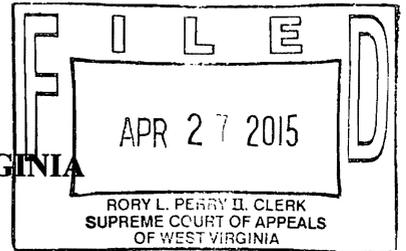


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Respondent

v.

Supreme Court No. 13-0421

Circuit Court No. 12-F-128
(Cabell) 12-F-444

WILLIAM F. FYKES,

Petitioner.

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

- I. **The question jurors asked during deliberations was legal in nature and demonstrated that the jury was confused regarding the applicable law, and, therefore, the judge was obligated to clarify the legal implication of a conspiracy.**

Petitioner asserts it was reversible error for the trial court not to answer the jurors' question. The State responds their question was factual and improper for the court to answer. However, the jurors did not ask whether a conspiracy existed; they asked, instead, what the legal implication was if a conspiracy existed. "If we feel this is a conspiracy [sic] does it negate any of the charges[?]" This question was a legal question and the trial court was obligated to provide a response. *State v. Lutz*, 183 W.Va. 234, 235, 395 S.E.2d 478, 479 (1988) ("[I]t was reversible error for the judge to deny defendant's motion orally to re-instruct the jury in light of the jury's evident confusion over the law."); *Shafer v. South Carolina*, 532 U.S. 36, 44, 121 S.Ct. 1263, 1269 (2001)(A trial judge's duty is to give instructions sufficient to explain the law even when that requires giving supplemental instructions *on issues not covered in original charge*). The trial court's decision was error as it simply told the jurors to reread the instructions they found to be confusing and did not clarify the legal issue raised by the jurors. Therefore, Mr. Fykes is entitled to a new trial.

The State correctly asserts that counsel did not complain about the initial charge given to the jury. *State's brief at 16*. In fact, the State spends a tremendous amount of time discussing the initial charge from the trial court, who submitted what instruction, and the applicable law regarding an initial charge to the jury. However, all of these issues discussed by the State are immaterial to the narrow issue present in Mr. Fykes' case. The issue this Court must decide is:

whether the trial court was obligated to formulate and give supplemental instructions based on the specific legal question posed by jurors during deliberations? This Court has previously answered this question in the affirmative by stating: "...where, as here, the judge is called upon to answer a well framed question following the initial charge. *Quite often, the judge must tailor, mold and even sculpt the law in fashioning an answer to fit the question.*" *State v. Davis*, 220 W.Va. 590, 596, 648 S.E.2d 354, 360 (2007) (emphasis added) (internal citations omitted) It is immaterial that Mr. Fykes was not charged with conspiracy or that the court had not previously instructed on conspiracy. Again, the jury's question which the court needed to answer was, what was the legal effect if the "victims" were acting in concert with the defendant?

Upon receiving this question from the jury, the trial court was obligated to respond in a way that would clear up the confusion jurors expressed in the note. *See State v. McClure*, 163 W.Va. 33, 37, 253 S.E.2d 555, 558 (1979) ("... where it clearly and objectively appears in a criminal case from the statements of the jurors that the jury has failed to comprehend an instruction on a critical element of the crime or a constitutionally protected right, the trial court *must* on the request of defense counsel, reinstruct the jury.") The question indicated the jurors were contemplating Mr. Fykes' defense and were seeking further legal guidance from the trial court in order to apply the law as given to them in the original charge.

In *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S.Ct. 402, 405 (1946), a case where jurors requested supplemental instructions from a trial court, the United States Supreme Court held the jury's ability to draw the appropriate legal conclusions in a case depends on the trial court providing the proper guidance in the form of a lucid statement of the relevant legal standards. The Court further explained that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Id.*, 326. *See also Alcindore v. United*

States, 818 A.2d 499, 501(D.C. 2003) (“When a jury sends a note which demonstrates that it is confused, the trial court must not allow that confusion to persist.”); *People v. Mainer*, 197 P.3d 254,259 (2008) (internal citations omitted) (It is the trial court’s duty to instruct the jury on all matters of the law, and if a question cannot be answered by directing their attention to the original instructions, the trial court has an obligation to clarify the matter in a concrete and unambiguous manner.). The trial court failed to clear the confusion in Mr. Fykes’ case. This failure by the court required the jury to deliberate without a clear understanding of the law it was required to apply.

In *Gray v. United States*, 79 A. 3d 326, 341(D.C. 2013), a case similar to Mr. Fykes’ case, the jury asked the court a question that indicated it was considering the defendant’s theory of defense, and, just like Mr. Fykes’ case, the answer to the question required the court to discuss the controlling issue in the case. Over counsel’s objection, the trial court did not answer the question posed by jurors. Instead, the court responded by rereading an instruction in the original charge *which did not answer the question*. Gray’s conviction was reversed based on the trial court’s failure to answer the *specific* question. The *Gray* Court reasoned that reversal was necessary because as instructed, it was possible that the jurors were accepting Gray’s defense but still convicted him due to their confusion. The court held that “... an answer to a jury note that is adequate to dispel jury confusion on a controlling issue of a case is such an important aspect of due process of law that we [must] be satisfied beyond a reasonable doubt that an omission to provide [such an answer] was harmless before we [can] conclude that it did not vitiate the verdict.” *Id* at 340 (internal citations omitted).

Therefore in Mr. Fykes’ case, because the question asked by jurors dealt with the controlling issue and it appeared as though the jurors were considering his defense, it was

extremely important that the trial court answer the question. Simply pointing jurors in the direction of the original charge, which did not contain the answer, was not sufficient. *See Lovell v. State*, 702 A.2d 261, 279, 347 Md. 623, 660-61 (1997) (A trial court must respond to a question from a deliberating jury in a way that clarifies the confusion evidenced by the query when the question involves an issue central to the case.); *Bircher v. State*, 109 A.3d 153,160, 221 Md. App. 376, 388 (2015); *People v. Tomes*, 672 N.E.2d 289, 284 Ill. App. 3d 514 (1996) (“The ... giving of a response that provides no answer to the particular question of law posed [by the jury] has been held to be prejudicial error.”). The Fykes’ jury was seeking clarification and guidance from the court on a central issue to ensure that it was “clearly and properly advised of the law in order . . . to render a true and lawful verdict.” *State v. McClure*, 163 W.Va. 33, 37, 253 S.E.2d 555, 558 (1979). The trial court incorrectly asserted that it did not have the ability to instruct the jury on “specific areas of the law that we have not previously dealt with.” *A.R. 1072*. Counsel’s objection was specific and requested specific action from the court. Therefore, the trial court was given ample opportunity to cure this issue before the jurors returned a verdict. *A.R. 1070-71*.

“Ultimately, the responsibility to ensure in criminal cases that the jury is properly instructed rests with the trial court.” *State v. Lambert*, 173 W.Va. 60, 312 S.E.2d 31 (1984). In Mr. Fykes’ case, the jurors’ confusion was evident in the written question. By refusing to respond to the jurors’ question, the trial court forced the jurors to speculate as to the proper application of the applicable law, thereby denying Mr. Fykes the right to due process and the right to a fair trial. Therefore, Mr. Fykes is entitled to a new trial.

II. The prosecutor's improper questioning of Mr. Fykes on his post arrest silence in a case that rested on credibility did in fact constitute plain error.

Despite the alleged mountain of evidence the State asserts existed against Mr. Fykes, the jurors' note to the trial court demonstrates Mr. Fykes' case was not as clear as the State represents. Therefore, credibility was extremely important to the outcome of this case. Additionally, if the evidence was so overwhelmingly against Mr. Fykes the prosecutor would not need to ask questions that violate well-settled law that the State's use of a defendant's post-arrest silence for impeachment purposes violates due process and the privilege against self-incrimination. *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 2241 (1976). *See Syl. Pt. 1, State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977) ("... it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury.").

The State is correct that counsel did not object to the prosecutor's improper questions, and that counsel followed up on the prosecutor's improper questions on redirect. This is well settled law, however, and the fact that both the prosecutor and defense counsel violated this constitutional principle makes the error more egregious. Mr. Fykes was punished for exercising a constitutional right and his advocate allowed this to happen. Because this is such a well-settled area of the law, the prosecutor had to know these questions were improper but still chose to proceed. This type of intentional disregard for constitutional rights should not go unaddressed because counsel failed to object since it is an issue of fundamental fairness. Therefore, because credibility was a crucial issue in Mr. Fykes' case, the prosecutor's improper questions rise to the level of plain error and therefore, do constitute reversible error. Mr. Fykes should receive a new trial.

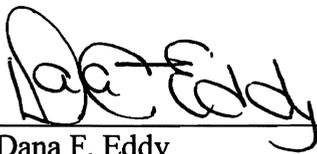
CONCLUSION

As to the first issue, the trial court's refusal to respond to the jurors' question forced the jurors to speculate as to the proper application of the applicable law, thereby denying Mr. Fykes the right to due process and the right to a fair trial. Therefore, Mr. Fykes is entitled to a new trial. And as to the second issue, the prosecutor's improper questioning of Mr. Fykes on his post arrest silence in a case that rested on credibility did in fact constitute plain error. Therefore, because credibility was a crucial issue in Mr. Fykes' case, the prosecutor's improper questions rise to the level of plain error and resulted in reversible error. It is for these reasons that Mr. Fykes respectfully requests that this Honorable Court grant him a new trial.

Respectfully submitted,

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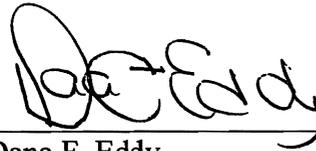
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CERTIFICATE OF SERVICE

I, Dana F. Eddy, counsel for Petitioner, William F. Fykes, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *Petitioner's Reply Brief* to the following:

Laura Young
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812 Quarrier Street, 6th Floor
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by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 27th day of April, 2015.



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