

11-1336

AUG 29 2011

IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs. // Criminal Case Number: 10-F-79

RICHARD A. WHITE,

Defendant.

**SENTENCING ORDER**  
**and**  
**ORDER RELIEVING COUNSEL**

On the 3rd day of August 2011 came the State of West Virginia by and through her Prosecuting Attorney James R. Milam II and came the defendant herein, Richard A. White, in person and by counsel, William C. Forbes, for the purpose of a sentencing hearing herein before the Honorable Gary L. Johnson, Judge.

Whereupon, the Court reviewed the file in this matter and noted that on March 30, 2011, the defendant herein, Richard A. White, was convicted by a jury of the felony offense of First Degree Murder with the recommendation from the jury of no mercy.

The Court counsel for the defendant advised the Court that the defendant wished to waive the pre-sentence investigation and proceed to sentencing at this time.

The Court, thereafter, placed the defendant under oath and made inquiry of him if he did, in fact, wish to waive the pre-sentence investigation in this matter to which the defendant replied affirmatively.

Therefore, the Court finds that the defendant has knowingly, intelligently and voluntarily waived the pre-sentence investigation in this matter and **ORDERS** that same is hereby waived.

Thereupon, the Court inquired of the parties whether there was any reason not to proceed to sentencing herein, and there being none, **ORDERED** this matter proceed to sentencing herein.

Thereupon, counsel for the defendant addressed the Court, as did the defendant, on behalf of the defendant requesting that the Court grant the defendant alternative sentencing.

Counsel for the State advised the Court that certain members of the victim's family were present in the courtroom who wishes to make victim impact statements unto the Court.

Thereafter, Selena Funk, Sonny Hersman and Brenda Funk each addressed the Court as to the impact of the crime committed herein.

The Court, upon due deliberation and consideration, does **ORDER** and **ADJUDGE** that the defendant herein, Richard A. White, be, and he is hereby sentenced to the West Virginia State Penitentiary for the remainder of his natural life, without mercy. It is further **ORDERED** that the defendant shall pay all costs of prosecution.

The Court advised the defendant that should he fail to pay the costs of prosecution as set forth herein above, the Clerk of the Circuit Court shall notify the Division of Motor Vehicles of such failure to pay and the Division of Motor Vehicles shall suspend said defendant's driver's license or privilege to operate a motor vehicle in the State of West Virginia until such time as said costs are paid.

Whereupon, the Court advised the defendant that he had the right to appeal this case to the West Virginia Supreme Court of Appeals. The Court further advised the defendant that a written notice of intent to appeal must be filed within thirty (30) days from the date of entry of the final order in this matter and that said appeal must be perfected within four (4) months by the filing of a petition. The Court further advised the defendant that if he could not afford an attorney to perfect his appeal for him, the Court would appoint an attorney to represent him in this matter and that if he could not afford a transcript of the proceedings herein, the Court would likewise provide a copy of the transcript to him free of charge.

It is **ORDERED** that the defendant is hereby remanded to the custody of the West Virginia Division of Corrections for execution of the sentence herein imposed.

Thereafter, counsel for the defendant moved the Court to be relieved as counsel for the defendant in any further proceedings in this matter, to which motion counsel for the State had no objection. And the Court, upon consideration, grants the motion and **ORDERS** that William C. Forbes is hereby relieved as counsel for the defendant in any and all further proceedings relative to this matter.

The Court advised the defendant that he could submit a financial affidavit for the purpose of determining his eligibility for court-appointed counsel for representation in any further matters

relative hereto.

It is further **ORDERED** that the Clerk of the Circuit Court shall prepare and forward a certified copy of this order to William C. Forbes, Attorney at Law, 1118 Kanawha Blvd. East, Charleston, WV 25301, to Central Regional Jail and to the West Virginia Division of Corrections.

ORDER:

ENTER: 8-23-11

[Signature]  
JUDGE

APPROVED BY:

[Signature]  
JAMES R. MILAM II WV ID # 7899  
COUNSEL FOR THE STATE

[Signature]  
WILLIAM C. FORBES WV ID 1238  
COUNSEL FOR THE DEFENDANT

A true copy, certified this

25 day of Aug., 2011  
[Signature]

DEBBIE FACEMIRE CIRCUIT CLERK  
Nicholas County Circuit Court  
Summersville, WV 26051

By M. Woods Deputy

AUG 23 2011

IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs.

Case Number: 10-F-79

RICHARD A. WHITE,

Defendant.

**ORDER DENYING MOTION FOR NEW TRIAL**

On the 3<sup>rd</sup> day of August, 2011, came the State of West Virginia by and through her Prosecuting Attorney, James R. Millam, II, and came the Defendant, Richard A. White, in person and by counsel, William C. Forbes, for the purpose of a hearing on the Defendant's Motion for New Trial (the "Motion"), filed on April 29, 2011. As directed by the Court at a hearing on the Motion on May 27, 2011, the Defendant filed *Defendant's Brief of Prosecutorial Misconduct as Grounds for New Trial* ("Defendant's Brief") on June 21, 2011, and the State filed its *Response to Defendant's Brief for a New Trial for Prosecutorial Misconduct* ("State's Response") on July 15, 2011.

The Court has carefully considered the Motion, the Defendant's Brief, the State's Response, arguments made at the hearing, as well as other pertinent documents and legal authorities. As a result of these deliberations, the Court concludes that the Defendant is not entitled to a new trial, and the Motion for New Trial is hereby **DENIED**, for the following reasons:

**Factual Findings**

The Court makes the following findings of fact:

1. Harvey Hersman was killed on December 2, 2009, and on that evening, his girlfriend, Judy Stewart, found his body in his home.
2. On December 3, 2009, the morning following Harvey Hersman's death, Judy Stewart gave a statement to Sergeant Mankins. In her statement, when describing how she found the victim, she said "I reached down and touched him trying to make him respond, but he wouldn't." This will be referred to herein as "Ms. Stewart's Statement".
3. On September 14, 2010, the Defendant was indicted on one (1) count of Murder for causing the death of Harvey Hersman.
4. On November 19, 2010, the State provided Ms. Stewart's Statement to defense counsel.
5. As part of the State's discovery, the State listed Ms. Stewart as a witness for the State.
6. Defense counsel did not interview Judy Stewart prior to trial and did not list her as a witness.
7. The Defendant's jury trial in this case began on Tuesday, March 29, 2011.
8. The State did not call Ms. Stewart as a witness. After the defense rested, the Prosecutor spoke briefly with Ms. Stewart, decided not to call her as a rebuttal witness and then dismissed her as a witness, at which time she entered the courtroom to watch the remainder of the trial.
9. On Wednesday, March 30, 2011, the jury returned its verdict, finding the Defendant guilty of First Degree Murder without mercy.
10. The Defendant timely filed his Motion for New Trial on April 29, 2011, pursuant to an Agreed Order entered on April 7, 2011, extending the time within which to file a motion

for new trial, under Rule 33 of the West Virginia Rules of Criminal Procedure, until April 30, 2011.<sup>1</sup>

11. As directed by the Court at a hearing on May 27, 2011, the parties briefed the issue of prosecutorial misconduct and then appeared for a final hearing on the Motion on August 3, 2011.

### Discussion

The Defendant moves for a new trial pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure, which provides:

The court on motion of a defendant **may grant a new trial to that defendant if required in the interest of justice.** If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within ten days after verdict or finding of guilty or within such further time as the court may fix during the ten-day period.

Rule 33 (emphasis added). In the Motion and Defendant's Brief, the Defendant alleges several types of misconduct by the Prosecution in this case, which are summarized and discussed below. After reviewing each allegation, the arguments of the parties and the applicable law, the Court does not find that the interest of justice requires that the Court grant the Defendant a new trial.

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<sup>1</sup> The Defendant also moved for a new trial on the basis of juror misconduct. That portion of Defendant's Motion was resolved by order entered on July 20, 2011.

**A. Allegation that Ms. Stewart Moved Victim's Body**

The greater part of the Defendant's allegations revolves around Defendant's claim that Ms. Stewart moved the victim's body. The Defendant alleges that Ms. Stewart told the Prosecutor that she moved the body and that the Prosecution's failure to disclose this potentially exculpatory information constituted a constitutional "*Brady* violation." The Defendant further alleges that the Prosecution committed additional error by making comments during closing arguments based on the placement of the body, which comments were improper given that the Prosecutor knew that Ms. Stewart moved the body.<sup>2</sup>

However, none of these allegations justify a new trial because Judy Stewart did not move the victim's body. On July 15, 2011, Ms. Stewart executed an Affidavit stating:

1. That on December 3, 2009, I, JUDY LYNN STEWART, gave a written statement unto F/Sgt. B.L. Mankins of the West Virginia State Police, regarding the murder of Harvey Hersman.

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<sup>2</sup> Defense counsel's argument was based on generalities, and he did not specifically identify any phrases or portions of the transcript that he found objectionable. Upon review of the transcript, the only portions of the Prosecutor's closing argument which refer to the position of the body read as follows:

That knife was found at the crime scene, and it was under Harvey Hersman's body in an opened position. . . .

Now, the guns themselves. The bullets we found on Harvey Hersman's head and the one recovered under his body, which was underneath the fan in the pool of blood, if you remember from the photograph, they were fired from the .45 Ruger pistol. . . .

The .357 was found at the victim's feet. Now, there's some conflicting testimony based on Richard White's statement as to whether or not Harvey even had that gun in his hand when he shot him.

All we can tell you is, from the evidence that we know to be true by the photographs taken at the crime scene, is that gun was found at Harvey Hersman's feet. I can't tell you whether he had that gun in his hand or not when he was shot the first time. I can't ask you to make that decision, okay. We don't have the evidence to support that.

Excerpts from Transcript of the State's Closing Arguments. The Court does not find any portion of this argument objectionable, even if the Prosecutor had been told that Ms. Stewart moved the body.

2. That in my written statement dated December 3, 2009, I stated that I had found Harvey laying on the fan with blood on his head and that I reached down and touched him trying to make him respond.
3. That I did not move Harvey Hersman's body in any way.
4. That I did not touch any firearms or knives while at the crime scene.
5. That I did not inform the Prosecutor or his assistants that I moved Harvey Hersman's body.

Affidavit of Judy Lynn Stewart, dated July 15, 2011, which is attached to the State's Response. At the hearing on the Motion on August 3, 2011, defense counsel stated that he did not object to the Affidavit and that he believed it was reflective of what Ms. Stewart's testimony would be. Therefore, the Court finds that Judy Stewart did not move the victim's body and never informed the Prosecution that she did. Judy Stewart's only statement regarding the victim's body was that she touched the body; and that fact was fully disclosed in Ms. Stewart's Statement, which was provided to defense counsel on November 19, 2010. Accordingly, the State possessed no exculpatory evidence to be disclosed and there was no misconduct on the part of the Prosecution in this case.<sup>3</sup>

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<sup>3</sup> Due to Judy Stewart's Affidavit (and defense counsel's lack of objection to it), this Court did not need to reach the three-factor test set out by the West Virginia Supreme Court for determining when a constitutional due process violation under *Brady v. State of Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) and *State v. Hatfield*, 169 W. Va. 191, 205, 286 S.E.2d 402, 411 (1982) has occurred. The three (3) factors that are to be considered are:

- (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence;
- (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and
- (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

Syllabus point 2, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007); see also *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999) (setting forth the same "three components of a true *Brady* violation"). In this case, Ms. Stewart's Affidavit states that she did not move the victim's body or inform the Prosecution that she did. Therefore, there was never even any evidence (exculpatory or impeachment) that was favorable to the Defendant.

**B. Failure to Provide Background Check on Ms. Stewart**

Defense counsel also claims that the State failed to provide the Defendant with Ms. Stewart's criminal background check, but the State contends that they did provide this information to the Defendant. No evidence or proof was offered on this issue, but even if the Defendant could prove that the State did not provide Ms. Stewart's background check, this issue would not justify a new trial. First, the Defendant never raised this issue until it was alleged in the Defendant's Brief, filed over two (2) months after the conclusion of the trial. If defense counsel had not received and needed Ms. Stewart's criminal background check prior to trial, a motion for production of the same should have been made prior to trial. Second, Ms. Stewart was not listed as a witness for the defense and was never called as a witness by the State. Therefore, the Defendant was not prejudiced by his alleged failure to receive Ms. Stewart's criminal background check.

**C. Improper Remarks to the Jury**

Finally, the defense counsel argues that the Prosecutor made improper remarks to the jury, which remarks constitute prosecutorial misconduct. In *State v. Hamrick*, 216 W. Va. 477, 607 S.E.2d 806 (2004) the West Virginia Supreme Court discusses, at length, when prosecutorial comments are improper and so damaging as to require a new trial. In that case, the Court held that:

“Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to

extraneous matters.” Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

Syl. Pt. 1, *State v. Hamrick*, 216 W. Va. 477, 607 S.E.2d 806 (2004).

In this case, defense counsel does not cite any specific remarks or portions of the trial as being improper, but rather makes general allegations that fall into two categories: (1) comments made by the Prosecution which indicate that the Prosecutor abandoned his “quasi-judicial duties” and was acting as a “partisan eager to convict”; and (2) remarks made in front of the jury questioning the witness’s credibility and suggesting that the Defendant’s son changed his testimony after meeting with defense counsel. The Prosecution notes, and the Court acknowledges, that defense counsel raised no objection to any of these allegedly improper comments at the time of the trial. A post-trial motion is not the proper time or means for objecting to comments made in the presence of the jury. Nevertheless, the Court has considered the substance of these allegations.

Although defense counsel did not identify any specific portions of the trial as objectionable, the Court reviewed the transcript for any instances of improper prosecutorial comments. First, the Court looked for and failed to find any instance of the Prosecutor improperly giving his personal opinion or acting as a partisan. Second, the Court looked carefully at the Prosecution’s questioning of Robert White, the Defendant’s son. The only relevant exchange took place during the Prosecution’s re-direct of Robert White, the Defendant’s son:

- Q: Did you talk to Mr. Forbes about your testimony here –  
A: No.  
Q: -- prior to coming in there today?  
A: No. He told me to stay by my statement.  
Q: You didn’t meet with him yesterday evening?  
A: I mean, I talked to him about my dad.

Q: Did you talk to him yesterday evening about your statement?

A: About my dad, not about my statement.

Q: About what you're going to testify to?

A: No.

Q: You've never talked to him?

A: No.

Forbes: Are you through?

Prosecutor: Yes.

Although defense counsel asked "are you through?", he never objected to the line of questioning by the Prosecution. Moreover, the Court does not find this line of questioning improper.

Therefore, when the four (4) factors set forth in *Hamrick* are applied to the facts of this case, the Defendant is not entitled to a new trial. (1) There is a very slight possibility, if any, that the Prosecutor's comments would have misled the jury or prejudiced the Defendant. (2) The remarks, to the extent they were even improper, were isolated. (3) Absent the remarks, there was ample proof introduced to establish the guilt of the Defendant. For instance, the State introduced the video-recorded statement of the Defendant in which he repeatedly stated that he shot the victim three times in the head and buried the murder weapon.<sup>4</sup> (4) Finally, this Court does not find any comments were deliberately placed before

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<sup>4</sup> The jury watched the video-recorded interview of the Defendant, taken on December 3, 2009, in which the Defendant stated:

. . . I shuck the shell in it, there was no shell in it, in, in the chamber, there was one in the clip and when I shucked it in there I shot, he had three shells in the clip and I shot him three times in the head. (p. 5)

\* \* \*

And that's the gun I shot him in the head with (p. 10) . . . Three times (p. 11)

\* \* \*

The gun I shot him with, I mean I can get it for you . . . I put it up on the bank. . . Wrapped it up in a bag, yeah. . . . It's just, it's just up on a bank right past the split rail fence I just went out there and wrapped it in a bag and buried it. (p. 13)

\* \* \*

the jury. For all of these reasons, the interest of justice does not require the Court to grant the Defendant a new trial on the basis of improper prosecutorial comments.

### Conclusions of Law

1. Judy Stewart did not move the victim's body and did not tell the Prosecutor that she did move the victim's body. Judy Stewart only touched the victim, trying to make him respond, and that fact was disclosed to the Defendant well before trial. Therefore, this case involved no constitutional due process violation under *Brady v. State of Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) and *State v. Hatfield*, 169 W. Va. 191, 205, 286 S.E.2d 402, 411 (1982).
2. The Defendant was not prejudiced by the State's alleged failure to provide Judy Stewart's criminal background check.
3. No comments made by the Prosecutor at the trial of this matter were so damaging as entitle the Defendant to a new trial under the factors set forth in *State v. Hamrick*, 216 W. Va. 477, 607 S.E.2d 806 (2004).

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. . . it wasn't loaded in the chamber. So I shucked it in the chamber and when I shucked the chamber, then I fired and then one shot fired, so I just emptied it. . . . And, right in his head . . . (p. 15)

\* \* \*

I had the gun, he didn't have one. Well, when he kind of just looked at me and laughed and, and dove off to the side to grab the gun. . . That's when I shot him in the head. (p. 25)

\* \* \*

. . . when that gun snapped and he looked at me and laughed and he bailed for that gun you know the only thing I done was shucked it and when I shucked it they was one in the clip and when and it was three \* in audible 3 shells in that clip. . . I, I shot them right in his head. . . when he went and bailed for that I walked right up to him and shot him. (p. 26)

\* \* \*

And I shot him, I think both times or all three times right beside the head because he was leaning over trying to grab that gun. You know, I wasn't shooting him square in the face because he was laying, digging for the gun. (p. 27)

Transcript of Defendant's statement.

4. For all of the foregoing reasons, the interest of justice does not require this Court to grant the Defendant a new trial pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure.

Now, therefore, the Court does hereby **ORDER**:

1. The Defendant's Motion for New Trial is hereby **DENIED**; and
2. It is further **ORDERED** the Clerk of the Circuit Court shall forward a copy of this order to William C. Forbes, Esq., Forbes Law Offices, PLLC, 1118 Kanawha Blvd., E., Charleston, WV 25301; and to James R. Milam, II, Esq., Nicholas County Prosecuting Attorney, 203 McClung Annex, Summersville, West Virginia 26651.

ENTERED this 18<sup>th</sup> day of August, 2011.

  
Hon. GARY L. JOHNSON, Circuit Judge

A true copy, certified in this  
19 day of Aug, 2011  
Debbie FaceMire  
DEBBIE FACEMIRE CIRCUIT CLERK  
Nicholas County Circuit Court  
Summersville, WV, 26651  
By M. Woods, Deputy