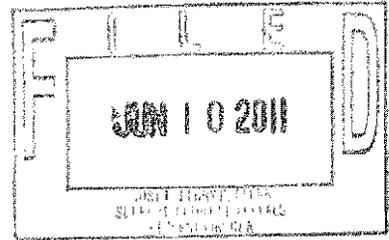


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,



Supreme Court No. 11-0459

v.

Circuit Court No. 09-F-162  
(Fayette County)

DAVID L. WELCH,

Petitioner.

---

RESPONDENT'S BRIEF

---

Carl L. Harris (WV Bar No. 1609)  
Prosecuting Attorney  
Roger L. Lambert (WV Bar No. 10800)  
Assistant Prosecuting Attorney  
108 East Maple Ave.  
Fayetteville, WV 25840  
T: 304.574.4230  
F: 304.574.0228

Counsel for Respondent

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... ii

**STATEMENT OF THE CASE**..... 1

**SUMMARY OF ARGUMENT**..... 3

**STATEMENT REGARDING ORAL ARGUMENT** ..... 4

**ARGUMENT**..... 4

**I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY VIOLATING  
RULE 11, W. VA. R. CRIM. P.**..... 4

    A. The trial court did not violate Rule 11(e), W. Va. Crim. P. by summarily rejecting a plea agreement between Welch and the State. .... 4

        1. Because Welch and the State had not entered into a plea agreement at the time the trial court expressed its disapproval of the state’s plea offer, the trial court was not required to follow Rule 11 procedures..... 4

        2. Because Welch had not entered a guilty plea pursuant to plea agreement when the trial court expressed disapproval of the State’s plea offer, the trial court was not required to follow Rule 11 procedures..... 6

        3. Assuming *arguendo* that the trial court failed to comply with Rule 11, W. Va. R. Crim. P. when it indicated its disapproval to Welch entering a guilty plea to three counts of sexual assault, subsequent events made this a harmless error. .... 7

    B. The trial court did not violate Rule 11(e) by participating in plea negotiations between Welch and the State. .... 8

**II. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT LINDA SMITH DIED AS A RESULT OF OR IN THE COMMISSION OF A SEXUAL ASSAULT.**..... 9

    A. Sufficiency of Evidence Standard ..... 9

    B. The State presented sufficient evidence for the jury to find beyond a reasonable doubt that that Linda Smith died of asphyxiation..... 10

    C. The State presented sufficient evidence for the jury to find beyond a reasonable doubt that that Linda Smith died as a result of or during the commission of a felony..... 14

**III. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY ADMITTING EVIDENCE OF COLLATERAL CRIMES.**..... 15

**CONCLUSION** ..... 17

## TABLE OF AUTHORITIES

### Cases

<u>Mabry v. Johnson</u> , 467 U.S. 504, 507, 104 S.Ct. 2543, 2546, 81 L.Ed.2d 437, 442 (1984) .....	5
<u>Myers v. Frazier</u> , 173 W. Va. 658, 664 n.5, 319 S.E.2d 782, 788 n.5 (1984) .....	5
<u>Salem Lodge No. 70 v. Smith</u> , 94 W. Va. 718 (1923).....	5
<u>State ex rel. Brewer v. Starcher</u> , 195 W. Va. 185, 192, 465 S.E.2d 185, 192 (1995).....	5, 8
<u>State ex rel. Roark v. Casey</u> , 169 W. Va. 280, 283, 286 S.E.2d 702 , 704 (1982) .....	9
<u>State ex. rel. Roger L. Bowers v. McBride</u> , No. 101458 (W. Va. Supreme Court, May 18, 2010)(memorandum decision).....	14
<u>State v. Guthrie</u> , 194 W. Va. 657, 461 S.E.2d 163 (1995).....	10, 13
<u>State v. Lopez</u> , 197 W. Va. 556, 476 S.E.2d 227 (1996)(per curiam).....	6
<u>State v. Mayle</u> , 178 W. Va. 26, 357 S.E.2d 219 (1987).....	14
<u>State v. Miller</u> , 194 W. Va. 3, 459 S.E.2d 114 (1995).....	16
<u>State v. Myers</u> , 204 W. Va. 449, 513 S.E.2d 676, 685 (1998).....	5

### Rules

Rule 11, W. Va. R. Crim. P. ....	<i>passim</i>
----------------------------------	---------------

## STATEMENT OF THE CASE

The August 2008 Fayette County Grand Jury returned a fourteen count indictment against David L. Welch for felony murder; sexual assault in the second degree; and sexual assault in the first degree. The victim relating to all of the counts in the indictment was Linda K. Smith.

On the morning before Welch's trial, Fayette County Prosecuting Attorney, Carl Harris, made a verbal plea offer to Welch's counsel. As part of the offer, Welch would plead guilty to three counts of sexual assault in the second degree as contained in the indictment and the remainder of the indictment would be dismissed. (See 04/13/10, Tr. 6). Mr. Harris also told Welch's counsel, James Adkins, that he would advise the trial judge of the plea offer to determine if the judge would find the offer acceptable, in which case a jury and witnesses for the following day's trial would likely not be needed. (See id. at 11).

Mr. Harris, believing he had defense counsel's approval, later relayed the offer to presiding Judge Paul M. Blake, Jr., who simply stated that he didn't find the offer acceptable. Following this conversation, Mr. Harris made a second offer for Welch to plead to four counts of second degree sexual assault. After being made this second offer, Welch filed a Writ of Prohibition with this Court alleging that the trial court had improperly participated in plea negotiations.

On the following morning of Welch's trial, Judge Blake described his conversation with Mr. Harris regarding the plea offer as a very short encounter:

On yesterday, I was getting -- working in the office, and Mr. Harris contacted me and asked me if I would accept -- or I felt a plea to three counts of second degree sexual assault -- and my recollection is that the conversation was there would be a Kennedy plea, that there was some discussion of a Kennedy plea, and that the murder count would be dismissed, nine or ten counts of second degree sexual assault would be dismissed and the -- I think there's

three or four counts of first degree sexual abuse that would be dismissed.

Based on Mr. Harris's preliminary inquiry, I indicated to him I did not feel that was an appropriate disposition of the case. And my recollection was that he wasn't too happy when I told him that, but that was the extent of our conversation . . . .

(04/13/10, Tr. 8).

Judge Blake stated that the reason for his disapproval of the plea offer was the serious nature of the offenses alleged and his having heard most of the evidence at pre-trial hearings. (See id. at 7). He also expressed his personal opinion on the usefulness of plea agreements to resolve cases and his willingness to accept reasonable plea agreements without setting arbitrary deadlines for the receipt of the same. (See id.).

Judge Blake further expressed his opinion that Mr. Harris was acting in good faith when he informed the trial court of the plea agreement. Moreover, Judge Blake indicated that attorneys regularly will inform him of the existence and basic structure of a plea agreement without going into details. In this case in particular, Judge Blake cited "a whole litany of things" that were not discussed by him and Mr. Harris, which would have to be put in writing. (See id. at 9-10).

Finally, Judge Blake made clear that he had no input in Mr. Harris' decision to make a second plea offer for Welch to plead to four counts of second degree sexual assault instead of three. In fact, Judge Blake stated that he would not know whether he would accept the new offer until it was formally presented to him in writing, which he invited both counsel for the State and Welch to do. (See id. at 8, 10). Judge Blake flatly denied having participated in plea negotiations. (See id. at 10).

Following jury selection, the trial court held a formal hearing on the written plea agreement submitted to it, which memorialized the second plea offer. During the hearing,

counsel for the both the State and Welch spoke. Welch also spoke in response to the Court's inquiry prescribed by Rule 11, W. Va. R. Crim. P. The hearing concluded with Welch rejecting the plea offer and requesting that the trial court proceed with the jury trial. Neither Welch nor his counsel made any statement that the trial court's alleged participation in plea negotiations had influenced Welch's rejection of the plea offer in any way. (04/13/10, Tr. 105-36).

### SUMMARY OF ARGUMENT

The trial court did not violate Rule 11, W. Va. R. Crim. P. by summarily rejecting a plea agreement without following Rule 11 procedures. Neither a formal plea agreement nor a guilty plea was before the trial court at the time that the Prosecutor Harris informed the trial court of a pending plea offer. The trial court also did not participate in plea negotiations in violation of Rule 11, W. Va. R. Crim. P when it expressed its disapproval of the State's plea offer. This Court has held that rejection of a proposed plea agreement does not equal participation. Finally, even if this Court does find that the trial court deviated from Rule 11 procedures, then the error was harmless because a formal plea hearing was subsequently held and Welch made a voluntary decision to reject the State's plea offer.

The State presented sufficient evidence for the jury to find beyond a reasonable doubt that Welch committed felony murder. The State presented video evidence to the jury of Welch sedating Ms. Smith for the express purpose of sexually assaulting her. The State also presented testimony that Welch admitted that Ms. Smith died when he placed his hand over her nose and mouth. And the State presented medical testimony that placing a hand over the nose and mouth of a sedated person can be fatal. The jury clearly had sufficient evidence that Ms. Smith died of asphyxiation and that her death directly resulted from being placed under sedation by Welch for the express purpose of facilitating his sexual assaults on her.

The trial court did not commit plain error due to the fact that a witness testified that Welch knew that “he was going back to prison.” The jury was not given any specific information relating to Welch’s criminal history or the reason why he had previously been incarcerated. Thus, this one statement that is tangentially related to Welch’s criminal history does not create reversible error.

#### STATEMENT REGARDING ORAL ARGUMENT

The State believes that the present appeal is frivolous. Thus, oral argument should not be necessary for its disposition.

#### ARGUMENT

##### I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY VIOLATING RULE 11, W. VA. R. CRIM. P.

In his Petition for Appeal, Welch argues that the trial court abused its discretion by violating Rule 11, W. Va. R. Crim. P. Specifically, Welch argues that the trial court abused its discretion in two ways. First, Welch claims that the trial court summarily rejected an existing plea agreement between him and the State without following the procedures required by Rule 11. Second, Welch claims that the trial court participated in plea negotiations in violation of Rule 11. But as discussed below, both of these claims are without merit.

A. The trial court did not violate Rule 11(e), W. Va. Crim. P. by summarily rejecting a plea agreement between Welch and the State.

1. Because Welch and the State had not entered into a plea agreement at the time the trial court expressed its disapproval of the state’s plea offer, the trial court was not required to follow Rule 11 procedures.

Welch begins his Petition for Appeal with the bald assertion that on the morning before his scheduled jury trial, he and the State entered a plea agreement whereby he would enter guilty pleas to three counts of second degree sexual assault.

This Court has observed that a defendant has “no constitutional right to have his case disposed of by way of a plea bargain.” See State ex rel. Brewer v. Starcher, 195 W. Va. 185, 192, 465 S.E.2d 185, 192 (1995)(quoting Myers v. Frazier, 173 W. Va. 658, 664 n.5, 319 S.E.2d 782, 788 n.5 (1984)). In fact, “[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.” See Brewer, 195 W. Va. at 192, 465 S.E.2d at 192 (quoting Mabry v. Johnson, 467 U.S. 504, 507, 104 S.Ct. 2543, 2546, 81 L.Ed.2d 437, 442 (1984)). This Court has repeatedly used contract law principles to determine the enforceability of plea agreements. See Brewer, 195 W. Va. at 192, 465 S.E.2d at 192, See also Myers, 173, W. Va. at 672 n.21, 319 S.E.2d at 796 n.21, See also State v. Myers, 204 W. Va. 449, 513 S.E.2d 676, 685 (1998).

Clearly under contract law principles, Welch and the State had not entered into a plea agreement when Prosecuting Attorney Carl Harris briefly described the plea offer that had been extended to Welch to the trial court. A longstanding principle in contract law is that a contract must contain certain and definite terms or it will be held void for vagueness. See e.g. Salem Lodge No. 70 v. Smith, 94 W. Va. 718 (1923). Here, as the trial court stated, the State’s plea offer for Welch to plead to three counts of sexual assault still left a whole litany of unanswered questions that needed to be addressed in a formal written plea agreement. One such important issue was whether the State reserved the right to file a recidivist information against Welch following the entry of his guilty pleas. (4/13/10, Tr. 9).

There is no dispute that when Mr. Harris briefly spoke to the trial court regarding the State’s plea offer, the offer had not been reduced to a formal written agreement containing

certain and definite terms. Because there was no plea agreement, the trial court was not required to follow Rule 11 procedures when it indicated its disapproval to Mr. Harris.

Nevertheless, Welch's defense counsel attempts to brand the trial court and Mr. Harris with a nefarious intent by repeatedly referring to their "*ex parte* discussion." Welch's counsel also argues that the trial court was required to ascertain all details of the "plea agreement" before it expressed its opinion of disapproval. But the fact remains that Mr. Harris did not present a plea agreement subject to the procedures of Rule 11 to the trial court *ex parte* on the morning before Welch's trial. Instead, Mr. Harris simply informed the trial court that a plea agreement was anticipated, which would entail Welch pleading to three counts of sexual assault. And his only purpose in doing this was to save the trial court from the inconvenience of calling a jury if no trial was going to be needed. Welch's present appeal exemplifies the adage, "no good deed goes unpunished."

2. Because Welch had not entered a guilty plea pursuant to plea agreement when the trial court expressed disapproval of the State's plea offer, the trial court was not required to follow Rule 11 procedures.

Welch argues that the trial court abused its discretion by summarily rejecting a plea agreement between him and the State without following the required Rule 11 (e) procedures. But this Court has held that Rule 11 only prescribes its procedures to be followed where a defendant has actually entered a guilty plea pursuant to plea agreement.

In State v. Lopez, 197 W. Va. 556, 476 S.E.2d 227 (1996)(*per curiam*), the defendant appealed his felony murder conviction. One of his assignments of error was that the trial court failed to follow appropriate procedures as required by Rule 11(e) when it rejected the proposed plea bargain agreement between him and the State. In deciding this issue, the Court paid special attention to Rule 11(e)(4), which governs the rejection of a plea agreement:

Rejection of a plea agreement.—If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, afford the defendant the opportunity to then withdraw the plea, and advise the defendant if he or she persists in a guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Upon close examination of Rule 11(e)(4), this Court held that Rule 11 procedures only have to be followed when a defendant has actually entered a guilty plea pursuant to a plea bargain agreement. In support of its decision, this Court stated that the rule is clearly intended to protect a defendant's right to proceed to trial after a plea agreement is rejected, which was the basis for the defendant's entry of a guilty or no contest plea. In Lopez, the defendant did not enter a guilty or no contest plea when the plea agreement was presented to the trial court; thus, this Court held that the trial court was not obligated to comply with Rule 11 procedures when it rejected the proffered plea agreement.

In the case *sub judice*, the facts are undisputed that Welch did not enter a guilty or no contest plea at the time that the trial court expressed disapproval of the State's proposed plea offer. Thus, under Lopez, the trial court was not required to follow the procedures prescribed by Rule 11(e), W. Va. R. Crim. P.

3. Assuming *arguendo* that the trial court failed to comply with Rule 11, W. Va. R. Crim. P. when it indicated its disapproval to Welch entering a guilty plea to three counts of sexual assault, subsequent events made this a harmless error.

Rule 11(h), W. Va. R. Crim. P. provides that “[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.” As such,

a violation of Rule 11 does not necessarily require automatic reversal or vacatur. Rather, when a defendant claims that a circuit court failed to comply with Rule 11, a straightforward, two-step harmless error analysis must be conducted: (1) Did the circuit

court in fact vary from the procedures required by Rule 11, and (2) if so, did such variance affect substantial rights of the defendant?

Syl. Pt. 8, Brewer, 195 W. Va. at 189, 465 S.E.2d at 189.

The circuit court did not vary from procedures required by Rule 11 for the reasons stated above. However, assuming *arguendo* that the circuit did vary from the procedures required by Rule 11, the fact remains that the variance did not affect Welch's substantial rights in any way.

Following jury selection on the first day of Welch's trial, Welch and the State presented a formal plea agreement in open court and on the record. Both counsel for Welch and for the State had an opportunity to address the trial court and give their reasons for the plea agreement. Welch also directly responded to questions from the Court regarding his understanding of the plea agreement and his voluntary waiver of rights. At the conclusion of this hearing, Welch rejected the plea agreement and opted instead to proceed with the jury trial.

Certainly, by holding this plea hearing, the trial court cured any conceivable error and prevented any prejudice to Welch's substantial rights. Nevertheless, if this formal plea hearing was not enough to prevent prejudice to Welch, then Welch's wholesale rejection of the plea agreement and request to proceed with trial certainly resolves any doubt regarding whether a failure to follow Rule 11 procedures prejudiced any of Welch's substantial rights. Simply put, Welch's rejection of the plea agreement renders this a moot issue.

B. The trial court did not violate Rule 11(e) by participating in plea negotiations between Welch and the State.

Welch claims that the trial court violated Rule 11's prohibition on courts participating in plea negotiations by rejecting his plea agreement with the State. By expressing its disapproval of the plea, Welch argues that the trial court "derailed" the parties' plea negotiations and "forced" the parties to return to plea negotiation process after they had reached an agreement. In making

this argument, Welch invites this Court to adopt a broad holding that any discussion between the parties and the trial court regarding the acceptability of a plea agreement outside the context of a Rule 11 hearing is the equivalent of judicial participation.

Remarkably, Welch cites State ex rel. Roark v. Casey, 169 W. Va. 280, 283, 286 S.E.2d 702 , 704 (1982), for the proposition that it could be argued that a trial court effectively participates in plea negotiations when rejecting a plea agreement. But right after saying this, this Court goes on to say that this argument is invalid: “Nevertheless, we reject the notion that Rule 11 is self-contradictory by explicitly prohibiting one form of behavior in one sentence while implicitly permitting it in another.” Id. Furthermore, the Court also refrained from adopting a broad holding prohibiting trial courts from expressing their reasons for rejecting plea agreements, for which Welch now advocates:

We do not mean to foreclose at-bench discussions between prosecutor, defense attorney, and judge concerning the judge’s objections to a rejected plea bargain. We hold that it is entirely consistent with our process that the parties be informed of the judge’s reasons for rejecting a proffered agreement.

Roark, 169 W. Va. at 283-84, 286 S.E.2d at 704.

In the present case, it is undisputed that the trial court did nothing more than express its opinion of disapproval to a proposed plea. Rule 11(e)(4) and Roark make clear the trial court was entirely within its right to do so. The trial court did not participate in plea negotiations between Welch and the State.

## **II. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT LINDA SMITH DIED AS A RESULT OF OR IN THE COMMISSION OF A SEXUAL ASSAULT.**

### **A. Sufficiency of Evidence Standard**

In State v. Guthrie, this Court adopted the relevant standard of review for appeals challenging the sufficiency of evidence presented at trial

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, 194 W. Va. 657, 461 S.E.2d 163 (1995).

This Court also made clear in Guthrie that any defendant who challenges a conviction on sufficiency of evidence grounds "takes on a heavy burden:"

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.

Id. at Syl. Pt. 3.

Despite the fact that Welch correctly stated the applicable standard in his Petition, his arguments wholly ignore the severely limited review that this Court affords to alleged errors based on sufficiency of evidence grounds.

- B. The State presented sufficient evidence for the jury to find beyond a reasonable doubt that Linda Smith died of asphyxiation.

Welch argues that the State failed to present sufficient evidence that the victim, Linda Smith, died of asphyxiation. Specifically, Welch argues against the probative value of two key pieces of evidence: (1) the final video footage recorded of Ms. Smith being gagged and sexually assaulted before her death and (2) the testimony and opinion of Dr. Paul Mullen, M.D. that Linda Smith died of asphyxiation.

The State's forensic pathologist, Dr. Paul Mullen, MD, performed an autopsy on Linda Smith on August 29, 2009. Ms. Smith had been dead for several days by this point, so her body was in an advanced state of decomposition. He could find no physical injuries explaining the cause of death. Dr. Mullen's initial impression was that Ms. Smith's death was either toxicology-related or from asphyxiation, which is a blockage of the airways. (See 04/15/10, Tr. 14).

Dr. Mullen took a blood sample from Ms. Smith's chest cavity and vitreous fluid from from her eye. Although the sample taken from the chest cavity showed a blood alcohol level of .55, Dr. Mullen did not find the sample to be reliable because blood in the cavities of a decomposing body can be contaminated with bacteria, which ferments and creates alcohol. (See id. at 24). But no alcohol was found in the vitreous eye fluid, which is much more reliable. (See id. at 31-32). Thus, Dr. Mullen eliminated alcohol intoxication as a cause of death (See id. at 18). Although two drugs, Trazadone and Seroquel, were found in Ms. Smith's system, these drugs were not found to be at high levels. Thus, Dr. Mullen also eliminated drug overdose as a cause. (See id.).

Dr. Mullen was later provided with video footage found on Welch's computer. This footage showed Ms. Smith in a semi-conscious state. The video footage also showed Welch inserting his penis into Ms. Smith's mouth and panty hose in her mouth. Based on the footage in

this video, which was the last footage taken before her death, Dr. Mullen opined that Ms. Smith died from asphyxiation.

Another witness, Larry Bowles, testified that Welch had told him that Ms. Smith had died after he had put his hand over her mouth and nose while she was unconscious. (See 04/14/10, Tr. 41). Dr. Mullen confirmed that putting a hand over the nose and mouth of a sedated person can result in death. He also stated that there would not be much injury to the face or neck in such a case. (See 04/15/10, Tr. 25). Clearly, based on the combined testimony of Larry Bowles and Dr. Mellen, the jury had sufficient evidence to find beyond a reasonable doubt that Ms. Smith died from asphyxiation due to Welch placing his hand over her nose and mouth.

In addition to this evidence, the State presented a witness who testified that Welch had told him that he thought Ms. Smith had died of asphyxiation. After Smith's death, Welch fled to Virginia before turning himself in to the authorities in James City County, Virginia. Officer James Neal of the James City Police Department interviewed Welch. Officer Neal asked Welch what he thought had been the cause of Ms. Smith's death. Welch replied, "asphyxiation." (04/14/10, Tr. 16).

Although the final piece of video footage taken of Smith before her death shows that she is breathing, the videos also show Welch inserting various objects, including pantyhose, into her mouth while she is in an unresponsive state. Based on the video evidence and Dr. Mellen's testimony, the jury could have also inferred beyond a reasonable doubt that sometime after the last video footage was taken, Welch inserted enough material in Smith's mouth while she was sedated to result in her death from asphyxiation.

In arguing that the jury was presented with insufficient evidence that Smith died of asphyxiation, Welch first attempts to discredit Dr. Mullen's opinion by arguing that it is more

likely that Ms. Smith died as a result of voluntary alcohol intoxication than asphyxiation. In doing so, Welch asks this Court to substitute its judgment of the facts and evidence for the jury's verdict.

Guthrie makes clear that it is not within the purview of the appellate court to make witness credibility assessments. Nonetheless, Welch asks this Court to invade the province of the jury and give more weight to witness statements that Ms. Smith was an alcoholic than to Dr. Mellen's expert opinion excluding death by alcohol intoxication. Welch also has submitted new evidence in the form of a treatise in support of his argument that postmortem alcohol production typically does not increase blood alcohol content by more than .10%. Of course, this treatise was not used at trial to impeach Dr. Mellen. Welch's use of this treatise is clearly improper and the State respectfully requests that this Court completely disregard the treatise and any of Welch's arguments based thereon.

Welch also alludes to the possibility that Ms. Smith may have died from sleep apnea due to her obesity. Defense counsel questioned Dr. Mellen about this possibility. But the fact remains that the jury determined based on the evidence that this was not the cause of death. In Guthrie, this Court held that "the mere existence of other reasonable hypotheses is not enough to reverse a jury verdict." 194 W. Va. at 668, 461 S.E.2d at 174. Despite this holding, Welch now attempts to raise every other reasonable possibility relating to the cause of Ms. Smith's death as creating reversible error. But Guthrie limits this Court's determination to whether the evidence presented to the jury was sufficient, not whether the jury properly weighed the evidence.

Finally, Welch argues that because Dr. Mellen could only testify that Ms. Smith had a "possibly compromised or obstructed airway" from watching the video, then his opinion was insufficient. But Welch also concedes in his Petition that Dr. Mellen's testimony that putting a

hand over the nose and mouth of a sedated person could be fatal confirmed Welch's admission to Larry Bowles that Smith died after he put his hand over her nose and mouth. Although Welch attempts to discredit Bowles, it was clearly within the jury's province to believe his testimony.

- C. The State presented sufficient evidence for the jury to find beyond a reasonable doubt that that Linda Smith died as a result of or during the commission of a felony.

Welch concedes in his Petition that "[i]t is true that Mr. Bowles' testimony may be sufficient to support a conviction for first-degree murder via a premeditated theory." But he then contends that Bowles' testimony does not show that Ms. Smith died as a result of or during the commission of a felony. Under the felony murder doctrine, the State is required to prove (1) the commission of or attempt to commit one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; and (3) the death of the victim as a result of injuries received during the course of such commission or attempt. Syl. Pt. 5, State v. Mayle, 178 W. Va. 26, 357 S.E.2d 219 (1987).

This Court recently revisited the "result" element of felony murder in State ex. rel. Roger L. Bowers v. McBride, No. 101458 (W. Va. Supreme Court, May 18, 2010)(memorandum decision). In that case, the victim purchased heroin from the defendant. After being injected with the heroin, the victim had an immediate adverse reaction and passed out. The defendant then stuffed the victim into a small car where he later died. The medical opinion was that the victim died of positional asphyxiation with contributing factors of alcohol and heroin, which prevented the victim from changing the position that he was lying in and that obstructed his airway. This Court found no error relating to the defendant's conviction for felony murder.

In this case, the video that was shown to the jury shows Welch putting what appear to be pills in Ms. Smith's mouth. Welch would then pinch Ms. Smith to ensure that she was

unresponsive. After determining that Ms. Smith was unresponsive, he would then sexually assault her. (See generally State's Exhibit 16, See also 04/15/10, Tr. 146). As such, the video footage clearly shows that Welch drugged Ms. Smith as part of the sexual assaults that he committed against her.

Like in Bowers, Ms. Smith died of asphyxiation while unconscious from drugs. Welch argues that the State had to prove that Smith died while he was having intercourse with her. But the evidence shows that Welch drugged Smith for the express purpose of sexually assaulting her. Smith's being under sedation was part and parcel of the crime of sexual assault. The State presented sufficient evidence to the jury that one of the reasons that Smith died was that she was under sedation. And that Welch sedated Smith so that he could sexually assault her. Therefore, the State presented sufficient evidence that Smith died "as a result of injuries received during the commission of a sexual assault."

### **III. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY ADMITTING EVIDENCE OF COLLATERAL CRIMES.**

Welch's last assignment of error is that the trial court committed plain error regarding the testimony of Officer Neal that Welch told him that "he knew he was going to have to go back to prison." The alleged error arises from the following exchange:

Q BY MR. HARRIS [Prosecutor]: Did he talk to you about what the circumstances were why he left West Virginia?

A A little bit. He said he left in a hurry when he woke up and his girlfriend was dead, then he was scared that – he knew he was going to have to go back to prison.

MR. ADKINS [Defense counsel]: Objection

THE COURT: On what grounds? Well, come up here.

(Court, counsel and defendant at benchside)

MR. ADKINS: Okay. He said he knew he was going to have to go back to prison. I don't want this to get out of control.

THE COURT: Me either. That's as far as it's going to go, Carl?

MR. HARRIS: Yes. I didn't expect that

THE COURT: All right.

(4/14/10, Tr. 15-16).

Welch bases his entire allegation that the Court committed reversible error on the short exchange cited above. Further, because defense counsel did not move for a mistrial or request a jury instruction, this assignment of error must be reviewed under the plain error standard. To prove plain error, Welch must show that the above exchange constituted "(1) an error; (2) that is plain; (3) that effects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7 (in part), State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Welch clearly cannot show that his substantial rights were affected by the jury hearing the words, "he knew he was going to have to go back to prison." The jury was not informed in any way as to the type of conviction that had resulted in Welch's previous stay in prison. For all the jury knew, the crime could have been a property related crime having nothing to do with violence or sex crimes.

It should also be noted that even the prosecutor had no idea that his question was going to elicit the comment that Welch knew that he was going back to prison. And the prosecutor did not subsequently ask the witness any questions relating to Welch's criminal history.

Welch also claims that the trial court committed plain error by not issuing an instruction to the jury to disregard the witness' testimony that Welch knew he was going back to prison. But issuing such an instruction would likely have done as much harm, if not more so, than good,

which is probably why defense counsel did not request one. By issuing an instruction, the Court would have likely only succeeded in drawing more attention to the statement and invited the jury to make the inference that the reason Welch had been to prison in the past was because he has a criminal history.

Welch argues that the statement, “he knew he was going back to prison,” likely influenced the jury’s decision to not recommend mercy. Here again, Welch assumes too much. The jury was shown several videos of Welch sexually assaulting the victim while she was sedated. Certainly, it is more likely than not that the jury based its decision to not recommend mercy on the graphic—but properly admitted—video evidence rather than this one sentence fragment.

#### CONCLUSION

Based on the foregoing, the State respectfully requests that Welch’s Petition for Appeal be denied in its entirety.

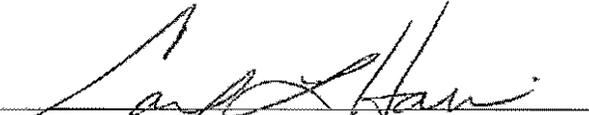
**STATE OF WEST VIRGINIA  
BY COUNSEL**



Carl L. Harris (WV Bar No. 1609)  
Prosecuting Attorney  
Roger L. Lambert (WV Bar No. 10800)  
Assistant Prosecuting Attorney  
108 East Maple Ave.  
Fayetteville, WV 25840  
T: 304.574.4230  
F: 304.574.0228

CERTIFICATE OF SERVICE

I, Carl L. Harris, hereby certify that on this 10<sup>th</sup> day of June, 2011, a copy of the foregoing RESPONDENT'S BRIEF was sent via U.S. Postal Service to Gregory L. Ayers, Deputy Public Defendant, Kanawha County Public Defender Office, P.O Box 2827, Charleston, WV 25330.

  
\_\_\_\_\_  
Carl L. Harris  
Counsel for Respondent