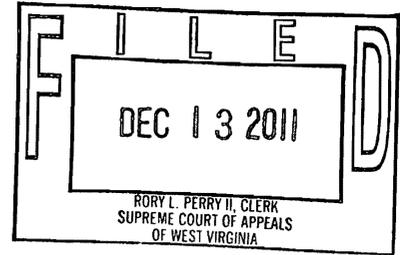


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0691



STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

ROBERT FRAZIER,

*Defendant Below,  
Petitioner.*

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SUMMARY RESPONSE

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**SUMMARY RESPONSE**

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**I.**

**RESPONSE TO THE PETITIONER'S STATEMENT OF THE CASE**

The Statement of the Case in the Petitioner's Brief tells this Court that one portion of what the Petitioner said to the police -- shortly after the Petitioner was arrested while trying to flee the jurisdiction -- is what "really and truly" happened (Pet'r's Br. at 1; *Id.* n.1.) on August 25, 2008 -- when the Petitioner's loaded and cocked, single-action shotgun was pressed into and then blew to smithereens the face of the Petitioner's girlfriend, Kathy Smith. However, the jury clearly disbelieved that portion of the Petitioner's statement.

In his post-arrest interview (App. vol. II at 982-1034.) the Petitioner, an admitted drug dealer, first told police that one 19-year-old Josh Jackson killed Ms. Smith in a bedroom in the Petitioner's apartment, during an argument about drugs: "I went in there and her head was half way blown off." (App. vol. I at 23-25.)

Then, the Petitioner changed his story. He told police that he, the Petitioner, was arguing with Ms. Smith; that she went into a bedroom and the Petitioner followed her; that Ms. Smith then “pulled” a loaded and cocked shotgun “on” the Petitioner; that the two struggled over the shotgun; and that the gun discharged in the struggle. (*Id.* at 26-31.) The Petitioner told police that he “put [the gun] back in [Kathy Smith’s] face and it went off.” (*Id.* at 38.) The Petitioner stated to police (and the jury heard): “[Y]es, I shot her.” (*Id.* at 26.) The Petitioner did not take the stand in his own defense.

Josh Jackson, the young man who the Petitioner initially said killed Kathy Smith, testified that when he arrived at the Petitioner’s residence, the Petitioner and Ms. Smith were arguing, and that Ms. Smith left the living room and went into a bedroom. (App. vol. II at 1207.) The Petitioner then grabbed a shotgun that was beside the chair in which the Petitioner was sitting. (*Id.* at 1208-09, 1254.) The Petitioner said, “I will fucking show you, bitch” and walked into the bedroom -- and the shotgun fired almost immediately. (*Id.*)

Mr. Jackson, frightened, quickly left the house after the shooting. (*Id.* at 1210.) From outside the house, Mr. Jackson saw the Petitioner exiting the bedroom window. (*Id.*) The Petitioner asked Mr. Jackson to deny that he had been there and to say he did not see anything. (*Id.*) Mr. Jackson went home and told his father what had happened. (*Id.*) The father called 911 and reported the shooting. (*Id.* at 1262-65.) The Petitioner, meanwhile, fled the scene, and was arrested several hours later. He had changed out of the clothes that he had been wearing at the time of the shooting and was planning to leave town. (App. vol. I at 25, 36-37.)

At the Petitioner’s trial, his attorney objected, on a *Crawford* confrontation clause basis, to the testimony of Dr. James Kaplan, the West Virginia Chief Medical Examiner. (App. vol. II at 848-50.) Dr. Kaplan presented the findings of an autopsy of Ms. Smith that was conducted by Dr. Robert

Belding; Dr. Belding no longer worked for the Medical Examiner's office at the time of trial. (*Id.* at 862.) The circuit court ruled that the autopsy report was admissible as a business record. (*Id.* at 874-76.)

The Petitioner's counsel argued they were unfairly surprised by Dr. Kaplan's substitution for Dr. Belding; and stated that "maybe we could have tracked Dr. Belding down and spoken with him ourselves if we had been given notice." (*Id.* at 869-70.) The Petitioner's counsel, however, had not made any effort to interview Dr. Belding before trial; and did not ask for a recess or make any other effort to attempt to locate or subpoena Dr. Belding.

## II.

### RESPONSE TO THE PETITIONER'S ASSIGNMENTS OF ERROR

The Petitioner's First Assignment of Error -- claiming that the prosecution did not present enough evidence to refute beyond a reasonable doubt the Petitioner's claim of self-defense -- is without merit. The testimony of Josh Jackson alone was sufficient, if believed by the jury (which it was), to refute beyond a reasonable doubt the Petitioner's claim that he went unarmed into the bedroom, was threatened with deadly force, and exercised his right to self-defense.

The Petitioner's Second Assignment of Error -- alleged instructional error -- is also without merit. The Petitioner's Brief states at pages 19 and 20 that the trial judge "refused to instruct the jury" on the defenses of both self-defense and accident; and that [w]hen [defense] counsel submitted [an accident defense] instruction the court incorrectly held counsel could not offer inconsistent defense instructions." (*Id.*, citing to App. vol. II at 1200.) The Respondent respectfully suggests that neither the cited page in the Appendix, nor any other place in the record, supports these inaccurate statements. The trial judge distinguished between accident and self-defense in a discussion about

obtaining criminal records. (App. Vol. II at 1199-1202.)<sup>1</sup> The trial judge was never presented with -- much less “refused to give” -- an instruction on accident.

The Petitioner’s Third Assignment of Error Number Three is partially meritorious. The Respondent agrees that the admission of the autopsy report was under the circumstances a violation of the Petitioner’s right to confront the witnesses against him. However, the erroneous admission of evidence in violation of the right of confrontation of witnesses is subject to a “harmless error” analysis. *See Bullcoming v. New Mexico*, \_\_ U.S. \_\_, \_\_\_\_, 131 S. Ct. 2705, 2719 n. 11 (2011) (“We express no view on whether the Confrontation Clause error in this case was harmless. The New Mexico Supreme Court did not reach that question . . . and nothing in this opinion impedes a harmless-error inquiry on remand.”).

In *Koenig v. State*, 933 N.E.2d 1271, 1273 (Ind. 2010), the court stated:

Violations of the right of cross-examination do not require reversal if the State can show beyond a reasonable doubt that the error did not contribute to the verdict. *See Delaware v. Van Arsdall* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) at 684, 106 S.Ct. 1431; *see also Smith v. State*, 721 N.E.2d 213, 219 (Ind.1999) (“[V]iolations of the right to cross-examine are subject to harmless-error analysis.”).

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court rejected the argument that all federal constitutional errors, regardless of their nature or the circumstances of the case, require reversal of a judgment of conviction.

The Supreme Court has explained that a *Chapman* harmless error analysis turns on a number of factors available to the reviewing court:

These factors include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the

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<sup>1</sup>Two pages of trial transcript, pages 572 and 573, that immediately precede page 1200 of the Appendix Record, were inadvertently omitted from the Appendix; they are attached hereto as Exhibit 1 by agreement of counsel.

testimony of the witness on material points, the extent of cross-examination otherwise permitted and, of course, the overall strength of the prosecution's case. *Arsdall*, 475 U.S. at 684, 106 S.Ct. 1431.

In the instant case, the autopsy report itself largely verified information that was presented by other witnesses. Dr. Kaplan was subject to substantial cross-examination on all aspects of the report. The overall strength of the prosecution's case was substantial. The Petitioner fled the scene, changed out of his bloody clothes, and when arrested was planning to continue his flight. He initially denied having any involvement in the shooting and accused another person; then admitted shooting Ms. Smith; and then changed his story again to claim an accident while exercising his self-defense rights. An eyewitness contradicted the Petitioner's self-defense claim, and said the Petitioner went after Ms. Smith with a gun. This evidence was sufficient -- without the autopsy report -- for the jury to find the Petitioner guilty beyond a reasonable doubt. Therefore, the erroneous admission of the autopsy report and Kaplan's testimony were not reversible error.

The Petitioner's Fourth Assignment of Error -- that exculpatory material and information was not timely provided to the Petitioner before trial -- is also at least arguably partially meritorious.

Contrary to the Petitioner's arguments, the trial judge correctly concluded that the recorded statement of witness Jackson was not exculpatory, because it was consistent with his preliminary hearing and trial testimony on the issue of how the shooting actually took place -- as demonstrated in the extensive cross-examination of Jackson on the statement. (App. vol. II at 1210-71). Additionally, the prosecution was not aware before trial of the additional autopsy notes that were provided by Dr. Kaplan during his testimony, belying the Petitioner's claims of prosecutorial misconduct. (App. vol. I at 869-72.)

However, the additional autopsy notes themselves, under the circumstances, were arguably exculpatory matters that should have been disclosed before trial. The Petitioner's counsel did, however, not seek a recess or make any other efforts to have Dr. Belding testify; and the Petitioner's counsel was able to cross-examine Dr. Kaplan extensively about the autopsy notes. The Petitioner offers only speculation as to what his counsel "might have done" if provided with certain information prior to trial. Based on all the evidence presented at trial, that speculation does not rise to the level an affirmative showing that the Petitioner was seriously prejudiced by the lack of timely-provided potentially exculpatory information, so as to call into question the jury's verdict.

The Petitioner's Fifth Assignment of Error -- failure to strike a juror for cause -- is without merit. The juror in question did not express a disqualifying prejudice or bias when she observed that (1) she believed that trained investigators would be more reliable than "someone else[;]" but (2) that she would nevertheless judge law enforcement testimony "just like someone else's." (Pet'r's Br. at 46.) The Petitioner's objection to the juror's serving comes down to the fact that her father was an FBI agent, and that she was at one time married to an FBI agent. (App. vol. I at 763.) The Petitioner argues that such family relationships are immutable and essentially *per se* evidence of a disqualifying bias that "[can] not be changed." (Pet'r's Br. at 46.)

However, a prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a *per se* disqualification for cause in a criminal case, unless the law enforcement official is actively involved in the prosecution of the case. *State v. Beckett*, 172 W. Va. 817, 823, 310 S.E.2d 883, 889 (1983).

### III.

#### CONCLUSION

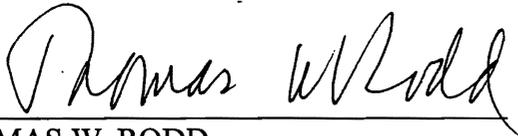
The Petitioner admitted that he shot Kathy Smith with his own shotgun. The Petitioner's account of how Ms. Smith came to be killed was contradicted by an eyewitness. The jury rejected the Petitioner's claim of self-defense. An autopsy report that was erroneously admitted; but the evidence against the Petitioner was strong without the report. The late disclosure of certain possibly exculpatory evidence was similarly harmless error. The Petitioner's other assignments of error are without merit. For the foregoing reasons, the Petitioner's conviction for second-degree murder should be upheld.

Respectfully submitted,

STATE OF WEST VIRGINIA  
*Plaintiff Below, Respondent,*

*by counsel*

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



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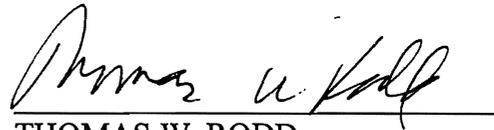
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*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *SUMMARY RESPONSE* upon the Petitioner's counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this 15<sup>th</sup> day of December, 2011, addressed as follows:

To: Crystal L. Walden, Esq.  
Kanawha County Office of the Public Defender  
P.O. Box 2827  
Charleston, West Virginia 25330

  
\_\_\_\_\_  
THOMAS W. RODD