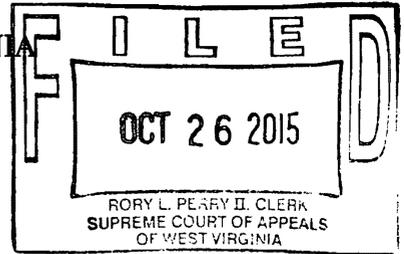


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

RICKY GREENFIELD, JR.,

Defendant Below, Petitioner.

DOCKET NO.: 15-0535
(Berkeley County Case No.: 13-F-233)

RESPONDENT STATE OF WEST VIRGINIA'S BRIEF

Cheryl K. Saville, Esq.
Assistant Prosecuting Attorney
State Bar No. 9362
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971
csaville@berkeleywv.org

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PETITIONER'S ASSIGNMENT OF ERROR

- I. WHETHER THE CIRCUIT COURT ERRED BY DENYING THE PETITIONER'S MOTION FOR NEW TRIAL WHEN THE JURY FOUND THE PETITIONER GUILTY OF MURDER IN THE FIRST DEGREE WITHOUT A RECOMMENDATION OF MERCY AFTER DELIBERATING FOR SEVENTY (70) MINUTES?
- II. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY NOT ALLOWING THE PETITIONER TO CROSS EXAMINE A WITNESS REGARDING A PRIOR CONVICTION PURSUANT TO RULE 609 OF THE WEST VIRGINIA RULES OF EVIDENCE?
- III. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO PLAY THE RECORDED STATEMENT OF KRISTIN STRONG FOLLOWING HER TESTIMONY AT TRIAL PURSUANT TO RULE 613 OF THE WEST VIRGINIA RULES OF EVIDENCE?
- IV. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO ADMIT A COLOR PHOTOGRAPH OF THE VICTIM AS FOUND AT THE CRIME SCENE?
- V. WHETHER THE CIRCUIT COURT ERRED BY DENYING THE PETITIONER'S MOTION FOR NEW TRIAL BASED UPON KRISTIN STONG'S TESTIMONY THAT THE PETITIONER SIGNED HIS CORRESPONDENCE TO HER AS "THE HAMMER?"
- VI. WHETHER THE CIRCUIT COURT ERRED BY DENYING THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AGAIN AT THE CLOSE OF EVIDENCE, OR, IN THE ALTERNATIVE, WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT OF THE JURY?
- VII. WHETHER THE CUMULATIVE WEIGHT OF ALL THE ERRORS COMMITTED WARRANTS THE GRANTING OF A NEW TRIAL?

STATEMENT OF THE CASE

The Petitioner was indicted by a Berkeley County grand jury on one (1) felony count of Murder on or about October 17, 2013. [AR, 8.] The charge was based upon allegations that the Petitioner murdered his estranged wife by striking her multiple times in the face and head with a ball peen hammer.

Following a trial by jury on January 27 - January 30, 2015, the Petitioner was found guilty of Murder in the First Degree [AR, 1030, 1042-1044.] The jury did not recommend

mercy. [Id.] Thereafter, the Petitioner, by counsel, filed a number of post trial motions. [AR, 1045-1066.]

On April 3, 2015, the Petitioner appeared for sentencing before the circuit court. The circuit court first considered argument on the Petitioner's post trial motions. Following the presentation of counsel, the court denied those motions. [AR, 1067-1070, 1073-1082.] The Petitioner was then sentenced to life imprisonment without the possibility of parole pursuant to **W.Va. Code §61-2-2** and the jury's finding of no mercy. [AR, 1067-1070, 1082-1087.] It is from this final order of the court that the Petitioner appeals.

SUMMARY OF ARGUMENT

The circuit court properly denied the Petitioner's motion for a new trial. The length of time the jury deliberated prior to returning a verdict is irrelevant so long as the jury had a sufficient evidentiary basis to support the verdict.

The court properly limited the scope of the Petitioner's cross examination of witness Stotler considering his prior felony conviction was older than ten (10) years pursuant to **W.Va.R.Evid. 609(b)**.

The court properly allowed the State to play the recorded statement of witness Strong following her testimony at trial pursuant to **W.Va.R.Evid. 613(b)**.

The court properly allowed the State to present a single photograph depicting the injuries to the victim in the condition she was found at the scene. The photo was relevant pursuant to **W.Va.R.Evid. 401**, and its probative value, both with regard to the question of malice, deliberation, and premeditation as well as the issue of mercy, outweighed the photo's prejudicial effect pursuant to **W.Va.R.Evid. 403**.

The circuit court properly denied the Petitioner's motion for new trial with regard to witness Strong's testimony that the Petitioner signed correspondence that he had written to her as "the hammer." The testimony was particularly relevant and probative with regard to the issue of mercy. The inclusion of this evidence was also not an improper remark of the prosecuting attorney requiring such an analysis; however, even under such an analysis, a new trial would not be warranted.

There was sufficient evidence, viewing the evidence in light most favorable to the prosecution and granting all inferences in favor of the prosecution, upon which the jury could and did find the Petitioner guilty of Murder in the First Degree beyond a reasonable doubt. Therefore, the court properly denied the Petitioner's motions for judgment of acquittal at both the close of the State's presentation of evidence and the close of all evidence.

There were no cumulative errors warranting a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State avers that the facts and legal arguments are adequately presented in the briefs and record on appeal and that the decisional process would not be significantly aided by oral argument. As such, oral argument would be unnecessary in this matter pursuant to Rule 18. If, however, this Court were to find oral argument necessary, the State believes argument pursuant to Rule 19 would be appropriate.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR BY DENYING THE PETITIONER'S MOTION FOR NEW TRIAL BASED UPON THE LENGTH OF TIME THE JURY TOOK TO REACH A VERDICT.

A. Standard of Review

“The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.” **W.Va.R.Crim.P.** 33.

“The question of whether a new trial should be granted depends on the circumstances of the case and is a matter largely in the discretion of the trial court. State v. Nicholson, 170 W.Va. 701, 296 S.E.2d 342, 344 (1982).”

State v. King, 173 W. Va. 164, 165, 313 S.E.2d 440, 442 (1984). “The question of whether a new trial should be granted is within the discretion of the trial court and is reviewable only in the case of abuse.” State v. Crouch, 191 W. Va. 272, 275, 445 S.E.2d 213, 216 (1994).

B. Discussion

The circuit court properly denied the Petitioner's motion for new trial. The Petitioner argues that because this was a four (4) day trial that the jurors could not have faithfully discharged their duty by returning a verdict after seventy (70) minutes of deliberation.

The State first points out that the entire first day of trial consisted of jury selection. [AR, 209-449.] Opening statements were not given until day two. [AR, 465-486.] Furthermore, a large number of the exhibits accounting for the volume of documents admitted into evidence were duplicative. For example, the cell phone records of the Petitioner, the victim and some of the witnesses were admitted in full along with a condensed version used by the State and a condensed version used by the Petitioner. [AR, 843-845.] These were also referenced extensively during the testimony of witnesses and portions of them were actually read into the record during the testimony of Detective Albaugh. [AR, 849-924.] Lastly, there was also no

testimony on day four. The defense rested that morning. [AR, 953, 967.]

Aside from these factors, demonstrating that practically there were only two days during which the jury actually heard evidence, the Petitioner also fails to recognize the overwhelming evidence presented by the State in this case against the Petitioner. The Petitioner indicated via text to the victim that he was bringing their children to her home the night he killed her. The Petitioner indicated to his girlfriend that he was taking the children to his wife's home the night he killed her. The neighbors heard the Petitioner's heavy work boots on the wooden stairs of the apartment complex and heard the children babbling the night of the victim's murder. Immediately following the murder, the Petitioner called both his father and his sister and told both of them that he had killed the victim by beating her in the face with a hammer. The Petitioner told his girlfriend when he arrived back at her house, still with the children, that he had killed the victim by beating her in the face with a hammer. When the Petitioner turned himself in to police, his clothing was covered in the victim's blood.

Although the Petitioner's strategy at the beginning of the case was to argue that someone else may have killed the victim, by the time the State rested, the evidence against him was so overwhelming that he was left to try to mitigate by introducing evidence that the killing was not premeditated or malicious. By the time deliberations began, even by the Petitioner's own account, the questions for the jury were down to what degree of guilt they should find and, if first degree, whether or not they should recommend mercy.

As the Petitioner points out, this Honorable Court does not have a great deal of precedent concerning this particular issue. However, the State agrees with the law as espoused by the Petitioner on this point. Courts addressing this issue have frequently found that the amount of time spent in deliberations is irrelevant.

While the Fourth Circuit does not have a holding directly on point, other circuits have addressed this issue. In holding that the amount of time spent in deliberations was irrelevant, and should not have been considered by the district judge, the Seventh Circuit wrote that, “If we trust our jury system, we must trust our jurors. Before attaching great significance to the short time the jury took for deliberations, we must have reason to suspect that the jury in some way disregarded its instructions or otherwise failed in its duty. A brief deliberation cannot, alone, be a basis for an acquittal.”U.S. v. Cunningham, 108 F.3d 120, 124 (7th Cir.1997). The Fifth Circuit has repeatedly held that “[w]e cannot hold an hourglass over the jury. If the evidence is sufficient to support the verdict, the length of time the jury deliberates is immaterial.”Guar. Serv. Corp. v. Am. Employers’ Ins. Co., 893 F.2d 725, 729 (5th Cir.1990) (quoting Marx v. Hartford Accident and Indem. Co., 321 F.2d 70, 71 (5th Cir.1963)).

United States v. Ward, No. 5:06CR35-V (W.D.N.C. June 17, 2008), 2008 WL 2485587.

The fact that the jury delivered a verdict after seventy minutes of deliberation does not indicate that the jury failed to consider the evidence presented or ignored the legal instructions of the circuit court. The fact remains that the jury had ample evidence to support its verdict under the law, and there is no evidence that its decision was based upon emotion rather than the evidence presented to it during the trial. The circuit court clearly did not abuse its discretion in denying the Petitioner’s motion for new trial. State v. Crouch, *supra*.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY NOT ALLOWING THE PETITIONER TO CROSS EXAMINE THE STATE’S WITNESS REGARDING A PRIOR FELONY CONVICTION, WHICH WAS MORE THAN TEN (10) YEARS OLD PURSUANT TO RULE 609(b) OF THE WEST VIRGINIA RULES OF EVIDENCE.

A. Standard of Review

8. The extent of cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in case of manifest abuse or injustice.” Syl. pt. 4, State v. Carduff, 142 W.Va. 18, 93 S.E.2d 502 (1956).

9. The extent to which prior convictions may be introduced to impeach the credibility of a witness other than the defendant in a criminal trial rests within the sound discretion of the trial court.

Syl. Pts. 8 & 9, State v. Davis, 176 W. Va. 454, 345 S.E.2d 549 (1986).

B. Discussion

Rule 609 of the West Virginia Rules of Evidence states as follows:

(a) General Rule.

...

(2) *All Witnesses Other Than Criminal Defendants.* For the purpose of attacking the credibility of a witness other than the accused

(A) evidence that the witness has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and

(B) evidence that the witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if the court determines, in the interests of justice, that:

- (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
- (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

W.Va.R.Evid. 609.

The Petitioner sought to introduce as impeachment evidence a 1986 arson conviction in the Commonwealth of Virginia against Michael Stotler. Mr. Stotler testified that he had been in a romantic relationship with the victim for a few weeks prior to her death. [AR, 774-815.] The Petitioner states that at that time in the trial, there was “considerable doubt” as to whether or not Mr. Stotler was a suspect in the crime. By that time in the trial, the Petitioner’s father and sister had already testified that the Petitioner confessed to them, officials (including forensic analysts)

had already testified that the Petitioner had the victim's blood all over his clothes when the Petitioner turned himself in, and the neighbors had already testified to hearing the Petitioner and the children leave the scene of the crime. The State avers that Mr. Stotler was not a suspect at that point in time.

Prior to inquiring about Mr. Stotler's prior conviction, the circuit court had a sidebar to hear the positions of counsel. [AR, 810-814.] There was no dispute that Mr. Stotler's conviction fell under subsection (b) of **W.Va.R.Evid.** 609. Therefore, the court was under no statutory obligation to allow any questioning of the witness with regard to the conviction. However, in the circuit court's discretion, it allowed the Petitioner to inquire as to whether or not Mr. Stotler was a convicted felon, but limited the scope of that inquiry since it was simply "collateral," i.e., of little probative value. The circuit court also asked what proof of the felony conviction was at hand in case the witness denied the conviction, and the parties indicated that it was simply listed as a conviction on the NCIC sheet, but neither party indicated that it had details as to the surrounding circumstances of the charge or the precise nature of the conviction other than its classification as a felony. The State believes this further supports the circuit court's decision to limit inquiry on cross-examination. Based upon the foregoing, the circuit court did not abuse its discretion. State v. Carduff, *supra.*, State v. Davis, *supra.*

Lastly, the State points out that the Petitioner did not object to circuit court's ruling limiting its scope of inquiry into the prior conviction. Generally, the failure to object constitutes waiver of a right to raise the matter on appeal. State v. Asbury, 187 W.Va. 87, 91, 415 S.E.2d 891, 895 (1992).

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO PLAY THE RECORDED STATEMENT OF KRISTIN STRONG FOLLOWING HER TESTIMONY AT TRIAL PURSUANT TO RULE 613(b) OF THE WEST VIRGINIA RULES OF EVIDENCE.

A. Standard of Review

“A trial court is afforded wide discretion in determining the admissibility of videotapes and motion pictures.” Syl. pt. 1, Roberts v. Stevens Clinic Hospital, Inc., 176 W.Va. 492, 345 S.E.2d 791 (1986).

Syl. Pt. 1, State v. King, 183 W. Va. 440, 396 S.E.2d 402 (1990).

The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.

Syl. Pt. 1, State v. Harris, 216 W.Va. 237, 605 S.E.2d 809 (2004)(per curiam); Syl. Pt. 1, State v. Calloway, 207 W.Va. 43, 528 S.E.2d 490 (1999).

B. Discussion

Rule 613 of the West Virginia Rules of Evidence states as follows:

(b) Extrinsic Evidence of a Prior Inconsistent Statement.
Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it.

W.Va.R.Evid. 613(b).

During the State’s case-in-chief, it called Kristin Strong to the stand. Ms. Strong was the girlfriend of the Petitioner. From the very beginning of Ms. Strong’s testimony, she gave answers to questions that were inconsistent with her prior recorded statement. Ms. Strong even denied that she and the Petitioner were anything more than friends, when in fact they were involved in an intimate relationship and the Petitioner was even living with her at the time of the murder. [AR, 816.] She denied that the Petitioner said or did anything at work that caused her

concern when, in fact, she had asked the Petitioner's father to speak with the Petitioner because the Petitioner had been making threats to harm the victim. [AR, 818.] She stated that when the Petitioner returned from supposedly dropping off his children with the victim- still with the children in tow- that the Petitioner's statement to her was that he was "worried" for the victim "because there was a man coming over." [AR, 820-821.] She eventually conceded that the Petitioner told her that the victim "had died" but stated that she didn't know how she had died. [AR, 821.] When asked if she noted anything about the Petitioner's appearance or demeanor when he came home, she answered no and just that he was "worried." [AR, 822.] Most illuminating is that when asked if seeing a transcript of the statement she had given to the police the night of the murder would refresh her recollection, Ms. Strong answered "probably not." [AR, 821.] The State was granted permission to treat Ms. Strong as a hostile witness and attempted to impeach her through use of the transcript of her statement to the best of its ability.

During the Petitioner's cross examination of Ms. Strong, she did admit that she was involved in an intimate, sexual relationship with the Petitioner and had been so involved prior to the murder. [AR, 829.] Ms. Strong continued to deny that she saw blood on the Petitioner. [AR, 830.] In re-direct, Ms. Strong not only continued to deny that she saw blood on the Petitioner, but she denied that she observed him wash up in the sink. The State, again, did its best to impeach her testimony through use of the transcript. [AR, 831-834.] During re-cross, Ms. Strong indicated that the Petitioner did not tell her that he had used a hammer or gave her details regarding what had occurred. In fact, Ms. Strong indicated that it was actually the police officer who told her that a hammer was used and not the Petitioner. [AR, 834-836.] Nearly the entirety of Ms. Strong's testimony was in direct opposition from her prior recorded statement.

The State then indicated to the circuit court that it wanted to present Capt. Swartwood of the Martinsburg Police Department to lay a foundation for the admission of Ms. Strong's video recorded statement given to Capt. Swartwood on the night of the murder. [AR, 840.] The circuit court heard argument on the matter. [AR, 840-843.] The Petitioner objected to the admission of the video based on the fact that the State had an opportunity to cross examine the witness using the transcript of the statement and to admit the video would be cumulative. [AR, 842.] In making its ruling the circuit court indicated that it certainly had questions, considering the final re-cross of the witness, as to whether the hammer was suggested to her by the police or whether that information actually came to her from the Petitioner. [AR, 842-843.] The circuit court found that the video recording was an available piece of evidence that "may enlighten the jury on an important point" and that "pictures and contemporaneous video frequently tell a story much more vividly than recounting it verbally from the stand ever could." [AR, 843.] The circuit court additionally found that just reading from a transcript deprives the trier of fact from assessing demeanor and whether or not there was something suggestive about the way questions were posed to the witness by the police. [AR, 1077-1078.]

The Petitioner argues that the video recorded statement was bolstering because of the State's attempt to impeach the witness through use of the transcript. However, the Petitioner led the jury to believe on cross examination that the police were suggestive to Ms. Strong in interviewing her and the initial impression left as a result of her statement that the Petitioner was simply "worried" about the victim "because a man was coming over" falsely indicated to the jury that there was possibly another suspect when in fact the Petitioner had confessed the entire killing to Ms. Strong. The State attempted to use the transcript to impeach Ms. Strong to give her an opportunity to explain or deny the statement she had given. **W.Va.R.Evid.** 613(b).

However, because of her lack of cooperation and the level of departure of her testimony from the recorded statement, it was necessary to introduce the actual recording of the statement. As the circuit court properly found in the exercise of its discretion, the admission of the video recorded statement was necessary in this case to show the witness' demeanor in giving the statement as well as enlighten the jury as to any inconsistencies that may have been apparent from her cross examination. [AR, 843.] Considering the circuit court's careful consideration, there was no abuse of discretion. State v. Harris, supra., State v. Calloway, supra.

IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO PRESENT A COLOR PHOTOGRAPH OF THE VICTIM AS FOUND AT THE CRIME SCENE.

A. Standard of Review

8. The admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence.

9. Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.

10. Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.

Syl Pts. 8-10, State v. Derr, 192 W. Va. 165, 451 S.E.2d 731 (1994).

B. Discussion

The State sought to introduce certain photographs of the crime scene in this case, including a single picture depicting the injuries to the victim. That picture was the only picture to which the Petitioner objected.¹ [AR, 1100.]

The Petitioner concedes that the photograph is relevant. The Petitioner states that the exhibit would have been just as relevant and effective in demonstrating the degree and manner of injury if presented in black and white rather than color. However, the “gruesomeness” of a photograph is not a deciding factor on its admission.

Gruesome photographs simply do not have the prejudicial impact on jurors as once believed by most courts. “The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced.... [G]ruesome or inflammatory pictures exists more in the imagination of judges and lawyers than in reality.” People v. Long, 38 Cal.App.3d 680, 689, 113 Cal.Rptr. 530, 537 (1974). As early as 1968, the Kentucky court questioned whether photographs of deceased victims had any prejudicial impact. In Napier v. Commonwealth, 426 S.W.2d 121, 122-23 (Ky.Ct.App.1968), the court stated:

“The fact is that it was not so gruesome as to be likely to prejudice or inflame the men and women, inured as they are to the horrors of both war and television, who sit on a modern jury. The time has come when it should be presumed that a person capable of serving as a juror in a murder case can, without losing his head, bear the sight of a photograph showing the body of the decedent in the condition or place in which found. ‘Where the photographs revealed nothing more than the scene of the crime and the persons of the victims, they were not incompetent.’ Salisbury v. Commonwealth [, 417 S.W.2d 244, 246 (Ky.Ct.App.1967)].”

State v. Derr, 192 W. Va. 165, 177 fn. 12, 451 S.E.2d 731, 743, fn. 12 (1994). The photograph introduced was simply a picture depicting the injuries to the victim in the condition in which she was found at the scene. Furthermore, it is somewhat questionable, considering the amount of

¹ For use in the testimony of the medical examiner, the State agreed to use mostly diagrams rather than photographs. No other picture of the victim’s injuries was shown to the jury. [AR, 29-33.]

blood on and surrounding the victim's head, if a black and white photograph would have shown anything other than a field of gray. The circuit court echoed this concern. [AR, 1080-1081.]

Ultimately, the circuit court conducted the appropriate analysis for admission of the photograph. [AR, 25-26, 29-33.] The court found that as part of the jury's analysis of the case, they would be asked to look at varying degrees of murder and it was relevant and probative in a consideration of the "nature and circumstances of the offense." [AR, 32-33.] The court also took into consideration the State's use of a just single photograph depicting the victim's injuries. [Id.]

Because the State has the burden to show malice in order to establish a case for first or second degree murder, a picture depicting the location and extent of the victim's injuries was especially probative. Furthermore, the State points out that there was no motion for bifurcation of the guilt and mercy phases of this trial. Therefore, the jury was hearing evidence as it pertained to both the Petitioner's guilt and whether or not it should find mercy if it convicted of Murder in the First Degree. To that end, this Court's recent opinion of State v. Trail, -- W.Va. --, -- S.E.2d -- (2015)(No. 14-0887, W.Va. Supreme Court October 7, 2015), 2015 WL 5928478, is also relevant.

Autopsy or crime scene photographs may be particularly relevant to depicting the nature of the crime committed by a defendant who has been found guilty of first degree murder. Even if deemed gruesome, the probative value of these photographs is greater at the mercy phase of a bifurcated trial than at the guilt phase of such trial.

Syl. Pt. 4, State v. Trail, *supra*.

The circuit court found the photograph relevant under **W.Va.R.Evid.** 401, and then conducted the appropriate analysis under **W.Va.R.Evid.** 403 and determined that the probative

value of the photograph outweighed its prejudicial effect. The circuit court did not abuse its discretion in admitting the single photograph of the victim's injuries. State v. Derr, *supra*.

V. THE CIRCUIT COURT DID NOT ERR IN DENYING THE PETITIONER'S MOTION FOR NEW TRIAL BASED UPON KRISTIN STRONG'S TESTIMONY THAT THE PETITIONER SIGNED HIS CORRESPONDENCE TO HER FOLLOWING THE MURDER AS "THE HAMMER."

A. Standard of Review

"The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." **W.Va.R.Crim.P.** 33.

"The question of whether a new trial should be granted depends on the circumstances of the case and is a matter largely in the discretion of the trial court. State v. Nicholson, 170 W.Va. 701, 296 S.E.2d 342, 344 (1982)."

State v. King, 173 W. Va. 164, 165, 313 S.E.2d 440, 442 (1984). "The question of whether a new trial should be granted is within the discretion of the trial court and is reviewable only in the case of abuse." State v. Crouch, 191 W. Va. 272, 275, 445 S.E.2d 213, 216 (1994).

B. Discussion

As a part of the State's direct examination of Kristin Strong, the State sought to examine the extent of the relationship between Ms. Strong and the Petitioner. The State asked questions regarding her familiarity with his children, how frequently the two spoke on the phone, and how frequently the two wrote letters to one another. [AR, 826-827.] The prosecutor asked Ms. Strong if, in her communications with the Petitioner, he ever signed his letters with a nickname or anything other than "Rickie." [AR, 827.] Ms. Strong replied that he signed them as "Hammer." [AR, 827.] The circuit court indicated during its consideration of post-trial motions that it recalled that Ms. Strong smiled when she answered the question, which then prompted the prosecutor to ask "did you find that funny?" [AR, 1079, 827.]

The Petitioner never objected to the questions asked by the State nor did the Petitioner object to the answers given by the witness. [AR, 827.] As discussed above, the failure to object constitutes waiver of a right to raise the matter on appeal. State v. Asbury, 187 W.Va. 87, 91, 415 S.E.2d 891, 895 (1992).

Further, the Petitioner first argues that this information was not disclosed in discovery and was, consequently, never addressed between counsel and the Petitioner. However, this information was disclosed in discovery. Among the many items sent to the Petitioner by the State were a number of recorded jail calls, which included calls between the Petitioner and Ms. Strong. These calls were provided to the Petitioner in discovery, and the Petitioner even moved to continue the trial date after receiving said calls along with a number of other items from the State. [AR, 162-166.] While the Petitioner concludes that the State “obviously” received correspondence from the Petitioner to Ms. Strong through some impliedly shady means, this is not the case. The Petitioner and Ms. Strong discuss and joke about the fact that he signed a letter as “the hammer” in one of their recorded phone conversations. The State only had knowledge of this through listening to the recorded jail calls.

Next, the Petitioner attempts to couch this testimony as an improper remark made by a prosecutor; however, this was not a remark of the prosecutor. This was the testimony of a witness. The circuit court likewise indicated that it did not think, in context, that this was a case of an improper remark by the prosecutor. [AR, 1078-1080.]

The circuit court nonetheless considered the exchange under the analysis in State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995), as proposed by the Petitioner.

5. A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.

6. Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pts. 5 & 6, State v. Sugg, 193 W. Va. 388, 456 S.E.2d 469 (1995).

The circuit court found that this information was isolated and was not the focus of the evidence. [AR, 1078-1080.] The court further found that there was “substantial and compelling evidence” to establish the guilt of the Petitioner in this case absent any remark of that nature. [Id.]² The circuit court further found that Ms. Strong presented as a hostile witness to the State, was clearly doing everything she could to help the Petitioner, and having a non-leading question generate that response from Ms. Strong does not qualify as an improper comment deliberately placed in the record by the prosecution in order to divert attention to extraneous matters. [Id.] As the court stated, “that’s just the way the evidence came in.” [Id.]³

Following this analysis, the circuit court properly used its discretion to deny the Petitioner’s motion for new trial, finding that there was no manifest injustice. Considering the circuit court’s careful consideration of the issue, there was no abuse of discretion. State v. Crouch, *supra*.

² The State would also point out that the prosecutor did not reference this comment in the course of her closing or rebuttal argument at the close of trial. [AR, 986-998, 1020-1023.]

³ Furthermore, the Petitioner attempts to argue that the introduction of this evidence was improper and “deliberately placed before the jury to divert attention not to matters of guilt or innocence but to extraneous matters which had no bearing on the ultimate issue.” The Petitioner also recognizes, however, that “the remark weighed less on the issue of guilt or innocence but hugely upon the issue of mercy.” There was no bifurcation in this case. The jury was being asked to consider the issue of mercy if it found the Petitioner guilty of First Degree Murder. Mercy was not an “extraneous matter” but *was* part of the ultimate issue the jury was asked to decide in this case. The State avers the evidence was properly admitted as to the issue of mercy.

VI. THE CIRCUIT COURT DID NOT ERR IN DENYING THE PETITIONER'S MOTIONS FOR JUDGEMENT OF ACQUITTAL AS THE EVIDENCE WAS MORE THAN SUFFICIENT TO SUPPORT THE JURY'S VERDICT OF GUILT.

A. Standard of Review

“A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.’ Syllabus Point 3, State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).”

Syl. Pt. 1, State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998); Syl. Pt. 3, State v. Williams, 198 W. Va. 274, 480 S.E.2d 162 (1996); Syl. Pt. 2, State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

B. Discussion

There was overwhelming evidence of the Petitioner's guilt in this case. Family members of the Petitioner testified that the Petitioner and the victim had a history of marital problems and were separated at the time of the murder. [AR, 512-556, 558-577.] The victim had always taken the Petitioner back on prior occasions when the two had split. [Id.] The Petitioner's father testified that the Petitioner indicated that he did not want to reconcile with the victim until the Petitioner discovered that the victim did not want to reconcile with him and was beginning to date other men. [AR, 524.] This was despite the fact that the Petitioner himself had a girlfriend, Ms. Strong, with whom he was residing. Furthermore, Ms. Strong had requested that the

Petitioner's father speak with the Petitioner because he had been making statements indicating his desire to harm the victim. [AR, 525-527, 528-529, 551, 552.] The Petitioner's father stated that he spoke with the Petitioner and even went as far as telling him not to take a gun with him when he was going to see the victim. [Id.]

Text messages between the Petitioner and victim indicate that they were communicating with regard to the care of their children and were also discussing the dynamics of their relationship and their relationships with other people. [AR, 903-918.] Text messages revealed that the Petitioner was to drop off the children at the victim's apartment on the evening of her murder. [Id.] This was confirmed through the testimony of Ms. Strong. She stated that the Petitioner got off work and, without changing out of his work uniform, picked his children up from daycare and left in his truck to drop off the children with the victim. [AR, 815-836.]

The only sounds the neighbors report hearing before the police arrived that evening was the Petitioner's heavy work boots on the wooden stairs of the apartment complex along with the toddler babble of the couple's two children as the Petitioner and the two children left the apartment complex that evening. [AR, 645-657, 658-665.] Shortly after the neighbors stated they heard them leave, the Petitioner called his father and sister and reported to both of them that he had killed the victim with a hammer. [AR, 512-556, 558-577.] Both suggested that maybe she wasn't really dead and the Petitioner insisted that he had hit her multiple times, she no longer had a face, and he was sure that she was dead. [Id.] The Petitioner also mentioned committing suicide because the cops were after him. [AR, 517-518.] The Petitioner's father heard the children in the background of the phone call and became increasingly worried for the Petitioner and his grandchildren. [Id.]

When the call ended with the Petitioner, the Petitioner's father phoned Mr. Kidwell, the

Petitioner's uncle who also worked for Brown Funeral Home. [AR, 489, 516-519.] The Petitioner's father asked Mr. Kidwell if he was on call. [Id.] Mr. Kidwell indicated that he was not. [Id.] The Petitioner's father then relayed the conversation he had just had with the Petitioner, and the two men drove to the victim's apartment to check on the situation. [AR, 489-491, 519-520.] When the Petitioner's father and Mr. Kidwell arrived, they knocked on the victim's door and got no answer. They then called 911. [Id.]

Once the police arrived, they entered the apartment and discovered no signs of a struggle or disturbance in the open areas of the apartment. [AR, 578-586, 613-637, 666-683.] There appeared to be blood spatter on the door leading to the master bedroom, which was at that time closed. [Id.] When they entered, they discovered the body of the victim laying partially on the bed, blood spatter on the walls, and a ball peen hammer located near the victim's body. [Id.]

The Petitioner called his father again after the police had arrived on scene. [AR, 522, 527-528, 606-613.] The Petitioner's father was able to talk the Petitioner into turning himself in to the officers. [Id.] The Petitioner indicated to his father that he was at the apartment with Ms. Strong and the children. [Id.] Ms. Strong indicated that the Petitioner had returned to the apartment in his truck and still had the children. [AR, 820.] The Petitioner also told Ms. Strong that he had killed the victim. [AR, 825.] When the Petitioner turned himself in to police, he had blood on his shirt and pants. [AR, 587-599, 720-746, 746-765.] Forensic analysis determined that the blood on the Petitioner's clothing was the victim's blood. [Id.] Additionally, there were no tools other than the hammer located at the victim's apartment, but there were several tools located in the bed of the Petitioner's truck. [AR, 704-711.] The record indicates that the hammer appeared to be weathered, as though it had been kept somewhere where it had been exposed to the elements. [AR, 215, 992.]

The medical examiner testified that the victim's death was a homicide caused by blunt force trauma to the victim's head with an object. [AR, 686-699.] The medical examiner stated that he estimated seven or eight blows to the head, mostly to the facial area. [Id.]

Based upon this evidence, reviewing said evidence in the light most favorable to the prosecution and crediting all inferences and credibility assessments that the jury might have drawn in favor of the prosecution, the jury had a sufficient basis upon which to find the Petitioner guilty beyond a reasonable doubt. State v. Guthrie, *supra.*, State v. Miller, *supra.*

VII. THERE WERE NOT CUMULATIVE ERRORS TO JUSTIFY THE GRANTING OF A NEW TRIAL.

A. Standard of Review

"The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." **W.Va.R.Crim.P.** 33.

"The question of whether a new trial should be granted depends on the circumstances of the case and is a matter largely in the discretion of the trial court. State v. Nicholson, 170 W.Va. 701, 296 S.E.2d 342, 344 (1982)."

State v. King, 173 W. Va. 164, 165, 313 S.E.2d 440, 442 (1984). "The question of whether a new trial should be granted is within the discretion of the trial court and is reviewable only in the case of abuse." State v. Crouch, 191 W. Va. 272, 275, 445 S.E.2d 213, 216 (1994).

B. Discussion

The Petitioner correctly cites the precedent of this Court as follows:

"where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error."

Syl. Pt. 14, State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993); Syl. Pt. 5, State v.

Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972). However, if this Court finds no error in this case, the cumulative error doctrine has no application. State v. Knuckles, 196 W.Va. 416, 426, 473 S.E.2d 131, 141 (1996). Cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors. Id.

For the reasons argued with particularity above concerning the six previous allegations of error, the State asks this Court to find that the trial court did not abuse its discretion in denying the Petitioner's Motion for New Trial, as there was no error, either individually or cumulatively, that prevented the Petitioner from receiving a fair trial. State v. Knuckles, *supra.*; State v. King, *supra.*, State v. Crouch, *supra.*

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to affirm the conviction and sentence of the Petitioner and deny the Petition for Appeal.

Respectfully submitted,
State of West Virginia,

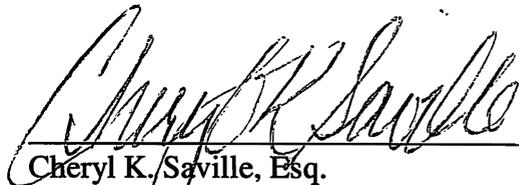


Cheryl K. Saville, Esq.
Assistant Prosecuting Attorney
State Bar No.: 9362
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971
csaville@berkeleywv.org

CERTIFICATE OF SERVICE

I, Cheryl K. Saville, Assistant Prosecuting Attorney, hereby certify that I have served a true and accurate copy of the foregoing Respondent State of West Virginia's Brief by mailing of the same, United States Mail, postage paid to the following on this 23rd day of October, 2015:

B. Craig Manford, Esq.
Counsel of Record for the Petitioner
P.O. Box 3021
Martinsburg, West Virginia 25402



Cheryl K. Saville, Esq.
Assistant Prosecuting Attorney
State Bar No.: 9362
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971
csaville@berkeleywv.org