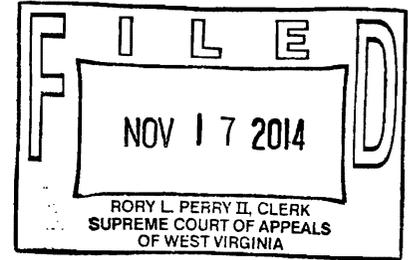


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 14-0887

LILLIE M. TRAIL,
Petitioner,



V.

Appeal from a final order of the
Circuit Court of Lincoln County
(97-F-28)

STATE OF WEST VIRGINIA,
Respondent.

Petitioner's Brief

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ASSIGNMENTS OF ERROR

- I. Petitioner's *Remmer* Hearing Was Fatally Flawed As the Circuit Court Erred by Placing the Burden of Proof Upon Petitioner Without Determining Whether the Source of the Improper Juror Contact Was an "Interested Party."
- II. The Circuit Court Erred By Applying A Relaxed Evidentiary Standard In the Mercy Phase To Evidence That It Deemed Too Prejudicial to Admit During the Guilt Phase, and By Doing So, It Violated Petitioner's Equal Protection and Due Process Rights.
- III. The Circuit Court Erred By Reading To The Jury West Virginia's Slayer Statute Because It Was Irrelevant, Created Confusion, Was Misleading, And Resulted In Unfair Prejudice Which Was Not Cured By the Limiting Instruction.
- IV. The Circuit Court Committed Reversible Error by Permitting the Prosecutor to Imply During Closing Argument that a Verdict of "No Mercy" Would Bring "Atonement" For A Victim In An Unrelated Case.
- V. The Circuit Court Committed Reversible Error When It Permitted the Prosecutor to Make Statements to the Jury That Were Unsupported by Any Evidence At Trial.
- VI. The Circuit Court Abused Its Discretion by Admitting a Summary Chart That Was Misleading and Did Not Assist the Jury in Finding the Truth.
- VII. The Circuit Court Erred By Not Granting Petitioner A New Trial Based Upon Insufficient Evidence.
- VIII. Petitioner's Conviction Should Be Set Aside in Light of the Cumulative Effect of Errors in Her Trial.

STATEMENT OF THE CASE

1. Procedural History

This appeal arises out of a 1997 First-Degree Murder conviction *without mercy* in the Circuit Court of Lincoln County, West Virginia, before the Honorable Jay Hoke. The Petitioner, Lillie M. Trail, was found guilty of aiding and abetting Gregory Whittington ("Mr. Whittington") in the shooting death of her husband, Lawrence Chester Trail ("Chester"). The trial commenced on October 6, 1997, and was bifurcated into guilt and mercy phases. After both sides rested, the jury found Petitioner guilty with no recommendation of mercy. On October 27, 1997, the circuit

court sentenced Petitioner to life in prison without mercy to run concurrently with a sentence for malicious wounding that she had pled no contest to in the Circuit Court of Kanawha County, West Virginia.

Following the trial, Petitioner's counsel was apprised of potential jury tampering that occurred with a juror during the underlying trial. On November 5, 1998, the circuit court held a *Remmer* hearing on this issue.

On January 8, 2007, the circuit court entered a "Further and Final Order" denying the Rule 29 and Rule 33 motions that Petitioner had previously filed. On July 15, 2014, the circuit court granted Petitioner's "Motion For Purposes of Restarting Appeal" which was entered by the Circuit Clerk on July 17, 2014.

2. Statement of Facts

The State's theory of the case was that Petitioner hired her nephew, Mr. Whittington, to kill her husband so that she could collect on insurance policies. In advancing its theory, the State relied heavily, and almost exclusively, on the testimony of Mr. Whittington, an admitted liar, drug addict, and murderer, who testified against Petitioner in exchange for a plea deal. A.R. Vol. 3, 104. For his testimony, the State agreed to reduce Mr. Whittington's sentence to life with mercy and dismiss all charges in an unrelated incident that were pending against him in Kanawha County involving Petitioner's brother-in-law, Mark Medley. A.R. Vol. 3, 92-93.

For background purposes, it is important to note the Mark Medley incident was referenced throughout the entire trial. Prior to the instant case, Mr. Whittington and his Father, Charles Whittington, drugged, tied up, and beat Mark Medley with a claw hammer. A.R. Vol. 3, 93:8-25, 94-103, 153:9-25, 154-166. Despite Petitioner being on trial over the death of her

husband, the jury constantly heard references to an incident wholly unrelated to the circumstances in which Petitioner stood trial.¹

The only direct evidence linking Petitioner to the death of her husband was the testimony of Mr. Whittington. He alleged that sometime before the Mark Medley incident that Petitioner asked him to kill Chester and to make it look like a hunting accident. A.R. Vol. 3, 106:19-25, 107:1-4, 109:3-14. Mr. Whittington further testified that Petitioner threatened to turn him into the police for his involvement in the Mark Medley incident, turn him into the Army for being AWOL, and that he would have his children taken from him if he did not kill Chester. A.R. Vol. 3, 115:15-21. On November 22, 1994, Mr. Whittington shot and killed Chester while he was in the woods hunting. A.R. Vol. 2, 127-132. 123:22-25, 124-127.

On cross-examination, Mr. Whittington's testimony contained major discrepancies from his prior statements.² Mr. Whittington acknowledged numerous other lies he had told others about the shooting, agreeing that they were "crazy stories." A.R. Vol. 3, 198-202. For blackmail purposes, Mr. Whittington also claimed that he had a package of photographs that depicted him meeting with Petitioner to discuss the killing of Chester if Petitioner ever went to the police. A.R. Vol. 3, 183, 189. Yet, Mr. Whittington testified that he told his wife to destroy the envelope that contained the photographs in the event that he was arrested, which she did. *Id.*, 189. Even Trooper Howell of the West Virginia State Police testified that he and other law enforcement officers had problems with all of the "discrepancies" in Mr. Whittington's stories. A.R. Vol. 2, 163, 164:1-4. Specifically, Trooper Howell acknowledged numerous instances of false statements by Mr. Whittington regarding the killing of Chester and the subsequent investigation of the shooting. A.R. Vol. 2 at 143-166. For example, Mr. Whittington told Trooper Howell that

¹ Petitioner pled no contest to the charge of malicious wounding arising out of the Mark Medley incident.

² See generally, A.R. Vol. 3, 149-151, 153, 157-58, 160, 174, 196-198, 214.

he would lead him to the ski mask that he wore the day he killed Chester, but the evidence was never found. A.R. Vol. 2, 145. Nor could law enforcement locate the shell casings that Mr. Whittington said were in his yard. *Id.* Most glaringly, Trooper Howell testified that other than the word of Mr. Whittington, that there was no corroborating evidence linking Petitioner to Chester's death except for the insurance policies. A.R. Vol. 2, 143.

As part of its case in chief, the State also called twelve (12) insurance representatives to discuss twenty (20) separate insurance policies involving Chester. The State alleged that Petitioner had obtained these policies for the purpose of collecting the benefits when Chester was killed. However, cross-examination revealed that Chester had taken out many of the policies himself, or acquired them incidental to his employment or membership with organizations. A.R. Vol. 2, 74:14-24; A.R. Vol. 3, 70:18-25, 71; A.R. Vol. 4, 66:11-24, 91-106. Several insurance agents testified that there was nothing unusual about a coal miner, like Chester, obtaining accidental insurance in light of the hazardous nature of the job. A.R. Vol. 3, 57. Testimony from Chester's supervisor at work, Arch Runyon, demonstrated that Chester had a number of accidents at work in 1992, 1993 and 1994, (before his death in 1994), and that insurance companies routinely solicited business at the company where they worked. A.R. Vol. 6, 71-85.

(3) Statement of Errors

(i) After the trial, Petitioner's counsel received information that Linda Shamblin had sought out and improperly contacted Juror Teresa Nunley during the trial at the Sam's Club in Charleston, West Virginia. Upon learning this information, counsel notified the circuit court and moved for Petitioner's conviction to be set aside. The circuit court promptly conducted a *Remmer* hearing in accordance with this Court's holding in *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995). *See* Syl. Pt. 2 ("A hearing conducted to determine whether or not any

contact with a juror was prejudicial has now been informally named a *Remmer* hearing.”) *Sutphin*, 195 at 558, 466 at 409. Petitioner contends the *Remmer* hearing was fatally flawed from the start because the circuit court automatically placed the burden of proof on Petitioner without ever determining whether the source of the alleged misconduct was a stranger or interested party. Such a finding is critical under the presumption of prejudice analysis as set forth in *Sutphin*.

(ii) Moreover, Petitioner contends the circuit court applied a relaxed evidentiary standard during the mercy phase of her trial involving autopsy and crime scene photographs which violated her equal protection and due process rights. During the guilt phase, the circuit court denied the State’s attempt to introduce an autopsy photograph of Chester pursuant to W. Va. R. Evid. 401 and 403. A.R. Vol. 6, 6:6-12, 8:8-24, 9:1-5. However, during the mercy phase, the circuit court permitted, over objection, the jury to view the same autopsy photograph in addition to gruesome crime scene photographs. A.R. Vol. 11, 4:15-24, 5:1-20; A.R. Vol. 13, 88-89; A.R. Vol. 13, 90-120.³ The crime scene photographs depict the victim lying in the woods in a bloody mess after being shot multiple times. A.R. Vol. 13, 90-120. Petitioner contends that if the autopsy photograph was not probative and was too prejudicial for the jury to view in the guilt phase, then the same photograph, as well as the more visceral crime scene photographs should never have been admitted during the mercy phase. In essence, these photographs did not gain any evidentiary value between the two trial phases.

(iii) During the guilt phase, the circuit court took judicial notice of and read to the jury, over objection, the West Virginia Slayer Statute, W. Va. Code § 42-4-2. The Slayer statute had

³ The undersigned counsel reviewed the official Court file located in the Lincoln County Circuit Clerk’s Office. Unfortunately, the crime scene photographs were missing from the Court file. However, the undersigned was able to locate the crime scene photographs, in the file maintained by Petitioner’s trial counsel, Timothy Koontz. The photographs were contained in an envelope labeled “crime scene.” As such, Petitioner believes that A.R. Vol. 13, 90-120 are the official crime scene photographs that should have been in the Court file.

no place in Petitioner's *criminal* trial. The State moved for judicial notice and the reading of the statute at the conclusion Paul Little, Jr.'s testimony. A.R. Vol. 3, 72:11-12. Mr. Little worked for Appalachian Life Insurance, and he testified about a life insurance policy ("Appalachian Policy") on Chester that was paid to Chester's estate in the amount of \$14,000. A.R. Vol. 3, 67-69. Specifically, the State asked Mr. Little why Chester's life insurance benefits were not paid directly to Petitioner. *Id.*, 70:11. In response, Mr. Little testified, "we received a disclaimer [from Petitioner] giving up the right for payment to the beneficiary." *Id.*, 12-13. While *in camera*, Petitioner's counsel argued that the Slayer Statute was irrelevant to this case and taking judicial notice of the statute and reading it to the jury would be unfairly prejudicial. *Id.*, 75:12-25, 76-80. Petitioner's counsel further argued that taking judicial notice of the Slayer Statute would compel Petitioner to testify, an act which could not necessarily cure the prejudicial effect of the judicial notice. A.R. Vol. 3, 77:12-18. The circuit court overruled the objection. However, the circuit court did give a curative instruction "in the sense that [it would] explain to the jury that this statute, they are to draw no inference merely for the fact it is given, but to attach to it whatever weight or credit they believe it's entitled to receive after hearing all the evidence in the case and all the law in the case." *Id.*, 81-82. Despite the categorically ineffectual curative instruction, the circuit court still read the Slayer Statute causing jury confusion and undue prejudice to Petitioner.

(iv) The Mark Medley incident was continuously referenced by the State throughout Petitioner's trial. During the mercy phase, the State summed up the evidence presented by various witnesses, including Mark Medley, as follows: "Ladies and gentlemen, he was beaten within an inch of his life on the request of [Petitioner], by Greg and Charles Whittington." A.R. Vol. 9, 31:13-16. For four (4) more transcript pages, the State detailed the circumstances of Mr.

Whittington's involvement in the Mark Medley incident. In light of Mr. Whittington's involvement in the Mark Medley incident, the State informed the jury that discussions Mr. Whittington testified to having had with Petitioner were outright conclusive of Petitioner's guilt: "And that proves she did it again." A.R. Vol. 9, 35:13.

Most glaring, the State remarked to the jury that they could provide "atonement" - and not only for the death of Chester, but also for the malicious wounding to Mark Medley. A.R. Vol. 11, 27-28. Petitioner's objection was overruled, and the circuit court asked the State to move on and get off the topic of Mark Medley. A.R. Vol. 11, 28:7-13. Petitioner contends the verdict of "no mercy" is the prejudiced result of a jury that went to deliberations with the wholly inappropriate notions that testimony regarding Petitioner's involvement in the Mark Medley incident somehow directly proved her guilt in the instant case, and that their decision could "atone" for acts of Petitioner in an unrelated case for which she had already been punished.

(v) During closing arguments, the State told the jury that Petitioner could not account for charges on her credit card statements and that Chester had been "sniffing" around the bank accounts. A.R. Vol. 9, 101:18-22. Petitioner's counsel objected on the grounds that no evidence was adduced during the trial that supported such comments. A.R. Vol. 9, 102:1-3. Petitioner contends that her conviction should be reversed when taking into consideration the totality of the State's improper remarks during closing arguments in both phases.

(vi) After the testimony of the final insurance representative, Jim Booth of Globe Life and Accident Insurance Company, the State moved the circuit court to admit a demonstrative exhibit representing a summary of the insurance policies discussed during the trial. A.R. Vol. 5:12-14; A.R. Vol. 13, 121. The circuit court overruled Petitioner's objection and admitted the chart into evidence. A.R. Vol. 6, 8-9. While Petitioner does not dispute that Rule 1006 of the

West Virginia Rule of Evidence may permit such a summary chart, Petitioner contends the summary chart was misleading and was prejudicial as it failed to aid the jury in ascertaining the truth and the jury should have never been able to take it back with them during deliberations.

(vii) Petitioner contends the evidence was insufficient to convict her and urges the Court to consider the following: (1) The State's primary witness, Trooper Howell, admitted that this case basically comes down to whether or not you believe the testimony of Mr. Whittington (A.R. Vol. 3, 25-26); (2) That it was uncontested at trial that the word of Mr. Whittington is the only evidence linking Petitioner to the murder of Chester (A.R. Vol. 2, 143:16-21); (3) That Mr. Whittington had a motive to lie in light of his plea deal; (4) That Mr. Whittington was a reputed liar; and (5) That Trooper Howell admitted that the officers had problems with the "discrepancies" in Mr. Whittington's stories. (*Id.*) Even resolving all credibility questions in the State's favor, Mr. Whittington lacks credibility as a witness and there was insufficient evidence to convict Petitioner.

(viii) Finally, Petitioner contends the cumulative effect of the totality of errors in her trial resulted in her suffering unfair prejudice.

SUMMARY OF ARGUMENT

The State's case based largely upon the unreliable testimony of Mr. Whittington, did not support Petitioner's conviction. The facts adduced, combined with the errors committed throughout the trial, including improper judicial notice, admission of highly prejudicial evidence, prosecutorial misconduct and misstatement, and jury tampering resulted in Petitioner suffering unfair prejudice and support Petitioner's request for her conviction to be set aside.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully requests oral argument in this case pursuant to Rev. R.A.P. 19.

ARGUMENT

I. Petitioner's *Remmer* Hearing Was Fatally Flawed As the Circuit Court Erred by Placing the Burden of Proof Upon Petitioner Without Determining Whether the Source of the Improper Juror Contact Was an "Interested Party."

A. Standard of Review

"The trial court's ruling will be revised on appeal when it is clear that the trial court has acted under some misapprehension of the law or evidence." *Bluestone Indus., Inc. v. Keneda*, 232 W. Va. 139, 751 S.E.2d 25, (2013) (citing Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159, W. Va. 621, 225 S.E.2d 218 (1976) ("We review the rulings of the circuit court concerning a new trial and its conclusions as to the existence of reversible error under and abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.")). A motion for new trial based upon juror misconduct will not be disturbed on appeal unless the defendant was injured by the misconduct. "The question as to whether or not a juror has been subjected to improper influence affecting the verdict, is a fact primarily to be determined by the trial judge from the circumstances which must be clear and convincing to require a new trial, proof of mere opportunity to influence the jury being insufficient." Syl. Pt. 1, *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995).

B. Applicable Law

In the landmark case of *Remmer v. United States*, 347 U.S. 227 (1954), the United States Supreme Court held that "any private communications, contact, or tampering, directly or indirectly, with a juror during trial about the matter pending before the jury" is "presumptively prejudicial." *Id.* at 229. See *Haley v. Blue Ridge Transfer Co., Inc.*, 802 F.2d 1532 (4th Cir. 1986). While West Virginia has never expressly rejected *Remmer's* presumption of prejudice

standard, case law suggests that a presumption of prejudice will only apply if the source of the improper juror contact was an “interested party.” This Court in *Sutphin* stated:

In order to determine whether the trial judge abused his discretion, **we first need to examine whether the misconduct was induced by a third-party stranger having no interest in the litigation, or whether a juror was induced to participate in an act of misconduct by an interested party. This analysis is necessary in order to determine whether prejudice is presumed** as in the latter factual construct, and unless rebutted by proof, the verdict will be set aside; or whether the misconduct was induced by a stranger or person having no interest in the litigation, thus requiring proof of manifest prejudice by clear and convincing evidence.

195 W. Va. 551, 557, 466 S.E.2d 402, 408 (emphasis added) (citing *Legg v. Jones*, 126 W. Va. 757, 30 S.E.2d 76 (1944)). Based upon *Sutphin*, it is critical for the circuit court to determine the “status” of the source, i.e. third-party stranger or interested party. See Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure Vol. II, 101 (Supp. 2d. ed. 2007) (“In reviewing claims of juror misconduct, the court in *State v. Sutphin*, 195 W. Va. 551, 557, 466 S.E.2d 402, 408 (1995), suggested that it was necessary first to determine the source of the misconduct.”)).

When analyzing whether prejudice is presumed, the Court in *Legg v. Jones* stated, “[u]pon a clear and satisfactory showing of misconduct by a juror induced, or participated in, by an interested party, no proof is required that the misconduct resulted in prejudice to the complaining party. Prejudice is presumed and unless rebutted by proof the verdict will be set aside.” 126 W. Va. at 763, 30 S.E.2d at 80 (1944). Notably, *Legg* was decided ten years prior to the United States Supreme Court’s presumption of prejudice analysis in *Remmer*.

In 2013, this Court confirmed *Legg*’s presumption of prejudice standard and held, **“prejudice is presumed when an interested party induces the misconduct of a juror.”** *Bluestone Indus., Inc. v. Keneda*, 232 W. Va. at 143, 751 S.E.2d at 29. (emphasis added). In *Bluestone*, plaintiff’s counsel observed a juror and defendant’s company representative speaking

on the courthouse steps during a lunch recess just after the court had read the jury instructions. *Id.* at 141, 27. The circuit court held a *Remmer* hearing and ultimately disqualified the juror at issue. The jury returned a defense verdict and the trial court granted plaintiff's motion for a new trial. On appeal, the Court conducted a two-step analysis using *Legg* as guidance and found the conversation between defendant's company representative and the juror created a presumption of prejudice against plaintiff. *Id.* at 143, 29. Next, the Court considered whether defendant rebutted the presumption and ultimately concluded that when the trial court removed the juror at issue, it had also removed the potential prejudice. *Id.* at 144-145, 30-31.

When analyzing the standard articulated in *Legg* and affirmed recently in *Bluestone*, the circuit court erred in automatically placing the burden upon Petitioner. The circuit court should have determined the source of the misconduct was an interested party and placed the burden upon the State to rebut the presumption of prejudice.

C. Discussion

1. The circuit court improperly shifted the burden of proof of upon Petitioner.

Petitioner contends the *Remmer* hearing was flawed because the circuit court never determined whether the source of the improper contact was a third-party stranger or interested party, and by failing to do so, it improperly placed the burden of proof upon her. Instead, the circuit court required the Petitioner to prove prejudice by clear and convincing evidence. A.R. Vol. 12, 8:10-14 ("the *Sutphin* case says that the [Petitioner] has the burden of proof by clear and convincing evidence.") *See also*, A.R. Vol. 13, 55-72. Petitioner respectfully disagrees that *Sutphin* automatically places the burden of proof on Petitioner. Stare decisis requires the circuit court to first examine the source of misconduct before it can determine who has the burden of proof. In this case, such an analysis is absent resulting in Petitioner suffering unfair prejudice.

2. Ms. Shamblin was an interested party and the State failed to rebut with proof the presumption of prejudice.

Had the circuit court conducted a *Sutphin* analysis, it would have been required to presume prejudice because the source of the improper contact was undoubtedly an interested party.

a. Definition of “interested party”

While the term “interested party” has never been clearly defined as it relates to a presumption of prejudice analysis, the Court has provided ample guidance on the issue. As stated in *Sutphin*, when the presumption of prejudice applies in conjunction with juror misconduct it is necessary to “. . . examine whether the misconduct was induced by a third-party stranger having no interest in the litigation, or whether a juror was induced to participate in an act of misconduct by an interested party.” 195 W. Va. 551, 557, 466 S.E.2d 402, 408. *See also State v. Daniel*, 182 W. Va. 643, 391 S.E.2d 90 (1990) (modified on other grounds). Further, this Court has consistently implied that a person “interested” in the litigation does not have to be a named party. The *Sutphin* Court used the phrase “third-party stranger having no interest in the litigation” to describe who was **not** an interested party. 195 W. Va. 551, 466 S.E.2d 402.m (emphasis added). Logic dictates that if an individual is not a stranger and can be perceived to have some interest in the litigation, he or she is an “interested party.” Additionally, *Legg v. Jones* supports this conclusion, as the Court held that the presumption of prejudice applies unless the “. . . misconduct is induced by a stranger, **or** a person having no interest in the litigation.” 126 W. Va. 757 at 764, 30 S.E.2d 76, 80 (emphasis added). The Court in *Legg* expanded the definition of “interested party” to include someone who is **either** not a stranger **or** someone having some interest in the litigation. Finally, this Court in *Bluestone* found that a defendant’s company representative speaking with a juror during the trial on the courthouse steps was enough to

establish an “interested party” under the *Sutphin* and *Legg* framework. 232 W. Va. 139, 751 S.E.2d 25 (2013).

b. Ms. Shamblin was an interested party

Based upon the trial record, Ms. Shamblin was not only an interested party here, but she also exerted improper influence upon Juror Nunley. Ms. Shamblin was related to Petitioner through the marriage of her daughter, Terri Trail, and Petitioner’s son, Stephen Trail. During the *Remmer* hearing Ms. Shamblin testified regarding her bitterness over this relationship and Petitioner’s involvement. Specifically, Ms. Shamblin admitted there had been “bad blood” between the “Trail family” and that she had “sore feelings” regarding Petitioner’s involvement in her daughter’s relationship with Stephen. A.R. Vol. 12, 14:24, 15:1-4, 18:3-7, 18:14-18. Based upon the above, Ms. Shamblin is clearly an interested party as contemplated in *Sutphin*, *Legg*, and *Bluestone*. She knew Petitioner and her family and at the time of the improper contact with Juror Nunley, she harbored ill will toward Petitioner. Accordingly, the circuit court should have found that prejudice was presumed based on Ms. Shamblin’s interest, and the burden of proof should have been placed on the State, not Petitioner.

c. Testimony of Ms. Shamblin, Juror Nunley, and Misty Dawn Holtzman

The improper contact between Ms. Shamblin and Juror Nunley occurred during the trial before the jury returned the guilty verdict. A.R. Vol. 12, 39:12-22. Moreover, the inconsistencies regarding the testimony of the only three witnesses called to testify at the *Remmer* hearing are concerning and should be taken into consideration in determining whether the State would have satisfied its burden.

Ms. Shamblin’s Account

Defense Counsel: “During the trial [in this] case, did you have occasion to have communication with [Juror Nunley]”?

Ms. Shamblin: “Yes, I did.”

Defense Counsel: “And did you at some point have some discussions with [Juror Nunley] while she was sitting on the jury”?

Ms. Shamblin: “I did not have any discussion with her as I told you last night. She – everybody at Sam’s knows that my daughter was married to [Petitioner’s] son. So when the trial was going on, everybody was questioning me. I knew nothing, and when someone told me – I don’t even know who it was – that [Juror Nunley] was on the jury. “I came to work one morning and [Juror Nunley] was in break room. I said, are you on [Petitioner’s] trial? And she said, I am not allowed to discuss that.” That was the end of it.”

A.R. Vol. 12, 22:15-17, 23:1-12.

Juror Nunley’s Account

Ms. Shamblin’s testimony of the exchange she had with Juror Nunley differs significantly from Juror Nunley’s testimony. When asked by Petitioner’s counsel what occurred at the Sam’s Club Juror Nunley testified, “well we was sitting around and I was getting ready to go outside. I never sat in there and had lunch. I always go outside and smoke. [Ms. Shamblin] just said something to me about the effect of knowing [Petitioner]. *[Ms. Shamblin] was telling me that, “Oh, I know she is guilty and stuff like that.”* A.R. Vol. 12, 31:5-24, 40:12-15. Moreover, Juror Nunley also testified that it appeared to her that Ms. Shamblin was attempting to influence her vote. *Id.*, 31:22-24, 32:1-2, 40:16-21.

Notably, Ms. Shamblin’s testimony indicates there was more than one exchange with Ms. Shamblin about Petitioner during the trial. As evidenced below, Defense counsel questioned Juror Nunley about the duration of the conversation that she had with Ms. Shamblin, Juror Nunley replied as follows:

Defense Counsel: “Is it possible that the conversation could have been more than 15 seconds”?

Juror Nunley: “It could have been more than 15 seconds on passing. It could have been. I mean, *there might have been two or three times that she had said something to the effect*, but it was never stopped and talked about.”

Id., 47:22-24, 48:1-4 (emphasis added).

Unfortunately, Petitioner’s counsel did not follow-up to Juror Nunley’s testimony about the “two or three times” that Ms. Shamblin had attempted to influence her. Further, the only communication referenced in the “Further and Final Order” is the exchange in the break room. Yet despite the record being empty of the specifics of the other exchanges between Ms. Shamblin and Juror Nunley, it is readily apparent that Ms. Shamblin’s attempt to influence the outcome of Petitioner’s trial was more than just an isolated incident.

Ms. Holtzman’s Account

According to Ms. Holtzman’s testimony, Juror Nunley had approached her to inquire if she knew Petitioner and to speak about the conversation Juror Nunley had with Ms. Shamblin, as referenced above. A.R. Vol. 12, 58:8-18. Based on the testimony of Ms. Holtzman, she believed that Juror Nunely was influenced by her conversation with Ms. Shamblin. *Id.* 61:6-8. When asked the basis of her belief, Ms. Holtzman testified that she could tell by Juror Nunley’s facial expressions and head nodding combined with the manner in which Juror Nunley was inquiring her opinion as to Petitioner’s guilt. *Id.* 61:1-18.

Additionally, when Ms. Holtzman was asked to explain Juror Nunley’s account of the conversation she had with Ms. Shamblin regarding Petitioner, Ms. Hotlzman testified that [“Juror Nunley] said that [Ms. Shamblin] had told her that there had been problems between her daughter and [Petitioner’s] son and that she felt, in her opinion, that [Juror Nunley] should go ahead and say that [Petitioner] was guilty because [Petitioner] was guilty as sin.” *Id.* at 62:4-8.

In conclusion, it is difficult to determine where the truth lies among the three witnesses who testified at the *Remmer* hearing. First, Ms. Shamblin testified that she simply asked Juror Nunley whether she was “on” Petitioner’s trial. Conversely, Juror Nunley testified that Ms. Shamblin attempted to influence her decision by eluding that Petitioner was guilty. Juror Nunley also testified that she never discussed the conversation that she had with Ms. Shamblin with anyone. A.R. Vol. 12, 47:19-21. Contrary to Juror Nunley’s testimony, Ms. Holtzman testified that Juror Nunley sought Ms. Holtzman out and discussed the details of the conversation she had with Ms. Shamblin. Nevertheless, the evidence adduced from the *Remmer* hearing clearly indicates that contact was made with a juror by an interested party and prejudice should have been presumed.

d. The State Failed to Rebut the Presumption

Had the circuit court shifted the burden of proof to the State, the State would not have been able to rebut the presumption of prejudice based on improper juror contact by an “interested party.” As the Court in *Sutphin* stated: “. . . unless **rebutted by proof**, the verdict will be set aside . . .” 195 W. Va. at 557, 466 S.E.2d at 408. (emphasis added). The United States Supreme Court deemed the prosecutor’s burden in this scenario as a “heavy” one. *See Remmer v. United States*, 347 U.S. at 229 (“The presumption is not conclusive, but the burden rests **heavily** upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.”). (emphasis added).

Here, the State failed to overcome its burden of rebutting the presumption of prejudice with regard to the improper juror contact. Despite having all twelve jurors and alternates present at the *Remmer* hearing, the State never called a witness on its behalf. A.R. Vol. 12. Further, the State could have inquired of these jurors whether they were aware of the contact between Ms.

Shamblin and Juror Nunley, and if so, whether it impacted their decision. As to the three individuals who did testify at the *Remmer* hearing, the State simply asked follow-up questions to defense counsel's examination, and elicited no response which could overcome the State's heavy burden of rebutting the presumption of prejudice.

In light of the foregoing, the State failed to rebut *by proof* the presumption of prejudice as required by either *Remmer* or *Sutphin*. Accordingly, Petitioner respectfully requests her conviction be set aside.

II. The Circuit Court Erred By Applying A Relaxed Evidentiary Standard In the Mercy Phase To Evidence That It Deemed Too Prejudicial to Admit During the Guilt Phase, and By Doing So, It Violated Petitioner's Equal Protection and Due Process Rights.

A. Standard of Review

The circuit court has the discretion to determine the probative nature of a photograph being offered as an exhibit under Rule 401 of the West Virginia Rules of Evidence. If the Court determines the photograph to be relevant, then it must conduct a balancing test under Rule 403 and consider whether the probative value of the photograph is "substantially outweighed by the counterfactors listed under Rule 403." Further, the circuit court has broad discretion when admitting evidence and its decision will not be "overturned absent a showing of clear abuse." Syl. Pt. 10, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

B. Applicable Law

1. Bifurcation, Scope of Admissible Evidence, Due Process & Equal Protection

It is well established that a trial court has the discretion to bifurcate a murder trial into a "guilt" and "mercy" phases as a matter of trial management. Syl. Pt. 4, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613, (1996). However, bifurcation does not permit the circuit court to expand evidence that would ordinarily be deemed inadmissible and relax the admissibility

requirements that exist in a unitary trial. FN 1, *State v. Rygh*, 206 W. Va. 295, 524 S.E.2d 447 (1999) (“Because bifurcation is a matter of trial court discretion, such an expansion could raise, inter alia, equal protection and due process issues, if one defendant were tried in a bifurcated proceeding with a relaxed evidentiary limitation - - as opposed to another defendant, who is tried in a unitary proceeding”). Furthermore, the evidence still must be “relevant under Rule 401 of the West Virginia Rule of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence.” Syl. Pt. 7, *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010). See also *Rygh*, (“Discretionary trial-management bifurcation does not itself alter or expand the scope of admissible prosecutorial evidence to include evidence that has been historically inadmissible in murder cases in this State.”). *Id.* Further, “[t]he possibility of bifurcation of a mercy phase is not an open door to the expansion of the ambit of evidence that the prosecution may put on against a defendant, in the absence of the defendant opening that door to permit narrowly focused impeachment or rebuttal evidence from the prosecution.” *Id.*

2. Admissibility of Gruesome Photographs

In *State v. Derr*, this Court held the admissibility of photographs over an objection of unfair prejudice because of their gruesome nature must be determined on a case-by-case basis pursuant to Rules 401 and 403 of the West Virginia Rules of Evidence. Further, if the trial court determines the photographs to be relevant to some fact of consequence in the case, it must then consider whether the probative value of the photographs is outweighed by W. Va. R. Evid. 403. Syl. Pt. 10, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994), See also *State v. Lopez*, 197 W. Va. 556, 476 S.E.2d 22 (1996) (remanding the case to the trial court with instructions to weigh the admission of photographs in light of the factors set forth in *Derr*). In determining whether a photograph is “gruesome,” . . . the focal inquiry is whether the photographs ‘may

unduly prejudice or inflame a jury.” *State v. Parsons*, 181 W. Va. 56, 61, 380 S.E.2d 223, 228 (1989) (citing Syl. Pt. 1, *State v. Rowe*, 163 W. Va. 593, 259 S.E.2d 26 (1979)).

The Court has expressed its concern over the admission of gruesome photographs during the mercy phase of a murder trial. In *State v. Rygh*, the Court answered the narrow question of whether a juvenile’s criminal record could be used by the prosecution during the mercy phase of a murder trial. While that issue is not presently before this Court, the prosecution in *Rygh* also admitted into evidence gruesome photos of the victim for the jury to view during the mercy phase without objection from defense counsel. FN 2, 206 W. Va. 295, 524 S.E.2d 447 (1999). Despite the issue of gruesome photographs not coming on appeal, the *Rygh* Court still found it important to express its concern over using these types of photographs during the mercy phase of a murder trial. *Id.* The Court opined that “*State v. Derr*, 192 W. Va. 165, 178-79, 451 S.E.2d 731, 744-45 (1994) reiterated this Court’s awareness of the potential for ‘hideous, ghastly, horrible, or dreadful’ photographs to ‘*arouse passion and cause the jury to [act] on improper grounds,*’” “a concern that is *applicable to both phases of a bifurcated murder trial.*” *Id.* (emphasis added).

C. Discussion

Both evidentiary and Constitutional concerns advance Petitioner’s argument that the autopsy and crime scene photographs should not have been admitted during the mercy phase of the trial.

- 1. The autopsy and crime scene photographs were non-probative and unfairly prejudicial under W. Va. R. Evid. 401 and 403 and their admission was clear abuse of discretion by the circuit court.**

The autopsy and crime scene photographs had no probative value and should have never been admitted during the mercy phase because of their gruesome nature. During the guilt phase,

the circuit court conducted the proper analysis in reaching the conclusion the autopsy photograph was inadmissible. As stated above, the State attempted to introduce through Petitioner's sister the autopsy photograph of the victim. A.R. Vol. 6, 6:6-12. In response, Petitioner's counsel questioned what possible probative value existed in having Petitioner's sister identify a picture of the victim lying on a slab in the morgue, other to inflame the jury. *Id.*, 7:5-16, 8:7-8. The circuit court performed a Rule 403 balancing test and concluded the autopsy photograph "lends nothing extra to the prejudicial value of the body on the slab when there is no issue attached to that of legal consequence in this proceeding." The circuit court further stated, "[m]aybe in other proceedings [the autopsy photograph] might have been, but not so much in this proceeding if the defense is willing to stipulate." *Id.*, 8:18-24, 9:1-5. Petitioner's counsel then stipulated that "Lawrence Chester Trail died on November 22, 1994, as the result of a gunshot wound." *Id.*, 9:6-8. Petitioner takes no issue with this ruling, but believes the circuit court should have applied the same analysis to the same piece of evidence during the mercy phase.

Regarding the crime scene photographs, our Court in *State v. Saunders*, 166 W. Va. 500, 275 S.E.2d 920 (1981) provides guidance to scenarios like the instant case where crime scene photographs are not probative and do not assist the jury. In *Saunders*, the defendant was on trial for first-degree murder and the State introduced color photographs of a victim's charred body and disfigured face after dying in a fire. *Id.* at 501, 921. The defendant was found guilty without a recommendation of mercy. The Court reversed holding that the photographs were not essential to the State's case and served no purpose other to inflame the jury. *Id.* at 501-502, 921-922. The same is true here. The photographs of Chester depict his original state while lying in the woods bloodied and clothed after he had been shot multiple times. There was no genuine need for the jury to view the photographs because the issues before the jury were unrelated to the manner in

which Mr. Whittington had shot the victim. In other words, the jury was not tasked with determining whether Chester was actually killed or who killed him. It was stipulated during the trial that Chester died by a gunshot wound and Mr. Whittington admitted to killing him. The facts of this case are similar to *Saunders* inasmuch as the crime scene photographs served no purpose other than to inflame the jury.

2. Due Process/Equal Protection

Petitioner believes that she was denied due process and equal protection under the law because the circuit court applied a relaxed evidentiary standard to the same piece of evidence in her bifurcated trial as opposed to what a defendant would have received during a unitary trial, as contemplated in FN 1, *State v. Rygh*, 206 W. Va. 295, 524 S.E.2d 447 (1999). In admitting the autopsy and crime scene photographs, the circuit court stated as follows:

While I didn't allow the autopsy photos or any other crime scene photos in, on the issue of guilt or no guilt, I believe they are relevant, and that their probative value outweighs the prejudicial impact they would have on the issue of mercy or no mercy. And to be honest with you one of the reasons I wanted to bifurcate this case, is so you can clear up issues like that during the presentation and phase one of the guilt or no guilt. Because when you have a non-bifurcated proceeding, I think, lots of times, things that wouldn't go in or wouldn't be allowed in would come in on the issue of mercy or no mercy that would not ordinarily be allowed. So, I think it is proper to admit these photos.

A.R. Vol. 11, 5:1-20.

Here, the circuit court implied that a different evidentiary standard existed between the guilt and mercy phases. Given the *Rygh* Court's concerns about precisely this type of inflammatory evidence, the circuit court's rationale for admitting the photographs directly contradicts West Virginia law. On one hand, the circuit court declared the autopsy photograph too gruesome for the guilt phase. On the other hand, the circuit court permitted the jury to view and consider the same autopsy photograph in addition to gruesome crime scene photographs in

making its determination to not recommend mercy. Petitioner contends that once the circuit court determined the autopsy photograph was inadmissible under Rule 401 *and* unduly prejudicial under Rule 403 during the guilt phase, logic dictates the same type of evidence, with objectively more gruesome content, is inadmissible during the mercy phase under *McLaughlin* and *Rygh*. While Petitioner agrees that in light of *McLaughlin* the admissibility of evidence during the bifurcated mercy phase is much broader, this does not change the fact the evidence must still meet the requirements of Rules 401 and 403. Not only did Petitioner suffer unfair prejudice by the circuit court admitting the same evidence that it previously excluded, but Petitioner also was unfairly prejudiced when the circuit court permitted this evidence to be used for purposes other than rebuttal or impeachment. As noted above, the *Rygh* Court permitted the prosecutor to use the defendant's juvenile record to rebut and impeach testimony that defendant was a "good kid." 206 W. Va. at 298, 524 S.E.2d at 450 (1999). Unlike the State in *Rygh*, the State in this case did not use the gruesome photographs as rebuttal or impeachment evidence. Instead, the State proceeded first during the mercy phase and introduced the autopsy and crime scene photographs through its first witness, Trooper Howell. A.R. Vol. 11, 12:13-24, 13, 14:14-21. The purpose of the photographic evidence in the Petitioner's trial was precisely the purpose warned against in *Rygh*, to "arouse passion and cause the jury to [act] on improper grounds." Accordingly, Petitioner contends that by applying a relaxed evidentiary standard to the same evidence the circuit court had already deemed inadmissible during the guilt phase, the circuit court violated her due process and equal protection rights. *See* U.S. Const. amend. XIV and W. Va. Const. art. III, § 14. The circuit court clearly abused its discretion in admitting the gruesome, non-probative, and highly prejudicial photographs. As a remedy for this error, Petitioner respectfully requests the Court remand this matter for a new trial.

III. The Circuit Court Erred By Reading To The Jury West Virginia's Slayer Statute Because It Was Irrelevant, Created Confusion, Was Misleading, And Resulted In Unfair Prejudice Which Was Not Cured By the Limiting Instruction.

A. Standard of Review

Judicial notice as taken here is an application of W. Va. R. Evid. 202 and therefore subject to an abuse of discretion standard: "A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998). Syl. Pt. 5, *State v. McCartney*, 228 W. Va. 315, 719 S.E.2d 785 (2011).

B. Discussion

1. The Reading of The Slayer Statute Cannot Survive a Rule 401 and 403 Analysis.

In this case, the Slayer Statute was irrelevant and had no probative value toward the essential issue of this case - whether Petitioner was criminally responsible for the death of her husband. West Virginia's slayer statute reads as follows:

No person who has been convicted of feloniously killing another, or of conspiracy in the killing of another, shall take or acquire any money or property, real or personal, or interest therein, from the one killed or conspired against, either by descent and distribution, or by will, or by any policy certificate of insurance, or otherwise. . . .

W. Va. Code § 42-4-2.

This Court has previously stated that in order to be admissible, "evidence must first be relevant." *State v. Wade*, 200 W. Va. 637, 652, 490 S.E.2d 724, 739 (1997), *See*, W. Va. R. Evid. 402. "Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." *Id.*, *See* W. Va. R. Evid. 401. Additionally, "[u]nder Rule 401, evidence having any probative value whatsoever can satisfy the relevant definition." *Wade* at

652, 490 S.E.2d at 739, citing *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995).

As argued by Petitioner's counsel, Petitioner contends the State requested the circuit court to take judicial notice of and read the Slayer Statute to the jury so it could "backdoor" an admission that Petitioner disclaimed her interest in the Appalachian Policy because she was in fact guilty of murder. A.R. Vol. 3, 76:17-21. Petitioner further contends the State's use of the statute had no probative value to the underlying issue in this case.

As this Court stated in *McClure v. McClure*, "W. Va. Code § 42-4-2 is designed to permit proof of a judgment of conviction for felonious killing to bar the slayer from obtaining property or life insurance proceeds from the person killed . . ." Syl. Pt. 2, 184 W. Va. 649, 403 S.E.2d 197 (1991). (emphasis added). Based on the purpose of W. Va. Code § 42-4-2 as explained in Syl. Pt. 2 of *McClure*, Petitioner contends the purpose of this statute is **not** to have a jury infer that a criminal defendant is guilty of a murder because he or she disclaimed life insurance benefits. Accordingly, the law requires "**where there is no such conviction, then evidence of an unlawful and intentional killing must be shown in a civil action.**" *Id.* (emphasis added) Without a doubt, at the time the court read the jury the Slayer Statute, and included what it believed to be a curative instruction that could overcome any prejudicial effects, Petitioner had **not** been convicted of the murder of Chester, nor had evidence of an unlawful and intentional killing been shown in **any** civil action.

Had this been a civil action and the underlying issue was whether Petitioner was entitled to collect life insurance proceeds from the victim, then the Slayer Statute may have been relevant and probative under the West Virginia Rules of Evidence. However this was a murder case, and at the time the Slayer Statute was read to the jury, Petitioner had yet to be convicted.

Even if the Slayer Statute passed the relevancy test under Rule 401, Petitioner contends the context in which the circuit court read the statute to the jury was unfairly prejudicial, created confusion, and was misleading pursuant to W. Va. R. of Evid. 403. Further, as this Court held in *State v. Derr, supra*, Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, while Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence - whether the prejudicial effects, confusion, potential to mislead or delay, etc. outweigh the probative value. Syl. Pt. 9, 192 W. Va. 165, 451 S.E.2d 731 (1994).

As stated *supra*, the reading of the Slayer Statute was virtually valueless evidence in that it was inapplicable to any issue before the circuit court. Assuming, *arguendo*, that its reading could somehow be considered relevant, the reading of the Slayer Statute presented ample unfair prejudice and confusion so as to merit exclusion under Rule 403 even if it passed the threshold of Rule 401.

First, the reading of the Slayer Statute to the jury was unfairly prejudicial to Petitioner as it inferred a false assumption that Petitioner was required to disclaim insurance proceeds for reasons of some involvement with the death of Chester. Additionally, the reading of the Slayer Statute at the conclusion of Mr. Little's testimony drew a direct connection between Mr. Little's testimony about Petitioner's decision to disclaim the insurance benefits and the Slayer Statute's prohibition against a convicted killer from taking such benefits. Practically speaking, if a juror hears that one was the named beneficiary of an insurance policy and then disclaimed herself as a beneficiary, and the circuit court then reads to the jury a statute the essentially states that someone who kills the insured cannot take from the insurance proceeds, it is a logical inference

that this statute required this person to disclaim the insurance benefits. The circuit court creation of this inference was not only unfairly prejudicial, but also distracted the jury from the ultimate issue in this case by applying a statute inapplicable to any issue in the case at bar.

The effect of informing jurors of the Slayer Statute's existence and its prohibition of benefits to one convicted of killing the insured outweighs any possible probative value of the circuit court's reading of the Slayer Statute by casting a shadow of conviction upon Petitioner where no such conviction had been obtained.

Regarding the curative instruction, the introduction of the Slayer Statute to the jury was so prejudicial that the circuit court's voluntary curative instruction was insufficient to cure the error. The circuit court followed its reading of the Slayer Statute and its description of how one convicted of a crime may not benefit from the crime with the following instruction which was intended, but failed, to cure the unfair prejudice that Petitioner had already suffered:

"Now, ladies and gentlemen, I want to instruct you that the mere reading of this statute to you is not to be automatically drawn any inference of guilt or innocence, but you are to consider it only in light of all the evidence and the law as instructed to you in this case, as well as the arguments of counsel."

A.R. Vol. 3, 90:2-7.

When a court gives a curative instruction, "[t]he normal presumption is that the jury will follow the curative instruction." *U.S. v. Hall*, 989 F.2d 711, 717 (4th Cir. 1993) (citing *Greer v. Miller*, 483 U.S. 756, 766, 107 S. Ct. 3102 (1987)). Despite this presumption, the United States Supreme Court has also recognized, "[t]hat in some circumstances the risk that the jury will not, or cannot, follow instructions is so great, and the consequence of failure is so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. *Simmons v. S.C.*, 512 U.S. 154, 114 S. Ct. 2187 (1994). Moreover, the normal presumption

"[c]annot apply when the curative instruction fails by its own terms to address the error," *Hall*, at 717.

Here, the error with the circuit court's curative instruction is two-fold. First, once the circuit court took judicial notice and read the Slayer Statute to the jury, the bell had already been rung. At that point, the circuit court's instruction was simply ineffectual and in no way dissipated the prejudice resulting from the circuit court's reading of the statute. Secondly, the curative instruction was confusing and meaningless. For example, the instruction admonishes the jury not to "automatically" infer guilt or innocence from the reading of the statute, which by implication, admonishes the jury that it is appropriate to draw an inference of guilt, so long as it is not done "automatically." The problem with this instruction is that no inference of guilt or innocence should be drawn at all, as the Slayer Statute had no relevance to any issue in this case. Thus, the circuit court's voluntary curative instruction was ineffectual and failed to correct the error of reading the Slayer Statute to the jury. As such, Petitioner respectfully requests this Court remand her case for a new trial.

IV. The Circuit Court Committed Reversible Error by Permitting the Prosecutor to Imply During Closing Argument that a Verdict of "No Mercy" Would Bring "Atonement" For A Victim In An Unrelated Case.

A. Standard of Review

"A judgment of conviction will be reversed because of improper remarks made by a prosecuting attorney to a jury that clearly prejudice the accused or result in manifest injustice. *See* Syl. Pt. 5, *State v. Ocheltree*, 170 W. Va. 68, 289 S.E.2d 742 (1982)." *State v. Stephens*, 206 W. Va. 420, 525 S.E.2d 301 (1999). Refusal to grant a new trial based on improper prosecutorial conduct is reviewed under an abuse of discretion standard. *Id.*

B. Applicable Law

Syl. Pt. 10, *State v. McCartney*, 228 W. Va. 315, 719 S.E.2d 785 (2011) provides the applicable balancing test to determine the extent of damage caused by prejudicial prosecutorial commentary. The Court noted, "[f]our 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) (emphasis added). With regard to the first factor, the Court has evaluated specifically what prejudice to the accused looks like. "In determining prejudice, we consider the scope of the objectionable comments and their relationship to the entire proceedings, the ameliorative effect of any curative instruction given or that could have been given but was not asked for, and the strength of the evidence supporting the defendant's conviction." *McCartney*, supra, at 801, 331 (internal citations omitted). Additionally, the State has traditionally been granted wide latitude in the scope of its argument, within certain parameters: "...[t]he discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom." Syl. Pt. 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927).

C. Discussion

- 1. The State's invitation for the jury to make "atonement" for Mark Medley misled the jury and prejudiced Petitioner when reviewed in relation to the entirety of the proceedings.**

Here, the State grossly exceeded its permitted latitude during closing arguments when compared to the factors set forth in *McCartney*. The Court in *McCartney* reviewed the record in its entirety and applied the four-part balancing test from *Sugg*. There, the Court indicated the remark that "letting a murderer go invites a repeat of the same crime" was "isolated" and "limited in nature" as compared against the balance of the record. *McCartney* at 332, 802.

Unlike *McCartney*, the State in the instant case elicited a tremendous amount of testimony about the Mark Medley incident, effectively rehashing a case within a case through the testimony of Mr. Whittington, primarily. The State then recalled the entirety of Mr. Whittington's testimony about the Mark Medley incident in its closing argument. Ultimately, the State called upon the jury to bring about "atonement" in that same, already-adjudicated matter. Even before legal analysis, the factual impropriety of telling a jury it may atone for a case already adjudicated is concerning. Under *Sugg*, the State's use of the Mark Medley incident and evidence therein - throughout the trial - led up to the State's clear opportunity to mislead the jury and prejudice Petitioner in its closing arguments.

2. The extent of the State's inappropriate remarks exacerbated the prejudice to Petitioner.

As detailed *supra*, the Mark Medley incident was a focal point of the State's case and the jury continuously heard about a case that was not before them. Furthermore, the State cleverly linked its closing remarks to the facts surrounding the Mark Medley incident and it even assigned the jury a responsibility to "atone" for the incident. The egregious remarks in closing did not exist in a vacuum but rather in the context of evidence outside the case that had been presented to the jury extensively. Accordingly, the State's decision to charge a jury with punishing a defendant for a crime not the subject of the case at bar, completely fails any test of

propriety and prejudiced Petitioner by subjecting her to the jury's review of acts that were not at issue.

3. Absent the State's remarks, the State lacked competent proof to establish Petitioner's guilt.

The vast majority of the testimony regarding the Mark Medley incident arose from the State's witness Mr. Whittington, whose testimony in this matter was part of a plea deal. Although this Court is not tasked with weighing Mr. Whittington's credibility,⁷ his testimony was the only evidence tying Petitioner directly to the death of her husband (A.R. Vol. 2, 143:16-21). Further, his testimony regarding the Mark Medley incident illustrated a murder-for-hire situation orchestrated by Petitioner upon which the State relied, inappropriately, to urge the jury to convict Petitioner without mercy. Importantly, Trooper Howell's testimony cannot be overlooked when the Trooper qualified all the evidence in the case with the caveat that it could only support the case if the jury believed known liar Mr. Whittington. A.R. Vol. 3, 25-26.

It is critical to note that this factor alone does not decide the propriety of prosecutorial remarks. For instance, in *State v. Keesecker*, 222 W. Va. 139, 663 S.E.2d 593 (2008) the Court found the State did produce other significant evidence to establish the guilt of the accused. In *Keesecker*, the defendant's failure to testify "carried heightened sensitivity" with the jury, and accordingly the Court reversed defendant's conviction based upon the State's improper comments. *Id.* at 147, 601. Comparably, the multiple references throughout trial to the Mark Medley incident created a heightened sensitivity to the jury in Petitioner's case as contemplated in *Keesecker*. Even if the prosecution had enough evidence to support a conviction, the other factors in the *McCartney* test outweigh this one and support remand for a new trial.

⁷"Credibility determinations are for a jury and not an appellate court." Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

4. The State's inappropriate comments were deliberately placed before the jury to divert attention to extraneous matters.

Evaluation of the fourth element set forth in *Sugg*, again invites factual comparison of this case with *McCartney*. While the State's remark in *McCartney* about inviting a repeat of the same crime refers to no specific incident, the opposite is true here. The State repeatedly and specifically referenced and thoroughly described through testimony the Mark Medley incident, as opposed to some hypothetical future event. The jury's attention was repeatedly diverted to matters outside the scope of the trial as it heard testimony about the Mark Medley incident and the State closed the loop on that testimony through its wholly inappropriate remarks in both its closing arguments by referencing it as evidence of Petitioner's guilt of the instant charge and diverting the jury's attention to an inappropriate charge to provide "atonement" for an event wholly outside the scope of the trial.

Thus, when taking into consideration the State's reference to the Mark Medley incident throughout the guilt phase coupled with its remark relating to "atonement" for Mark Medley during the mercy phase, the State misled the jury and unfairly prejudiced Petitioner. As such, Petitioner's conviction should be set aside because the improper remarks clearly prejudiced Petitioner or in the alternative, resulted in manifest injustice.

V. The Circuit Court Committed Reversible Error When It Permitted the Prosecutor to Make Statements to the Jury That Were Unsupported by Any Evidence At Trial.

A. Standard of Review

" 'A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.' " Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998). Syl. Pt. 5, *State v. McCartney*, 228 W. Va. 315, 719 S.E.2d 785 (2011). "The West Virginia Rules of Evidence . . . allocate significant discretion to

the trial court in making evidentiary . . . rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard. Syl. Pt. 7, *McCartney, supra* (internal citations at footnote).

B. Applicable Law

“A prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.” Syl. Pt. 3, *State v. Smith*, 190 W. Va. 374, 438 S.E.2d 554 (1993). Convictions have been reversed in West Virginia based upon the sheer number of improper remarks in a prosecutor's closing argument. *See, State v. Critzer*, 167 W. Va. 655, 280 S.E.2d 288 (1981).

C. Discussion

Petitioner has illustrated *supra* and in the assignment of error IV a number of improper remarks and references in the closing arguments by the State in both stages of her bifurcated trial. Here, the State improperly implied that Petitioner mismanaged her credit cards and that her husband was trolling the bank accounts. Not only were these comments unsupported by the trial record, but they were also prejudicial to Petitioner considering that she was on trial for a murder for hire scheme. While the circuit court ordered the State to move on, it did not admonish the jury of the unsupported comments or provide a curative instruction. A.R. Vol. 10, 102. Petitioner contends that when taking into consideration the totality of improper remarks made by the State during closing arguments of both phases, Petitioner's conviction should be reversed.

VI. The Circuit Court Abused Its Discretion by Admitting a Summary Chart That Was Misleading and Did Not Assist the Jury in Finding the Truth.

A. Standard of Review

"A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998). Syl. Pt. 5, *State v. McCartney*, 228 W. Va. 315, 719 S.E.2d 785 (2011). Further, "[t]he West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard." Syl. Pt. 7, *McCartney*, *supra* (internal citations omitted).

B. Applicable Law

West Virginia permits the use of summary charts as demonstrative evidence. Franklin D. Cleckley, *Handbook on Evidence of West Virginia Lawyers* § 11-2 at pg. 3. Such use is in the sound discretion of the trial court. *State v. Siebert*, 113 W. Va. 717, 169 S.E. 410 (1933). Moreover, W. Va. R. Evid. 1006 provides, "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation . . ." However, as with real evidence, a trial court must conduct a Rule 401 and 403 balancing test before admitting demonstrative evidence. Cleckley, § 11-1(C) at pg. 3. When reviewing the trial court's admission of a summary exhibit, the first principle is to "consider whether the summary chart aids the jury in ascertaining the truth." *U.S. v. Johnson*, 54 F.3d 1150, 1159 (4th Cir. 1995). Secondly, the trial court is to weigh the potential for prejudice if the summary chart is admitted. *Id.* Notably, "[t]he proper procedure to be followed in West Virginia is to permit the [summary chart] to be used but to refuse to allow the exhibit to be taken to the jury room during deliberations. Cleckley, § 11-2(G) at pg. 16. See *Wiseman v. Terry*, 111 W. Va. 620, 163 S.E. 425 (1931).

The law is clear that if a summary chart is to be used as a demonstrative aid for the jury, then the chart should be accurate and assist the jury in finding the truth. Further, in addition to the chart being relevant under Rule 401 of the West Virginia Rules of Evidence, the circuit court must also conduct a balancing test under Rule 403 and weight the potential prejudicial effect the chart may have on a defendant.

C. Discussion

Petitioner has three concerns regarding the summary chart at issue: (1) The chart is not entirely accurate; (2) The chart did not assist the jury in finding the truth because it was misleading; and (3) The chart should have never gone back to the jury during deliberations.

Regarding the insurance policy through Appalachian Life Insurance Company (No. 4), the summary chart does not accurately reflect the beneficiary at the time of trial. For example, the chart indicates that Petitioner (“LT”) is the beneficiary. While this was true initially, Petitioner disclaimed her rights as a beneficiary and she did not receive any benefits under this policy. A.R. Vol. 3, 70. The summary chart should have reflected this fact and in essence, it is not entirely accurate.

Additionally, the summary chart did not assist the trier of fact in finding the truth. In fact, the chart obscured the truth and was misleading when scrutinized under the State’s theory that Petitioner obtained these policies and then had her husband killed so that she could collect the insurance proceeds - the summary chart misrepresented the nature of the insurance on Chester’s life. The chart does not identify the individual who took out each insurance policy. For example, with regard to the insurance from Cigna Corporation (No. 8), Petitioner is the beneficiary on these policies, but Chester himself signed for the insurance through his former employer. A.R. Vol. 4, 97-104. Chester acquiring his own life insurance policies runs afoul of the State’s theory

that Petitioner solicited insurance policies to benefit from the proceeds after having her husband killed. Unfortunately, the jury could not draw that conclusion by simply reviewing the summary chart because it is devoid of this information.

Finally, the circuit court should have not permitted the summary chart to go back with the jury during deliberations because of the potential for prejudice. In viewing the chart during deliberations, the inaccuracies and omissions necessarily limited the jury's focus to Petitioner's status as the beneficiary on most of the policies. The chart deprived the jury of important context during deliberations; specifically, the jury could not discern from the chart who signed and/or contracted the insurance policies. As Justice Cleckley stated, "[t]he potency of demonstrative evidence proves true the old adage that 'a picture is worth a thousand words.'" Cleckley, § 4-3(F) at 64. Further, "the immediate impact of demonstrative evidence is much stronger than oral testimony, but it also has a continued effect upon the jury because it may remain in the courtroom throughout the trial and may be taken into the jury room during deliberations." *Id.* Perhaps the playing field would have been leveled if the jury had been permitted to take back to the jury room the trial transcripts pertaining to the insurance policies for the important context as opposed to an inaccurate, incomplete, and self-serving summary chart. Accordingly, Petitioner contends the circuit court erred in admitting the summary chart and permitting the chart to go back with the jury during deliberations.

VII. The Circuit Court Erred By Not Granting Petitioner A New Trial Based Upon Insufficient Evidence.

A. Standard of Review

"When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict." Syl. Pt. 3, *State v.*

Williams, 209 W. Va. 25, 543 S.E.2d 306 (2000). “This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.” *Id.*

B. Applicable Law

“The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt.” Syl. Pt. 1, *State v. MacPhee*, 221 W. Va. 693, 656 S.E.2d 444 (2007). “Thus, the relevant inquiry is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” *Id.* “It is a fundamental principle in a criminal prosecution that the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged.” *State v. Srnsky*, 213 W.Va. 412, 417, 582 S.E.2d 859, 864 (2003).

C. Discussion

Even viewing the evidence in a light most favorable to the State, no rational trier of fact could have found that Petitioner was guilty beyond a reasonable doubt for the murder of her husband. The State argued that Petitioner's status as beneficiary to a number of her husband's life insurance policies formed a motive for her to order his death as alleged. However, it was established at trial that some of those policies were taken out by Chester himself, and that several were taken out shortly after Chester had sustained injuries as a result of accidents working as a coal miner. It is simply without merit to suggest that a woman has a motive to kill her husband

merely because she is the primary beneficiary of a life insurance policy on her husband's life. In this case the State offered no evidence of any true "motive" (financial difficulty, estrangement, or otherwise) for this killing.

Typically, subjective observations lead a jury's evaluation of a witness' credibility. While no appellate court can assess the subjective credibility of a witness on the witness stand, there are certain things which bear upon the reliability of a witness's testimony that need not be observed - the objective indices of unreliability. In this case there were numerous objective reasons for doubting the veracity of Mr. Whittington's testimony. Specifically, Mr. Whittington offered to testify against Petitioner in exchange for a sentencing recommendation of life with mercy, he had a noted reputation as a liar, and he had given law enforcement several inconsistent stories throughout the course of this investigation. None of these aforementioned factors need be observed from the jury box in order to understand the effect they have on the testimony of Mr. Whittington.

The State offered "corroborating evidence" of Mr. Whittington's testimony. However, a critical inspection of this "corroborating" evidence shows that said evidence corroborated nothing more than the State's desire to obtain a guilty verdict. The "corroborating" evidence offered by the State consists only of conclusory statements made by Trooper Howell asserting his opinion that the statements at issue corroborate Mr. Whittington's story. Trooper Howell's testimony followed the State's lead through the statements of various witnesses and vaguely indicated possible corroboration of tangential facts with Mr. Whittington's testimony. *See*, A.R. Vol. 3, 7-9.

In conclusion, while the credibility of a witness is not something that appellate courts will typically take into consideration on appeal, Petitioner urges this Court to take into account that

when an entire case is predicated on the testimony of one unreliable witness with a motive to lie, and no other evidence is offered to truly corroborate this witness' testimony, justice would require the Court to vacate the jury's verdict given the lack of substantial evidence in this case.

VIII. Petitioner's Conviction Should Be Set Aside in Light of the Cumulative Effect of Errors in Her Trial.

"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." Syl. Pt. 9, *State v. Lively*, 226 W. Va. 81, 697 S.E.2d 117 (2010) (citing Syl. Pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972)).

Petitioner contends that each of the foregoing Assignments of Error, standing alone, merit her conviction being set aside. None of these Assignments stands alone, however. The trial record reflects Petitioner suffered undue prejudice, potential for jury confusion and misdirection, jury tampering, and misplaced presumptions to Petitioner's disadvantage. As such, Petitioner respectfully requests this Court to set aside her conviction based upon the highly prejudicial cumulative effect of the previously discussed errors throughout her trial.

CONCLUSION

The Circuit Court's Further and Final Order: Order Denying Rule 33 Motion for a New Trial and Denying the Motion of Acquittal entered January 8, 2007 should be reversed, and this matter should be remanded for a new trial.

Respectfully submitted,



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Counsel for Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 14-0887

LILLIE M. TRAIL,
Petitioner,

V.

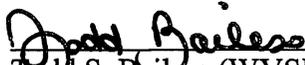
Appeal from a final order of the
Circuit Court of Lincoln County
(97-F-28)

STATE OF WEST VIRGINIA,
Respondent.

CERTIFICATE OF SERVICE

I, Todd S. Bailess, counsel for Petitioner, Lillie M. Trail, do hereby certify that I served the foregoing "**Petitioner's Brief**" upon counsel for the State by delivering a true copy thereof via hand delivery this 17th day of November, 2014, addressed as follows:

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