

**FILED**

**June 23, 2009**

**released at 10:00 a.m.**

**RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

Benjamin, Chief Justice concurring:

I concur with the majority decision to affirm the appellant's conviction. However, I write separately because I believe the appellant's statement to Ray Bryant, an EMT, was made during a custodial interrogation.

First, it is clear that the appellant was in custody when the statement at issue was made in that he had been handcuffed by Deputy Harvey. Therefore, a reasonable person in the appellant's position would have considered his freedom curtailed to a degree associated with a formal arrest. Also, it is significant that the appellant made the admission that he stabbed the victim in response to Mr. Bryant's direct interrogatory "Did you stab that guy?" Mr. Bryant's question is the type of inquiry that a law enforcement officer would make pursuant to the investigation of a crime and not the type of question that a healthcare worker would ask pursuant to treatment. Of further significance is the fact that Mr. Bryant was also a part-time police officer. In this situation, the notion that Mr. Bryant changed roles from a law enforcement officer to an EMT as easily as he changed uniforms is not consistent with human nature. When Mr. Bryant asked the appellant whether he stabbed the victim, Mr. Bryant was aware of the ongoing police investigation into the stabbing, he was aware that the appellant was most likely a suspect because he was in handcuffs, and he was aware that

Deputy Harvey was present and was privy to any statement made by the appellant. For these reasons, I believe that the appellant was subjected to a custodial interrogation when he admitted that he stabbed the victim. Because this interrogation occurred before the appellant was *Mirandized*, his statement should not have been admitted at trial.

However, regardless of my belief that the appellant's statement was improperly admitted at trial, I believe that the admission constitutes harmless error. It is clear to me in light of the substantial evidence of guilt that the error in admitting the appellant's statement to Mr. Bryant did not prejudice the appellant at trial. Accordingly, I concur.