity of Berry's 911 statements and that he ordered that Berry not be placed under arrest; the EOC recordings heard by the trial judge and the jury, confirming that Berry was informed that he was not under arrest; Berry's statement to Detective Bare and Deputy Kade, that he understood that he was not under arrest and Berry's own trial testimony, confirming that his statement to Detective Bare was voluntary. T. 24-38; 49-65; 76-90; 1531.

Further, there is no claim that the trial court erred in ruling:

In this case, there was no intentional delay for the purpose of receiving a statement. In fact, there is substantial evidence that the Defendant wished to

make a statement, that he affirmatively said so on more than one occasion, and so the prompt presentment rule is not implicated . . . and was not violated in this case.

T. 114-115.

This Court confirmed in *State v. Gray*, 619 S.E. 2d 104, 110-111 (W.Va. 2005), applying *State v. DeWeese* 582 S.E. 2d 786 (W.Va. 2003): “(A)s we wrote in footnote 10 of *DeWeese*, ‘(w)e wish to make clear that our prior cases do permit delay in bringing a suspect before a magistrate when the suspect wishes to make a statement.’”³

Finally, Appellant’s Brief makes the false accusation that “the prosecutor misrepresented the evidence” before the grand jury, but makes no assignment of error in this regard. The record of this trial confirms that Detective Bare’s grand jury testimony of Berry’s conduct in lying in wait was supported by the evidence, as was Detective Bare’s testimony concerning Berry’s being armed with the murder weapon and a “back up.” Defense counsel filed a pre-trial motion to dismiss the indictment insofar as it specified lying in wait. Defense counsel referred to the grand jury testimony in this regard and never made the claim, first raised in Appellant’s Brief (at 39), that the prosecutor “misrepresented the evidence.” T. 253-263. Defense counsel at trial also agreed that the indictment charging premeditated, malicious first degree murder was “absolutely correct.” T. 262. This Court has held:

Except for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency. Syll. Pt. 3., *State v. Grimes*, ___ S.E. 2d ___, W.Va. No. 34735, 11/16/09.

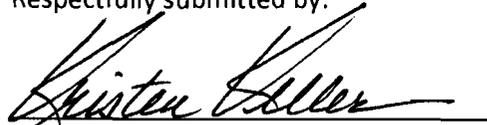
³ Reasonable inquiry would have revealed to appellate counsel that Raleigh County law enforcement officers, in consultation with prosecutors, frequently refrain from making an immediate arrest in order fully to investigate the evidence, including the suspect’s claims. The following are just a few recent local killings (and one non-fatal shooting) in which the confessed killer or shooter was not immediately arrested: *State v. Pruett*, 10-IM-28-H; *State v. Koveiter Robertson*, 10-F-78; *State v. Berlin Sheets*, 10-F-207; *State v. Christopher Bowling*, 10-F-142; *State v. Antonio Rout*, 10-F-970.

Rule 12(b), W.V. R. Crim. Pro. provides that any motion concerning a defect in the institution of the prosecution or the indictment must be made prior to trial. Defense counsel at trial, while moving to delete lying in wait from the indictment, never alleged that there was "willful, intentional fraud" before the grand jury because such allegation is an invention of appellate counsel.

CONCLUSION

As there was no error in these proceedings, the convictions and sentences must be affirmed.

Respectfully submitted by:

A handwritten signature in black ink, appearing to read "Kristen Keller", written over a horizontal line.

Kristen Keller
Raleigh County Prosecuting Attorney
Counsel for Appellee
112 N. Heber Street
Beckley, West Virginia 25801
PH: 304-255-9148
W.Va. State Bar # 1992

CERTIFICATE OF SERVICE

I, Kristen Keller, Prosecuting Attorney for Raleigh County, West Virginia, do certify that the foregoing *Brief of the Appellee* has been served upon the appellant herein by *MAILING* a true copy thereof to Crystal L. Walden, Deputy Public Defender, Kanawha County Office of the Public Defender, PO Box 2827, Charleston, WV 25330, by United States Mail, postage prepaid, this *9th* day of July, 2010.



KRISTEN KELLER
Raleigh County Prosecuting Attorney
Counsel for the Appellee
State Bar # 1992
P.O. Box 907
Beckley, West Virginia 25801
PH: 304-255-9148

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE