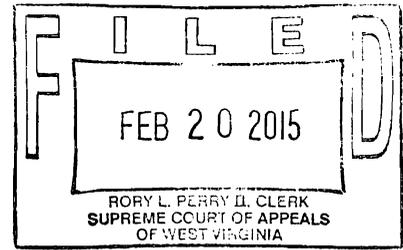


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 14-0887



LILLIE M. TRAIL,
Petitioner,

V.

Appeal from a final order of the
Circuit Court of Lincoln County
(97-F-28)

STATE OF WEST VIRGINIA,
Respondent.

Petitioner's Reply Brief

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STATEMENT OF THE CASE

This Court has the entire record below at its disposal. Petitioner included all relevant facts in her initial brief and Respondent's brief provided an in-depth chronological summary of all testimony elicited in the circuit court. Petitioner incorporates by reference the Statement of the Case in her initial brief and believes no further factual clarification is necessary unless and until this Court elects to hear oral argument.

ARGUMENT

Petitioner deems a Reply necessary to highlight the errors of law and prejudice that she suffered which merits a new trial as follows:

- I. Clear precedent dictates that Ms. Shamblin was an interested party and the State would not have been able to overcome the presumption of prejudice had the *Sutphin* hearing been properly conducted.**

Respondent argues that Ms. Shamblin was not an "interested party," and in doing so, it failed to mention or distinguish the clear precedent articulated in *Bluestone Indus., Inc. v. Keneda*, 232 W. Va. 139, 751 S.E.2d 25 (2013).

In *Bluestone*, this Court held that defendant's company representative was an interested party creating a presumption of prejudice after the representative had a conversation with a juror during a lunch recess outside the courtroom. Notably, defendant's representative testified the conversation was brief and only lasted a couple of seconds. *Id.* at 141, 27.

Here, when comparing *Bluestone* to the underlying case, Ms. Shamblin was undoubtedly an interested party to the litigation in that: (1) she knew Petitioner; (2) she approached Juror Nunley during the trial at work; (3) she told Juror Nunley that she believed Petitioner was guilty; and (4) Juror Nunley admitted that she believed Ms. Shamblin was trying to influence her vote.

For the reasons stated above, if the defendant’s company representative in *Bluestone* was deemed to be an interested party, then Ms. Shamblin should be as well.

Rather than automatically placing the burden of proof on Petitioner, had the circuit court properly determined that Ms. Shamblin was an interested party, then the burden would have shifted to the State to rebut the presumption of prejudice. As indicated in *Remmer v. United States*, 347 U.S. 227 (1954), the burden is a heavy one for the State to overcome. *Id.* at 229. Respondent proffered no evidence during the *Sutphin* hearing¹ to rebut the presumption of prejudice that Ms. Shamblin’s influence had on Juror Nunley. Critically, the State never called any of the other jurors to testify during the hearing to inquire whether Juror Nunley attempted to influence their decision based upon the conversation that took place with Ms. Shamblin.

Thus, when analyzing existing precedent, Ms. Shamblin was an interested party and the State would not have been able to overcome the heavy burden of rebutting the presumption of prejudice during the *Sutphin* hearing. As such, Petitioner is requesting a new trial on these grounds.

II. Admissibility of a type of evidence differs from admissibility of the same evidence in a bifurcated murder trial.

Petitioner does not dispute this Court’s holding in *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010), that the type of evidence admissible in the mercy phase of a proceeding is broader than the type of evidence that is admissible in the guilt phase.

However, Respondent chose to ignore the second part of Syl. Pt. 7 of *McLaughlin* where this Court reiterates that the evidence in question, in any phase of trial, must be found by the circuit court to be “relevant under Rule 401 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to W.Va. R. Evid. 403.” *Id.* at Syl. Pt. 7.

¹ *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995)

Further, Respondent erroneously argues that *McLaughlin* dispenses with the cautionary statements this Court provided in *State v. Rygh*, 206 W. Va. 58, 511 S.E.2d 469 (1998) regarding the admissibility of evidence calculated solely to inflame the jury. Rather, *McLaughlin* discusses whether evidence in addition to that adduced at the guilt phase of a trial may be proffered by either the prosecution or defense in the mercy phase. 226 W. Va. at 240, 700 S.E.2d at 300. Again, Petitioner does not dispute this area of settled law. Petitioner urges this Court to draw its attention to the second part of the *McLaughlin* holding, specifically, such additional evidence may be admitted “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.” *Id.* (emphasis added)

Petitioner contends the same rules of evidence should apply to both phases of a bifurcated murder trial. This is critical because in the instant case the circuit court after conducting a Rule 401 and 403 analysis deemed evidence (autopsy photograph) too prejudicial for the jury to view during the trial phase. Then the circuit court admitted the same evidence during the mercy phase.¹ Essentially, in a matter of days, the Rules of Evidence were applied differently to the same evidence.

The inconsistent application of the West Virginia Rules of Evidence over the same piece of evidence during both phases of the murder trial was prejudice to Petitioner and exceeded the contemplation of *McLaughlin*. In *McLaughlin*, evidence of the defendant’s prior bad acts was admitted in the mercy phase, and was tested under W. Va. R. Evid. 404(b) before its admission. By the time the mercy phase came around in Petitioner’s trial, the circuit court had already tested

¹ Respondent refers to *State v. Saunders*, 166 W. Va. 500, 275 S.E.2d 920 (1981), in an attempt to misdirect the Court into believing Petitioner’s earlier brief cited to law that has been overruled. The *Saunders* case has never been overruled, and Respondent actually has refused to perform the type of case-by-case analysis required by *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994) upon this issue and others throughout Respondent’s brief.

the autopsy photo under the West Virginia Rule of Evidence and deemed it to be inadmissible. During the trial, Petitioner had stipulated that her husband had been found shot dead in the woods, and had not disputed the testimony of Greg Whittington that he shot Chester Trail in the woods, and in what manner. Photographs of the result of that stipulated shooting proved nothing additional to this stipulated testimony in either phase of Petitioner's trial, pursuant to W. Va. R. Evid. 401. If the prejudicial effect was too great to admit the photographs in the guilt phase, the same photographs should not have been admitted in the mercy phase, under the cautionary provisions of *Rygh* that were not limited by *McLaughlin*.

Petitioner maintains the circuit court exceeded its broad discretion and that her constitutional rights were violated by admitting the same evidence under two different standards in two different trial phases. As such, Petitioner again respectfully requests the appropriate remedy of a new trial.

III. The reading of West Virginia's Slayer Statute in this criminal murder trial served no relevant purpose and created prejudicial error that was not saved by the limiting instruction.

Simply, the Slayer Statute had no place in Petitioner's murder trial. A plain reading of W. Va. Code § 42-4-2 reveals that its application is limited to one who has been convicted of the crime:

No person **who has been convicted** of feloniously killing another, or of conspiracy in the killing of another, shall take or acquire any money or property, real or personal, or interest therein, from the one killed or conspired against, either by descent and distribution, or by will, or by any policy certificate of insurance, or otherwise. . . (emphasis added)

At the time the Slayer Statute was read, Petitioner's trial had begun but she **had not been convicted**, and therefore the Slayer Statute was inapplicable. Its reading served only to advance a presumption by the State regarding Petitioner's awareness of its existence, and a presumption

that she would be divested of insurance proceeds if convicted, so she elected to waive life insurance benefits with that presumed knowledge. No evidence indicating Petitioner's awareness of the statute was introduced, but its introduction to the jury created prejudice regarding Petitioner's reasons for waiving insurance proceeds. This limiting instruction given by the circuit court did little, if anything, to limit this prejudice. Petitioner had not been convicted and was not attempting in the underlying case to prove her entitlement to any life insurance proceeds. Under W. Va. R. Evid. 401 and 403, judicial notice of the Slayer Statute was not relevant and was overly prejudicial to Petitioner. Accordingly, the circuit court erred by taking judicial notice of W. Va. Code § 42-4-2, designed for the purpose of preventing a convicted killer or conspirator from profiting from life insurance proceeds. Syl. Pt. 2, *McClure v. McClure*, 184 W. Va. 649, 403 S.E.2d 197 (1991).

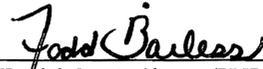
IV. The prosecutor asking the jury to atone for a victim involved in an incident unrelated to the charges in which Petitioner stood trial resulted in manifest injustice to Petitioner.

Petitioner first urges the Court to consider the facial impropriety of a prosecutor encouraging a jury to use its power to atone for a crime other than the one to which a defendant is being tried. Petitioner was on trial for the death of her husband and not for any crime related to Mark Medley, and yet the State unbelievably implied that the jury's power could lead to Petitioner's punishment for other crimes. A comment so facially egregious hardly merits further analysis. Petitioner respectfully refers the court to the four-part balancing test in *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995) and incorporates by reference her initial argument that the prosecutor's remarks were so prejudicial and misleading to the jury as to grossly exceed the scope of permissible prosecutorial comment, resulting in manifest injustice to Petitioner. See Petitioner's Brief at 28-31.

CONCLUSION

In light of the foregoing and Petitioner's initial Brief in this Appeal, the Circuit Court's Further and Final Order: Order Denying Rule 33 Motion for a New Trial and Denying the Motion of Acquittal entered January 8, 2007 should be reversed, and this matter should be remanded for a new trial.

Respectfully submitted,



Todd S. Bailess (WVSB #10482)
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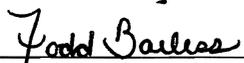
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STATE OF WEST VIRGINIA,
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CERTIFICATE OF SERVICE

I, Todd S. Bailess, counsel for Petitioner, Lillie M. Trail, do hereby certify that I served the foregoing **“Petitioner’s Reply Brief”** upon counsel for the State by delivering a true copy thereof via hand delivery this 20th day of February, 2015, addressed as follows:

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