

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 13-0099

NICHOLAS CO. CIRCUIT COURT CASE No. 11-F-81

STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent/Appellee,

v.

GARY LEE ROLLINS, Defendant Below,
Petitioner/Appellant.

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

REPLY ARGUMENTS.....3

1. DURING HIS CLOSING REBUTTAL ARGUMENT, THE PROSECUTING ATTORNEY COMMITTED PROSECUTORIAL MISCONDUCT.....3

a. An objection was not required to preserve this error for appeal, or in the alternative, the plain error doctrine is applicable.4

b. The promise made by the Prosecuting Attorney to the jury resulted in prejudice or manifest injustice to the Petitioner.6

2. THE TRIAL COURT ERRED IN REFUSING TO STRIKE A VICTIM OF DOMESTIC VIOLENCE FOR CAUSE. EVEN THOUGH A PEREMPTORY STRIKE WAS USED TO REMOVE THE BIASED JUROR, PREJUDICE SHOULD BE PRESUMED UNDER THE PARTICULAR FACTS OF THIS CASE AS THE RESULTING JURY WAS NOT FREE FROM BIAS OR PREJUDICE.....8

3. THE APPELLEE'S ANALYSIS REGARDING JUROR CRISLIP SERVING ON THE JURY THAT CONVICTED THE APPELLANT IGNORES CONTROLLING PRECEDENT AND IS WRONG. 11

4. ANY ERROR COMMITTED BY THE TRIAL COURT REGARDING INTRODUCTION OF SUCH EVIDENCE UNDER STATE V. MCGINNIS, *THE WEST VIRGINIA RULES OF EVIDENCE* PERTAINING TO HEARSAY OR THE CONFRONTATION CLAUSE WAS NOT HARMLESS ERROR.13

a. The evidence was offered for an improper purpose under Rule 404(b).....14

b. The evidence was inadmissible under the rules pertaining to hearsay.....14

c. The evidence was inadmissible under the Confrontation Clause.....16

d. The evidence should have been excluded because of its prejudicial effect17

5. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT CUMULATIVE EVIDENCE THROUGH THE TESTIMONY OF MULTIPLE EXPERT WITNESSES.....17

6. UNFAIR SURPRISE WAS PROPERLY PRESERVED FOR APPEAL AND THE UNFAIR SURPRISE HAMPERED THE PREPARATION AND PRESENTATION OF THE APPELLANT’S CASE IN THE PROCEEDINGS BELOW18

7. THE CUMULATIVE EFFECT OF NUMEROUS ERRORS WARRANTS A NEW TRIAL.....20

TABLE OF AUTHORITIES

Cases

West Virginia Authority

<u>McDougal v. McCammon</u> , 193 W. Va. 229, 455 S.E.2d 788 (1995)	18
<u>O'Dell v. Miller</u> , 211 W. Va. 285, 565 S.E.2d 407 (2002).....	9,12
<u>State v. Adkins</u> , 209 W. Va. 212, 544 S.E.2d 914 (2001).....	4,6
<u>State v. Atkins</u> , 163 W.Va. 502, 261 S.E.2d 55 (1979), <i>cert. denied</i> , 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980)	15
<u>State v. Audia</u> , 171 W.Va. 568, 301 S.E.2d 199 (1983).	12
<u>State v. Brown</u> , 210 W. Va. 14, 552 S.E.2d 390 (2001)	5
<u>State v. Dellinger</u> , 225 W. Va. 736, 696 S.E.2d 38 (2010)	12,13
<u>State ex rel. Justice v. Trent</u> , 209 W. Va. 614, 550 S.E.2d 404 (2001)	19
<u>State v. Hatley</u> , 223 W. Va. 747, 679 S.E.2d 579 (2009).....	11,12
<u>State v. Kanney</u> , 169 W. Va. 764, 289 S.E.2d 485 (1982).....	3,4
<u>State v. Kaufman</u> , 227 W. Va. 537, 711 S.E.2d 607 (2011)	16
<u>State v. LaRock</u> , 196 W. Va. 294 470 S.E.2d 613 (1996).....	5
<u>State v. Mechling</u> , 219 W. Va. 366, 633 S.E.2d 311 (2006).....	16,17
<u>State v. Miller</u> , 194 W.Va. 3, 459 S.E.2d 114 (1995)	5
<u>State v. Mongold</u> , 220 W. Va. 259, 647 S.E.2d 539 (2007).....	14
<u>State v. Myers</u> , 204 W. Va. 449, 513 S.E.2d 676 (1998)	10
<u>State v. Peacher</u> , 167 W.Va. 540, 280 S.E.2d 559 (1981).....	13
<u>State v. Phillips</u> , 194 W. Va. 569, 461 S.E.2d 75 (1995).....	9,10,15
<u>State v. Smith</u> , 178 W. Va. 104, 358 S.E.2d 188 (1987).....	15
<u>State v. Sugg</u> , 193 W.Va. 388, 456 S.E.2d 469 (1995).....	6
<u>State v. Sutherland</u> , 11-0799, 2013 WL 2460632 (W. Va. June 5, 2013).....	9,10

Other Authorities

<u>Brady v. Maryland</u> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)	8
<u>United States v. Beasley</u> , 102 F.3d 1440, 1449 (8th Cir.1996), <i>cert. denied</i> ,	
<u>Beasley v. United States</u> , 520 U.S. 1246, 117 S.Ct. 1856, 137 L.Ed.2d 1058 (1997)	5
<u>Walls v. Kim</u> , 250 Ga.App. 259, 549 S.E.2d 797 (2001).....	9
<u>State v. Kuhs</u> , 223 Ariz. 376, 224 P.3d 192 (2010).....	10

ARGUMENT

I. DURING HIS CLOSING REBUTTAL ARGUMENT, THE PROSECUTING ATTORNEY COMMITTED PROSECUTORIAL MISCONDUCT.

In this case, the Prosecuting Attorney wholly abandoned his quasi-judicial role and was only focused on obtaining a conviction. This Court has previously held that “[a] Prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.” State v. Kanney, 169 W. Va. 764, 765, 289 S.E.2d 485, 486-87 (1982).

It is not disputed that after the credibility of April Bailes was called into question in defense counsel’s closing argument, the Prosecuting Attorney told the jury in his rebuttal closing argument that, “[y]ou can bet your behind that I'm going to indict her [April Bailes] next month”. *Appellee’s Brief*, p. 20; (A. R. V at 207-208). April Bailes was never indicted.¹

In its Responsive Brief, the Appellee takes the outrageous position that the “Prosecuting Attorney did not legally commit himself to prosecute Bailes simply because he told the jury that he would”. *Appellee’s Brief*, p. 20. This argument misses the point and is without merit. It does

¹ By Order entered June 25, 2013, this Honorable Court denied Appellant’s Motion to Take Judicial Notice or in the Alternative to Supplement the Record on Appeal. The Motion sought admission of certain evidence to show that April Bailes was not indicted by the last three (3) Nicholas County Grand Juries. The Appellant respectfully requests this Honorable Court reconsider its ruling on this issue prior to rendering a decision in this matter, or that the Court accept the representations of the undersigned as an officer of the Court, that April Bailes has never been indicted.

not matter whether the Prosecuting Attorney was “legally committed” to prosecute Bailes. What matters is that this statement was implanted in the minds of the jury in a flagrant fashion to bolster the credibility of Bailes. In addition, the Appellee’s “he was not legally committed to indict” argument ignores the above quoted language from Kanney, supra, and sends a message that a Prosecuting Attorney can say whatever it takes to a jury to obtain a conviction. This Honorable Court should not tolerate a Prosecuting Attorney engaging in tactics that will ultimately serve to undermine the public’s confidence in our judicial system and deprive criminal defendants of their right to a fair trial. While the Appellee characterizes the Appellant’s subsequent decision not to indict April Bailes as one of “prosecutorial discretion”, the Appellant characterizes it as an unfulfilled promise which was implanted in the minds of the jury for the sole purpose of bolstering the credibility of a key witness to obtain a conviction. *Appellee’s Brief*, p. 20.

In order to prevail on his claim of prosecutorial misconduct, the Appellant must prove that improper remarks were “made by a prosecuting attorney to a jury that clearly prejudice the accused or result in manifest injustice.” State v. Adkins, 209 W. Va. 212, 216, 544 S.E.2d 914, 918 (2001). This portion of the Appellant’s reply will primarily address the arguments advanced by the Appellee regarding prosecutorial misconduct.

a. An objection was not required to preserve this error for appeal, or in the alternative, the plain error doctrine is applicable.

The Appellee’s primary contention is that the Appellant waived this argument on appeal since his trial counsel failed to make a timely objection to the Prosecuting Attorney’s statement that the State’s key witness, April Bailes, would be indicted by the Nicholas County Grand Jury the following month. (*Appellee’s Brief* pp. 17-18; A. R. V at 207-208). The Appellant disagrees

that an objection was required to preserve this error for appeal under the particular circumstances of this case.

First, an objection would have accomplished very little as the Prosecutor had already made a promise to the jury that they were likely to believe even if the trial court instructed them to disregard it. Second, Appellant's trial counsel had no way of knowing that the Prosecuting Attorney did not intend to live up to his promise to indict April Bailes.

Third, *and in the alternative*, the plain error doctrine would apply to the failure of trial counsel to make an objection at closing under the particular facts and circumstances of this case. *See State v. Brown*, 210 W. Va. 14, 19-20, 552 S.E.2d 390, 395-96 (2001) (“In criminal cases, plain error is error which is so conspicuous that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting the error.’ ‘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.” (citations omitted).” *See also* Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); Syllabus Point 7, *State v. LaRock*, 196 W. Va. 294 470 S.E.2d 613 (1996).

The plain error doctrine should be deemed applicable because the Prosecuting Attorney made an improper promise to the jury that seriously affected the fairness, integrity, or public reputation of the proceedings and deprived the Appellant of a fair trial. Moreover, the outcome of the proceedings were affected by the Prosecutor's improper vouching. *See United States v. Beasley*, 102 F.3d 1440, 1449 (8th Cir.1996), *cert. denied*, *Beasley v. United States*, 520 U.S. 1246, 117 S. Ct. 1856, 137 L.Ed.2d 1058 (1997) (“Impermissible vouching may ... occur when **the government implies a guarantee of a witness's truthfulness, refers to facts outside the**

record, or expresses a personal opinion as to a witness's credibility”). (emphasis added). By referring to a subsequent indictment of Bailes, the Prosecuting Attorney intended to convince the jury (by facts outside the record) that the witness was, in fact, an accessory to the crime of murder and that her testimony was implicitly guaranteed to be truthful. Moreover, April Bailes’ credibility was crucial as she was the sole witness presented by the State who testified that the Appellant confessed to killing his wife. (A.R. III at 209-210). All other evidence presented by the State was circumstantial and was the subject of conflicting expert opinions.

b. The promise made by the Prosecuting Attorney to the jury resulted in prejudice or manifest injustice to the Appellant.

In State v. Adkins, 209 W. Va. 212, 544 S.E.2d 914 (2001), this Court restated its prior holding that “[a] judgment of conviction will be reversed because of improper remarks made by a prosecuting attorney to a jury that clearly prejudice the accused or result in manifest injustice.” Id. at 216, 918. (citations omitted). The Appellee contends that the Prosecutor’s remarks did not result in prejudice or manifest injustice to the Appellant. *Appellee’s Brief*, p. 21. While the Appellee correctly identifies the four factors set forth under Syllabus point 6 of State v. Sugg, as controlling precedent on the issue of whether an improper prosecutorial comment is so damaging as to require reversal, it misapplies the facts of this case to the applicable law. State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995). The four Sugg factors are re-examined below.

(1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused

The Appellee asserts that the jury was not misled because the Appellant’s trial counsel had the opportunity to cross-examine and impeach Bailes regarding her prior inconsistent statements, in which she maintained the Appellant was innocent. *Appellee’s Brief*, p. 21. However, this argument is not relevant to the first Sugg factor as it overlooks the effect of the

Prosecutor's remarks on the jury. As set forth in the Appellant's Brief, the most important fact to this element is that April Bailes was the sole witness presented by the State that testified that the Appellant admitted to killing his wife. All other evidence presented by the State was circumstantial and the subject of conflict expert opinions. By telling the jury that April Bailes would be indicted as an accessory after the fact to murder, the Prosecutor improperly vouched for the credibility of April Bailes, which remarks had an extremely high tendency to mislead the jury and/or prejudice the Appellant. The first Sugg factor should be deemed satisfied.

(2) whether the remarks were isolated or extensive

Although the Appellee asserts that this remark consisted of a single comment, the transcript reveals that the Prosecutor went to great lengths to explain to the jury why they should believe the testimony of April Bailes, stating twice that she was not receiving any consideration for her testimony and then stating that she would be indicted the very next month. (A. R. V at 207-208). Even if the remarks are not deemed to be extensive, the comments were certainly persuasive and were designed to mislead the jury by focusing on matters outside the evidence. The second Sugg factor should be deemed satisfied.

(3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused;

The Appellee takes the position that there was "overwhelming evidence" that Rollins murdered his wife; however, all evidence cited by the Appellee, with the exception of the testimony of April Bailes, consists of circumstantial evidence and evidence of prior bad acts admitted under Rule 404(b). *Appellee's Brief*, p. 22. Given the numerous changes to cause and manner of death by the State Medical Examiner's Office, the conflicting expert testimony presented at trial and the purely circumstantial evidence of guilt presented by the State at trial, it is extremely likely the jury placed much emphasis and reliance on the testimony of April Bailes.

April Bailes offered the State's only direct evidence- that the Appellant admitted to killing his wife, which testimony was improperly bolstered by the Prosecuting Attorney during his rebuttal argument. The third Sugg factor should be deemed satisfied.

(4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Although the Appellee contends otherwise, this comment was made and deliberately placed before the jury in response to defense counsel's attack on the credibility of April Bailes. Insofar as the Prosecuting was talking about his future plans to indict April Bailes "next month" he was diverting the attention of the jurors to extraneous matters that had not occurred and still have not occurred. The fourth Sugg factor should be deemed satisfied.

Prejudice or manifest injustice to the Appellant is also apparent based on other facts, such as the State never disclosed prior to trial that Bailes, a co-defendant, would be given leniency (by not being indicted), in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). To the contrary, the jury was told Bailes was charged with being an accessory after the fact to murder. (A.R. III at 216). Further, the Prosecutor promised the jury in his rebuttal that she would be indicted the very next month. (A. R. V at 207-208).

For the foregoing reasons, this Honorable Court should reverse Appellant's conviction, and grant him a new trial as improper remarks made by the prosecuting attorney to the jury clearly prejudiced the accused and/or resulted in manifest injustice.

II. THE TRIAL COURT ERRED IN REFUSING TO STRIKE A VICTIM OF DOMESTIC VIOLENCE FOR CAUSE. EVEN THOUGH A PEREMPTORY STRIKE WAS USED TO REMOVE THE BIASED JUROR, PREJUDICE SHOULD BE PRESUMED UNDER THE PARTICULAR FACTS OF THIS CASE AS THE RESULTING JURY WAS NOT FREE FROM BIAS OR PREJUDICE.

Not unexpectedly, the Appellant and Appellee have conflicting positions on whether prospective juror Susie Jordan, *a former and current victim of domestic violence*, should have been stricken from the petit jury panel for cause. *See generally* (A.R. I at 138-142). The Appellee asserts that the trial court conducted a proper voir dire of Jordan and that her answers to the questions posed indicated that she could serve as a juror without bias or prejudice. *Appellee's Brief*, Pg. 24. In contrast, the Appellant contends Jordan should have been stricken for cause as she made clear statements during voir dire reflecting or indicating the presence of a disqualifying prejudice or bias. (A.R. I at 139-140). Specifically, during voir dire, juror Jordan repeatedly stated that she did not know if she could be fair. (A.R. I at 139-140). Additionally, she was emotional and tearful during questioning. (A.R. I at 138-140). Nevertheless, the trial court attempted to rehabilitate the biased juror through subsequent questioning, in violation of O'Dell v. Miller, 211 W. Va. 285, 290, 565 S.E.2d 407, 412 (2002) (citing Walls v. Kim, 250 Ga. App. 259, 260, 549 S.E.2d 797, 799 (2001)). Ultimately, the Appellant ended up using a peremptory strike to remove juror Jordan from the panel. (A.R. I at 157 and A.R. VII at 236).

At the time the Appellant perfected his appeal on May 15, 2013, the controlling law on this issue was set forth in Syllabus Point 8 of State v. Phillips, 194 W. Va. 569, 588, 461 S.E.2d 75 (1995), which provided that “[t]he language of W.Va. Code, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.”

However, as discussed in the Appellee's Brief, the automatic reversal remedy set forth in Syllabus Point 8 of Phillips, *supra*, was expressly overruled by the recent case of State v.

Sutherland, 11-0799, 2013 WL 2460632 (W. Va. June 5, 2013), which provides: “A trial court's failure to remove a biased juror from a jury panel, as required by W. Va.Code § 62–3–3 (1949) (Repl.Vol.2010), does not violate a criminal defendant's right to a trial by an impartial jury if the defendant removes the juror with a peremptory strike. In order to obtain a new trial for having used a peremptory strike to remove a biased juror from a jury panel, a criminal defendant must show prejudice. The holding in Syllabus point 8 of *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995), is expressly overruled.”

Therefore, under Sutherland, the analysis for this issue appears to be two-pronged: (1) did the trial court err in failing to strike the prospective juror for cause? and (2) was the defendant prejudiced? The Appellant’s brief and this reply brief adequately addresses the first prong and demonstrates that the trial court erred in failing to strike Juror Jordan. Assuming the first prong is satisfied, the issue of prejudice must be considered. While Sutherland makes it abundantly clear that the use of a peremptory strike to remove a biased juror in and of itself does not constitute prejudice, Sutherland does not offer much guidance on what constitutes prejudice or what type or degree of prejudice must be shown to be awarded a new trial.

This Court has previously recognized that, under certain circumstances, prejudice can be presumed to a criminal defendant. See State v. Myers, 204 W. Va. 449, 463, 513 S.E.2d 676, 690 (1998) (“Part of the rationale used by courts in presuming prejudice under certain narrow circumstances is the difficulty in measuring the harm caused by the error in these circumstances.”). The Appellant asserts that prejudice should be presumed where a criminal defendant is forced to use a peremptory challenge to remove a prospective juror and a biased juror is nonetheless seated on the jury panel that convicts him. Footnote 11 of Sutherland cites the case of State v. Kuhs, 223 Ariz. 376, 382, 224 P.3d 192, 198 (2010), which recognizes that

“when defense counsel peremptorily strikes a juror, we will not find reversible error based on the trial court's refusal to remove that juror for cause *unless the resulting jury was not fair and impartial.*” Id. (emphasis added). While Kuhns is not controlling precedent, the Appellant urges this Court to adopt its rationale and find that any showing that a resulting jury was not fair and impartial fulfills the requirement of prejudice set forth in Sutherland and automatic reversal is appropriate.

As discussed more fully below, Juror Crislip was permitted to serve on the jury that convicted the Appellant even though he was biased and should have been excluded for cause. This Court should find that the trial court committed error by failing to remove juror Crislip, that prejudice can be presumed to Appellant under the circumstances and that a new trial is warranted.

III. THE APPELLEE'S ANALYSIS REGARDING JUROR CRISLIP SERVING ON THE JURY THAT CONVICTED THE APPELLANT IGNORES CONTROLLING PRECEDENT AND IS WRONG.

As set forth more fully in Appellant's Brief, during voir dire Juror Crislip was not forthcoming about his relationship with the Prosecutor. (A.R. I at 51). *After the jury was already empaneled and sworn*, it came to light that Juror Crislip was a former client of the Prosecuting Attorney. (A.R. I at 203). While the Appellee is correct in stating that this is not the type of relationship that warrants automatic disqualification, it fails to discuss, distinguish or even mention the applicable law cited in Appellant's Brief. Instead, the Appellee merely contends the juror was not biased and that no error resulted. *Appellee's Brief, Pg. 26.*

In Syllabus Points 3 and 4 of State v. Hatley, 223 W. Va. 747, 748, 679 S.E.2d 579, 580 (2009), this Court set forth the appropriate analysis for this scenario:

3. “When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the

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

4. “Where a prospective juror is one of a class of persons represented by the prosecuting attorney at the time of trial, but there has been no actual contact between that juror and the prosecutor, the existence of the attorney-client relationship alone is not prima facie grounds for disqualification of that juror.” Syllabus Point 3, State v. Audia, 171 W.Va. 568, 301 S.E.2d 199 (1983).

The Court further cautioned that “[i]t is apparent from our discussions in *Audia* and *O'Dell* that while an attorney-client relationship between a prospective juror and the prosecuting attorney does not per se disqualify that juror, **such a relationship merits the closest scrutiny by the trial court, and the more prudent course may be to excuse the juror.**” Hatley, 223 W. Va. at 752, 679 S.E.2d at 584 (2009) (emphasis added).

In the instant case, the attorney-client relationship between the juror and prosecutor was more prolonged and more substantial than the impermissible relationship described in Hatley, which merely involved the preparation of a deed. (A.R. I at 203-211). In this case, just five years prior to the instant case, Prosecutor Milam appeared at two hearings and at a deposition on juror Crislip’s behalf in a personal injury case. (A.R. I at 203-204). The trial court committed reversible error by denying the Appellant’s motion to strike and by leaving Juror Crislip on the jury. Moreover, not only does this establish that Juror Crislip was biased; it also establishes that the resulting jury in this case was not fair and impartial, which should be deemed sufficient to fulfill the requirement of prejudice under Sutherland, *supra*.

Additionally, the Appellee does not even address Appellant’s argument under State v. Dellinger, 225 W. Va. 736, 740-43, 696 S.E.2d 38, 42-45 (2010), that the lack of candor by Juror

Crislip resulted the Appellant not receiving a fair trial. “As we held in syllabus point four of State v. Peacher, 167 W.Va. 540, 280 S.E.2d 559, 563 (1981), The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14, of the West Virginia Constitution. **A meaningful and effective voir dire of the jury panel is necessary to effectuate that fundamental right.**” Dellinger, 225 W. Va. at 741, 696 S.E.2d at 43.

Juror Crislip’s lack of candor prior to the jury being impaneled undermined the purpose of voir dire and deprived the Appellant of the opportunity to determine whether Juror Crislip harbored any prejudices or biases against him or in favor of the State. *See Dellinger*, 225 W. Va. at 741, 696 S.E.2d at 43. As a result, when the Appellant exercised his peremptory strikes, he did not have the benefit of weighing or considering Crislip’s relationship with the Prosecuting Attorney. For the foregoing reasons, the conviction should be reversed and the Appellant should be awarded a new trial.

IV. ANY ERROR COMMITTED BY THE TRIAL COURT REGARDING INTRODUCTION OF SUCH EVIDENCE UNDER STATE V. MCGINNIS, *THE WEST VIRGINIA RULES OF EVIDENCE* PERTAINING TO HEARSAY OR THE CONFRONTATION CLAUSE WAS NOT HARMLESS ERROR.

In reviewing the Appellee’s counter-arguments to Appellant’s arguments relating to: (1) the introduction and admissibility of alleged acts of prior abuse by the Appellant against the decedent pursuant to Rule 404(b) of the *West Virginia Rules of Evidence*, (2) the introduction and admissibility of such evidence under the *West Virginia Rules of Evidence* pertaining to hearsay, and (3) the introduction and admissibility of such evidence under the Confrontation Clause in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, the Appellant is of the opinion that his Brief, by and large,

adequately addresses these issues. *Appellant's Brief*, pp. 32-51. Accordingly, further discussion of these issues will be limited to the points set forth hereinbelow.

a. The evidence was offered for an improper purpose under Rule 404(b)

The Appellee failed to offer any counterargument on the Appellant's position that Rule 404(b)'s "absence of mistake or accident" exception is not applicable under the facts and circumstances of this case and that evidence under this exception is only admissible where a defendant relies upon a defense that the defendant made a mistake or caused an accident. (*See* A.R. VII at 51-52). In this case, the Appellant contended he did not have any involvement whatsoever in the death of Teresa Rollins. *Appellant's Brief*, pp. 34-36. Additionally, the Appellee failed to address Appellant's argument that the trial court erred in its application and reliance on State v. Mongold, 220 W. Va. 259, 647 S.E.2d 539 (2007). *Id.*

b. The evidence was inadmissible under the rules pertaining to hearsay.

Despite Appellee's argument, the non-hearsay exception does not apply to the decedent's statement. *See Appellee's Brief*, p. 29. As set forth in Appellant's Brief, the trial court erred in concluding that "the statements are not being offered for the truth of the matter asserted, but are, rather, being admitted solely for the purpose of identifying the bruises seen in the photographs. Accordingly, and so long as the statements are only used for identification purposes, they do not constitute inadmissible hearsay." (*Appellant's Brief*, pp. 38-39; A.R. VII at 58).

If admitted for the purpose identified by the trial court, to identify the bruises seen in the photographs, the evidence would not be relevant *unless accompanied by evidence of causation*. Therefore, the statements allegedly made by Teresa Rollins to Jimmy Thompson and Regina Lucente regarding her photographed injuries were offered to prove the truth of the matter asserted, i.e. that the Appellant caused the bruises depicted in the photographs of Teresa Rollins.

Additionally, the Appellee failed to address Appellant's argument that the present sense impression of Rule 803(1) does not apply under the test set forth in State v. Phillips, 194 W. Va. 569, 461 S.E.2d 75 (1995), *overruled on other grounds*. See Appellant's Brief, pp. 39-43. Phillips, *supra*, requires spontaneity of a statement in relation to an event. Id. at 572-573, 78-79. At the very most, the testimony of Jimmy Thompson only establishes that he took the pictures of Teresa Rollins' prior to July 4th, on either July 2nd or July 3rd. There is no clear indication of when the injuries occurred in relation to when Thompson took the pictures and this was not sufficient foundation for the admission of this evidence under Rule 803(1).

The Appellee also fails to address Appellant's argument that the requirements of the catch-all exception in Rule 804(b)(5) was not satisfied. See Appellant's Brief, pp. 43-44. There was no notice to the Appellant of the State's intention to offer the statements, the particulars of the statements were not provided and the name and address of the declarant was not provided in any notice. Without adherence to these formalities, the Court erred in admitting evidence under Rule 804(b)(5). See State v. Smith, 178 W. Va. 104, 114, 358 S.E.2d 188, 198-99 (1987), (“[w]e emphasize in closing that Rules 803(24) and 804(b)(5) cannot be viewed as an open door to thrust hearsay statements into a trial.”).

While the Appellee does not concede error in the trial court's determinations concerning the admissibility of the statements under the hearsay rules, it contends that if error was committed by the trial such error was harmless. Appellee's Brief, Page 31-32. Both the Appellant and Appellee agree that the controlling law on this issue is set forth in Syllabus Point two of State v. Atkins, 163 W.Va. 502, 261 S.E.2d 55 (1979), *cert. denied*, 445 U.S. 904, 100 S. Ct. 1081, 63 L.Ed.2d 320 (1980).

Pursuant to Atkins, *supra*, the Appellant contends that, if the statements are determined to be inadmissible evidence and removed from the State's case, the remaining evidence is not sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt. This contention is based on the fact that all of the State's evidence in this case, with the exception of the testimony of April Bailes, is circumstantial evidence. Given the numerous changes to cause and manner of death by the State Medical Examiner's Office, the conflicting expert testimony presented at trial and the purely circumstantial evidence of guilt presented by the State at trial, it is extremely likely the jury placed much emphasis on the improperly admitted evidence.

Even assuming *arguendo* that there was sufficient evidence absent the improperly admitted evidence to sustain a conviction, the prejudicial effect of placing the evidence before the jury was extremely high due to its inflammatory nature and by virtue of the nature of the allegations that the Appellant previously abused his deceased wife. As a result, a new trial should be awarded to the Appellant.

c. The evidence was inadmissible under the Confrontation Clause

The Appellee also fails to fully address Appellant's argument that admission of the statements allegedly made by the decedent violated the Confrontation Clause. See Appellant's Brief, pp. 44-49. Instead, the Appellee claims, once again, that if there was error by the trial court it was harmless. Appellee's Brief, pp. 32-33. For the reasons set forth above, as stated with regards to the hearsay argument, such error was not harmless.

The trial court narrowly interpreted the Syllabus Points 8 and 9 in Mechling to require a statement be made to law enforcement before it can be characterized as testimonial, which is in direct conflict with this Court's statement in Footnote 10 of Mechling that "[u]ntil the U.S. Supreme Court holds otherwise, we interpret the Court's remarks to imply that **statements made**

to someone other than law enforcement personnel may also be properly characterized as testimonial.” State v. Mechling, 219 W. Va. 366, 379, 633 S.E.2d 311, 324 (2006) (emphasis added). The trial court further failed to consider that there was no ongoing emergency at the time the statements were made. (A.R. VII at 65). Additionally, the Appellee failed to address the Appellant’s arguments concerning the trial court’s interpretation of State v. Kaufman, 227 W. Va. 537, 548, 711 S.E.2d 607, 618 (2011), in finding that the statements at issue are “more analogous to entries in a personal diary, such as the ones at issue in *Kaufman*, because they were made to Teresa’s close friend and confidant, Jimmy Thompson, and to her sister, Regina Lucente.” (A. R. VII at 65). For the reasons set forth in Appellant’s Brief, the statements at issue are not analogous to those in Kaufman.

In sum, the Confrontation Clause should have barred this testimony because it was testimonial for the following reasons (1) it not given during an ongoing emergency; (2) the statements were given under circumstances that would lead an objective witness to believe that they would be available for use at a later trial date.

Additionally, the Appellee failed to address Appellant’s argument that even if the statements are non-testimonial, the statements should be still be deemed inadmissible under the Confrontation Clause as they do not bear adequate indicia of reliability.

d. The evidence should have been excluded because of its prejudicial effect.

The Appellant reiterates the argument set forth in his Brief that the trial court abused its discretion in finding that the five (5) acts of alleged abuse were admissible under Rule 403. See Appellant’s Brief, pp. 49-51. The Appellee does not address this issue in its response.

V. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT CUMULATIVE EVIDENCE THROUGH THE TESTIMONY OF MULTIPLE EXPERT WITNESSES.

In reviewing the Appellee's counter-arguments to Appellant's arguments relating to the cumulative testimony offered by the State and Dr. Wecht's testimony, the Appellant is of the opinion that his Brief adequately addresses these issues and further discussion of these issues is not necessary. See Appellant's Brief, pp. 51-57. The issue is simply whether the trial court abused its discretion by permitting the State to offer cumulative expert testimony through three separate pathologists that the decedent's injuries were not consistent with being hit by a tree and whether this was unfairly prejudicial to the Appellant under Rule 403.

VI. UNFAIR SURPRISE WAS PROPERLY PRESERVED FOR APPEAL AND THE UNFAIR SURPRISE HAMPERED THE PREPARATION AND PRESENTATION OF THE APPELLANT'S CASE IN THE PROCEEDINGS BELOW.

In response to the Appellee's position on this issue, the Appellant concedes that an objection was not made at trial to Dr. Kaplan's surprise testimony. However, an objection is not required in order to preserve this ground for appeal. In Syllabus Point 4 of McDougal v. McCammon, 193 W. Va. 229, 232, 455 S.E.2d 788, 791 (1995), this Court held "[i]n order to preserve for appeal the claim of unfair surprise as the basis for the exclusion of evidence, the aggrieved party must move for a continuance or recess." As the record reflects, Dr. Kaplan offered this surprise opinion at the very end of his direct testimony. (A.R. III at 148). Counsel for the Appellant immediately requested a recess for two reasons: (1) a restroom break and (2) to confer with co-counsel for five minutes, as the Court permitted them to do with Dr. Sabet. (A.R. III at 148). In fact, the Court noted they could "kill two birds with one stone back there." (A.R. III at 148). Although the undersigned was not trial counsel, it is clear that Dr. Kaplan's change of opinion was discussed during the break as it was discussed on cross examination. (A.R. III at 175). The Appellee's assertion that the recess was solely a bathroom break is disingenuous and

not supported by the record. This claim was properly preserved for appeal by requesting a recess and no further objection was required to preserve this ground for appeal.

Despite the Appellee's assertion that this claim lacks merit and the Appellee's downplaying of the significance of the change regarding the manner of death from undetermined to homicide, the fact is that the testimony presented by Dr. Kaplan went much further than contained in his amended autopsy report signed on July 19, 2010.² This is especially outrageous when considering he had two years to supplement his opinion and did not. Yet, at trial, Dr. Kaplan testified that the manner of death was no longer undetermined and that this was a homicide and that the cause was a combination of drowning and strangulation. (A.R. III at 147-148, 174, 185-186). This resulted in unfair surprise to the Appellant, as he did not anticipate Dr. Kaplan to testify that the manner of death was a homicide. (A.R. VI at 425-427). As set forth in Appellant's Brief, everyone, including the Prosecutor, was surprised by the testimony of Dr. Kaplan. (A.R. VI at 426).

The non-disclosure by Dr. Kaplan hampered the preparation and presentation of the Appellant's case as he did not have time to prepare for an adequate cross-examination on this change of opinion. Under these circumstances, reversal is appropriate. *See State ex rel. Justice v. Trent*, 209 W. Va. 614, 618, 550 S.E.2d 404, 408 (2001). Additionally, had the Appellant known prior to trial that the State would have two pathologists testifying that the manner of death was a homicide, he could have moved the trial court for funding to hire an additional pathologist.

² On July 19, 2010 an amended autopsy report was filed changing the manner of death to undetermined, reflecting significant suspicion of homicidal assault. (A.R. II at 155, 195-196; A.R. VII at 206). At this time, Dr. Kaplan concurred with the manner of death being undetermined. (A.R. III at 174, 185, A.R. VII at 209). Two years later, at trial, Dr. Kaplan testified that the manner of death was no longer undetermined and that this was a homicide and the cause of death was a combination of strangulation and drowning. (A.R. III at 148, 174, 185-186).

The end result of Dr. Kaplan's surprise testimony was substantial prejudice to the Appellant and a new trial should be awarded.

VII. THE CUMULATIVE EFFECT OF NUMEROUS ERRORS WARRANTS A NEW TRIAL.

Even if the Court does not believe that reversal of Appellant's conviction is appropriate based on any single ground cited herein, the cumulative effect of biased jurors, denial of the opportunity to conduct a proper voir dire, denial of the right to an impartial and objective jury, improper remarks by the Prosecutor during closing arguments, admission of evidence in violation of the *West Virginia Rules of Evidence* and the Confrontation Clause, admission of cumulative expert testimony and undisclosed expert testimony resulting in unfair surprise, as set forth more fully herein, constitute sufficient error to have created a cumulative effect of denying the Appellant a fair trial.

Although the Appellee contends there is "overwhelming evidence" of guilt, all of the evidence in this case, with the exception of the testimony of April Bailes, is purely circumstantial evidence. The evidence was the subject of conflicting expert opinion and even the State's own experts changed their opinion as to cause and manner of death multiple times. The only piece of direct evidence, April Bailes' testimony, is tainted by the Prosecutor's misconduct and is not trustworthy.

CONCLUSION

Based upon the foregoing, the judgment of conviction should be reversed and a new trial should be awarded.

Signed: 
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 13-0099

NICHOLAS CO. CIRCUIT COURT CASE NO. 11-F-81

STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent/Appellee,

v.

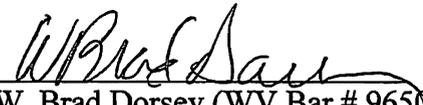
GARY LEE ROLLINS, Defendant Below,
Petitioner/Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2013, true and accurate copies of the foregoing **Appellant's Reply Brief** was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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