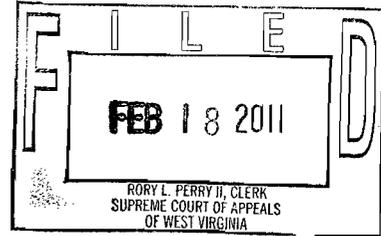


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



STATE OF WEST VIRGINIA,

Plaintiff below/Appellee,

v.

Docket No.: 35739

(Berkeley County Case No.: 08-F-35)

ANTHONY CHARLES JUNTILLA,

Defendant below/Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

State of West Virginia,

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I. ASSIGNMENTS OF ERROR.

A. WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTIONS FOR ACQUITTAL?

B. WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE SPONTANEOUSLY INITIATED STATEMENT OF THE APPELLANT TO TROOPER FAIRCLOTH?

C. WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO STRIKE JUROR SMALLWOOD?

D. WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY BY NOT GIVING GUIDELINES THAT WERE NOT REQUESTED REGARDING MERCY?

E. WHETHER THAT THE STATE OF WEST VIRGINIA DOES NOT HAVE EITHER A CONSTITUTIONAL OR STATUTORY APPEAL OF RIGHT IS AN ISSUE FOR DIRECT APPEAL?

II. STATEMENT OF THE CASE.

1. Shortly after the Memorial Day weekend 2007, the Appellant described for his girlfriend, Stephanie Brennan, how during that weekend with a man named Fred he raped a girl in his father's house, killed her, bleached the body, and then dumped the body near Dam 4 on the Potomac River. Ms. Brennan did not know Fred. Fred was described by the Appellant to Ms. Brennan as a white male. Ms. Brennan went to the police. [Criminal Complaint, State v. Anthony Charles Juntilla, Magistrate Case No.: 07-F-773.]

2. Based on the description of Fred, the police determined that Fred was Fred Douty. Mr. Douty was located and questioned by the police. Mr. Douty told the police of the rape and murder consistent with the information provided by Ms. Brennan. Mr. Douty took them to the body. About three weeks had passed that hot, wet late spring, and the elements and the animals left the body badly decomposed. The body was identified forensically as Tina Starcher. [Id.]

3. The Grand Jury indicted the Appellant for felony charges of: Murder in the First Degree; Felony Murder; Conspiracy to Commit Murder; Sexual Assault in the First Degree; and Conspiracy to Commit Sexual Assault. [Indictment, 2/20/08, State v. Anthony C. Juntilla, Case No.: 08-F-35.]

4. At the pre-trial hearing the trial court heard evidence of a statement the Appellant spontaneously volunteered to State Trooper Faircloth. The officer was obtaining a court-ordered buccal swab for DNA testing purposes from the Appellant at the Potomac Highlands Regional Jail. [The order was obtained after hearing before the circuit court. [Order for DNA Sample, 3/12/08.]] The officer provided the Appellant with a copy of the Order. The officer was there for this sole purpose, was otherwise unrelated to the murder investigation, and did not seek to solicit

any statement or comment from the Appellant. Unsolicited, the Appellant complained to the officer about the process. Trooper Faircloth testified to the Appellant's complaint: "He [the Appellant] did not know what was taking so long, they had a pretty solid case, that if he was in Virginia he would have already been to trial and sentenced by now." Trooper Faircloth's testimony was un rebutted. [Tr. 6/2/08, 51-66.] The trial court found the statement admissible as initiated by the Appellant while incarcerated. [Id., 66-69; Pre-trial Hearing Order, 8/6/08.]

5. During jury *voir dire*, prospective juror David Smallwood informed the trial court that he has an opinion that West Virginia should have the death penalty for cases involving the death of a police officer or a young child or a senseless killing. [Tr, 9/3/08, 155-156.] The Appellant's counsel asked whether Mr. Smallwood would bypass consideration of mercy since West Virginia does not have the death penalty. Mr. Smallwood said that he could give mercy since there was no death penalty but that he would have to listen to the case before giving a decision. [Id., 158-159.] The trial court denied the Appellant's motion to strike Mr. Smallwood for cause. [Id., 159-162.] The Appellant used a peremptory strike to remove Mr. Smallwood from the jury. [Id., 172-173.]

6. At trial, the following people testified on behalf of the State: Stephanie Brennan; James Juntilla; Trooper See; Trooper Nine; Trooper Bowman; Fred Douty; Trooper Chumley; Charmone Myers; Jody Cook; Cathy Beard; Trooper Pansch; Trooper Faircloth, Dr. Kaplan, Stephen King, Douglas Owsley, Allen Starcher, Amber Jones, Michael Underwood, Darren Francis, Melisse Runyan, and Kelly Beatty. [Trs. 9/2/08, 9/3/08, 9/4/08.]

7. The defense called one witness, Trooper Bowman. [Tr. 9/4/08, 145-149.]

8. Stephanie Brennan testified that she and the Appellant have a one year old child

together. She was residing with the Appellant at his father's home in Hedgesville. She was in a rehab facility for drugs from May 15 until she successfully completed the program on June 5 [2007]. On June 5 the Appellant told her over the phone that he did something bad; he said "think Hannibal Lecter." The Appellant then picked her up at the facility. While driving to the house the Appellant told Ms. Brennan that he had picked up a girl in Martinsburg, took her to the house and raped and killed her. He described the girl but did not know her name. He identified another man that was with him as Fred and told her he looked like Eminem. He told Ms. Brennan that he hit the girl in the head, bashed her head into the wall, carried her upstairs to the bathtub and stabbed her to death. He then poured bleach down her throat and in her vagina to get rid of evidence. He told Ms. Brennan he then stuffed the girl into a blue tote and took her out to Dam 4. After June 5, Ms. Brennan remained at the house by herself. It smelled of cleaning supplies. She could not locate a knife that had been in the kitchen. She began looking at two places on the sofa that the Appellant told her he cleaned, as well as an indentation on the wall. There were two blue plastic totes, one with her stuff and one with the Appellant's tools. About two weeks passed. She told the Appellant's brother what the Appellant told her. The brother called the police. The Appellant told her it happened when his father was away between May 26 and 27. The Appellant stipulated that that date was Memorial Day weekend. [Tr. 9/2/08, 213-231.]

9. James Juntilla testified that the Appellant is his son. In May 2007, the Appellant and Stephanie Brennan were living together in his home at 86 Tecumseh Trail, Hedgesville, Berkeley County. His other son, Stephen, would also occasionally stay. Mr. Juntilla was away during Memorial Day weekend at a family wedding. Stephen was also at the wedding. Mr. Juntilla

returned on Memorial Day. Ms. Brennan was in detox during that time. Mr. Juntilla gave police consent to search his house regarding allegations that a murder had happened there. [Id., 247-252.]

10. Trooper See testified that he went to 86 Tecumseh Trail on June 21, 2007, as part of a murder investigation. He identified numerous photographs of the suspected crime scene. He identified suspected blood stains and hairs in some of the photos. [Id., 253-275.]

11. Trooper Nine testified that he went to 86 Tecumseh Trail as part of a murder investigation. He participated in preliminary testing that revealed that stains on the couch and in the bathroom were blood. [Id., 276-285.]

12. Trooper Bowman testified that he went to 86 Tecumseh Trail as part of a murder investigation. He received a call on June 17 [2007] about a possible murder at that residence. He met Ms. Brennan and David [James] Juntilla there. There was at that time a large stain that looked like blood on the couch. Another officer tested the stain for blood. He also viewed an indentation in the wall above the couch. He viewed the upstairs bathroom. Ms. Brennan told him that the Appellant and a male named Fred committed the murder. Ms. Brennan told him that the Appellant said Fred looked like Eminem. She told him the killing took place over Memorial Day weekend. An initial search of the area around Dam 4 revealed nothing. He spoke with another Trooper about Fred and Fred's description; that officer immediately suggested Fred Douty. Mr. Douty was located and admitted that he had been with the Appellant, Charmone Myers and two other people that weekend. Mr. Douty initially denied that anything bad happened. Video surveillance films from two local gas stations showed Mr. Douty and the Appellant together the night in question. Mr. Douty told him that he and the Appellant picked up

a female in Martinsburg, took her to Tecumseh Trail, raped her and then the Appellant beat her unconscious. Mr. Douty told him that they then carried her to an upstairs bathroom where she was cleaned with a cleaning liquid and the Appellant slit her throat. They put the body in a plastic tub, put the tub in a gold Eagle Vision car, and drove the body to Dam 4. Mr. Douty showed them where the body was dumped at Dam 4. They located a badly decomposed body over a cliff in a heavily wooded area. He identified photos of the area where the body was found. The body was unidentifiable. [Id., 290-316.]

13. On the second day of trial, Trooper Bowman's testimony continued. He identified a photo of the victim, Tina Starcher. He testified as to the process by which samples from the couch, biologic samples from the victim, items seized from the house, and from the Eagle car, were sent to the lab for testing. [Tr. 9/3/08, 4-20.] On cross, he was asked about numerous falsehoods that Fred Douty told him during the investigation. [Id., 21-66.]

14. Fred Douty testified that he was currently incarcerated for the felony murder of Tina Starcher, with the underlying offense being sexual assault. A term of his plea agreement was for him to testify at the trial of the Appellant. He has a criminal history. He was living with Carl Moore and Charmone Myers off and on leading up to Memorial Day [2007]. That weekend he was smoking crack with Carl and the Appellant. He had not met the Appellant before but went to his residence and went swimming at the pool used by residents. He, the Appellant and Carl left to purchase crack; he was riding in the Appellant's car. They stopped at the 7-11 to get money. He and the Appellant argued with the clerk about a check. They bought crack in Martinsburg with the Appellant's money. The three of them smoked it. They then went and bought some more crack in Martinsburg. Carl got mad and left. He [Fred] and the Appellant

picked up a girl they did not know in Martinsburg by inviting her to go get high. The three of them drove to the Appellant's house and went inside. He described the house. Then the Appellant punched the girl in the face and told her to remove her pants. She complied and the Appellant had intercourse with her. Doudy then had vaginal intercourse with her. The Appellant wanted her to give him oral sex. She did not want to so the Appellant beat her until her head started to bleed and she went limp. The Appellant then carried her upstairs to a bathtub and put her in and Doudy tried cleaning her up. The Appellant left the room and then came back in and slit her throat with a large knife. The Appellant told Doudy to get a plastic tote from downstairs. Doudy dumped tools out of one and brought it upstairs. The Appellant put some cleaner in the girl's mouth and vaginal area. They put the girl in the tote and placed the tote in the trunk of the Appellant's gold car. He knows the girl did not want to have sex because she was assaulted and told to take her pants off. There was some blood on the couch but the shower washed most of the blood [in the tub] down the drain. Doudy suggested dumping the body near Dam 4. They did not put her in the water because there were fishermen nearby so they stopped by a cliff and the Appellant dumped her out of the tote and kicked her over the side. They returned with the tote to the house. He was later questioned by the police and lied to them at first because he was scared. He does not know Stephanie Brennan, except that he now knows that she was the Appellant's girlfriend. [Id., 67-104.]

15. Trooper Chumley testified that he was asked to collect evidence at Dam 4 and from a gold Eagle Vision car in relation to the murder of Tina Starcher. He identified photos of the car's exterior and interior. He identified several items that were sent to the lab for testing. [Id., 149-159.]

16. Charmone Myers testified that she has a sixteen year old daughter with the Appellant. She is married to Carl Moore. Prior to Memorial Day weekend last year [2007], the Appellant would sometimes stay over with her. Mr. Moore moved in and Fred Douty, Mr. Moore's friend, would stay a night here or there. Over Memorial Day weekend she, Carl, Fred and Bonnie went to the Appellant's to swim. They left that evening and stopped at the 7-11. Carl then left with Fred and the Appellant. Carl returned home around 2:15-2:30 a.m. after Fred and the Appellant were acting stupid. The following day the Appellant said he could not swim but told Ms. Myers that she could get the pool pass. He would not let her in his house. The Appellant usually drives a goldish tan car. [Id., 159-169, 174.]

17. Jody Cook testified that she works at the Hedgesville 7-11. She identified certain surveillance video from her store. [Id., 180-183.]

18. Cathy Beard testified that she works at the Martinsburg ROCS store. She identified certain surveillance video from her store. [Id., 183-187.]

19. State Trooper Pansch testified that as part of a murder investigation he obtained a video from the Hedgesville 7-11 depicting the Appellant, Fred Douty, Charmone Myers and Carl Moore. He also interviewed the Appellant at the Eastern Regional Jail after the Appellant waived his *Miranda* rights in writing. The recording of that statement was played. He also interviewed Fred Douty, Charmone Myers, Stephanie Brennan, and James Juntilla. The Appellant's story did not match their stories. [Id., 187-196.]

20. Trooper Bowman was recalled and testified about still photos from the 7-11 video. They bore a date of May 26, 2007, and covered a time lapse from about 21:42 hours to 21:46 [9:42-9:46 p.m.] They showed the Appellant and Fred Douty together. He also identified still

photos from the ROCS store video from later the same date and covering a time lapse from about 11:04-11:07. They showed the Appellant, Fred Douty and Carl Moore together with the Appellant's gold Eagle Vision car. He then identified another series of still photos from the ROCS store video from still later that night, then being May 27, 2007, from about 3:13-3:16 a.m. They showed the Appellant and Fred Douty together with the Appellant's gold Eagle Vision car. He then identified a final series of still photos from the ROCS store video as day begins to break on May 27, 2007, from about 5:40-5:42 a.m. They also showed the Appellant and Fred Douty together with the Appellant's gold Eagle Vision car. He identified DNA samples taken from Mr. Douty pursuant to search warrant. He identified DNA samples taken from Tina Starcher's father, husband, and daughter. He identified DNA samples taken from the couch, and hair samples from the shower curtain and plastic tub at 86 Tecumseh Trail. He identified samples and hair from a pink shirt found in the Eagle Vision. The body was badly decomposed when found, with a bra and one sock, earrings and necklaces. [Id., 197-221.]

21. Trooper Faircloth testified that he is a State Trooper in Romney and that he was not involved in the investigation of the death of Tina Starcher except to collect a DNA sample by court order from the Appellant. The Appellant at the time was housed in the Potomac Highlands Regional Jail. He identified the samples. The Appellant was not *Mirandized* by him. The Appellant asked Trooper Faircloth why he was taking the samples. Trooper Faircloth told him he did not know except that they were wanted. The Appellant then replied that he didn't "know what was taking so long, they had a pretty solid case, that if he was in Virginia he would have already been to trial and sentenced by now." Trooper Faircloth did not respond to the Appellant. [Id., 221-228, 227.]

22. Dr. Kaplan testified that he is the State Medical Examiner, and was qualified as a forensic pathologist. He conducted an autopsy of a decomposed body that was identified through a fingerprint as being Tina Starcher. Due to the decomposition of the body many testing procedures were foreclosed. The cause of death was determined to be a fatal physical assault with strong evidence of a sexual assault preceding. The death is considered a homicide. [Tr. 9/4/08, 3-10.]

23. Stephen King testified that he is the supervisor of the latent prints division of the State Police Lab. He was qualified as an expert in latent print [fingerprint] analysis and identification. He identified a set of two fingerprints sent to him from the Medical Examiner's office as being those of Tina Starcher. [Id., 16-20.]

24. Dr. Owsley testified that he is a forensic anthropologist with the Smithsonian Institute. He was qualified as an expert in that field. Based on analysis of skeletal remains, fingerprint identification and the police report, he identified the skeletal remains as Tina Starcher. He described fractures near the nasal area and a break of the scapula. The scapula requires a lot of force to break. Four ribs were fractured at around the time of death. He identified four or five clear injuries from different blows to cause that damage, plus evidence of damage to the face. The fact that the cervical vertebrae and the skull were completely skeletonized led him to believe that there was a cut in the neck area that attracted insects, although he could not so opine to a reasonable degree of medical certainty. [Id., 22-41.]

25. Allen Starcher testified that he was married to Tina Starcher. Tina had a cocaine addiction. She would sometimes go off with people she did not know and be gone for days. He gave the police a pillowcase that had Tina's blood on it. [Id., 43-46.]

26. Amber Jones testified that Tina Starcher is her mom. Her mouth was voluntarily swabbed by the police. [Id., 48-49.]

27. Michael Underwood testified that he is the biological father of Tina Starcher and that Tina had no identical twin. He volunteered a DNA swab from his mouth for the police. He had not seen Tina since before Memorial Day weekend last year. [Id., 49-51.]

28. Darren Francis testified that he is a forensic scientist in the State Police Lab. He was qualified as an expert in that field. He identified cuttings that were taken from a couch that were tested and found to have blood and semen, and then submitted for DNA testing. He identified hair and nail clippings from a Jane Doe, which were then forwarded for DNA testing. He identified hair samples from a shower curtain and a plastic tub that were also forwarded for DNA testing, as well as a sample from the collar of a pink shirt and hairs from that shirt that were submitted for DNA testing. He identified a piece of cloth from a pillowcase, found no blood, but forwarded it for DNA testing. He identified known saliva samples from Amber Jones, Michael Underwood and Allen Starcher. [Id., 51-70.]

29. Melissa Runyan testified that she is a biochemist with the State Police lab. She was qualified as an expert in that field. She identified known saliva samples from Fred Douty and known saliva samples from the Appellant. Based on testing, DNA from semen from a sample from the couch was consistent with Fred Douty's DNA. The sample was a mixture from three people from which the Appellant's DNA could not be excluded. That was not surprising since the couch came from the Appellant's home. A female donor was identified as matching the DNA found on a sample of a piece of cloth [the pillowcase.] Mr. Douty was excluded from three more mixture samples taken from the couch, but the Appellant and that same female donor could

not be. Another lab conducted paternity testing to determine who the female donor from the piece of cloth is. She could not say affirmatively that the four mixture samples had female DNA, just that the female donor could not be excluded. [Id., 71-116.]

30. Kelly Beatty testified that she is a parentage DNA analyst. She was qualified as an expert in that field. She compared DNA profiles for parentage analysis from the State Police Lab for Michael Underwood and a donor from a piece of cloth, as well as DNA profiles from Amber Jones and the donor from the same piece of cloth. She opined that it there is a 99.9996 per cent chance that Mr. Underwood is the father of the person identified as the donor on the piece of cloth. She opined that there is a 99.9999 per cent chance that the donor on the piece of cloth is the mother of Amber Jones. [Id., 117-131.]

31. The State rested. [Id., 132.]

32. The Appellant moved for acquittal. The trial court denied the motion. [Id., 133-139.]

33. The trial court conducted the *Neuman* dialogue. [Id., 139-140.]

34. The defense recalled Trooper Bowman, who was asked to consider two portions of Mr. Douty's statement which contradicted his testimony at trial. In the statement he admitted helping carry the victim upstairs whereas at trial he said that the Appellant carried her. In the statement he described he and the Appellant making the victim give each of them oral sex whereas at trial he said that he had vaginal sex with her. [Id., 145-149.]

35. The defense rested. [Id., 149.]

36. The Appellant renewed his motion for acquittal. The trial court denied the motion. [Id., 151.]

37. There is nothing in the record to suggest that the Appellant objected during discussion of instructions to the trial court not instructing the jury on “guidelines” for their “mercy” determination. [Tr. 9/3/08, 231-242; Tr. 9/4/08, 152-156, 156-178, 161-162; R. *passim*.]

38. The jury returned a verdict of guilt on three indicted felony charges: Murder in the First Degree; Sexual Assault in the First Degree; and Conspiracy to Commit Sexual Assault. The jury did not recommend mercy. [Order of Conviction, 9/5/08; Verdict Forms, 9/5/08.]

39. The trial court sentenced the Appellant to the statutory penitentiary sentences of life, without parole eligibility; fifteen to thirty-five years; and one to five years, for each of the above convictions, respectively, to run consecutively. [Sentencing Order, 10/28/08; Tr. 10/27/08, 16-17.]

40. It is from these convictions and sentences that the Appellant appeals.

41. The State of West Virginia respectfully requests this Court to affirm the judgment of the jury and the trial court’s imposition of sentence and deny the appeal.

III. SUMMARY OF THE ARGUMENT.

Shortly after the Memorial Day weekend 2007, the Appellant described for his girlfriend, Stephanie Brennan, how during that weekend with a man named Fred he raped a girl in his father's house, killed her, bleached the body, and then dumped the body near Dam 4 on the Potomac River. Ms. Brennan did not know Fred. Fred was described as looking like the rapper Eminem. Ms. Brennan went to the police.

Based on the description of Fred, the police eventually determined that Fred was Fred Douty. Mr. Douty was located and questioned by the police. Mr. Douty told the police of the rape and murder with the same details as Ms. Brennan had. Mr. Douty and Ms. Brennan had never met or spoken to each other. Mr. Douty took them to the body. About two or three weeks had passed that hot, wet late spring, and the elements and the animals left the body badly decomposed. The body was identified forensically as Tina Starcher.

Among the witnesses at trial were Ms. Brennan, Mr. Douty, and forensic evidence experts. The petit jury found the Appellant guilty of three indicted felony charges: Murder in the First Degree; Sexual Assault in the First Degree; and Conspiracy to Commit Sexual Assault. The jury did not recommend mercy. The trial court sentenced the Appellant to the statutory penitentiary sentences of life, without parole eligibility; fifteen to thirty-five years; and one to five years, respectively, to run consecutively.

It is from these convictions and sentences that the Appellant appeals.

The Appellant fails to prove that the trial court abused its discretion in denying his motions for acquittal, given the eyewitness evidence, the forensic evidence, and the circumstantial evidence presented by the State, all of which provided the jury with sufficient

evidence to find the Appellant guilty of the crimes of which he was convicted beyond a reasonable doubt. State v. Payne, 225 W.Va. 602, 694 S.E.2d 935 (2010); State v. Grimes, 226 W.Va. 411, 701 S.E.2d 449 (2009).

The Appellant also fails to prove the trial court abused its discretion in admitting the Appellant's unsolicited utterance to a State Trooper, when there was not a custodial interrogation occurring, that "He [the Appellant] did not know what was taking so long, they had a pretty solid case, that if he was in Virginia he would have already been to trial and sentenced by now." State v. Newcomb, 223 W.Va. 843, 679 S.E.2d 675 (2009); State v. Albright, 209 W.Va. 53, 543 S.E.2d 334 (2000); State v. Jones, 220 W.Va. 214, 640 S.E.2d 564 (2006).

The Appellant fails to prove that the trial court abused its discretion in denying the Appellant's motion to strike a juror who favored a state law permitting the death penalty when that juror also acknowledged that West Virginia does not have the death penalty, that he could grant mercy, and that he would have to listen to the facts of the case before making a decision. State v. Mills, 219 W. Va. 28, 631 S.E.2d 586 (2005).

The Appellant fails to prove that the trial court improperly instructed the jury by not giving them guidelines regarding mercy, when such guidelines are specifically prohibited by this Court and were never requested by the Appellant. State v. McLaughlin, 226 W.Va. 229, 700 S.E.2d 289, 293 n. 12 (2010); State v. Miller, 178 W. Va. 618, 363 S.E.2d 504 (1987).

The Appellant concedes that his final argument--that he has a right to have his appeal heard--is rendered moot by this Court agreeing to hear his appeal.

The State of West Virginia respectfully requests this Court to refuse the Petition for Appeal.

IV. ARGUMENT.

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTIONS FOR ACQUITTAL.

1. Standard of Review.

The standard of review utilized by this Court when reviewing the denial of a motion for acquittal is:

“Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.’ *State v. West*, 153 W. Va. 325 [168 S.E.2d 716] (1969).” Syllabus Point 1, *State v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974).

Syl. Pt. 5, *State v. Grimes*, 226 W.Va. 411, 701 S.E.2d 449 (2009); Syl. Pt. 3, *State v. Taylor*, 200 W. Va. 661, 490 S.E.2d 748 (1997).

The standard for reviewing the sufficiency of evidence to support a conviction is :

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled. Syllabus Point 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 9, *State v. Payne*, 225 W.Va. 602, 694 S.E.2d 935 (2010)(quoting *Guthrie* in part); Syl.

Pt. 1, State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998); Syl. Pt. 3, State v. Williams, 198 W. Va. 274, 480 S.E.2d 162 (1996); Syl. Pt. 2, State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

The specific inquiry of the appellate court in reviewing the sufficiency of the evidence is whether any rational trier of fact could have found the essential elements of a crime proved beyond a reasonable doubt:

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. 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. Syl. Pt. 1, *State v. Guthrie*, [*supra*].

State v. Berry, — W. Va. —, — S.E.2d — (No.: 35501, decided 1/20/11); Syl. Pt. 2, State v. Edmonds, — W. Va. —, 702 S.E.2d 408 (2010); Syl. Pt. 1, State v. Hughes, *supra*.

2. Discussion.

The circuit court properly exercised its discretion in denying the Appellant's motions for acquittal based on the evidence presented at trial, as viewed in a light most favorable to the State.

The evidence, summarized in the Statement of Facts, *supra*, is plainly sufficient upon which the jury could, and did, find beyond a reasonable doubt the Appellant guilty of

Murder in the First Degree ¹, Sexual Assault in the First Degree ², and Conspiracy to Commit Sexual Assault ³.

The State's evidence included the testimony of the other participant in these crimes, Fred Douty. The jury heard that Mr. Douty pleaded guilty to felony murder for the death of Tina Starcher and is serving a life sentence. Mr. Douty testified as to his and the Appellant's use of crack cocaine together on two separate trips to Martinsburg on the Saturday night before Memorial Day 2007. On the first trip they were with Carl Moore. On the second trip, they were

¹**W. Va. Code** § 61-2-1 reads in significant part:

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree.

²**W. Va. Code** § 61-8B-3 reads in significant part:

(a) A person is guilty of sexual assault in the first degree when:
(1) The person engages in sexual intercourse or sexual intrusion with another person and, in so doing:
(i) Inflicts serious bodily injury upon anyone; or
(ii) Employs a deadly weapon in the commission of the act[.]

³**W. Va. Code** § 61-10-31 reads in significant part:

It shall be unlawful for two or more persons to conspire (1) to commit any offense against the State or (2) to defraud the State, the state or any county board of education, or any county or municipality of the State, if, in either case, one or more of such persons does any act to effect the object of the conspiracy.

alone and invited an apparent stranger, a woman, back to the Appellant's house. Once at the Appellant's home, Mr. Douty testified, he and the Appellant forcibly sexually assaulted the woman after the Appellant punched her in the face, and then the Appellant savagely beat the woman unconscious while sexually assaulting her. Mr. Douty testified that the Appellant then carried the woman to an upstairs bathroom, slit her throat, and put a cleaning solution in her mouth and vagina to destroy any evidence. Mr. Douty then testified that he and the Appellant took the woman's body out to Dam 4 around dawn and dumped it over a cliff. Mr. Douty testified that he later showed the police where the body was dumped.

The jury also heard the testimony of Stephanie Brennan, the Appellant's then girlfriend, who testified that the Appellant himself told her a nearly identical story a week after the murder.

The Appellant asserts that the conviction should be overturned because Mr. Douty and Ms. Brennan were incredible. The Appellant asserts that Mr. Douty was incredible because of inconsistencies in his story. The Appellant asserts that Ms. Brennan was incredible because she blamed the Appellant for the loss of custody of their child. However, the jury is to make credibility determinations, not an appellate court. State v. Miller, supra; State v. Williams, supra; State v. Hughes, supra.

Douty and Brennan's testimony was corroborated in numerous ways by other independent substantive evidence. First, Douty and Brennan each testified that they do not know each other. Thus, they could not have fabricated the nearly identical story, that they each told independently, of how the Appellant sexually assaulted and murdered Tina Starcher.

Second, the jury heard testimony from the police that Mr. Douty showed the police where the body was dumped about three hot weeks earlier. The jury heard that the police then found a

badly decomposed body at that location. The jury heard that the body was forensically identified as that of Tina Starcher, a cocaine addict known to go with strangers in the quest of getting high. The jury heard that Ms. Starcher's family has not seen her since before Memorial Day weekend 2007. The jury heard that the body demonstrated signs of a severe beating and that the cause of death was homicide. The jury heard that there were indications from the skeletonization of the neck and skull of the body that insects had been drawn to a wound there, although decomposition and animal damage precluded an opinion with a reasonable degree of scientific certainty that the body's throat had been cut. The jury heard that testing identified Mr. Douty's DNA in a semen stain on the Appellant's couch. The jury heard that paternity testing identified DNA on a piece of a pillowcase taken from Ms. Starcher's home as having come from the daughter of Ms. Starcher's father and the mother of Ms. Starcher's daughter, or, in other words, from Ms. Starcher. The jury also heard that that DNA identified as matching the DNA from that pillowcase could not be excluded from samples taken from the Appellant's couch, thus providing some evidence that Ms. Starcher was in the Appellant's home--a presence that was otherwise never explained to the jury. Neither the Appellant's nor the female donor's DNA could be excluded from three mixture samples taken from the Appellant's couch. This forensic evidence identifying the body of Ms. Starcher, identifying Ms. Starcher's presence in the Appellant's home, and identifying Mr. Douty's semen on the Appellant's couch, was all corroborative of the description given by the Appellant to Ms. Brennan, and was consistent with the description given by Mr. Douty, as to the Appellant's sexual assault and murder of Ms. Starcher.

Third, the jury was presented with evidence connecting Mr. Douty and the Appellant together throughout the day and night of the Saturday of Memorial Day weekend into the

following Sunday at dawn. The testimony of Charmone Myers put she, Carl Moore, the Appellant and Mr. Douty together through the day and into the evening on that Saturday. Ms. Myers testified that Mr. Moore came home around 2:15-2:30 a.m., asserting that the Appellant and Douty were acting stupid. Videos from two different convenience stores put the Appellant, Mr. Douty and Carl Moore together with the Appellant's car at about 11:00 p.m., the Appellant and Mr. Douty (with no sign of Mr. Moore) again at just after 3:00 a.m., and the Appellant and Mr. Douty again at about 5:40 a.m. These videos were consistent with Mr. Douty's chronology of the events the night that Ms. Starcher was murdered. These videos were consistent with Ms. Myers' description of the events of the evening up until the time she and Mr. Moore separately parted ways with the Appellant and Mr. Douty.

The circuit court properly exercised its discretion in denying the Appellant's motions for acquittal based on the evidence presented at trial, as viewed in a light most favorable to the State. State v. Grimes, supra. "[A] jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt." State v. Payne, supra; State v. Miller, supra; State v. Williams, supra; State v. Hughes, supra.

The State respectfully request this Court to affirm the judgment of the jury and of the trial court and deny the appeal.

B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE SPONTANEOUSLY INITIATED STATEMENT OF THE APPELLANT TO TROOPER FAIRCLOTH.

1. Standard of Review.

This Court's standard of admissibility of a defendant's statement is:

1. "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

[...]

3. "When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Therefore, the circuit court's factual findings are reviewed for clear error." Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

Syl. Pts. 1 & 3, *State v. Jones*, 220 W.Va. 214, 640 S.E.2d 564 (2006).

2. Discussion.

At the pre-trial hearing the trial court heard evidence of a statement the Appellant spontaneously volunteered to State Trooper Faircloth. The officer was obtaining a court-ordered buccal swab for DNA testing purposes from the Appellant at the Potomac Highlands Regional Jail. The officer provided the Appellant with a copy of the Order. The officer was there for this sole purpose, was otherwise unrelated to the murder investigation, and did not seek to solicit any statement or comment from the Appellant. The Appellant complained to the officer about the process. Trooper Faircloth testified to the Appellant's complaint: "He [the Appellant] did not know what was taking so long, they had a pretty solid case, that if he was in Virginia he would have already been to trial and sentenced by now." Trooper Faircloth's testimony was

unrebutted. [Tr. 6/2/08, 51-66.] The trial court found the statement admissible as initiated by the Appellant while incarcerated. [Id., 66-69; Pre-trial Hearing Order. 8/6/08.]

The trial court's ruling was neither clearly wrong nor against the weight of the evidence. It is undisputed that the Appellant was then being held at the Potomac Highlands Regional Jail on charges related to the murder of Tina Starcher. He was in custody. It is undisputed that he was previously arraigned, advised of his rights, and then represented by counsel.

The trial court's ruling admitting the statement was correct because the only evidence was that the Appellant was not then subjected to a "custodial interrogation." When reviewing whether a defendant's statement was the product of a "custodial interrogation," this Court holds:

"The special safeguards outlined in *Miranda* are not required where a suspect is simply taken into custody, but rather only where a suspect in custody is subjected to interrogation. To the extent that language in *State v. Preece*, 181 W.Va. 633, 383 S.E.2d 815 (1989), and its progeny, may be read to hold differently, such language is expressly overruled." Syllabus Point 8, *State v. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83 (1999).

Syl. Pt. 10, *State v. Newcomb*, 223 W.Va. 843, 679 S.E.2d 675 (2009).

In affirming a murder conviction in *Newcomb*, this Court favorably cited the United States Supreme Court decision in *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed2d 297 (1980), for the definition of what constitutes an "interrogation":

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect,

rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, *id.*, 446 U.S. 291, 300-302, cited in State v. Newcomb, *supra*, 679 S.E.2d 675, 682. This Court specifically found in Newcomb that statements the defendant made to a police officer while handcuffed and in custody were admissible because they were not the product of police interrogation. *Id.*, 679 S.E.2d 684.

A year earlier, again using Rhode Island v. Innis, *supra*, as a backdrop, in determining that a defendant provided voluntary statements that were not the product of a custodial interrogation in the case of Damron v. Haines, 223 W.Va. 135, 672 S.E.2d 271 (2008), this Court opined:

the determination of whether a person was subjected to custodial interrogation for purposes of *Miranda* requires a consideration of the totality of the circumstances. To that end, this Court has set forth a list of factors which a trial court must consider in determining whether a custodial interrogation environment exists. In Syllabus Point 2 of State v. Middleton, 220 W.Va. 89, 640 S.E.2d 152 (2006), this Court held that,

‘The factors to be considered by the trial court in making a determination of whether a custodial interrogation environment exists, while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and nonverbal responses to the police officers; and

the length of time between the questioning and formal arrest.’

As we indicated, the list of factors set forth in *Middleton* is not all-inclusive. Other factors relevant to the determination of whether a custodial interrogation occurred include “the nature of the interrogator, the nature and condition of the suspect, the time and length of the questioning, the nature of the questioning-accusatory or investigatory, [and] the focus of the investigation at the time of questioning[.]” [Citations omitted.]

Damron v. Haines, *id.*, 672 S.E.2d 271, 277.

The totality of the circumstances demonstrates that there was no “interrogation” of the Appellant. The un rebutted testimony clearly established that the Appellant knew that the officer was present pursuant to court order solely to obtain a buccal swab relating to this murder case then pending against the Appellant. Despite this knowledge, and despite the fact that the Appellant was aware of his rights, and *without any prompting from Trooper Faircloth* for a statement of any kind, the Appellant initiated his comment. Faircloth was not otherwise part of the investigation. There is no indication from this evidence that Trooper Faircloth engaged in “words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.” Rhode Island v. Innis, *supra*; State v. Newcomb, *supra*. See also State v. Kilmer, 190 W.Va. 617, 439 S.E.2d 881 (1993)(defendant in custody and requested counsel, but not subject to interrogation); State v. Judy, 179 W.Va. 734, 372 S.E.2d 796 (1988)(defendant in custody but not subject to interrogation).

The inquiry should end here. However, if this Court were to find that Trooper Faircloth’s mere presence, without more, to collect the court ordered buccal swab constituted a “custodial interrogation,” the trial court’s ruling admitting the Appellant’s statement should still stand. The Appellant did not contest the fact that he initiated the conversation with Trooper Faircloth. This

Court holds:

“For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel.” Syllabus Point 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987).

State v. Albright, 209 W.Va. 53, 543 S.E.2d 334 (2000).⁴

The Appellant also well knew he was then held at the Potomac Highlands Regional Jail on charges related to the murder of Tina Starcher. The Appellant well knew that he was previously arraigned on those charges, had been advised of his rights, and was then represented by counsel. [The Appellant’s criminal history reflects an experience and understanding of the legal system. [Pre-sentence Report, 10/27/08.]] The unrebutted testimony clearly established that the Appellant knew that the officer was present pursuant to court order to obtain a buccal swab relating to this same murder case. Despite this knowledge, and despite the fact that the Appellant was aware of his rights, and without any prompting from Trooper Faircloth for a statement of any kind, the Appellant initiated his comment. Under the totality of the circumstances, it is apparent that the Appellant knowingly and intelligently waived his right to counsel when making his complaint about the slowness of the process to Trooper Faircloth. State v. Albright, *supra*. Since the Appellant offered no further statement, and Trooper Faircloth did not seek any further statement from the Appellant, there was neither opportunity nor necessity to seek a written

⁴The requirement of State v. Crouch, that the accused must initiate the conversation, was based on a similar ruling by the United States Supreme Court in Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). State v. Crouch, *supra*, 358 S.E.2d 782, 783-784. However, the United States Supreme Court subsequently and specifically overruled Michigan v. Jackson in Montejo v. Louisiana, — U.S. —, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), abandoning the presumption that a waiver is invalid unless the conversation was initiated by the accused. Montejo, 129 S.Ct. 2079, 2085-2090.

waiver of the Appellant's *Miranda* rights. Under the totality of the circumstances, the Appellant's statement constituted a knowing and intelligent waiver of his rights. *Id.*

The Appellant was not subject to a custodial interrogation when he made his spontaneous utterance to Trooper Faircloth. Rhode Island v. Innis, *supra*; State v. Newcomb, *supra*. Even were there a custodial interrogation, the Appellant knowingly and intelligently waived his right to counsel when making his complaint about the slowness of the process to Trooper Faircloth. State v. Albright, *supra*.

The trial court's ruling was neither clearly wrong nor against the weight of the evidence. State v. Jones, *supra*.

The State respectfully requests this Court to affirm the judgment of the jury and of the trial court and deny the appeal.

C. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO STRIKE JUROR SMALLWOOD.

1. Standard of Review.

In affirming a first degree murder conviction without a recommendation for mercy, this Court reiterated its holdings regarding excusing jurors for cause:

1. "The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for caused [sic]. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law." Syl. Pt. 6, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

2. "When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse

a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror.” Syl. Pt. 3, *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002).

3. “If a prospective juror makes an inconclusive or vague statement during *voir dire* reflecting or indicating the possibility of a disqualifying bias or prejudice, further probing into the facts and background related to such bias or prejudice is required.” Syl. Pt. 4, *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002).

4. “Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.” Syl. Pt. 5, *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002).

Syl. Pts. 1-4, *State v. Mills*, 219 W. Va. 28, 631 S.E.2d 586 (2005).

2. Discussion.

Juror Smallwood indicated that he favored a state law permitting the death penalty. However, he also acknowledged that West Virginia does not have the death penalty, that he could grant mercy, and that he would have to listen to the facts of the case before making a decision. Under the totality of the circumstances, the circuit court could not have been “left with a clear and definite impression that a prospective juror [Mr. Smallwood] would be unable faithfully and impartially to apply the law.” The circuit court properly exercised its discretion in denying the Appellant’s strike for cause. *State v. Mills, id.*

The State requests that this Court affirm the judgment of the jury and of the trial court and deny the appeal.

D. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY BY NOT GIVING GUIDELINES THAT WERE NOT REQUESTED REGARDING MERCY.

1. Standard of Review.

The law is plain and unambiguous in this State that an instruction to the jury outlining factors to be considered in determining mercy in murder cases should not be given:

An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given.

Syl. Pt. 1, State v. Miller, 178 W. Va. 618, 363 S.E.2d 504 (1987); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32, 41 (1990). *See also* State v. McLaughlin, 226 W.Va. 229, 700 S.E.2d 289, 293 n. 12 (2010), reaffirming this principle. The trial court properly did not give such an instruction.

Additionally, the Appellant points to no place in the record where he requested such an instruction or objected to the trial court not giving one. Objections to instructions first made on appeal will not be considered by this Court. State v. Davis, 205 W.Va. 569, 519 S.E.2d 852, 864 (1999), *citing* Syl. Pt. 3, State v. Gangwer, 169 W.Va. 177, 286 S.E.2d 389 (1982), and State v. Milam, 159 W.Va. 691, 226 S.E.2d 443 (1976). This Court will not consider issues on appeal that were not objected to at trial. Syl. Pt. 10, State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998). An appellant waives appellate review of issues not objected to at trial. State v. Browning, 199 W. Va. 417, 485 S.E.2d 1, 9 (1997).

The appellee State of West Virginia objects to this Honorable Court considering this issue raised for the first time on appeal. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed

defect. Syl. Pt. 2, State ex rel. Cooper v. Caperton, 196 W. Va. 208, 470 S.E.2d 162 (1996).”

Syl. Pt. 1, State v. Rodoussakis, 204 W. Va. 58, 511 S.E.2d 469 (1998).

This Court additionally holds that:

2. As a general matter, a defendant may not assign as error, for the first time on direct appeal, an issue that could have been presented initially for review by the trial court on a post-trial motion. [and]

3. When a defendant assigns an error in a criminal case for the first time on direct appeal, the state does not object to the assignment of error and actually briefs the matter, and the record is adequately developed on the issue, this Court may, in its discretion, review the merits of the assignment of error.

Syl. Pts. 2 and 3, State v. Salmons, 203 W. Va. 561, 509 S.E.2d 842 (1998).

2. Discussion.

Were the Court to review this matter over the State’s objection, the State requests that this Court affirm the judgment of the jury and of the trial court and deny the appeal. State v. Miller, *supra*.

E. THAT THE STATE OF WEST VIRGINIA DOES NOT HAVE EITHER A CONSTITUTIONAL OR STATUTORY APPEAL OF RIGHT IS NOT AN ISSUE FOR DIRECT APPEAL.

1. Standard of Review.

This Court is very clear that:

West Virginia does not grant a criminal defendant a first appeal of right, either statutorily or constitutionally. However, our discretionary procedure of either granting or denying a final full appellate review of a conviction does not violate a criminal defendant's guarantee of due process and equal protection of the law.

Syl. Pt. 4, Billotti v. Dodrill, *supra*.

The purpose of appellate review is to review cases for trial error. That the State of West Virginia does not have either a constitutional or statutory appeal of right is not an issue of alleged trial error.

For the reasons stated in Argument D, *supra*, the appellee State of West Virginia objects to this Honorable Court considering this issue raised for the first time on appeal. State v. Hager, *supra*, 204 W.Va. 28, 511 S.E.2d 139 (1998); State v. Browning, *supra*, 199 W. Va. 417, 485 S.E.2d 1, 9 (1997); State v. Rodoussakis, *supra*, 204 W. Va. 58, 511 S.E.2d 469 (1998); State v. Salmons, *supra*, 203 W. Va. 561, 509 S.E.2d 842 (1998).

2. Discussion.

The Appellant concedes that this issue is moot, given that this Court accepted his case for review, and that the new *Rules of Appellate Procedure* appear to provide an “opportunity for a final, full appellate review.” [Appellant’s Brf., 30.] Were the Court to review this matter over the State’s objection, the State requests that this Court affirm the judgment of the jury and of the trial court and deny the appeal. Billotti v. Dodrill, *supra*.

VI. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm the judgment of the jury and of the trial court and deny the appeal.

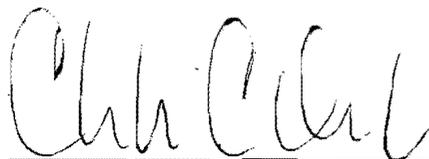
Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing **BRIEF OF APPELLEE STATE OF WEST VIRGINIA** on this the 16th day of February, 2011, by ___ hand-delivery, x first-class mail, postage prepaid, ___ facsimile:

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