

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-456

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**STATE OF WEST VIRGINIA,
Respondent,**

v.

**CARL RAY SUMMERFIELD,
Petitioner.**

**(An appeal of a final order
of Grant County Circuit
Court, Case No. 22-F-7)**

PETITIONER'S REPLY BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred by failing to grant a mistrial and/or new trial based upon impermissible prosecutorial comment during closing argument.
2. The Circuit Court erred by failing to give the Petitioner's "missing witness" instruction.
3. The Circuit Court erred by failing to grant the Petitioner's motion for judgment of acquittal based upon the State's reliance on inherently incredible testimony.
4. The Petitioner is entitled to a new trial due to the omission of bench conferences from the transcripts.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this matter is suitable for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure because it raises an issue of the constitutionality of a court ruling. Alternatively, this matter should be scheduled for Rule 19 argument as it involves an unsustainable exercise of discretion by the lower court. This matter should be disposed of by signed opinion.

ARGUMENT

A. The Respondent's characterization of the record in several areas is misleading.

The Respondent has made a number of assertions that are not consistent with the record, or which assume facts for which there is no record support. The Petitioner discusses these inaccuracies now in this reply in the hopes that the Court will weigh the merits of the case based upon what actually happened, rather than based upon a distortion of the reality of this case's events.

i. The Petitioner did not somehow consent to the failure of the court reporter to adequately record and/or transcribe the bench conferences in this trial.

The Respondent contends that the Petitioner “never objected to those portions of the trial not being transcribed” in relation to the missing bench conferences. Brief of the Respondent, at

7. Further in this vein, the Respondent quotes case law for the following proposition:

On top of failing to allege specific prejudice, “[t]here is no indication that at any point [Summerfield] was prevented from making any record which he chose to make.” *State v. Gilbert*, 184 W. Va. 140, 148, 399 S.E.2d 851, 859 (1990). “There is further no indication that [he] at any point objected to the failure of the court reporter to transcribe[] what was occurring.” *Id.* Yet “proceedings of trial courts are presumed regular, unless the contrary affirmatively appears upon the record.” Syl. pt. 17, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974). So, “the lack of an objection on [Summerfield’s] part to the failure of the court reporter to transcribe matter[s] which occurred off the record” coupled with the fact that he has not “affirmatively shown that the proceedings were irregular,” further shows how this assignment of error “is without merit.” *Gilbert*, 184 W. Va. at 148, 399 S.E.2d at 859.

Brief of the Respondent, at 27.

The suggestion that the Petitioner was not “prevented from making any record he wanted to make” is galling. The undersigned counsel specifically used the bench conferences in an effort to make a record out of the hearing of the jury. This is certainly true during the motion for mistrial made at the bench during the State's rebuttal described in the first assignment of error. There was no agreement that the conferences would not be transcribed, and the omission of the bench conferences is due to technical error discovered after the fact.¹ The Petitioner is exceptionally curious how the Respondent would suggest contemporaneously objecting to the failure to audibly record a bench conference that is not discovered to have been botched until months after the fact.

¹ The circumstances of the omission of the bench conferences was discussed in the Petitioner's fourth motion for extension of time.

The Petitioner has sought to be candid and forthright about what can and cannot be determined about each of the untranscribed bench conferences, using the context of the remainder of the record. However, it is impossible to accept the suggestion that Petitioner's counsel was somehow at fault or knowingly acquiesced to the omissions in the transcript. The record (and Respondent's Brief) is devoid of any indication in support of this theory that the Petitioner *chose* to allow the record of the bench conferences to be botched. It is discreditable for the Respondent to have made that assertion.

ii. It borders on misrepresentation for the Respondent to suggest that the State's expert, Theodore Chavez, testified that a Generation 2 Glock pistol could have fired the shots in this case.

The Respondent makes a stunning claim in its brief:

Summerfield claims that the problem with this testimony is that both experts in this case said that “only certain models of a Generation 5 Glock were capable of firing the shots that killed [Rohrbaugh].” Pet’r’s Br. 22. But the record shows less certainty. Although Theodore Chavez, the State’s expert, did say that he believed the shots must have been fired from a Generation 5 Glock, he said this was only because he “wouldn’t expect Gen 2, an earlier version ... to also” have been capable. App. 478-79 (emphasis added). Thus, in response to being asked if that “rule[d] out the possibility that a Glock Gen 2 pistol fired those bullets,” Chavez explained his reasoning but concluded “no.” App. 478-79.

Respondent's Brief, at 23.

This assertion – that Chavez said “no” when asked if he ruled out that the shots were fired from a Gen 2 Glock – is belied by the record. It is obvious from the context that he was saying “no” to whether it was possible, not “no” to whether he ruled it out.

Q. So ultimately here is it your testimony that the bullet fragments you were able to identify were marked with Glock Marksman Barrell rifling?

A. Yes.

Q. And does that mean they could only have been fired from a Glock Gen 5 pistol?

A. That's correct.

Q. Okay. Does that also rule out the possibility that a Glock Gen 2 pistol fired those bullets that created those fragments?

A. Based on the open source searching, I wouldn't expect Gen 2, an earlier version which would have contained just polygonal rifling to also contain GMB so, no.

(A.R., at 477-478).

In this passage, Mr. Chavez is explicitly stating that Gen 2 barrels create polygonal markings, and not GMB (Glock Marksman Barrel) markings. He agreed to the explicit proposition that the shots “could only have been fired from a Glock Gen 5 pistol[.]” (A.R., at 477). At no point did the State, in the proceedings below, try to suggest that a Gen 2 Glock could have been the murder weapon. Such an assertion would be absurd. An argument by the State that a Gen 2 Glock could have been the weapon to kill Mr. Rohrbaugh would constitute scientific fraud, and would be a due process violation in the same universe as the serological fraud committed by Fred Zain. See, *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W.Va. 321, 438 S.E.2d 501 (1993). Again, the Prosecuting Attorney explicitly *did not* make this argument, even though it would have been helpful to the prosecution if it was true. He did not make this argument because it would have been unethical and unlawful to do so. The precise syntax of Mr. Chavez's answers notwithstanding, it is baffling that the Attorney General's Office would represent to this Court now on appeal that the question of whether a Generation 2 Glock pistol could produce a Glock Marksman Barrel toolmark is somehow open to interpretation.

iii. The Petitioner explicitly requested a “missing witness” instruction in the alternative that the jury “may” make a finding that the missing testimony would have been harmful to the State.

The Respondent made the following factual assertion regarding the nature of the “missing witness” instruction requested by the Petitioner:

And while Summerfield alleges that he requested “permissive language” be added after the circuit court declined his instruction, the record shows this is not the case. Pet’r’s Br. 19. It is true that Summerfield’s counsel asked the court to consider an alternative instruction. App. 736-37. But when the court asked specifically what he “want[ed] it to say,” Summerfield’s counsel again requested mandatory language that the “failure to call an available witness in this case Denise Shanholtz and Caterina Mullins leads to an adverse inference that the testimony would have been adverse to the State’s case.” App. 737. Thus, the key requirement of permissive “may” language is absent from every potential jury instruction Summerfield requested.

But even if Summerfield had asked for the permissive “may” language in the instruction—which the record shows he did not [...]

Respondent's brief, at 17.

This recounting does not accurately describe what happened during the discussion with the Court concerning this instruction. To the contrary, the Petitioner explicitly requested the “permissive 'may'” language. Here is the entire exchange:

MR. EASTON: Mr. Cooper filed a Motion to add an Instruction after we had heard some testimony we were not necessarily expecting.

THE COURT: Okay. Can I see it?

MR. EASTON: It was e-filed.

MR. COOPER: I e-filed it yesterday morning Your Honor.

THE COURT: Well, you might as well have wrapped it up in an envelope and thrown it out in the yard for me. Can I get a copy of it?

MR. COOPER: I don't have one printed out Your Honor, I apologize.

THE COURT: That's alright. What's it for?

MR. COOPER: So, it's Defense Instruction A. It's an Instruction about missing witness where the State had the opportunity to call an available witness and did not. That leads to an inference that the testimony would have been adverse to the State's case.

THE COURT: Who'd they fail to call?

MR. COOPER: There was Caterina Mullins who was in the custody of the DOC who the State could have called as an eyewitness at the time or ear witness.

THE COURT: She has reviewed [sic] to cooperate with the State in any way.

MR. OURS: Your Honor. You don't have the Discovery, but her statement is I don't believe that my brother would do that and maintains that she wasn't there.

THE COURT: Okay.

MR. COOPER: And the other is Denise Shanholtz who also was present and supposedly heard a confession at the time.

THE COURT: Who?

MR. COOPER: Denise Shanholtz.

THE COURT: His mother?

MR. COOPER: Yes. Who was present at the scene when this supposedly happened and whose been present at the courthouse throughout these proceedings that was available to the State that they did not call. And in fact...

THE COURT: Why didn't you?

MR. COOPER: Well, we don't have the burden to produce evidence.

THE COURT: Okay. I'm not giving that Instruction.

MR. COOPER: **In the alternative, can I have an Instruction that they may draw an adverse inference from a missing witness?**

Lieutenant Thorne testified that they gave statements that were unhelpful to the State's case so it's not even consistent with what the States testimony reflected.

THE COURT: Get it printed out and let me look at it. Wait here it is. Hold on.

THE COURT: You want it to say what?

MR. COOPER: That the Court instructs the jury that States failure to call an available witness in this case Denise Shanholtz and Caterina Mullins leads to an adverse inference that the testimony would have been adverse to the State's case or something along those lines is what I put in the...

THE COURT: I'm going to deny that.

MR. COOPER: Please note my objection.

THE COURT: So, noted. These people failed to cooperate in any way. Alright. We ready? Bring them in.

(A.R., at 735-737) (emphasis added).

Petitioner's counsel was attempting, from memory, to recite the proposed instruction, which had been e-filed during trial, and which the Circuit Court did not have in written form because by e-filing, counsel apparently "might as well have wrapped it up in an envelope and thrown it out in the yard[.]" (A.R., at 735). However, the Petitioner clearly requested the written form of the instruction, which was not permissive, and explicitly *also* requested in the alternative the permissive form of the instruction. (A.R., at 736). It is not accurate to state that the Petitioner failed to seek the permissive form of the instruction.

iv. It is inaccurate to suggest that the Petitioner did not make a strategic tradeoff in declining to move for a bifurcated trial.

The Respondent asserts baldly that the decision not to seek bifurcation was *not* a

strategic trade-off made by the Petitioner, and cites nothing in the record to support this claim. (Petitioner's Brief, at 12). To the contrary, the record clearly reflects Petitioner's assertion to the trial court that the decision not to seek a separate mercy phase was strategically made to avoid the possibility of the decedent's relatives testifying before the jury made a decision on mercy. (A.R., at 119). This Court has recently recognized that the decision whether or not to seek bifurcation is indeed a question of strategy, in the context of a post-conviction habeas proceeding alleging ineffective assistance:

Petitioner suggests counsel's decision to withdraw the bifurcation motion left the jury without sufficient information about him including his "successful employment, good relations with others, and an apparent dose of remorsefulness."

The habeas court found that counsel's decision to proceed with a unitary trial was a sound strategy. It noted that

[b]ifurcation goes two ways. While there might exist evidence that the [P]etitioner would have wanted the jury to hear that was not admissible during the guilt phase, . . . [t]he State, however, definitely would have had evidence that it could have presented in the mercy phase, including, but not necessarily limited to information obtained from the criminal records . . . that [P]etitioner had at least two previous criminal convictions . . . [and] a 2003 arrest for forgery; an arrest for malicious wounding; two instances of violating a domestic violence protective order and a conviction for aggravated robbery.

. . . .

This Court believes the jury made its decision about mercy based upon the brutal and senseless murder of a defenseless, intoxicated victim who had her throat cut by not one but two knives. Not bifurcating the trial had no impact upon the jury's decision regarding mercy. In fact, the [S]tate had negative information about the [P]etitioner that the jury did not hear, and would have heard in a bifurcated trial.

After review, we agree with the habeas court's ruling.

Withdrawing the bifurcation motion was a strategic decision that prevented Petitioner's prior criminal history from being considered by the jury. Also, by withdrawing the motion, the victim's family would not be able to testify about the grief they suffered because of the brutal murder.

Rogers v. Ames, No. 19-0612, at *17-18 (W. Va. Nov 12, 2020) (memorandum decision) (emphasis added).

The Court in *Rogers* explained the trade-off well. By having a unitary trial, a defendant can keep out emotional testimony from the victim's family at the cost of the ability to present mitigating information. The decision not to seek a bifurcated trial was a strategic bargain. As discussed in the Petitioner's Brief, the the Petitioner was deprived of the benefit of the bargain. The Respondent's bald assertion that there was no strategic decision is illogical, contrary to the record, and meritless.

v. The trial court did not prevent “the ink” from spilling; the State's misconduct clearly put the decedent's family's suffering into the minds of the jury immediately prior to deliberation.

The Respondent attempts to downplay the ramifications of the State's misconduct during rebuttal argument, in which it sought to introduce the decedent's family to the jury.

And all of that assumes that the remarks were damaging in the first place. The circuit court's intervention casts doubt on that proposition. Still, even if Summerfield is correct in saying that “[a] drop of ink cannot be removed from a glass of milk,” Pet'r's Br. 15 (quoting *Gov't of V.I. v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976), no such contamination occurred here. The “drop of ink” discussed in *Toto* referred to the admission of “prior criminal acts which ha[d] no purpose except to infer a propensity or disposition [of the defendant] to commit crime.” *Toto*, 529 F.2d at 283. That is not the kind of comment at issue here. Yet even assuming the half-spoken comments from the prosecutor started to rise to that level, the circuit court prevented them from getting there. So, at worst, the prosecutor picked up the inkwell, but before he could do anything further, the circuit court removed the pen from his hand. Because of the circuit court's intervention, there is no reason to suspect that the prosecutor's comments affected Summerfield's “presumption

of innocence.” *Id.* Thus, the proverbial glass of milk remained unadulterated

Respondent's Brief, at 11-12.

A review of the record does not support the notion that the Circuit Court “removed the pen” from the prosecutor's hand. The Respondent barely acknowledges that this Court has held references to a decedent's surviving family members to be irrelevant and improper. See, Syl. Pt. 10, *State v. Wade*, 490 S.E.2d 724, 200 W.Va. 637 (1997). A review of the Circuit Court's commentary shows that the Prosecutor, by his misconduct, was successful in getting the jury to think about the family; the Circuit Court ultimately “spilled the ink” itself at the Prosecutor's behest:

[MR. OURS]: Ladies and Gentlemen, I could talk longer, and the Judge will tell you this will probably be the first time John didn't use all of his time. You've heard enough. I told you earlier, when you look at the verdict the first one is the one, you'll be looking for. It says Guilty of Murder in the First Degree. Then you come to the mercy part of it. I want to introduce you to Wes's father...

MR. COOPER: Objection Your Honor. I have to approach.

THE COURT: Hold on. Come on. Everybody come up.

(COUNSEL BENCH SIDE)²

THE COURT: Ladies and Gentlemen, do not consider the last remarks the Prosecuting Attorney made where he introduced the family. Certainly, everybody has a family and I imagine both families are very upset about this situation but do not take into account what the Prosecutor just said.

(A.R., at 794).

The Circuit Court may have instructed the jury to “not consider the last remarks” but in

² It is evident from the surrounding context of the transcript and the trial orders that the Petitioner moved for a mistrial and took the position that a curative instruction was insufficient to ameliorate the error during the omitted bench conference. (A.R., at 112, 794). That oral motion for mistrial and assertion of the insufficiency of a curative instruction was also alluded to in the written post-trial motions that followed the verdict. (A.R., at 119).

doing so, continued to remark upon the families being “very upset.” The Petitioner insisted on a mistrial,³ not merely a curative instruction. The State's misconduct and the Circuit Court's mishandling of the situation allowed the jury to go back to its deliberation actively thinking about the decedent's surviving family members, a clearly irrelevant, inadmissible fact that was damaging to the Petitioner's right to a fair trial, per *Wade*.

B. The “inherently incredible” rule is not limited to sexual assault cases.

The Respondent contends that this Court should not find the testimony concerning the firearm alleged to have been used in this case to be “inherently incredible” because that rule is supposedly only applicable in sexual assault prosecutions:

The incredible evidence standard advanced by Summerfield does not concern insufficiency of the evidence generally but instead is “the standard for assessing a motion for acquittal” in “sexual offense case[s].”

Respondent's Brief, at 22.

This Court has found that a court may deem testimony inadmissible if it is inherently incredible in a homicide prosecution:

When a trial court considers the testimony of a witness to be so inherently incredible that it is completely untrustworthy, the trial court may be justified in excluding that witness's testimony as a matter of law. E.g., *Jackson v. United States*, 353 F.2d 862 (D.C.Cir.1965); *United States v. Smith*, 592 F.Supp. 424 (E.D.Va.1984), vacated on other grounds, 780 F.2d 1102 (4th Cir.1985); *Coleman v. United States*, 515 A.2d 439 (D.C.1986); see also F. Cleckley, *supra*, § 2.3(C).

State v. Humphrey, 351 S.E.2d 613, 620, 177 W.Va. 264 (1986).

More on point, this Court has more recently applied the “inherently incredible” rule in analyzing a sufficiency claim in a homicide prosecution. *State v. L. M. C.*, No. 18-0851, at *5-6

³ To the extent that the record is insufficient to demonstrate the contemporaneous objections of the Petitioner to the Prosecutor's remarks and the Circuit Court's instructions, such insufficiency would create cause for relief on the Petitioner's fourth assignment of error regarding the omitted bench conferences.

(W. Va. Jul 30, 2020). Although the rule is best known in its formulation in Syllabus Point 5 of *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981), in which it explicitly relates to sexual offenses, it is puzzling for the Respondent to stake out the position that a conviction for *any* offense should rightly rest upon inherently incredible evidence.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court grant the following relief:

1. That the judgment be reversed and remanded for entry of a judgment of acquittal;
2. That the judgment be reversed and remanded for a new trial;
3. That the Court grant any other relief the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 1st day of April, 2024, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Reply Brief to the Office of the Attorney General, Appellate Division, by e-service via File&ServExpress.

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