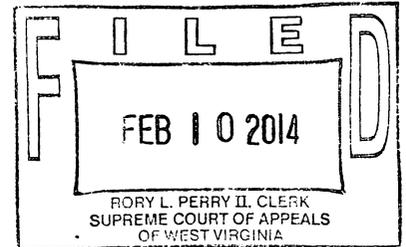


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

at

CHARLESTON, WEST VIRGINIA



NO. 13-1111

**Douglas Libert, Petitioner
Below, Respondent**

Vs.

**Joseph Kuhl, Magistrate in and for Wood County, West Virginia,
Respondent**

**Wood County Circuit Court
Case Nos. 13-P-46
The Honorable J.D. Beane**

**PETITIONER'S REPLY BRIEF ON BEHALF OF
DOUGLAS LIBERT**

ERIC K. POWELL, Esq.
West Virginia State Bar Number 6258
Counsel for Petitioner
Powell Law Office
500 Green Street
Post Office Box 31
Parkersburg, West Virginia 26101
(304) 422-6555 Phone No.
(304) 422-2889 Fax No.

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ASSIGNMENT OF ERROR

- 1. THE CIRCUIT COURT ERRED BY FAILING TO GRANT THE PETITIONER'S PETITION FOR A WRIT OF PROHIBITION WHERE THE MAGISTRATE GRANTED A MISTRIAL IN THE UNDERLYING PROCEEDING WITHOUT A MANIFEST NECESSITY TO DO SO, AFTER JEOPARDY HAD ATTACHED AND THEN INTENDED TO RE-TRY THE PETITIONER ON THE CHARGE.**

STATEMENT OF THE CASE

Respondent alleges that the subject videotape only depicts events occurring after the incident. Petitioner asserts that the videotape depicts events occurring both before and after the incident. Petitioner also stresses that the State exacerbated the situation by having its own witness refer to the videotape after the Magistrate instructed the jury to disregard Counsel's remark.

ARGUMENT

- 1. THE CIRCUIT COURT ERRED BY FAILING TO GRANT THE PETITIONER'S PETITION FOR A WRIT OF PROHIBITION WHERE THE MAGISTRATE GRANTED A MISTRIAL IN THE UNDERLYING PROCEEDING WITHOUT A MANIFEST NECESSITY TO DO SO, AFTER JEOPARDY HAD ATTACHED AND THEN INTENDED TO RE-TRY THE PETITIONER ON THE CHARGE.**

The Respondent goes to great lengths to argue that the Magistrate had the right to review his interlocutory Order wherein he instructed the jury to disregard Counsel's remark, even suggesting that the Magistrate could have reconsidered his ruling *sua sponte*. The fact remains that the Magistrate did not reconsider his ruling *sua sponte*. He reconsidered only upon the State's untimely Motion after they had condoned the error by having their own witness mention the videotape.

The point is not whether the Magistrate could reconsider his ruling. Petitioner makes no argument that he couldn't. The point is two-fold:

1. Did the magistrate abuse his discretion, and
2. Did the State waive its right to even having the motion for a mistrial?

In State v. Day, 225 W.Va. 794, 696 S.E. 2d 310 (W.Va. 2010), this Court stated

"Where a party objects to incompetent evidence, but subsequently introduces the same evidence, he is deemed to have waived his objection." Syl. Pt. 2.

In Day, defense counsel objected to an expert's testimony on the basis of a Rule 16 violation. The objection was overruled. Defense counsel then cross-examined the expert and elicited some of the same testimony he had objected to. On appeal, this Court ruled he had thereby waived his objection.

In addition, defense counsel did not make his objection under Rule 16 until the last question was asked of the expert on direct-examination. This Court found that the objection was untimely, stating:

"West Virginia Rule of Evidence 103(a)(1) requires that, to preserve for appellate review an objection to evidence, the objection must be (1) specific, (2) timely, and (3) of record...Indeed, timeliness of objection under the Rule requires that it be made at the time the evidence is offered...Thus, any argument by Appellant that the entirety of Sgt. Castle's testimony was inadmissible...was untimely and was, therefore, waived."

In this case, the State broke both of the rules set down in Day. They did not move for a mistrial when Counsel's remark was made. They acquiesced in the curative instruction given by the Magistrate. Then, before moving for mistrial, their own witness

mentioned the videotape to the jury. At that point, the score was even. It was a matter of hours before they moved for a mistrial without a showing of prejudice.

The Respondent relies heavily on Arizona v. Washington, 434 U.S. 497, 505 (1978). However, the conduct by defense counsel complained of in that case was significantly more egregious than what occurred here.

In Arizona, the Defendant had been convicted of murder in Arizona in 1971. However, his conviction was reversed and a new trial ordered because the prosecutor had withheld exculpatory evidence.

The Defendant's second trial began in January, 1975. During voir dire, defense counsel told the jurors that:

"there was evidence hidden from [respondent} at the last trial."

To make matters worse, he then told the jurors in his opening statement:

"You will hear testimony that notwithstanding the fact that we had a trial in May of 1971 in this matter, that the prosecutor hid those statements and didn't give those to the lawyer for George saying the man was Spanish speaking, didn't give those statements at all, hid them.

"You will hear that that evidence was suppressed and hidden by the prosecutor in that case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case.

The prosecution made a timely motion for a mistrial at the close of opening statements. After careful and protracted consideration, and after granting the parties overnight to research the issue, the Court granted the mistrial.

In Arizona, defense counsel directly impugned the character and integrity of the prosecuting attorney, or at least his office. In an obvious attempt to gain sympathy

from the jury, he expressly told them that his client had not been dealt with fairly by deceptive means on the part of his adversary.

Counsel's remark in this case does not rise to such a level. He did not impugn anybody's character or even suggest whose side of the case the tape favored. He did not mention at to whose request the video was ruled inadmissible. He did not tell the jury what was on the videotape.

In Arizona, the prosecutor did not condone the statement by subsequently introducing evidence of the prior prosecutorial remark, In this case, they did when they offered the alleged victim as a witness and he mentioned the videotape.

Respondent admits that "midtrial discharge of a jury at the behest of the prosecution and over the objection of a defendant is generally not favored." Syl. Pt. 1, Porter v. Ferguson, 174 W.Va. 253, 324 S.E. 2d 397 (1984).

Respondent further admits:

Where a prosecutor claims that the defense has by its actions prejudiced the jury, he is entitled to obtain a mistrial, without double jeopardy barring a retrial, if it can be shown: (1) that the conduct complained of was improper and prejudicial to prosecution, and (2) that the record demonstrates the trial court did not act precipitously and gave consideration to alternative measures that might alleviate the prejudice and avoid the necessity of terminating the trial.

Syl. Pt. 5, Keller v. Ferguson, 177 W.Va. 616, 355 S.E. 2d 405 (1987).

As was the case below Respondent makes the bare assertion that the State's case was prejudiced by counsel's remark. However, Respondent cannot point to any fact in the record which establishes such prejudice, primarily because the state made no attempt to establish prejudice and indentified no actual prejudice. Respondent essentially argues that prejudice should be presumed and any improper conduct during opening statement should be sufficient grounds for a mistrial. Such a finding here

would vitiate this Court's requirement in Keller that the prosecutor must make a showing (not an inference) of prejudice to its case.

Moreover, Respondent attempts to downplay the importance and necessity of polling the jury. This Court, however, has stressed the importance of polling the jury.

"Here, however, no showing was made at the time the motion for mistrial was tendered that any member of the jury had in fact seen or read the offensive article, we do not think that prejudice to the accused can be presumed from the mere opportunity during trial to read or to hear about objectionable media reports. See *McHenry v. U.S.*, 276 F. 761 (D.C. Cir. 1921); *Sundahl v. State*, 154 NEB. 550, 48 N.W. 2d 689 (1951). Rather, a defendant who seeks a mistrial on the ground that the jury has [172 W. Va. 305] been improperly influenced by prejudicial publicity disseminated during trial must make some showing to the trial court at the time the motion is tendered that the jurors have in fact been exposed to such publicity. In the absence of a showing of juror exposure to prejudicial publicity during the courts of trial, it will be presumed that the jurors followed the trial court's instruction to avoid or to ignore such publicity. *Wayne v. Com.*, 219 Va. 683, 251 S.E. 2d 202, cert. denied, 442 S.S. 924, 99 S. Ct. 2850, 61 L.Ed.2d 292(1979).

Since in many instances it would be impossible for a defendant to show actual juror exposure to prejudicial publicity without a direct inquiry of the jurors themselves, we believe the proper methods of making such a showing is a poll of the jury at the time the motion for a mistrial is made. In *State v. Williams*, *supra*, we cited with approval the following language from § 3.5(f) of the American Bar Association's Standards Relating to Fair Trial and Free Press:

"If it is determined that material disseminated during trial raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material." [Emphasis supplied.]

160 W.Va. at 24, 230 S.E.2d at 746. If it appears from examination that none of the jurors were actually exposed to the prejudicial publicity, the court need make no further

inquiry. *U.S. v Hankish*, 502 F.2d 71 (4th Cir. 1971). If any of the jurors indicate that they have in fact read the prejudicial article, then the court should proceed with the individual examination of each juror mandated by *State v. Williams*, *supra*, to determine the effect of such exposure upon the juror's ability to render an impartial verdict in the case and to ascertain the corrective measures necessary to afford the defendant a fair trial.

Here however, counsel for the appellant did not request that an inquiry be made of the individual jurors. Indeed, as we noted earlier, counsel expressly declined to make such an inquiry. Instead he acquiesced in the continuation of the trial. The State asserts that by declining the opportunity to poll the jury at the time the motion for a mistrial was made, the appellant waived his right to object to the possible prejudicial effect of the publicity on the impartiality of the jury. We agree."

State v. Williams, 172 W.Va. 295, 305 S.E. 2d 251 (1983).

As in *Williams*, the State also acquiesced in the continuance of the trial and the court gave a curative instruction. When the motion for mistrial was made, the State showed no prejudice on the part of any juror and it is clear that no juror actually saw the videotape or was prejudiced by the mere mention of it. Also as in *Williams*, prejudice to the State should not "be presumed from the mere opportunity during trial to read or to hear about" the videotape.

Finally, the State made no request to poll or question the jury to establish any actual prejudice. Therefore, as in *Williams*, it should be "presumed that the jurors followed the trial court's [curative] instruction."

Respondent also downplays the effectiveness of need for a curative instruction. This Court has stressed the effectiveness and need for a curative instruction. See *Williams*, *Id.* The law for this jurisdiction is replete with rulings by this Court that the

giving of a curative instruction is generally sufficient to remove the taint of improper evidence.

Finally, despite Respondent's assertions to the contrary, a single improper remark by counsel or a witness has not generally been held by this Court to necessitate a mistrial.

"The manifest necessity in a criminal case permitting the discharge of a jury without rendering a verdict may arise from various circumstances. Whatever the circumstances, they must be forceful to meet the statutory prescription." State v. Catlett, 536 S.E. 2d 728 (W.Va. 2000).

This case is very similar to Catlett. In Catlett, one of the State's experts mentioned the existence of excluded evidence. As in this case, he apparently did not give any details as to the content of that evidence. Counsel for the Defendant objected and asked for and received a curative instruction. He also moved for a mistrial, but that was denied.

On appeal, the Defendant asked the Court to reverse his conviction for the trial court's failure to grant a mistrial. Our Court denied him relief, stating:

"This Court has also stated that ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error . . . Given the fact that the circuit court gave a curative instruction in this case which the parties agreed to, we do not find that the circuit court abused its discretion by denying the appellant's motion for a mistrial."

"The right to obtain a mistrial based on manifest necessity arising out of improper questioning by the parties should not be easily obtainable. We echo the sentence expressed in Oregon v. Kennedy, and recognize that some degree of latitude must be accorded to attorneys for both sides in the clash of the adversary criminal process. Other courts have come to much the same conclusion and have applied the double jeopardy bar where the

defense attorney's remarks were either not sufficiently prejudicial or, if they were, the court acted precipitously by not considering alternatives that would have cured the prejudice, E.g. Spaziano v. State, 429 S. 2d 1344 (Fla. App. 1983) (mis-statement of evidence in opening remarks . . .") Keller, supra.

It is well established by the Court that an isolated improper remark by Counsel does not automatically warrant a mistrial. It is also well established that a showing of prejudice must be made. Defense counsel herein did not even make mention of the contents of the videotape or use it to support any theory of his case.

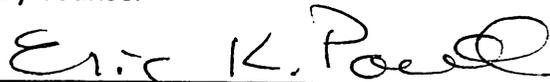
CONCLUSION

In summary, the lower court erred in granting the mistrial because:

- 1) Counsel's remark was isolated and relatively neutral,
- 2) The lower court gave a curative instruction,
- 3) The State did not make a timely motion for mistrial,
- 4) The State acquiesced in the continuance of the trial,
- 5) The State condoned the error by introducing evidence of the existence of the videotape, and
- 6) The State did not poll the jury or otherwise make a showing of prejudice to its case.

Therefore, the Circuit Court of Wood County erred in failing to grant the Petition for a Writ of Prohibition prayed for therein.

Respectfully submitted,
Douglas Libert,
By Counsel



Eric K. Powell, Esq.
WV State Bar No. 6258
Powell Law Office, 500 Green Street
Parkersburg, WV 26101
Phone: (304) 422-6555
FAX (304) 422-2889

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v.

JOSEPH KUHL, Magistrate in
And for Wood County, WV,

Case No. 13-1111

Respondent.

CERTIFICATE OF SERVICE

I, Eric K. Powell, hereby certify that on February 10, 2014, I have caused to be served upon the parties hereto listed below, a true and accurate copy of the attached *Petitioner's Reply Brief* by sending the same by U.S. Postal Service on same date to all the parties listed below with actual filing of same with the Clerk of the Circuit Court on February 10, 2014.

Scott E. Johnson, Senior Assistant Attorney General
West Virginia Supreme Court of Appeals
State Capitol, Room E-317
Charleston, WV 25305



Eric K. Powell, Esq. WV State Bar 6258
Powell Law Office
500Green Street
Parkersburg, WV 26101
304-422-6555