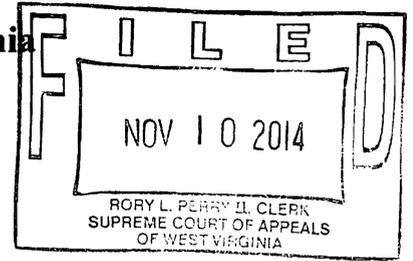


In the Supreme Court of Appeals of West Virginia

Docket No. 14-0438



STATE OF WEST VIRGINIA, Plaintiff below,
Respondent

vs.)

JEREMY LAMBERT, Defendant below,
Petitioner

Appeal from a final order
of the Circuit Court of
Raleigh county (12-F-53-B)

Brief of Petitioner

Counsel for Petitioner, Jeremy Lambert

Mary Guy Dyer (4255)
Thomas G. Dyer (4579)
DYER LAW OFFICES
Post Office Box 1332
349 Washington Avenue
Clarksburg, WV 26302
(304) 622-1635
dyerlawof@aol.com

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
ASSIGNMENTS OF ERROR	1, 2
STATEMENT OF THE CASE	2
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	6
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. THE TRIAL ERRED BY PERMITTING THE DEFENDANT TO BE PROSECUTED ON THE UNINDICTED THEORIES OF FELONY MURDER AND MURDER BY LYING IN WAIT AND BY PERMITTING THE JURY TO DELIBERATE ON THESE UNINDICTED THEORIES	9
A. THE STATE PROVIDED NO NOTICE WHATSOEVER OF IT'S INTENT TO PROSECUTE THE DEFENDANT ON THE THEORIES OF FELONY MURDER AND MURDER BY LYING IN WAIT	10
B. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO REQUIRE THE STATE TO MAKE AN ELECTION, AND BY INSTRUCTING THE JURY ON FELONY MURDER AND MURDER BY LYING IN WAIT AS WELL AS PREMEDITATED MURDER	13
II. THE TRIAL COURT ERRED BY IMPROPERLY INSTRUCTING THE JURY AS TO THE ELEMENTS OF MURDER BY LYING IN WAIT	14
III. THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY ON VOLUNTARY MANSLAUGHTER WHEN THE DEFENDANT'S EXPERT TESTIFIED THAT DUE TO CERTAIN MENTAL DEFECTS AND DISORDERS, THE DEFENDANT WAS INCAPABLE OF PREMEDITATING OR FORMULATING THE INTENT TO KILL	17
IV. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO REFER TO REBUTTAL WITNESS JENNIFER OSBORNE AS DR. OSBORNE AND TO INQUIRE ABOUT HER EDUCATION AND EXPERIENCE BECAUSE SHE WAS TESTIFYING AS A FACT WITNESS	18
V. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO PLAY, DURING CROSS-EXAMINATION OF THE DEFENDANT, AN AUDIO RECORDING OF THE	

	FORENSIC INTERVIEW OF THE DEFENDANT BY DR. BOBBY MILLER	19
VI.	THE TRIAL COURT ERRED BY IMPROPERLY LIMITING THE TESTIMONY OF THE DEFENDANT’S EXPERT, LAWSON BERNSTEIN, M.D	22
	A. DR. BERNSTEIN DID NOT PERFORM A COURT ORDERED FORENSIC INTERVIEW WITH THE DEFENDANT	23
	B. DR. BERNSTEIN WAS AN EXPERT WITNESS AND PURSUANT TO RULE 703 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE, DR. BERNSTEIN WAS PERMITTED TO BASE HIS OPINION ON FACTS AND DATA KNOWN TO HIM AT OR BEFORE THE HEARING AND IF SUCH FACTS AND DATA WERE OF A TYPE REASONABLY RELIED UPON BY EXPERTS IN THE FIELD, THE FACTS AND DATA NEED NOT BE ADMISSIBLE IN EVIDENCE	24
VII.	THE TRIAL COURT ERRED BY PERMITTING EXTENSIVE IMPERMISSIBLE CROSS-EXAMINATION OF THE DEFENDANT’S EXPERT, LAWSON BERNSTEIN, M.D	28
	A. THE STATE CROSS-EXAMINED DR. BERNSTEIN ABOUT MEDICAL RECORDS AND REPORTS THAT HE WAS NOT PERMITTED TO TESTIFY TO ON DIRECT	28
	B. THE STATE CROSS-EXAMINED DR. BERNSTEIN ABOUT STATEMENTS MADE BY THE DEFENDANT AND BY DR. BOBBY MILLER THAT WERE NOT THE SUBJECT OF DIRECT EXAM	29
	C. THE STATE CROSS-EXAMINED DR. BERNSTEIN ABOUT THE DEFENDANT’S JAIL RECORDS WHICH HE DID NOT REVIEW	30
VIII.	THE TRIAL COURT COMMITTED CUMULATIVE ERROR	31
	CONCLUSION	32

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Jones v. Warden</i> , 161 W.Va. 168, 173, 241 S.E.2d 914, 916-17 (1978)	26
<i>Stuckey v. Trent</i> , 202 W.Va. 498, 505 S.E.2d 417 (1998)	11
<i>State v. Berry</i> , 227 W.Va. 221, 707 S.E.2d 831 (2011)	15, 16
<i>State v. Duell</i> , 175 W.Va. 233, 332 S.E.2d 246 (1985)	25, 26
<i>State v. Harper</i> , 179 W.Va. 24, 365 S.E.2d 69 (1987)	16, 17
<i>State v. Hinkle</i> , 200 W.Va. 280, 489 S.E.2d 257 (1996)	18
<i>State v. Hughes</i> , 225 W.Va. 218, 691 S.E.2d 813 (2010)	10, 11
<i>State v. Jackson</i> , 171 W.Va. 329, 298 S.E.2d 866 (1982)	22
<i>State v. Leonard</i> , 217 W.Va. 603, 619 S.E.2d 116 (2005)	17
<i>State v. McGuire</i> , 200 W.Va. 823, 824, 490 S.E.2d 912, 923 (1997)	18
<i>State v. Myers</i> , 159 W.Va. 353, 222 S.E.2d 300 (1976)	26
<i>State v. Neider</i> , 170 W.Va. 662, 295 S.E.2d 902 (1982)	17
<i>State v. Pendry</i> , 159 W.Va. 738, 227 S.E.2d 210 (1976)	26
<i>State v. Smith</i> , 156 W.Va. 385, 193 S.E.2d 550 (1972)	31
<i>State v. Stalnaker</i> , 167 W.Va. 225, 227, 279 S.E.2d 416, 417 (1981)	17, 18
<i>State v. Walker</i> , 188 W.Va. 661, 425 S.E.2d 616 (1992)	13
<i>State v. Wilkerson</i> , 230 W.Va. 366, 738 S.E.2d 32 (2013)	17
<i>State v. Joseph</i> , 214 W.Va. 525, 590 S.E.2d 718 (2002)	25

<u>Statutes</u>	<u>Page</u>
W.Va. Code §27-6A-1	21, 24
W.Va. Code §27-6A-4	7
W.Va. Code §61-2-1	11, 14, 16
W.Va. Code §61-2-4	17

<u>Rules</u>	<u>Page</u>
Rule 702 of the West Virginia Rules of Evidence	22
Rule 703 of the West Virginia Rules of Evidence	24

ASSIGNMENTS OF ERROR

1. THE TRIAL ERRED BY PERMITTING THE DEFENDANT TO BE PROSECUTED ON THE UNINDICTED THEORIES OF FELONY MURDER AND MURDER BY LYING IN WAIT AND BY PERMITTING THE JURY TO DELIBERATE ON THESE UNINDICTED THEORIES.
 - A. THE STATE PROVIDED NO NOTICE WHATSOEVER OF IT'S INTENT TO PROSECUTE THE DEFENDANT ON THE THEORIES OF FELONY MURDER AND MURDER BY LYING IN WAIT.
 - B. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO REQUIRE THE STATE TO MAKE AN ELECTION, AND BY INSTRUCTING THE JURY ON FELONY MURDER AND MURDER BY LYING IN WAIT AS WELL AS PREMEDITATED MURDER.
2. THE TRIAL COURT ERRED BY IMPROPERLY INSTRUCTING THE JURY AS TO THE ELEMENTS OF MURDER BY LYING IN WAIT.
3. THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY ON VOLUNTARY MANSLAUGHTER WHEN THE DEFENDANT'S EXPERT TESTIFIED THAT DUE TO CERTAIN MENTAL DEFECTS AND DISORDERS, THE DEFENDANT WAS INCAPABLE OF PREMEDITATING OR FORMULATING THE INTENT TO KILL.
4. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO REFER TO REBUTTAL WITNESS JENNIFER OSBORNE AS DR. OSBORNE AND TO INQUIRE ABOUT HER EDUCATION AND EXPERIENCE BECAUSE SHE WAS TESTIFYING AS A FACT WITNESS.
5. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO PLAY, DURING CROSS-EXAMINATION OF THE DEFENDANT, AN AUDIO RECORDING OF THE FORENSIC INTERVIEW OF THE DEFENDANT BY DR. BOBBY MILLER.
6. THE TRIAL COURT ERRED BY IMPROPERLY LIMITING THE TESTIMONY OF THE DEFENDANT'S EXPERT, LAWSON BERNSTEIN, M.D.
 - A. DR. BERNSTEIN DID NOT PERFORM A COURT ORDERED FORENSIC INTERVIEW WITH THE DEFENDANT.
 - B. DR. BERNSTEIN WAS AN EXPERT WITNESS AND PURSUANT TO RULE 703 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE, DR. BERNSTEIN WAS PERMITTED TO BASE HIS OPINION ON FACTS AND DATA KNOWN TO HIM AT OR BEFORE THE HEARING AND IF SUCH FACTS AND DATA WERE OF A TYPE REASONABLY RELIED UPON BY EXPERTS IN THE

FIELD, THE FACTS AND DATA NEED NOT BE ADMISSIBLE IN EVIDENCE.

7. THE TRIAL COURT ERRED BY PERMITTING EXTENSIVE IMPERMISSIBLE CROSS-EXAMINATION OF THE DEFENDANT'S EXPERT, LAWSON BERNSTEIN, M.D.
 - A. THE STATE CROSS-EXAMINED DR. BERNSTEIN ABOUT MEDICAL RECORDS AND REPORTS THAT HE WAS NOT PERMITTED TO TESTIFY TO ON DIRECT.
 - B. THE STATE CROSS-EXAMINED DR. BERNSTEIN ABOUT STATEMENTS MADE BY THE DEFENDANT AND BY DR. BOBBY MILLER THAT WERE NOT THE SUBJECT OF DIRECT EXAM.
 - C. THE STATE CROSS-EXAMINED DR. BERNSTEIN ABOUT THE DEFENDANT'S JAIL RECORDS WHICH HE DID NOT REVIEW.
8. THE TRIAL COURT COMMITTED CUMULATIVE ERROR.

STATEMENT OF THE CASE

In October, 2011, the Defendant, Jeremy Lambert, was 20 years old and living with his parents in Oak Hill, West Virginia. (A.R. Vol. 1, 802). He is a veteran, having served in the Air Force and in the Army. (A.R. Vol. 1, 718, 766). He joined the Air Force right out of high school in the summer of 2000. (A.R. Vol. 1, 718). He was unexpectedly deployed in late 2002 to an airbase in Kuwait near the Iraqi border. (A.R. Vol. 1, 724, 730, 743). Following his deployment, the Defendant returned to West Virginia where he spent most of the remainder of his commitment to the Air Force at Yeager Air Force Base in Charleston. (A.R. Vol. 1, 743-744). He was honorably discharged in 2006. In 2007, he voluntarily enlisted in the Army and was assigned to Fort Huachuca in Arizona. (A.R. Vol. 1, 766-767). Soon following his arrival there, the Defendant began exhibiting random and spontaneous outbursts of aggression, self-mutilation and extreme abuse of alcohol. (A.R. Vol. 1, 770-771). He began to visit regularly with Army staff psychologist, Dr. Samuel R. Caron. (A.R. Vol. 1, 793-795). In 2008, the Defendant received an involuntary but honorable

discharge from the Army when, following a six month psychiatric evaluation, he was diagnosed with severe PTSD-combat related. (A.R. Vol. 1, 797, 798). He was thereafter awarded a fifty percent disability by the Veteran's Administration because of the PTSD. (A.R. Vol. 1, 1076).

The victim, Cyan Maroney, was a professional dancer. (A.R. Vol. 1, 373). The Defendant and Ms. Maroney met while both employed by Gabriel Brothers. (A.R. Vol. 1, 804). They became involved in a romantic relationship beginning mid-May of 2011. The Defendant and Ms. Maroney broke up in September 2011 but remained friends. (A.R. Vol. 1, 805, 807).

On October 2, 2011, the Defendant and Ms. Maroney agreed to meet at her house to talk about their relationship after she finished working her shift at Tamarack in Raleigh County. (A.R. Vol. 1, 810-814). Earlier that day, the Defendant had gotten into a disagreement with his younger sister, which left him frustrated. (A.R. Vol. 1, 811). He left his home and purchased a six-pack of beer and drank it in the parking lot of the Crossroads Mall in Beckley. (A.R. Vol. 1, 811). During this time, he was in communication with Ms. Maroney via text and by phone. (A.R. Vol. 1, 812). Their conversations were cordial and friendly. At some point the Defendant began driving around the Beckley area. He bought one or two more beers, which he also drank. (A.R. Vol. 1, 813-814).

As the day progressed, the Defendant began to become obsessively concerned about the possibility of another man being at Ms. Maroney's house when he would arrive there. (A.R. Vol. 1, 814-815). As a result, he ultimately decided to go to Walmart to buy a knife in the event he needed to protect himself. (A.R. Vol. 1, 814-815). At approximately 6:42 pm the Defendant went into Walmart and bought a 14 inch bowie knife. (A.R. Vol. 1, 815). He then sat in his car in the Walmart parking lot waiting for Ms. Maroney to let him know that she had arrived home and that he could then come over. (A.R. Vol. 1, 816-817).

At approximately 8:10 pm, the Defendant arrived at Ms. Maroney's home, which she shared

with other roommates, and parked across the street. (A.R. Vol. 1, 817). He smoked some cigarettes. (A.R. Vol. 1, 818). Ms. Maroney came out of the house and went to the Defendant's car. She told him she was upset that he was drinking and driving and smoking cigarettes. (A.R. Vol. 1, 818, 929). She went back into the house. The Defendant sat in his car for one or two minutes and then got out. (A.R. Vol. 1, 818-819). At this point, the Defendant was feeling paranoid and looking around the periphery of the house at all avenues of approach, analyzing the possibility that someone might be hidden somewhere. (A.R. Vol. 1, 820). He was in a state of panic. (A.R. Vol. 1, 820). He got the bowie knife and put it in the small of his back. (A.R. Vol. 1, 820). He went onto the porch and spoke briefly to Ms. Maroney. (A.R. Vol. 1, 818-819). He looked in the dining room and the bathroom as he entered the house and also checked the back door to the porch. (A.R. Vol. 1, 821). He then walked into Ms. Maroney's bedroom and sat on her bed. The Defendant asked her where the guy was. He looked in the closet. No one was there. (A.R. Vol. 1, 821). Ms. Maroney then insisted that he leave because he was "hammered". The next thing the Defendant remembered was walking toward the front door and trying to unlock it to leave. (A.R. Vol. 1, 822). The Defendant had stabbed Ms. Maroney 23 times. The Defendant has no memory of that.

When the Defendant exited Ms. Maroney's bedroom, he walked past her roommates and out the front door, carrying the bloody knife. (A.R. Vol. 1, 386, 406). He immediately got into his car and left. (A.R. Vol. 1, 407). He was arrested later that night by law enforcement and charged with first degree murder. (A.R. Vol. 1, 649, 664). The Defendant was interviewed a number of times, but has never had any memory of the stabbing.

In January, 2012, the Defendant was indicted by a Raleigh County grand jury on the charge of first degree murder. (A.R. Vol. 3, 2191). The indictment specifically alleged that the Defendant "did unlawfully, feloniously, maliciously, willfully, deliberately and with premeditation slay, kill

and murder one Cyan Maroney.” (A.R. Vol. 3, 2191). At trial, the Defendant sought to raise the defense of diminished capacity through the testimony of his expert, Lawson Bernstein, MD and through the testimony through Dr. Bobby Miller, who performed a court ordered forensic evaluation. Prior to trial, the State filed a Motion in Limine, seeking to exclude the testimony of Dr. Bernstein and of Dr. Miller. (A.R. Vol. 3, 2170-71). The trial court granted the motion as to Dr. Miller but denied the motion as to Dr. Bernstein. (A.R. Vol. 3, 2186-87). The trial began on February 24, 2014. The Defendant testified. On cross examination, the State played a recording of the forensic interview of the Defendant with Dr. Miller. The Defendant objected because Dr. Miller had been excluded by the court from testifying, because the interview contained inadmissible hearsay statements of Dr. Miller, and because the recording contained incriminating statements of the Defendant. The trial court overruled the Defendant’s objection.

After the State had rested and the defense had presented the testimony of the Defendant, Jill Lambert (the Defendant’s mother) and family friend Terri Smith, the parties argued jury instructions. The State proposed a jury instruction for felony murder and murder by lying in wait. The Defendant had not received any notice that the State would be pursuing those theories and objected. The trial court allowed the case to proceed on both of those theories.

The Defendant presented the testimony of his expert witness, Dr. Lawson Bernstein. The court excluded much of his testimony, ruling that he had performed a forensic evaluation and that Rule 703 of the West Virginia Rules Civil Procedure did not apply. The court limited Dr. Bernstein’s testimony in support of his opinion that the Defendant suffered from diminished capacity at the time of the incident to evidence and testimony he personally heard in the courtroom or that was otherwise admissible evidence. However, the trial court allowed the State to cross examine Dr. Bernstein as to certain reports and records that formed the basis of his opinion and that

were not testified to on direct examination. The court ruled that the testimony was not offered for the truth of the matter asserted but was proper impeachment. Similarly, the trial court permitted, over the Defendant's objection, the State to cross examine Dr. Bernstein about statements by the Defendant and by Dr. Miller that were not the subject of direct examination.

The case went to the jury on March 6, 2014. The trial court refused to instruct the jury on voluntary manslaughter, even though the Defendant had presented evidence sufficient for such a finding by the jury. Further, the trial court did not correctly instruct the jury as to the elements of murder by lying in wait. The jury returned a verdict of guilty of first degree murder. The jury did not recommend mercy. (A.R. Vol. 2, 2005). The Defendant was immediately thereafter sentenced. (A.R. Vol. 2, 2008-2009). The Defendant asks that this Court reverse his Judgment of Conviction and order a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner submits that oral argument is necessary upon this appeal under Rule 19 of the *Revised Rules of Appellate Procedure*, as this appeal involves (1) assignments of error in the application of settled law; (2) an unsustainable exercise of discretion where the law governing that discretion is settled; (3) insufficient evidence or a result against the weight of the evidence; and (4) narrow issues of law. Thus, the Petitioner prays that this matter be scheduled for a Rule 19 oral argument upon this appeal.

SUMMARY OF THE ARGUMENT

This is a case involving multiple errors committed by the trial court, which the Petitioner/Defendant contends rises to the level of cumulative error such that the Petitioner/Defendant (hereinafter "Defendant") should be awarded a new trial.

This case involves a murder by stabbing of Cyan Maroney. In January, 2012, the Defendant

was indicted by a Raleigh County grand jury on the charge of First Degree Premeditated Murder. The Defendant admitted killing Ms. Maroney, but sought to establish that, at the time of the killing, he was unable to premeditate or formulate intent due to his mental defects and diseases. The Defendant retained Dr. Lawson Bernstein as an expert witness. Dr. Bernstein later testified that the Defendant suffered from diminished capacity at the time of the incident.

After the State rested, and the defense had presented the testimony of the Defendant, his mother, Jill Lambert, and Terri Smith, the parties argued jury instructions. It was at this time that the Defendant was made aware that the State was also prosecuting the Defendant on felony murder and murder by lying in wait. The Defendant contends that it was error for the trial court to permit the State to prosecute the Petitioner on these unindicted theories on the basis that the Defendant had not received any notice whatsoever that the State would pursue these theories. The Defendant contends that it was also error for the State to allow the jury to deliberate on these theories. Furthermore, the Defendant contends that the jury was not properly instructed as to the elements of lying in wait.

Because the Defendant established his defense of diminished capacity by expert testimony, the trial court erred by refusing to instruct the jury on manslaughter since the Defendant's expert psychiatrist had testified that the Defendant was unable to form intent or premeditate.

The defense presented the testimony of expert, Lawson Bernstein, M.D. in support of his diminished capacity defense. The trial court erred by finding and ruling that Dr. Bernstein had performed a forensic evaluation and that he could not testify as to the statements, records and reports which he relied upon in formulating his opinion. The Petitioner contends that, in the first instance, Dr. Bernstein was an expert and that he did not perform a forensic evaluation pursuant to West Virginia Code §27-6A-4. Rather, Dr. Bernstein was an expert and therefore rules 702 and 703 of

the West Virginia Rules of Civil Procedure applied and permitted him to testify to reports, records and statements that he relied upon in formulating his opinions, even if they would otherwise be inadmissible.

Although Dr. Bernstein was not permitted to testify regarding the reports, records and statements he reviewed, the trial court permitted the State to inquire about those records on cross-examination because the trial court found that line of questioning to be for impeachment purposes. The State, under the guise of “impeachment” was allowed to read isolated statements and then inquire of Dr. Bernstein whether the evaluator said or wrote the statement in the report. The State also inquired about statements made by the Defendant in a forensic interview conducted by Dr. Bobby Miller. Some statements were incriminating. The State was also permitted to inquire of Dr. Bernstein regarding jail records even though Dr. Bernstein did not testify to or even read the jail records. The trial court erred by overruling the Defendant’s objections and by ruling that the questions were permissible for impeachment purposes.

Dr. Bobby Miller did not testify at trial. Dr. Bobby Miller had performed a court ordered forensic evaluation. Dr. Miller’s testimony had been the subject of a Motion in Limine filed by the State prior to trial. The trial court ruled that Dr. Miller could not testify at trial on behalf of the defendant’s diminished capacity defense. The trial court erred by permitting the State, during cross-examination of the Defendant to play almost the entirety of the interview of the Defendant by Dr. Miller. The recorded interview contained prejudicial and inadmissible hearsay statements of Dr. Miller. Furthermore, the recorded statements contained incriminating statements made by the Defendant. It was error for the trial court to rule, over the Defendant’s objection, that the recorded statement was permissible cross-examination. The trial court also erred in ruling that the Defendant could not call Dr. Miller to testify.

Last, during the State's rebuttal, the State presented the testimony of Dr. Jennifer Osborne. Dr. Osborne had been the Defendant's girlfriend prior to her attending medical school. Over the Defendant's objection, the trial court permitted the State to inquire as to Dr. Osborne's education, training and credentials and the trial court further permitted the State to refer to the witness as Dr. Osborne throughout her testimony, which was prejudicial to the Defendant.

Based upon these errors and the cumulative and prejudicial errors of the trial court, the Petitioner would request that he be awarded a new trial.

ARGUMENT

I. The trial erred by permitting the Defendant to be prosecuted on the unindicted theories of felony murder and murder by lying in wait and by permitting the jury to deliberate on these unindicted theories.

In January, 2012, the Defendant was indicted by a Raleigh County Grand Jury on the charge of First Degree Murder. The indictment specifically alleged that the Defendant "did unlawfully, feloniously, maliciously, willfully, deliberately, and with premeditation slay, kill and murder one Cyan Maroney." (A.R. Vol. 3, 2191). The Defendant had been arrested on October 3, 2011. The criminal complaint alleged that the Defendant "did feloniously, premeditatedly, willfully, maliciously, deliberately, and unlawfully slay, kill and murder the deceased, Cyan Elizabeth Maroney." (A.R. Vol. 3, 2192) The complaint was based on the following facts:

On 10/02/2011 I responded to 618 Meyers Avenue, Beckley, Raleigh County, WV to a report of a stabbing. Based on witness statements and evidence gathered on the scene, the above stated defendant and the victim had been involved in a relationship in the past. The defendant came to the victim's residence at 618 Meyers Avenue, Beckley, Raleigh County, WV. An argument ensued outside the residence and the victim went inside the residence to her bedroom. The defendant followed her inside her bedroom where the argument continued. Witnesses state that they heard sounds of a struggle inside the bedroom and shortly thereafter the defendant exited the bedroom carrying a knife and angrily stated words to the effect of "get the fuck

out of my way.” Witnesses entered the bedroom where they observed the victim unresponsive and lying in a pool of blood. Witnesses stated that they viewed the knife and the knife was of the type kept in the residence. The defendant then fled the scene. The defendant admitted to Lt. Burgess that he had stabbed the victim. The victim had been stabbed approximately twelve times. The defendant is personally known by the witnesses. All of the previous occurred in Raleigh County, WV. The victim was deceased as a result of her injuries.
(A.R. Vol. 3, 2193)

A. The State provided no notice whatsoever of its intent to prosecute the Defendant on the theories of felony murder and murder by lying in wait.

The Defendant was indicted on first degree premeditated murder in January, 2012. A jury trial commenced on February 24, 2014 before the Honorable Robert A. Burnside, Jr., Judge, in Raleigh County, West Virginia. (A.R. Vol. 1, 333).

In the more than two years that this case was pending, the State never told or even implied to defense counsel that it would be pursuing any theory other than first-degree premeditated murder.

On March 3, 2014, jury instructions were submitted and argued. The Defendant received the State’s jury instructions immediately prior to arguing them, and found that the State had submitted jury instructions on felony murder and murder by lying in wait. The Defendant objected to these jury instructions arguing that the Defendant had been indicted on first degree premeditated murder and had received no notice of the State’s intent to prosecute him on felony murder and murder by lying in wait. (A.R. Vol. 1, 1163). In response, the State argued, citing *State v. Hughes*, 225 W.Va. 218, 691 S.E.2d 813 (2010), that it wasn’t necessary for an indictment to set forth the manner or means in which the death of the deceased was caused, but was sufficient to charge that the Defendant “did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased.”(A.R. Vol. 1, 1165-66).

This court held in syllabus point 2 of *State v. Hughes*:

In West Virginia, (1) murder by any willful, deliberate, and premeditated killing, and (2) felony-murder constitute alternative means under W.Va. Code §61-2-1(1991), of committing the statutory offense of Murder of the First Degree; consequently, the State's reliance upon both theories at a trial for Murder of the First Degree does not, per se, offend the principles of due process, provided that the two theories are distinguished for the jury through Court instructions: nor does the absence of a jury verdict formed distinguishing the two theories violate due process, where the State does not proceed against the Defendant upon the underlying felony.

Syl. pt. 2, *State v. Hughes*, 225 W.Va. 218, 691 S.E2d 813 (2010), citing Syl. pt. 5, *Stuckey v. Trent*, 202 W.Va. 498, 505 S.E.2d 417 (1998).

It is not clear in reading *Hughes*, whether in that case the defendant received any prior notice that the State would or might prosecute the defendant on the alternative theories. In this case however, there was no type of notice whatsoever (or even any suggestion) provided to the Defendant of the State's intent to prosecute on the alternative theories. Furthermore, the State had been made aware by the Defendant's timely disclosures that the Defendant was pursuing a diminished capacity defense. The diminished capacity defense would not be useful under the alternative theories. This Court in *Hughes* and in *Stuckey*, held, as stated hereinabove, that the reliance by the State on the alternative murder theories does not, per se, offend the principles of due process. The Defendant was prejudiced and unfairly surprised by the State's actions in "notifying" the Defendant of these theories after the Defendant, his mother, Jill Lambert, and Terri Smith had already testified and believes that this information was purposefully withheld by the State in order for the State to have an advantage over the Defendant.

This case can be distinguished from *Hughes*. In *Hughes*, the burglary and the murder were intertwined inextricably throughout the factual development of the case. The case before the Court is not a case in which there was an obvious felony committed at the time of the killing. The State's

felony murder theory was that the murder was committed during a burglary. The State contended that the Defendant, although invited into the house, entered with the intent to commit the crime of brandishing (A.R. Vol. 1, 1166-1171). The State also asserted that the Defendant testified during trial that his intent was to search the house for a man and that his intention in purchasing the Bowie knife was to “brandish” the knife at any man he may find inside the house. The State contended the Defendant had confessed at trial to brandishing which provided notice of the felony murder theory based on burglary. (A.R. Vol. 1, 1168).

Here, the State’s theory of burglary was not obvious or apparent under the facts of this case, although from a purely technical prospective, it could be argued.

The idea that the State would be pursuing a conviction based on the theory of murder by lying in wait was first presented during the arguments on jury instructions. The State disagreed that the Defendant had no notice of this theory, arguing that the Defendant should have had notice as to this theory, because in opening, counsel for the State had “called it a murder by ambush, [and] spoke about a private attack committed by the Defendant against the victim” and that “repeatedly throughout this trial, in addition to the private attack, it is that the Defendant’s deadly weapon and his purpose was concealed from Ms. Maroney.” (A.R. Vol. 1, 1174).

Further, the State argued that it’s file included witness statements of Ms. Maroney’s three roommates, all of which were called on the first day of trial. The State contended that these roommates had testified that “the Defendant and the victim argued outside, that the victim then went back into the house and back into the room and the Defendant then entered” and that “we have proven that he entered with the murder weapon in his back pocket.” (A.R. Vol. 1, 1167-68). Therefore, the State contended that there could be no unfair surprise. (A.R. Vol. 1, 1174).

The Defendant contends that a “private attack” or evidence that the Defendant’s purpose and

weapon were concealed does not establish murder by lying in wait, and therefore, there could not be notice factually. (See “II.” hereinbelow.) The Defendant was unfairly surprised and prejudiced by the trial court permitting the State to prosecute on these theories with no notice and little, if any, underlying factual support.

B. The trial court erred by denying the Defendant’s motion to require the State to make an election, and by instructing the jury on felony murder and murder by lying in wait as well as premeditated murder.

The Defendant objected to State’s instruction number 1 which instructed the jury with respect to the State’s theories of felony murder and murder by lying in wait. The Defendant moved the Court to require the State make an election between the different theories, arguing unfair surprise and that it was a violation of due process because at that point in trial the Defendant was precluded from the opportunity to defend those theories. (A.R. Vol. 1, 1150, 1164). The trial court denied the motion.

This Court has held that “[t]he granting of a motion to force the State to elect is within the discretion of the trial court, and such a decision will not be reversed unless there is a clear abuse of discretion.” Syl. Pt. 3, *State v. Walker*, 188 W.Va. 661, 425 S.E.2d 616 (1992). It was an abuse of discretion for the trial court to allow the State to pursue alternative theories of murder under the facts of this case. The Defendant was not given any notice as to the theories until approximately one hour prior to the arguing of jury instructions and there had been no evidence presented by the State in its case in chief to indicate that the Defendant may be required to defend these alternative theories. It is totally unfair and prejudicial to the Defendant to ambush him at trial by pursuing alternate theories. The State knew through the Defendant’s rule 12.2 disclosures that he was pursuing a diminished capacity defense. That type of defense cannot be pursued under the felony murder or murder by lying in wait theory, yet, the State never in any way or form disclosed or mentioned to

defense counsel prior to the jury instructions that the Defendant would be prosecuted on these theories. Although it is not necessary under West Virginia Code §61-2-1 to set forth a manner or means by which the death of the deceased was caused, under the facts of this case, it was an abuse of discretion for the trial court to allow the case to be prosecuted on the alternative theories. Furthermore, as to the theory of murder by lying in wait, the Defendant would contend that there was no evidence whatsoever to support this theory.¹

It was an abuse of discretion for the trial court to deny the Defendant's motion to have the State make an election between the alternate theories of murder and to allow the jury to deliberate felony murder, murder by lying in wait and premeditated murder.

II. The trial court erred by improperly instructing the jury as to the elements of murder by lying in wait.

The trial court instructed the jury as follows:

A person is guilty of first-degree murder by lying in wait when the Defendant waits and watches, in either concealment or in secrecy, for the purpose of or with the intent to kill or inflict bodily harm upon another. In order to prove a Defendant guilty of first-degree murder by lying in wait, it is not required that there be any proof that the Defendant acted with the specific intent to kill or with premeditation. In order to prove lying in wait, the State is not required to prove that the killer was concealed or that the victim was unaware of his presence. A Defendant acts in secrecy when he relies on the element of surprise in order to carry out his intent to kill or to inflict bodily harm.

Bodily harm means either substantial physical pain or any impairment of physical condition. If one places himself in a position to make a private attack upon his victim and attacks the victim when the victim does not know or is not aware of his purpose to kill or inflict bodily harm, the killing constitutes first-degree murder by lying in wait.

¹ The lack of evidence to support the theory of murder by lying in wait is discussed in detail in Section II.

Therefore, if you find from the evidence beyond a reasonable doubt that this Defendant, Jeremy Lambert, placed himself in a position to make a private attack upon Cyan Maroney and attacked her when she did not know of his purpose to kill her or to cause her bodily harm, then you may find this Defendant guilty of first-degree murder as charged in the indictment.

(A.R. Vol. 2, 1925-26).

During argument, the State, citing *State v. Berry*, 227 W. Va. 221, 707 S.E.2d 831 (2011) contended that in terms of lying in wait, the Defendant “does not have to be both acting in secrecy and concealment” and that “it is not necessary in order to establish lying in wait that the Defendant’s presence is a secret or is concealed but his purpose is a secret and concealed from the victim.” (A.R. Vol.1, 1175) The State, apparently also citing *Berry, id.*, argued that the language approved by the Court in that case is “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 assassins presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait.” (A.R. Vol. 1, 1176). The State contended that in this case, the facts supporting lying in wait were the following:

The evidence would be that the Defendant made arrangements to meet with the victim at her residence, that the Defendant confirmed on the witness stand that she had no reason to suspect his plan or purpose, she had no reason to suspect he was purchasing and arming himself with the murder weapon and that, as far as she knew, this was only going to be a talk. Defendant then, in secrecy to the victim, purchases the deadly weapon. The Defendant then – and he also admitted this on the witness stand – enters the victim’s residence and then her home with a deadly weapon and his intentions, which, in the State’s theory of the case, would be to murder her, to kill her, that those were hidden, that his purpose in being in the bedroom was concealed and was a secret and that he – as I had said in opening, murdered her by ambush.

(A.R. Vol. 1, 1176-77)

The Defendant objected to the trial court's instruction on the basis that the State did not present evidence sufficient to justify such an instruction, because the defendant had not received notice of this theory of murder and because the instruction was not a correct statement of the law. The trial court denied the Defendant's objection to this instruction stating that "the secrecy with respect to having the weapon in his possession and not disclosing it to her that he had it or that he had some intent to use it or display under some circumstances brings this within lying in wait." (A.R. Vol. 1, 1178-79).

In *State v. Berry*, 227 W.Va. 221, 707 S.E.2d 831 (2011), this Court citing Syl. pt. 2, *State v. Harper*, 179 W.Va. 24, 365 S.E.2d 69 (1987) stated that:

"lying in wait" as a legal concept has both mental and physical elements. The mental element is the purpose or intent to kill or inflict bodily harm upon someone; the physical elements consist of waiting, watching and secrecy or concealment. In order to sustain a conviction for first-degree murder by lying in wait pursuant to W.Va. Code §61-2-1 [1987], the prosecution must prove 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.

Berry at n. 2.

This Court in *Berry*, noted that under *Harper*, the theory of lying in wait may be shown by **either** concealment or secrecy. *Berry*, at n. 21. The State and the trial court have misconstrued *Harper*. Under *Harper*, the State must prove 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. *Id.* The State's contention that the elements of lying in wait set forth in *Berry* could be established by evidence that the Defendant secretly bought a weapon, entered the victim's residence with the intention to kill her, that such intention was hidden from her and that his purpose for being in the bedroom was concealed and a secret is ridiculous, unimaginable, and defies logic. The State has misconstrued *Harper*.

Under the State's interpretation of *Harper* all murders would be murder by lying in wait unless the Defendant made an announcement or warned the victim of his or her intent to kill.

The trial court erred by incorrectly instructing the jury as to the elements of lying in wait.

III. The trial court erred by refusing to instruct the jury on voluntary manslaughter when the Defendant's expert testified that due to certain mental defects and disorders, the Defendant was incapable of premeditating or formulating the intent to kill.

The testimony by Dr. Bernstein concerning the Defendant's mental defects and mental disorders was sufficient to create a reasonable doubt as to the question of malice and premeditation and it was error for the trial court to refuse to instruct the jury on voluntary manslaughter. The refusal of the trial court to give this instruction denied the Defendant his right to a fair trial.

It is fundamental that a trial court must give an instruction for a lesser included offense when "evidence has been produced to support such a verdict." *State v. Stalnaker*, 167 W.Va. 225, 227, 279 S.E.2d 416, 417 (1981).

Syllabus Point 2 of *State v. Leonard*, 217 W.Va. 603, 619 S.E.2d 116 (2005), states the standard for determining whether a defendant is entitled to an instruction on a lesser included charge:

"The question of whether a Defendant is entitled to an instruction on a lesser included offense involved a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense." *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Accord, Syl. Pt. 3, *State v. Wilkerson*, 230 W.Va. 366, 738 S.E.2d 32 (2013). Both requirements for giving a voluntary manslaughter instruction have been met in this case.

It is well settled that voluntary manslaughter, a felony under West Virginia Code §61-2-4

is a lesser included offense of murder. *State v. McGuire*, 200 W.Va. 823, 824, 490 S.E.2d 912, 923 (1997). Thus, the first element has been met.

The second element to be considered under *Stalaker*, is whether there is evidence tending to prove the lesser included offense. During trial, the Defendant called psychiatrist Dr. Lawson Bernstein as his expert witness. Dr. Bernstein testified that the Defendant suffered from diminished capacity at the time of the killing. (A.R. Vol. 2, 1382). Dr. Bernstein further testified that the Defendant suffered from multiple mental disorders including post-traumatic stress disorder, a mood disorder (either major depressive disorder or bi-polar II disorder) a mixed personality disorder with prominent borderline features and alcohol dependence, and that these mental diseases or defects rendered the Defendant incapable of premeditating or formulating the intent to kill Cyan Maroney. (A.R. Vol. 2, 1302). Based upon Dr. Bernstein's testimony, the jury could have found that the Defendant was an unable to form intent, premeditation, deliberation and malice and could have found him guilty of voluntary manslaughter.

Syllabus Pt. 1 of *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996), states:

“As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law and the review is *de novo*.”

It was an abuse of discretion for the trial court to refuse to instruct the jury on voluntary manslaughter.

IV. The trial court erred by permitting the State to refer to rebuttal witness Jennifer Osborne as Dr. Osborne and to inquire about her education and experience because she was testifying as a fact witness.

The State presented the testimony of fact witness Jennifer Osborne in it's case on rebuttal. The purpose of the testimony of Ms. Osborne, according to the State, was to describe an act of

domestic violence by the Defendant against Ms. Osborne before he went to Kuwait and to describe an incident in which the Defendant went to her apartment with a gun after she broke up with him. (A.R. Vol. 2, 1587).

Ms. Osborne and the Defendant went to high school together and had a relationship when she was fifteen and he was seventeen. (A.R. Vol. 2, 1631). Ms. Osborne later went to medical school and at the time of her testimony was a physician, board certified in internal medicine. She was currently doing a fellowship in pulmonary critical care. (A.R. Vol. 2, 1629). The State, throughout her testimony, referred to the witness as “Dr. Osborne.” The Defendant objected to the state’s questions respecting Ms. Osborne’s education and training on the basis that she was not testifying as an expert and that her education and training and title of “Dr.” were not relevant. (A.R. Vol. 2, 1629). The court overruled the Defendant’s objection.

It was error of the trial court to permit the State to inquire into the credentials of this witness and to refer to her as Dr. Osborne when she was not testifying as an expert and her credentials were not relevant. This action by the State was an attempt to bolster the testimony of this witness and provide to the jury an impression that she may be more knowledgeable in the issues before the Court or more truthful. These references by the State to the education and experience of Ms. Osborne and the State’s continual reference to her as Dr. Osborne were prejudicial to the Defendant.

V. The circuit court erred by permitting the State to play, during cross-examination of the Defendant, an audio recording of the forensic interview of the Defendant by Dr. Bobby Miller.

The Defendant had disclosed Dr. Bobby Miller, a Huntington, West Virginia psychiatrist, as one of its expert witnesses.² The State filed its Motion in Limine to Preclude the Testimony of

² Dr. Miller had previously been ordered by the trial court to perform a forensic evaluation to determine competency and criminal responsibility. (A.R. Vol. 3, 2148-2155)

Dr. Miller. A pre-trial hearing was held on this issue. The trial court, by Memorandum Order, granted the State's Motion in Limine as to Dr. Miller. (A.R. Vol. 3, 2186-2187).

The State's first question to the Defendant on cross-examination was whether he had been interviewed by Dr. Miller on November 9, 2011. The Defendant replied that he was. The dialogue between the State and the Defendant were as follows:

Q. You were interviewed by Dr. Bobby Miller on November 9th, 2011; weren't you?

A. Yes.

Q. Dr. Bobby Miller was a psychiatrist chosen by your former defense lawyer, Joe Noggy; correct?

A. Yes.

Q. And when you were interviewed on November 9th, 2011, about a month after the murder, you explained to Bobby Miller that you killed Cyan because you were, quote, pissed off; correct?

A. I don't recall that.

Q. Did you also tell Bobby Miller that it was because of jealousy?

A. I don't recall saying that.

Q. Do you recall Bobby Miller giving you some advice about what you should be saying to avoid a first-degree murder conviction?

A. No.

MS. KELLER: Your Honor, the State would – I need to mark it first. The State will be asking to mark as State's Exhibit – 68 is it –

DEPUTY CLERK: Uh-huh.

MS. KELLER: – the recorded interview of Dr. Bobby Miller and play it to the jury.”

(A.R. Vol. 1, 827-828).

During the forensic interview of the Defendant by Dr. Miller, the Defendant described the

events that occurred on October 2, 2011, his mental infirmaries, his past history, and his past psychological and psychiatric treatment. As suggested by the State in questioning the Defendant, at one point in the interview, Dr. Miller essentially advised the Defendant that there were certain things he should or should not say to avoid a conviction. The Defendant objected to the playing of the interview on the basis that the statements made by Dr. Miller would be hearsay and inadmissible. (A.R. Vol. 1, 829, 831, 832). Counsel argued that the State presented this recorded interview in an attempt to backdoor the Defendant. (A.R. Vol. 1, 835). The trial court overruled the Defendant's objection to the playing of the interview between Dr. Miller and the Defendant on the basis that it was the Court's belief that it was being offered as the Defendant's statement by a party opponent and because it was a forensic interview. (A.R. Vol. 1, 835). Counsel then asked the court if the Defendant would then be able to call Dr. Miller to testify. The Court denied such request saying that it was a "different subject" since the recording (and transcript) were being offered as the Defendant's statement and it was given in the context of an interview with Dr. Miller. (A.R. Vol. 1, 835-836).

Not only was the recording of the interview inadmissible but it was very prejudicial to the Defendant due to the statement made by Dr. Miller which was not redacted. The Defendant was not able to cross-examine Dr. Miller as to the statements he made during the interview due to the trial court's ruling that Dr. Miller could not testify.

Further, the interview by Dr. Miller was a forensic court ordered interview pursuant to West Virginia Code §27-6A-1, and therefore, incriminating statements made by the Defendant to Dr. Miller were inadmissible as violating his privilege against self incrimination.

This Court has held that the Fifth Amendment to the United State Constitution and Section 5 of Article III of the West Virginia Constitution applied to court-ordered psychiatric examinations.

State v. Jackson, 171 W.Va. 329, 298 S.E.2d 866 (1982). This Court reasoned that “if a defendant, while in the custody of the State, is evaluated by a court-ordered psychiatrist, the psychiatrist becomes a State agent for the purpose of analyzing a self-incrimination claim.” 171 W.Va. 333, 298 S.E.2d 870. Although a psychiatrist can testify about the basis of a medical opinion as to the Defendant’s medical condition, a psychiatrist should exclude any specific statements a defendant made regarding the criminal offense. 171 W.Va. 334, 298 S.E.2d 871. The interview of the Defendant by Dr. Bobby Miller contained numerous incriminating statements. The trial court committed error by permitting these statements to be heard by the jury.

VI. The trial court erred by improperly limiting the testimony of the Defendant’s expert, Lawson Bernstein, M.D.

The Defendant admitted that he killed Cyan Maroney and raised the defense of diminished capacity. The Defendant retained forensic psychiatrist, Dr. Lawson Bernstein to perform an evaluation of the Defendant and to testify at trial. Dr. Bernstein was of the opinion that at the time of the killing of Cyan Maroney, the Defendant suffered from mental diseases and defects that rendered the Defendant incapable of premeditating or formulating the intent to kill Cyan Maroney. (A.R. Vol. 2, 1302).

The State objected to Dr. Bernstein’s testimony regarding the diminished capacity defense and filed its Motion in Limine Regarding Defense Psychiatric Evidence alleging therein that the conclusions of Dr. Bernstein did not satisfy the requirements of a diminished capacity defense, that the testimony would be inadmissible hearsay statements of the Defendant and of collateral sources and that the testimony did not generally meet the requirements of Rule 702 of the W.Va. Rules of Evidence. (A.R. Vol. 3, 2170). A hearing was held and the Court gave the Defendant the opportunity to have Dr. Bernstein issue a supplemental report. Dr. Bernstein issued his

supplemental report which the Court found had corrected the deficiency. (A.R. Vol. 3, 2186). The Court denied the Motion in Limine as to Dr. Bernstein. In the court's order (entitled "Memorandum") it ruled that "the predicate necessary to (Dr. Bernstein's) conclusion requires the admission of competent evidence that confirms Dr. Bernstein's account of the Defendant's "particular mental state on the night of the homicide as delineated in my prior report." (A.R. Vol. 3, 2186-87). The Court however made a "preliminary conclusion" that Dr. Bernstein's reference in his report to statements made to him by the Defendant would be impermissible hearsay. (A.R. Vol. 3, 2187). The Court therefore noted that if Dr. Bernstein was precluded on hearsay grounds from reciting the Defendant's statement as to his state of mind or if other foundational evidence as to the Defendant's mental state at the time of the event charged is not in the record, Dr. Bernstein would not be permitted to testify to his opinion. (A.R. Vol. 3, 2187). The State objected to much of Dr. Bernstein's testimony at trial.

A. Dr. Bernstein did not perform a court ordered forensic interview with the Defendant.

The State contended that Dr. Bernstein could not testify to any underlying records and statements that he had reviewed as part of formulating his opinion. The first objection made by the State during the testimony of Dr. Bernstein was as follows:

"Q. Does Jeremy have a history of delusional thoughts based on the records that you reviewed?

A. I believe he does.

Q. Can you identify any of those for the jury?

A. He's got a very paranoid stance in general, but he had a couple of unusual B I believe one in particular. He was going to build a bunker.

MS. KELLER: Objection, your Honor, pre-trial ruling."

(A.R. Vol. 2, 1329). This objection prompted a lengthy bench conference regarding the trial court's pre-trial ruling and what testimony could be elicited from Dr. Bernstein. The trial court noted that the interview by Dr. Bernstein was "a forensic interview, a diagnostic interview". (A.R. Vol. 2, 1332). The Defendant contended that Dr. Bernstein's evaluation was not a forensic interview but that Dr. Bernstein was an expert witness and under Rule 703 of the W.Va. Rules of Evidence he could rely upon facts and data not otherwise inadmissible into evidence if of a type reasonably relied upon by experts in his field.

The trial court's ruling that Dr. Bernstein conducted a forensic interview set the stage for the remainder of the testimony by Dr. Bernstein. This ruling and opinion of the trial court was plainly wrong. Dr. Bernstein was retained by the Defendant as an expert witness to provide testimony regarding his evaluation of the Defendant. There had been two prior forensic interviews performed. By Order entered February 23, 2012, the trial court ordered that the Defendant undergo an out-patient psychological/psychiatric evaluation to be performed by Dr. Bobby Miller and a psychologist at Clayman and Associates, PLLC to determine competency and criminal responsibility as provided in W.Va. Code §27-6A-1. (A.R. Vol. 3, 2153-55). The trial court never stated the basis upon which it believed that Dr. Bernstein had performed a forensic evaluation. Dr. Bernstein was not appointed by court order but was separately retained by the defense for the purpose of providing expert testimony. It was reversible error of the Court to find, in the first instance that Dr. Bernstein had performed a forensic evaluation.

- B. Dr. Bernstein was an expert witness and pursuant to rule 703 of the West Virginia Rules of Civil Procedure, Dr. Bernstein was permitted to base his opinion on facts and data known to him at or before the hearing and if such facts and data were of a type reasonably relied upon by experts in the field, the facts and data need not be admissible in evidence.**

The defense of diminished capacity is a serious and material defense that must be established

by medical testimony. See, *State v. Joseph*, 214 W.Va. 525, 590 S.E.2d 718 (2003). The field of psychiatry is well recognized in the medical profession and equally recognized in the law. One of the diagnostic tools utilized by a psychiatrist is the information which can be obtained from the Defendant in the form of an interview. The interview is a crucial and essential part of the evaluation of the Defendant, without which, a psychiatrist could not form an opinion. The information elicited during the interview should, if the Defendant so elects, be disclosed to the jury. A limitation on such disclosure would prevent the psychiatrist from telling the jury important and indispensable elements of his diagnosis and to that extent would prevent him from fully advising the jury as to the basis of his opinion. Furthermore, it is typical, if not the standard, for a psychiatrist to review past medical and psychiatric records of the Defendant, also to aid in formulating his opinion. The Defendant contends that it is prejudicial to preclude an expert from making reference to information which comes to him in the form of records or documents prepared in a normal course of his evaluation, which he has relied upon in formulating his opinion.

The Defendant admitted stabbing Cyan Maroney and retained Dr. Lawson Bernstein to provide expert testimony in support of his diminished capacity defense. In *State v. Duell*, 175 W.Va. 233, 332 S.E.2d 246 (1985), the Defendant relied on the defense of insanity. The defendant called psychiatrist Dr. Lee Neilan, who testified that the defendant suffered from psychogenic fugue and was incapable of perceiving the nature and consequences of the actions that resulted in her husband's death. The trial court had limited Dr. Neilan's testimony by permitting Dr. Neilan only to "testify from facts within her own knowledge." She was prohibited from testifying concerning her review of the transcript of the defendant's interview and her consultations with another doctor. This Court held in Syllabus Pt. 3 as follows:

In presenting testimony in a criminal trial, an expert medical witness

should be permitted to state the facts or data upon which he bases his opinion, and this includes the information available to him in the form of records or documents whose reliability has been reasonably established and which have been kept in the regular course of professional care or treatment of the Defendant are of a type reasonably relied upon by experts in the witness' particular field of expertise. Syl. pt. 1, *State v. Pendry*, 159 W.Va. 738, 227 S.E.2d 210 (1976), overruled on other grounds, *Jones v. Warden*, 161 W.Va. 168, 173, 241 S.E.2d 914, 916-17 (1978).

In *Duell*, this court found reversible error due to the trial court's restriction on the testimony of the defendant's psychiatrist.

In coming to this holding and conclusion, this Court noted that restricting the testimony of a doctor would require the jury to accept medical opinions as a matter of faith. The Court, citing *State v. Myers*, 159 W.Va. 358, 222 S.E.2d 304, stated as follows:

“To prevent the doctor from utilizing such records and from disclosing to the jury his utilization of them in arriving at his diagnosis places an unreal stricture on him and compels him to be not only less than frank with the jury but also compels him to appear to base his diagnosis upon reasons which are flimsy and inconclusive when in fact they may not be.”

This Court, citing Syl. pt. 1, *State v. Myers*, 159 W.Va. 353, 222 S.E.2d 300 (1976) held as follows:

“In a criminal trial, a psychiatrist testifying on the issue of insanity should be permitted to make unrestricted use of the information elicited by him during his interview with the Defendant and should further be permitted to make reference to information available to him in the form of records or documents whose reliability has been reasonably established and which have been kept in the regular course of professional care or treatment of the Defendant, provided that such information either from the interview or the records is information taken into consideration by the psychiatrist in arriving at his diagnosis.”

Duell, 175 W.Va. at 239. The trial court's rulings on Dr. Bernstein's testimony were contrary to this Court's holdings.

In response to defense counsel's inquiry as to whether everything in the medical records that had been reviewed by the doctor were off limits, the trial court analyzed the situation as follows:

THE COURT: So that kind of walks us off into another discussion.

Is there – but you asked me whether everything in the medical record's off limits to the extent that it comes through this witness. It looks like possibly, yeah, but I don't want to say so because – until I know what specific part you propose to bring in from the medical records through this witness. So I don't want – I don't want to tell you there's a blanket exclusion that maybe that exclusion would be incorrect as to some item that I haven't thought about.

MS. DYER: And I mean I'll try to limit it to – to things that are in the medical records that Jeremy might have already testified to in his past.

THE COURT: Well, there is an opening for you –

MS. DYER: I'll try.

THE COURT: – that we can talk about.

MS. DYER: Yeah.

THE COURT: Because the thing that I have to sort through is the portal by which something becomes an item of evidence that's admitted to the jury.

If we think of Dr. Bernstein as the portal, there's a different set of questions – different set – different analytical questions than if somebody else was the portal, and if it came through any portal of admissibility and got to the jury by way of evidence in this record, then I have a different set of things to think about, and the things I would then think about would be this, did Dr. Bernstein himself hear that evidence; number two, is that piece of evidence that he heard and that the jury heard and the jury can evaluate for themselves whether it's true or not, is that thing that he heard, Dr. Bernstein, something that supports an opinion that he can now express, assuming it's been disclosed and we've got that problem solved.

To me, it is how did this thing get to the jury. Well, has it gotten to the jury by way of the evidence. If it has, did the doctor himself hear it rather than someone else telling him here's what the evidence is, because that creates problems, and, if he, himself, heard it, did he form an opinion based on that and can he express that opinion. Those are the steps in my analysis if it's something that was admitted into evidence earlier.

I don't know where that takes me, but that's what I need to think about.

MS. DYER: Can I have it admitted through a hypothetical question, which it's fair for an opinion if –

THE COURT: No, the question is did some other witness present this to the jury, was it admitted to the jury, did he hear it and did he analyze it, is that part of the date upon which he relies now in forming his opinion. If he wasn't here to hear it, there's a whole different set of problems.”

(A.R. Vol. 2, 1384-86).

Dr. Bernstein was present for very little of the prior testimony and therefore based on the Court's ruling there was little he could testify to.³

The trial court committed reversible error by restricting the Defendant's expert witness' testimony to facts within his knowledge – facts and testimony that he personally received in the courtroom, and other admissible evidence.

VII. The trial court erred by permitting extensive impermissible cross-examination of the Defendant's expert, Lawson Bernstein, M.D.

A. The State cross-examined Dr. Bernstein about medical records and reports that he was not permitted to testify to on direct.

As discussed more fully hereinabove, the trial court ruled that Dr. Bernstein could not testify on direct to the contents of medical records and reports that he reviewed and relied upon in formulating his opinion on diminished capacity. However, the trial court permitted the State to disclose the contents of some of the reports and records for the purpose of impeachment.

Near the beginning of cross-examination, the State made reference to a report made by Hudson Forensic that was ordered by Dr. Bernstein and relied upon him in formulating his opinion.

(A.R. Vol. 2, 1465). Dr. Bernstein did not testify to the contents of this report. However, the State began its questioning of Dr. Bernstein by asking the following:

³ This was a nine day trial. The expense to have Dr. Bernstein present for all those days would have been astronomical.

Q. Referring to the Hudson Forensic Psychology Report at page 7, did the evaluator make the following statement: “Mr. Lambert may not have answered in a completely forthright manner during that evaluation?”

(A.R. Vol. 2, 1470). The Defendant objected to this question on the basis that it was not proper cross-examination because the Court had ruled that Dr. Bernstein could not testify to that report during direct examination.

The State asserted that the line of questioning was for impeachment and not for the truth of the matter asserted. (A.R. Vol. 2, 1472). The Defendant further contended that because there had been no testimony regarding the report, the jury would not know what the State was impeaching.

(A.R. Vol. 2, 1473). The Court overruled the objection. (A.R. Vol. 2, 1476).⁴

There is no doubt that this line of questioning by the State was not impeachment but was elicited to get certain statements into evidence. It was improper cross-examination for the expert witness to simply confirm that a statement was contained verbatim in a report he didn’t write.

B. The State cross-examined Dr. Bernstein about statements made by the Defendant and by Dr. Bobby Miller that were not the subject of direct exam.

The State further questioned Dr. Bernstein about whether or not he heard the Defendant testify to certain statements. The pattern of asking these questions would be for the State to ask Dr. Bernstein if he heard certain testimony and then to state the testimony. (A.R. Vol. 2, 1495). Then, even if Dr. Bernstein answered that he wasn’t in the courtroom to hear the particular testimony, it allowed the State to emphasize certain testimony or statements of the Defendant for the jury.

Similarly, the State asked Dr. Bernstein a series of questions regarding statements made by

⁴ These questions, which started with either “did the evaluator say” or “did the evaluator write” (referring to the Hudson Forensics report), were followed by a statement in the report. Dr. Bernstein was then asked if the evaluator did in fact say or write it. These types of questions were asked at least thirteen times by the State. (A.R. Vol. 2, 1470, 1476, 1477, 1478, 1479, 1480).

the Defendant to Dr. Miller during the forensic interview that Dr. Bobby Miller had performed on the Defendant. (A.R. Vol. 2, 1497). Almost the entirety of the interview was played for the jury during cross-examination of the Defendant. Dr. Bernstein was not present at the time the recording was played and he was not asked about it during direct. (A.R. Vol. 2, 1496). The State began a series of questions asking Dr. Bernstein if he would agree with statements made by Dr. Bobby Miller or by the Defendant during the interview. (A.R. Vol. 2, 1496, 1497, 1498). The purpose of this cross-examination was improper. Clearly the purpose was to reiterate and emphasize for the jury certain things said by the Defendant in Dr. Miller's interview. This cross-examination simply had no relevance whatsoever to Dr. Bernstein's opinion and was beyond the scope of direct since Dr. Bernstein was not questioned about Dr. Miller's interview during direct examination.

The State also cross-examined Dr. Bernstein about certain statements made to him by the Defendant during his evaluation of him and certain in-court testimony by the Defendant. (A.R. Vol. 2, 1558-1564). Dr. Bernstein was not present in the courtroom for the vast majority of the Defendant's testimony. This type of cross-examination was impermissible, in the first instance because Dr. Bernstein was not in court to hear that testimony and the trial court had ruled that defense counsel was limited to questioning him about statements and evidence he heard in the courtroom and about admissible evidence. This was yet another attempt by the State to get other evidence before the jury and to emphasize its theory of the case.

C. The State cross-examined Dr. Bernstein about the Defendant's jail records which he did not review.

The State also questioned Dr. Bernstein about the Defendant's jail records. The State began by asking whether or not Dr. Bernstein obtained them. (A.R. Vol. 2, 1499-1500). Dr. Bernstein replied that he had not. The State then went on to ask Dr. Bernstein questions about what was found

in those records. The Defendant objected on the basis that because Dr. Bernstein testified that he had not read the records, it was not proper to question him about them and because the report and the facts and statements on the report were not in evidence. (A.R. Vol. 2, 1501-02). The Court overruled the objection.

VIII. The trial court committed cumulative error.

The Defendant contends that the trial court committed error by permitting the State to prosecute the Defendant on unindicted theories of murder, by instructing the jury on felony murder and murder by lying in wait, by improperly instructing the jury as to the elements of murder by lying in wait, by improperly refusing to instruct the jury on voluntary manslaughter despite there being evidence to support such an instruction, by permitting the State to improperly refer to a lay witness by “Dr.” in order to bolster her credibility or infer to the jury that her testimony should be given more weight, by permitting the State to play almost the entirety of the forensic interview between Dr. Bobby Miller and the Defendant, by improperly limiting the testimony of the Defendant’s expert, Lawson Bernstein, M.D., and by permitting improper and extensive cross-examination of Dr. Bernstein.

“Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the Defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.” Syllabus Pt. 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

The trial court committed numerous errors such that the Defendant did not receive a fair trial. As a result of the numerous errors of the trial court, the Defendant’s conviction should be set aside by this Court.

CONCLUSION

Based on the foregoing, the Judgment of Conviction should be reversed and a new trial should be awarded.



THOMAS G. DYER (Bar ID No: 4579)
MARY G. DYER (Bar ID No: 4255)
Counsel for Defendant, Jeremy Lambert
Dyer Law Offices
P. O. Box 1332
Clarksburg, WV 26302
(304) 622-1635

In the Supreme Court of Appeals of West Virginia

Docket No. 14-0438

STATE OF WEST VIRGINIA, Plaintiff below,
Respondent

vs.)

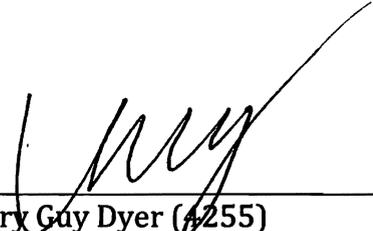
JEREMY LAMBERT, Defendant below,
Petitioner

Appeal from a final order
of the Circuit Court of
Raleigh County (12-F-53-B)

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2014, I served the foregoing
Petitioner's Appeal and Appendix (3 volumes) upon Kristen Keller by U.S. mail at the
following address:

Kristen Keller, Prosecuting Attorney for Raleigh County
Raleigh County Courthouse
215 Main St. Beckley, WV 25801



Mary Guy Dyer (4255)
Thomas G. Dyer (4579)
DYER LAW OFFICES
Post Office Box 1332
349 Washington Avenue
Clarksburg, WV 26302
(304) 622-1635
dyerlawof@aol.com