

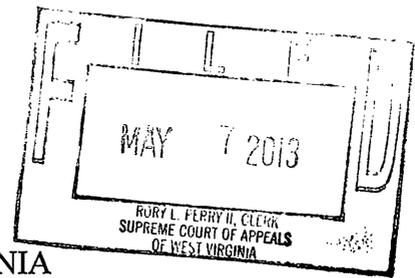
**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**

**STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,**

v.

Supreme Court Docket No.: 12-0836

**RAY COOK, Defendant Below,
Petitioner.**



**FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA**

**STATE OF WEST VIRGINIA'S
RESPONSE TO PETITION FOR APPEAL**

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INDEX

The Kind of Proceeding and Nature of the Ruling Below 3

Statement of Facts 3

Alleged Assignments of Error 20

Points and Authorities Relied Upon 21

Standard of Review 23

Memorandum of Law 23

I. The Circuit Court did not err when it denied Defendant’s Motion
to Suppress Evidence Seized by the State. 23

 A. Standard of Review. 24

 B. The search of the Defendant’s car was not in violation
 of the Fourth Amendment. 25

 1. The search warrant issued for the Defendant’s automobile
 was proper and supported by a sufficient affidavit. 25

 2. Even if the search warrant is found to be insufficient,
 a search of the defendant’s vehicle without a warrant was permissible. 33

 3. The search warrant for the Defendant’s cellular phone and seizure
 of evidence from that phone was lawful. 33

II. The statements of the Defendant were properly admitted into evidence. 38

 A. Standard of Review. 38

 B. The Circuit Court properly admitted the defendant’s statements
 made to law enforcement during his arrest and booking. 39

 1. Statement to Captain Stevens at Southern States. 39

 2. Statement to Corporal Norris in the Police Cruiser 43

 3. Statement to Corporal Norris in the Interview Room 45

 4. Statement to Officer Henderson while being Booked 48

 C. There was no error by the Circuit Court in relation to a statement
 neither admitted, nor attempted to be admitted at trial. 49

 D. The Circuit Court properly applied the holding of *State v.*
 DeGraw when it admitted the Defendant’s previously
 inadmissible statements in Rebuttal. 49

III. The Circuit Court properly admitted the testimony of the State’s expert witness. 52

IV. The Circuit Court properly conducted the presentation of evidence. 57

V. There was no Brady violation. 60

VI. The brief ELMO display of the defendant’s statement was not reversible error. 64

VII. An inadvertent reference to a defendant’s incarceration was not reversible error. 74

VIII. The burden of proof never shifted to the Defendant, even when the trial court
properly denied the Defendant’s request to present a case in surrebuttal. 78

IX. The mercy phase of the trial was properly conducted and does not merit
the granting of a new trial on the issue of mercy. 82

Request for Relief87
Certificate of Service 88

THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The Defendant was convicted of the first degree murder of Jenny Lou Perrine on June 15, 2012, after a nine day jury trial. The jury recommended that the defendant be given no mercy, and accordingly, the defendant was sentenced to life in prison without the possibility of parole. The jury further found the defendant guilty of brandishing a firearm and the court sentenced him to one year in the regional jail, with such sentence to be served consecutively to the life sentence for murder in the first degree. It is from these convictions and sentences that the Defendant now appeals.

STATEMENT OF FACTS

Jenny Lou Perrine was 36 years old at the time of her death in the parking lot of Southern States in Ranson, Jefferson County, West Virginia on July 15, 2011. A native of Webster Springs, Ms. Perrine had relocated to the eastern panhandle several years before and for nearly eight years she worked at Jefferson Pharmacy in Ranson, just blocks from the place where she was killed.

The Defendant and Ms. Perrine dated for several years, lived together and at one time were engaged. Friends and co-workers of Ms. Perrine testified that the relationship was troubled and that Jenny Perrine moved out of the house at least four times. (June 7, 2012 Tr. 37:17 – 19; 87:13; 101:1- 2). Shortly after moving out the first three times Ms. Perrine moved back in with the Defendant. However in March, 2011, Ms. Perrine moved out for the final time. Each time Ms. Perrine left the defendant she had moved in to the spare bedroom of a friend, Mark Stickel.

(June 7, 2012 Tr. 101: 3- 19). In March, 2011, Ms. Perrine also moved in with Mark who, although he welcomed her, did not have pets and did not want to have animals in his home.

(June 7, 2012 Tr. 103:21 – 23).

Ms. Perrine and the Defendant had two dogs, a pug named Sadie and another small dog named Sophie. According to her friends Ms. Perrine was especially attached to Sadie. (June 7, 2012 Tr. 8:20 – 24; 102: 14 – 16). One friend and co-worker, Erin Brandenburg, testified that, “It seemed like [the Defendant] used the dogs as leverage to keep her in his life. . . . he would threaten to get rid of the dogs, he would threaten not to let her see them.” (June 7, 2012 Tr. 41: 6 - 10).

On July 14, 2011, Ms. Perrine argued with the Defendant about the dogs during a phone call overheard by her roommate, Mr. Stickel, who understood that the Defendant had threatened to get rid of the dogs. (June 7, 2012 Tr. 103:11-13). On the morning of July 15, 2011, the date that Jenny Perrine was killed, she texted her roommate Mark Stickel to ask if she could bring Sadie to live in his house. Mr. Stickel agreed. (June 7, 2012 Tr. 104: 3 – 14).

Joy Skidmore, a co-worker at Jefferson Pharmacy and friend of Jenny’s, testified that Jenny Perrine’s relationship with the Defendant was “off and on.” (June 7, 2012 Tr. 8: 4 – 6). Ms. Skidmore was working with Jenny on the date of her death. Ms. Skidmore testified that she eats her lunch in her car each day from 1 p.m. to 1:30 p.m. while reading or listening to music. (June 7, 2012 Tr. 9:23 – 10:6). Ms. Skidmore testified that on July 15, 2011, while sitting in her car during lunch that she saw the Defendant walk through the pharmacy’s employee parking lot directly in front of her car. (June 7, 2012 Tr. 10: 21 – 11:3). Ms. Skidmore then saw the Defendant “use his finger as a gun and point it at Jenny’s car.” (June 7, 2012 Tr. 11:6 – 7).

Shortly after returning from her lunch break Ms. Skidmore saw Jenny Perrine leave the pharmacy. (June 7, 2012 Tr. 11:20 – 12:1). Later that day Ms. Skidmore and the employees at the pharmacy learned that Jenny Perrine was dead. (June 7, 2012 Tr. 12: 9 – 11).

Keyleigh Payne, another co-worker at Jefferson Pharmacy testified that Jenny's relationship with the defendant was "not a good relationship" because "they were constantly arguing." (June 7, 2012 Tr. 18: 15 – 18). Ms. Payne testified that she helped Jenny move out the house she shared with the Defendant in late February or early March of 2011. (June 7, 2012 Tr. 19: 12 – 18). Ms. Payne also testified that she saw the Defendant crying when Jenny moved out at that time.

Ms. Payne testified that earlier on the day Jenny Perrine was shot by the Defendant that she was in the room while the Defendant was on speaker phone with Ms. Perrine. Ms. Payne testified that the Defendant was "telling her off" and "cussing her out" (June 7, 2012 Tr. 21: 14 – 16), and that "he was screaming in the phone obscenities at her" (June 7, 2012 Tr. 22: 3 – 4). Ms. Payne testified that Jenny was very upset and was crying during the phone call. (June 7, 2012 Tr. 22: 21).

Ms. Payne also testified that she saw the Defendant in the employee parking lot on July 15, 2011 when she was going to lunch, and she, like Joy Skidmore, witnessed the Defendant use his finger to suggest shooting Jenny's car. (June 7, 2012 Tr. 24:9 – 25:8).

Ms. Payne testified that she saw Jenny Perrine just before Jenny left the pharmacy to get her dogs from the Defendant. At that time Jenny was excited to get her dogs, although Ms. Payne testified she was also crying. (June 7, 2012 Tr. 25: 17 – 23).

Another friend and co-worker, Chastity Stotler, testified that she too knew that Jenny and the Defendant were fighting over who would keep the dogs. Ms. Stotler offered to keep one of

the dogs, Sophie, until Jenny could keep both dogs in the same house. (June 7, 2012 Tr. 86:6 – 11).

Erin Brandenburg, a friend and co-worker, testified that she overheard part of a telephone conversation where Jenny was fighting with the Defendant about the dogs on July 15, 2011. (June 7, 2012 Tr. 41: 19 – 23). Ms. Brandenburg testified that the part of the conversation she heard from Jenny was that the Defendant “was going to give the dogs away one minute and the next minute he told her that she could have them.” (June 7, 2012 Tr. 42:2 – 4). Ms. Brandenburg was present when Jenny left work to go get the dogs and was concerned for Jenny’s safety (June 7, 2012 Tr. 43:18). Ms. Brandenburg “asked her to call me or text me and let me know that she was okay and what vehicle he was in.” (June 7, 2012 Tr. 43: 11 – 12). Ms. Brandenburg also testified about a number of text messages sent to and from Jenny Perrine near the time of her death on July 15, 2011. At 2:13 p.m. Ms. Brandenburg sent Jenny a text that read “U ok?” (State’s Exhibit 21; June 7, 2012 Tr. 44:5 – 14). At 2:16 p.m., Ms. Brandenburg sent another text which read “text me plz or i am coming down”. (State’s Exhibit 22; June 7, 2012 Tr. 45:4- 10). At 2:17 p.m., Jenny sent Ms. Brandenburg a text that read, “He’s [n]ot here yet.” (State’s Exhibit 23; June 7, 2012 Tr. 45: 11 – 19). At 2:17 p.m., Jenny sent Ms. Brandenburg another text that read, “He went to wal mart.” (State’s Exhibit 24; June 7, 2012 Tr. 46: 1 – 6). At 2:20 p.m., Jenny sent Ms. Brandenburg a third text that read, “Marriner” to identify that the Defendant was in his car, a Mercury Mariner. (State’s Exhibit 25; June 7, 2012 Tr. 46: 7 – 17). At 2:21 p.m., Ms. Brandenburg sent another text to Jenny which read, “Tag num plz”. (State’s Exhibit 26; June 7, 2012 Tr. 46: 18 – 24). At 2:32 p.m., Ms. Brandenburg sent a final text which read “U ok?”. (State’s Exhibit 27; June 7, 2012 Tr. 47:1 – 7). By that time the police were on the scene and Jenny Perrine was dead.

Tara Myers, the Defendant's ex-wife, also testified regarding text messages she received from the Defendant immediately prior to the shooting of Jenny Perrine, including one sent at 2:06 p.m. that read, "Tell the kids I love them every day of their lives!!!" (State's Exhibit 28; June 7, 2012 Tr. 71: 11 – 20). To that text Ms. Myers responded at 2:08 p.m., "They know u love them... but I will tell them. they dont doubt how u feel abt them". (State's Exhibit 28; June 7, 2012 Tr. 71:22 – 72: 3). The Defendant replied at 2:18 p.m., "To tell u the truth I'm getting ready to kill jen! So ill be going away for awhile". (State's Exhibit 28; June 7, 2012 Tr. 72: 4 – 10). Ms. Myers responded to that message with a text that read, "Kids need u dont b doing anything that cld hurt them. there are othr people out there that wont hurt u." (State's Exhibit 28; June 7, 2012 Tr. 72: 11 – 15).

Witnesses at Southern States watched the Defendant shoot Jenny Perrine on July 15, 2011. Ollie Figgins, a local horseman who was leaving Southern States after picking up feed, drove his truck up to the stop sign adjacent to the Southern States parking lot when he "started hearing shots, and then I looked and I saw someone shooting into the car, I was—I wasn't sure what I was seeing but then I didn't know if it was a prank or what. Then I realized it was real, someone or something in the car was getting shot at." (June 6, 2012 Tr. 55:14 – 19). Mr. Figgins testified that he believed 10 to 15 shots were discharged (June 6, 2012 Tr. 57:3 - 5), but that there was a time when the shooter stopped shooting, "went back to his automobile and came back and then started shooting again." (June 6, 2012 Tr. 56: 7 – 12). Mr. Figgins then testified that following the shooting, that the shooter "stepped back away from the car and laid his gun down and faced the Southern States store and kind of did a bow, like that's it, I am done sort of thing." (June 6, 2012 Tr. 57: 7 – 10). Southern States surveillance video showed Mr. Figgins' truck approach and stop at the intersection next to Southern States for 41 seconds while a black car

reversed in the parking lot, consistent with Mr. Figgins' testimony. Other witnesses confirmed that the black car was Ms. Perrine's.

Camille Campbell testified that when she approached the Southern States building on July 15 she heard popping sounds over her shoulder, turned and saw a white man rapidly shooting into a car with his arm fully extended. (June 6, 2012 Tr. 75:17 – 76:7). Virginia Blaylock, an employee at Southern States, testified that she heard two series of shots "right after one another" with no pause in between the shots. (June 6, 2012 Tr. 94:20 – 95: 5).

Racine Lynch testified that when she tried to pull her car into the parking lot of Southern States on July 15, 2011 that a man shouted at her to "go, go, go". Ms. Lynch's windows were down and she spoke to the man asking, "Can I park right there?" The man "shouted at us, get out of here, I just shot someone." Ms. Lynch backed up out of the parking lot. (June 6, 2012 Tr. 111:2 – 15) Ms. Lynch testified that the man did not appear to be excited, confused or frightened. (June 6, 2012 Tr. 113:12 – 114:13).

Carmela Harmon testified that she was an employee at Comcast a business located adjacent to, but across Beltline Street from, Southern States, and that on July 15, 2011, through the open loading dock doors which face Southern States, that she heard "a rapid sound, we originally thought it was like a firecracker, and that is when we looked out to see what was going on". (June 6, 2012 Tr. 127:4 – 6). Ms. Harmon testified that she saw a man "that was pretty much just yelling and screaming at a [black] car basically." (June 6, 2012 Tr. 127: 21 – 24; 132: 18 – 23). Ms. Harmon testified that when she looked outside after the second set of shots she saw a man "pacing around the parking lot and probably about 30 seconds to 45 seconds later, took off his hat, threw it in the parking lot, emptied all his pockets threw it in the parking lot,

then he got down on his knees and then we saw the police officers come in the parking lot.” (June 6, 2012 Tr. 128: 15 – 20).

Sandra Hoskins testified that while working at Southern States on July 15, 2011, she heard a sound that she attributed to a car backfiring. (June 6, 2012 Tr. 134: 3 – 15). Ms. Hoskins testified that she saw “a white male shooting into the car.” (June 6, 2012 Tr. 134: 21). Ms. Hoskins saw the man fire the gun into the car, “turn around and face me and pull the magazine out of the gun and go towards the ground.” (June 6, 2012 Tr. 135: 17 – 18).

Matthew Rehberg, Assistant Manager of Southern States, testified that “at 2:22 on that date a woman was murdered in my parking lot,” and that he could provide a precise time because he received a phone call at “the exact same time this started, the gun fire started, it was 2:22.” (June 6, 2012 Tr. 140: 1 – 6). Mr. Rehberg testified that when he went to lock the door after the first set of shots, “the second barrage of gun fire started.” Mr. Rehberg locked the door and was able to observe the shooter, a man “screaming to the person on the other side of the phone that he was ‘Oh my God, I cannot believe what I just did, I am so sorry, I am so sorry.’” (June 6, 2012 Tr. 141: 17 – 19; 146:18 - 19). The defense stipulated that the shooter was the defendant, Ray Cook. (June 6, 2012 Tr. 142: 12 – 13). Mr. Rehberg testified that he was only 10 to 15 feet away from Mr. Cook, that he could see Mr. Cook pacing while he was on the phone, and that “within 30 seconds police officers came from both directions of my building. Mr. Cook then knelt down, went to both knees, and they arrested him at that point.” (June 6, 2012 Tr. 145: 5 – 12). Mr. Rehberg testified that the defendant “dropped to his knees when the police officers arrived to the parking lot and they were simultaneous. As I am standing at the front door at the corner of the building, and two officers came this way, he dropped to his knees.” (June 6, 2012 Tr. 146: 3 – 7).

The recording of the 911 call made by the Defendant to Jefferson County Emergency

Headquarters was played for the jury:

911 DISPATCHER: Jefferson County 911.

RAY COOK: Yeah, I just killed somebody at the Southern States in Charles Town.

911 DISPATCHER: Okay, what's your name?

RAY COOK: My name is Ray Cook. Please come here right now.

911 DISPATCHER: What's your phone number, Ray?

RAY COOK: It's 304-240-8056. Come here now, please.

911 DISPATCHER: Why did you do it?

RAY COOK: Because she's fucking with me and my whole life, my kids and everything. I can't do this anymore.

911 DISPATCHER: How old is she?

RAY COOK: Thirty-six.

911 DISPATCHER: Is she awake?

RAY COOK: No. I think she's dead. I'm sorry. I'm so sorry. Please come. Please come now.

911 DISPATCHER: Ray? Ray? Listen—

RAY COOK: I'm sorry.

911 DISPATCHER: Listen to me. Are you at the Southern States?

RAY COOK: Yeah, I'm right here now.

911 DISPATCHER: Okay.

RAY COOK: I ain't taking my medication or nothing. I'm all fucked up.

911 DISPATCHER: Where is your gun?

RAY COOK: It's in the seat.

911 DISPATCHER: In the seat. Where are you?

RAY COOK: I'm right here in the parking lot. Please come now. (Inaudible) please. I'm sorry.

911 DISPATCHER: Okay, can you look at her? Is she awake?

RAY COOK: I don't want to look at her, sir.

911 DISPATCHER: Ray, do me a favor, look at her and tell me if she's awake. I need to know. I need to know if she's breathing.

RAY COOK: No, sir. She's dead. I'm so sorry.

911 DISPATCHER: Okay, Ray, listen to me. Do you want to try to do CPR to help her?

RAY COOK: I can't. She's done. She's not doing anything, sir.

911 DISPATCHER: Is your gun loaded?

RAY COOK: No. I done shot all the rounds. I'm sorry.

911 DISPATCHER: What kind of car are you in?

RAY COOK: I'm right here in a black car. It's got Marine Corp shit on it.

911 DISPATCHER: A black car with Marine—

At that point the phone call ended. State's Exhibit 1 (Audio); Joint Exhibit 1 (Transcript).

Captain Glen Stevens of the Charles Town Police Department testified that when he and other officers responded to the Southern States for a report of an active shooting, that "the only person moving in the parking lot or parked on that side of the street was Mr. Cook who was beside his SUV." (June 6, 2012 Tr. 150: 23 – 151: 1). Captain Stevens testified that when he exited his vehicle he drew his weapon and saw that "he had I think a hat, a wallet and a cell

phone in his hands.” (June 6, 2012 Tr. 152 7 – 8). Captain Stevens asked the Defendant if he was the shooter, “he turned around, dropped his property on the ground in front of him, and at that time facing the store, he went down on his knees and crossed his legs in a surrender position, hands behind his head.” (June 6, 2012 Tr. 152: 10 – 14). Captain Stevens testified that “as I was approaching him he said he shot her and paused and said, ‘I’m sorry, I don’t normally act like this but I didn’t take my medication.’” (June 6, 2012 Tr. 153:15 – 18). According to Captain Stevens during the pat down search of the Defendant, the Defendant “stated the gun was there and indicated by looking at his SUV.” (June 6, 2012 Tr. 154:10 -11). During his interaction with the Defendant, Captain Stevens testified that “he seemed fairly composed to me,” without any outbursts or crying (June 6, 2012 Tr. 154:14 - 17). Captain Stevens testified that the defendant was responsive to his questions. (June 6, 2012 Tr. 164: 10 – 12).

Corporal Patrick Norris, the investigating officer, testified that he received the call to respond to the shooting at Southern States at 2:24 p.m. on July 15, 2011. (June 6, 2012 Tr. 169: 21 – 22). Corporal Norris took custody of the Defendant at the scene of the shooting, placed the Defendant in his patrol car, transported the Defendant to the Ranson Police Department and once there placed the Defendant in an interview room where he was Mirandized before being questioned about the shooting. A transcript of the interview which was admitted into evidence reads, in part, as follows:

CPL. NORRIS: How you doing?

RAY COOK: Not good, man.

CPL. NORRIS: (Inaudible) my name is Pat Norris. I work for Ranson Police Department. I understand (inaudible) let me get these handcuffs off of you. Bend over for me, all right?

RAY COOK: I don’t know what the hell is going on.

CPL. NORRIS: (Inaudible).

RAY COOK: I got three kids. What the hell (inaudible).

CPL. NORRIS: Before we go any further I'm going to read you your rights, okay?

RAY COOK: (Inaudible).

CPL. NORRIS: (Inaudible). What's your name, sir?

RAY COOK: My name is Ray Cook.

CPL. NORRIS: What's your date of birth?

RAY COOK: May 15, 1974

CPL. NORRIS: Are you under the influence of any drugs or alcohol?

RAY COOK: No (Inaudible).

CPL. NORRIS: How about prescription medications?

RAY COOK: I got Seroquel but I don't take it. That might be one of the reasons.

CPL. NORRIS: Is that all you're prescribed?

RAY COOK: I got (inaudible) medicine and Jen she give me like anxiety medication every now and then.

CPL. NORRIS: Are you on that today?

RAY COOK: No. That's the thing, I didn't—

CPL. NORRIS: So you're not on anything?

RAY COOK: No (Inaudible).

CPL. NORRIS: Did you take any of your prescription medication today?

RAY COOK: No. Just yesterday (inaudible).

CPL. NORRIS: Do you read and write English?

RAY COOK: Yes, sir, I do.
CPL. NORRIS: That's a dumb question but—

RAY COOK: That's fine. You got to ask that. That's
fine.

State's Exhibit 13. The remainder of the interview included a reference to the defendant being arrested for murder, and the rights that were available to him to either invoke or waive. The defendant indicated his wish to obtain a lawyer and to not make a statement.

Corporal Norris testified that throughout his interaction with the Defendant that the Defendant did not exhibit any bizarre or abnormal behavior, his speech was understandable, and he was responsive to questioning.

Patrolman William Henderson testified that he fingerprinted the Defendant following his arrest on July 15, 2011, and that the Defendant spontaneously said, "I am sorry that I screwed everybody's life up." (June 7, 2012 Tr. 5: 18 – 19).

The defendant presented a diminished capacity defense¹ and put on both factual and expert witnesses. One of the defendant's witnesses, Robert Williams, was a friend and co-worker of the defendant who testified that he saw the Defendant each morning the Monday through Thursday immediately preceding Ms. Perrine's death on Friday afternoon. June 8, 2012 Transcript 170: 16 – 18. Although, Mr. Williams claimed that the Defendant appeared to be "a zombie" who "was not functioning very well," *Id.* at 168: 8 – 9, under cross examination Mr. Williams testified that to his knowledge the Defendant was able to perform his job that week without any complaints. *Id.* at 8 – 21.

¹ The defendant initially gave notice of his intent to rely on an insanity defense. Thereafter, the Defendant abandoned the insanity defense and provided the Court with a written stipulation declaring his intent to rely upon the defense of diminished capacity.

The Defendant also presented expert testimony that at the time of Ms. Perrine's killing that he was in a "trance-like state". Dr. Bernard Lewis testified that he prepared an evaluation of the Defendant which relied upon his interviews with the Defendant, his mother, father and brother, as well as his review of police reports, a diary written by the Defendant, certain text messages sent to and received by the Defendant on July 15, 2011, a review of medical records from the Veterans Administration hospital, and a review of the interview of the Defendant by the State's expert's, Dr. David Clayman, and Dr. Clayman's raw testing data. June 7, 2012 Transcript 133:1 – 21; 132: 21 – 133:1; 134: 4 – 17.

Dr. Lewis opined that the Defendant "was in an altered state of mind such that he was unable to control his thoughts, his feelings and his behaviors, and that is directly what resulted in his actions at that time." Id. at 135:9 – 16. Dr. Lewis further opined that the Defendant is bipolar, and the defense proceeded to introduce a number of records from the VA regarding the Defendant's mental health, including that the Defendant had previously sought treatment at the VA for anxiety. Id. at 135:17 – 136:4; 143:11 – 144:12; 145: 14 – 17; 150: 4 – 10; 182: 6 - 10. Dr. Lewis also testified that the Defendant advised that some of the medication he was prescribed for bipolar disorder made "his arms flap like a chicken, [and caused] uncontrollable tremors in his arms" Id. 181: 1 – 6.

Dr. Lewis also testified to a large portion of the content of Defendant's journal entitled, "Ray's journal of daily events while Jen is gone!" Id. at 201:10 – 211: 24. Dr. Lewis testified that "Everything about his psychiatric /psychological presentation says that he is an internalizer, he holds feelings inside he blames himself as opposed to the opposite of that is an externalizer, that is someone who blames everybody else and lashes out at everyone else. So clearly his

journal and everything else in psychiatric records says he is a hold things inside kind of person.”
Id. at 207: 23 – 208: 6.

Dr. Lewis then testified that the Defendant’s behavior immediately during and immediately following the shooting was “nothing short of bizarre” when “he walked back to his car, unloaded that weapon, re-loaded it, walked back to her car again, essentially killed her again, essentially shot, I am not sure how many other bullets into her. So he killed her twice during that time.” Id. 219: 1; 219: 9 – 14. Dr. Lewis further characterized the Defendant’s remorse as bizarre. “I have never seen somebody so sorry about what has happened. I think that is just nothing short of bizarre.” Id. 220:4 – 6. Dr. Lewis then testified that because the defendant claimed not to know what was going on when police arrived that left the Defendant “in almost a fog state or a state of just being not able to control his own thoughts and feelings so he is in this weird state that I don’t know we have ever experienced.” Id. 220: 16 – 221: 9.

Dr. Robert Novello also testified that the Defendant appeared to be in a trance-like state, or “in this fog in my opinion doing things that it is very hard for us to understand.” June 12, 2012 Transcript 132:16 – 18. Under cross examination, Dr. Novello admitted that he had not found the defendant’s medical records to show, nor had he personally observed the defendant to have at least three of the factors recognized in the DSM-IV necessary to establish a diagnosis of bipolar disorder. *Id.* at 177:1 – 7; 178: 3 – 18.

The State’s expert witness, Dr. David Clayman, a clinical psychologist testified over two days. Dr. Clayman opined that the Defendant did not suffer from any mental illness or incapacity that would prevent him from forming intent, premeditation or malice to kill Jenny Perrine. June 13, 2012 Transcript 288: 10 – 18. Dr. Clayman opined that the Defendant is not bipolar, but rather that his medical records document a reported history of bipolarity. Further,

Dr. Clayman testified that bipolarity is based upon a chemical imbalance within the brain and is not based upon situational stimuli. *Id.* at 295: 19 – 297: 7. However, Dr. Clayman reviewed the Defendant’s “Journal of daily events while Jen is gone” (Defendant’s Exhibit 7) and found that in the entries from March 28, April 4, April 21, among other dates that the defendant’s mood is dependent upon his relationship with Ms. Perrine, which mood changes were situational, and were not be expected with someone with a chemical imbalance. 297: 14 – 19; 302:8 – 24; 305:1 – 15; 304:8 – 21. Dr. Clayman further testified that the Defendant’s mood appeared to be dependent upon external factors, specifically his relationship with the woman he killed, Jenny Perrine. 308:11 – 15.

Dr. Clayman’s testimony continued on June 14, 2012. On that day he testified that he did not believe the defendant was suffering from a severe mental illness. June 14, 2012 Transcript 11:19 – 20. Dr. Clayman also testified at length about his interview of the defendant and the defendant’s memory of events surrounding the killing of Jenny Perrine. The defendant told Dr. Clayman that he could remember: going fishing by the river a few days before the shooting, including that he took a photo of the stream and sent it to Ms. Perrine; that he and Ms. Perrine argued over her decision to go to the gym; that on July 14, 2011 Ms. Perrine “didn’t care about me or my kids” she was just worried about her dog; the details of the argument he and Ms. Perrine had on July 14; that he was supposed to meet Ms. Perrine at the Ranson park on July 15; that he instead understood he was to meet her at Wal-Mart; that they had a conversation about the confusion of where to meet; that he intended to shoot himself in front of her. *Id.* at 13:16 – 14: 4; 17: 7 – 18: 4; 18:18 – 19:7. Dr. Clayman testified that the Defendant told him, “It boiled down to it made me feel like she loved that dog more than me and my kids.” 19: 9 – 11. Dr. Clayman opined, “in total he had recall of the events of that time.” *Id.* at 20: 16 – 17.

However the defendant claimed he had no memory of the shooting or the few minutes preceding it. *Id.* at 26:7 – 15. Dr. Clayman testified that the defendant had specific memories of events, “all but for on that day of work [he’s] declaring he doesn’t remember what he was doing at work that day and the event surrounding what went on there. He has a fairly good recollection of almost everything else that I asked him about.” *Id.* at 27:8 – 14. In response to questions about whether the defendant’s behavior was consistent with the “trance-like state” as was attributed to him by a defense expert, Dr. Clayman responded:

His explanation about driving down the highway and missing your exit, things like that, if that is trance-like, yes, I do understand that. That is not part of what was going on here. People get distracted, that is not a trance-like state. They just forget things. I think that trance-like states are very controversial. There is a thing called sociographs, I think Dr. Lewis mentioned that in his testimony, there is no evidence nobody proffered anything this was a diassociative state. It just isn’t. It’s not reflective of a trance-like state.

Id. at 29:8 – 18. Moreover, Dr. Clayman testified that the Defendant’s journal does not include a single reference to adverse reactions medication in the month prior to the killing of Ms. Perrine.

Id. at 35:5 – 19.

Dr. Clayman opined that without a mental disorder there can be no diminished capacity.

Id. at 40: 14 – 19. Further, in his evaluation of the Defendant, Dr. Clayman reviewed medical records from the VA:

looking for examples of concrete behaviors where he is out of control, where his judgment is impaired, where he is not able to function, where he is not carrying on activities of daily living, when he’s not doing the things that you would expect that might lead to involvement in the criminal event.

Id. at 44:17 – 22. Instead, Dr. Clayman found that “he was taking care of his kids. He was going to work. He worked for 14 years. . .” and that he “functions normally.” *Id.* at 45:15 – 16; 53:18.

Dr. Clayman opined that the defendant acted purposefully on July 15, 2011, and was “evidencing goal behavior related to reality,” *Id.* at 65, and that, “As far as the record shows, he went to work in the morning. He did texting. He did phone calling. He did all of that behavior is purposeful and goal directed. It was not scattered. It was not. It was in service of a goal, of service of going somewhere.” *Id.* at 66: 1 – 6. Dr. Clayman opined that he believed that the Defendant’s text message to his ex-wife that he was “going to kill Jen” and the subsequent shooting of Jenny Perrine four minutes later, indicated that the Defendant was fully conscious of what he was about to do. *Id.* at 73:6 - 10. Further, Dr. Clayman testified that the Defendant was in touch with reality, “He knows what is going on. He knows where he is. He knows what is going on. He could identify himself. I don’t find anything there that is suggestive of a thought disorder or any kind of an aberration of emotion, none at all.” *Id.* at 78:9 – 14. Dr. Clayman testified that there was nothing to indicate the defendant suffered from psychosis, delusions, hallucination, or a break with reality. *Id.* at 80:1 – 10.

ALLEGED ASSIGNMENTS OF ERROR

- I. The Circuit Court erred when it failed to suppress all evidence that was seized pursuant to illegal searches and seizures.
 - A. Standard of Review
 - B. The Circuit Court erred when it failed to suppress the evidence seized from the search of Defendant's vehicle where the search conducted pursuant to a search warrant that contained a bare bones affidavit.
 - C. The Circuit Court erred when it failed to suppress the information that was obtained from the search of Defendant's cellular phone.
- II. The Circuit Court erred when it failed to suppress Defendant's statements that were elicited in violation of his rights.
 - A. Standard of Review
 - B. The Circuit Court erred when it failed to suppress Defendant's statements that were elicited in violation of his Miranda rights.
 1. Statement to Captain Stevens in Southern States Parking Lot.
 2. Statement to Corporal Norris in Police Cruiser
 3. Statement to Corporal Norris in Interview Room
 4. Statement to Patrolman Henderson while being booked.
 - C. The Circuit Court erred when it failed to suppress Defendant's statements that the investigating officers elicited in violation of his Sixth Amendment Right to Counsel.
 - D. The Circuit Court erred when it allowed the State to enter Defendant's statements that were suppressed pursuant to Miranda in the States' rebuttal case where the defendant had not testified.
- III. The Circuit Court erred in denying Defendant's motion to suppress statements made to the State's psychological expert, Dr. David Clayman, or in the alternative, to strike Dr. Clayman's testimony where Dr. Clayman failed to follow the State v. Jackson procedures by recording his entire interview of the Defendant.
- IV. The Circuit Court erred in rejecting the Defendant's motion to have the State present its medical and psychological evidence as to Defendant's state of mind in the State's case-in-chief.
- V. The State's Brady violation requires this court to grant a new trial.
 - A. Standard of Review
 - B. Due Process Violation under Brady v. Maryland.
 1. The evidence was favorable to Defendant as both exculpatory evidence and impeachment evidence.
 2. The evidence was inadvertently suppressed by the State until the penultimate day of trial.
 3. The evidence was material and the late disclosure on the penultimate day of trial prejudiced the defense.
- VI. The State's publishing of Defendant's invocation of his Fifth Amendment right to remain silent and to counsel, pursuant to Miranda, was reversible error necessitating a new trial be granted.
 - A. Standard of Review

- B. The inadvertent publishing of Defendant's invocation of his right to silence and right to counsel on an overhead projection on the wall of the courtroom violated Defendant's Fifth Amendment Rights.
- VII. Dr. Clayman's reference to defendant's being in jail custody at the time of his interview was reversible error necessitating the granting of a new trial.
- VIII. The Court's failure to allow the Defendant to present a case in surrebuttal improperly shifted the burden of proof.
- IX. Errors during the mercy phase of the trial require granting of a new trial on the issue of mercy.

POINTS AND AUTHORITIES RELIED UPON

United State Constitution

Amendment IV

United States Supreme Court Cases

Aguilar v. Texas, 378 U.S.108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)
 Arizona v. Gant, 556 U.S. 332, 346, 129 S.Ct. 1710, 1721, 173 L.Ed.2d 485 (2009)
 Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)
 Brown v. Illinois, 422 U.S. 590, 610- 611 (1975)
 Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)
 Giordenello v. United States, 357 U.S. 480 (1958)
 Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004)
 Illinois v. Gates, 462 U.S. 213 (1983)
 Jones v. United States, 362 U.S. 269 (1960)
 Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19, L.Ed.2d 576 (1967)
 Massachusetts v. Upton, 466 U.S. 727 (1984)
 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)
 Nathanson v. United States, 290 U.S. 41 (1933)
 New York v. Quarles, 467 U.S.649 (1984)
 Rhode Island v. Innis, 446 U.S. 291, 301 (1980)
 Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)
 Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)
 U.S. v Doyle, 426 U.S. 610 (1976)
 U.S. v. Leon, 468 U.S. 897, 923 (1984)
 United States v. Miller, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976)
 United States v. Ross, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)
 Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).
 Zant v. Stephens, 462 U.S. 862, 900, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)

West Virginia Cases

Brooks v. Worrell, 156 W.Va. 8, 190 S.E.2d 474 (1972)
 Chrystal R. M. v. Charles A. L. 194 W.Va. 138, 459 S.E.2d 415 (1995)
 Humphries v. McBride, 220 W.Va. 363, 647 S.E.2de 798 (2007)

Schofield v. West Virginia Department of Corrections, 185 W.Va. 199, 406 S.E.2d 425 (1991)
State v. Adkins, 176 W.Va. 613, 346 S.E.2d 762 (1986)
State v. Barlow, 181 W.Va. 565, 383 S.E.2d 530 (1989)
State v. Blake, 197 W.Va. 700, 705, 478 S.E.2d 550, 555 (1996)
State v. Blankenship, 137 W.Va. 1, 69 S.E.2d 398 (1952)
State v. Black, 227 W.Va. 297, 708 S.E.2d 491 (2010)
State v. Bookheimer, 221 W.Va. 720, 656 S.E.2d 471 (2007)
State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977)
State v. Bradshaw, 193 W.Va. 519, 457 S.E.2d 456 (1995)
State v. Craft, 131 W.Va. 195, 47 S.E.2d 681 (1948)
State v. Davis, 182 W.Va. 482, 388 S.E.2d 508 (1989)
State v. DeGraw, 196 W.Va. 26, 470 S.E.2d 215 (1996)
State v. Ferguson, 222 W.Va. 73, 662 S.E.2d 515 (2008)
State v. Finley, 219 W.Va. 747, 639 S.E.2d 839 (2006)
State v. George, 185 W.Va. 539, 408 S.E.2d 291 (1991)
State v. Gum, 172 W.Va. 567, 355 S.E.2d 356 (1987)
State v. Hardaway, 182 W.Va. 1, 385 S.E.2d 62, 67 (1989)
State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 401 (1982): (1)
State v. Jackson, 171 W.Va. 329, 298 S.E.2d 866 (1982)
State v. Judy, 179 W.Va. 734, 372 S.E.2d 796
State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991)
State v. Kilmer, 190 W.Va. 617, 439 S.E.2d 881 (1993)
State v. King, 183 W.Va. 440, 396 S.E.2d 402 (1990)
State v. Lacy, 196 W.Va. 104, 468 S.E.2d 719 (1996)
State v. LaRock, 196 W.Va. 294, 460 S.E.2d 613 (1996)
State v. Lowery, 222 W.Va. 284, 288, 664 S.E.2d 169, 173(2008)
State v. Massey, 178 W.Va. 427, 359 S.E.2d 865 (1987)
State v. McLaughlin, 226 W.Va. 229, 700 S.E.2d 289 (2010)
State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986)
State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995)
State v. Murray, 220 W.Va. 735, 649 S.E.2d 509 (2007)
State v. Preece, 181 W.Va. 633, 383 S.E.2d 815 (1989)
State v. Reed, 218 W.Va. 586, 590, 625 S.E.2d 348, 352 (2005)
State v. Ricketts, 219 W.Va. 97, 632 S.E.2d 36 (2006)
State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
State v. Rowe, 163 W.Va. 593, 259 S.E.2d 26 (1979)
State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999)
State v. Staley, 45 W.Va. 792, 32 S.E. 198 (1899)(Emphasis added.)
State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1994).
State v. Thomas, 187 W.Va. 686, 421 S.E.2d 227 (1992)
State v. Welch, 229 W.Va. 647, 734 S.E.2d 194 (2012)
State v. Williams, 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983)
State v. Wilson, 157 W.Va. 1036, 207 S.E.2d 174 (1974)
State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253 (1989)
State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007)

Other Cases

Elisha v. State, 949 So.2d 271 (Fla. App. 2007)
People v. Gutierrez, 222 P.2d 925 (Colo. 2009).

West Virginia Rules

West Virginia Rule of Criminal Procedure 41(c)
West Virginia Rule of Evidence 611

STANDARD OF REVIEW

The standard of review for each ground raised herein is included with that section of this Response.

MEMORANDUM OF LAW

The Defendant asserts fifteen different grounds for appeal which are divided into nine sections. The State has responded in the same manner below.

I. The Circuit Court did not err when it denied Defendant's Motion to Suppress Evidence Seized by the State.

The Defendant argues that the State improperly seized evidence from his automobile and cellular phone and that accordingly the trial court's admission of that evidence supports a reversal of his conviction. However, separate search warrants were properly obtained to search the defendant's automobile, and the contents of the defendant's cell phone. The search warrant for the defendant's automobile which the defendant claims was improper because it was "bare bones" sufficiently states evidence necessary to support a finding of probable cause for the search warrant. Even if this Court were to find that the search warrant was improper, the search and seized evidence were still admissible based on the plain view exception.

Additionally, the text messages which were sent from the Defendant's cellular phone and introduced into evidence by the State were secured from the third party recipient, his ex-wife, Tara Myers who testified regarding her receipt of those messages. Once the Defendant sent those text messages he had no reasonable expectation of privacy for the same; his diminished expectation of privacy combined with the properly obtained search warrant render his argument meritless. Moreover, the State did not introduce any evidence seized from the Defendant's cellular phone, instead, introducing evidence of messages received from the Defendant's cellular phone. Other evidence regarding the defendant's repeated calls and texts were introduced by the Defendant through various State and defense witnesses.

The Fourth Amendment to the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

A. Standard of Review

"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. Because of the highly fact specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error." *Syllabus Point 1, State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996); *Syllabus Point 1, State v. Bookheimer*, 221 W.Va. 720, 656 S.E.2d 471 (2007).

“In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*. Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.” *Syllabus Point 2, State v. Lacy, supra; Syllabus Point 2, State v. Bookheimer, supra.*

“Reviewing courts should grant magistrates deference when reviewing warrants for probable cause.” *Syllabus Point 5, in part, State v. Thomas, 187 W.Va. 686, 421 S.E.2d 227 (1992); Syllabus Point 8, State v. Kilmer, 190 W.Va. 617, 439 S.E.2d 881 (1993).*

B. The search of the Defendant’s car was not in violation of the Fourth Amendment.

Following the defendant’s arrest at the Southern States shortly after he killed Jenny Perrine on July 15, 2011, Ranson Police Officer Tharp sought a search warrant for the Defendant’s Mercury Mariner SUV parked in the Southern States parking lot. A handgun, ammunition magazines and a holster were visible in plain view in the front seat of the car.

1. The search warrant issued for the Defendant’s automobile was proper and supported by a sufficient affidavit.

The narrative portion of the affidavit for a search warrant presented by Officer Tharp to Magistrate Mary Paul Rissler approximately two hours after Ms. Perrine’s death stated, “An investigation into an incident where Mr. Ray Cook shot and killed his estranged girlfriend, Jenny Perrine, at the above named location. His vehicle is located in the parking lot with a weapon,

magazines, and holster visible within the vehicle.” In the first page of the Officer Tharp’s form “Affidavit and Complaint for Search Warrant” sought for “Murder one Jenny Perrine” sworn to before Magistrate May Paul Rissler on July 15, 2011, Officer Tharp identified that the search warrant was for, “Cell Phone)S [sic], papers, weapon(s), magazine(s), holster (s), ammunition, and all other evidence of or items used in connection with the above crimes” and which items were concealed within “a black in color Mercury Mariner (WV NHL981 VIN 4M2YU57115DJ28079) registered to a Ray Cook. Parked at 222 N. Mildred (Southern States). Located 3rd parking space north of W. Beltline”.

The warrant affidavit particularly states the place to be searched, identifying the car by its color, make, model, license plate, VIN (Vehicle Identification Number), ownership and location, down to the exact parking space. The affidavit further states with particularity what is to be seized from the car including a list of six specific items, three of which are visible in plain view from outside the vehicle, and lists one call-all provision for other items used in connection with the first degree murder of Jenny Perrine.

West Virginia Rule of Criminal Procedure 41(c) which governs the issuance of search warrants provides:

A warrant shall issue only on an affidavit or affidavits sworn to before the magistrate or a judge of the circuit court and establishing the grounds for issuing the warrant. If the magistrate or circuit judge is satisfied that grounds for the application exist, or that there is probable cause to believe that they exist, that magistrate or circuit judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the magistrate or circuit judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The

warrant shall be directed to the sheriff or any deputy sheriff of the county, to any member of the department of public safety, or to any police officer of the municipality wherein the property is located, or to any other officer authorized by law to execute such search warrants. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant may be executed either in the day or night. It shall designate a magistrate to whom it shall be returned.

Syllabus Point 3, of *State v. Lacy, supra*, explains:

A search warrant must particularly describe the place to be searched and the things or persons to be seized. In determining whether a specific warrant meets the particularity requirement, a circuit court must inquire whether an executing officer reading the description in the warrant would reasonably know what items are to be seized. In circumstances where detailed particularity is impossible, generic language is permissible if it particularizes the types of items to be seized. When a warrant is the authority for the search, the executing officer must act within the confines of the warrant.

However, Defendant argues that the affidavit prepared by Officer Tharp is “bare bones” and thus the search warrant and subsequent search are invalid and should be suppressed. It is clear that the search warrant prepared by Officer Tharp cited with detailed particularity the place to be searched: the defendant’s car, identified by its color, make, model, license plate, VIN, and location. Further, the warrant detailed what items were sought within the car, namely, cell phones, papers, weapons, magazines, a holster, ammunition and all other evidence of items used in connection with the murder of Jenny Perrine. Defendant claims that there was an insufficient nexus between the affidavit and the criminal activity.

In *State v. Kilmer*, 190 W.Va. 617, 439 S.E.2d 881 (1993), this Court recognized that the critical components of the search warrant sought in that case were present in that the affidavit “does convey to the magistrate that the Appellant was suspected of ‘conspiring to kill and slay one Sharon Lewis:’ that the Appellant was linked to Mr. Lewis in that he occasionally worked

for the victim’s husband; and that the officer had information which placed the Appellant at the crime scene in close proximity to its commission.” 190 W.Va. at 628. Similarly, in this instance, the search warrant conveyed to the magistrate that the Defendant was suspected of shooting and killing his estranged girlfriend, Jenny Perrine, at a specific location, the Southern States in Ranson, and that the Defendant’s vehicle was located in the Southern States parking lot in close proximity to the commission of the crime with a weapon, magazines, and holster visible in plain view. Given the totality of the circumstances, and applying the Kilmer analysis, it appears that sufficient information was presented to the magistrate by the affidavit to support a finding of probable cause, thereby justifying the issuance of the search warrant for the Defendant’s car.

The United States Supreme Court wrote in U.S. v. Leon, 468 U.S. 897, 923 (1984) that suppression remains “an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false. . .” The Leon court also recognized that a judicial officer would not “manifest objective good faith in relying on a warrant based on an affidavit ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” *Id. quoting Brown v. Illinois*, 422 U.S. 590, 610- 611 (1975). The Court also noted that “depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.” 468 U.S. at 923.

However, here there is no allegation that the magistrate was misled in any respect by the search warrant for the Defendant’s car. Additionally, the search warrant affidavit was sufficiently particular as to identify the color, make, model, and VIN of the car, as well as that

the car was registered to the defendant, and to identify the very parking space where the car was located, the third space to the north of Beltline Street. Thus, the particularity of the warrant in specifying the place to be searched and the items to be seized does not suggest that the magistrate acted in bad faith in issuing the warrant. Likewise, nothing suggests that the warrant was so facially deficient that the executing officer could not reasonably presume it to be valid.

In State v. Barlow, 181 W.Va. 565, 383 S.E.2d 530 (1989), this Court upheld a search warrant sought by a State Trooper where the affidavit was based upon information learned from a Deputy Sheriff, and distinguishes such instances from affidavits based upon confidential informants or anonymous tips. In Barlow the Court wrote, “it was not necessary for Trooper Reed to detail information regarding [Deputy] McCauley’s veracity.” 181 W.Va. at 568. The Court held in Syllabus Point 1:

Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers.

The treatment of information received from another law enforcement official was viewed to be separate and distinct from information received from a confidential informant or anonymous tip in regard to the requirement of independent verification of the information in whole or part.

Landmark United States Supreme Court cases previously established that substantial verification is required from confidential informants or anonymous tips. Aguilar v. Texas, 378 U.S.108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

However, as stated by this Court in State v. Adkins, 176 W.Va. 613, 346 S.E.2d 762

(1986), there is also a line of United States Supreme Court cases which rule that:

where a police officer affiant is reciting information obtained from a fellow police officer, it is ordinarily not necessary to detail information with regard to their veracity. *See, e.g., Whiteley v. Warden*, 401 U.S. 560, 568, 91 S.Ct. 1031, 1037, 28 L.Ed.2d 306, 313 (1971) (credibility of police officer); *United States v. Ventresca*, 380 U.S. 102, 111, 85 S.Ct. 741, 747, 13 L.Ed.2d 684, 690 (1965) (credibility of IRS investigator). The same is true of hearsay information obtained from victims or a citizen observer by the affidavit affiant. *See, e.g., United States v. Bell*, 457 F.2d 1231 (5th Cir.1972); *Edmondson v. United States*, 402 F.2d 809 (10th Cir.1968) (credibility of eyewitnesses presumed); *People v. Hester*, 39 Ill.2d 489, 514, 237 N.E.2d 466, 481 (1968) (credibility of ordinary citizen presumed).

176 W.Va. 621, 346 S.E.2d at 771.

The Defendant argues that the affidavit as prepared was “bare bones” and thus insufficient, citing to People v. Gutierrez, 222 P.2d 925 (Colo. 2009). However, even the portions of Gutierrez cited by Defendant support the State’s position. In Gutierrez, the warrant which was issued and later suppressed authorized the search of a tax preparer’s files, including the tax returns of all her clients, without identifying either the tax preparer or Gutierrez as the targets of the search. The court wrote that such a warrant, “permitted an unbridled search conducted, as the trial court described, ‘with the hope of uncovering evidence of criminal activity.’” 222 P.2d at 929. There was not an unbridled search simply for the hope of uncovering some sort of criminal activity here. Rather, a specific crime, murder in the first degree, was committed at a specific location, Southern States, where the victim’s body and the Defendant himself were in close proximity to the commission of the crime, and where his car was also in close proximity to both the Defendant and the location of the commission of the crime. The warrant identified the defendant as the suspect, identified the crime he was being charged with,

sought to search a specific location, identified that location with particularity and identified items sought.

The Defendant argues that the warrant contains “no factual allegation of criminal activity”. However, that assertion fails to mention the first page of the Affidavit and Complaint for Search Warrant (State’s Exhibit 2) which lists the crime as “murder one” and the victim as Jenny Perrine. The Defendant also claims that there is no documentation that the vehicle belongs to the defendant other than the phrase “his vehicle.” Again, the Defendant fails to note the first page of the Affidavit and Complaint for Search Warrant which clearly states that the black in color Mercury Mariner parked at Southern States with West Virginia tag NHL981, with the accompanying VIN, and was “registered to a Ray Cook.”

Defendant next argues that it was impossible for the magistrate to determine whether the affiant personally viewed the weapon, magazine and holster visible within the vehicle. This ground too is without merit, as the United States Court has previously held that a police officer may rely upon information received from other police officers without verifying the same information. *See Whiteley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

Moreover, the Adkins decision relied upon by the Defendant reviews the progression of United States Supreme Court law related to search warrants which were either based on hearsay provided by a confidential informant, or not supported by personal knowledge of the officer seeking the warrant. However, those cases are all distinguishable from the case *sub judice*, or support the State’s position. Nathanson v. United States, 290 U.S. 41 (1933) (“An officer’s statement that ‘[a]ffiants have received reliable information from a credible person and do believe’ that heroin is stored in a home, is likewise inadequate.”), Giordenello v. United States, 357 U.S. 480 (1958)(search warrant affidavit held to be defective because it contained “no

affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein.”), Jones v. United States, 362 U.S. 269 (1960)(hearsay was a permissible basis for a search warrant “so long as a substantial basis for crediting the hearsay is presented.”), Aguilar v. Texas, 378 U.S. 108 (1964)(a search warrant affidavit must (1) show the informant’s “basis of knowledge” and (2) must contain information so the magistrate can determine the informant’s veracity by showing either the informant (a) is credible or (b) has information that is reliable based upon corroboration of the information), Spinelli v. United States, 393 U.S. 410 (1969)(the veracity or credibility of the informant could be supported by either independent corroboration or sufficient detail to demonstrate actual knowledge and not simple rumor), Illinois v. Gates, 462 U.S. 213 (1983)(affidavit based partly upon hearsay in the form of an anonymous letter held permissible when police investigation corroborated some of the information in the letter), Massachusetts v. Upton, 466 U.S. 727 (1984)(affidavit found to be properly issued when it was based upon a informant’s extremely detailed information, part of which was corroborated by the officer seeking the warrant).

In State v. Adkins, *supra*, the defendant’s conviction was reversed and remanded based in part on the issuance of a search warrant by a magistrate who did not swear the requesting officers before they provided information regarding the requested warrant. The Adkins court held in Syllabus Point 3, “Both the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution provide that no warrant shall issue except upon probable cause supported by oath or affirmation.” In contrast, here, Officer Tharp learned of the location of those items within the Defendant’s car from other police officers, then independently verified that information before she sought a search warrant for the defendant’s car based upon her own observation that a “weapon, magazines, and holster [were] visible within the vehicle.”

At the pre-trial hearing on May 15, 2012 , Officer Tharp confirmed that she saw the weapon, magazine and holster inside the Defendant's vehicle in plain view from outside the vehicle. (Tr. May 15, 2012, 33:1 – 7; 43: 6 – 21; 44:15 – 19; 45:1 - 3.)

All of those cases listed above herein, including Adkins, concerned search warrants sought upon hearsay or without a basis of knowledge by the officer seeking the warrant. By contrast, here Officer Tharp personally observed the items in the Defendant's vehicle. She sought a search warrant based upon her personal observation of the probable murder weapon visible in plain view in the Defendant's automobile, following the Defendant's telephone call to 911 Emergency Headquarters of his location at Southern States and that he'd just shot Jenny Perrine, whom he acknowledged was dead at the time of his call.

2. Even if the search warrant is found to be insufficient, a search of the defendant's vehicle without a warrant was permissible.

Even if this court were to find that the affidavit for the search warrant for the defendant's car was insufficient, nonetheless the officer had authority to perform a search of the defendant's car pursuant to his lawful arrest based upon the weapon, magazines and holster all being in plain view inside the car.

In Arizona v. Gant, 556 U.S. 332, 346, 129 S.Ct. 1710, 1721, 173 L.Ed.2d 485 (2009), the Supreme Court held that an officer may "conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest." The Gant decision notes that "if there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), authorizes a search of any area of the vehicle in which the evidence might be found."

Pursuant to Arizona v. Gant, a search of the defendant's vehicle was justified because it was reasonable to believe that the vehicle contained evidence of criminal activity, specifically the murder weapon, based upon a firearm being in plain view in the front seat of the car. Moreover, under the holding of United States v. Ross, a search of any area of the defendant's automobile where evidence of criminal activity might be found—not just those areas under the defendant's immediate control—was justified based upon the existence of probable cause to believe that evidence might be found within the vehicle. More significantly, neither of those cases are based upon the evidence being located within plain view, which it was here.

In *Syllabus Point 3* of State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991), this Court articulated the plain view exception to the requirement of obtaining a search warrant pursuant to the Fourth Amendment when it held:

The essential predicates of a plain view warrantless seizure are (1) that the officer did not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed; (2) that the item was in plain view and its incriminating character was also immediately apparent; and (3) that not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself.

The three elements were all present in this case. Various officers observed the gun in the seat of the defendant's vehicle located at the scene of the shooting of Jenny Perrine, and the defendant was in close proximity to his car when law enforcement arrived on the scene. Moreover, the defendant advised the 911 operator that his gun was "in the seat". Joint Exhibit 1, 8:11 – 12. Pursuant to the defendant's phone call to 911² police immediately responded to an active shooting at the scene. Additionally, Captain Stevens testified that when he arrived at Southern States and interacted with the defendant, who identified himself as the shooter, "As I was

² Other callers to 911 also reported they saw the shooting or heard shots at Southern States.

searching him, I was conducting a search pat down, I don't remember if I asked him where the gun was, or if he stated the gun – just stated the gun was there and indicated by looking at his SUV.” June 6, 2012 Transcript, 154: 8 – 11. Although Officer Tharp was advised by colleagues that a firearm and other evidence were in plain view inside the Defendant's automobile, she also personally verified the presence of the firearm inside the car.

Applying the three-part test articulated in State v. Julius, *supra*, it is clear that a warrantless search of the Defendant's car was also permissible. Because police officers arrived on the scene in response to calls to 911, including the Defendant's call to Emergency Headquarters to advise he had just shot someone, there was no violation of the Fourth Amendment by the police arrival on the scene. The officers were aware prior to their arrival that a shooting had occurred. Once they arrived on scene, the officers ascertained that the victim, Ms. Perrine, was shot and deceased. The firearm in plain view in the defendant's car was clearly incriminating and immediately apparent. The police officers present in the parking lot of Southern States were there lawfully, and they were able to plainly see the weapon in the defendant's car and had a lawful right to access the gun incident to the Defendant's arrest. Thus, pursuant to the three-part test stated in State v. Julius, police were justified in a search of the vehicle incident to a lawful arrest even without obtaining a search warrant. Notwithstanding that justification, law enforcement further attempted to protect the defendant's Fourth Amendment rights by obtaining a search warrant which was sufficient in its particulars, stating the place to be search and the items to be seized within it.

3. The search warrant for the Defendant's cellular phone and seizure of evidence from that phone was lawful.

Petitioner next argues that the search warrant for his cellular phone was bare bones and thus invalid. The search warrant prepared for the cellular phone was prepared several days after arrest with a longer narrative portion. It included that it was to search the cellular phone “concealed in Room 205 @ 700 North Preston Street, Ranson, WV”. It stretches credulity to imagine that the search warrant for the cell phone was intended to determine if any physical evidence was contained within the cellular phone. The ordinary plain meaning of the warrant sought to search the cellular phone was to search the information contained within the cellular phone. To follow the logic of the defendant if the search warrant was for a book or journal belonging to the defendant locating the book itself, perhaps to determine if DNA evidence was located on the outside of the book, would be permissible, but to seize the book, then to read the book to determine if it contained any evidence would be inadmissible. Such a result is untenable. Giving the search warrant its plain, ordinary meaning, a search of the contents of the cellular phone was what was sought.

Defendant cites to Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), to support his contention that the search warrant in this case did not state with sufficient particularity the items to be seized. In Groh, in the blank space in the search warrant form for a description of the person or property to be seized was inserted a description of the respondents’ two story blue house, rather than a description of the alleged stockpile of firearms. The government argued that although the warrant itself lacked the description of the explosives and firearms sought, the application included such a description. However, the Groh court soundly rejected that argument, stating that “[t]he fact that the *application* adequately described the

‘things to be seized’ does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents.” 540 U.S. at 557 (emphasis in original). By comparison, here, the warrant includes with particularity the items to be seized and there is no argument by the Petitioner that the warrant is facially deficient in that respect. Instead he argues that the warrant is deficient because it does not state that the contents of the cellular phone may be searched. The defendant further argues that the place to be searched lists the evidence room instead of the cell phone. The warrant actually reads that the item to be searched is *concealed* within the evidence room, not that the evidence room is what is to be searched.

Even if the evidence seized from the phone pursuant to the search warrant was found to be invalid, the text messages which were entered into evidence by the State at the trial were received by police from one of the recipients who appeared at trial and testified about her receipt of the messages from the Defendant. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19, L.Ed.2d 576 (1967), articulates a two-prong analysis for whether a defendant has a reasonable expectation of privacy in evidence which he seeks to suppress. A defendant must demonstrate that he has “exhibited an actual (subjective) expectation of privacy and, [] that the expectation [is] one that society is prepared to recognize as ‘reasonable.’” 389 U.S. at 361.

In United States v. Miller, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), the Supreme Court held that when a person voluntarily discloses information to a third party, even for a limited purpose, that person usually ceases to have a reasonable expectation of privacy in such information under the Fourth Amendment because he assumes the risk that third party may reveal that information to the government.

Here, the defendant voluntarily sent a series of text messages to his ex-wife one of which revealed that he was “about to kill Jen.” Less than five minutes after the Defendant sent that text message he shot and killed Jenny Perrine. The Defendant assumed the risk that the third party he sent that message to would reveal the information to the government. In fact, Ms. Myers did just that. She contacted police and shared the text messages on her phone that she had received from the Defendant on July 15, 2011.

The Defendant did not have a spousal privilege with Ms. Myers on that date, having been divorced from her for some time. Ms. Myers was remarried already on July 15, 2011 but remained in regular contact with the Defendant with whom she had three children. Accordingly, when the defendant voluntarily disclosed to Ms. Myers that he was about to kill Jen he had no reasonable expectation of privacy in that message.

The Defendant is unable demonstrate that he has an actual expectation of privacy in the text messages he sent to Ms. Myers, and that such an expectation would be recognized as reasonable. Accordingly, the evidence of the Defendant’s text messages received by police from Ms. Myers, and entered into evidence through her testimony were permissible and the trial court properly permitted the evidence.

II. The statements of the Defendant were properly admitted into evidence.

A. Standard of Review.

“On appeal, legal conclusions made with regard to suppression determinations are reviewed de novo. Factual determination upon which these legal conclusions are based are reviewed under the clearly erroneous standard.” *Syllabus Point 3, State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

“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.” *Syllabus Point 6, State v. Hardaway*, 182 W.Va. 1, 385 S.E.2d 62, 67 (1989).

“Volunteered admissions by a defendant are not inadmissible because the procedural safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were not followed, unless the defendant was both in custody and being interrogated at the time the admission was uttered.” *Syllabus Point 3, State v. Judy*, 179 W.Va. 734, 372 S.E.2d 796 (1988) quoting *Syllabus Point 2, State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979).

A defendant who volunteers a statement during the booking process cannot later claim a Miranda violation. *State v. Judy, supra*.

B. The Circuit Court properly admitted the defendant’s statements made to law enforcement during his arrest and booking.

1. Statement to Captain Stevens at Southern States.

Captain Stevens testified that he was one of the first officers to arrive at the scene, and that the defendant was the only person in the parking lot. When he arrived in the parking lot, initially Captain Stevens was facing the defendant’s back. As Captain Stevens drove into the parking lot the defendant turned and faced Captain Stevens’ cruiser. Captain Stevens exited his cruiser with his weapon drawn. The defendant dropped his wallet and cell phone without being ordered to do so. He then made the statement, “I’m okay, but she needs help. Go check on her.” He then voluntarily dropped to his knees and placed his hands behind his head in the classic surrender position. Captain Stevens approached the defendant and placed him into handcuffs. The defendant then stated “I shot her.” He then paused and added, “I don’t normally act like

this, but I didn't take my medication." During this interaction and pat down by Captain Stevens the defendant then indicated that his gun was inside his SUV parked nearby.

The defendant's statements to Captain Stevens were voluntarily given with little or no prompting from Captain Stevens or anyone else. The Defendant was ready, and even eager, to take responsibility for killing Ms. Perrine. By the time police arrived at the scene the Defendant had already reported to 911 Emergency Headquarters operator Brandon Potts that he had killed Ms. Perrine, identifying himself as the shooter, providing his name, cellular phone number, a description of his car, the identity of the victim, and a motive for the killing. Subsequently, he made additional admissions in the presence of other officers.

Additionally, the initial detention of the defendant was not a formal arrest, but rather, a detention to ensure officer safety while the officers investigated the crime. The detention took place in the middle of the day, next to a busy road, in a public parking lot. The officers were told by 911 operators that there was a shooting in progress. The officers came to the scene and saw the defendant in an otherwise deserted parking lot. At this time they did not have probable cause to make an arrest, but the circumstances demanded that the officers take immediate action to ensure public safety. Thus, pursuant to the dictates of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the officers had the authority to pat down the defendant and briefly detain him while they determined what had taken place. Immediately after Captain Stevens detained the defendant he made the admission, "I shot her," and then added, "I don't usually act like this, but I didn't take my medications." At this point the officers had probable cause to make an arrest.

It is well established that a person is not taken into custody for purposes of Miranda when he is detained under Terry. Further, statements made during a Terry stop are not inadmissible

because the defendant was not read his Miranda rights. State v. Hardaway, 182 W.Va. 1, 385 S.E.2d 62, 67 (1989)(questioning performed in a suspect's home was not custodial interrogation). This is true even if the questioning is done in a police car.

In State v. George, 185 W.Va. 539, 408 S.E.2d 291 (1991), the defendant was approached by law enforcement officers who exited their cars with guns drawn, as occurred here. George was then placed in front of his car, with his hands on the hood while his person was searched. Then following the defendant's permission to do so, the officers searched his vehicle. The questioning of the defendant then occurred inside the police car. In its decision in George the Court stated, "[i]t is clear that in this jurisdiction *Miranda* warnings are required only when a suspect has either been 'formally arrested or subjected to custodial interrogation.'" George, *supra*, at 297, *Quoting Syllabus Point 1*, in part, State v. Preece, 181 W.Va. 633, 383 S.E.2d 815 (1989). The court in George concluded that the defendant was not held for any lengthy period of time, and the questions were investigatory." *Id.*

Here the officers who responded to the scene were reporting to an active shooting and exited their vehicles with guns drawn. The questions posed to the Petitioner by Captain Stevens were investigatory, the Petitioner was not held for any lengthy period of time during those minimal investigatory questions and during that time the defendant, within seconds, confessed to shooting and killing Ms. Perrine. Upon establishing probable cause for arrest the Petitioner was placed under arrest and later transported to the police station and read his Miranda rights. While Captain Stevens performed his investigatory detention of the Petitioner pursuant to Terry, the requirements of Miranda did not apply.

In State v. Gum, 172 W.Va. 567, 355 S.E.2d 356 (1987), this court stated that, "the informal questioning which took place [] as part of the preliminary investigation of the victim's

death did not take place in a custodial or coercive setting. Therefore, there was no duty to give the appellant [] Miranda warnings, and the information elicited was admissible at trial.”

The State further asserts that even if the Court were to find Miranda applicable to the initial encounter between Captain Stevens and the defendant, then the statements are still admissible pursuant to the “public safety” exception to the procedural requirements of Miranda. This exception was recognized by the United States Supreme Court in the case of New York v. Quarles, 467 U.S.649, 104 S. Ct. 2626, 81 L.Ed.2d 550 (1984). The Court held in that case that, “the need for answers in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.” The Court went on to state:

We decline to place officers . . . in the untenable position of having to consider, often in matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warning and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

There cannot be any serious dispute that the officers responded to a scene that posed a serious risk to public safety on July 15, 2011. They were responding to a call of a shooting in progress. As Captain Steven understood the situation, a person was armed with a firearm and was shooting it in a public place, possibly inside the Southern States store. His overriding responsibilities were to find the person, immediately disarm him, find the weapon, and secure the scene. He arrived at the scene and saw the defendant standing alone in a deserted parking lot around 2:30 p.m. on a Friday afternoon. Captain Stevens drew his weapon and the defendant voluntarily assumed the surrender position. Captain Stevens then approached the Defendant and placed him in handcuffs. The location of the weapon was still uncertain, and it was unknown if

there was another shooter. Under these circumstances Captain Stevens can hardly be faulted for choosing not to pause to locate and execute a Miranda rights form. For this precise reason the Court in Quarles adopted the public safety exception, and accordingly, the Circuit Court properly admitted this statement of the defendant's.

2. Statement to Corporal Norris in the Police Cruiser

After the Defendant was placed in handcuffs, Corporal Norris of the Ranson Police Department arrived on the scene, located in the city of Ranson, and the control of the crime scene was turned over to him by Captain Stevens of Charles Town Police. The items abandoned by the defendant at the scene, a wallet, cell phone and hat, as well as physical custody of the defendant himself were taken over by Corporal Norris who then placed the defendant in the back of his police cruiser. The following exchange was captured by the recording equipment in Corporal Norris' police cruiser:

OFFICER NORRIS: You in there?

DEFENDANT: Yeah, I think something is in my shoe. Feels like glass. I'm sorry. That's a stick right there.

OFFICER NORRIS: You got it good.

DEFENDANT: See that big stick? Sorry. Don't worry about it. See it on the side of my sock? Sticking the shit out of me. I'm sorry.

OFFICER NORRIS: Hey, man, you do me a favor?

DEFENDANT: Yes, sir.

OFFICER NORRIS: You sit right ther and you don't start acting out, all right?

DEFENDANT: I'm good.

OFFICER NORRIS: You need to relax and stay put.

DEFENDANT: I'm not on my bipolar meds.

OFFICER NORRIS: I'm not worried about your problems.

DEFENDANT: I know, sir.

OFFICER NORRIS: Hey, may, sit right in that seat.

DEFENDANT: Oh, like this?

OFFICER NORRIS: Yeah.

DEFENDANT: Okay, sorry. I'm so sorry, you all.
Sir.

Corporal Norris was not questioning the defendant about any matter at the time and certainly not questioning him about the events that had just transpired. In fact, Corporal Norris heard to responded to one of the defendant's complaints by saying, "I'm not worried about your problems." At no time while the defendant was in his cruiser did Corporal Norris question him about the events which led to his arrest. All statements made by the defendant in Corporal Norris' cruiser were entirely voluntary.

In order for the Court to find a *Miranda* violation, there must be evidence that the statements were the result of an interrogation. Interrogation has been defined by the United States and West Virginia Supreme Court as "express questioning or any words or actions on the part of the police [] that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Kilmer, supra, quoting Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). None of the questions or statements of Corporal Norris in the above exchange can remotely be deemed the result of an interrogation. In fact, Corporal Norris attempted to prevent the defendant from engaging in any conversation by telling him that he is "not worried about

your problems.” There is no reference to the homicide of Ms. Perrine in any of the exchanges. Accordingly, although the defendant was in custody, there was no custodial interrogation, and therefore, no violation of Miranda.

Thus, because the statements made by the defendant in Corporal Norris’ cruiser were spontaneous and voluntary and not based upon any questioning of the defendant, there was no custodial interrogation, and no ground to suppress those statements, and the Circuit Court properly admitted those statements at trial.

3. Statement to Corporal Norris in the Interview Room

After the crime scene was secured, Corporal Norris transported the defendant to the Ranson Police Department for processing. The Defendant was placed in an interview room and sat in a chair next to a table in that room while Corporal Norris left the room for a short period. A video recording device played throughout the time the Defendant was brought into the room. Approximately 20 minutes after being seated in the interview room Corporal Norris entered with a Miranda rights form. He removed the defendant’s handcuffs. Before going over the form, Corporal Norris asked the defendant some preliminary questions designed to ensure that he could read, write and understand the form. The defendant answered the questions. One of the questions concerned whether or not the defendant was at the time under the influence of drugs or alcohol. Corporal Norris asked whether the defendant was prescribed medication and the defendant responded, “I got Seroquel, but I don’t take it.” State’s Exhibit 39, Transcript, 3: 24. The Defendant also told Corporal Norris that he did not take his prescription medication that day, but that he had taken his medication yesterday. *Id.* at 4:9 – 11. Corporal Norris then read the defendant his *Miranda* rights. After being read his *Miranda* rights the defendant told Corporal Norris that he wished to “lawyer up” and seek the advice of counsel. At this time Corporal

Norris terminated the interview. Officer Norris then asked the defendant to remove jewelry and other items from his person. The defendant started to comply. Corporal Norris was given a necklace and asked the defendant if it was his necklace. *Id.* at 6. The defendant responded, “No. That’s actually hers.” *Id.* Corporal Norris asked, “when did you get ahold of this?” The defendant responded that he had had the necklace since he and the decedent split up. Then, without any prompting by Corporal Norris, the defendant continued, “She just gave me so much hope and then kept fucking with me. I’m so tired of it.” At this point Officer Norris even made an attempt to stop the outburst by interjecting, “All right. “Let me get—” before being interrupted by the defendant who says, “everything I fucking done for her.” *Id.* at 7.

Before leaving the room Corporal Norris and while placing handcuffs back on the defendant Corporal Norris noticed that the defendant had a cut or scratch on his arm near the location where the handcuffs were. Officer Norris asked, “did you get that scratch today?” The defendant responded, “I guess. When I called 911 to them what was going on they told me to check on her. I was like I don’t want to. They said you need to.” Next, while placing the handcuffs back on the defendant Officer Norris asked, “Are you okay with that?” referring to the tightness of the handcuffs. The defendant then responded, “I put my arm through the window and cut my wrist.” Officer Norris made no attempt to follow up on this comment or inquire about the details of the shooting but instead directed the defendant back to the cut on his wrist, “I mean you don’t have any other cuts on you.” Such redirection shows that Corporal Norris’ intent was to determine the extent of any injury to the defendant and not to elicit incriminating responses from him. *Id.* at 7 – 8.

The defendant claims that the statements made in the interview room are inadmissible because they were taken in violation of his 6th Amendment right to counsel. The state asserts that

for there to be a violation of the defendant's 6th Amendment right to counsel the statements must be "deliberately elicited." Interrogation has been defined by the United States and West Virginia Supreme Courts as "express questioning or any words or actions on the part of the police...that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Kilmer*, 190 W.Va. 617, 439 S.E.2d 881 (1993), quoting *Rhode Island v. Innis*, 446 U.S. 291 at 301 (1980).

Thus, the inquiry must be whether or not Officer Norris' questions were reasonably likely to elicit an incriminating response. The question about whether the defendant was on any medication before he was read his *Miranda* rights was not designed to elicit an incriminating response, rather, it is a routine question designed to ensure that the suspect is able to able to comprehend the list of rights the officer was about to go over with him.

This pattern continued when the Corporal Norris asked, "did you get that scratch today?" referring to the scratch on the defendant's wrist and the defendant responded, "I put the arm through the window and cut my wrist." Corporal Norris in asking this question was checking on the defendant's well-being and attempting to ascertain if he needed medical attention. This is evidenced by his follow up question, "You don't have any other kind of cuts on you?" When the defendant answered no, Corporal Norris told him to "sit tight" and left the room. The only other interaction between the defendant and Officer Norris in the interview room is when Officer Norris checked on the defendant to see if he needed anything to drink or to use the restroom.

Accordingly, the defendant's statements to Officer Norris were neither reasonably likely to nor deliberately designed by the officer to elicit an incriminating response and therefore, were properly admitted.

4. Statement to Officer Henderson while being Booked

Officer Henderson testified that during the booking process that the Petitioner voluntarily stated, "I am sorry that I screwed everybody's life up." Some of the authority cited by the Petitioner to suppress that statement in fact supports the admission of the statement to Officer Henderson. Petitioner cites to State v. Bradshaw, 193 W.Va. 519, 457 S.E.2d 456 (1995), which itself cites Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981):

The Supreme Court added another layer [] [of] protection in *Edwards v. Arizona*, and its progeny, by holding that once a defendant invokes his right to an attorney under Miranda, the defendant must reinitiate contact in order for the authorities to resume interrogation.

193 W.Va. at 528. Although police officers did not resume any interrogation of the Defendant after the Defendant's invocation of his right to counsel in the interview room, the Defendant initiated contact with Officer Henderson when he blurted out that he was sorry for screwing everybody's life up.

The State asserts that such a statement made by the defendant was not the result of any police questioning about the crime. Thus, pursuant to the holding of State v. Judy, 179 W.Va. 734, 372 S.E.2d 796 (1988) there is no issue as to a Fifth or Sixth Amendment violation. The Court in Judy held in Syllabus Point 3 that:

Volunteered admissions by a defendant are not inadmissible because the procedural safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were not followed, unless the defendant was both in custody and being interrogated at the time the admission was uttered. *Syllabus Point 2, State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979).

The statement of the defendant to Officer Henderson was made during the booking process, not during the interrogation of the defendant, and was not the result of questioning by

anyone. Thus, pursuant to Judy, *supra*, that statement is not barred and was properly admitted by the Circuit Court.

C. There was no error by the Circuit Court in relation to a statement neither admitted, nor attempted to be admitted at trial.

Defendant is without standing to challenge an event which never occurred. Defendant argues that the Circuit Court erred because at Pre-Trial, before it had ruled on the admission of a statement made by the Defendant to Lt. Roberts while being transported to jail, the State advised the court that it did not intend to introduce that statement at trial.

Defendant argues that “if the State had not withdrawn its intent to enter this statement into evidence, it is clear that it would have been suppressed.” However, the State did withdraw its intent to enter the statement into evidence, and accordingly, the Circuit Court had no need to rule on the matter, and thus acted properly. Moreover, citation appears unnecessary to support the contention that the defendant has no standing to challenge an injury which he did not suffer.

D. The Circuit Court properly applied the holding of *State v. DeGraw* when it admitted the Defendant’s previously inadmissible statements in Rebuttal.

Defendant claims the Circuit Court improperly applied the holding of *Syllabus Point 3* of State v. DeGraw, 196 W.Va. 26, 470 S.E.2d 215 (1996) which provides:

When a defendant offers the testimony of an expert in the course of presenting a defense such as the insanity defense or the diminished capacity defense, which calls into question the defendant's mental condition at the time the crime occurred, and the expert's opinion is based, to any appreciable extent, on the defendant's statements to the expert, the State may offer in evidence a statement the defendant voluntarily gave to police, which otherwise is found to be inadmissible in the State's case-in-chief, solely for impeachment purposes either during the

cross-examination of the expert or in rebuttal, even though the defendant never takes the witness stand to testify.

This syllabus point exactly mirrors the situation in this case. In DeGraw, the defendant was accused of murdering a female neighbor by multiple stab wounds. The defendant's mother testified that she saw her son with a bloody butcher knife at 7:00 a.m. on the day of the murder and that his hand was bleeding. The defendant relied upon the diminished capacity defense based upon his diagnosis of bipolar disorder, together with an antisocial personality disorder, combined with his consumption of three Percocet prescription medication pills, the huffing of paint fumes, and his alcoholic intoxication the night before and morning of the murder. The defense expert testified that DeGraw claimed to have a loss of memory on the morning of the murder.

The State presented rebuttal testimony including a detective who when transporting³ the defendant from Michigan to West Virginia saw the injury to his "hand and remarked, 'I know how you got that,' to which [DeGraw] responded, 'You've talked to mama.'" DeGraw, 196 W.Va. at 267. The detective also testified that DeGraw remarked on the different route the police were using from the route he used previously in traveling to Michigan.

The defendant offered the testimony of Dr. Bernard Lewis and Dr. Robert Novello to advance the defense that he was under a diminished capacity to form the intention or mental state necessary to commit first degree murder at the time he shot Jenny Perrine. The defendant did not testify.

In DeGraw and here the "State was offering the defendant's illegally obtained statement not to impeach a defense witness' testimony, but to impeach the contradictory statements the defendant made to that witness." 196 W.Va. at 268. In response to the question, "Where is it in

³ The defendant was transported from Michigan back to West Virginia pursuant to a fugitive warrant.

any of the records or even in your discussions with the Defendant that he claims to have lost contact with reality?” Dr. Lewis responded in part that:

for an obviously intelligent man to not know what is going on when he is at the police station after what had occurred strongly suggests to me that he is out of touch with reality. So even as late as when he is being questioned by the police and he doesn't know what is going on. . . it was when he was in jail that he began to understand that she was dead. So that is a pretty strong definition of how out of contact with reality [he was].

June 8, 2012 Transcript, 43:10 – 21. Dr. Lewis' testimony was based in part on the defendant's statements to Dr. Lewis, however, those statements were contradictory to statements the defendant made in police custody after he exercised his right to counsel. While the Defendant was in custody at the police station Corporal Norris was placing handcuffs on the Defendant and noticed the Defendant had a cut on his wrist. Corporal Norris inquired when, not how, he got the cut and the Defendant responded that he cut his wrist while acting upon the direction of the 911 Operator to reach into the car to check on Ms. Perrine after the shooting.

Although the court properly found those statements made after the defendant exercised his right to counsel were not permissible in the State's case in chief, under the holding of *Syllabus Point 3* of DeGraw and the rationale explained in the case, it is clear the trial court properly admitted those same statements to impeach the contradictory statements made to Dr. Lewis. A comparison with DeGraw shows that both defendants claimed to have no memory of the murder, both claimed to have bipolar disorder combined with an intoxicating effect based upon prescription medication, both had a cut on his hand or wrist, and both defendants had clear memories of some details of the day the murders were committed. The contradictory statements made by the defendant—one to Dr. Lewis wherein he claimed to have no memory of events—

and one to Corporal Norris—wherein he demonstrated a clear memory of events—were properly admitted in the State’s rebuttal case to impeach the expert witness who relied on the statements.

III. The Circuit Court properly admitted the testimony of the State’s expert witness.

The Petitioner next asserts that the trial court committed reversible error when it denied the defendant’s motion to suppress statements made to the State’s psychological expert, Dr. David Clayman, because, *inter alia*, Dr. Clayman allegedly failed to follow the procedures for recording such a statement mandated by State v. Jackson, 171 W.Va. 329, 298 S.E.2d 866 (1982). Additionally, the Petitioner then argues that the references made at trial by Dr. Clayman to statements made by the defendant in the interview were improper because the interview was the equivalent to an interrogation of the Petitioner without counsel present.

Petitioner filed a notice of intent to present a mental defense and provided the Respondent with expert disclosures from its expert psychologist and psychiatrist. The State’s then moved the Court to order an independent forensic evaluation pursuant to West Virginia Code §27-6A-1, et seq. A hearing on this motion was held on March 26, 2012, with all parties present at which time the Court entered an order entitled “Forensic Evaluation and Payment Order”. On page two of that order the Court outlined the following procedure to be followed in conducting the forensic evaluation:

Moreover, pursuant to *State v. Jackson*, 298 S.E.2d 866 (W.Va. 1982), it is ORDERED that the entire interview of the Defendant shall be tape recorded and that the tape-recording of the entire interview shall be given to Defendant’s counsel and the State. Furthermore, an *in camera* hearing will be held at the pre-trial hearing in this matter to guarantee that the court-ordered psychiatrist’s testimony will not contain any incriminating statements made by the defendant that are not germane to an issue respecting mental condition on which the defendant has introduced testimony.

The Petitioner's complaint that the procedure outlined in Jackson, *supra.*, was violated is not based on the fact that the defendant was not read his *Miranda* rights. There was a lengthy discussion between Dr. Clayman and the defendant about his rights and Dr. Clayman made clear the matters discussed were in the interview were not going to be confidential. May 24, 2012 Transcript, 134. Additionally, there is no allegation that the interview was not recorded. It was. The recording of the interview is approximately three and one half hours long.

The sole allegation made by the Petitioner of an alleged Jackson violation at the May 24, 2012, pre-trial hearing was that, according to Petitioner's counsel at the time, there were three momentary gaps in the recording when the tape was recording device was turned off by Dr. Clayman. The Petitioner did not allege that the gaps were intentional. In fact, counsel for the Petitioner specifically denied making such a claim. While cross-examining Dr. Clayman Petitioner's counsel stated to Dr. Clayman that the gaps were "[j]ust human error. I am not suggesting otherwise, doctor." May 24, 2012 Transcript 101:7 – 8. Nor was there any evidence before the trial court that any topic of substance was discussed during the gaps. At least one of the gaps occurred while Dr. Clayman was conducting a routine check of the defendant for complaints of physical illness. May 24, 2012 Transcript 98 – 99. Dr. Clayman estimated that in totality the tape recording was missing about five to six minutes of the three and one half hour recording. *Id.* The Petitioner himself testified that he was aware of brief times when the recorder was turned off, but did not recall what was being discussed. *Id.* at 126. Presumably, if the topic had been of some importance the Petitioner would have recalled the topic being discussed. The Petitioner also testified that one time he told Dr. Clayman that recorder was off and Dr. Clayman thanked him and immediately turned on the recorder. *Id.* at 127.

Reviewing the evidence introduced before the trial court, it is evident that the State and Dr. Clayman substantively complied with the procedure outlined by the trial court's March 26, 2012, order and by this Court in Jackson. It is also abundantly clear that any alleged violation of the Jackson procedure was of a technical, not substantive, nature. The Petitioner's counsel himself admitted that any violation of the rule was "pure human error". This Court has held that it is not bound to reverse a conviction of criminal defendant based on a mere technical violation, even where the alleged violation involves a fundamental right. State v. Reed, 218 W.Va. 586, 590, 625 S.E.2d 348, 352 (2005).

The Petitioner goes on to allege that the Jackson procedure followed by the trial court "opened a flood gate for allowing a multitude of Mr. Cook's statements to be entered into evidence" and that the introduction of these statements was somehow a violation of his constitutional rights. Other than the objection concerning the alleged defects in the recording of the Petitioner's statement, the Petitioner did not offer any additional objection to the trial court regarding the admissibility of these statements. Moreover, Petitioner fails to acknowledge that the procedure followed by the trial court was the exact same one it outlined in its "Forensic Evaluation and Payment Order" entered by the trial court after a hearing on March 26, 2012, and not objected to by the defendant. The order permitted the state to introduce Petitioner's statements that were "germane to an issue of the defendant's mental health on which the defendant has introduced testimony."

The Petitioner introduced an extensive amount of evidence through its experts that was contradicted by his own statements to Dr. Clayman. Additionally, the Petitioner effectively introduced his own testimony through the admission of Defendant's Exhibit Number 7 "Ray's Journal of Daily Events While Jen is Gone!" which was over sixty pages of statements and

reflections made by the Petitioner concerning his relationship with his victim in the months preceding her murder. The defense experts, especially Dr. Lewis, quoted extensively from this text. June 7, 2012 Transcript, 200-211.

Additionally, Dr. Lewis on direct examination opined the following:

Everything about his psychiatric/psychological presentation says that he is an internalizer, he hold feelings inside, he blames himself as opposed to the opposite of that an externalizer, that someone who blames everybody else and lashes out at everyone else in the psychiatric records says he is a hold things inside kind of person.

June 7, 2012 Transcript 207: 23 – 208:6. Dr. Lewis went on to attempt to place part of the blame for the Petitioner’s psychological state squarely on the victim stating that immediately prior to Jenny Perrine’s murder the Petitioner was:

under pressure from Jen he started taking a whole pill [of Seroquel] even though he didn’t think it was a good thing to do because of the way it made him feel, but he reported that she essentially said, ‘you have to do this’, so she is pressuring him to take the full medicine so he did so.

Id. 213: 20 – 214:1. Dr. Lewis in his testimony also opined that on the day of the murder that the Petitioner:

doesn’t know what is going on, even at that point [about an hour after the homicide] even at that point which is not seconds, probably not just a few minutes, but quite a ways afterwards he still doesn’t understand what is going on.

June 7, 2012 Transcript 220: 20 – 24. And later Dr. Lewis states that on the day of the Jenny Perrine’s killing that the Petitioner:

was in a fog state or a state of just being not able to control his own thoughts and feelings so he is in this weird state that I don’t know that we have *ever* experienced.

June 7, 2012 Transcript 221: 6 – 7. Emphasis added.

Additionally, the Petitioner's counsel on direct examination of Petitioner's friend, Bobby Williams, entered into the following exchange:

Q: Are you aware whether or not Jen had any jealousy issues with Ray?

A: She seemed to be mad if he wanted to see or hang out with friends.

June 8, 2012 Transcript 165. Furthermore, the defendant's expert psychiatrist, Dr. Joseph Novello, testified that in killing Jenny Perrine the Petitioner acted without anger or resentment. June 12, 2012 Transcript 101: 6 – 10.

Thus, the Petitioner introduced testimony that he was someone who did not blame others for their perceived shortcomings but tended to blame himself. He introduced testimony that he didn't know what he was doing at the time of the killings. He introduced testimony that he was in a "fog like," or alternatively, "trance like" state and was unable to control his own thoughts and feelings. He also introduced testimony that it was the decedent who had jealousy issues and that he had no real anger or resentment towards her. Given this testimony, the state was well within its rights, the trial court's March 26, 2012 order and the mandates of State v. Jackson, to introduce statements of the Petitioner made to Dr. Clayman which directly contradict the propositions of the Petitioner's witnesses.

Moreover, the State was not the first to introduce Petitioner's statements from Dr. Clayman's interview with Petitioner. The Petitioner himself introduced statements from that interview through Dr. Novello. At one point while answering a question from Petitioner's counsel about the interview, Dr. Novello says:

What I was struck with, I know he (Dr. Clayman) introduced himself to Ray, he said that this was a rebuttal evaluation...

June 12, 2012 Transcript 117. Later during the examination Dr. Novello characterized Dr. Clayman's interview with the Petitioner as similar to a police interrogation. *Id.* at 118. At another point Petitioner's counsel placed a portion of the transcript of the interview between Petitioner and Dr. Clayman on the ELMO machine and displayed it to the jury. *Id.* at 120. Yet another reference was made by Dr. Novello to Dr. Clayman's statement to the Petitioner, "You don't look bipolar to me." *Id.* at 121.

Thus, through his expert and lay witnesses the Petitioner introduced the very topics inquired about by the State through Dr. Clayman. The State conducted its examination consistent with the trial court's order which was not objected to by the defendant and the defendant did not raise any objections to the state's questioning of Dr. Clayman's interview with the Petitioner other than the alleged minor defects in the recording. Additionally, the defendant was the first to introduce segments of the interview, and thus, had opened the door to further examination of it by the state. State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986).

Importantly, unlike the facts of State v. Jackson, *supra*, or State v. McWilliams, *supra*, the state introduced no evidence through Dr. Clayman that the Petitioner admitted to having committed the crime. Petitioner maintained throughout the interview that he had no recollection of the immediate events surrounding Jenny Perrine's homicide.

Accordingly, the Petitioner's request for a new trial on these grounds is without merit and should be denied.

IV. The Circuit Court properly conducted the presentation of evidence.

Rule 611(a) the West Virginia Rules of Evidence provides that, "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence

so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” *Syllabus Point 4* of State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998), holds that “A trial court’s evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.”

The Court ruled permitting the Defendant to conduct surrebuttal of Officer Norris, but denied further surrebuttal. In his claim of error in this section, the Defendant relies upon his argument made in relation to the Court’s denial of his motion to present a further case in surrebuttal in Section VIII. The Defendant does not demonstrate in either section IV or VIII of his brief that there was an abuse of discretion by the trial court in its rulings on the procedure for trial, including the order in which evidence was admitted in the parties’ cases in chief and rebuttal, or the subsequent denial of further evidence in surrebuttal.

Surrebuttal is a recognized method of introducing evidence in West Virginia courts. *See State v. Woodall*, 182 W.Va. 15, 385 S.E.2d 253 (1989); *State v. Ferguson*, 222 W.Va. 73, 662 S.E.2d 515 (2008); and *State v. King*, 183 W.Va. 440, 396 S.E.2d 402 (1990). The presentation of evidence was discussed at a pre-trial hearing where counsel for the Defendant acknowledged, “under Rule 611 the Court has a right to order the presentation of proof.” May 15, 2012 Transcript 131: 6 – 7. Defense counsel then proposed two separate orders of proof: (1) where the State would present its evidence, the Defendant would present his case, the State would present its case in rebuttal, then the Defendant would present any case in surrebuttal; or (2) where “the State would put their evidence of insanity on in their case in chief and then the Defendant would put their evidence on after that.” *Id.* 131: 23 – 132: 1.

At trial Defense counsel argued that, “we asked that the State’s presentation of proof be such that we wouldn’t be surprised by issues, we wouldn’t have to ask surrebuttal.” June 14, 2012 Transcript 232: 18 -21. Counsel for the State countered at that time:

They have known what the case in rebuttal was going to be because they had reports from our expert witnesses for some time. They have not had to guess. . . . This is not new. It has not been brought up newly in rebuttal. This is a fundamental basis underlying basis of their case. They have known about these reports. . . . for months. . . . Your honor, they have had the medical records for months saying that he has not been compliant with medication. They have had the reports that have said he’s not compliant with his medication. They are now hoping to bring in three separate witnesses to discuss these matters. These are issues that should have been brought up in their case in chief. They had witnesses noticed, the same witnesses they now want to bring in, and they chose not to do so.

Id. 234: 4 – 9. 236: 15 – 24; 237: 21 – 238: 5. The Court ruled that:

We have had three witnesses that are proposed in surrebuttal witnesses by the Defendant, the Court finds that the first of them that is requested is Patrolman Norris on the issue that has already been revisited with the Patrolman Norris at the very conclusion of the Defendant’s case in chief. If the Defendant wishes it for the sole purpose of introducing the purse into testimony, where the [medication] was retrieved from the purse, the questions I think were closely asked except that it wasn’t introduced, I think that for that limited purpose, the Court would permit that. . . . The other witnesses the Court would find as improper surrebuttal.

June 14, 2012 Transcript 238: 1 – 239: 11; 240: 4 – 5. The Court’s ruling was proper in that the Court determined the appropriate mode and order of interrogating witnesses, consistent with the authority granted in West Virginia Rule of Evidence 611(a). Because the Court did not abuse its discretion, following the standard of review articulated in State v. Rodoussakis, *supra*, the trial Court’s ruling on the order of interrogating witnesses should be affirmed. Accordingly, the

court's ruling that surrebuttal was proper only on the limited issue of admitting into evidence the defendant's purse and its contents was proper and should be upheld.

V. There was no Brady violation.

On June 13, 2012, defense counsel indicated that absent a requested ruling from the court he would move for a mistrial on the basis that there was an alleged Brady violation by the State. Transcript 134: 6 – 8. The Court then proposed a solution to which defense counsel agreed without actually moving for a mistrial, and without the Court ruling on such a motion. June 13, 2012 Transcript 134: 11 – 135: 11.

“The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is matter within the sound discretion of the trial court.” *Syllabus Point 8, State v. Davis*, 182 W.Va. 482, 388 S.E.2d 508 (1989). “The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard.” *State v. Lowery*, 222 W.Va. 284, 288, 664 S.E.2d 169, 173(2008).

The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a ‘manifest necessity’ for discharging the jury before it has rendered its verdict. This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court’s discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.

State v. Williams, 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983). A formal motion for a mistrial was not made by the defendant on this issue; defense counsel only indicated that he would move for a mistrial if the issue was not resolved to his satisfaction. Thereafter the matter was so resolved and defense counsel stated, “that is perfectly satisfactory.” June 13, 2012

Transcript 135: 11. Accordingly, this court need not review the trial court's discretion to grant or deny a motion for a mistrial on this matter.

Even if this Court is inclined to view the threat of a motion for a mistrial as such a motion, the Defendant is still unable to demonstrate that a Brady violation was committed which might have supported such a motion for a mistrial. "There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 401 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial." *Syllabus Point 2, State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007); *Syllabus Point 8, State v. Black*, 227 W.Va. 297, 708 S.E.2d 491 (2010).

The defendant asserts that the State committed a Brady violation which constituted prejudicial error by the disclosure during the eighth day of trial of a container found within Ms. Perrine's purse that contained Ativan pills. The defendant in complaining of this "late" disclosure failed to disclose that on May 17, 2012, approximately three weeks before trial⁴, his counsel inspected the purse and its contents along with the assistant prosecutors handling the case, and the investigating officer. As acknowledged by defense counsel during a pre-trial hearing on May 24, 2012, "We met for several hours or longer over at the evidence room on Thursday in Ranson. . . . In the evidence room. We asked each piece of evidence be brought out." Transcript 151: 13 – 14; 156: 11- 12. At the police station both State and Defense counsel were given an opportunity to and did inspect and handle each piece of evidence before returning

⁴ On Monday, June 4, 2012, the Circuit Clerk called a panel of 80 potential jurors who appeared and filled out a questionnaire prepared by the parties. Jury selection based upon those questionnaires took place all day on June 5, 2012. Opening statements and testimony of witnesses began on Wednesday, June 6, 2012.

the same to the investigating officer. During this inspection defense counsel, along with all other present, failed to notice the small container which was located within one of the side pockets of the purse. During trial, at the request of defense counsel, Officer Norris conducted another search of the purse and its contents at which time he noticed the container. At this point Officer Norris immediately notified the assistant prosecutor who in turn immediately notified defense counsel of the oversight.

The defendant claims that this evidence was potentially exculpatory and of significant probative value. The State respectfully disagrees. There was no evidence adduced at trial or otherwise that the defendant ever had access to this pill container. The container was found inside the decedent's purse, not among the defendant's belongings. Moreover, the defendant was aware that Ms. Perrine had a prescription for Ativan. The state in a supplemental disclosure dated May 17, 2012⁵, informed the defendant that Ms. Perrine had a prescription for Ativan and that the dosage was .5 milligrams. The state further disclosed a witness, pharmacist Linda Bowers, who could testify to the prescription and dosage amount. Moreover, defense counsel in his opening stated, "Jen suggested that he [the defendant] take some Ativan anti-anxiety she had a prescription for in her purse at the time of her death." June 6, 2012 Transcript p. 43:13 – 15.

Thus, it is readily apparent that defense counsel knew that the decedent had a prescription for Ativan and that she carried it in her purse. In fact, counsel for the defendant acknowledged during trial when the container was noticed after the search by Officer Norris, "I have never suggested or said that I was surprised by the testimony" regarding the Ativan. June 14, 2012 Tr. 245: 20 – 21. This is to be expected since the State had in fact disclosed the victim's prescription dosage for Ativan along with a witness who could confirm that dosage. Furthermore, defense

⁵ The disclosure and certificate of service by facsimile were dated May 17, 2012, however the Clerk's office did not stamp the same as received until May 18, 2012.

counsel correctly believed that Jenny Perrine had the Ativan pills in her purse at the time of her death, a supposition made clear in the defendant's opening statement. It is only logical to assume that defense counsel prepared his cross-examination of the state's witnesses upon this belief which was asserted to the jury during opening, although it is now asserted to be "new" evidence. The only fact that was "new" to the defense team on June 14, 2012 was that the Ativan was contained in a small container rather than in a prescription pill bottle. It is hard to imagine how the type of container in which the pills were contained is of any significance whatsoever.

Applying the three-part test articulated in Youngblood, *supra*, it is clear that there was no Brady violation; the Defendant is unable to articulate two of the three prongs of Youngblood. First, the evidence may be considered as exculpatory or impeachment evidence. Defense counsel asked questions of various witnesses, including expert witnesses, regarding Ms. Perrine's Ativan prescription, thus it appears the evidence was deemed by the defense to possess either exculpatory or impeachment value.

However, the defense cannot establish either of the remaining prongs of the Youngblood test. Second, the evidence was not suppressed by the State, either willfully or inadvertently. Rather the existence of the prescription and a witness who could testify to the same were provided by a Supplemental Witness disclosure served on May 17, 2012. The defendant does not explain how such evidence was suppressed inasmuch as the existence of the prescription was disclosed to the defendant along with the name of a pharmacist witness who could verify that prescription and dosage. Accordingly, it appears plain that the evidence of a prescription for Ativan was known to the defendant regardless of whether the presence of the physical medication in a pill bottle or other container was disclosed. The additional search of Jenny

Perrine's purse conducted during trial and subsequent location of the pill container and immediate disclosure only served to further supplement the May 17 disclosure. Moreover, based upon the opening statement of the defense, the Ativan was known or believed to be located in Jenny Perrine's purse on June 6, 2012, however, counsel did not request an additional search of the purse until June 13, 2012. At that time the Defense called Corporal Norris as a witness and admitted Defendant's Exhibit 20, the container key chain with pills inside, and Defendant's Exhibit 23, Jenny Perrine's purse. Defense counsel on June 14, 2012 acknowledged on the record that he was not surprised by the presence of the Ativan in Ms. Perrine's purse.

Third, the presence of the actual Ativan pills in Jenny Perrine's purse was not material to the defendant and did not prejudice the defense at trial, in that the defense was advised of the existence of a prescription for the medication, the prescription was mentioned by defense counsel in opening statements as being located exactly where the medication was later found—in Ms. Perrine's purse—and cross examination of witnesses was conducted with that knowledge or belief.

Accordingly, the Defendant is unable to meet two of the three prongs of the Youngblood test which are required to demonstrate a Brady violation and his argument is without merit.

VI. The brief ELMO display of the defendant's statement was not reversible error.

The appellant next asserts that the trial court committed reversible error when it did not grant his motion for a mistrial based upon his allegation that the state published to the jury a portion of the transcript which contained the defendant's statement "talk to a lawyer".

"The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court." *Syllabus Point 8, State v. Davis*,

supra. “The decision to grant or deny a motion for a mistrial is reviewed under an abuse of discretion standard.” State v. Lowery, *supra*.

The issue arose during the state’s cross-examination of defense psychologist, Dr. Lewis. Dr. Lewis testified that in his interview with the defendant, the defendant claimed he had no memory of the time around the shooting of Ms. Perrine and that this lack of memory persisted for “minutes, maybe hours, afterwards.” At this point, pursuant to the holding of State v. DeGraw, 196 W.Va. 261, 470 S.E.2d 215 (1996), the state requested permission to introduce statements made by the defendant after the invocation of his right to counsel for the limited purpose of impeaching the defendant’s representations to Dr. Lewis. June 8, 2012 Transcript 52: 8 – 53:22.

The state first showed the video tape of the interaction between Corporal Norris and the defendant. The state requested a recess to queue up the tape to the appropriate place so as to not show the defendant invoking his right to counsel. Because of the poor quality of the audio, the state also relied upon a transcript of exchange prepared by a court reporter at the request of the parties. The state used pages 6-9 of the transcript of the defendant’s interaction with Corporal Norris in the interview room on July 15, 2011. Page 6 of the transcript reads as follows and is incorporated as the trial court’s Exhibit A and reads as follows:

RAY COOK: (Inaudible).

CORPORAL NORRIS: Okay.

RAY COOK: That’s about it.

CORPORAL NORRIS: All right.

RAY COOK: Talk to a lawyer.

CORPORAL NORRIS: Okay. All right. You need some water or bathroom or anything like that?

RAY COOK: No. Just call my parents, that's about it. Let them know what's going on.

CORPORAL NORRIS: (Inaudible) mind taking that off for me? Do you have any jewelry on or anything like that?

RAY COOK: No, sir, I do not.

CORPORAL NORRIS: Inaudible.

RAY COOK: Even my mom told me (inaudible). I said I know, mom.

CORPORAL NORRIS: All right. You need to take that off. Is that yours?

RAY COOK: No. That's actually hers.

CORPORAL NORRIS: When did you get ahold of this?

RAY COOK: What's that? I've had that on since we split up. She just gave me so much hope and then kept fucking with me. I'm just so tired of it. (Inaudible)

See also State's Exhibit 13. During his cross-examination of Dr. Lewis, counsel for the state placed this page on the projector with the page folded over so that the defendant's statement, "talk to a lawyer" and everything preceding that statement on page 6 was not visible to the jury. The witness was then asked questions about the uncovered portion of the transcript. Later during the cross-examination a follow up question was asked about the last part of the exchange on the page. The transcript was placed back on the projector still folded to obscure the defendant's statement "talk to a lawyer". The questioning centered around the defendant's use of the word "gave" in the past tense on line 22 to demonstrate his understanding that Ms. Perrine was deceased. June 8, 2012 Transcript 70: 5 – 18. Line 22 of Court's Exhibit A was circled by co-counsel using the ELMO device provided by the Court. It is at this time that defense counsel allegedly noticed that Court's Exhibit A, line 5, "Talk to a lawyer" had also briefly become

visible. No attention was drawn to the line by counsel for the state or the witness. It was never referenced by any other witness or in closing or opening remarks by the state. In fact, neither counsel for the state or the Court noticed the offending line until defense counsel raised the issue at sidebar. June 8, 2012 Transcript 71:5. The trial court in denying the defendant's motion for a mistrial noted the events transpired in the following manner:

The State in cross-examining this expert witness, at first putting on the almost inaudible video of the Defendant with Patrolman Norris, now has been questioning him from a transcript. After first attempting to find the right question, or the right meaning for the question, but Mr. Rasheed was using it, the sheet of the transcript was placed on the ELMO and projected overhead for the jury on the wall beside the jury.

Both times Mr. Rasheed or, I guess, Ms. Sims who was operating the digital equipment used the animation screen to circle the paragraph at the bottom of the page that they were drawing the witness's [sic] attention to for the proposition that he Defendant realized that the victim was dead.

So the construction of that paragraph was being focused with a vivid blue ring around it each time when that sheet was before the jury. It was there for a short time. It was not something that was being dwelled upon.

Plainly it was visible because Mr. Mills and Mr. McDermott say they saw it. The Court didn't notice it because the Court was focusing its attention where the prosecutor would have us with circling the one statement.

What was visible to the defense team as they looked was the words 'talked to a lawyer' and that was up at the top of the sheet. The Court, first of all, feels that given the brief time that it was up on the screen, given the fact that through the use of the device of circling the paragraph in a vivid blue line that the animation screen makes available, focused everyone down on that paragraph. It was then taken from the screen.

The defense was aware of the entire contents of that page, saw it, I believe that someone who had not seen that page before would not necessarily know, and a lay jury would not see it. I think that it was purely inadvertence. It was quick. It was a partial reference.

As such, I frankly, don't feel that it represents any sort of prejudicial or insurmountable thing. I, frankly, believe the jurors didn't see it. But I am not going to quiz them on this because I think even a cautionary instruction or asking them about it would

simply call people's attention to something that I believe wasn't up there long enough.

The focus was clearly drawn to another part of the document, so that I don't think that—I believe that they didn't see it. Also, the significance of what it was, I don't think would stand out in any way that would prejudice the Defendant.”

June 8, 2012 Transcript 77: 23 – 80:4.

The defendant cites a number of cases for the proposition that the brief, inadvertent and unspoken publication to the jury of the single sentence “[t]alk to a lawyer” is an error of such fundamental importance that it requires reversal of the defendant's conviction and the granting of a new trial. However, a review of the facts of the cases cited by the defendant reveals that his reliance upon them for this proposition is entirely misplaced.

First, and most importantly, every single case cited by the defendant involves a prosecutor deliberately making a direct or indirect reference to the defendant's invocation of his right to counsel or a deliberate reference to his refusal to testify or speak to the police. For example, the defendant cites State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977). However, in Boyd, the Court noted:

The prosecutor, on cross-examination [of the defendant], sought to impeach the defendant by asking him why he had not disclosed his self defense story to the police at the jail. This was objected to by defense counsel. The court overruled the objection, but did advise the jury that the defendant at the time of his arrest was not required to make any pre-trial statement if he did not elect to do so. The defendant responded with the statement: ‘That is what they told me down there’ (apparently at the jail). Whereupon, the prosecutor proceeded to comment on the defendant's election to remain silent at jail.

Id. at 236.

Moreover, the above exchange in Boyd was just one example of a pattern of prosecutorial misconduct which tainted the proceedings in that case. The prosecutor in Boyd repeatedly

interrupted defense counsel during his examination of witnesses by laughing or talking loudly at counsel table. He made derisive comments in front of the jury when defense counsel would make objections and implied that the defendant's attorney was trying to hide something. The prosecutor in Boyd also used derogatory terms such as "granny" and "boy" when cross-examining defense witnesses. The prosecutor in Boyd belittled the defendant's attorney and at one point demanded that defense counsel be put under oath. *Id.* at 242.

This Court in the Boyd case was obviously concerned about the prosecutor's direct comments about the defendant invocation of his right to remain silent. This was especially true after defense counsel had objected and the trial court had instructed the jury that the defendant was not required to make statements to the police. Nevertheless, the prosecutor in Boyd again commented on the defendant's election to remain silent at the jail. This occurred against a backdrop of an overzealous prosecutor who was disrespectful to opposing counsel and lacked any indicia of respect for the judicial process.

The defendant also cites State v. Murray, 220 W.Va. 735, 649 S.E.2d 509 (2007), in support of his contention that the possible brief and inadvertent publishing of defendant's four word statement "talk to a lawyer" is grounds for a new trial. However, the facts in Murray are easily distinguishable from the case *sub judice*. The prosecutor in Murray in a prosecution for leaving the scene of an accident, repeatedly referred to the defendant's failure to testify by stating that by failing to testify the defendant had shown a "failure to accept responsibility while driving" and implying that because he failed to testify "it's hard [for the state] prove what the defendant knew" and at one point during her opening statement anticipating the defendant's "testimony-not testimony, statements of the defendant." *Id.* at 737, 738. The prosecutor in Murray went on to state in closing arguments "So how do I prove this? Do I just ask the

defendant? ‘Did you know? Did you see him?’ Okay, you said you didn’t know, you didn’t see him then. Well then we’ll just let you go.” *Id.* Thus, the prosecutor in Murray, in a questionable evidentiary case, made repeated references to the defendant’s failure to testify, including a hypothetical cross-examination of the defendant.

The defendant in his petition to this Court cites Murray for the proposition that a “slip of the tongue” by a prosecutor when referring to a defendant’s right not to testify is reversible error. However, as documented above, the prosecutor in Murray did not simply make a single isolated statement which was a mere “slip of the tongue”, but rather made repeated references to the defendant’s failure to testify. The prosecutor’s repeated comments to the jury about the defendant’s failure to take responsibility for his actions and her repeated emphasis on that failure to testify was apparently one of the pillars of the state’s case. This failure to testify was used by the prosecutor in Murray to explain the state’s inability to explain the defendant’s actions on the night of the offense. *Id.* at 523 (Benjamin, J., concurring opinion).

Similarly, the defendant cites State ex rel. Humphries v. McBride, 220 W.Va. 363, 647 S.E.2d 798 (2007), for the proposition that the state cannot *comment* on the defendant’s invocation of his right to counsel. Petitioner’s brief, p.74 (emphasis added). Again in Humphries we see a repeat of the pattern whereby a prosecutor’s repeated and deliberate references to the invocation of a defendant’s rights resulted in the reversal of his conviction. In Humphries the state elicited testimony which made light of the fact that Humphries consulted with his attorney and opted not to speak to investigators at the time of the initial investigation into the crime. Later on, the prosecution in Humphries *again* elicited testimony from a separate witness regarding his choice to consult with a lawyer before answering questions. *Id.* at 369-70.

Likewise, the defendant cites a Florida case Elisha v. State, 949 So.2d 271 (Fla. App. 2007), for the proposition that an inadvertent publication to the jury of a defendant's right to counsel is reversible error. Defendant's interpretation of Elisha is misleading. First, there is no indication by the Florida appellate court that the publication to the jury of defendant's invocation of his right to counsel was inadvertent. It apparently was purposeful. In Elisha an audio taped recording containing the following exchange was *played* for the jury by the state:

Elisha: When is my lawyer going to show up?

Benito: You want a lawyer?

Elisha: Yes.

Benito: This is the first time you tell me you want a lawyer.

Elisha: No, because you are already accusing me and you are saying I am lying.

Benito: Fine, this is it. I am not going to ask you anything else without a lawyer present.

Id. at 273-274.

Notably in the above exchange there are three references to the defendant's invocation of his right to counsel. Furthermore, the above exchanged was not only played for the jury, but also admitted into evidence. Moreover, the court in Elisha emphasized the weakness of the state's case in determining that the above exchange was prejudicial to the defendant. Finally, the Elisha court also referenced additional instances of improper comments by the prosecutor throughout the trial of Mr. Elisha including repeated references to Elisha's masturbation which the court concluded were calculated to inflame the prejudices of the jury. *Id.* at 273.

An overriding theme throughout all the cases cited by the defendant is the extent of the misconduct by the prosecutors. In Boyd, Murray, Humphries, Elisha and U.S. v Doyle, 426 U.S. 610 (1976), the references to either the defendant's silence or his invocation of the right to

counsel were not only deliberate, but repeated. In Boyd, Humphries, Doyle and Elisha the impermissible references were actually admitted into evidence. In Boyd and Elisha the misconduct was compounded by the disparaging remarks made by the prosecutor to either the defendant's counsel or to the defendant himself.⁶

Another recurring theme present in both Murray and Elisha is the weakness of the state's case against the defendant. The clear implication being that the jury may not have convicted the defendant but for the improper references made by the state.

The facts of the cases cited by the defendant stand in stark contrast to the facts of the appellant's case. The state was using a portion of the defendant's statement made to Officer Norris, pursuant to State v. Degraw, 196 W.Va. 261, 470 S.E.2d 215 (1996), to rebut a claim by the defendant presented through his expert psychologist, Dr. Bernard Lewis, that the defendant had no recollection of the events surrounding the death of Jenny Perrine. The statement was recorded but because of the poor audio quality the state was compelled to refer a transcript of the interview. During this examination the state referred to statements that were made to the officer on page 6 of the transcript. The transcript was projected onto the wall using the Court's ELMO. At the top of the page the defendant's four word statement "talk to a lawyer" which was a response to the *Miranda* warnings given to the defendant earlier in the statement which were notably not referenced by either party at trial in any manner. This four word phrase was without any real context and was in any event covered up by the prosecution during its cross-examination of Dr. Lewis by folding the top of the page over onto itself.

During this cross-examination the state questioned Dr. Lewis about a statement the appellant made at the very bottom of the transcript in which he referred to the decedent, Jenny

⁶ All of the cases cited by the defendant on this issue which resulted in a reversal of the defendant's conviction were predicated on the prosecution either deliberately introducing the invocation of *Miranda* rights by the defendant, or by making references to his invocation of his rights during opening statement or closing argument.

Perrine, in the past tense saying that “she gave me so much hope and then she just kept fucking with me. I’m just so tired of it.” The prosecutor circled this portion of the transcript with a vivid blue line and then asked Dr. Lewis a question about it. According to the defendant’s attorneys it was at this time that the page became unfolded and the phrase “talk to a lawyer” briefly became visible. This occurred so quickly that neither the state or the trial court were aware that the offending phrase had become visible at all. As the trial court noted it is unlikely that any of the jurors noticed the offending statement at all given that the state was drawing their attention to an entirely different portion of the transcript. Unlike the cases cited by the defendant the state did not attempt to introduce this transcript into evidence. Rather, a redacted transcript without the phrase was created and submitted to the jury in State’s Exhibit 13. The state made no references directly or indirectly to the defendant’s invocation to his right to counsel throughout the nine day trial. Moreover, the state did not question any witness about the defendant’s invocation of his right to counsel.

Furthermore, unlike many of the cases cited by the defendant, the evidence of the defendant’s guilt in this case was overwhelming. In addition to the multiple confessions of the defendant, police apprehended him at the scene of the crime just moments after it occurred in close proximity to the murder weapon which was located in his vehicle. No fewer than five witnesses observed him commit the murder in broad daylight. Additionally, he texted his intention to commit the crime four minutes before the murder.

Accordingly, the trial court did not abuse its discretion in making the determination that the alleged brief and inadvertent publication of the four word phrase “talk to a lawyer” did not so significantly affect the integrity of the trial as to warrant a mistrial.

VII. An inadvertent reference to a defendant’s incarceration was not reversible error.

The defendant moved for a mistrial after one of the State’s expert witnesses made an inadvertent reference to a defendant’s incarceration surrounding a psychological evaluation performed at South Central Regional Jail.

“The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court.” *Syllabus Point 8, State v. Davis*, 182 W.Va. 482, 388 S.E.2d 508 (1989). “The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard.” *State v. Lowery*, 222 W.Va. 284, 288, 664 S.E.2d 169, 173(2008). In *State v. Williams*, 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983), this court wrote:

The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is matter within the sound discretion of the trial court. *State v. Craft*, 131 W.Va. 195, 47 S.E.2d 681 (1948). A trial court is empowered to exercise this discretion only when there is a ‘manifest necessity’ for discharging the jury before it has rendered its verdict. [] This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court’s discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy. *See State ex rel. Brooks v. Worrell*, 156 W.Va. 8, 190 S.E.2d 474 (1972).

See State v. Lowery, 222 W.Va. 284, 664 S.E.2d 169 (2008). The Circuit Court did not abuse its discretion in denying the Defendant’s motion for a mistrial in this matter. There was no manifest necessity for discharging the jury before it reached its verdict. Absent such an abuse of discretion the trial court’s decision should be affirmed.

In *State v. Welch*, 229 W.Va. 647, 734 S.E.2d 194 (2012), this court held that a reference to the defendant being in custody, which statement was offered by a witness without being

purposefully sought by the State, would be reviewed under the plain error doctrine. “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” *Syllabus Point 7, State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

In Welch, a police officer was asked, “Did [the defendant] talk to you about what the circumstances were why he left West Virginia?” The officer replied, “A little bit. He said he left in a hurry when he woke up. He said 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.” The Welch court found that there was not plain error, stating:

Even assuming that the witness’s comment was improper, given the other evidence at trial, the comment did not affect Mr. Welch’s substantial rights or seriously affect the fairness, integrity or public reputation of the proceedings. Further, absent the comment, we believe that the evidence at trial was sufficient to support the convictions and the jury’s refusal to grant mercy on the murder charge.

734 S.E.2d at 201.

By comparison, here the State’s expert witness, Dr. Clayman, testified regarding his interaction and evaluation of the defendant and stated in part, “I wasn’t supposed to do this evaluation, it was assigned to one of my colleagues. Scheduling got screwed up, I took it over, so I had not read things, he was shipped down, I don’t know if he was shipped down from the ERJ down to South Central but we held him so he could come to our office for two days.” June 14, 2012 Tr. 56:6 – 12. Following a sidebar and motion for a mistrial which was denied, the Court, instructed the jury as follows:

Before we broke the witness made what the Court has deemed an improper reference to the possible custody of the Defendant at the time of the interview to which this witness was testifying. You should be aware that in criminal prosecutions across the board it is

the most ordinary and common thing for persons either to experience some period of custody or out on bond, it is just an ordinary thing. It has absolutely nothing to do with the person being ultimately not being guilty being found not guilty. So just as I cautioned you earlier on when I read – before I read the language of the indictment to you, you will remember that I told you that is not evidence of anything, that is merely the formal charge that joined the issues between the parties, so just to basically sweep that aside and not consider that evidence or indication of guilty. Well, the same would be true of such comment. It is not evidence of anything that you should take as an issue of guilt or innocence. Basically, you should just ignore that. Thank you very much. Don't discuss it. Thank you.

Id. at 64.

The comment in Welch although not constituting plain error, appears far more prejudicial than the comment here, that “he was shipped down, I don't know if he was shipped down from the ERJ down to South Central but we held him so he could come to our office for two days.” In Welch, the officer referred to the defendant being *incarcerated in prison*, which might be viewed as testimony concerning a prior bad act because, distinct from incarceration in a regional jail, prison is the facility where a defendant is only sent *after* being convicted of crime. By comparison, here a reference that was made to the defendant possibly being transported from one jail and held for two days at another jail for an evaluation does not carry the same weight because it does not imply any prior bad act. Moreover, the Court gave the jury a cautionary instruction on the matter. Moreover, several days before Dr. Clayman's testimony, defense expert Dr. Bernard Lewis testified that, “it was when [the defendant] was in jail that he began to understand [Ms. Perrine] was dead.” June 8, 2012 Transcript, 43: 18 – 19. Finally, the defense also entered Defendant's Exhibit 22, a “Primecare Medical, Inc. Medication Log Sheet” which listed “Inmate Name: Cook, Ray” followed by “Inmate # 2527883” dated July 18, 2011, three days after Jenny Perrine was killed. Defendant's Exhibit 22 lists “inmate name” or “inmate

signature” in at least three additional places immediately below blanks which were to be filled in. The log sheet also states in two separate places that the medication is associated with “the above named inmate” or “the inmate”. In all, the one page form uses the word “inmate” seven times. Thereafter, in closing argument Defense counsel at least twice mentioned the defendant’s medical records from the Eastern Regional Jail⁷. Defense counsel argued, “the medical records from the Eastern Regional Jail note the receipt of a bottle of Seroquel in Ray’s name with 15 and a half pills in it.” June 15, 2012 Transcript 69: 9 – 11. Counsel later argued, “When the pills are destroyed or noted at the ERJ that they’re in evidence, that they’re in custody there, there are 15 and a half pills left.” *Id.* at 21 – 24.

It is not clear that there was error by the reference of the State’s witness, not that the alleged error was plain, or that the defendant’s substantial rights were affected. Succinctly, the defendant introduced evidence that the defendant was incarcerated which listed him as an inmate with his inmate number, and at least twice mentioned the same fact definitively in closing arguments. Additionally, the Defendant’s expert witness testified that the Defendant was incarcerated. Accordingly, such an inadvertent reference by the State’s witness did not seriously affect the fairness, integrity or public reputation of the judicial proceeding. Thus, the defendant cannot meet the four part test to demonstrate plain error.

By comparison, in State v. Ricketts, 219 W.Va. 97, 632 S.E.2d 36 (2006), after the trial court ordered that evidence of a prior drug conviction was inadmissible, the State intentionally questioned the defendant about that conviction, and this court reversed the conviction and granted a new trial. Here there was no intentional questioning about the location of the defendant, but the witness offered the information. As characterized by the trial court at sidebar,

⁷ Defendant’s Exhibit 22 lists among other medications “Quetiapine 50 mg 31 half tabs”. Quetiapine is the generic name for the brand name Seroquel; the brand name was used throughout the trial. Counsel referred to the quantity as 15 and a half pills rather than 31 half tablets.

“I think this witness has a chatty anecdotal style with the jury. He speaks in chunks . . . he just sort of talks.” Accordingly, because there was no plain error, and the statement by the witness did not affect the defendant’s substantial rights or the fairness, integrity or public reputation of the trial, in applying the abuse of discretion standard of review for evidentiary rulings stated in *Syllabus Point 4* of State v. Rodoussakis, *supra*, the trial court’s ruling should be affirmed.

VIII. The burden of proof never shifted to the Defendant, even when the trial court properly denied the Defendant’s request to present a case in surrebuttal.

The defendant claims that because he was not permitted to present a case in surrebuttal that the burden of proof improperly shifted to him. No authority exists to support the concept that a denial of surrebuttal shifts the burden of proof as argued by the Defendant.

As noted previously, “A trial court’s evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.” *Syllabus Point 4*, State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998). The Court repeatedly instructed the jury⁸ that the State, not the defendant, bears the burden of proof. In closing argument Defense counsel acknowledged that the burden of proof never shifted from the State to the Defendant:

The judge is telling you, one, the State always has the burden of proof. We talked about the Defendant doesn’t have to prove anything but he chose to. The burden never

⁸ Some of those instructions from the June 15, 2012 Transcript include: “*The burden is on the State* to prove the Defendant’s guilty beyond a reasonable doubt. The Defendant is not required to prove his innocence.” Page 9: 9 – 1. “The Defendant is presumed innocent and *the burden is on the prosecution* to prove the Defendant guilty beyond a reasonable doubt. *This burden never shifts to a Defendant* for the law never imposes upon a Defendant in a criminal case, the burden or duty of calling any witnesses or producing any evidence.” Page 11: 18 – 23. “The Constitution of the United States and the Constitution of the State of West Virginia gives to all persons the right to remain silent during the trial of a criminal case, and to *require the State to prove guilt beyond a reasonable doubt.*” 11: 24 – 12: 4. “*The burden is on the State* to prove the guilty of the Defendant beyond a reasonable doubt. The Defendant, Ray Cook, is not required to prove himself innocent.” 13:10 – 13. (Emphasis added.)

shifts to the Defendant. The State has to prove that he was not suffering from a diminished capacity.

June 15, 2012 Transcript, 55: 1 – 6.

The Defendant claims he was prejudiced because “of the State’s eliciting new information from its experts during rebuttal.” Defendant fails to cite a single example of the information which was “new” and that might have modified his counsel’s preparation. Defendant admits that he possessed the State’s experts’ reports prior to the rebuttal testimony offered by the State. Dr. Clayman’s “Forensic Psychological Evaluation” was twenty-three pages in length. Additionally, the Defendant had an audio recording of his interview with Dr. Clayman which lasted approximately three hours and twenty minutes and from which a 189-page transcript was prepared.

The cases cited by the Defendant do not require trial courts to permit surrebuttal to address challenges to State rebuttal witnesses. In an ancient case cited by the Defendant this court wrote that, “If the witness proposed to be impeached had been before examined by the state on the main issue, the court would have it in its discretion to so rule when the witness was recalled in rebuttal, but being introduced in rebuttal for the first time, the defendant should have the right to *impeach him if he could.*” State v. Staley, 45 W.Va. 792, 32 S.E. 198 (1899)(Emphasis added.) However, the case does not refer to surrebuttal—or suggest that the defendant should be permitted to call additional witnesses in surrebuttal—it merely states that the defendant has the right to *impeach* rebuttal witnesses if he is able to do so.

State v. Massey, 178 W.Va. 427, 359 S.E.2d 865 (1987), also cited by the Defendant, held in *Syllabus Point 4*, “The admissibility of evidence as rebuttal is within in the sound discretion of the trial court, and the exercise of such discretion does not constitute ground for reversal unless it is prejudicial to the defendant.” *Quoting Syllabus Point 4, State v. Blankenship*,

137 W.Va. 1, 69 S.E.2d 398 (1952). Evidence is by its very nature prejudicial, the question is whether the evidence is unfairly so. The Defendant here raised a defense of diminished capacity with the clear understanding and expectation that the State would present witnesses to rebut that defense.

As recognized in Section IV above, surrebuttal is permissible in West Virginia, however, whether to permit such surrebuttal lies in the discretion of the trial court. In State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253 (1989), surrebuttal was prohibited by the trial court because although the subject of the proposed surrebuttal witnesses' testimony was known during the defendant's case in chief, the defendant rested without calling those witnesses.

In State v. Wilson, 157 W.Va. 1036, 207 S.E.2d 174 (1974), this Court affirmed the conviction of the Defendant for voluntary manslaughter after the trial court refused to permit the defendant's wife to testify in surrebuttal⁹. The Court wrote that "it appears from the rebuttal evidence that she would have testified to the same statement she made on direct examination in an attempt to contradict the sheriff whose testimony merely was to impeach this witness on the statement she made when she testified on behalf of the defendant. . ." The court explained, "this proposed evidence was merely to impeach an impeaching witness, and if not limited, could continue indefinitely." 157 W.Va. at 1046.

It is clear that the discretion for whether such surrebuttal shall be permitted lies with the trial court, consistent with *Syllabus Point 4* of Massey, *supra*. Moreover, absent an abuse of discretion in this area, the Court's ruling should be affirmed. The state's rebuttal witnesses, along with a summary of their anticipated testimony, was provided to the defense well in advance of trial. The defendant had the opportunity to call witnesses regarding that anticipated testimony in his case-in-chief but chose not to exercise this option; the three witnesses whom the

⁹ The Court also noted that the defendant's wife had not been sequestered after her initial testimony.

defendant wished to call in surrebuttal were all noticed on the defendant's witness list. There was no evidence presented in the state's rebuttal case that the defendant could not have anticipated during his case-in-chief. Nonetheless, the trial court permitted the defendant the limited surrebuttal testimony of Corporal Norris.

The defendant claims that the Court somehow shifted the burden of proof by allowing the state to present its expert witnesses in rebuttal. This is manifestly untrue. The Court in its instructions repeatedly informed the jury that the burden of proof in this case was the state's and that the state must prove each and every element of the alleged offenses beyond a reasonable doubt. Defense counsel stated the same in his closing argument: that the burden of proof lay with the State and the Defendant had no burden to prove anything. June 15, 2012 Transcript 55: 1 – 4. There was no suggestion by the state, the state's witnesses or the Court that the defendant was under any burden to produce evidence or even cross-examine witnesses. Nonetheless, the defendant elected to proceed with the theory that he acted under a diminished capacity. *Id.* 55: 5. This defense did not shift the burden of proof from the State, rather, it added another layer of proof necessary by the state: that the defendant did not have a diminished capacity at the time he shot and killed Jenny Perrine.

The trial court properly determined that extensive surrebuttal was inappropriate. Because a trial court's evidentiary rulings and application of the Rules of Evidence should be overruled only when there is an abuse of discretion, and because the defendant can demonstrate no abuse of discretion, the denial of further surrebuttal should not be disturbed. Moreover, because no authority exists to support the concept that a denial of surrebuttal shifts the burden of proof as argued by the Defendant, and because the Defendant is unable to demonstrate the same, the argument is meritless.

IX. The mercy phase of the trial was properly conducted and does not merit the granting of a new trial on the issue of mercy.

Standard of Review

“Where the issue on an appeal from the circuit court is clearly a question of law. . . we apply a de novo standard of review.” *Syllabus Point 1*, State v. Finley, 219 W.Va. 747, 639 S.E.2d 839 (2006) *quoting Syllabus Point 1*, in part, Chrystal R. M. v. Charles A. L. 194 W.Va. 138, 459 S.E.2d 415 (1995).

Defendant cites to State v. McLaughlin, 226 W.Va. 229, 700 S.E.2d 289 (2010), to support his contention that the defense should have proceeded first at the mercy stage of the trial, however, a closer reading of McLaughlin, and other cases does not support that argument. *Syllabus Point 2* provides that, “A trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy.” *Quoting Syl. Pt. 4*, State v. LaRock, 196 W.Va. 294, 460 S.E.2d 613 (1996). *Syllabus Point 8* of McLaughlin holds that while, “in the mercy phase of a bifurcated first degree murder proceeding, the defendant will ordinarily proceed first; however, the trial court retains the inherent authority to conduct and control the bifurcated mercy proceeding in a fair and orderly manner.”

Additionally, *Syllabus Point 7* of McLaughlin provides that:

The type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the evidence admissible for purposes of determining a defendant’s guilt or innocence. Admissible evidence necessarily encompasses evidence of the defendant’s character, including evidence concerning the defendant’s past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the defendant guilty of first degree murder, so long as that evidence is found by the trial court to be relevant under Rule 401 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence.

In McLaughlin this court also wrote that “there is no ‘burden of proof’ relative to the mercy recommendation” (226 W.Va. at 234), and cited footnote one of State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999) which stated:

We do not believe that conceptually there is any separate or distinctive “burden of proof” or “burden of production” associated with the jury’s mercy/no-mercy determination in a bifurcated mercy phase of a murder trial, if the court in its discretion decides to bifurcate the proceeding. In making its overall verdict, in a unitary trial or a bifurcated trial, the jury looks at all of the evidence that the defendant and the prosecution have put on—and if the jury concludes that an offense punishable by life imprisonment was committed, then the jury determines the mercy/no-mercy portion of its verdict, again based on all of the evidence presented to them at the time of their determination. We would anticipate that a defendant would ordinarily proceed first in any bifurcated mercy phase. We emphasize that the possibility of bifurcation of a mercy phase is not an open door to the expansion of the ambit of evidence that the prosecution may put on against a defendant, in the absence of the defendant opening that door to permit narrowly focused impeachment or rebuttal evidence from the prosecution.

Accordingly it is clear from the holdings and dicta of McLaughlin, LaRock and Rygh that the trial court possessed the inherent authority to conduct and control the bifurcated mercy proceeding in a fair and orderly manner, and that by directing the State to proceed first in the mercy proceeding, the court was acting within its inherent authority to conduct and control the proceeding, and that neither party had a burden of proof in that stage of the proceedings. While *Syllabus Point 8* of McLaughlin provides that a defendant ordinarily proceeds first, the word “ordinarily” clearly implies that the order of evidence may vary. As noted in Section IV above, Rule of Evidence 611(a) permits the Court to control the mode and interrogation of witnesses and presentation of evidence. All of this authority supports the decision of the Circuit Court to permit the State to proceed before the defendant in the penalty or mercy phase.

Moreover, during the mercy phase of the trial the Defendant stated through both of his trial attorneys that he did not wish to testify. Mr. Mills first advised the court, “Your honor, having had an opportunity to consult with the Defendant, the Defendant has advised me that he does not wish to testify at this phase of his trial.” (Tr. June 15, 2012, 105: 17 – 20). The Court then inquired of the Defendant himself:

THE COURT: Mr. Cook, having heard Mr. Mills’ offer, is that your own decision?

RAY COOK: Yes, sir.

THE COURT: You desire not to testify?

RAY COOK: That is correct.

THE COURT: All right, sir.

Mr. Mills continued and advised the Court that, “the Defendant has advised me that he does not wish to have *any* witnesses presented on his behalf.” (Tr. June 15, 2012, 106: 17 – 18)(Emphasis added). Defense counsel then requested of the court that:

by us declining to go forward, then I would ask that the State be in turn held to that same—there is nothing to rebut, we would just argue the case to the jury. We are not going to call witnesses. There is nothing on our behalf to rebut so we ask that the State not call witnesses.

June 15, 2012 Transcript 107: 4 -15. In his brief Defendant argues that the Circuit Court allowed the State to present its case first. In fact, the Defendant declined to proceed then requested the State to follow suit, which the State refused to do. It is clear that the Defendant acknowledged his decision not to proceed with witnesses during the mercy phase. Further, the Defendant acknowledged that he had the ability to proceed first if he so desired, which he did not. Thereafter counsel for the State proceeded to call witnesses. Jenny Perrine’s mother, Cheryl Perrine, read a statement. The victim advocate read a statement on behalf of Jenny Perrine’s

father, George Perrine. Chastity Stotler, Jenny's friend and co-worker, gave testimony. Jenny Perrine's aunt, Carol Myers, read a statement. Following those statements and testimony the court inquired, "Are there any other witnesses that anybody would have us hear or any statements that anybody would have us make?" Defense counsel Mr. McDermott responded,

Your honor, Mr. Cook has advised, we had a bunch of witnesses lined up, we had members of his family and Dr. Lewis lined up to testify on his behalf, he was going to take the stand on behalf as well, but he advised us he doesn't want to put anyone else through this difficult thing that everyone here has had to go through here today including his family or anyone else to prolong the proceeding any further so he is not going to be making a statement on his behalf. He doesn't want anyone from his family or the doctor to make a statement on his behalf either.

June 15, 2012 Transcript 126:21 – 127: 10. Clearly, the Defendant, by counsel, articulated his decision not to present evidence during the mercy portion of the trial several times, including an explicit statement of that decision made before the jury. Moreover, counsel articulated the reason for his decision to not present evidence: that he did not want to put anyone else through the emotional difficulty of a prolonged proceeding. The Defendant acknowledged his ability or right to go forward first in the mercy phase but elected not to do so.

The opinion issued in State v. LaRock, 196 W.Va.294, 470 S.E.2d 613 (1996) quotes Justice Workman's dissent in Schofield v. West Virginia Department of Corrections, 185 W.Va. 199, 406 S.E.2d 425 (1991), where she wrote, "The determination of whether a defendant should receive mercy is so crucially important that justice for both the state and defendant would be best served by a full presentation of all relevant circumstances without regard to strategy during trial on the merits." Nonetheless, the defendant for strategic or personal reasons chose not to proceed during the mercy phase.

Defendant also argues that the admission of a prior battery conviction was improper and necessitates a retrial of the mercy phase of the proceedings. However, McLaughlin is again instructive. The decision quotes a prior decision of this court in State v. Finley, 219 W.Va. 747, 639 S.E.2d 839 (2006), which stated:

at the penalty phase, the jury is no longer looking narrowly at the circumstances surrounding the charged offense. In order to make a recommendation regarding mercy, the jury is bound to look at the broader picture of the defendant's character—examining the defendant's past, present and future according to the evidence before it—in order to reach its decision regarding whether the defendant is a person who is worthy of the chance to regain freedom. *See Zant v. Stephens*, 462 U.S. 862, 900, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (Rehnquist, J., concurring in judgment) (at the penalty stage a jury considers the character and propensities of a defendant in order to make a “unique, individualized judgment regarding the punishment that a particular person deserves.”).

The McLaughlin court recognized that evidence of a defendant’s character and past conduct was critical evidence for a jury prior to making a recommendation of mercy. Accordingly, the admission of evidence of the defendant’s prior conviction for battery was appropriate evidence for the jury to hear in the penalty phase.

REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, the Respondent requests that this Court refuse the Petition for Appeal.

Respectfully submitted,
STATE OF WEST VIRGINIA

By counsel:



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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**

**STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,**

v.

Supreme Court Docket No.: 12-0836

**RAY COOK, Defendant Below,
Petitioner**

CERTIFICATE OF SERVICE

I, Brandon C. H. Sims, Assistant Prosecuting Attorney for Jefferson County, West Virginia and counsel for the Respondent do hereby certify that on this 6th day of May, 2013, I have placed a true copy of the foregoing, "State of West Virginia's Response to Petition for Appeal" in the United States Mail to:

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