

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

V.

CASE NO.: 11-F-288-OA

BRANDON J. FLACK

OPINION ORDER DENYING  
*DEFENDANT'S MOTION FOR NEW TRIAL*

On June 6, 2012, came the parties all for a hearing on the Defendant's Motion for New Trial and the State's opposition to the Defendant's motion. There appearing were the State of West Virginia by her Prosecuting Attorney Scott A. Ash, Esq. and her Assistant Prosecuting Attorney, Kelli L. Harshbarger, Esq, the Defendant in person and by counsel, Derrick W. Lefler, Esq. and Ward Morgan, Esq. Two main grounds were argued by the Defendant in his Motion for New Trial: One involved his constitutional right to a jury from a fair cross section of the community had been violated and the second concerned the lack of a limiting instruction regarding the testimony of his co-defendant at his trial was plain error. The Court heard the testimony of Margaret Bryant, an assistant deputy clerk for the Office of the Mercer County Circuit Clerk concerning the methodology employed in obtaining names and contact information for potential jurors. The Defendant, by counsel, also without objection, submitted into evidence documentation of the jury pools and the racial makeup of Mercer County.

Based upon consideration of the arguments of the parties and the pertinent legal authorities and the specific facts in the case *sub judice*, the Court does hereby issue this separate opinion order for the benefit of the parties and does hereby conclude that the Defendant's motion should be **DENIED**. In support thereof, the Court **FINDS** and **CONCLUDES** as follows:

Lack of Limiting Instruction

The Defendant moved this Court for a new trial on one of the alleged grounds that the failure to issue a limiting instruction concerning his co-defendant's testimony was reversible and plain error as such an instruction was mandatory. The Defendant's argument is based on Syllabus Point 3 of *State v. Caudill*, 170 W. Va. 74 (1982) wherein the West Virginia Supreme Court of Appeals stated:

In a criminal trial an accomplice may testify as a witness on behalf of the State to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the issue of the witness-accomplice's credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however, reversible error.

The *Caudill* Court referenced an instruction that came from a federal court case wherein nine defendants were being tried together for mail fraud crimes. Before the trial, two of the defendants had withdrawn their not guilty pleas and entered pleas of guilty. During the trial of the remaining defendants, three defendants withdrew their not guilty pleas and pleaded guilty.

The trial court advised the jury of the change in pleas:

I want to tell you again the fact that such pleas were entered does not mean that the remaining three defendants on trial are guilty with them. The pleas are not evidence to the defendants remaining on trial that they are guilty, or the crime charged in the indictment was committed. These pleas do not give rise to any inference as to the guilt of the remaining defendants here on trial. The guilt or innocence of the defendants still on trial must be determined solely by you, solely by the evidence introduced in the trial of this case.

See, *Wood v. United States*, 279 F.2d 359, 362 (8<sup>th</sup> Cir. 1960).

The Court examined the background of the federal case and compared it with the Defendant's and one of the main differences is that the defendants from the Wood case were tried all at once,

whereas the Defendant's co-defendant, Jasmen Montgomery, had entered his plea of guilty last November. The plea was not contemporaneous with the Defendant's trial.

The Court also acknowledges that the West Virginia Supreme Court of Appeals has held that "[a]n accomplice's guilty plea cannot be used to show the defendant's guilt by association." *Acord v. Hedrick*, 176 W. Va. 154 (1986). The Defendant has argued that Jasmen Montgomery's guilty plea could be interpreted by the jury as the Defendant's guilt as opposed to Mr. Montgomery's credibility without the limiting instruction. The State contends that the plea agreement was brought out during direct examination and that Mr. Montgomery had agreed to testify truthfully in the matter, further, the Defendant's cross examination of Mr. Montgomery dealt almost exclusively with the plea agreement and the sentence he received as a result.

In *State v. Cabalceta*, 174 W. Va. 240 (1984), the West Virginia Supreme Court of Appeals held that the trial court's failure to give a limiting instruction that the testimony of accomplices, who testified for the State in exchange for guilty pleas to the crime charged against the defendant, that the testimonies were not to prove the defendant's guilt but was relevant to the issue of accomplices' credibility *was not error* where there was sufficient evidence to sustain the conviction. In *Cabalceta*, the evidence of one co-defendant's guilty plea and sentence was elicited during cross examination; just as in the case *sub judice*. The State objected to defense questioning of the co-defendant's cooperation with the State in exchange for his plea, which the trial court overruled, and *sua sponte* in the midst of the cross examination, gave a limiting instruction to the jury (which basically instructed the jury to not use the plea agreement as evidence of defendant's guilt, but to assess the credibility of the co-defendant's testimony). A second co-defendant testified, and again, during the cross examination, the evidence of her plea

agreement and sentence was related to the jury, but the trial court did not issue another limiting instruction.

Of importance here, is that the evidence of Jasmen Montgomery's plea agreement and ability to testify truthfully of the matters at issue during the Defendant's trial was elicited during direct examination and further explored during cross examination. At no time did the Defendant object to Mr. Montgomery's testimony. A review of the trial recording indicates that Mr. Montgomery's testimony was more helpful to the Defendant than prejudicial: Mr. Montgomery testified that he himself shot and killed the victim; Mr. Montgomery testified that the Defendant did not have a gun and even admonished Mr. Montgomery of having a gun. The Defendant echoed this testimony when he took the witness stand in his own defense.

In *State v. Barnett*, 226 W. Va. 422 (2010), a guilty verdict was overturned on the basis that the trial court abused its discretion by excluding prior inconsistent statements of the State's key witness. The West Virginia Supreme Court of Appeals did not specifically answer the question as to whether it is mandatory for a trial court *sua sponte* instruct a jury when a situation like the issue involved in this case arises: The co-defendant testified against the defendant per a plea agreement with the State; defense counsel did not object to the testimony; defense counsel had an opportunity (as counsel did in the case *sub judice*) to cross examine and challenge the credibility of the co-defendant; and that neither the defense nor the State requested a limiting instruction during the discussion over instruction prior to submitting same to the jury. Indeed, this Court went over jury instructions at length with the parties and not once did a suggestion for a limiting instruction rise.

Nevertheless, the Defendant pointed to Footnote 11 of the *Barnett* case wherein a discussion of error concerning the trial court's failure to issue a cautionary instruction

concerning the co-defendant's testimony who had entered a guilty plea to the same indictment being tried, where neither the defendant nor the State requested a limiting instruction per *Caudill*, and the trial court did not so instruct the jury on its own: "We observe that our holding in *Caudill* would appear to require the trial court to give such an instruction." The State argued that the defense waived any error if it did not raise the issue of limiting instruction. Because resolution of the appeal was decided on other grounds, the West Virginia Supreme Court of Appeals did not determine if the trial court's failure to give a limiting instruction was plain error under those specific circumstances.

A trial court's decision to admit evidence of a plea agreement of a co-defendant is an evidentiary ruling which is reviewed for abuse of discretion. See, *State v. Swims*, 212 W. Va. 263 (2002). Syl. Pt. 4 of *Swims* provides that during direct examination of a co-defendant, a prosecutor may elicit testimony regarding the co-defendant's plea agreement, and may actually introduce the plea agreement into evidence (not relevant to the case *sub judice*) for purposes which include, but are not necessarily limited to: (1) allowing the jury to accurately assess the credibility of the witness; (2) eliminating any concern by the jury that the government has selectively prosecuted the defendant; and (3) explaining how the witness has first-hand knowledge of the events about which she/he is testifying.

In the *Swims* case, the West Virginia Supreme Court of Appeals held that the trial court erred by not redacting prejudicial language from the plea agreement that had been admitted into evidence – it was also clear from the record that the defendant therein was identified SOLELY upon the testimonies of the co-defendants who had previously entered plea agreements, and therefore the conviction stemmed SOLELY by the co-defendants' testimonial evidence. The State in the case *sub judice* contends that there had been a "tsunami" of evidence leading to the

Defendant's convictions. This Court agrees. The evidence elicited during the Defendant's trial clearly shows that the Defendant had been convicted on strong evidence, including DNA evidence linking him to the crime, as well as eyewitness testimonies that were corroborated by the Defendant himself of being at the scene of the crime, including pursuing the victim up the stairs, which resulted in the Defendant being shot, and ultimately, the victim as well, only fatally. It is clear that Jasmen Montgomery's testimony did not disproportionately affect the jury's decision to convict the Defendant on all counts of the indictment.

The plain error complained of by the Defendant was not triggered either; plain error contains the following elements: (1) an error; (2) that it is plain; (3) that it affects substantial rights; and (4) that it seriously affects the fairness, integrity or public reputation of the judicial process. *State ex rel. Morgan v. Trent*, 195 W. Va. 257 (1995). This is a high burden of proof for the Defendant. The plain error must affect the Defendant's substantial rights, and in order to do so, that prejudicial error must have affected the outcome of the proceedings in this Court. *Id.* The jury's verdict can only be reversed if there is doubt as to what the jury's verdict would have been had the proper instruction been given. *State v. Collins*, 186 W. Va. 1 (1990).

An analysis of every witnesses' trial testimonies reveals no unfairness and certainly no doubt that the jury's verdict was proper and was NOT disproportionately affected by Mr. Montgomery's testimony. The evidence was sufficient and substantial to convict the Defendant. The Court specifically instructed the jury:

You are the sole judges of the evidence in this case as well as the credibility or believability of the witnesses testifying before you. In determining the weight to be given to the evidence of any witnesses you have the right to take and consider the intelligence of such witness, his or her conduct, appearance and demeanor while testifying, as well as the interest such witness may have in the result of the trial. From all these, and all other facts and circumstances in this case you should give the witness' testimony and evidence such credit as you may believe it entitled to receive, you being the sole judges of the testimony and evidence and

the weight thereof, as well as the credibility of the witness who testified in the case.

For all these reasons, the Court FINDS and CONCLUDES that the lack of the limiting instruction under the circumstances of this case did not unduly prejudice the Defendant and further, did not constitute reversible or plain error.

#### Composition of the Jury

The Defendant also moved this Court for a new trial on the basis that the jury composition did not represent a fair cross section of the community, thereby violating his constitutional rights. The Defendant was convicted by a jury of his peers, albeit an all-white jury, and the Defendant is African American. All five panels of potential jurors in Mercer County were summoned to appear for jury duty. One African American juror was excused for cause because she was related to the Defendant's and the victim's family.

The test for resolving the question of whether a particular method of jury selection comports with the Sixth Amendment guarantee of a fair cross-section of the community was succinctly restated in *Duren v. Missouri*, 439 U.S. 357, 364 (1979): The defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Both the Defendant and the State recognized that Mercer County employs a state-wide system that draws names for jury duty in a racially neutral manner, from voter registration and DMV records. Both the Defendant and the State recognized that the Administrative Division of

the West Virginia Supreme Court of Appeals endorses the system used by not just Mercer County, but all counties within the state from which to draw potential jurors. Evidence submitted during the motions hearing indicated that the African American population represents 6.1% of the entire population in Mercer County, and less than that was represented in the five panels that appeared and ultimately, were selected for the Defendant's jury. However, the State argued that there was no evidence to indicate whether the 6.1% included persons younger than eighteen years of age or having felony convictions, which would render such potential jurors ineligible for jury duty. In other words, the alleged underrepresentation of African Americans (less than the 6.1% total population) in the present jury panels reasonably excluded individuals who were not eligible for jury duty. Furthermore, the Defendant failed to show that there was any "systematic exclusion" of African Americans in the jury selection process. *State v. Hobbs*, 168 W. Va. 13 (1982).

The Defendant complained that few individuals even respond to the summons and questionnaires for jury duty. Twice every term of court the Mercer County Circuit Clerk issues summons and questionnaires to approximately eight hundred (800) people. In fact, out of a possible 800 individual names generated by the racially neutral computerized lists, usually only one hundred and forty (140) or so eligible individuals respond. The Defendant argues that most potential jurors exclude themselves from jury duty and the Court fails to apprehend those who fail to answer the summons. Simply put, the police authorities of this county do not have the manpower to affect nearly six hundred arrests twice every term of court. In order to overcome that issue, the solution has been to increase the pool of jurors, where it now rests at approximately 800 individuals. Furthermore, the Mercer County Circuit Clerk has operated

under this handicap successfully without any problems in obtaining enough potential jurors for both criminal and civil trials in this circuit.

Most importantly, the Defendant failed to prove his burden that his constitutional right to a fair and impartial jury espoused by *Hobbs* had been violated. There was no evidence presented indicating that the Court, the system used for jury selection, the State or any other entity “systematically excluded” African Americans or any other distinct or identifiable group from jury selection in Mercer County.

This Court FINDS and CONCLUDES that the Defendant received a fair trial and was convicted of his crimes by an impartial jury by a substantial showing of the evidence.

Although not addressed during the motions hearing, the Defendant had submitted pleadings to this Court that the Court permitted hearsay evidence from the investigating officer about statements from witnesses concerning the presence of a gun. However, this Court had previously found that such testimony was permissible pursuant to *State v. Morris*, 227 W. Va. 76 (2010). In that case, an officer’s testimony relaying a statement given to him by a treating nurse at the hospital was not hearsay because it was not offered for the truth of the matter asserted, but offered to explain why the defendant was arrested and to provide background of the investigation. The State in the case *sub judice* made the same argument: the statement was for purposes of providing the background of the investigation and to determine presence of a gun, not whether the Defendant committed the crime.

#### Ruling

WHEREFORE, on the basis of all the above, the Court does hereby **ORDER**, **ADJUDGE**, and **DECREE**, as follows:

- (1) The Defendant's Motion for New Trial is **DENIED**.
- (2) The Defendant's convictions are **AFFIRMED**.
- (3) The Court notes the objections and exceptions of the parties to the above rulings.
- (4) The Court directs the Circuit Clerk to forward copies of this Order to counsel for the Defendant and to the Prosecuting Attorney.

ENTER: This 7<sup>th</sup> day of June, 2012.



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OMAR J. ABOULHOSN, CHIEF JUDGE  
9<sup>th</sup> Judicial Circuit of Mercer County