No. 32693 – *State of West Virginia v. James Blaine Waldron*

FILED
December 16, 2005
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Chief Justice, dissenting:

I respectfully dissent from the majority opinion of this Court. I believe that the lower court erred by admitting into evidence several gruesome photographs, to the undue prejudice of the Appellant in the circumstances of this case.

The majority quite properly initiates its discussion of the admission of the subject photographs with a recitation of the pertinent syllabus points written by Justice Cleckley in *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994). In its analysis of the issue, however, the majority deviates from the standards specified in *Derr* and relies upon a myriad of opinions issued by this Court *prior* to the 1994 *Derr* opinion. *Derr* substantially altered the manner in which the admissibility of such photographs is analyzed and specifically overruled *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979), which had been accepted as the primary model for analyzing the admissibility issue prior to this Court's *Derr* opinion. In *Derr*, Justice Cleckley recognized that *Rowe* had been decided before the adoption of the West Virginia Rules of Evidence and, therefore, did not take into account the changes in our evidentiary jurisprudence made by those rules. Justice Cleckley explained as follows at syllabus point six: "Whatever the wisdom and utility of *State v.*

Rowe, 163 W.Va. 593, 259 S.E.2d 26 (1979), and its progeny, it is clear that the *Rowe* balancing test did not survive the adoption of the West Virginia Rules of Evidence. Therefore, *State v. Rowe, supra*, is expressly overruled because it is manifestly incompatible with Rule 403 of the West Virginia Rules of Evidence." 192 W.Va. at 168, 451 S.E.2d at 734. Further, in pertinent part of syllabus point seven, the *Derr* Court explained: "These rules constitute more than a mere refinement of common law evidentiary rules, they are a comprehensive reformulation of them." *Id*.

Thus, utilizing the specific *Derr* standards rather than relying upon prior general case law, the issue of admissibility of gruesome photographs is governed by Rule 401 and Rule 403 of the West Virginia Rules of Evidence, and exclusion of photographs is justified if the prejudicial effect of the gruesomeness outweighs the probative value of the photographs. Syllabus point nine of *Derr* specifies that even relevant evidence may be "excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence." *Id*. Syllabus point ten of *Derr* explains that the relevancy of the photograph is to be determined "on the basis of whether the photograph is probative as to a fact of consequence in the case." *Id*.

Accordingly, the probative value of tendered photographic evidence should be evaluated with regard to its possible impact on any "fact of consequence" in the case. In

State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995), this Court explained that in order to perform a "Rule 403 balance, we must assess the *degree* of probity of the evidence, which, in turn, depends on its relation to the evidence and strategy presented at trial in general." 194 W.Va. at 682, 461 S.E.2d at 188. That reasoning underscores the *Derr* syllabus point eight holding that "[t]he 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." 192 W.Va. at 168, 451 S.E.2d at 734. In *State v. Copen*, 211 W.Va. 501, 566 S.E.2d 638 (2002), for instance, the photographs were determined to be probative because "there was some question as to intent and malice, and intent and malice were plainly issues in the case when the photographs were offered into evidence." 211 W.Va. at 505, 566 S.E.2d at 642.

In the present case, the record does not disclose that the court below conducted the balancing exercise; on the record, the trial court simply permitted the introduction of five of the ten photographs tendered without significant explanation. I believe that the five photographs admitted were not probative of any "fact of consequence in the case," and it is clear that the lower court made no such finding incident to admitting them into evidence. There was no question that the victim was deceased and that she had been shot by Doug Mullins while the Appellant served as a lookout. The position of the victim was not in question; angles of bullet wounds were not in dispute; and the identity of the shooter had been established. Rather, it appears from the record that the sole contested issue in the trial

was the level of the Appellant's participation in the homicide: Was he an unwitting presence or an active participant, e.g., as a lookout?

Thus, the value of the photographs, as a means of assisting the jury in determining the truth or falsity of any fact *of consequence*, was minimal or non-existent. The probity of the evidence, which as *Derr* explained depends on the relation to the evidence and strategy at trial, was likewise minimal or non-existent. It appears that the sole object served by the introduction of these photographs was to elicit an emotional response from the jury, to provoke sympathy toward the victim and indignation toward the Appellant. As the *Guthrie* Court wisely observed:

> The mission of Rule 403 is to eliminate the obvious instance in which a jury will *convict because its passions are aroused rather than motivated by the persuasive force of the probative evidence.* Stated another way, the concern is with any pronounced tendency of evidence to lead the jury, often for emotional reasons, to desire to convict a defendant for reasons other than the defendant's guilt.

194 W.Va. at 682-83, 461 S.E.2d at 188-89 (emphasis supplied).

As this Court astutely remarked in *State v. Sette,* 161 W.Va. 384, 242 S.E.2d 464 (1978), "the introduction of photographs portraying a crime, the circumstances of which are basically stipulated, is always risky because the prejudicial effect may be so far in excess of any legitimate probative value as to preclude their admission." 161 W.Va. at 396, 242 S.E.2d at 472. It may also be observed that merely reducing the number of photographs to

be admitted does not relieve the trial court of the obligation to conduct the necessary balancing test.

For the reasons discussed, I believe that the prejudicial effect of the five photographs introduced easily outweighed their probative value and that their introduction constituted reversible, prejudicial error, entitling the Appellant to a new trial. I therefore respectfully dissent.

I am authorized to state that Justice Starcher joins in this dissenting opinion.