



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. ~~11-0234~~

14-097

STATE OF WEST VIRGINIA, plaintiff

v.

DENNY FRANKLIN ERVIN, defendant

**FROM THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA
CASE NO. 12-F-85**

PETITIONER'S BRIEF OF THE DEFENDANT, DENNY FRANKLIN ERVIN

Michael J. Sharley
Attorney at Law
WV Bar #6377
5 Dunkard Avenue
Westover, West Virginia 26501
(304) 292-6075
mjsharleylaw@aol.com

Richard M. Gutmann
Attorney at Law
WV Bar #5773
235 High Street, Suite 511
Morgantown, WV 26505
(304) 685-1561
rgutmanna@aol.com

December 22, 2014

TABLE OF CONTENTS

Table of Authorities.....3
Statement of the Case.....4
Argument.....6
Conclusion.....16

TABLE OF AUTHORITIES

West Virginia Cases:

<i>Fox v. B&O R.R. Co.</i> , 34 W.Va. 466, 12 S.E. 757 (1890).....	6
<i>State v. Brown</i> , 210 W.Va. 14, 552 S.E.2d 390 (2001).....	7
<i>State v. Scotchel</i> , 168 W.Va. 545, 285 S.E.2d 384 (1981).....	10
<i>State v. Critzer</i> , 280 S.E.2d 288 (W.Va. 1981).....	12
<i>State v. Moose</i> , 110 W.Va. 478, 158 S.E. 715 (1931).....	12
<i>State v. Meadows</i> , 304 S.E.2d 831 (W.Va. 1983).....	12, 13, 14
<i>State v. Ocheltree</i> , 289 S.E.2d 742 (W.Va. 1982).....	12
<i>State v. Kennedy</i> , 249 S.E.2d 188 (W.Va. 1978).....	12
<i>State v. Bragg</i> , 140 W.Va. 585, 87 S.E.2d 689 (1955).....	12

West Virginia Statutes:

West Virginia Code §56-6-17 (2014).....	6
---	---

West Virginia Rules of Criminal Evidence (2014):

Rule 801(c).....	8
Rule 801(d)(2).....	8

West Virginia Rules of Criminal Procedure (2014):

Rule	
12(b)(4).....	13
Rule 7(f).....	13, 14

PETITIONER'S BRIEF OF THE DEFENDANT, DENNY FRANKLIN ERVIN

Comes now the Petitioner and respectfully provides this honorable court with his petition for appeal. The petitioner asserts to assignments of error:

- A. The Preston County Circuit Court erred by not permitting the jury to visit the site of the incident.
- B. The Preston County Circuit Court erred by not permitting the testimony of Lisa McCartney.
- C. The Defendant argues that the jury did not consider all of the relevant evidence presented at the trial, and considered evidence which was not presented at trial when coming to a verdict.
- D. The prosecutor misrepresented evidence during the closing argument.
- E. The prosecutor prejudiced the Defendant by not providing a court ordered Bill of Particulars as related to the use of a firearm.

STATEMENT OF THE CASE

This petition is an appeal from a murder trial in the Circuit Court of Preston County. On October 6, 2012, a Preston County grand jury returned an indictment against the Defendant, Denny Franklin Ervin. The indictment contained five separate counts which are: First Degree Murder, Use of a Firearm, Stalking, Wanton Endangerment Involving a Firearm, and Domestic Assault. The indictment alleges that all of these acts occurred on or about May 8, 2012.

Prior to trial the Defendant filed several motions including a motion for a jury view of the site of the incident. Additionally, the Defendant filed a witness list including the name of Lisa McCartney. On July 13, 2012 a hearing was held on the Defendant's motion for a jury viewing.

The Circuit Court ruled that the jury could not view the site. On April 2, 2014 a hearing was held in which the Circuit Court ruled that Lisa McCartney could not be called as a witness for the Defendant because her testimony would be hearsay. The Circuit Court also ruled the prosecutor had to provide the Defendant with a bill of particulars as to the use of a firearm.

On April 17, 2014 after an eight day trial, the jury returned a verdict in which it found the Defendant guilty of Murder in the First Degree without Mercy as charged in Count 1 of the indictment and guilty of Wanton Endangerment Involving a Firearm as charged in Count 4 of the indictment. The jury also answered the interrogatory involving the use of a firearm in the commission of the murder in the affirmative as charged in Count 2 of the indictment.

On April 23, 2014 the Defendant, through trial counsel, Kevin Tipton, filed a “Motion for Judgment of Acquittal, or in the Alternative, a New Trial.” On May 1, 2014 the Defendant filed two pro se motions with the Court for “extension of Time to File a Motion for a New Trial Based on Newly Discovered Evidence” and for “appointment of New Appellate Counsel.”

On June 10, 2014 the Court appointed Richard M. Gutmann and Michael J. Sharley to represent the Defendant in all post-conviction matters. The Defendant, by counsel, filed this appeal and requests that the Court overturn the jury verdict of guilt and grant him a new trial.

ARGUMENT

A. The Preston County Circuit Court erred by not permitting the jury to visit the site of the incident.

The jury may, in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary in a just decision, and in such case the judge presiding at the trial may go with the jury and control the proceedings; and in a felony case the judge and the clerk shall go with the jury and the judge shall control the proceedings, and the accused shall likewise be taken with the jury or, if under recognizance, shall attend the view and his recognizance shall be construed to require such attendance W.Va. Code §56-6-17 (2014).

The object of a view by a jury is to acquaint the jury with the situation of the premises, and the location of the property, so that they may better understand the evidence, and apply it to the local surroundings of the case. *Fox v. B&O R.R.Co.*, 34 W.Va. 466, 12 S.E. 757, (1890).

On April 1, 2014, the Defendant filed a motion for a jury site visit. The motion listed several areas that were of particular interest to the case. These areas are:

1. The victim's mobile home, particularly the window and back door;
2. The location of Roger Curry's home in relation to the victim's mobile home;
3. The location of Marc Atkinson's home in relation to the victim's mobile home;

4. The location of the chicken coop in relation to the victim's mobile home;
5. The brush/tree line in relation to the victim's mobile home;
6. The location of the abandoned home in relation to the victim's mobile home;
7. The location of the area where the Defendant parked on May 8, 2012, and its relation to the victim's mobile home and the Curry's home;
8. The location of other State witness' homes in relation to the victim's mobile home; and
9. The road that leads to the victim's mobile home and its relation to the victim's parents' home.

The State did not oppose the Defendant's motion in theory. But the State did advise the Court that the location had changed and that a site view might be misleading to the jury. The Circuit Court relied on *State v. Brown*, 210 W.Va. 14, 552 S.E.2d 390 (2001) to conclude that a site view would be misleading and photographs and video tape of the crime scene would enable the jury to visualize the scene. The Court also found that the distance from the courthouse was too far to take the jury (Appendix, page 45).

The trial occurred in April 2014 and the incident occurred on May 8, 2012. These two dates are approximately during the same time of the year. The vegetation would be slightly different, but jurors would be able to get a sense of the crime scene. Additionally, jurors would be able to observe the location of witnesses' homes and the overall layout of the land which had not significantly changed from the date of this incident to the date of trial. In a first degree murder case where self-defense is raised as

a defense by the Defendant, it is very important for a jury to know the lay of the land where the incident occurred. Without going to the actual site of the incident, a jury would never be able to get a true and accurate account of what actually occurred.

The Circuit Court also stated that the site was too far from the courthouse. The site was only a half hour drive from the courthouse. Preston County is a large, rural county. Most litigated incidents would happen at a distance from the courthouse. So by using distance as a reason to deny a site view, the Court was denying virtually every site view. This would not allow any jury to adequately view the evidence in any case.

Wherefore, the Preston County Circuit Court erred in denying the jury to visit the site of the incident and the verdict of the jury must be overturned.

B. The Preston County Circuit Court erred by not permitting the testimony of Lisa McCartney at trial.

The Preston County Circuit Court did not permit Lisa McCartney to testify about a statement made by the victim, Leslie Dawn Layman, to McCartney because the Court ruled the statement would be hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c) W.Va. Rules of Criminal Evidence (2014). The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's

agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. Rule 801(d)(2) W.Va. Rules of Evidence (2014).

The Defendant wanted to call Lisa McCartney to testify that Leslie Dawn Layman had told her that she had previously shot a gun at the Defendant. Ms. Layman also had told Ms. McCartney that she had backed the Defendant out of the house with her shotgun on a previous day. The Circuit Court did allow the testimony of 911 operator Justin Wolfe who testified that on February 28, 2011, Ms. Layman made a 911 call regarding an incident between her and the Defendant. Mr. Wolfe testified at trial that Ms. Layman told him that she would shoot the Defendant if he returned to her house. However, the Defendant still wanted to call Ms. McCartney as a witness to the fact that Ms. McCartney and Ms. Layman were best friends and it would lend credibility to his claim of self-defense (Appendix, page 16).

Ms. Layman is a party opponent by the mere fact that she is the alleged victim of the crime. Her statement falls clearly under statements which are not hearsay. The Defendant needed to use Ms. McCartney's testimony to prove to the jury that Ms. Layman had been violent towards the Defendant in the past. The State put on testimony from both of Ms. Layman's daughters portraying Ms. Layman as a loving and caring mother only trying to protect her children. The Defendant had to show the jury that Ms. Layman had another side to her. This side had used violence against the Defendant. The only way the Defendant could show this violent side of Ms. Layman was to call Ms.

McCartney as a witness. Ms. Layman had told Ms. McCartney that she had backed the Defendant out of her house with a gun and that she had shot at the Defendant with a shotgun.

The State had used hearsay testimony against the Defendant from numerous witnesses. The State called Don Spiker, Margaret Ervin, Mark Atkinson, Linda Soccorsi, and Tammy Belldina to testify about hearsay statements made by the Defendant. In fact, the State made much of its case based on hearsay statements by the Defendant. However, the trial court prevented the Defendant from introducing a party opponent admission statement made by Ms. Layman stating that she had acted with violence toward the Defendant and had used the threat of physical violence against him.

Additionally, the Defendant was found guilty of First Degree Murder without Mercy. The evidence of Ms. Layman's violent acts and threat of violence toward the Defendant could have been used by the jury when determining mercy. Without receiving the full picture of the relationship between the Defendant and Ms. Layman, the jury could not grant the Defendant mercy. Therefore, the Defendant was, at the least, denied the opportunity to put on mitigating evidence that would have likely caused the jury to grant mercy in his case.

Therefore, the Circuit Court erred by not granting the Defendant the ability to call Lisa McCartney as a witness.

C. The Defendant argues that the jury did not consider all of the relevant evidence presented at the trial, and considered evidence which was not presented at trial when coming to a verdict.

According to the West Virginia Supreme Court of Appeals, particularly in criminal trials, facts not in evidence provided to the jury by a third party may be used to impeach the jury verdict *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981).

On April 16, 2014 on the first day of jury deliberations, the jury sent a note to the court asking to see the Defendant's cell phone log and the cell phone video from the "female's I-phone." The Circuit Court responded to the jury after consulting with both parties by saying that this evidence cannot be published to the jury (Appendix, page 20).

The Defendant had previously filed a motion excluding this evidence from the trial and a hearing was held regarding this motion on March 21, 2014. At that hearing the State did not oppose the motion and said it did not intend to offer this evidence in its case in chief, but may introduce the video if the Defendant opened the door to his character during the trial.

On April 11, 2014 the Prosecutor called Lieutenant Kenneth Wotring of the Preston County Sheriff's Department as a witness. The Prosecutor asked Lieutenant Wotring if a second cell phone was taken to the Digital Forensics Unit. Lieutenant Wotring testified that a second cell phone was taken to the Digital Forensics Unit and that a lady had called and told him she had received a video. At that point counsel for the Defendant objected. The Prosecutor stated that this issue had already been raised by defense counsel, but cautioned the witness not to say what was on the cell phone and to

only describe what he did with it. He testified he went to the State Police in Morgantown and they extracted it from the lady's cell phone (Appendix, page 22).

Although the video from the I-phone was not admitted into evidence, the jury requested to see it during their deliberations. Obviously the jury found this evidence to be important enough to ask to see it during deliberations. The Circuit Court stated that it would be merely speculation of what the jury actually did with this evidence. But since they asked for it, it can be reasonably inferred that the knowledge of the video's existence carried some weight in the deliberations. Therefore the jury based their decision in part on evidence that was not admitted during the trial (Appendix, page 25).

Therefore, since the jury based their decision in part on evidence that was not admitted during the trial, the Defendant must be granted a new trial.

D. The prosecutor misrepresented evidence during the closing argument.

A prosecuting attorney has a duty not to make statements concerning facts not in evidence or not inferable from the evidence. *State v. Critzer*, 280 S.E.2d 288 (W.Va. 1981). The attorney for the state may prosecute vigorously as long as he deals fairly with the accused, but he should not become a partisan, intent only on conviction. And it is a flagrant abuse of his position to refer in his argument to the jury to material facts outside the record or not fairly deducible therefrom. *State v. Moose*, 110 W.Va. 478, 158 S.E. 715 (1931); *State v. Critzer, supra*; *State v. Meadows*, 304 S.E.2d 831 (W.Va. 1983); *State v. Ocheltree*, 289 S.E.2d 742 (W.Va. 1982); *State v. Kennedy*, 249 S.E.2d 188 (W.Va. 1978); *State v. Bragg*, 140 W.Va. 585, 87 S.E.2d 689 (1955).

During his closing argument, Assistant Prosecutor James Shay referred to a series of phone messages left by the Defendant on Leslie Layman's voice mail. Mr. Shay states "He says, 'I'll slay you.'" Now, Mr. Tipton might argue that he's actually said, 'I'll show you' there. And that is a question a fact for you to decide. I can't tell you what he said. But what would be the difference? (Appendix, page 57).

There is a major difference between the statements "I'll slay you," and "I'll show you." "I'll slay you," would lead a jury to believe that the Defendant had the intent to kill Ms. Layman when he went to her home. This would negate any claim of self-defense. However, if he only said "I'll show you," he may not have had intent to kill her when he went to her house. Therefore, if Ms. Layman had come after him with a gun, it would make a claim of self-defense more plausible.

Obviously, Mr. Shay wanted the jury to think that the Defendant intended to "slay" Ms. Layman when he went to her house. But this is not what the evidence shows. He said "I'll show you," which could be interpreted many different ways. The prosecutor was adding statements by the Defendant that was not in evidence only to bolster his case of premeditated murder. This is clearly prosecutorial misconduct.

Therefore, the Defendant did not receive a fair trial due to the fact the assistant prosecutor, James Shay, included evidence that was not in evidence at trial.

E. The prosecutor prejudiced the Defendant by not providing a court ordered Bill of Particulars as related to the use of a firearm.

The court may direct the filing of a bill of particulars. A motion for a bill of particulars shall be made pursuant to the provision of Rule 12(b)(4) West Virginia rules of Criminal Procedure (2014) or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires. W.Va. Criminal Rule of Procedure 7(f). A bill of particulars is for the purpose of furnishing details omitted from the accusation or indictment, to which the defendant is entitled before trial *State v. Meadows*, 172 W.Va. 247, 304 S.E.2d 831 (1983).

The Defendant had made a motion for a bill of particulars and the motion was granted by the Circuit Court. However, the Prosecutor failed to provide the Defendant with a bill of particulars throughout the proceedings. Although defense counsel raised the prosecutor's failure to provide a bill of particulars, there was still a standing order for a bill of particulars throughout the procedure. The prosecutor never complied with this standing order.

The bill of particulars is a discovery device that provides the accused with details of the alleged crime that have been omitted from the indictment *State v. Meadows*, 172 W.Va. 247, 304 S.E.2d 831 (1983). In this case, the Defendant needed more detail from the State about the use of a firearm and how that use violated the law. The prosecutor did not provide this discovery to the Defendant and thus made the discovery incomplete. The Defendant is always entitled to complete discovery when preparing a case for trial. Therefore, since the bill of particulars was not provided and the discovery was incomplete

under Rule 7(f) of the West Virginia Rules of Criminal Procedure (2014) the Defendant was not provided a fair trial.

Therefore, the Defendant must be granted a new trial and the State must give him the ordered bill of particulars concerning the use of the firearm.

CONCLUSION

The Court must overturn the jury verdict against the Defendant in this matter and remand this case back to the Preston County Circuit Court for a new trial. The Circuit Court erred in not permitting the jury to view the site of the incident. The Circuit Court also erred in not permitting Lisa McCartney to testify as to evidence that, at the very least, would have resulted in a verdict including mercy. Additionally, the jury based their decision in part on evidence that was not admitted during the trial, and the assistant prosecutor, James Shay, made prejudicial arguments not based on the evidence adduced at trial. The Defendant was prevented from fully preparing his defense because a bill of particulars was not provided and the discovery was incomplete. Therefore, for these reasons, the Court must grant the Defendant a new trial.



Michael J. Sharley
Attorney at Law
WV Bar #6377
5 Dunkard Avenue
Westover, West Virginia 26501
(304) 292-6075
mjsharleylaw@aol.com



Richard M. Gutmann
Attorney at Law
WV Bar #5773
235 High Street, Suite 511
Morgantown, WV 26505
(304) 685-1561
rgutmannic@aol.com

CERTIFICATE OF SERVICE

I, Michael J. Sharley, do hereby certify that service of the foregoing **PETITIONER'S BRIEF** was made upon the following, by forwarding a true and exact copy thereof in a properly stamped and addressed envelope deposited in United States mail, postage prepaid, on this 17th day of December 2014.

Mel Snyder
106 West Kingwood St.
Suite 201
Kingwood, WV 26537


Michael J. Sharley