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CRIMINAL LAW DIGEST

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THE CRIMINAL LAW RESEARCH CENTER
JOHN A ROGERS, DIRECTOR

A DIVISION OF

WEST VIRGINIA PUBLIC DEFENDER SERVICES
JOHN A. ROGERS, EXECUTIVE DIRECTOR

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INTRODUCTION

Criminal Law Digest Volume IV contains selected cases issued by the West Virginia Supreme Court of Appeals from May 1, 1988 - September 5, 1990. The types of cases selected are primarily those in which West Virginia Public Defender Services is authorized to provide services. i.e., criminal, juvenile, abuse and neglect, paternity, contempt and mental hygiene matters. DUI administrative appeals are applicable to criminal matters. Cases are cross-indexed throughout the digest according to the issues discussed by the Court.

We have attempted to index all relevant cases handed down by the West Virginia Supreme Court within the heretofore mentioned time period. We suggest, however, that because of the possibility of errors that you not rely exclusively on this Digest when doing research. If you note an error, please contact this office.

In briefing the cases, we have attempted to be faithful to the language of the Court. Taking statements out of context, however, may distort their meaning. Also, since we used slip opinions in summarizing these cases, revision by the Court may have occurred subsequent to publication of this Digest. We again suggest that the summary of the case may not be used as a substitute for a thorough reading of the case.

We welcome any comments or suggestions on this material and any ideas you may have regarding future projects for the research center which will assist practitioners.

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ABDUCTION

Incidental to another crime

State v. Weaver, 382 S.E.2d 327 (1989) (Miller, J.)

See ABDUCTION With intent to defile, As separate offense, (p. 1) for discussion of topic.

With intent to defile

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, Abduction with intent to defile and kidnaping, (p. 155) for discussion of topic.

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See KIDNAPING Standard of proof, (p. 433) for discussion of topic.

As separate offense

State v. Weaver, 382 S.E.2d 327 (1989) (Miller, J.)

Appellant was convicted of first-degree sexual assault, attempt to kill or injure by poison and abduction of a minor child for immoral purposes. On appeal, he argued that the abduction was incidental to the assault, and therefore should not be a separate offense.

Syl. pt. 2 - A defendant cannot be convicted of abduction under *W.Va.Code*, 61-2-14(b), if the movement or detention of the victim is merely incidental to the commission of another crime. The factors to be considered in determining whether the abduction is incidental to the commission of another crime are the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm.

Here, the abduction was not merely incidental to the assault. The victim was seized and detained for more than an hour and moved a distance of 150 yards. No error.

ABUSE AND NEGLECT

Custody of infant

State of Florida ex rel. W.Va. DHS v. Thornton, No. CC969 (7/20/89) (Brotherton, C.J.)

The State of Florida sought a writ of *habeas corpus* commanding appellants to deliver an infant child. The child's mother, who never married, moved to Florida, where she abused the child and murdered his brother. Florida placed the child in legal custody and gave the child to Mildred and Carl Thornton, West Virginia residents, pursuant to the Interstate Compact on Placement of Children. Florida ultimately sought the return of the child, claiming that the Thorntons were unfit. The Florida court granted a change in custody. The Thorntons argued that they were given a valid consent by the child's natural father to adopt the child.

The West Virginia trial court granted the writ but certified the following questions:

> 1. Upon a petition for a writ of *habeas corpus* seeking the return of a child from persons in the receiving state pursuant to the provisions of the Interstate Compact on the Placement of Dependent Children, does the Court in the receiving state in which the Petition is filed have jurisdiction to hear evidence regarding the validity of the underlying placement order vesting custody of the infant child in the appropriate agency of the sending state?
>
> 2. Does the Court in the receiving state, upon presentation of a petition of a writ of *habeas corpus* seeking the return of the infant dependent child to the appropriate agency of the sending state, have jurisdiction to hear evidence upon the issue of the best interest of the infant child and rule upon the issue of the custody of the child by applying the law of the sending state?
>
> 3. Do persons who are custodians of an infant dependent child in the receiving state in accordance with the Interstate Compact for the Placement of Dependent Children and who also have in their

ABUSE AND NEGLECT

Custody of infant (continued)

State of Florida ex rel. W.Va. DHS v. Thornton, (continued)

> possession an executed consent to the adoption of said infant child executed by the natural father thereof who was not personally notified nor present as a party to proceedings in the sending state whereby custody of the infant child was obtained by the appropriate state agency have standing in the Courts of the receiving state to challenge, though extrinsic evidence, a determination by the appropriate agency of the receiving state that continued custody with those persons is inappropriate?

The Court held that the Compact clearly requires that the sending agency, the Florida Department of Health and Rehabilitative Services, retain jurisdiction over the child. That jurisdiction includes the power to cause the child's return. Therefore, the West Virginia trial court has no jurisdiction to hear evidence regarding the validity of placement. The child must be returned to Florida.

Due process

In re Carolyn Jean T. & Terry Jo T., 382 S.E.2d 577 (1989) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, (p. 4) for discussion of topic.

Sexual abuse

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Expert witnesses, Psychologist's testimony in child sexual abuse case, (p. 226) for discussion of topic.

ABUSE AND NEGLECT

Temporary custody

When appropriate

In the Matter of Jonathan P., 387 S.E.2d 537 (1989) (Miller, J.)

See ABUSE AND NEGLECT Termination of parental rights, When appropriate, (p. 8) for discussion of topic.

Termination of parental rights

In re Carolyn Jean T. & Terry Jo T., 382 S.E.2d 577 (1989) (Per Curiam)

The infants in this action were placed in temporary custody following a serious injury to one of them. The childrens' natural mother was subsequently found to have inflicted or allowed the abuse; the court also found neglect within the meaning of *W.Va. Code* 49-1-3. Following a twelve month improvement period, during which the mother's progress was carefully monitored, the circuit court terminated the mother's parental rights. In this action, the mother sought to regain custody of her children.

Syl. pt. 1 - "Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody. Even then, the legal rights of the parents, being founded in nature and wisdom, will be respected unless they have been transferred or abandoned." Syllabus Point 8, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

Syl. pt. 2 - "'In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitution.' Syllabus Point 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 Syllabus Point 1, *State ex rel. W.Va. Dep't Human Serv. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

ABUSE AND NEGLECT

Termination of parental rights (continued)

In re Carolyn Jean T. & Terry Jo T., (continued)

Syl. pt. 3 - "'Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as *parens patriae*, if the parent is proved unfit to be entrusted with child care.' Syllabus Point 5, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973)." Syllabus Point 1, *State v. C.N.S.*, 173 W.Va. 651, 319 S.E.2d 775 (1984).

Although the improvement plan here did not fully satisfy the requirements of *W.Va. Code* 49-6D-3, the deficiencies were deemed remedied by the circuit court's clear directions to the mother. Despite repeated attempts to assist the mother in obtaining counseling, the circuit court concluded that no likelihood of substantial improvement existed in the foreseeable future. The Court noted that the mother had a full twelve month improvement period and an extension for an additional five and one-half months. Affirmed.

Improvement period

In the Matter of Jonathan P., 387 S.E.2d 537 (1989) (Miller, J.)

See ABUSE AND NEGLECT Termination of parental rights, When appropriate, (p. 8) for discussion of topic.

In the Matter of R.O. & R.O., 375 S.E.2d 823 (1988) (Neely, J.)

The trial court granted the petition of a Human Services protective services worker to place the children herein in temporary custody pending correction of appellant's alleged abuse and neglect. During the subsequent preliminary hearing appellant requested an improvement period. The appellant waived her right to hearing and agreed to the terms of a three-month improvement plan drafted by the Department of Human Services. The trial court accepted the plan but ordered the children to remain in temporary custody during the improvement period.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Improvement period (continued)

In the Matter of R.O. & R.O., (continued)

The evidence at the adjudicatory hearing showed that at the time of the original petition appellant had failed to provide housing, clothing and food for her children, as well as failing to discipline them. Since that time, appellant had provided housing and home furnishings, but her progress toward complying with the case plan was poor. Appellant appeared to be suffering from a serious mental illness and seemed unable to understand why her children were taken from her. She refused mental health evaluations and treatment, even when recommended by her own attorney.

The trial court found that the children were neglected at the time of the original petition but that the neglect was not willful in that appellant was mentally ill. The court further found that appellant's mental illness rendered her incapable of exercising proper parenting skills or of improving those skills. Despite the sufficiency of these findings to terminate her parental rights, the judge granted appellant a further three month post-dispositional improvement period. Following a lapse of more than a year the appellant was committed to a mental health facility pursuant to a Department of Human Services petition. Upon release, appellant's parental rights were terminated.

Syl. pt. 1 - "'As a general rule the least restrictive alternative regarding parental rights to custody of a child under *W.Va. Code*, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.' Syl. pt. 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 1, *In the Interest of Darla B.*, 175 W.Va. 137, 331 S.E.2d 868 (1985).

Termination of parental rights (continued)

Improvement period (continued)

In the Matter of R.O. & R.O., (continued)

Syl. pt. 2 - "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) 1977 that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 4, *State v. C.N.S.*,173 W.Va. 651, 319 S.E.2d 775 (1984).

Here, the Court held that appellant's mental illness and evident inability to correct the problem could justify termination of her parental rights. However, the Court remanded the case for findings relating to appellant's condition upon release from the mental health facility.

Least restrictive alternative

In the Matter of Jonathan P., 387 S.E.2d 537 (1989) (Miller, J.)

See ABUSE AND NEGLECT Termination of parental rights, When appropriate, (p. 8) for discussion of topic.

In the Matter of R.O. & R.O., 375 S.E.2d 823 (1988) (Neely, J.)

See ABUSE AND NEGLECT Termination of parental rights, Improvement period, (p. 5) for discussion of topic.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Right to hearing

Artrip v. White, No. 18492 (7/20/88) (Per Curiam)

Mr. and Mrs. C were found guilty of neglect so gross as to constitute abuse. Following the adjudicatory hearing, the Department of Human Services moved for a permanent termination of parental rights. Respondent held that action unnecessary and ordered a three and one-half month improvement period.

Petitioner herein, Director of Child Protective Services for the Children's Home Society, moved to terminate the improvement period on the grounds that the neglect was continuing and the parents had refused counseling. Respondent refused to hold a hearing prior to the expiration of the improvement period.

The issue before the Court was whether the respondent had a duty to conduct an immediate hearing on the motion to terminate the improvement period. The Court chose to characterize the motion to terminate as an allegation of abuse or neglect pursuant to *W.Va. Code* 49-6-1. A prompt hearing was therefore mandatory.

When appropriate

In the Matter of Jonathan P., 387 S.E.2d 537 (1989) (Miller, J.)

Appellant claimed that her parental rights were erroneously terminated because there was insufficient evidence of neglect; the trial court did not grant an improvement period; the court erroneously ruled that there was no likelihood of improvement; improper hearsay testimony was admitted; and a former prosecuting attorney was allowed to represent the child.

On April 7, 1987, temporary custody was given to the Department of Human Services. On April 14, 1987, a social worker testified that appellant refused all help, that appellant did not have sufficient formula to feed the child and expressed no concern over sleeping in a car. On June 25, 1987, the trial court ordered a sixty day assessment period. Following an extended period for further evaluation, the trial court terminated appellant's parental rights on August 25, 1988.

ABUSE AND NEGLECT

Termination of parental rights (continued)

When appropriate (continued)

In the Matter of Jonathan P., (continued)

Syl. pt. 1 - *W.Va.Code*, 49-6-3 (1984), authorizes, upon the filing of a petition, the immediate, temporary taking of custody of a child by the Department of Human Services when there exists an imminent danger to the physical well-being of the child and there are no reasonably available alternatives to the removal of the child.

Syl. pt. 2 - "*W.Va.Code*, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial." Syllabus Point 2, *State ex rel. W.Va. Dep't of Human Serv. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

Syl. pt. 3 - Under *W.Va.Code*, 49-6-2(b) (1984), a request for an improvement period must be made "prior to final hearing."

Syl. pt. 4 - "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In r R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

The Court found imminent danger to appellant's child (see *W.Va.Code* 49-6-3) sufficient to justify temporary custody. Appellant failed to request an improvement period, even after an extended evaluation period, until after the final order terminating her parental rights. She exhibited an itinerant lifestyle and had a sporadic work history. Further, there was sufficient evidence to support a finding that improvement would not occur.

As to the alleged hearsay testimony, the Court found that the social worker who testified actually observed appellant and her child. No hearsay. Finally, the Court found no conflict with the former assistant prosecuting attorney's representation of the child as a guardian ad litem. The attorney at no time represented the State's interests in this matter. No error.

ABUSE OF DISCRETION

Argument by counsel

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

See APPEAL Standard for review, Argument for counsel, (p. 43) for discussion of topic.

Confessions

State v. Stewart, 375 S.E.2d 805 (1988) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Burden of proof, (p. 584) for discussion of topic.

Continuance

Granting

State v. Catlett, 376 S.E.2d 834 (1988) (Neely, J.)

See CONTINUANCE Discretion of court, (p. 124) for discussion of topic.

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See CONTINUANCE Discretion in granting, (p. 124) for discussion of topic.

State v. Wilkinson, 381 S.E.2d 241 (1989) (Per Curiam)

See CONTINUANCES Appeal of, Standard for review, (p. 123) for discussion of topic.

ABUSE OF DISCRETION

Evidence

Admissibility

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See EVIDENCE Admissibility, Photographs, (p. 199) for discussion of topic.

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Character of victim (p. 188) for discussion of topic.

State v. Shugars, 376 S.E.2d 174 (1988) (Per Curiam)

See EVIDENCE Admissibility, Generally, (p. 186) for discussion of topic.

State v. Thomas, 374 S.E.2d 719 (1988) (Per Curiam)

See EVIDENCE Admissibility, After case presented, (p. 186) for discussion of topic.

State v. White, 383 S.E.2d 87 (1989) (Per Curiam)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 207) for discussion of topic.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 207) for discussion of topic.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See EVIDENCE Flight, (p. 195) for discussion of topic.

ABUSE OF DISCRETION

Evidence (continued)

Courtroom demonstrations

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See EVIDENCE Admissibility, Courtroom demonstrations, (p. 191) for discussion of topic.

Flight

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See EVIDENCE Admissibility, Flight, (p. 193) for discussion of topic.

Gruesome photographs

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See EVIDENCE Gruesome photographs, (p. 230) for discussion of topic.

Qualifying expert witness

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

See EVIDENCE Expert witnesses, Qualifications of, (p. 227) for discussion of topic.

Ruling on

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

See EVIDENCE Admissibility, Trial court's discretion, (p. 209) for discussion of topic.

ABUSE OF DISCRETION

Evidence (continued)

Standard for review

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Generally, (p. 241) for discussion of topic.

Investigative services

Denial of

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

See JUDGES Discretion, Investigative services, (p. 384) for discussion of topic.

Joinder

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See JOINDER Discretion of judge, (p. 373) for discussion of topic.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See JOINDER Offenses, Generally, (p. 375) for discussion of topic.

Multiple offenses

State v. Hatfield, 380 S.E.2d 670 (1988) (McGraw, J.)

See JOINDER Multiple offenses, (p. 373) for discussion of topic.

ABUSE OF DISCRETION

Parental rights (termination)

In the Matter of R.O. & R.O., 375 S.E.2d 823 (1988) (Neely, J.)

See ABUSE AND NEGLECT Termination of parental rights, Improvement period, (p. 5) for discussion of topic.

Photographs

Admissibility

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See EVIDENCE Admissibility, Photographs, (p. 199) for discussion of topic.

Probation

Granting of

State v. White, 383 S.E.2d 87 (1989) (Per Curiam)

See PROBATION Right to, (p. 501) for discussion of topic.

Testimony

Form of

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

Appellant was convicted of sexual abuse. At trial, an expert witness was allowed to testify in narrative form; appellant objected on appeal.

Syl. pt. 2 - "The trial court is vested with sound discretion to permit a witness to testify in narrative form, rather than by question and answer." Syllabus point 3, *State v. Armstrong*, 179 W.Va. 435, 369 S.E.2d 870 (1988).

See also, *State v. McCoy*, 179 W.Va. 223, 366 S.E.2d 731 (1988).

ABUSE OF DISCRETION

Venue

State ex rel. Kisner v. Starcher, No. 18520 (11/10/88) (Per Curiam)

See VENUE Change of venue, Abuse of discretion, (p. 647) for discussion of topic.

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

See VENUE Change of venue, Factors to consider, (p. 647) for discussion of topic.

Refusal to grant change

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See VENUE Change of venue, Factors to consider, (p. 648) for discussion of topic.

Voir dire

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See *VOIR DIRE* Abuse of discretion, (p. 650) for discussion of topic.

Comments during

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See JURY *Voir dire*, (p. 420) for discussion of topic.

Voluntary confession

State v. Stewart, 375 S.E.2d 805 (1988) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Burden of proof, (p. 584) for discussion of topic.

ABUSE OF DISCRETION

Witnesses

Competency

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See WITNESSES Competency, (p. 655) for discussion of topic.

ACCESSORY TO CRIME

Distinguished from aiding and abetting

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

See AIDING AND ABETTING Principal in 1st and 2d degree, (p. 23) for discussion of topic.

ADMINISTRATIVE HEARINGS

Right to counsel

Revoked or suspended license

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

See RIGHT TO COUNSEL Administrative hearings, Revoked or suspended license, (p. 544) for discussion of topic.

AFFIDAVIT

Basis for search warrant

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 564) for discussion of topic.

AIDING AND ABETTING

Accessory before the fact

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See AIDING AND ABETTING Principal and accessory distinguished, (p. 21) for discussion of topic.

Concerted action

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

See AIDING AND ABETTING Principal in 1st and 2d degree, (p. 23) for discussion of topic.

Distinguished from accessory before the fact

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

See AIDING AND ABETTING Principal in 1st and 2d degree, (p. 23) for discussion of topic.

Distinguished from witnessing

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

See AIDING AND ABETTING Principal in 1st and 2d degree, (p. 23) for discussion of topic.

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See AIDING AND ABETTING Principal and accessory distinguished, (p. 21) for discussion of topic.

AIDING AND ABETTING

Distinguished from witnessing (continued)

State v. Hoselton, 371 S.E.2d 366 (1988) (Per Curiam)

Appellant was convicted of entering without breaking with intent to commit larceny. The only evidence linking the appellant with the crime was his own voluntary statement that he was present while his companions committed larceny. He claimed that he was unaware of their intent. On appeal he claimed that the evidence was insufficient.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "'Merely witnessing a crime, without intervention, does not make a person a party to its commission unless his interference was a duty, and his noninterference was one of the conditions of the commission of the crime; or unless his noninterference was designed by him and operated as an encouragement to or protection of the perpetrator.' Syllabus, *State v. Patterson*, 109 W.Va. 588, 155 S.E. 661 [1930]." *State v. Haines*, 156 W.Va. 281, 192 S.E.2d 879 (1972).

Here, the Court held that the State had not met its burden. Reversed.

Principal and accessory distinguished

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

Appellant was one of five men accused of sexually assaulting the same woman. He was convicted of abduction with intent to defile; kidnaping; sexual assault, second-degree; and sexual abuse, first-degree. On several counts appellant was found guilty as an accessory or an aider and abettor. Appellant claimed the evidence was insufficient to support the convictions.

Syl. pt. 5 - A person who is the absolute perpetrator of a crime is a principal in the first-degree, and a person who is present, aiding and abetting the fact to be done, is a principal in the second-degree.

Principal and accessory distinguished (continued)

State v. Fortner, (continued)

Syl. pt. 6 - "An accessory before the fact is a person who being absent at the time and place of the crime, procures, counsels, commands, incites, assists or abets another person to commit the crime, and absence at the time and place of the crime is an essential element of the status of an accessory before the fact." Syllabus Point 2, *State ex rel. Brown v. Thompson*, 149 W.Va. 649, 142 S.E.2d 711, *cert. denied*, 382 U.S. 940, 15 L.Ed.2d 350, 86 S.Ct. 392 (1965).

Syl. pt. 7 - The chief difference between a principal in the second-degree and an accessory before the fact is that the former is actually or constructively present at the time and place of the commission of the offense, while the latter is absent.

Syl. pt. 8 - Where a defendant is convicted of a particular substantive offense, the test is sufficiency of the evidence to support the conviction necessarily involves consideration of the traditional distinctions between parties to offenses. Thus, a person may be convicted of a crime so long as the evidence demonstrates that he acted as an accessory before the fact, as a principal in the second-degree, or as a principal in the first-degree in the commission of such offense.

Syl. pt. 9 - "'Merely witnessing a crime, without intervention, does not make a person a party to its commission unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator.' Syllabus, *State v. Patterson*, 109 W.Va. 588, 155 S.E. 661 (1930)." Syllabus Point 3, *State v. Haines*, 156 W.Va. 281, 192 S.E.2d 879 (1972).

Syl. pt. 10 - Proof that the defendant was present at the time and place the crime was committed is a factor to be considered by the jury in determining guilt, along with other circumstances, such as the defendant's association with or relation to the perpetrator and his conduct before and after the commission of the crime.

Syl. pt. 11 - Under the concerted action principal, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator.

AIDING AND ABETTING

Principal and accessory distinguished (continued)

State v. Fortner, (continued)

Syl. pt. 12 - For a criminal defendant to claim that he withdrew from a criminal venture so as to avoid criminal responsibility, he must show that he disavowed the criminal purpose sufficiently in advance of the act to give his confederated a reasonable opportunity to withdraw, if they so desire, and did so in such a manner as to communicate to them his disapproval of or opposition to the criminal act.

Here, appellant was not merely an innocent bystander; he not only committed unlawful acts himself but clearly aided the others. Even the charge relating to a secondary assault by one member of the gang acting out of the sight of the others was valid. Mere physical absence does not excuse appellant.

Principal in 1st and 2d degree

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

Appellant's son sexually assaulted a woman in appellant's mobile home in appellant's presence. The victim repeatedly appealed to appellant for help but he refused; he even lay next to the victim on the bed while the assault took place. Appellant claimed he should not have charged with assault.

Syl. pt. 2 - "A person who is the absolute perpetrator of a crime is a principal in the first-degree, and a person who is present, aiding and abetting the fact to be done, is a principal in the second-degree." Syllabus Point 5, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 3 - "'An accessory before the fact is a person who being absent at the time and place of the crime, procures, counsels, commands, incites, assists or abets another person to commit the crime, and absence at the time and place of the crime is an essential element of the status of an accessory before the fact.' Syllabus Point 2, *State ex rel. Brown v. Thompson*, 149 W.Va. 649, 142 S.E.2d 711, *cert. denied*, 382 U.S. 940, 15 L.Ed.2d 350, 86 S.Ct. 392 (1965)." Syllabus Point 6, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

AIDING AND ABETTING

Principal in 1st and 2d degree (continued)

State v. Davis, (continued)

Syl. pt . 4 - " ' "Merely witnessing a crime without intervention, does not make a person a party to its commission unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator." Syllabus, *State v. Patterson*, 109 W.Va. 588, 155 S.E. 661 (1930).' Syllabus Point 3, *State v. Haines*, 156 W.Va. 281, 192 S.E.2d 879 (1982)." Syllabus Point 9, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 5 - "Proof that the defendant was present at the time and place the crime was committed is a factor to be considered by the jury in determining guilt, along with other circumstances, such as the defendant's association with or relation to the perpetrator and his conduct before and after the commission of the crime." Syllabus Point 10, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 6 - "Under the concerted action principle, a defendant who is present at the scene of the crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator." Syllabus Point 11, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

The Court found that appellant did more than merely witness the crime. The assault occurred in his home and his son was the principal assailant. Further, the victim looked upon appellant as a family member and even referred to him as "Uncle Dewey." The Court found these circumstances sufficient to support the jury's finding that appellant's presence facilitated and encouraged the assault.

ALIMONY

Enforcement of

State v. Lusk, 376 S.E.2d 351 (1988) (Miller, J.)

See CHILD SUPPORT AND ALIMONY Criminal contempt, Grounds for, (p. 100) for discussion of topic.

APPEAL

Generally

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

Appellant was convicted of kidnaping; abduction with intent to defile; sexual assault, second-degree; and sexual abuse, first-degree. On appeal, he claimed that the State improperly introduced into evidence a tape recording of telephone calls received the local emergency services center and the trial court refused to provide a complete transcript of the trial of one of his codefendants.

Syl. pt. 17 - "'As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.' Syl. pt. 17, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)." Syllabus Point 4, *State v. Nicastro*, 181 W.Va. 556, 383 S.E.2d 521 (1989).

The Court noted that the record revealed neither a request for the transcript nor an objection at trial to the introduction of the tape. No error.

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, Generally, (p. 361) for discussion of topic.

Presumption of regularity

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See JURY Disqualification, Employment with law enforcement agency, (p. 408) for discussion of topic.

Abstract instructions

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See INSTRUCTIONS Abstract proposition of law, (p. 354) for discussion of topic.

APPEAL

Confessions

Voluntariness

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 114) for discussion of topic.

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See POLICE OFFICERS Duty to advise of right to counsel, (p. 483) for discussion of topic.

Confession of error by prosecution

State v. Gibson, 394 S.E.2d 905 (1990) (Per Curiam)

Appellant's motion for return of a motor vehicle was denied. The underlying offenses were dismissed. Appellee confessed error.

In Syllabus Point 1 of *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1980), this Court held, " ' "In a criminal case where the State confesses error, urges that the judgment be reversed and that the defendant be granted a new trial, this Court, upon ascertaining that the errors confessed are reversible errors and do in fact constitute cause for the reversal of the judgment of conviction, will reverse the judgment and grant the defendant a new trial." Syl. *State v. Goff*, 159 W.Va. 348, 221 S.E.2d 891 (1976)'; *State v. Cokeley*, 159 W.Va. 664, 226 S.E.2d 40 (1976)." Reversed and remanded.

Constitutional error

Right to bear arms

State ex rel. City of Princeton v. Buckner, 377 S.E.2d 139 (1988) (McHugh, C.J.)

See STATUTES Statutory construction, Dangerous or deadly weapons, (p. 613) for discussion of topic.

Constitutional error (continued)

Right to bear arms (continued)

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See HOMICIDE First-degree, Malice, (p. 301) for discussion of topic.

Contrary to evidence

State v. Hoselton, 371 S.E.2d 366 (1988) (Per Curiam)

See AIDING AND ABETTING Distinguished from witnessing, (p. 21) for discussion of topic.

Cumulative error

Effect of

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

Appellant was convicted of grand larceny, aggravated robbery, burglary, arson and felony-murder. He contended that the cumulative effect of the trial court's allowing him to act as co-counsel; requiring his presence at counsel table during a hearing on the suggestiveness of a photographic line-up; presentation of a rebuttal witness during the prosecution's case in chief; comments made by the prosecution during closing argument; and sentencing him on a legal holiday result in cumulative error sufficient to require reversal.

Syl. pt. 7 - "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." Syllabus Point 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

Here, the Court found that the trial court did not make numerous errors, nor did the errors prevent appellant from receiving a fair trial.

APPEAL

Denial of right to appeal

Preast v. White, No. 18306 (7/22/88) (Per Curiam)

Petitioner was convicted of malicious assault on 16 September 1985. He was sentenced to two to ten years imprisonment, with an enhancement of five years for being an habitual offender.

On 26 November 1985 his appointed counsel filed notice of intent to appeal. Subsequently, the deadline for filing an appeal was extended to 20 November 1986. Original counsel was removed in September and new counsel requested an additional one month's time to 17 November 1986. New counsel then requested removal due to ill health.

Petitioner was committed to the penitentiary on 21 April 1987 and resentenced by the circuit court on 18 June 1987 so as to revive the time for appeal. Over the subsequent period several appointed counsel represented petitioner. Petitioner claims that he was unaware of the last counsel's appointment on 22 October 1987. On 22 December 1987 he filed a *pro se* petition for writ of *habeas corpus* and one of his former counsel was appointed. Following yet another extension, an appeal was filed on 18 July 1988.

The State admitted all of the facts set forth above but filed affidavits by three of petitioner's former counsel alleging that petitioner was abusive and uncooperative; and that he has demanded that his various counsel withdraw. He has filed two ethics complaints against former counsel.

West Virginia's rule of extraordinary dereliction is set forth in *Carter v. Bordenkircher*, 159 W.Va. 717, 226 S.E.2d 711 (1976). Where a defendant's failure to timely appeal is due to "extraordinary dereliction on the part of the State," an appropriate remedy may be obtained in *habeas corpus*. This remedy is to be tailored to the individual case so as to "permit the effective prosecution of an appeal."

Whether extraordinary dereliction exists, sufficient to warrant release from custody, is a question of fact. *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977). In Syllabus Point 6 of *Rhodes* the Court held:

Denial of right to appeal (continued)

Preast v. White, (continued)

> "Factors to be considered in determining whether there has been extraordinary dereliction are: the clarity and diligence with which the relator has moved to assert his right to appeal; the length of time that has been served on the underlying sentence measured against the time remaining to be served; whether prior writs have been filed or granted involving the right of appeal; and the related question of whether resentencing has occurred in order to extend the appeal period. While extraordinary dereliction on the part of the State does not require a showing of malice or ill will, certainly if such is shown it would be a significant factor."

Here, applying *Rhodes*, the Court noted that petitioner did not complain of any delay until December, 1987. In addition, petitioner has served only two years of a fifteen year sentence, an appeal has been timely filed and the State was not at fault for the delay. Petitioner himself seems to have caused much of the delay. Writ denied.

Wolfe v. Hedrick, No. 18261 (7/20/88) (Per Curiam)

Petitioner was convicted of kidnaping and armed robbery on 30 May 1985. He was sentenced to life imprisonment, with mercy recommended on the kidnaping conviction. Trial counsel withdrew and another was appointed for the appeal.

Petitioner alleged that he was unsuccessful in attempting to contact the new attorney. Although another attorney was appointed, two years after conviction no appeal was filed. The state alleged that the original appellate counsel was unable to appeal for lack of a transcript, only receiving it on 17 April 1987. Following review, he claimed that only two issues were appealable and that counsel for petitioner's coindictee had lost the same issues on appeal.

Petitioner was resentenced on 30 September 1987 and an appeal has been filed. Petitioner requested immediate release due to the State's dereliction.

APPEAL

Denial of right to appeal (continued)

Wolfe v. Hedrick, (continued)

Applying the standard in *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977), the Court found that petitioner has not served the minimum amount of time on his sentences, any delay in filing the appeal is harmless (an appeal has now been filed) and petitioner has not demonstrated actual harm. Writ denied.

Withdrawal of counsel

State ex rel. Dorton v. Ferguson, No. 18949 (4/6/89) (Per Curiam)

On an original proceeding in *habeas corpus*, petitioner alleged that he was denied his right to counsel. Petitioner was convicted of malicious wounding on 16 September 1986. An attorney was appointed to pursue an appeal. Petitioner received a letter from this attorney, dated 21 January 1988, stating that he was unable to find grounds for an appeal and had requested that the court relieve him of the appointment; the attorney did not file an *Anders* brief (see *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967) supporting arguable grounds for appeal.

A second attorney was similarly unable to find grounds for appeal and advised petitioner by letter dated 1 August 1988 to ask the court for yet another attorney. This second attorney did not comply with *Anders* either, despite petitioner's letters of 28 April 1988, 5 July 1988, and 25 July 1988, providing her with grounds for the appeal.

Petitioner was resentenced to allow further opportunity to appeal, but no appeal was filed. On 28 December 1988 he filed this petition alleging ineffective assistance of counsel in the failure to assist him in an appeal.

The Court held that petitioner had a right to effective assistance in pursuing his appeal. "An indigent criminal defendant who desires to appeal his conviction has a right, under Article III, Sections 10 and 17 of the West Virginia Constitution, to the effective assistance of court-appointed counsel on his appeal." Syllabus Point 2, *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977).

APPEAL

Withdrawal of counsel (continued)

State ex rel. Dorton v. Ferguson, (continued)

An appointed attorney must submit "a brief referring to any point in the record that might arguably support the appeal." *Turner v. Haynes*, 162 W.Va. 33, at 36, 245 S.E.2d 629, at 631 (1978). The defendant must receive a copy of the brief. *Id.*, 162 W.Va. at 36, 245 S.E.2d at 631. Since these requirements were not met, the Court ordered that petitioner be resentenced and court-appointed counsel file an *Anders* brief within forty-five days of the effective date of the order.

Error invited or offered by defendant

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Arson, (p. 625) for discussion of topic.

Evidence

Motion in limine

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

Appellant was convicted of first-degree murder and sexual assault of his wife. Prior to jury selection, appellant requested an *in camera* hearing to determine if the probative evidence of his flight was outweighed by potential prejudice. The trial court did not rule on the motion. When the evidence was introduced at trial, no objection was made.

Syl. pt. 4 - "An objection to an adverse ruling on a motion in limine to bar evidence at trial will preserve the point, even though no objection was made at the time the evidence was offered unless there has been a significant change in the basis for admitting the evidence." Syllabus Point 1, *Wimer v. Hinkle*, 180 W.Va. 660, 379 S.E.2d 383 (1989).

Here, no adverse ruling was made. Therefore, appellant waived the error by failing to object at introduction of the evidence.

APPEAL

Evidence (continued)

Objection to ruling

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

Appellant was convicted of first-degree murder and sexual assault of his wife. Prior to jury selection, appellant requested an *in camera* hearing to determine if the probative evidence of his flight was outweighed by potential prejudice. The trial court did not rule on the motion. When the evidence was introduced at trial, no objection was made.

Syl. pt. 4 - "An objection to an adverse ruling on a motion in limine to bar evidence at trial will preserve the point, even though no objection was made at the time the evidence was offered unless there has been a significant change in the basis for admitting the evidence." Syllabus Point 1, *Wimer v. Hinkle*, 180 W.Va. 660, 379 S.E.2d 383 (1989).

Here, no adverse ruling was made. Therefore, appellant waived the error by failing to object at introduction of the evidence.

Failure to object

State v. Davis, 376 S.E.2d 563 (1988) (Per Curiam)

Appellant was convicted of first-degree sexual abuse, second-degree sexual assault and abduction with intent to defile. He complained that the prosecuting attorney made improper remarks during closing argument. No objection was made at trial.

Syl. pt. 5 - "'Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court.' Point 6, Syllabus, *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945)." Syllabus point 7, *State v. Cirello*, 142 W.Va. 56, 93 S.E.2d 526 (1956).

The Court refused to address the assignment of error. (See also, *State v. Lewis*, 133 W.Va. 584, 57 S.E.2d 513 (1949); *State v. Fisher*, 123 W.Va. 745, 18 S.E.2d 649 (1941); and *State v. Clifford*, 58 W.Va. 681, 52 S.E. 864 (1906).

Failure to object (continued)

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See APPEAL Generally, (p. 26) for discussion of topic.

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

See APPEAL Standard for review, Matters for trial court, (p. 44) for discussion of topic.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See APPEAL Evidence, Motion in limine, (p. 32) for discussion of topic.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See APPEAL Evidence, Objection to ruling, (p. 33) for discussion of topic.

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See INSTRUCTIONS Non-binding, (p. 363) for discussion of topic.

Failure to preserve

State v. Fisher, 370 S.E.2d 480 (1988) (Per Curiam)

Appellant was convicted of possession of a controlled substance with intent to distribute. Appellant contended that an unconstitutional instruction was given, shifting the burden of proof to the appellant to prove his alibi defense. Unfortunately, counsel did not object at trial.

Failure to preserve (continued)

State v. Fisher, (continued)

Syl. pt. 3 - "The invalidation of the instruction approved in *State v. Alexander*, 161 W.Va. 776, 245 S.E.2d 633 (1978), that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt is only applicable to those cases currently in litigation or on appeal where the error has been properly preserved at trial." Syllabus Point 2, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

Syl. pt. 4 - "Although this Court may, under Rule 30 of the West Virginia Rules of Criminal Procedure, notice plain error in the giving of an erroneous instruction (in the absence of a proper and timely objection at trial), this Court will not ordinarily recognize plain error under such circumstances, even of constitutional magnitude, where the giving of the erroneous instruction did not substantially impair the truth-finding function of the trial." Syllabus Point 2, *State v. Hutchinson*, 176 W.Va. 172, 342 S.E.2d 138 (1986).

While the instruction was clearly erroneous, the Court did not reverse. Given the weight of the prosecution's evidence and the defendant's weak alibi evidence, the Court concluded justice did not require reversal.

Generally

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See *VOIR DIRE* Abuse of discretion, (p. 650) for discussion of topic.

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See APPEAL Generally, (p. 26) for discussion of topic.

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, Generally, (p. 361) for discussion of topic.

Failure to preserve (continued)

Effect of

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

Appellant was convicted of second-degree murder in the shooting death of her husband. The prosecution was allowed to introduce testimony by the victim's girlfriend. Although a suppression hearing was held regarding how police came to contact the witness, the record of that hearing was not sent for review. Appellant alleged that the witness' phone number was obtained from appellant after she had requested an attorney (and, presumably, before the attorney arrived); and that police testimony at the suppression hearing was at variance with testimony at trial.

Based on the record before it, no error. The Court found that ".... as a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record. ...." Syl. Pt. 17, in part, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445, 449 (1974).

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See JURY Venire, Sufficient size of, (p. 420) for discussion of topic.

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See JURY *Voir dire*, (p. 420) for discussion of topic.

Failure to develop record

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

During appellant's trial on charges of driving with a revoked operator's license, the trial court refused to allow defense counsel to cross-examine the arresting officer as to why the officer resigned from a municipal police department. Counsel did not vouch the record with the information he sought.

Failure to preserve (continued)

Failure to develop record (continued)

State v. Cole, (continued)

Syl. pt. 5 - "In order to make exclusion of offered evidence available as a ground of error in the appellate court, the record must be so prepared in the court below as to show what the excluded evidence was. There is no presumption as to what answer a witness would have made to a question propounded." Syllabus Point 4, *State v. Carr*, 65 W.Va. 81, 63 S.E. 766 (1909).

The Court refused to consider the issue.

State v. Schoolcraft, 396 S.E.2d 760 (1990) (Brotherton, J.)

See INDICTMENT Conviction of only certain charges, (p. 319) for discussion of topic.

Failure to object

State v. Davis, 376 S.E.2d 563 (1988) (Per Curiam)

See APPEAL Failure to object, (p. 33) for discussion of topic.

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

See APPEAL Standard for review, Matters for trial court, (p. 44) for discussion of topic.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See APPEAL Evidence, Motion in limine, (p. 32) for discussion of topic.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See APPEAL Evidence, Objection to ruling, (p. 33) for discussion of topic.

APPEAL

Failure to preserve (continued)

General objections

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See INSTRUCTIONS Abstract propositions of law, (p. 354) for discussion of topic.

Habeas corpus

Distinguished from writ of error

Billotti v. Dodrill, 394 S.E.2d 32 (1990) (Brotherton, J.)

See *HABEAS CORPUS* Scope of, (p. 289) for discussion of topic.

Indictment

Standard for review

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 160) for discussion of topic.

Ineffective assistance

Standard of proof

State v. Snodgrass, 382 S.E.2d 56 (1989) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 348) for discussion of topic.

APPEAL

Ineffective assistance (continued)

Standard of proof (continued)

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See INEFFECTIVE ASSISTANCE, Standard of proof, (p. 345) for discussion of topic.

State v. Glover, 396 S.E.2d 198 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Burden of proof, (p. 334) for discussion of topic.

Instructions

Incomplete

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See ROBBERY Elements of, (p. 556) for discussion of topic.

Insufficient evidence to convict

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 621) for discussion of topic.

Merits of

Effect of denial of petition

Smith v. Hedrick, 382 S.E.2d 588 (1989) (Brotherton, C.J.)

See APPEAL Rejection of petition, Effect on subsequent appeal, (p. 41) for discussion of topic.

APPEAL

Plain error

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

State v. Moore, 409 S.E.2d 490 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 203) for discussion of topic.

Erroneous instructions

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See ROBBERY Elements of, (p. 556) for discussion of topic.

Presumption of trial court's propriety

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See INSTRUCTIONS Non-binding, (p. 363) for discussion of topic.

Prosecution's right to

State v. Adkins, 388 S.E.2d 316 (1989); ***State v. Goodwill Motors, Inc.,***; ***State v. Damron***,; ***State v. Kapourales***,; ***State v. Simpkins***,; ***State v. Sizemore***,; ***State v. Van Meter***,; and ***State v. Ward***, (Brotherton, C.J.)

See PROSECUTING ATTORNEY Appeal by, (p. 512) for discussion of topic.

APPEAL

Rejection of petition

Effect on subsequent appeal

Smith v. Hedrick, 382 S.E.2d 588 (1989) (Brotherton, C.J.)

Appellant was denied a writ of *habeas corpus* from his first-degree sexual assault conviction. Appellant's earlier petition for appeal was also denied. In this action, he appealed from the denial of his writ of *habeas corpus*. He contended that the trial court erred in refusing to consider ten of his grounds for habeas relief because they were presented in the earlier petition for appeal.

Syl. pt. - This Court's rejection of a petition for appeal is not a decision on the merits precluding all future consideration of the issues raised therein, unless, as stated in Rule 7 of the West Virginia Rules of Appellate Procedure, such petition is rejected because the lower court's judgment or order is plainly right, in which case no other petition for appeal shall be permitted.

The Court noted that rejection of a petition for appeal is not a decision on the merits of the claims. See *Blackburn v. State*, 170 W.Va. 96, 290 S.E.2d 22 (1982); also, *Knotts v. Moore*, 177 W.Va. 9, 350 S.E.2d 9 (1986). Here, no decision was made with regard to the issues raised. Reversed and remanded for rehearing.

Release when unsuccessful

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See ATTORNEYS Appointment of, Duty to appeal unless relieved, (p. 61) for discussion of topic.

Right to

Billotti v. Dodrill, 394 S.E.2d 32 (1990) (Brotherton, J.)

Petitioner was found guilty of several counts of first-degree murder and sentenced to life without parole.

Billotti v. Dodrill, (continued)

Petitioner's initial writ of *habeas corpus* to the Court was denied February 14, 1985. A second *habeas corpus* writ was denied July 2, 1986. Petition for appeal with the United States District Court was also denied.

On 22 April 1987 appellant filed a writ of *habeas corpus* in the circuit court and was granted an omnibus hearing on 1 October 1987. The petition was dismissed; petitioner appealed from that dismissal, claiming that his right to due process was abridged by the denial of an automatic full appellate review in cases involving first-degree murder, with a sentence of life imprisonment without parole.

Syl. pt. 1 - "One convicted of crime is entitled to the right to appeal that conviction and where he is denied his right to appeal such denial constitutes a violation of the due process clauses of the state and federal constitutions and renders any sentence imposed by reason of the conviction void and unenforceable." Syllabus, *State ex rel. Bratcher v. Cooke*, 155 W.Va. 850, 188 S.E.2d 769 (1972).

Syl. pt. 2 - "In the enactment of a statute, the Legislature is presumed not to enact a statute which is violative of any of the provisions of the Constitution of the United States or the Constitution of West Virginia." Syllabus point 2, *Linger v. Jennings*, 143 W.Va. 57, 99 S.E.2d 740 (1957).

Syl. pt. 3 - Through the interpretation of Article III, § 10 and Article III, § 17 of the Constitution of West Virginia, this Court has recognized a constitutional right to petition for appeal in criminal cases and has also "constitutionalized" the criminal defendant's right to receive a free transcript, appointed counsel, and the effective assistance of counsel in appellate proceedings.

Syl. pt. 4 - West Virginia does not grant a criminal defendant a first appeal of right, either statutorily or constitutionally. However, our discretionary procedure of either granting or denying a final full appellate review of a conviction does not violate a criminal defendant's guarantee of due process and equal protection of the law.

APPEAL

Right to (continued)

Billotti v. Dodrill, (continued)

The Court noted that no federal constitutional right of appeal exists but that West Virginia recognizes the right to some review. One class of indigents cannot be treated differently than other indigents, nor can the ineffectiveness of counsel or the defendant's own delay prejudice that right (although the remedy may be affected).

The right to petition for review does not carry with it the right to a full review. Writ denied.

Setting aside verdict

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See HARMLESS ERROR Nonconstitutional, Test for, (p. 294) for discussion of topic.

Standard for review

Argument for counsel

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

Appellant was convicted of first-degree murder. His primary defense at trial was insanity. During closing argument to the jury, the prosecution stated that the American Medical Association believes that the insanity defense should be abolished and that no correlation exists between crime and mental illness. The prosecution also argued that the jury could ignore all expert witnesses and agree with the AMA. Appellant claimed on appeal that the argument conflicted with the trial court's instructions on the insanity defense. Appellant cited Rule VI of the Trial Court Rules that counsel "may not argue against the correctness of an instruction..."

Standard for review (continued)

Argument for counsel (continued)

State v. Bennett, (continued)

Syl. pt. 2 - "'The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom.' Syllabus point 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927)." Syl. Pt. 9, *State v. Flint*, 171 W.Va. 676, 301 S.E.2d 765 (1983).

No error.

Error offered or solicited by counsel

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

See EVIDENCE Admissibility, Error offered or solicited by counsel, (p. 192) for discussion of topic.

Matters for trial court

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

Appellant was convicted of delivery of a controlled substance. The indictment failed to include the words "with remuneration." (See INDICTMENT Sufficiency, Controlled substances, (p. 322)). At the conclusion of trial, two verdict forms were submitted to the jury; neither form included the option of guilty of delivery without remuneration. Defense counsel did not object until after the case had gone to the jury.

Syl. pt. 4 - "As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there." Syl. pt. 17, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Standard for review (continued)

Matters for trial court (continued)

State v. Nicastro, (continued)

The Court noted that objection during the sentencing hearing was not timely. No error; counsel did preserve for appeal.

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

See APPEAL Standard for review, Argument for counsel, (p. 43) for discussion of topic.

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See INSTRUCTIONS Non-binding, (p. 363) for discussion of topic.

Nonconstitutional harmless error

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Collateral cases, (p. 218) for discussion of topic.

Out of court identifications

State v. Stacy, 384 S.E.2d 347 (1989) (Workman, J.)

See IDENTIFICATION Out of court, Factors to consider, (p. 309) for discussion of topic.

Plain error

State v. Stacy, 384 S.E.2d 347 (1989) (Workman, J.)

See HOMICIDE Felony-murder, Instructions, (p. 298) for discussion of topic.

Standard for review (continued)

Presumption of propriety

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See INSTRUCTIONS Non-binding, (p. 363) for discussion of topic.

Prosecution's remarks

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See IDENTIFICATION Habitual offender, (p. 306) for discussion of topic.

Setting aside verdict

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 628) for discussion of topic.

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 623) for discussion of topic.

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

Appellant was convicted of kidnaping, second-degree murder and third degree arson. The victim was lured away from her place of business by a phone call from a man claiming to be a magistrate and another call from a man claiming to be an undercover policeman. The magistrates in the area were both female. She was never seen again but her vehicle was found burned near appellant's trailer.

Substantial evidence was introduced at trial showing that appellant habitually made phone calls pretending to be another person. These calls were to local young women and usually asked them to meet him in an isolated area. It was also shown that appellant had made over 200 calls to bookstores and libraries pretending to be a physician and asking for information about anal sex.

State v. Ferrell, (continued)

On appeal he claimed that there was insufficient evidence to convict of kidnaping.

Syl. pt. 1 - "In a criminal case, a verdict of guilty will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The necessary element here was proof of fraud in the inducement to lure the victim away for the purpose of gaining a "concession or advantage." The Court found that the telephone calls previously made were sufficient to show system, motive and intent; and that the jury could reasonably have concluded that fraud was used to lure the victim away.

The Court rejected appellant's argument that he cannot be convicted of kidnaping if he is convicted of murder. The kidnaping here was not incidental to the murder. The jury could reasonably have believed that the victim was lured away for the purpose of rape. No error.

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See APPEAL Standard for review, Sufficiency of evidence, (p. 49) for discussion of topic.

Standard for review (continued)

Sufficiency of evidence

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

Appellant was convicted of second-degree murder. He was accused of shooting the victim with a handgun. He argued that there was a fight and the gun went off accidentally but expert testimony contradicted this argument.

Syl. pt. 2 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The Court found no error.

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Setting aside judgment, (p. 635) for discussion of topic.

State v. McPherson, 371 S.E.2d 333 (1988) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual attacks, (p. 635) for discussion of topic.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 626) for discussion of topic.

APPEAL

Standard for review (continued)

Sufficiency of evidence (continued)

State v. Perdue, 372 S.E.2d 636 (1988) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Homicide, First-degree murder, (p. 629) for discussion of topic.

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Generally, (p. 624) for discussion of topic.

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

Appellant was convicted of first-degree murder. On appeal he claimed that the evidence was insufficient to support a verdict of guilty. Testimony was given that established appellant's presence with another at a laundromat just prior to the murder. Appellant's companion stated that they were going to the scene of the murder. Other evidence tended to show that the murder weapon was in appellant's possession prior to the killing. Appellant's brother was having an adulterous relationship with the victim's wife.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and the consequent injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The evidence was sufficient here. The Court noted that two different standards of review apply in determining whether sufficient circumstantial evidence exists and in determining whether the evidence is "manifestly inadequate." Circumstantial evidence must establish time, place, motive means and conduct while under *Starkey*, *supra*, the evidence must be sufficient to establish guilt beyond a reasonable doubt.

APPEAL

Standard for review (continued)

Voir dire

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See JURY *Voir dire*, (p. 420) for discussion of topic.

Voluntariness of confession

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 114) for discussion of topic.

State v. Parsons, 381 S.E.2d 246 (1989) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Mental condition, (p. 585) for discussion of topic.

State v. Preece, 383 S.E.2d 815 (1989) (McHugh, J.)

See SELF-INCRIMINATION *Miranda* warnings, Traffic accident, (p. 572) for discussion of topic.

State's right to

State v. Adkins, 388 S.E.2d 316 (1989); ***State v. Goodwill Motors, Inc.,***; ***State v. Damron***,; ***State v. Kapourales***,; ***State v. Simpkins***,; ***State v. Sizemore***,; ***State v. Van Meter***,; and ***State v. Ward***, (Brotherton, C.J.)

See PROSECUTING ATTORNEY Appeal by, (p. 512) for discussion of topic.

APPEAL

Statements by defendant

Voluntariness

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, *In camera* hearing, (p. 585) for discussion of topic.

***Sua sponte* actions**

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

Sufficiency of evidence

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 621) for discussion of topic.

Transcript

Right to

Short v. Workman, No. 18494 (7/18/88) (Per Curiam)

See TRANSCRIPT Right to transcript, (p. 642) for discussion of topic.

Voir dire

Standard for review

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See JURY *Voir dire*, (p. 420) for discussion of topic.

ARREST

Generally

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Appearance before magistrate

Juveniles

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See JUVENILES Prompt presentment, (p. 427) for discussion of topic.

Confessions

Illegal arrest

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Warrantless arrest

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Probable cause hearing

Disclosure of informant

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

See PRELIMINARY HEARING Disclosure of informant, (p. 486) for discussion of topic.

ARREST

Probable cause hearing (continued)

Standard for misdemeanor arrest

Simon v. W.Va. Dep't of Motor Vehicles, 832 S.E.2d 320 (1989) (Neely, J.)

See ARREST Warrantless, Misdemeanor arrest, (p. 54) for discussion of topic.

Prosecuting attorney's participation

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

See PROSECUTING ATTORNEY Arrest, Participation in, (p. 513) for discussion of topic.

Test for occurrence

State v. Preece, 383 S.E.2d 815 (1989) (McHugh, J.)

See SELF-INCRIMINATION *Miranda* warnings, Traffic accident, (p. 572) for discussion of topic.

Test for when occurs

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Validity of

Test for

State v. Hefner, 376 S.E.2d 647 (1988) (McGraw, J.)

See SEARCH AND SEIZURE Warrantless search, Burden of state to show exception, (p. 566) for discussion of topic.

ARREST

Warrantless

Misdemeanor arrest

Simon v. W.Va. Dep't of Motor Vehicles, 832 S.E.2d 320 (1989) (Neely, J.)

Appellee was arrested for driving while under the influence of alcohol. His license was revoked and he appealed. Upon losing at the administrative hearing, he successfully appealed to circuit court. The Department took an appeal from that ruling reinstating appellee's license. The sole issue was whether the police officer had probable cause to arrest appellee.

Syl. pt. - Probable cause to make a misdemeanor arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that a misdemeanor is being committed in his presence.

Here, the police officer observed appellee's vehicle continue through an intersection from a lane marked for left turns only. He followed appellee and observed appellee's vehicle run off the road two or three times within a half-mile. Upon stopping the car, the officer detected the strong odor of alcohol and noted that appellee could barely walk. Appellee was unable to maintain his balance or touch his nose with either index finger.

Appellee testified that the police officer was too close to his car so he tried to allow the officer to pass, that he staggered because his leg was injured and that the smell of alcohol was a result of his recent beers.

The circuit court ruled that the testimony was in conflict and that the officer did not have probable cause to stop appellee.

The Court held the facts sufficient to warrant the stop. Reversed and remanded.

Probable cause for

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

ARSON

Dwelling place defined

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See ARSON First-degree, Sufficiency of indictment, (p. 55) for discussion of topic.

First-degree

Sufficiency of indictment

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

Appellants were convicted of first-degree arson. On appeal they claimed that the indictment was insufficient to support a conviction of first-degree arson because it omitted reference to a dwelling house. See *W.Va.Code* 61-3-1. Appellants claim the indictment describes second-degree arson. See *W.Va. Code* 61-3-2.

Syl. pt. 1 - "An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based." Syl. pt. 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

Syl. pt. 2 - An indictment for a charge of first-degree arson is sufficient to sustain a conviction if, in charging the offense, it makes reference to *W.Va.Code*, 61-3-1, as amended, and fully informs the defendant of the particular offense with which the defendant is charged.

Syl. pt. 3 - A building which contains an apartment, intended for habitation, whether occupied, unoccupied or vacant, is a "dwelling house" for purposes of *W.Va.Code*, 61-3-1, as amended.

The Court noted that the evidence adduced at trial proved that the burned building was a dwelling (an apartment house).

ARSON

Sufficiency of evidence

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Arson, (p. 625) for discussion of topic.

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See SUFFICIENCY OF EVIDENCE Arson, (p. 625) for discussion of topic.

ASSAULT

Evidence

Reputation of victim

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

See EVIDENCE Character of victim, (p. 215) for discussion of topic.

ATTEMPTED MURDER

Generally

(See Generally, HOMICIDE Attempted murder, (p. 297))

ATTORNEYS

Annulment

Committee on Legal Ethics v. Boettner, 394 S.E.2d 735 (1990) (Miller, J.)

See ATTORNEYS Professional responsibility, Mitigation hearing, (p. 80) for discussion of topic.

Committee on Legal Ethics v. Anderson, No. 18804 (2/17/89) (Per Curiam)

See ATTORNEYS Professional responsibility, Obstruction of justice, (p. 82) for discussion of topic.

Committee on Legal Ethics v. Six, 380 S.E.2d 219 (1989) (Miller, J.)

See ATTORNEYS Professional responsibility, Annulment, (p. 78) for discussion of topic.

Appeal

Failure to pursue

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See ATTORNEYS Appointment of, Duty to appeal unless relieved, (p. 61) for discussion of topic.

Appointment of

Rehmann v. Maynard, 376 S.E.2d 169 (1988) (Miller, J.)

Petitioner brought a writ of prohibition to prevent her appointment to represent indigent defendants. Petitioner is an attorney employed by a federally funded legal services program.

Appointment of (continued)

Rehmann v. Maynard, (continued)

Petitioner and respondent differed regarding whether federal law prohibits petitioner from accepting criminal appointments. Respondent, citing 45 C.F.R. 1613.4, contended that federal law was not a bar so long as the appointment process applied to all attorneys practicing in the circuit. Petitioner cited 42 U.S.C. 2996f(b)(2), which prohibits federal money from being used to provide criminal counsel (except in Indian matters).

Syl. pt. - A circuit judge is prohibited by 42 U.S.C.S. § 2996f(b)(2) (1974) and 45 C.F.R. § 1613.4 (1978) from appointing an attorney employed by a local legal services program that receives funds from the federal Legal Services Corporation to represent criminal defendant, where the local legal services program has made a formal policy determination that such criminal representation is inconsistent with its primary responsibility to provide legal assistance to eligible clients in civil matters.

The Court noted that the local service provider may allow for representation if it determines that representation is consistent with its primary responsibility.

State ex rel. Facemire v. Sommerville, No. 19047 (6/7/89) (Neely, J.)

Petitioner, Prosecuting Attorney of Clay County, brought this mandamus action to compel Judges Sommerville and Cline to appoint counsel for indigent criminal defendants and others eligible for state paid counsel. Judge Cline had previously found the system of appointments to be violative of both equal protection and due process rights. Following the ruling of *Jewell v. Maynard*, 181 W.Va. 536, 383 S.E.2d 536 (1989) (see elsewhere, this Digest), reheard and reissued July 21, 1989, Judge Cline refused to reconsider and further held that relief could not be postponed until July 1, 1990.

The Court reviewed its holding in *Jewell* and ordered the judges to begin making appointments.

Appointment of (continued)

Duty to appeal unless relieved

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

Appellant was convicted of first-degree murder. He waited one and one half years to get a transcript, two and one half years for his trial counsel to fail to appeal, three years for his replacement counsel to fail to appeal and finally got a third attorney who filed this writ of *habeas corpus*. He asked for unconditional discharge based on extraordinary dereliction in failing to provide an appeal.

Syl. pt. 4 - Once a criminal defendant's appeal has been heard and found lacking in merit, notwithstanding possible due process violations arising from delays in transcribing the trial transcript or counsel's dilatory actions in perfecting the appeal, the defendant is not entitled to an unconditional release.

Syl. pt. 5 - Appointed trial counsel for an indigent criminal defendant who is convicted is required to continue representation of the defendant through the appeal process unless an order is entered relieving him of such obligation. When such appointed counsel is relieved of post-trial representation of the defendant, the court shall immediately appoint new counsel to represent the defendant on appeal unless the defendant chooses to retain other counsel, or affirmatively waives his right to appeal in open court on the record after consultation with competent counsel. The clerk of the circuit court which enters an order appointing counsel shall serve a certified copy of such order on the defendant and on new counsel.

The Court held this appeal to be without merit. Writ denied. See *United States v. Johnson*, 732 F.2d 379 (4th Cir. 1984), *cert. denied*, 469 U.S. 1033 (1984).

The Court found the two attorneys who failed to appeal to be in "profound dereliction of their duties as court-appointed attorneys."

Appointment of (continued)

One day prior to trial

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

Appellant was convicted of receiving and transferring stolen property; and of recidivism. On appeal he challenged his 1965 grand larceny conviction on the grounds of ineffective assistance of counsel because the appointment of counsel and the entry of his guilty plea occurred on the same day.

Syl. pt. 2 - "An interval of one day or less between the appointment of counsel and trial or the entry of a guilty plea raises a rebuttable presumption that the defendant was denied effective assistance of counsel and shifts the burden of persuasion to the state." Syllabus point 1, *Housden v. Leverette*, 161 W.Va. 324, 241 S.E.2d 810 (1978).

The Court found no evidence to rebut the presumption of ineffective assistance. The 1965 conviction cannot be used to support the recidivist charge.

Right to refuse

Cunningham v. Sommerville, et al., 388 S.E.2d 301 (1989) (McHugh, J.)

Petitioner is an in-house counsel for a corporation, prohibited from outside practice of law as a condition of her employment. Her work week is a minimum of thirty-nine hours, with occasional work weeks of up to seventy-five hours. She has no private secretary, utilizing the services of another employee of the corporation; likewise, all materials, office space and equipment and files are the property of the corporation. Petitioner does not carry legal malpractice insurance, except for matters directly related to her employment.

Upon petitioner's appointment to represent forty-three indigent defendants, she requested that the circuit court relieve her of the appointments. Citing *State ex rel. Facemire v. Sommerville*, No. 19047 (6/7/89), the circuit court refused.

Appointment of (continued)

Right to refuse (continued)

Cunningham v. Sommerville, et al., (continued)

The Court noted that *Facemire* did not require that every attorney licensed to practice be subject to appointment. *W.Va.Code* 29-21-9 must be followed, resulting in appointments from within the circuit first, then appointments from outside the circuit.

Syl. pt. - House counsel employed on a full-time basis by a business corporation which forbids such counsel from engaging in the separate practice of law may, under Rule 6.2(b) of the *West Virginia Rules of Professional Conduct* (1989), avoid an appointment by a tribunal to represent an indigent in a criminal or other eligible proceeding, on the ground that the representation "is likely to result in an unreasonable financial burden" on the lawyer.

Assuming that petitioner was engaged in the "active practice of law" so as to be eligible for appointment, the Court noted that petitioner would likely lose her job if required to represent the indigents here. This risk is an "unreasonable financial burden." As to competence to practice criminal law, the Court made a clear distinction between the analysis made to determine effectiveness of counsel and the analysis necessary for appointment. The standard for appointment is clearly lower.

Swisher v. Summerfield, No. 18739 (3/28/89) (McHugh, J.)

See INDIGENTS Appointed counsel, (p. 326) for discussion of topic.

Argument at trial

Standard for review

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

See APPEAL Standard for review, Argument for counsel, (p. 43) for discussion of topic.

ATTORNEYS

Conflict of interest

Prosecuting attorneys

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

See PROSECUTING ATTORNEY Duties, Generally, (p. 521) for discussion of topic.

Contempt of court

State ex rel. Ferrell v. Adkins, 394 S.E.2d 909 (1990) (Per Curiam)

Petitioner attorney represented Roger Ferrell in an appeal from magistrate court regarding conviction of DUI. Larry Farley testified that he, rather than the defendant, was operating the vehicle at the time of the offense. In the presence of the jury, the trial court directed the sheriff to arrest Farley for obstructing an officer. Mr. Ferrell was found guilty and sentenced to 40 hours in jail and a fine of $500.00.

Petitioner requested a post-conviction bond pending appeal. This motion was denied and petitioner was found in contempt of court and fined $200.00, and ordered to remain in jail pending payment of the fine. Petitioner filed this writ of *habeas corpus*.

Syl. pt. - "The rule with regard to contempt by an attorney begins with a recognition that under our adversary system of justice zealous advocacy on the part of an attorney must be permitted. Consequently, it is only when his conduct is boisterous or disrespectful to the degree that it constitutes an imminent threat to the administration of justice that summary punishment for contempt will be authorized." Syl. pt. 2, *State v. Boyd*, 166 W.Va. 690, 276 S.E.2d 829 (1981).

After requesting that bond be set, petitioner told the court that he had advised his client that the client could serve a sentence rather than accept probation. This advice apparently precipitated the finding of contempt. Writ granted.

ATTORNEYS

Continuing legal education

West Virginia MCLE Commission v. Barr, No. 18838 (7/12/89) (Per Curiam)

The Mandatory Continuing Education Commission brought a petition to suspend the licenses of several attorneys for failure to complete the required continuing legal education during the fiscal year 1987-88. None of the named parties responded to the rule to show cause so the Court ordered them suspended until they prove compliance with the requirements.

Defined

State v. Shugars, 376 S.E.2d 174 (1988) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Arrest, Procedural exceptions, (p. 163) for discussion of topic.

Disbarment

Committee on Legal Ethics v. Anderson, No. 18804 (2/17/89) (Per Curiam)

See ATTORNEYS Professional responsibility, Obstruction of justice, (p. 82) for discussion of topic.

Committee on Legal Ethics v. Esposito, No. 18181 (7/1/88) (Per Curiam)

See ATTORNEYS Professional responsibility, Moral turpitude, (p. 81) for discussion of topic.

Committee on Legal Ethics v. Six, 380 S.E.2d 219 (1989) (Miller, J.)

See ATTORNEYS Professional responsibility, Annulment, (p. 78) for discussion of topic.

ATTORNEYS

Disbarment (continued)

Burden of proof

Committee on Legal Ethics v. Lewis, 371 S.E.2d 92 (1988) (Per Curiam)

Respondent pled guilty to embezzlement by trustee and one count of possession of a controlled substance in the state of Oklahoma. He also resigned from the practice of law in Oklahoma.

The West Virginia State Bar then filed certified copies of the Oklahoma court orders and asked that respondent's West Virginia license be annulled for engaging in illegal conduct in violation of DR-1-102(A)(3) of the Code of Professional Responsibility.

Since respondent made no response to the Committee's charges, the Court held that the Committee had met its burden of proof and annulled respondent's license.

Disciplinary standards

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

See ATTORNEYS Discipline, Public official, (p. 71) for discussion of topic.

Discipline

Generally

Committee on Legal Ethics v. Esposito, No. 18181 (7/1/88) (Per Curiam)

See ATTORNEYS Professional responsibility, Moral turpitude, (p. 81) for discussion of topic.

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

See ATTORNEYS Discipline, Public official, (p. 71) for discussion of topic.

Discipline (continued)

Generally (continued)

Committee on Legal Ethics v. Six, 380 S.E.2d 219 (1989) (Miller, J.)

See ATTORNEYS Professional responsibility, Annulment, (p. 78) for discussion of topic.

In the Matter of Bivens, 376 S.E.2d 161 (1988) (Per Curiam)

See JUDGES Discipline, Suspension pending disposition, (p. 383) for discussion of topic.

Annulment

Committee on Legal Ethics v. Anderson, No. 18804 (2/17/89) (Per Curiam)

See ATTORNEYS Professional responsibility, Obstruction of justice, (p. 82) for discussion of topic.

Contempt of court

State ex rel. Ferrell v. Adkins, 394 S.E.2d 909 (1990) (Per Curiam)

See ATTORNEYS Contempt of court, (p. 64) for discussion of topic.

Conviction of crime

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

Respondent pled guilty to six counts of a federal misdemeanor offense for possession of cocaine. The Committee on Legal Ethics found respondent guilty of professional misconduct in violation of DR 1-102(A)(4), (5) and (6) and recommended a three-year suspension of respondent's license to practice law.

Discipline (continued)

Conviction of crime (continued)

Committee on Legal Ethics v. Roark, (continued)

Respondent argued that possession of cocaine is not an offense involving moral turpitude and therefore a three-year suspension is not warranted.

Syl. pt. 1 - An attorney convicted of a crime that does not involve moral turpitude can nevertheless be suspended from the practice of law.

Committee on Legal Ethics v. Higginbotham, 342 S.E.2d 152 (1986)

The Court noted that the Committee's case did not rest on the moral turpitude issue, nor was the recommended punishment an annulment. See Section 23, Part E, Article VI, By-Laws of the West Virginia State Bar; see also, *In re Smith*, 158 W.Va. 13, 206 S.E.2d 920 (1974).

Fee disputes

Committee on Legal Ethics v. Gallaher, 376 S.E.2d 346 (1988) (Miller, J.)

Respondent attorney collected a fee from the settlement of an insurance claim involving an automobile accident. His client was not well educated, lacked prior experience with attorneys and could not read or write. She was injured when a car driven by her son slid on icy roads and struck another vehicle.

The insurance company was slow in paying the claim and made a settlement offer of $726.25. The client's medical bills alone totaled $2300.00. Respondent advised suit against the insurance company and against the client's son. The client refused to sue her son.

Respondent did not file suit but made a settlement demand of $8,500.00. The insurance company countered with an offer of $4,500.00 and respondent accepted immediately, without consulting his client. The client accepted the offer but believed that respondent told her that the offer was in addition to payment for future medical bills. This mistaken belief made the settlement look more attractive than it was. Respondent demanded fifty percent of the settlement as his fee ($2,250.00).

Discipline (continued)

Fee disputes (continued)

Committee on Legal Ethics v. Gallaher, (continued)

Syl. pt. 1 - "If an attorney's fee is grossly disproportionate to the services rendered and is charged to a client who lacks full information about all of the relevant circumstances, the fee is 'clearly excessive' within the meaning of Disciplinary Rule 2-106(A), even though the client has consented to such fee. The burden of proof is upon the attorney to show the reasonableness and fairness of the contract for the attorney's fee." Syllabus Point 2, *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986).

Syl. pt. 2 - "In the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is a 'clearly excessive fee' within the meaning of Disciplinary Rule 2-106(A)." Syllabus Point 3, *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986).

Syl. pt. 3 - This Court has the authority, in a disciplinary case, to order an attorney to make restitution of a fee that is clearly excessive in violation of DR 2-106.

The Court found this fee to be grossly disproportionate to the risk involved in the case, the time and effort expended and the clear decision of the client not to sue her son. The Court particularly noted that the settlement minus the fee did not even recompense the client for her out-of-pocket medical expenses.

Fees for pneumoconiosis claims

Committee on Legal Ethics v. Triplett, 378 S.E.2d 82 (1988) (Per Curiam)

This case was on remand following the United States Supreme Court's decision in *United States Dep't of Labor v. Triplett*, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990), reversing this Court's decision in *Committee on Legal Ethics v. Triplett*, 180 W.Va. 533, 378 S.E.2d 82 (1988).

Discipline (continued)

Fees for pneumoconiosis claims (continued)

Committee on Legal Ethics v. Triplett, (continued)

This Court's original ruling declared the attorney fees provision of the black lung claims act unconstitutional in that a claimant is deprived of due process because of lack of representation. Therefore an attorney who violates those provisions is not guilty of unethical conduct. The U.S. Supreme Court held that those provisions do not deprive a claimant of his right to legal representation.

Respondent agreed to stipulate that he knowingly violated the black lung regulations (20 C.F.R. Sec. 725.365) in contravention of DR 1-102(A) 4), (5) and (6) of the Code of Professional Responsibility. A public reprimand was agreed upon and the Committee would accept $100.00 as payment in full of the costs imposed on Mr. Triplett by the U.S. Supreme Court. No agreement was reached as to reimbursement of the Committee's own costs of $449.27.

Noting that it was not bound by the stipulation, Syl Pt. 2, *Committee on Legal Ethics v. Douglas*, 179 W.Va. 490, 370 S.E.2d 325 (1988), the Court nonetheless accepted the agreement and also ordered respondent to pay the Committee's costs. *Committee on Legal Ethics v. White*, 176 W.Va. 753, 349 S.E.2d 919 (1986); *Committee on Legal Ethics v. Pence*, 161 W.Va. 240, 240 S.E.2d 668 (1977).

Frivolous litigation

Committee on Legal Ethics v. Douglas, No. 19008 (7/14/89) (Per Curiam)

Following a remand to the Committee on Legal Ethics (see *Committee on Legal Ethics v. Douglas*, 179 W.Va. 490, 370 S.E.2d 325 (1988), this Digest) the Committee chose to review respondent's suit to recover a "stud fee."

The Committee found that the purpose of the suit was to "harass or injure another," in violation of DR 7-102(A)(1) and (2). The Committee recommended suspension for six months.

Discipline (continued)

Frivolous litigation (continued)

Committee on Legal Ethics v. Douglas, (continued)

The Court agreed. "'Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Legal Ethics Committee . . . are to be given substantial consideration.' Syllabus Point 3, in part, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980)." Syl. pt. 2, *Committee on Legal Ethics v. White*, 176 W.Va. 753, 349 S.E.2d 919 (1986). The Court noted that respondent offered no defense to substantive matters, or facts in mitigation (see *Committee on Legal Ethics v. Lilly*, 174 W.Va. 680, 328 S.E.2d 695 (1985).

Suspension for six months ordered.

Public official

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

Respondent, a former mayor of the City of Charleston, pled guilty to six counts of the federal misdemeanor of possession of cocaine. The Committee on Legal Ethics found him guilty of violating DR 1-102(a)(4), (5) and (6) and recommended that his license to practice be suspended for three years.

Respondent claimed that his conduct should be judged by DR 8-101, relating to acts by a public official. Further, he claimed that he had not violated DR 8-101 and should therefore not be suspended.

Syl. pt. 2 - Disciplinary Rule 8-101 of Code of Professional Responsibility, relating to a lawyer's conduct as a public official, does not supplant the general prohibition against misconduct contained in Disciplinary Rule 1-102.

Syl. pt. 3 - Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office.

Discipline (continued)

Public official (continued)

Committee on Legal Ethics v. Roark, (continued)

Syl. pt. 4 - "'In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances (in each case), including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action.' Syl. pt. 2, *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976)." Syllabus Point 2, *Committee on Legal Ethics v. Higginbotham*, 176 W.Va. 186, 342 S.E.2d 152 (1986).

Syl. pt. 5 - "In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).

The Court declined to follow respondent's suggestion that explicit inclusions were designed to omit other matters in the Disciplinary Rules. The doctrine of *expressio unius* is clearly limited to situations where there is a contrast between what is expressed and what is impliedly omitted. DR 8-101 merely adds a special set of duties for lawyers holding public office; it does not relieve the lawyer from the other obligations elsewhere expressed.

The Court rejected respondent's plea for mitigation of suspension based on having already served in prison and paid a fine.

Reprimand

Committee on Legal Ethics v. Triplett, 378 S.E.2d 82 (1988) (Per Curiam)

See ATTORNEYS Discipline, Fees for pneumoconiosis claims, (p. 69) for discussion of topic.

ATTORNEYS

Discipline (continued)

Suspension

Committee on Legal Ethics v. Wright, No. 18912 (3/27/89) (Per Curiam)

See ATTORNEYS Professional responsibility, Neglect, (p. 82) for discussion of topic.

West Virginia MCLE Commission v. Barr, No. 18838 (7/12/89) (Per Curiam)

See ATTORNEYS Continuing legal education, (p. 65) for discussion of topic.

Driving under the influence

Special procedures

State v. Shugars, 376 S.E.2d 174 (1988) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Arrest, Procedural exceptions, (p. 163) for discussion of topic.

Embezzlement

Committee on Legal Ethics v. Six, 380 S.E.2d 219 (1989) (Miller, J.)

See ATTORNEYS Professional responsibility, Annulment, (p. 78) for discussion of topic.

Ethics

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

See ATTORNEYS Discipline, Conviction of crime, (p. 67) for discussion of topic.

ATTORNEYS

False tax return

Committee on Legal Ethics v. Anderson, No. 18804 (2/17/89) (Per Curiam)

See ATTORNEYS Professional responsibility, Obstruction of justice, (p. 82) for discussion of topic.

Fees

Disproportionate

Committee on Legal Ethics v. Gallaher, 376 S.E.2d 346 (1988) (Miller, J.)

See ATTORNEYS Discipline, Fee disputes, (p. 68) for discussion of topic.

Indigents

Jewell v. Maynard, 383 S.E.2d 536 (1989) (Neely, J.)

See INDIGENTS Appointed counsel, Payment of, (p. 327) for discussion of topic.

Indigents

Generally

Jewell v. Maynard, 383 S.E.2d 536 (1989) (Neely, J.)

See INDIGENTS Appointed counsel, Payment of, (p. 327) for discussion of topic.

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See ATTORNEYS Appointment of, Duty to appeal unless relieved, (p. 61) for discussion of topic.

ATTORNEYS

Ineffective assistance

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See INEFFECTIVE ASSISTANCE OF COUNSEL Standard of proof, (p. 346) for discussion of topic.

Generally

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See INEFFECTIVE ASSISTANCE Generally, (p. 333) for discussion of topic.

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 341) for discussion of topic.

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 344) for discussion of topic.

State ex rel. Wilson v. Hedrick, 379 S.E.2d 493 (1989) (Per Curiam)

See INEFFECTIVE ASSISTANCE Burden of Proof, (p. 334) for discussion of topic.

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 342) for discussion of topic.

ATTORNEYS

Ineffective assistance (continued)

Generally (continued)

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 345) for discussion of topic.

State v. Glover, 396 S.E.2d 198 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Burden of proof, (p. 334) for discussion of topic.

Conflict of interest

Cole v. White, 376 S.E.2d 599 (1988) (Miller, J.)

See INEFFECTIVE ASSISTANCE Conflict of interest, (p. 336) for discussion of topic.

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

Habeas corpus

Cole v. White, 376 S.E.2d 599 (1988) (Miller, J.)

See *HABEAS CORPUS* Ineffective assistance, Conflict of interest, (p. 284) for discussion of topic.

ATTORNEYS

Ineffective assistance (continued)

Presumption of effectiveness

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 343) for discussion of topic.

Standard of proof

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 343) for discussion of topic.

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 343) for discussion of topic.

Moral turpitude

Committee on Legal Ethics v. Six, 380 S.E.2d 219 (1989) (Miller, J.)

See ATTORNEYS Professional responsibility, Annulment, (p. 78) for discussion of topic.

ATTORNEYS

Professional responsibility

Committee on Legal Ethics v. Douglas, No. 19008 (7/14/89) (Per Curiam)

See ATTORNEYS Discipline, Frivolous litigation, (p. 70) for discussion of topic.

Annulment

Committee on Legal Ethics v. Six, 380 S.E.2d 219 (1989) (Miller, J.)

Respondent pled guilty in circuit court to one count of felony embezzlement and one count of breaking and entering. The Committee on Legal Ethics charged him with violating DR 1-102 (A)(3), (4) and (6) and moved to disbar. Respondent answered that he was disbarred due to nonpayment of Bar dues and therefore the issue of disbarment was moot. The Court summarily rejected the mootness argument, noting that nonpayment involves a suspension and automatic reinstatement.

Syl. pt. 1 - "'In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint.' Syl. Pt. 1, *Committee on Legal Ethics v. Pence*, W.Va., 216 S.E.2d 236 (1975)." Syllabus Point 1, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).

Syl. pt. 2 - Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction.

Syl. pt. 3 - "'Section 23, Part E, Article VI of the By-Laws of the West Virginia State Bar imposes upon any Court before which an attorney has been qualified a mandatory duty to annul the license of such attorney to practice law upon proof that he has been convicted of any crime involving moral turpitude.' Point 2, syllabus, *In the Matter of Mann*, 151 W.Va. 644, 154 S.E.2d 860 (1967)." Syllabus, *In re Smith*, 158 W.Va. 13, 206 S.E.2d 920 (1974).

Syl. pt. 4 - Embezzlement is generally held to be among those offenses which involve moral turpitude as a matter of law.

ATTORNEYS

Professional responsibility (continued)

Annulment (continued)

Committee on Legal Ethics v. Six, (continued)

The Court ordered respondent to reimburse the Bar for its expenses and annulled respondent's license. (See text of opinion for citation of cases involving moral turpitude.)

Burden of proof

Committee on Legal Ethics v. Six, 380 S.E.2d 219 (1989) (Miller, J.)

See ATTORNEYS Professional responsibility, Annulment, (p. 78) for discussion of topic.

Conviction of crime

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

See ATTORNEYS Discipline, Conviction of crime, (p. 67) for discussion of topic.

Disciplinary standards

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

See ATTORNEYS Discipline, Public official, (p. 71) for discussion of topic.

Fees

Committee on Legal Ethics v. Gallaher, 376 S.E.2d 346 (1988) (Miller, J.)

See ATTORNEYS Discipline, Fee disputes, (p. 68) for discussion of topic.

Professional responsibility (continued)

Fees for pneumoconiosis claims

Committee on Legal Ethics v. Triplett, 378 S.E.2d 82 (1988) (Per Curiam)

See ATTORNEYS Discipline, Fees for pneumoconiosis claims, (p. 69) for discussion of topic.

Misrepresentation

Committee on Legal Ethics v. Wright, No. 18912 (3/27/89) (Per Curiam)

See ATTORNEYS Professional responsibility, Neglect, (p. 82) for discussion of topic.

Mitigation hearing

Committee on Legal Ethics v. Boettner, 394 S.E.2d 735 (1990) (Miller, J.)

Respondent was convicted of violating 26 U.S.C. 7201, a felony, for evasion of income taxes. The Committee on Legal Ethics asked that his license to practice be annulled for violation of Rule DR-8.4 of the Rules of Professional Conduct and pursuant to Article VI, Section 23 of the By- Laws of the State Bar, which calls for annulment upon proof of conviction of crime involving moral turpitude.

Respondent offered to do community service with the West Virginia Legal Services Plan, without remuneration, if he were allowed to retain his license. In the alternative, respondent requested a hearing for mitigation of discipline.

Syl. pt. 1 - "Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics burden of proving an ethical violation arising from such conviction." Syllabus Point 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Professional responsibility (continued)

Mitigation hearing (continued)

Committee on Legal Ethics v. Boettner, (continued)

Syl. pt. 2 - A license to practice law is a valuable right, such that its withdrawal must be accompanied by appropriate due process procedures. Where annulment of an attorney's license is sought based on a felony conviction under Article VI, Section 23 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar, due process requires the attorney be given the right to request an evidentiary hearing. The purpose of such a hearing is not to attack the conviction collaterally, but to introduce mitigating factors which may bear on the disciplinary punishment to be imposed.

Syl. pt. 3 - The right to an evidentiary mitigation hearing is not automatic. In order to obtain such a hearing, the attorney must make a request therefor after the Committee on Legal Ethics files its petition with this Court under Article VI, Section 25 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar.

The Court ordered that respondent's license be suspended pending the mitigation hearing. Respondent's right to an additional hearing was based on "procedural due process."

Moral turpitude

Committee on Legal Ethics v. Esposito, No. 18181 (7/1/88) (Per Curiam)

Respondent pled guilty to perjury in Federal court. The Court noted that crimes involving fraud or attempted fraud are "consistently and uncontrovertedly recognized as involving moral turpitude." (Quoting *In re West*, 155 W.Va. 648, 650, 186 S.E.2d 776, 777 (1972).

Here, respondent knowingly provided false information relevant to a court proceeding. Respondent's license was annulled.

Professional responsibility (continued)

Neglect

Committee on Legal Ethics v. Wright, No. 18912 (3/27/89) (Per Curiam)

Respondent Wright was accused of neglect in violation of Disciplinary Rule 1-102(A)(4). The Committee on Legal Ethics alleged that in December, 1982 Mr. Wright was retained to pursue an action for a construction site injury. It was agreed that respondent would seek workers' compensation, Social Security disability and also file a civil action against the complainant's employer.

Mr. Wright failed to file an action until after the statute of limitations had run. The suit was dismissed. He then failed to inform his client of the dismissal and even deceived him into believing that the action was pending.

Noting that the burden is on the Committee on Legal Ethics to prove the charges, *Committee on Legal Ethics v. Daniel*, 160 W.Va. 388, 235 S.E.2d 369 (1977), the Court held that the Committee had met its burden. The Court ordered the respondent's license suspended for six months, as the Committee recommended. See *Committee on Legal Ethics v. Lilly*, 174 W.Va. 680, 328 S.E.2d 695 (1985). The Court also ordered the respondent to reimburse the Bar for expenses incurred. *Committee on Legal Ethics v. White*, 176 W.Va. 753, 349 S.E.2d 919 (1986).

Obstruction of justice

Committee on Legal Ethics v. Anderson, No. 18804 (2/17/89) (Per Curiam)

Respondent pled guilty in United States District Court to obstruction of justice and subscribing to a false tax return. As a result, the Committee on Legal Ethics charged respondent with violating DR 1-102(A) of the Code of Professional Responsibility, engaging in conduct involving moral turpitude, dishonesty, fraud, deceit, or misrepresentation; and engaging in conduct adversely reflecting on his fitness to practice law.

The Court held that respondent's conduct clearly involved moral turpitude. *In re Smith*, 158 W.Va. 13, 206 S.E.2d 920 (1974); *In re West*, 155 W.Va. 648, 186 S.E.2d 776 (1972); *In the Matter of Mann*, 151 W.Va. 644, 154 S.E.2d 860 (1967).

ATTORNEYS

Professional responsibility (continued)

Obstruction of justice (continued)

Committee on Legal Ethics v. Anderson, (continued)

The Court also held that the Committee had met its burden of proof by submitting a certified copy of the order or judgment of conviction. *In re Trent*, 154 W.Va. 333, 175 S.E.2d 461 (1970). Respondent's license was annulled.

Public official

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

See ATTORNEYS Discipline, Public official, (p. 71) for discussion of topic.

Reprimand

Committee on Legal Ethics v. Triplett, 378 S.E.2d 82 (1988) (Per Curiam)

See ATTORNEYS Discipline, Fees for pneumoconiosis claims, (p. 69) for discussion of topic.

Prosecuting

Generally

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 515) for discussion of topic.

Prosecuting (continued)

Appeal by

State v. Adkins, 388 S.E.2d 316 (1989); ***State v. Goodwill Motors, Inc.,***; ***State v. Damron***,; ***State v. Kapourales***,; ***State v. Simpkins***,; ***State v. Sizemore***,; ***State v. Van Meter***,; and ***State v. Ward***, (Brotherton, C.J.)

See PROSECUTING ATTORNEY Appeal by, (p. 512) for discussion of topic.

Appointment of special prosecutor

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

Conflict in prior representation of co-defendant

State v. Catlett, 376 S.E.2d 834 (1988) (Neely, J.)

See PROSECUTING ATTORNEY Conflict in representation, Prior representation of co-defendant, (p. 517) for discussion of topic.

Discretion in charging

State v. Satterfield, 387 S.E.2d 832 (1989) (Neely, J.)

See PROSECUTING ATTORNEY Discretion, Charging accused, (p. 518) for discussion of topic.

Disqualifications

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

ATTORNEYS

Prosecuting (continued)

Duties

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 515) for discussion of topic.

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

See PROSECUTING ATTORNEY Duties, Generally, (p. 521) for discussion of topic.

General duties

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See PROSECUTING ATTORNEY Duties, Generally, (p. 520) for discussion of topic.

Misstating evidence

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See PROSECUTING ATTORNEY Duties, Generally, (p. 520) for discussion of topic.

Withholding evidence

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See DUE PROCESS Prosecuting attorney withholding evidence, (p. 172) for discussion of topic.

ATTORNEYS

Reprimands

Committee on Legal Ethics v. Gallaher, 376 S.E.2d 346 (1988) (Miller, J.)

See ATTORNEYS Discipline, Fee disputes, (p. 68) for discussion of topic.

Committee on Legal Ethics v. Triplett, 378 S.E.2d 82 (1988) (Per Curiam)

See ATTORNEYS Discipline, Fees for pneumoconiosis claims, (p. 69) for discussion of topic.

Suspension

Committee on Legal Ethics v. Boettner, 394 S.E.2d 735 (1990) (Miller, J.)

See ATTORNEYS Professional responsibility, Mitigation hearing, (p. 80) for discussion of topic.

Committee on Legal Ethics v. Douglas, No. 19008 (7/14/89) (Per Curiam)

See ATTORNEYS Discipline, Frivolous litigation, (p. 70) for discussion of topic.

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

See ATTORNEYS Discipline, Public official, (p. 71) for discussion of topic.

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

See ATTORNEYS Discipline, Conviction of crime, (p. 67) for discussion of topic.

West Virginia MCLE Commission v. Barr, No. 18838 (7/12/89) (Per Curiam)

See ATTORNEYS Continuing legal education, (p. 65) for discussion of topic.

Suspension (continued)

Committee on Legal Ethics v. Wright, No. 18912 (3/27/89) (Per Curiam)

See ATTORNEYS Professional responsibility, Neglect, (p. 82) for discussion of topic.

Waiver of right to

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

See RIGHT TO COUNSEL Administrative hearings, Revoked or suspended license, (p. 544) for discussion of topic.

BAIL

Determination of

State ex rel. Keith v. Dodd, No. 18369 (5/19/88) (Per Curiam)

Relator was charged with conspiracy to possess cocaine with the intent to distribute and with delivery of cocaine. The arraigning magistrate set bail at $150,000. Following a bail reduction hearing, the circuit court reduced bail to $30,000 with certain restrictions, among them that he remain at his grandmother's premises except for medical emergency or prior permission. Relator attempted to obtain permission to have Thanksgiving dinner at another place. When he was unable to contact anyone he left his grandmother's premises without permission.

Relator was arrested on a capias and the circuit court raised the amount of bail to $200,000. Relator brought this *habeas corpus* action, claiming the amount was excessive.

The Court noted that right to bail is determined on a case by case basis (*State ex rel. Hutzler v. Dostert*, 160 W.Va. 412, 236 S.E.2d 336 (1977) and is based on whether the accused is likely to appear for trial and whether he is likely to commit other crimes while free. *State ex rel. Ghiz v. Johnson*, 155 W.Va. 186, 183 S.E.2d 703 (1971).

Here, the Court noted that relator's desire to attend dinner did not show an attempt to flee nor an inclination to commit other offenses. While agreeing that the violation of the terms of release was serious, the Court directed that the circuit court enter an order reducing bail to $50,000.

Municipal court

Requirement for

Robertson v. Goldman, 369 S.E.2d 888 (1988) (McGraw, J.)

See INDIGENTS Right to equal protection, (p. 331) for discussion of topic.

BAIL

Municipal court (continued)

Trial *de novo*

Robertson v. Goldman, 369 S.E.2d 888 (1988) (McGraw, J.)

See INDIGENTS Right to equal protection, (p. 331) for discussion of topic.

Release of

Robertson v. Goldman, 369 S.E.2d 888 (1988) (McGraw, J.)

See INDIGENTS Right to equal protection, (p. 331) for discussion of topic.

BREAKING AND ENTERING

Distinguished from larceny

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, (p. 155) for discussion of topic.

BURDEN OF PROOF

Generally

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See KIDNAPING Standard of proof, (p. 433) for discussion of topic.

Abduction with intent to defile

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See KIDNAPING Standard of proof, (p. 433) for discussion of topic.

Affirmative defenses

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

Appellant was convicted of first-degree murder and malicious wounding. He claimed on appeal that the prosecution's instructions to the jury unconstitutionally shifted the burden of proof. The instructions required appellant to present credible evidence regarding accidental killing or wounding.

Syl. pt. 5 - A defendant is required to present evidence on the affirmative defenses asserted as long as the State does not shift to the defendant the burden of disproving any element of the State's case.

The Court distinguished this case from *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir. 1982), *cert. denied* 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982) and *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983), by noting that those cases involved proof of an alibi defense, while here the defenses of accidental wounding or self-defense carried an affirmative burden to prove them. No error.

Competency to stand trial

State v. Jenkins, 379 S.E.2d 156 (1989) (Per Curiam)

See COMPETENCY To stand trial, Generally, (p. 108) for discussion of topic.

BURDEN OF PROOF

Disciplinary hearings

Committee on Legal Ethics v. Lewis, 371 S.E.2d 92 (1988) (Per Curiam)

See ATTORNEYS Disbarment, Burden of proof, (p. 66) for discussion of topic.

Ineffective assistance of counsel

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 342) for discussion of topic.

Appointment one day prior to trial

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See ATTORNEYS Appointment of, One day prior to trial, (p. 62) for discussion of topic.

Intent

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See KIDNAPING Standard of proof, (p. 433) for discussion of topic.

Plea bargain

Involuntariness

State ex rel. Wilson v. Hedrick, 379 S.E.2d 493 (1989) (Per Curiam)

See PLEA BARGAINING Voluntariness, Burden of proof, (p. 480) for discussion of topic.

BURDEN OF PROOF

Probation violations

State v. Bowman, 375 S.E.2d 829 (1988) (Per Curiam)

See PROBATION Revocation, Burden of proof, (p. 500) for discussion of topic.

Warrantless search

State v. Hefner, 376 S.E.2d 647 (1988) (McGraw, J.)

See SEARCH AND SEIZURE Warrantless search, Burden of state to show exception, (p. 566) for discussion of topic.

BURGLARY

Elements of nighttime

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

Appellant was convicted of grand larceny, burglary, aggravated robbery, first-degree arson and felony-murder. He contended that the jury was improperly allowed to consider the burglary as the underlying offense in the felony-murder charge. Appellant claimed that the victim voluntarily allowed him into his home and thus the charge of burglary was invalid, making the felony-murder conviction invalid.

Syl. pt. 1 - Under *W.Va.Code*, 61-3-11(a) (1973), the essential requirement of burglary committed in the nighttime is that the defendant "enter . . . with the intent to commit a felony or any larceny." The intent and the acts of the defendant are controlling, and the consent of the occupant to entry is not a defense when the defendant is shown to have entered through fraud or threat of force with the requisite criminal intent. The statutory requirement of entry is also fulfilled when a person with consent to enter exceeds the scope of the consent granted.

Here, the appellant clearly entered with the "intent to commit a felony." *W.Va.Code* 61-3-11(a). The statute does not require that the entry be by force or against the occupant's will. No error.

CERTIFIED QUESTION

Custody of abused infant

State of Florida ex rel. W.Va. DHS v. Thornton, No. CC969 (7/20/89) (Brotherton, C.J.)

See ABUSE AND NEGLECT Custody of infant, (p. 2) for discussion of topic.

CHILD ABUSE AND NEGLECT

Sexual abuse

Expert testimony

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Expert witnesses, Psychologist's testimony in child sexual abuse case, (p. 226) for discussion of topic.

CHILD CUSTODY

Duty of clerk to enter order

Evans & Vance v. Sheppard, et al., 387 S.E.2d 313 (1989) (Per Curiam)

See CHILD SUPPORT AND ALIMONY Circuit clerk, Duty to enter order, (p. 100) for discussion of topic.

Temporary custody

Imminent danger

In the Matter of Jonathan P., 387 S.E.2d 537 (1989) (Miller, J.)

See ABUSE AND NEGLECT Termination of parental rights, When appropriate, (p. 8) for discussion of topic.

Termination of parental rights

Honaker v. Burnside, 388 S.E.2d 322 (1989) (Workman, J.)

The Circuit Court gave custody of respondent's child to the child's stepfather. Subsequently, custody was given to petitioner, following a six-month transition period.

Petitioner is the child's natural father. Her mother was killed in an accident following divorce and remarriage; custody was granted to the stepfather as guardian pursuant to the mother's will.

Syl. pt. 1 - "A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syl. Pt. *Whiteman v. Robinson*, 145 W.Va. 685, 116 S.E.2d 691 (1960).

Syl. pt. 2 - Although custody of minor child should be with the natural parent absent proof of abandonment or some form of misconduct or neglect, the child may have a right to continued visitation rights with the stepparent or half-sibling.

Termination of parental rights (continued)

Honaker v. Burnside, (continued)

Noting that a strong presumption lies that the welfare of the child is best served when in the custody of the natural parent, the Court affirmed the granting of custody to petitioner. The Court added that the transition period should be so structured as to allow for the gradual replacement of the stepfather with the natural father; and that liberal visitation should be granted so as to ensure the close bond between the child and her half-brother and stepfather.

In the Matter of Jonathan P., 387 S.E.2d 537 (1989) (Miller, J.)

See ABUSE AND NEGLECT Termination of parental rights, When appropriate, (p. 8) for discussion of topic.

In the Matter of R.O. & R.O., 375 S.E.2d 823 (1988) (Neely, J.)

See ABUSE AND NEGLECT Termination of parental rights, Improvement period, (p. 5) for discussion of topic.

In re Carolyn Jean T. & Terry Jo T., 382 S.E.2d 577 (1989) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, (p. 4) for discussion of topic.

Due process

In re Carolyn Jean T. & Terry Jo T., 382 S.E.2d 577 (1989) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, (p. 4) for discussion of topic.

CHILD CUSTODY

Termination of parental rights (continued)

Improvement period

In the Matter of Jonathan P., 387 S.E.2d 537 (1989) (Miller, J.)

See ABUSE AND NEGLECT Termination of parental rights, When appropriate, (p. 8) for discussion of topic.

Visitation

Stepparent or half-sibling

Honaker v. Burnside, 388 S.E.2d 322 (1989) (Workman, J.)

See CHILD CUSTODY Termination of parental rights, (p. 97) for discussion of topic.

CHILD SUPPORT

Circuit clerk

Duty to enter order

Evans & Vance v. Sheppard, et al., 387 S.E.2d 313 (1989) (Per Curiam)

In this mandamus proceeding, relators charge that the Clerk and Deputy Clerk of the Circuit Court of Mingo County refused to enter properly authorized orders in domestic cases until court costs are paid. In both cases, the opposing parties were ordered to pay costs; their refusal to pay effectively prevented entry of the orders against them, and, consequently, the enforcement of those orders.

Syl. - "As a general rule, the clerk of a circuit court has a mandatory, nondiscretionary duty to record the appropriate civil order book in her office a final judgment order entered in a civil action and endorsed for entry by the signature of the judge of the court." Syllabus Point 1, *Humphrey v. Mauzy*, 155 W.Va. 89, 181 S.E.2d 329 (1971).

The Court noted that Rule 58 of the West Virginia Rules of Civil Procedure requires the Circuit Clerk to enter judgments. Rule 54(d) allows costs to be assessed against the losing party unless otherwise directed by the circuit court. Writ awarded; both orders to be entered.

Criminal contempt

Grounds for

State v. Lusk, 376 S.E.2d 351 (1988) (Miller, J.)

Appellant was convicted of criminal contempt for failure to make child support payments. He was sentenced to six months in jail, without the opportunity to purge the contempt. On appeal he claimed that he should have been given the chance to purge and that criminal contempt was inappropriate since he was unable to pay.

Syl. pt. 1 - The option contained in *W.Va.Code*, 48-2-22(b), for a court to convert a criminal contempt finding under *W.Va.Code*, 48-2-22(a), into a civil contempt is not mandatory.

CHILD SUPPORT

Criminal contempt (continued)

Grounds for (continued)

State v. Lusk, (continued)

Syl. pt. 2 - The legislature is enacting *W.Va.Code* 48-2-22, did not intend to depart from our traditional law in this area which forecloses jailing a defendant who is in arrears in either alimony or child support payments, unless his actions are deemed to be a willful or contumacious disobedience of the court order. A second requirement is that he have the financial ability to pay.

Syl. pt. 3 - The income and expenses of the defaulting spouse and the amount of payment required are key considerations in determining whether there is the ability to pay. Additional considerations are (1) whether the defaulting spouse is without income because of a deliberate design to divest one's self of the ability to pay, in which event these assets will be considered, and (2) whether the defaulting spouse has assumed voluntary obligations in order to reduce potential income.

Here, the Court noted that during the period of arrears, appellant was employed and had received employment security payments. Considering his income and expenses, along with the payment required here ($50.00 when unemployed and $75.00 or 15 % of his net income when employed), the Court concluded that the appellant had the resources to pay. In light of some evidence that appellant may have deliberately lost his job and increased his expenses, the case was properly allowed to go to the jury and the Court refused to disturb its finding.

Limitations on action

Res judicata

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

See PATERNITY *Res judicata*, (p. 465) for discussion of topic.

State ex rel. DHS v. Benjamin, 395 S.E.2d 220 (1990) (McHugh, J.)

See PATERNITY *Res judicata*, (p. 465) for discussion of topic.

Limitations on action (continued)

Statute of limitations

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

Appellant complained of the dismissal of a paternity action below. Appellant's child was born in November, 1973. She brought a paternity action in September, 1976 but agreed to dismiss the action; an order was entered in July, 1977. In May, 1985, she filed this action. Respondent defended on the basis of *res judicata* and the ten-year paternity statute of limitations (*W.Va.Code* 48-7-4(a).

Syl. pt. 3 - Under equal protection principles, a statute which discriminates based on sex or illegitimacy must be substantially related to an important government objective. This test is one of intermediate scrutiny which rests between the "rational basis" review and the "strict" scrutiny" test.

Syl. pt. 4 - The intermediate test in illegitimacy cases for equal protection purposes under the Fourteenth Amendment to the United States Constitution and Article VI, Section 39 of the West Virginia Constitution requires that the questioned legislation must be substantially related to an important governmental objective.

Syl. pt. 5 - The provision of *W.Va.Code*, 48-7-4(a) (1983), providing for a ten-year statute of limitations, violate the equal protection provisions of the Constitution of the United States and the Constitution of the State of West Virginia and are, therefore, unenforceable.

Suit allowed.

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

See PATERNITY *Res judicata*, (p. 465) for discussion of topic.

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

See EQUAL PROTECTION Sexual discrimination, Paternity actions, (p. 181) for discussion of topic.

CIRCUIT CLERK

Duty to enter order

Evans & Vance v. Sheppard, et al., 387 S.E.2d 313 (1989) (Per Curiam)

See CHILD SUPPORT AND ALIMONY Circuit clerk, Duty to enter order, (p. 100) for discussion of topic.

Duty to serve order appointing counsel

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See ATTORNEYS Appointment of, Duty to appeal unless relieved, (p. 61) for discussion of topic.

CIRCUMSTANTIAL EVIDENCE

Sufficiency of

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 627) for discussion of topic.

COLLATERAL CRIMES

Introduction at trial

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See EVIDENCE Collateral crimes, (p. 220) for discussion of topic.

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Collateral cases, (p. 218) for discussion of topic.

State v. Gilbert, 399 S.E.2d 851 (1990) (Per Curiam)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 604) for discussion of topic.

COLLATERAL ESTOPPEL

Generally

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

The appellant was convicted of first-degree murder for the killing of one of two half-brothers, both of whom were killed while asleep in a van. The indictment charged the appellant with both killings but the counts were tried separately following appellant's successful motion to sever; appellant was acquitted in the first trial but at the second trial his motion to dismiss for violation of double jeopardy was denied and he was convicted.

Appellant contended on appeal that the second trial violated principles of collateral estoppel found in the Fifth Amendment.

Syl. pt. 1 - The principle of collateral estoppel applies in a criminal case where an issue of ultimate fact has once been determined by a valid and final judgment. In such case, that issue may not again be litigated between the State and the defendant. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

Because the record of the first trial was not before the Court, the case was remanded for consideration by the circuit court whether the first trial involved a decision as to the ultimate issue. The Court rejected the State's contention that the successful motion to sever waived the issue of double jeopardy.

COMPETENCY

Criminal responsibility

State v. Parsons, 381 S.E.2d 246 (1989) (Per Curiam)

See INSANITY Test for, (p. 351) for discussion of topic.

Right to hearing

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See DUE PROCESS Right to hearing, Competency, (p. 173) for discussion of topic.

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See HARMLESS ERROR Constitutional, Generally, (p. 291) for discussion of topic.

To manage affairs

Harper v. Rogers, 387 S.E.2d 547 (1989) (Per Curiam)

See MENTAL HYGIENE Determination of, (p. 450) for discussion of topic.

To stand trial

Generally

State ex rel. Wilson v. Hedrick, 379 S.E.2d 493 (1989) (Per Curiam)

See PLEA BARGAINING Voluntariness, Burden of proof, (p. 480) for discussion of topic.

COMPETENCY

To stand trial (continued)

Generally (continued)

State v. Jenkins, 379 S.E.2d 156 (1989) (Per Curiam)

Appellant was found competent to stand trial for first-degree sexual assault and subsequently pled guilty to sexual abuse. Appellant is mildly to moderately retarded. One psychiatrist and one psychologist rendered opinions that appellant was retarded but was able to understand the charges against him and to assist counsel at trial. A second psychologist concluded that appellant should not be held criminally responsible for his behavior. Following a hearing at which appellant testified, the trial court held him competent to stand trial. The second psychologist testified that appellant appeared to be able to assist counsel but was not competent to stand trial.

Syl. pt. - "'No person may be subjected to trial on a criminal charge when, by virtue of mental incapacity, the person is unable to consult with his attorney and to assist in the preparation of his defense with a reasonable degree of rational understanding of the nature and object of the proceedings against him.' Syllabus Point 1, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976)." Syl. pt. 6, *State v. Barrow*, 178 W.Va. 406, 359 S.E.2d 844 (1987).

Noting that the standard of review below was whether the finding was supported by a preponderance of the evidence, the Court found no error.

Post-trial examination on

State v. Catlett, 376 S.E.2d 834 (1988) (Neely, J.)

See NEW TRIAL Newly discovered evidence, Sufficiency for new trial, (p. 462) for discussion of topic.

CONDUCT AT TRIAL

Cross-examination on pretrial silence

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

CONFESSIONS

Admissibility

Generally

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See EVIDENCE Admissibility, (p. 185) for discussion of topic.

Accomplice

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

Appellant was convicted of first-degree murder and arson. The prosecution introduced evidence of confessions appellant made to his sister and to his cellmate after arrest; and the confession of an accomplice. Appellant admitted the arson but claimed to know nothing of the murder.

Syl. pt. 1 - "A confession of an accomplice which inculpates the accused is presumptively unreliable. Where the accomplice is unavailable for cross-examination, the admission of the confession, absent sufficient independent 'indicia of reliability' to rebut the presumption of unreliability, violates the Sixth Amendment right of confrontation." Syl. Pt. 2, *State v. Mullens*, 179 W.Va. 567, 371 S.E.2d 64 (1988).

The accomplice here refused to testify, claiming he was in "supreme danger." He was held in contempt and a written statement introduced into evidence. Noting that the accomplice's statement was made while in custody, that the accomplice had already pled guilty to arson, and that the testimony shifted possible criminal liability away from him, the Court held the statement inherently unreliable and in violation of appellant's right to confront. Reversed and remanded for new trial.

CONFESSIONS

Admissibility (continued)

For impeachment

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See EVIDENCE Admissibility, Prior voluntary statement, (p. 204) for discussion of topic.

Fruit of illegal arrest

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Exclusionary rule

Retroactivity

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See JUVENILES Prompt presentment, (p. 427) for discussion of topic.

Induced by promise of immunity

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Prompt presentment

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

See PROMPT PRESENTATION Confessions made without, (p. 506) for discussion of topic.

CONFESSIONS

Suppressed for failure to make prompt presentment

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Voluntariness

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

Appellant was convicted of first-degree murder. He claimed that the three confessions which he gave while in custody were coerced. The trial court held suppression hearings to determine voluntariness and admitted the statements to evidence.

Syl. pt. 6 - "The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case." Syl. Pt. 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975).

Syl. pt. 7 - "A statement freely and voluntarily made by an accused while in custody or deprived of his freedom by the authorities and subjected to questioning is admissible in evidence against him if it clearly appears that such statement was freely and voluntarily made after the accused had been advised of his constitutional right to remain silent and that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney and if he can not afford an attorney one will be appointed for him, and that, after he has been so advised, he knowingly and intelligently waives such rights." Syl. Pt. 7, *State v. Plantz*, 155 W.Va. 24, 180 S.E.2d 614 (1971).

Syl. pt. 8 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

The Court found that the trial court's ruling was not clearly wrong. No error.

Voluntariness (continued)

State v. Randolph, 370 S.E.2d 741 (1988) (Per Curiam)

See EVIDENCE Admissibility, Involuntary confessions, (p. 196) for discussion of topic.

State v. Stewart, 375 S.E.2d 805 (1988) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Burden of proof, (p. 584) for discussion of topic.

After requesting counsel

State v. Gunnoe, 374 S.E.2d 716 (1988) (Neely, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Post-arrest, After requesting counsel, (p. 582) for discussion of topic.

Delay in taking before a magistrate

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Confessions to police, (p. 577) for discussion of topic.

Hearing not required

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

Appellant was convicted of first-degree murder. At trial, a neighbor was allowed to testify that appellant came to him the day after the murder and told him that he had killed the victim with an ax and that the body was in a wooded area. Appellant alleged error on appeal in that the trial court did not conduct a hearing on the voluntariness of appellant's statement.

State v. Baker, (continued)

Syl. pt. 3 - "'A spontaneous statement by a defendant made prior to any action by a police officer or before an accusation, arrest or any custodial interrogation is made or undertaken by the police may be admitted into evidence without the voluntariness thereof first having been determined in an *in camera* hearing.' Syllabus Point 1, *State v. Johnson*, 159 W.Va. 682, 226 S.E.2d 442 (1976)." Syllabus Point 3, *State ex rel. White v. Mohn*, 168 W.Va. 211, 283 S.E.2d 914 (1981).

Syl. pt. 4 - When the evidence suggests that a confession is spontaneous and voluntarily given, it is not error to admit the confession without an in camera voluntariness hearing where there is no objection to the introduction of the confession, and no request for such a hearing at trial.

The Court noted that the appellant did not request a voluntariness hearing at trial, nor did he object to the admission of the statement. Considering that no challenge was made at the hearings held to determine mental competency and to suppress physical evidence, the Court found no error.

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

Appellant was convicted of second-degree murder. On appeal she challenged the trial court's failure to suppress incriminating statements she made immediately following the shooting. She made two statements to appellant's neighbor prior to the arrival of the police and additional statements in custody after being advised of her rights.

Syl. pt. 4 - "'A spontaneous statement by a defendant made prior to any action by a police officer or before an accusation, arrest or any custodial interrogations is made or undertaken by the police may be admitted into evidence without the voluntariness thereof first having been determined in an *in camera* hearing.' Syl. Pt. 1, *State v. Johnson*, 159 W.Va. 682, 226 S.E.2d 442 (1976)." Syl. Pt. 3, *State ex rel. White v. Mohn*, 168 W.Va. 211, 283 S.E.2d 914 (1981).

Voluntariness (continued)

Hearing not required (continued)

State v. Gibson, (continued)

Syl. pt. 5 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146, 148 (1978).

The Court rejected arguments based on *State v. Sanders*, 161 W.Va. 399, 242 S.E.2d 554 (1978) that the statements were not voluntary; *Sanders* involved a defendant who was "suicidally depressed and mentally ill." Appellant here was legally intoxicated.

Statements made prior to the arrival of the police are clearly admissible, while the admission of statements made to police was not clearly against the weight of the evidence.

Mental capacity

State v. Parsons, 381 S.E.2d 246 (1989) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Mental condition, (p. 585) for discussion of topic.

Offer of immunity to induce

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Voluntariness (continued)

Prompt presentment not made

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

See PROMPT PRESENTATION Confessions made without, (p. 506) for discussion of topic.

Proof required for admissibility

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Standard for review

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See POLICE OFFICERS Duty to advise of right to counsel, (p. 483) for discussion of topic.

State v. Preece, 383 S.E.2d 815 (1989) (McHugh, J.)

See SELF-INCRIMINATION *Miranda* warnings, Traffic accident, (p. 572) for discussion of topic.

CONFLICT OF INTEREST

Ineffective assistance

Habeas corpus

Cole v. White, 376 S.E.2d 599 (1988) (Miller, J.)

See *HABEAS CORPUS* Ineffective assistance, Conflict of interest, (p. 284) for discussion of topic.

Joint representation of co-defendants

State v. Haddix, 375 S.E.2d 435 (1988) (Per Curiam)

See INEFFECTIVE ASSISTANCE Joint representation of co-defendants, (p. 338) for discussion of topic.

Multiple representation

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See MULTIPLE DEFENDANTS Standard for review, (p. 460) for discussion of topic.

Prior representation of co-defendant by prosecutor

State v. Catlett, 376 S.E.2d 834 (1988) (Neely, J.)

See PROSECUTING ATTORNEY Conflict in representation, Prior representation of co-defendant, (p. 517) for discussion of topic.

CONFRONTATION CLAUSE

Denial of right to cross-examine

State v. Mullens, 371 S.E.2d 64 (1988) (Brotherton, J.)

See RIGHT TO CONFRONT Denial of right, (p. 542) for discussion of topic.

CONSENT

Defense to nighttime burglary

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See BURGLARY Elements of nighttime, (p. 94) for discussion of topic.

Sexual assault

Second and third degree distinguished

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Same offense, (p. 158) for discussion of topic.

CONSPIRACY

Double jeopardy

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See CONSPIRACY Proof of, (p. 120) for discussion of topic.

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See DOUBLE JEOPARDY Conspiracy, (p. 151) for discussion of topic.

Presumption of guilt

State v. Curry, 374 S.E.2d 526 (1988) (Per Curiam)

Defendant was tried and convicted pursuant to *W.Va.Code* 61-6-7, the "Red Men's Act," for conspiracy to inflict injury to property. Defendant had been present when another person fired a shotgun at the window of a gasoline service station.

The Court noted that the statute had previously been held unconstitutional for imposing a presumption of guilt upon a mere showing that the accused was present. *Pinkerton v. Farr*, 159 W.Va. 223, 220 S.E.2d 682 (1975). Reversed.

Proof of

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

Appellant was convicted of grand larceny, breaking and entering, and conspiracy to commit grand larceny and breaking and entering. On appeal he alleged that he committed only one offense under either the "same transaction" or "same evidence" tests. More importantly, he alleges that his conviction on two conspiracy charges constitutes double jeopardy.

Syl. pt. 5 - "*W.Va.Code*, 61-10-31(1), is a general conspiracy statute and the agreement to commit any act which is made a felony or misdemeanor by the law of this State is a conspiracy to commit an 'offense against the State' as that term is used in the statute." Syllabus Point 1, *State v. Less*, 170 W.Va. 259, 294 S.E.2d 62 (1981).

Proof of (continued)

State v. Johnson, (continued)

Syl. pt. 6 - "In order for the State to prove a conspiracy under *W.Va.Code*, 61-10-31(1), it must show that the defendant agreed with another to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy." Syllabus Point 4, *State v. Less*, 170 W.Va. 259, 294 S.E.2d 62 (1981).

Syl. pt. 7 - The double jeopardy clause of the Fifth Amendment prohibits the prosecution of a single conspiracy as two or more conspiracies under a general conspiracy statute merely because two separate substantive crimes have been committed.

Syl. pt. 8 - The following factors are normally considered under a totality of circumstances test to determine whether one or two conspiracies are involved: (1) time; (2) persons acting as coconspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offenses charged which indicate the nature and the scope of the activity which the government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place. These factors are guidelines only. The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object.

Here, the Court held that only one agreement was present. No violation of double jeopardy.

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See DOUBLE JEOPARDY Conspiracy, (p. 151) for discussion of topic.

CONTEMPT

Attorneys

State ex rel. Ferrell v. Adkins, 394 S.E.2d 909 (1990) (Per Curiam)

See ATTORNEYS Contempt of court, (p. 64) for discussion of topic.

Criminal

Conversion to civil in child support cases

State v. Lusk, 376 S.E.2d 351 (1988) (Miller, J.)

See CHILD SUPPORT AND ALIMONY Criminal contempt, Grounds for, (p. 100) for discussion of topic.

CONTINUANCE

Appeal of

Standard for review

State v. Wilkinson, 381 S.E.2d 241 (1989) (Per Curiam)

Appellant was convicted of driving under the influence of alcohol, second offense. Prior to trial appellant visited a physician for breathing tests (appellant had trouble exhaling during his breathalyzer test). He did not include the physician on his witness list, nor did he subpoena him. Three or four days prior to trial appellant learned that his aunt, who was blind and depended on him for care, was to have surgery on the date of trial; her physician requested appellant to be at the hospital.

Appellant contacted his attorney to ask that the trial be postponed; the attorney was unable to reach the circuit judge, who was out of town. The morning of the trial appellant learned that his doctor would not be able to attend the trial. Appellant moved for a continuance on account of the unavailability of a witness and his aunt's surgery. The trial court denied the motion.

Syl. pt. - "A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syllabus point 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

The Court noted that appellant did not support his claim that the absent witness was material to his case. See *State v. Burdette*, 135 W.Va. 312, 63 S.E.2d 69 (1950); *State v. Vance*, 168 W.Va. 666, 285 S.E.2d 437 (1981); and *State v. Whitecotton*, 101 W.Va. 492, 133 S.E. 106 (1926). In addition, appellant seemed to have been aware of his aunt's surgery on the preceding Thursday before his Monday trial but did not file an affidavit setting forth the circumstances. No abuse of discretion in refusing the motion for continuance.

CONTINUANCE

Discretion in granting

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

Six days before appellant's trial one of his co-conspirators entered a guilty plea and the prosecution decided to call him as a witness. Appellant was given a copy of the co-conspirator's statement. On the first day of trial defense counsel moved for a continuance on the grounds that he had not had adequate opportunity to review the statement or to interview the co-conspirator. The motion was denied.

Syl. pt. 5 - "The granting of a continuance is a matter within the sound discretion of the trial court, though subject to review, and the refusal thereof is not ground for reversal unless it is made to appear that the court abused its discretion, and that its refusal has worked injury and prejudice to the rights of the party in whose behalf the motion was made.' Syl. pt. 1, *State v. Jones*, 84 W.Va. 85, 99 S.E. 271 (1919)." Syllabus Point 1, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549 (1986).

No abuse of discretion here. Appellant's counsel had adequate opportunity to interview the co-conspirator and had in his possession a copy of the co-conspirator's statement.

Discretion of court

State v. Catlett, 376 S.E.2d 834 (1988) (Neely, J.)

Appellant was convicted of first-degree murder. At trial his girlfriend testified that she saw the victim on the floor in the appellant's kitchen while a club lay in the sink with water running over it. Defense counsel moved for a continuance so that the club (a tree branch) could be tested for "tensile strength." The weapon was discovered immediately prior to trial.

Syl. pt. 2 - "A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syllabus Point 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

Discretion of court (continued)

State v. Catlett, (continued)

The evidence showed that the branch had been analyzed unsuccessfully for hair, blood and fingerprints. The branch was broken into two pieces. The victim clearly died from multiple fractures of the skull. The Court found that the capacity of the branch to inflict a mortal blow was not a serious issue and that the motion for continuance was primarily dilatory. No error.

CONTRABAND

Gambling devices

Seizure of

Buzzo v. City of Fairmont, 380 S.E.2d 439 (1989) (Workman, J.)

See GAMBLING Devices, Electronic poker machines, (p. 272) for discussion of topic.

CONTROLLED SUBSTANCES

Delivery of

Intent assumed

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See CONTROLLED SUBSTANCES Intent, Delivery, (p. 127) for discussion of topic.

Intent

Delivery

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

Appellant was convicted for first offense delivery of marijuana. He claimed that the trial court failed to instruct the jury on the issue of intent.

Syl. pt. 4 - "Only an 'intentional' or 'knowing' delivery of a controlled substance is prohibited by statute, although the statute fails to expressly require criminal intent." Syllabus Point 3, *State v. Dunn*, 162 W.Va. 63, 246 S.E.2d 245 (1978).

Syl. pt. 5 - "'In a criminal trial for violation of Code, 60A-4-401(a), the jury must be instructed about each element of the crime including intent.' Syl. pt. 2, *State v. Barnett*, 168 W.Va. 361, 284 S.E.2d 622 (1981)." Syllabus Point 5, *State v. Nicastro*, 181 W.Va. 556, 383 S.E.2d 521 (1989).

Syl. pt. 6 - "The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syllabus Point 4, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

Intent (continued)

Delivery (continued)

State v. Nicholas, (continued)

The Court assumed that intent is a necessary element of the charge. Here, failure to instruct on the element of intent was not plain error. The defense was based on the denial of the delivery; once the jury chose not to believe appellant's denial, no evidence was present to show the delivery was unintentional. The question of intent was never at issue. Failure to instruct on intent, while perhaps an error, was not reversible.

Necessary element for instruction

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

See INSTRUCTIONS Controlled substances, Intent, (p. 356) for discussion of topic.

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See CONTROLLED SUBSTANCES Intent, Delivery, (p. 127) for discussion of topic.

Probation

Hutchinson v. Dietrich, 393 S.E.2d 663 (1990) (Brotherton, J.)

Relator was sentenced to two consecutive terms of one to fifteen years for delivery of marijuana and of cocaine. The prosecuting attorney filed an information asking for an enhanced sentence for recidivism (*W.Va.Code* 61-11-19) in that relator was convicted of grand larceny seven years earlier.

The circuit court enhanced the sentence for delivery of marijuana and cocaine from one to ten to one to fifteen years and denied probation. Relator claimed that he was entitled to probation for the delivery of marijuana since the delivery was for less than fifteen grams. See *W.Va.Code* 60A-4-402 and 60A-4-407.

Probation (continued)

Hutchinson v. Dietrich, (continued)

Syl. pt. 1 - The Legislature, in enacting *W.Va.Code*, 60A-4-402(c), did not intend that individuals involved in the traffic of drugs other than marijuana be accorded special, mandatory probation.

Syl. pt. 2 - Multiple convictions rendered on the same day should be treated as a single conviction for the purposes of the habitual criminal statute, *W.Va.Code*, 61-11-19, and multiple sentences can be enhanced under the habitual criminal statute only once where the sentences are imposed for convictions rendered on the same day.

The Court noted that relator distributed both marijuana and cocaine and was not a first offender distributing less than fifteen grams of marijuana alone. However, the Court ruled that enhancement here was improper as to both convictions. Writ granted to allow for proper resentencing.

Sentencing

Elements to consider

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See SENTENCING Controlled substances, Elements to consider, (p. 590) for discussion of topic.

Factors to be considered

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

See SENTENCING Controlled substances, Elements to consider, (p. 589) for discussion of topic.

CONTROLLED SUBSTANCES

Sufficiency of indictment

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

See INDICTMENT Sufficiency, Controlled substances, (p. 322) for discussion of topic.

Delivery of marijuana

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

Appellant was convicted for first offense delivery of marijuana. On appeal, he argued that the indictment was fatally defective for failure to specify whether the delivery was with or without remuneration.

Syl. pt. 1 - "An indictment alleging a violation of *W.Va.Code*, 60A-4-401 (a), as amended, is sufficient to sustain a conviction for delivery of marihuana, even though the indictment omits stating whether the alleged offense was committed with or without remuneration." Syllabus Point 3, *State v. Nicastro*, 181 W.Va. 556, 383 S.E.2d 521 (1989).

No error.

COUNTY JAILS

Conditions of confinement

Facilities Review Panel v. McGuire, No. 19029 (12/20/90) (Per Curiam)

See JAILS Conditions of confinement, (p. 372) for discussion of topic.

State prisoners

Responsibility for

County Commission of Mercer County v. Dodrill, 385 S.E.2d 248 (1989) (McHugh, J.)

See GOVERNOR Reprieve, Authority to grant, (p. 273) for discussion of topic.

COURTS

Administrative authority

Carter v. Taylor, 378 S.E.2d 291 (1989) (Workman, J.)

See JUDGES Administrative authority, Appointment of circuit clerk, (p. 377) for discussion of topic.

Contempt by attorney

State ex rel. Ferrell v. Adkins, 394 S.E.2d 909 (1990) (Per Curiam)

See ATTORNEYS Contempt of court, (p. 64) for discussion of topic.

Custody of abused infant

Jurisdiction to hear

State of Florida ex rel. W.Va. DHS v. Thornton, No. CC969 (7/20/89) (Brotherton, C.J.)

See ABUSE AND NEGLECT Custody of infant, (p. 2) for discussion of topic.

Grand jury

Authority over

State v. Pickens, 395 S.E.2d 505 (1990) (Per Curiam)

See PROSECUTING ATTORNEY Grand jury, Presenting evidence to, (p. 524) for discussion of topic.

COURTS

Invalid indictment

Effect of

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

See INDICTMENT Validity of, Grand jury does not approve text, (p. 324) for discussion of topic.

Plain error doctrine

State v. Moore, 409 S.E.2d 490 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 203) for discussion of topic.

Procedure

Presumption of propriety

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See APPEAL Failure to preserve, Effect of, (p. 36) for discussion of topic.

COURT REPORTERS

Duty to provide transcript

Toler v. Sites, No. 19213 (11/29/89) (Per Curiam)

See TRANSCRIPTS Right to, (p. 642) for discussion of topic.

CROSS-EXAMINATION

Character witnesses

Limiting prosecution's cross

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See EVIDENCE Character, Limits on cross-examination, (p. 213) for discussion of topic.

Credibility of witnesses

Past conduct

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See EVIDENCE Credibility of witnesses, Use of past conduct, (p. 223) for discussion of topic.

Expert witnesses

Use of treatise

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

See EVIDENCE Expert witnesses, Cross-examination based on treatise, (p. 226) for discussion of topic.

Pre-trial silence

State v. Fisher, 370 S.E.2d 480 (1988) (Per Curiam)

See SELF-INCRIMINATION Pre-trial silence, (p. 573) for discussion of topic.

CROSS-EXAMINATION

Scope of

State v. Allman, 391 S.E.2d 103 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Witnesses' credibility, (p. 243) for discussion of topic.

Witnesses' credibility

State v. Hoard, 375 S.E.2d 582 (1988) (Per Curiam)

See WITNESSES Cross-examination, Reputation evidence, (p. 658) for discussion of topic.

CRUEL AND UNUSUAL PUNISHMENT

Severe sentence

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See PROPORTIONALITY Appropriateness of sentence, (p. 511) for discussion of topic.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

Appellant was convicted of multiple counts of sexual abuse, sexual assault, aggravated robbery and kidnaping. He was sentenced to two life sentences without parole and a maximum of 335 years, to be served consecutively. He contended on appeal that the sentence constituted cruel and unusual punishment.

Syl. pt. 8 - Severe prison sentences, including life without parole, for serious crimes against the person, are not cruel or unusual punishment.

See *Rummel v. Estelle*, 445 U.S. 263 (1980). See also, *Coker v. Georgia*, 433 U.S. 584 (1977) (death sentence for rape is cruel and unusual).

DANGEROUS OR DEADLY WEAPONS

Inference of malice from use of

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See HOMICIDE First-degree, Malice, (p. 301) for discussion of topic.

Right to bear

State ex rel. City of Princeton v. Buckner, 377 S.E.2d 139 (1988) (McHugh, C.J.)

See STATUTES Statutory construction, Dangerous or deadly weapons, (p. 613) for discussion of topic.

State ex rel. LeMasters v. Narick, No. 18300 (7/6/88) (Per Curiam)

See STATUTES Statutory construction, Dangerous or deadly weapons, (p. 615) for discussion of topic.

Limits on

In re Application of Metheney, 391 S.E.2d 635 (1990) (Brotherton, J.)

See RIGHT TO BEAR ARMS Generally, (p. 541) for discussion of topic.

[NOTE] Four cases are consolidated in the summary of the above case. The other three cases are *In re Application of Goots*, 391 S.E.2d 635 (1990); *In re Application of Cueto*, 391 S.E.2d 635 (1990); and, *In re Application of Rinker*, 391 S.E.2d 635 (1990).

DEFENSES

Affirmative defenses

Burden of proof

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See BURDEN OF PROOF Affirmative defenses, (p. 91) for discussion of topic.

Defendant's burden

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See BURDEN OF PROOF Affirmative defenses, (p. 91) for discussion of topic.

Consent

Nighttime burglary

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See BURGLARY Elements of nighttime, (p. 94) for discussion of topic.

Insanity

Query to psychologist

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

See SELF-INCRIMINATION - PSYCHOLOGICAL TESTS Questioning psychologist, (p. 576) for discussion of topic.

DEFENSES

Self-defense

State v. Bates, 380 S.E.2d 203 (1989) (Per Curiam)

See SELF-DEFENSE Burden of proof, Prosecution's after *prima facie* showing, (p. 570) for discussion of topic.

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See SELF-DEFENSE Deadly force, (p. 571) for discussion of topic.

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

Appellant was convicted of second-degree murder. On appeal she contended that the trial court erred in not directing a judgment of acquittal for failure of the prosecution to prove appellant did not act in self-defense.

Syl. pt. 8 - "Once the defendant meets his initial burden of producing some evidence of self-defense, the State is required to disprove the defense of self-defense beyond a reasonable doubt." Syl. Pt. 6, *State v. McKinney*, 178 W.Va. 200, 358 S.E.2d 596, 598 (1987).

Although appellant presented evidence tending to show self-defense, the prosecution introduced sufficient evidence to go to the jury. Viewing the evidence in the light most favorable to the prosecution, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43, 45 (1983). No error.

DENIAL OF FAIR TRIAL

Charges not connected to evidence

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

Appellant was convicted of sexual assault, sexual abuse, aggravated robbery and kidnaping. The various charges went to the jury in a general form, *i.e.*, the evidence was not connected specifically with each charge. Appellant claims that this form denied him the right to a unanimous jury verdict. *W.Va. Const.*, art. III, Sec. 14.

The Court rejected the contention, finding that the instructions given on burden of proof insured that the jury reached its verdict properly. No error.

Cumulative error

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See APPEAL Cumulative error, Effect of, (p. 28) for discussion of topic.

Jury misconduct

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

Appellant was convicted of several counts of sexual abuse, sexual assault, aggravated robbery and kidnaping. During trial, the jury was overheard discussing the case during lunch at a public restaurant, despite instructions not to discuss the case. The trial court admonished them *in camera* and received their assurance that they could find the facts properly.

Syl. pt. 9 - When the trial judge hears that jurors may have discussed the case among themselves, and he interviews them, admonishes them, and concludes that they can determine the facts fairly, it is not error for him to refuse a mistrial.

See *Smith v. Phillips*, 455 U.S. 209 (1982).

Jury misconduct (continued)

State v. Woodall, (continued)

The Court noted that the primary objectives in these instances are that the jury receive evidence only in the courtroom; that a juror not make up his mind before all evidence is in; and that the process not appear to be unfair. Juror discussions among themselves are thus less troubling than discussions with outsiders. No error.

Prosecutor's comments/conduct

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 515) for discussion of topic.

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See PROSECUTING ATTORNEY Comments out of court re: guilt of accused, (p. 513) for discussion of topic.

Publicity

Still cameras in courtroom

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

Appellant was convicted of kidnaping, abduction with intent to defile and burglary. On appeal he contended that the trial judge erred in allowing still cameras in the courtroom. Defense counsel objected during trial to the noise made by the camera shutters.

DENIAL OF FAIR TRIAL

Publicity (continued)

Still cameras in courtroom (continued)

State v. Hanna, (continued)

Syl. pt. 1 - "Article III, Section 14 of the West Virginia Constitution, when read in light of our open courts provision in Article III, Section 17, provides a clear basis for finding an independent right in the public and press to attend criminal proceedings. However, there are limits on access by the public and press to a criminal trial, since in this area a long-established constitutional right to a fair trial is accorded the defendant." Syllabus Point 1, *State ex rel. Herald Mail Co. v. Hamilton*, 165 W.Va. 103, 267 S.E.2d 544 (1980).

Syl. pt. 2 - A criminal conviction will not ordinarily be reversed on the ground that the trial court abused its discretion in allowing the use of cameras or sound recording or broadcasting equipment at trial absent a showing that the defendant's right to a fair and impartial trial, as required under the Due Process Clause of both the federal and West Virginia Constitutions, was adversely affected thereby.

Balancing the defendant's right to a fair trial against the guarantees of freedom of the press, the Court found no abuse of discretion here. Appellant did not demonstrate that the noise of the cameras adversely affected his right to a fair trial.

Venue

Refusal of change

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See VENUE Change of venue, Factors to consider, (p. 648) for discussion of topic.

DENIAL OF FAIR TRIAL

Waiver of right to testify

State v. Neuman, 371 S.E.2d 77 (1988) (McGraw, J.)

See DUE PROCESS Defendant's right to testify, Waiver of, (p. 170) for discussion of topic.

DETENTION FACILITIES

Standards for

Facilities Review Panel v. Coe, 420 S.E.2d 532 (1989) (Brotherton, C.J.)

See JUVENILES Detention facilities, Standards for, (p. 425) for discussion of topic.

DIRECTED VERDICT

Generally

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

Defendant was convicted of involuntary manslaughter. She admitted obtaining a gun before the incident, failing to give a warning shot and shooting the decedent. Further, she also admitted that the decedent was not armed.

Syl. pt. 2 - "'Upon the motion to direct a verdict for the defendant, the evidence is to be viewed in the light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.' Point 1, Syllabus, *State v. Fischer*, 158 W.Va. 72, 211 S.E.2d 666 (1974)." Syllabus Point 4, *State v. Johnson*, 159 W.Va. 682, 226 S.E.2d 442 (1976).

Viewing the evidence here in the light most favorable to the prosecution, the Court concluded that the elements of malice, premeditation and intent were supported by the evidence. No error in refusing the motion for directed verdict.

DISCOVERY

Documents

Limits on

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

During appellant's trial on charges of sexual assault against a minor child, appellant moved for production of records concerning a prior abuse and neglect case involving the child. The state did not produce the records because (1 they were in the foreign jurisdiction and (2 the law of the foreign jurisdiction required the consent of the accused to release the records.

Syl. pt. 7 - Rule 16(a)(1)(C) of the West Virginia Rules of Criminal Procedure limits a defendant's discovery of documents and tangible objects to those which are within the possession, custody, and control of the State.

The state did not withhold evidence here, since the evidence was not in the state's possession.

Failure to disclose

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

Defendant was convicted of murder. One of the witnesses against him was a hitchhiker who testified at a prior trial of defendant's accomplice. Defendant claimed that the prosecution failed to give adequate discovery in that the prosecution gave him a copy of the transcript of the prior trial without identifying what statements would be offered. At trial, the judge limited the prosecution to matters within the record of the prior trial.

Syl. pt. 6 - "When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non- disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defendant is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syllabus Point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980).

The Court found disclosure here adequate in light of the limits placed on testimony at trial and in that the defense did not seem to be surprised or prejudiced.

DISCOVERY

Failure to disclose (continued)

Scientific tests

State v. Myers, 370 S.E.2d 336 (1988) (Per Curiam)

Appellant was convicted of first-degree murder. He complained of the admission of two scientific tests not disclosed in pretrial discovery.

In an attempt to duplicate the circumstances of the firing of the pistol used in the killing the prosecution's expert performed two experiments. The results of experiments were not disclosed to the defendant pursuant to the defendant's discovery motions. Counsel for the defendant did, however, interview the expert after the experiments were completed. In addition, results of a test identical to one of the experiments were given to the defendant.

At trial, counsel objected to the admission of testimony concerning the tests. The trial court *sua sponte* ordered a recess until the following day and directed the prosecution to share the results of the test with the defendant and to permit consultation with the expert witness.

Syl. pt. 1 - "When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syllabus Point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980).

Syl. pt. 2 - "Our traditional appellate standard for determining whether the failure to comply with court ordered pretrial discovery is prejudicial is contained in Syllabus Point 2 of *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980). This was evolved prior to the adoption of our Rules of Criminal Procedure, but is applied to Rule 16 discovery." Syllabus Point 4, *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (1987).

Syl. pt. 3 - "Rule 16(d)(2) [of the West Virginia Rules of Criminal Procedure enables a trial court to impose sanctions that may have the effect of curing a late discovery problem." Syllabus Point 5, *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (1987).

Here, the Court held that any possible prejudice was cured by the trial court's actions.

DISCOVERY

Failure to disclose (continued)

Witnesses

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

Appellant was convicted of breaking and entering, grand larceny, conspiracy to commit breaking and entering and conspiracy to commit grand larceny. He complained that the prosecution failed to disclose a key witness during pretrial discovery.

The trial court denied defense counsel's motion for mistrial as untimely. The motion was made after the witness testified and the court noted that counsel was not surprised by the witness since she had testified the previous day in a companion case.

Syl. pt. 1 - Our traditional appellate standard for determining whether the failure to comply with court ordered pretrial discovery is prejudicial is contained in Syllabus Point 2 of *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980), and is applicable to discovery under Rule 16 of the Rules of Criminal Procedure. It is summarized: The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case.

Syl. pt. 2 - "Rule 16(d)(2) [of the West Virginia Rules of Criminal Procedure] enables a trial court to impose sanctions that may have the effect of curing a late discovery problem." Syllabus Point 5, *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (1978).

Here, the Court affirmed the trial court's denial of the motion for mistrial.

Failure to disclose witnesses

State v. Weaver, 382 S.E.2d 327 (1989) (Miller, J.)

See PROSECUTING ATTORNEY Failure to disclose witnesses, (p. 524) for discussion of topic.

DOCUMENTS

Discovery of

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See DISCOVERY Documents, Limits on, (p. 147) for discussion of topic.

DOUBLE JEOPARDY

Aggravated robbery and grand larceny

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See LESSER INCLUDED OFFENSES Generally, (p. 435) for discussion of topic.

Breaking and entering

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, (p. 155) for discussion of topic.

Collateral estoppel

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See COLLATERAL ESTOPPEL Generally, (p. 106) for discussion of topic.

Conspiracy

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See CONSPIRACY Proof of, (p. 120) for discussion of topic.

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

Appellant was convicted of burglary, grand larceny, breaking and entering, petty larceny and four counts of conspiracy. On appeal he contended the conspiracy convictions violated double jeopardy.

Syl. pt. 1 - "The double jeopardy clause of the Fifth Amendment prohibits the prosecution of a single conspiracy as two or more conspiracies under a general conspiracy statute merely because two separate substantive crimes have been committed." Syllabus Point 7, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

Conspiracy (continued)

State v. Judy, (continued)

Syl. pt. 2 - "The following factors are normally considered under a totality of circumstances test to determine whether one or two conspiracies are involved: (1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offenses charged which indicate the nature and the scope of the activity which the government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place. These factors are guidelines only. The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object." Syllabus Point 8, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

The Court held the conspiracy convictions improper. Defendant was guilty of two conspiracies at most.

Felony murder

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

Appellant, a juvenile, was convicted of first-degree murder and first-degree sexual assault (see PROBABLE CAUSE Warrantless arrest, (p. 497) this Digest). He argued on appeal that his conviction of first-degree murder rested on a felony-murder theory which bars conviction on the underlying crime of sexual assault on the basis of double jeopardy principles.

Syl. pt. 8 - "Double jeopardy prohibits an accused charged with felony murder, as defined by *W.Va.Code* § 61-2-1 (1977 Replacement Vol.), from being separately tried or punished for both murder and the underlying enumerated felony." Syllabus point 8, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

Felony murder (continued)

State v. Giles, (continued)

Syl. pt. 9 - In a prosecution for first-degree murder, the state must submit jury instructions which distinguish between the two categories of first-degree murder -- willful, deliberate, and premeditated killing and felony-murder -- if, under the facts of the particular case, the jury can find the defendant guilty of either category of first-degree murder. When the State also proceeds against the defendant on the underlying felony, the verdict forms provided to the jury should also reflect the foregoing distinction so that, if a guilty verdict is returned, the theory of the case upon which the jury relied will be apparent.

Here, the same principle of double jeopardy applies as if the offenses were tried separately. (Reversed on other grounds.)

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

Appellant was convicted of felony-murder, burglary, attempted robbery, assault and conspiracy. He claimed on appeal that the trial court violated double jeopardy principles by sentencing him for both the felony-murder and the underlying felonies.

Syl. pt. 1 - "Double jeopardy prohibits an accused charged with felony-murder, as defined by *W.Va.Code* Section 61-2-1 (1977) Replacement Vol.), from being separately tried or punished for both murder and the underlying enumerated felony." Syllabus point 8, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

Reversed and remanded.

Habeas corpus **release**

Inapplicable to

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See *HABEAS CORPUS* Double jeopardy, (p. 282) for discussion of topic.

DOUBLE JEOPARDY

Larceny

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, (p. 155) for discussion of topic.

Lesser included offenses

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See LESSER INCLUDED OFFENSES Generally, (p. 435) for discussion of topic.

Mistrial

Manifest necessity

State ex rel. Bass v. Abbot, 375 S.E.2d 590 (1988) (Neely, J.)

See MISTRIAL Retrial following, (p. 455) for discussion of topic.

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 162) for discussion of topic.

Prosecutorial intent

State ex rel. Bass v. Abbot, 375 S.E.2d 590 (1988) (Neely, J.)

See MISTRIAL Retrial following, (p. 455) for discussion of topic.

DOUBLE JEOPARDY

Multiple offenses

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

Appellant was convicted of grand larceny, breaking and entering, and conspiracy to commit grand larceny and breaking and entering. On appeal he alleged that he committed only one offense and that his conviction on both grand larceny and breaking and entering constitutes double jeopardy.

Syl. pt. 9 - "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Syllabus Point 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983).

Syl. pt. 10 - Breaking and entering and larceny are distinct and separate offenses and indictment and conviction for both offenses even though they occurred close in time does not violate double jeopardy principles.

Abduction with intent to defile and kidnaping

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

Appellant was convicted of abduction with intent to defile; kidnaping; sexual assault, second-degree; and sexual abuse, first-degree. On appeal he claimed that the multiple charges violated double jeopardy in that they were multiple punishments for the same offense.

Syl. pt. 13 - The crimes of abduction with intent to defile, *W.Va.Code*, 61-2-14 (1984), and kidnaping with intent to avoid arrest, *W.Va.Code*, 61-2-14a (1965), are separate offenses.

Multiple offenses (continued)

Abduction with intent to defile and kidnapping (continued)

State v. Fortner, (continued)

Syl. pt. 14 - "In interpreting and applying a generally worded kidnaping statute, such as *W.Va.Code*, 61-1-14a, in a situation where another offense was committed, some reasonable limitations on the broad scope of kidnaping must be developed. The general rule is that a kidnaping has not been committed when it is incidental to another crime. In deciding whether the acts that technically constitute kidnaping were incidental to another crime, courts examine the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm." Syllabus Point 2, *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985).

Syl. pt. 15 - "Where a defendant commits separate acts of our statutorily defined term 'sexual intercourse' in different ways, each act may be prosecuted and punished as a separate offense." Syllabus Point 2, *State v. Carter*, 168 W.Va. 90, 282 S.E.2d 277 (1981).

The abduction, "asportation" and detention of the victim were clearly separate and distinct from the sexual assaults. The assaults themselves were also clearly distinguishable. No error.

Sexual assault and sexual abuse

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, Abduction with intent to defile and kidnaping, (p. 155) for discussion of topic.

Negligent homicide

State v. Richeson, 370 S.E.2d 728 (1988) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Negligent homicide, (p. 632) for discussion of topic.

DOUBLE JEOPARDY

Same offense

State v. Davis, 376 S.E.2d 563 (1988) (Per Curiam)

Appellant was convicted of abduction with intent to defile, first-degree sexual abuse and second-degree sexual assault and was sentenced for each offense, the sentences to run consecutively. He contended on appeal that to sentence him on all three charges constitutes multiple punishments for the same offense, in contravention of the principles of double jeopardy.

Syl. pt. 1 - "'Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.' Syl. pt. 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983), quoting *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)." Syllabus point 1, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

Syl. pt. 2 - "Double jeopardy prohibits multiple punishment for the same offense, therefore under our criminal sexual conduct statute, *W.Va.Code*, 61-8B-1 *et seq.*, 1976, a single sexual act cannot result in multiple criminal convictions." Syllabus point 4, *State v. Reed*, 166 W.Va. 558, 276 S.E.2d 313 (1981).

Here, the Court held that the acts of moving and detaining the victim were in furtherance of the sexual assault and therefore merely incidental to the assault, not separate offenses. See *State v. Trail*, 174 W.Va. 656, 328 S.E.2d 671 (1985) and *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985). The Court reached a similar conclusion on the sexual abuse charge. See *State v. Carter*, 168 W.Va. 90, 282 S.E.2d 277 (1981) and *State v. Reed*, 166 W.Va. 558, 276 S.E.2d 313 (1981).

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See COLLATERAL ESTOPPEL Generally, (p. 106) for discussion of topic.

Same offense (continued)

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

Appellant was convicted of both second and third degree sexual assault resulting from the same transaction. He claimed double jeopardy because the convictions were for the same offense and third degree sexual assault is a lesser included offense of second-degree sexual assault.

Syl. pt. 3 - "'The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.' Syl. pt. 1 of *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977)." Syllabus point 1, *State v. Myers*, 171 W.Va. 277, 298 S.E.2d 813 (1982).

Syl. pt. 4 - "'Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.' Syl. pt. 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983), quoting *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)." Syllabus point 1, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

Syl. pt. 5 - A third-degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime.

Since the two offenses here involved different elements no violation of double jeopardy occurred.

DOUBLE JEOPARDY

Separate criminal acts

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See KIDNAPING Incidental to another crime, Generally, (p. 432) for discussion of topic.

Separate counts

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See KIDNAPING Incidental to another crime, Generally, (p. 432) for discussion of topic.

Sexual assault and sexual abuse

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, Abduction with intent to defile and kidnaping, (p. 155) for discussion of topic.

Sexual assault

Separate counts

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Same offense, (p. 158) for discussion of topic.

When jeopardy attaches

State ex rel. Thomas v. Egnor, No. 19146 (10/27/89) (Per Curiam)

See PROHIBITION Right to, Generally, (p. 504) for discussion of topic.

When jeopardy attaches (continued)

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

Relator sought to compel Judge Maynard to vacate an order requiring dismissal of an embezzlement indictment with prejudice.

The grand jury proceedings included testimony by a state policeman that "we had a preliminary hearing on this and she didn't deny filling out the ledger." The ledger in question had been filled with false amounts to reflect the loss of cash. Appellant did not testify at the preliminary hearing. The trial court found that the police officer deliberately misled the grand jury, although he absolved the prosecuting attorney of any responsibility for the misrepresentation. Finding that jeopardy had attached, the trial court dismissed with prejudice.

Syl. pt. 1 - "One is in jeopardy when he has been placed on trial on a valid indictment, before a court of competent jurisdiction, has been arraigned, has pleaded and a jury has been impaneled and sworn." *Brooks v. Boles*, 151 W.Va. 576, 153 S.E.2d 526, 530 (1967).

Syl. pt. 2 - "Except for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or is sufficiency." Syl. Pt., *Barker v. Fox*, 160 W.Va. 749, 238 S.E.2d 235 (1977).

Syl. pt. 3 - Once the defendant establishes a *prima facie* case of willful, intentional fraud in obtaining an indictment he is entitled to a hearing with compulsory process. *Barker v. Fox*, 160 W.Va. 749, 238 S.E.2d 235, 237 (1977).

Syl. pt. 4 - "Most courts hold that as a general rule, a trial court should not grant a motion to dismiss criminal charges unless the dismissal is consonant with the public interest in the fair administration of justice." Syl. Pt. 12, in part, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782, 786 (1984).

Syl. pt. 5 - When perjured or misleading testimony presented to a grand jury is discovered before trial and there is no evidence of prosecutorial misconduct, the State may withdraw the indictment without prejudice, or request the court to hold an *in camera* hearing to inspect the grand jury transcripts and determine if other sufficient evidence exists to support the indictment.

When jeopardy attaches (continued)

State ex rel. Pinson v. Maynard, (continued)

Syl. pt. 6 - "[D]ismissal of [an] indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision to indict was free from substantial influences of such violation." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 101 L.Ed.2d 228, 238, 108 S.Ct. 2369 (1986) (citing *United States v. Mechanik*, 475 U.S. 66, 78 (1986) (O'Connor, J., concurring).

Syl. pt. 7 - In reviewing the evidence for sufficiency to support the indictment, the court must be certain that there was significant and material evidence presented to the grand jury to support all elements of the alleged criminal offense.

The Court found that jeopardy had not attached here. Appellant was not arraigned, did not enter a plea or go to trial (a jury was not even impaneled). Dismissal with prejudice on the grounds of double jeopardy was improper. Further, appellant did not make out a *prima facie* case that fraud was committed in the grand jury. While misleading, the testimony did not appear to be willfully fraudulent. Nonetheless, because of an inadequate record, the Court assumed a *prima facie* case but, on balance, refused to reverse for prejudice. Perjured testimony at trial is more serious than perjured testimony before a grand jury.

The Court noted that dismissal may be justified where prosecutorial misconduct is involved but not dismissal with prejudice unless the misconduct is especially egregious. The prosecution may withdraw an improperly obtained indictment discovered before trial if there is no prosecutorial misconduct. The withdrawal may be without prejudice.

The circuit court was directed to dismiss the indictment without prejudice.

When jeopardy attaches (continued)

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

Appellant was convicted of second-degree murder in the shooting death of her husband. On the original trial date a jury was impaneled, sworn and then a recess was taken. The next day one of the jurors did not return; after determining that the juror could not be expected to return, the trial court declared a mistrial (no alternate jurors had been impaneled). Appellant claimed on appeal that double jeopardy bars retrial.

Syl. pt. 1 - "'One is in jeopardy when he has been placed on trial on a valid indictment, before a court of competent jurisdiction, has been arraigned, has pleaded and a jury has been impaneled and sworn.' *Brooks v. Boles*, 151 W.Va. 576, 153 S.E.2d 526 (1967)." Syl. Pt. 1, *Adkins v. Leverette*, 164 W.Va. 377, 264 S.E.2d 154, 155 (1980).

Syl. pt. 2 - "Termination of a criminal trial arising from a manifest necessity will not result in double jeopardy barring a retrial." Syl. pt. 4, *Keller v. Ferguson*, 177 W.Va. 616, 355 S.E.2d 405 (1987).

Syl. pt. 3 - The failure of a juror to report back to jury duty for a trial in progress constitutes a manifest necessity sufficient to permit the court to declare a mistrial where the judge determines that the juror will be unable to serve for the remainder of the trial and where no alternate juror were selected prior to trial.

The Court rejected appellant's argument that appointment of an alternate juror was within the trial court's control and therefore a "manifest necessity" did not exist. See *W.Va.Code* 62-3-7; *State v. Little*, 120 W.Va. 213, 97 S.E. 626 (1938). Since the discharge of a jury is a discretionary act, the Court will reverse only after finding an abuse of discretion. *State v. Oldaker*, 172 W.Va. 258, 304 S.E.2d 843, 849 (1983). No abuse of discretion here.

DRIVING UNDER THE INFLUENCE

Arrest

Procedural exceptions

State v. Shugars, 376 S.E.2d 174 (1988) (Per Curiam)

Appellant was convicted of driving under the influence of alcohol, causing a death; and driving under the influence of alcohol, causing a bodily injury. On appeal, he contested the admission of a blood sample not taken incident to a lawful arrest and admission of prejudicial evidence.

The police officer at the scene of the accident noted a half-full wine bottle in appellant's vehicle and smelled alcohol on appellant's breath. Within two hours of the accident, the officer charged the appellant with driving under the influence and asked him for a blood sample. Appellant gave a voluntary sample containing .17 percent alcohol by weight. A warrant was obtained the next day and appellant gave a written statement following *Miranda* warnings.

Syl. pt. 1 - "Under the provisions of *W.Va.Code*, 17C-5-A-1, *as amended*, a law-enforcement officer may arrest a person and a test for blood alcohol may be administered incident thereto at the direction of the arresting officer who has reasonable grounds to believe the person to have been driving a motor vehicle upon a public highway while under the influence of intoxicating liquor." Syllabus Point 1, *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976).

Syl. pt. 2 - "Good cause, excusing noncompliance with *W.Va.Code*, 17C-19-3, *as amended*, and justifying implementation of the arrest procedures set forth in *W.Va.Code*, 17C-19-4, as amended, includes such reasons as a justice not being readily available or injuries to the offender which require immediate medical attention or hospitalization." Syllabus Point 5, *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976).

Syl. pt. 3 - "An arrest is the taking, seizing or detaining of the person of another (1) by touching or putting hands on him; (2) by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested." Syllabus Point 2, *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976).

Arrest (continued)

Procedural exceptions (continued)

State v. Shugars, (continued)

Here, the officer clearly had probable cause to suspect that the appellant was guilty of a felony. In addition, the lapse of time between the performance of the blood alcohol test and the arrest was twenty-four hours. The appellant was actually charged before the test was performed and he acknowledged in writing within forty-eight hours of the test that he had been advised of the charges prior to the test. Clearly, there was a lawful arrest and the blood test was performed incident thereto.

When occurs

State v. Shugars, 376 S.E.2d 174 (1988) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Arrest, Procedural exceptions, (p. 163) for discussion of topic.

Breathalyzer tests

Deficient samples

State v. Wilkinson, 381 S.E.2d 241 (1989) (Per Curiam)

Appellant was convicted of second offense, driving under the influence of alcohol. The trial court allowed into evidence a breathalyzer sample which the arresting officer called "deficient." The officer administering the test was permitted to testify as to the test's validity. Appellant had apparently been unable to blow a normal amount of air into the machine.

The Court found that the test was performed in accordance with the rules established by the state Department of Health. See *W.Va.Code* 17C-5A- 5; *State v. Dyer*, 160 W.Va. 166, 233 S.E.2d 309 (1977). No error.

[NOTE] In spite of the decision in this case, the Court noted that a deficient sample may, under special circumstances, result in an inaccurate reading and (presumably) be inadmissible. See 3 R. Erwin, *Defense of Drunken Driving Cases* Sec. 24A. 12(8) (3ded. 1989).

DRIVING UNDER THE INFLUENCE

Charges

Prosecution's discretion

State v. Satterfield, 387 S.E.2d 832 (1989) (Neely, J.)

See PROSECUTING ATTORNEY Discretion, Charging accused, (p. 518) for discussion of topic.

Enhancement of administrative penalties

Shingleton v. Romney, 382 S.E.2d 64 (1989) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Prior offenses, Forum to challenge, (p. 166) for discussion of topic.

Indictments

Sufficiency of

State v. Satterfield, 387 S.E.2d 832 (1989) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Prior offenses, Sufficiency of indictment, (p. 168) for discussion of topic.

Municipal offenses

Effect of

Shingleton v. Romney, 382 S.E.2d 64 (1989) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Prior offenses, Forum to challenge, (p. 166) for discussion of topic.

DRIVING UNDER THE INFLUENCE

Prior offenses

Admissibility

State v. Wilkinson, 381 S.E.2d 241 (1989) (Per Curiam)

See EVIDENCE Prior offenses, DUI convictions, (p. 241) for discussion of topic.

Forum to challenge

Shingleton v. Romney, 382 S.E.2d 64 (1989) (Per Curiam)

Appellant protested the refusal of the trial court to vacate 1977 and 1980 convictions for driving while under the influence. He alleged that he appeared without counsel in the two prior convictions. Both convictions were in municipal court; the first, a violation of *W.Va.Code* 17C-5-2, the second a violation of a municipal ordinance.

Before the second conviction appellant waived his right to a lawyer, his right to a jury trial, his right to remain silent, his right to a trial and to a preliminary hearing. The signed waiver also contained a hand-printed acknowledgment that appellant understood he was pleading to a first offense DWI (sic) rather than the second offense charged and that appellant understood he might still lose his license to drive for up to ten years. The Department of Motor Vehicles revoked appellant's license for ten years.

In April 1987, appellant pled nolo contendere to a third conviction and the Department revoked his license for life. Appellant then appealed his two prior convictions to the trial court.

Prior offenses (continued)

Forum to challenge (continued)

Shingleton v. Romney, (continued)

Syl. pt. 1 - "'The proper forum for attacking the constitutional validity of a prior traffic offense conviction when that offense is the foundation for adverse administrative action by the commissioner of motor vehicles is the county in which such a conviction was initially rendered if the conviction is a West Virginia conviction, or the state courts of the state in which the conviction was initially rendered if it is an out-of-state conviction. To the extent that *State ex rel. Vance v. Arthur*, 142 W.Va. 737, 98 S.E.2d 418 (1957) and *State ex rel. Lemley v. Roberts*, 164 W.Va. 457, 260 S.E.2d 850 (1979) are to the contrary, they are overruled.' *Stalnaker v. Roberts*, 168 W.Va. 593, 287 S.E.2d 166 (1981). Syllabus Point 1, *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985).

Syl. pt. 2 - "'The findings of fact of a trial court are entitled to peculiar weight upon appeal and will not be reversed unless they are plainly wrong.' Syllabus Point 6, *Mahoney v. Walter*, 157 W.Va. 882, 205 S.E.2d 692 (1974)." Syllabus Point 4, *Frasher v. Frasher*, 162 W.Va. 338, 249 S.E.2d 513 (1978).

While collateral attacks on prior proceedings are permissible, the Court noted that the procedural standards are less stringent. *Stalnaker v. Roberts*, 168 W.Va. 593, 287 S.E.2d 166 (1981). Appellant was clearly aware that a third conviction for DUI would result in loss of his license for life, even though no duty exists to warn him. *State v. Barker*, 179 W.Va. 194, 366 S.E.2d 642, 647 (1988). Similarly, even though enhanced criminal penalties are not applicable due to a legislative change in 1986, enhanced administrative sanctions are clearly available. *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393, 397. No error.

Prior offenses (continued)

Sufficiency of indictment

State v. Satterfield, 387 S.E.2d 832 (1989) (Neely, J.)

Defendant was initially charged with driving under the influence, second offense. Following proceedings in magistrate court, the prosecution informed defendant that he was aware that she had two prior offenses and offered to allow a plea of guilty to second offense. This offer was refused and defendant was indicted and convicted of DUI, third offense.

Defendant claimed the indictment was defective for failure to adequately set forth the prior offenses.

Syl. pt. 2 - "An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based." Syllabus Point 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

The Court agreed that the prior offenses were not set forth; the indictment was therefore invalid for failure to adequately inform defendant of the charges against her. Reversed and remanded.

Prosecution's discretion in charging

State v. Satterfield, 387 S.E.2d 832 (1989) (Neely, J.)

See PROSECUTING ATTORNEY Discretion, Charging accused, (p. 518) for discussion of topic.

Sentencing

Alternative sentencing available

State v. Kerns, 394 S.E.2d 532 (1990) (McHugh, J.)

See STATUTES Statutory construction, Sentencing, (p. 616) for discussion of topic.

DUE PROCESS

Appeal

Billotti v. Dodrill, 394 S.E.2d 32 (1990) (Brotherton, J.)

See APPEAL Right to, (p. 41) for discussion of topic.

Attorneys

Failure to appeal in timely manner

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See ATTORNEYS Appointment of, Duty to appeal unless relieved, (p. 61) for discussion of topic.

Representation of indigents

Jewell v. Maynard, 383 S.E.2d 536 (1989) (Neely, J.)

See INDIGENTS Appointed counsel, Payment of, (p. 327) for discussion of topic.

Courtroom publicity

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See DENIAL OF FAIR TRIAL Publicity, Still cameras in courtroom, (p. 142) for discussion of topic.

DUE PROCESS

Defendant's right to testify

Waiver of

State v. Neuman, 371 S.E.2d 77 (1988) (McGraw, J.)

Appellant was convicted of first-degree murder. On appeal he claimed that the trial court failed to establish on the record that he had knowingly, intelligently and voluntarily waived his right to testify in his own behalf.

Syl. pt. 3 - The West Virginia Constitution, art. III, section 10, provides a criminal defendant a level of due process protection at least equal to that provided through the fifth and fourteenth amendments to the United States Constitution, and may, in certain circumstances, require higher standards of protection.

Syl. pt. 4 - A criminal defendant's right to give testimony on his own behalf is protected under article three, section ten of our Constitution, as well as the due process provisions of the federal constitution.

Syl. pt. 5 - Certain constitutional rights are so inherently personal and so tied to fundamental concepts of justice that their surrender by anyone other than the accused acting voluntarily, knowingly and intelligently would call into question the fairness of a criminal trial.

Syl. pt. 6 - "Courts indulge every reasonable presumption against waiver of a fundamental constitutional right and will not presume acquiescence in the loss of such fundamental right." Syl. Pt. 2, *State ex rel. May v. Boles*, 149 W.Va. 155, 139 S.E.2d 177 (1964).

Syl. pt. 7 - A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant's waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right.

The Court specifically applied these procedural matters to all prospective cases. Reversible error here.

DUE PROCESS

Indictment delayed for strategic advantage

Hundley v. Ashworth, 382 S.E.2d 573 (1989) (Miller, J.)

Relator was indicted for sexual assault and incest eight years after the acts were alleged to have occurred. He filed a writ of prohibition following denial of his motion to dismiss the indictment, claiming that his right to a speedy trial was denied.

Syl. pt. 1 - "In those situations where there has been no arrest or indictment, the Sixth Amendment right to a speedy trial is not implicated. Yet, the prosecution may have substantially delayed the institution of criminal proceedings causing prejudice to the defendant by way of loss of witnesses or other evidence. In this situation, the Fifth Amendment due process standard is utilized." Syllabus Point 2, *State v. Drachman*, 178 W.Va. 207, 358 S.E.2d 603 (1987).

Syl. pt. 2 - The Due Process Clause of the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution require the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the State's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.

The Court refused to apply the presumptively prejudicial analysis of *State ex rel. Leonard v. Hey*, 269 S.E.2d 394 (W.Va. 1980) and noted that even in that instance the State need only show that the delay was not a deliberate ploy in order to gain an advantage. Here, it was clear that the State had no actual knowledge (notice of abuse to the Department of Human Services was not attributed to the police or prosecution). Writ denied.

Indigents

Compensation for representing

Jewell v. Maynard, 383 S.E.2d 536 (1989) (Neely, J.)

See INDIGENTS Appointed counsel, Payment of, (p. 327) for discussion of topic.

DUE PROCESS

Prosecuting attorney withholding evidence

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

Appellant was convicted of abduction with intent to defile; kidnaping; sexual assault, second-degree; and sexual abuse, first-degree. The prosecution did not disclose the victim's statement that one of the five men who assaulted her took a less active part than the others. Appellant claimed to have participated only out of fear of his companions. He did not become aware of the victim's statement until several months after trial.

Syl. pt. 4 - "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." Syllabus Point 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

The Court found the information here was not clearly exculpatory. No error.

Right against self-incrimination

State v. Fisher, 370 S.E.2d 480 (1988) (Per Curiam)

See SELF-INCRIMINATION Pre-trial silence, (p. 573) for discussion of topic.

Right to expert during witness interview

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See WITNESSES Competency, Examination with expert, (p. 657) for discussion of topic.

DUE PROCESS

Right to hearing

Competency

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

Appellant was convicted of sexual assault and kidnaping. On appeal he claimed that he was denied due process because he was not given a competency hearing prior to trial.

Syl. pt. 5 - There is no due process right to a competency hearing where psychological evidence performed prior to trial revealed that the appellant was aware of his legal rights and able to participate in his defense.

The Court noted that *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), upon which appellant relied, involved a statute requiring a hearing where some showing of incompetence was made. Noting that three mental health professionals had examined appellant, the Court held that West Virginia procedure was followed. No error.

Withholding evidence

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See DUE PROCESS Prosecuting attorney withholding evidence, (p. 172) for discussion of topic.

State v. Hoard, 375 S.E.2d 582 (1988) (Per Curiam)

Appellant was convicted of petit larceny and breaking and entering. On appeal he contended that the prosecution withheld evidence so as to effectively foreclose adequate cross-examination of the main prosecution witness. The witness had been convicted of both felony and misdemeanor charges and had charges pending; the prosecuting attorney gave only information concerning prior felony convictions.

Withholding evidence (continued)

State v. Hoard, (continued)

Syl. pt. 3 - "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." Syllabus Point 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Reversed and remanded.

DUI

Probation

State ex rel. Hagg v. Spillers, 382 S.E.2d 581 (1989) (Miller, J.)

Relator, the prosecuting attorney of Hancock County, sought to prohibit the granting of probation to the respondents, who were convicted of third-offense DUI (see *W.Va.Code* 17C-5-2(i). Respondents relied on *State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 305 S.E.2d 268 (1983), which held that probation is allowed in DUI cases.

Syl. pt. 1 - The 1983 amendment contained in *W.Va.Code*, 17C-5-2(M), has altered *State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 305 S.E.2d 268 (1983), by prohibiting probation, but under this section a court may order release for work or other purposes pursuant to *W.Va.Code*, 62-11 A-1, *et seq.*, if the authorized sentence is for one year or less.

Syl. pt. 2 - When an individual is convicted of third-offense driving under the influence of alcohol, the term of imprisonment set out in *W.Va.Code*, 17C-5-2(i) of confinement in the penitentiary for not less than one nor more than three years is mandatory and is not subject to probation.

Writ granted.

Sentencing

First offense

State ex rel. Hagg v. Spillers, 382 S.E.2d 581 (1989) (Miller, J.)

See DUI Probation, (p. 175) for discussion of topic.

Second offense

State ex rel. Hagg v. Spillers, 382 S.E.2d 581 (1989) (Miller, J.)

See DUI Probation, (p. 175) for discussion of topic.

DUI

Sentencing (continued)

Third offense

State ex rel. Hagg v. Spillers, 382 S.E.2d 581 (1989) (Miller, J.)

See DUI Probation, (p. 175) for discussion of topic.

ELECTIONS

Magistrates

Candidate for circuit clerk

Feltz v. Crabtree, 370 S.E.2d 619 (1988) (Brotherton, J.)

See MAGISTRATE COURT Judicial ethics, Candidacy for circuit clerk, (p. 441) for discussion of topic.

EMBEZZLEMENT

Attorneys

Discipline

Committee on Legal Ethics v. Six, 380 S.E.2d 219 (1989) (Miller, J.)

See ATTORNEYS Professional responsibility, Annulment, (p. 78) for discussion of topic.

EQUAL PROTECTION

Child support

Statute of limitations

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

See PATERNITY *Res judicata*, (p. 465) for discussion of topic.

Indigents' right to

Robertson v. Goldman, 369 S.E.2d 888 (1988) (McGraw, J.)

See INDIGENTS Right to equal protection, (p. 331) for discussion of topic.

Racial discrimination

Jury composition

State v. Marrs, 379 S.E.2d 497 (1989) (Neely, J.)

Defendant, a black man, was convicted of selling marijuana. All four prosecution witnesses were white. The jury venire contained only two black men, one of whom was struck for cause and the other struck peremptorily. Defendant claimed on appeal that use of the peremptory strike denied defendant equal protection of the laws under the Fourteenth Amendment.

Syl. pt. 1 - It is a violation of the Equal Protection Clause of the Fourteenth Amendment to the *U.S. Constitution* for a member of a cognizable racial group to be tried on criminal charges by a jury from which members of his race have been purposely excluded.

Syl. pt. 2 - To establish a *prima facie* case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, "the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defen

State v. Marrs, (continued)

dant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." (Citations omitted.) *Batson v. Kentucky*, 476 U.S. 79 at 96 (1986).

Syl. pt. 3 - The State may defeat a defendant's *prima facie* case of a violation of equal protection due to racial discrimination in selection of a jury by providing non-racial, credible reasons for using its peremptory challenges to strike members of the defendant's race from the jury.

Syl. pt. 4 - "'The plain error doctrine of *W.Va.R.Crim.P.* 52(b), whereby the court may take notice of plain errors or defects affecting substantial rights although they were not brought to the attention of the court, is to be used sparingly and only in those circumstances in which a miscarriage of justice would otherwise result. Syllabus Point 2, *State v. Hatala*, 176 W.Va. 435, 345 S.E.2d 310 (1986).' Syllabus Point 4, *State v. Grubbs*, 178 W.Va. 811, 364 S.E.2d 824 (1987)." Syllabus Point 2, *State v. Fisher*, 179 W.Va. 516, 370 S.E.2d 480 (1988).

Here, the Court refused to believe the prosecution's explanation that she used the peremptory strike because the juror had the same last name as another person accused of a crime; the prosecuting attorney could have asked the entire panel if any relative of theirs was accused of a crime, or could have asked the juror in question individually.

The Court rejected the state's argument that the error was not preserved for appeal because objection was made after the jury was sworn and instructed by the trial court. Using the plain error doctrine, the Court reversed and remanded.

EQUAL PROTECTION

Sexual discrimination

Paternity actions

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

Appellant complained of the dismissal of a paternity action below. Appellant's child was born in November, 1973. She brought a paternity action in September, 1976 but agreed to dismiss the action; an order was entered in July, 1977. In May, 1985, she filed this action. Respondent defended on the basis of *res judicata* and the ten-year paternity statute of limitations (*W.Va.Code* 48-7-4(a).

Syl. pt. 3 - Under equal protection principles, a statute which discriminates based on sex or illegitimacy must be substantially related to an important government objective. This test is one of intermediate scrutiny which rests between the "rational basis" review and the "strict" scrutiny" test.

Syl. pt. 4 - The intermediate test in illegitimacy cases for equal protection purposes under the Fourteenth Amendment to the United States Constitution and Article VI, Section 39 of the West Virginia Constitution requires that the questioned legislation must be substantially related to an important governmental objective.

Syl. pt. 5 - The provision of *W.Va.Code*, 48-7-4(a) (1983), providing for a ten-year statute of limitations, violate the equal protection provisions of the Constitution of the United States and the Constitution of the State of West Virginia and are, therefore, unenforceable.

Suit allowed.

ESTOPPEL

Collateral estoppel in criminal cases

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See COLLATERAL ESTOPPEL Generally, (p. 106) for discussion of topic.

ETHICS

Generally

Committee on Legal Ethics v. Anderson, No. 18804 (2/17/89) (Per Curiam)

See ATTORNEYS Professional responsibility, Obstruction of justice, (p. 82) for discussion of topic.

Committee on Legal Ethics v. Boettner, 394 S.E.2d 735 (1990) (Miller, J.)

See ATTORNEYS Professional responsibility, Mitigation hearing, (p. 80) for discussion of topic.

Committee on Legal Ethics v. Douglas, No. 19008 (7/14/89) (Per Curiam)

See ATTORNEYS Discipline, Frivolous litigation, (p. 70) for discussion of topic.

Committee on Legal Ethics v. Esposito, No. 18181 (7/1/88) (Per Curiam)

See ATTORNEYS Professional responsibility, Moral turpitude, (p. 81) for discussion of topic.

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

See ATTORNEYS Discipline, Conviction of crime, (p. 67) for discussion of topic.

Committee on Legal Ethics v. Six, 380 S.E.2d 219 (1989) (Miller, J.)

See ATTORNEYS Professional responsibility, Annulment, (p. 78) for discussion of topic.

Committee on Legal Ethics v. Wright, No. 18912 (3/27/89) (Per Curiam)

See ATTORNEYS Professional responsibility, Neglect, (p. 82) for discussion of topic.

Generally (continued)

In the Matter of Baughman, 385 S.E.2d 910 (1989) (Neely, J.)

See JUDGES Discipline, Family dispute within judge's family, (p. 381) for discussion of topic.

In the Matter of Crislip, 391 S.E.2d 84 (1990) (Miller, J.)

See JUDGES *Ex parte* dismissal, (p. 389) for discussion of topic.

Committee on Legal Ethics v. Triplett, 378 S.E.2d 82 (1988) (Per Curiam)

See ATTORNEYS Discipline, Fees for pneumoconiosis claims, (p. 69) for discussion of topic.

Judicial discipline

In the Matter of Karr & McCarty, 387 S.E.2d 126 (1989) (McHugh, J.)

See JUDGES Discipline, Solicitation or acceptance of campaign funds, (p. 381) for discussion of topic.

In the Matter of Mendez & Evans, No. 19009 (7/12/89) (Per Curiam)

See JUDGES Discipline, Standard of proof, (p. 382) for discussion of topic.

EVIDENCE

Accomplice's conviction

State v. Mullens, 371 S.E.2d 64 (1988) (Brotherton, J.)

Appellant was convicted of being an accessory before the fact to both first-degree murder and malicious wounding; and to conspiracy to commit murder. She complained of the introduction of her accomplice's conviction (he had pled guilty prior to appellant's trial).

The Court noted that an accomplice's guilty plea is inadmissible as evidence of the defendant's guilt but may be admitted as reflecting on the credibility of the accomplice's testimony at the later proceeding. *State v. Caudill*, 170 W.Va. 74, 289 S.E.2d 748 (1982).

Here, since the accomplice was called as a witness but refused to testify (claiming, erroneously, Fifth Amendment privilege), the plea was not admissible.

Admissibility

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

Appellant was convicted of first-degree murder in the killing of two half-brothers. While being held for trial, appellant, in response to a question by a prison guard, admitted that he had committed the murders. On appeal, he contended that the confession was elicited by the State in violation of his Fifth Amendment right against self-incrimination.

Syl. pt. 5 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 6 - "One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Syl. pt. 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court found that the confession was given voluntarily. No abuse of discretion in admitting the statement.

Admissibility (continued)

Generally

State v. Shugars, 376 S.E.2d 174 (1988) (Per Curiam)

Appellant was convicted of driving under the influence of alcohol, causing a death; and driving under the influence of alcohol, causing bodily injury. One of the crucial pieces of evidence introduced was a wine bottle found on the floor of appellant's vehicle. Appellant objected to the introduction of the bottle as irrelevant, cumulative and prejudicial since he admitted to drinking. The trial court found that the circumstances under which the bottle was found and the location of the bottle at the time of the accident made it relevant and probative.

Syl. pt. 4 - ""Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596, 599 (1983).' Syllabus Point 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983)." Syllabus Point 7, *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985).

No error here.

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

See EVIDENCE Admissibility, Error offered or solicited by counsel, (p. 192) for discussion of topic.

After case presented

State v. Thomas, 374 S.E.2d 719 (1988) (Per Curiam)

Appellant was convicted of delivery of a schedule II controlled substance. He alleged that the trial court erred in allowing the jury to view the scene of the alleged delivery, after the case was presented but before it was submitted to the jury, without allowing him to make a subsequent statement and partial re-enactment of the events.

Admissibility (continued)

After case presented (continued)

State v. Thomas, (continued)

Syl. pt. 1 - "'Whether a party shall be permitted to introduce further evidence after the case has been closed and submitted to the jury, and before the jury returns a verdict, is a matter of sound discretion of the trial court, and its exercise of this discretionary power will not be cause for reversal except in case of the abuse of the discretion, and that it plainly appears that the person making the request has been injured by the refusal.' Syl. pt. 4, *State v. Littleton*, 77 W.Va. 804, 88 S.E. 458 (1916)." Syllabus Point 4, *State v. Sandler*, 175 W.Va. 572, 336 S.E.2d 535 (1985).

Syl. pt. 2 - "Where in the trial of any case it appears to the court that a view of the premises involved in the hearing would enable the jury to arrive at a better conclusion, or would better inform it as to actual conditions, it is proper for the court to allow such view." Syllabus Point 2, *State v. McCausland*, 82 W.Va. 525, 96 S.E. 938 (1918).

Syl. pt. 3 - "'The allowance of a view by the jury is within the discretion of the trial court, and its refusal is not ground for reversal unless it is clearly manifest that a view was necessary to the just decision, and that the refusal operated to the injury of the party asking it.' Point 4, Syllabus, *Compton v. County Court of Marshall County*, 83 W.Va. 745, 99 S.E. 85 [1919]." Syllabus Point 4, *Daugherty v. Baltimore & O.R.R.*, 135 W.Va. 688, 64 S.E.2d 231 (1951).

Viewing the evidence as presented, the Court held that the denial did not prejudice the appellant. No error.

Appeal of ruling

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

See APPEAL Failure to preserve, Failure to develop record, (p. 36) for discussion of topic.

Admissibility (continued)

Character of accused

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Collateral cases, (p. 218) for discussion of topic.

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See EVIDENCE Character of accused, (p. 212) for discussion of topic.

Character evidence of victim

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

Appellant was convicted of first-degree murder in the death of a woman whom he met at a bar and took to his apartment. The trial court excluded testimony relating to the victim's reputation for aggressive behavior; the testimony was proferred to bolster appellant's theory of self-defense.

Syl. pt. 5 - "Rule 404(a)(2) of the West Virginia Rules of Evidence essentially codifies the common[-]law rules on the admission of character evidence of the victim of a crime. In particular, under our traditional rule, a defendant in a homicide, malicious wounding, or assault case, who relies on self-defense or provocation, may introduce evidence concerning the violent or turbulent character of the victim, including prior threats or attacks on the defendant. This is reflected by Syllabus Point 2 of *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596 (1983): 'In a prosecution for murder, where self-defense is relied upon to excuse the homicide, and there is evidence showing, or tending to show, that the deceased was at the time of the killing, making a murderous attack upon the defendant, it is competent for the defense to prove the character or reputation of the deceased as a dangerous and quarrelsome man, and also to prove prior attacks made by the deceased upon him, as well as threats made to other parties against him; and, if the defendant has knowledge of specific acts of violence by the deceased against other parties, he should be allowed to give evidence thereof.' (Citations omitted)." Syl. pt. 2, *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989).

Admissibility (continued)

Character evidence of victim (continued)

State v. Dietz, (continued)

Syl. pt. 6 - It is proper for a trial court to exclude testimony relating to the reputation for aggressiveness and character for violence of the victim in a homicide case where the defendant claims reasonable apprehension of danger, but where the defendant had no prior knowledge of such reputation at the time of the homicide.

Syl. pt. 7 - "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.'" Syl. pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983) (quoting *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596, 599 (1983)).

Here, there was no evidence that appellant knew the victim prior to the killing. The trial court did not abuse its discretion by excluding the evidence as to the victim's reputation for aggressive behavior.

State v. Neuman, 371 S.E.2d 77 (1988) (McGraw, J.)

See EVIDENCE Character of victim, (p. 214) for discussion of topic.

Collateral crimes

State v. Gilbert, 399 S.E.2d 851 (1990) (Per Curiam)

See SEXUAL ATTACKS, Sufficiency of evidence, (p. 604) for discussion of topic.

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Collateral cases, (p. 218) for discussion of topic.

Admissibility (continued)

Confessions

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 114) for discussion of topic.

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Confession of accomplice

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

See CONFESSIONS Admissibility, Accomplice, (p. 110) for discussion of topic.

Confessions to police

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 114) for discussion of topic.

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Admissibility (continued)

Courtroom demonstrations

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

Appellant was convicted of first-degree murder. At trial the prosecuting attorney presented a physical demonstration showing the position of all furnishings in the room where the killing took place, including the height of the bed where the victim lay and the actual dresser on which the weapon rested. Appellant claimed error.

Syl. pt. 7 - "It is ordinarily within the discretion of the trial court to permit or to refuse to permit experiments or demonstrations to be conducted before the jury, either in or out of the court room, and such discretion will not be interfered with unless it is apparent that it has been abused." Syl. pt. 5, *State v. Taft*, 144 W.Va. 704, 110 S.E.2d 727 (1959).

Syl. pt. 8 - It is not error for a trial court, in a homicide case, to allow the State to conduct a demonstration in the presence of the jury which re-creates the scene of the homicide by arranging articles in substantially the same position as they were at the time of the homicide, if the demonstration allows the jury to more intelligently consider the State's theory of the case or to rebut the defendant's theory of the case and if the probative value of such demonstration is not substantially outweighed by the danger of unfair prejudice.

The Court found the demonstration here to be probative. No error.

DNA tests

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SCIENTIFIC TESTS DNA tests, Admissibility, (p. 558) for discussion of topic.

Admissibility (continued)

Error offered or solicited by counsel

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

Appellant was convicted of first-degree murder in the shooting death of his wife. At trial a prosecution witness was cross-examined as to her knowledge of appellant's saying anything about killing anyone. The witness responded that appellant talked about shooting his first wife in 1967. A pretrial motion in limine prohibited the prosecution from introducing evidence of this prior shooting.

The trial court found the error to have been elicited by the defense and instructed the jury that the shooting was not to be considered for any purpose. Appellant's motion for a mistrial was denied.

Syl. pt. 3 - "An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case." Syl. Pt. 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971).

Syl. pt. 4 - "'Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error.' Syl. Pt. 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966)." Syl. Pt. 5, *State v. Haller*, 178 W.Va. 642, 363 S.E.2d 719 (1987)".

No error.

Exclusionary rule

State v. Hefner, 376 S.E.2d 647 (1988) (McGraw, J.)

See SEARCH AND SEIZURE Warrantless search, Burden of state to show exception, (p. 566) for discussion of topic.

Admissibility (continued)

Expert testimony

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SCIENTIFIC TESTS DNA tests, Admissibility, (p. 558) for discussion of topic.

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Expert witnesses, Psychologist's testimony in child sexual abuse case, (p. 226) for discussion of topic.

Flight

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

Defendant was convicted of murder. The trial judge admitted evidence of his flight following an *in camera* hearing during which the prosecution indicated that the evidence would be limited to time spent in Florida following defendant's receipt of a telephone call that he was wanted.

Syl. pt. 5 - "In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should hold an *in camera* hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect." Syllabus Point 6, *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981).

No abuse of discretion here.

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

Appellant was convicted of grand larceny, aggravated robbery, burglary, arson and felony-murder. At trial evidence was admitted of appellant's flight from the scene of the crimes.

State v. Plumley, (continued)

Syl. pt. 6 - "In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should hold an *in camera* hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect." Syllabus Point 6, *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981).

The Court found that the trial court did not abuse its discretion in finding the evidence of flight admissible. No error.

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

Defendant was convicted of armed robbery of a convenience store. On appeal he complained that an instruction was given on flight without evidence adduced at trial.

Syl. pt. 5 - "In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should hold an *in camera* hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect." Syllabus Point 6, *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981).

The defendant's neighbor testified that the defendant had not been seen for three months from the date of the robbery when defendant's wife returned to remove personal effects. Defendant admitted leaving the area after hearing the robbery discussed on his CB scanner. No error.

EVIDENCE

Admissibility (continued)

Flight (continued)

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

Appellant was convicted of sexual abuse, sexual assault, aggravated robbery and kidnaping. During the pretrial investigation, police searched appellant's home and work place and told appellant, prior to arrest, that a warrant would be obtained to get a sample of his hair. Appellant was arrested attempting to cross into another state.

Syl. pt. 11 - "In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge." Syl. Pt. 6, *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981).

The trial court gave a cautionary instruction. No error.

Fruit of unlawful arrest

State v. Hefner, 376 S.E.2d 647 (1988) (McGraw, J.)

See SEARCH AND SEIZURE Warrantless search, Burden of state to show exception, (p. 566) for discussion of topic.

Hearsay

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Hearsay, Generally, (p. 231) for discussion of topic.

Admissibility (continued)

Identifications out-of-court

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See IDENTIFICATION Out-of-court, Admissibility, (p. 308) for discussion of topic.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See IDENTIFICATION Out-of-court, Admissibility, (p. 308) for discussion of topic.

Immunity-induced statements

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Invited error

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Arson, (p. 625) for discussion of topic.

Involuntary confessions

State v. Randolph, 370 S.E.2d 741 (1988) (Per Curiam)

Appellant was convicted of receiving and transferring stolen property. Following detainment he signed a "waiver of rights" form and a written confession admitting the purchase of the stolen merchandise. He was never advised of the potential charges or his *Miranda* rights.

Admissibility (continued)

Involuntary confessions (continued)

State v. Randolph, (continued)

The Court noted that some information must be given to a defendant in order for waiver of *Miranda* rights to be truly voluntary. See *State v. Goff*, 169 W.Va. 778, 289 S.E.2d 473 (1982). The Court concluded that the totality of the circumstances here showed that the defendant had not knowingly and voluntarily waived his *Miranda* rights.

Syl. pt. - "A confession that has been found to be involuntary in the sense that it was not the product of the freewill of the defendant cannot be used by the State for any purpose at trial." Syllabus Point 2, *State v. Goff*, 169 W.Va. 778, 289 S.E.2d 473 (1982).

Reversed and remanded.

Motion in limine

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See APPEAL Evidence, Motion in limine, (p. 32) for discussion of topic.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See APPEAL Evidence, Objection to ruling, (p. 33) for discussion of topic.

Motive or intent

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See EVIDENCE Character of accused, (p. 212) for discussion of topic.

Admissibility (continued)

Objection to ruling

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See APPEAL Evidence, Motion in limine, (p. 32) for discussion of topic.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See APPEAL Evidence, Objection to ruling, (p. 33) for discussion of topic.

Obtained without transfer hearing

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See EXTRADITION Hearing prior to, (p. 259) for discussion of topic.

Opinion of expert

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

See EVIDENCE Expert witnesses, Admissibility of opinion, (p. 225) for discussion of topic.

Other crimes

State v. Robinette, 383 S.E.2d 32 (1989) (Miller, J.)

Appellant was convicted of first-degree murder. On appeal he claimed that the trial court erred in allowing introduction of false statements he made on an employment application.

Admissibility (continued)

Other crimes (continued)

State v. Robinette, (continued)

Syl. pt. 1 - Rule 404(b) of the West Virginia Rules of Evidence provides that evidence of other crimes, wrongs, or acts is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This rule, recognized in our law prior to the adoption of our Rules of Evidence, permits such evidence to be utilized against a defendant in a criminal prosecution.

Syl. pt. 2 - Evidence of other crimes or wrongs admissible under Rule 404(b) of the West Virginia Rules of Evidence is subject to the provisions of Rule 403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste or time, or needless presentation of cumulative evidence." This balancing test existed in our prior law.

The Court noted that appellant had put his credibility in issue by testifying; more particularly, he had testified as to his employment. His answers therefore made relevant the falsifying of his employment application. The only true issue was the avoidance of prejudice. Other far more damaging evidence reflecting on appellant's credibility was admitted without objection. The Court found no prejudice in the admission of the false statements.

Photographs

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

Defendant was convicted of murder. Photographs of the murder scene taken two months after the murder were admitted over counsel's objections to markings on the photographs. Additional evidence was allowed concerning the markings.

Admissibility (continued)

Photographs (continued)

State v. Deskins, (continued)

Syl. pt. 4 - "'As a general rule photographs of persons, things, and places, when duly verified and shown by intrinsic evidence to be faithful representations of the objects they purport to portray, are admissible in evidence as aids to the jury in understanding the evidence; and whether a particular photograph or groups of photographs should be admitted in evidence rests in the sound discretion of the trial court and its ruling on the question of the admissibility of such evidence will be upheld unless it clearly appears that its discretion has been abused.' Syl. pt. 1, *Thrasher v. Amere Gas Utilities Co.*, 138 W.Va. 166, 75 S.E.2d 376 (1953), appeal dismissed, 347 U.S. 910, 74 S.Ct. 478, 98 L.Ed. 1067 (1954)." Syllabus Point 2, *State v. Dunn*, 162 W.Va. 63, 246 S.E.2d 245 (1978).

No abuse of discretion here.

Polygraph tests

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See EVIDENCE Polygraph tests, (p. 239) for discussion of topic.

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See EVIDENCE Polygraph tests, (p. 240) for discussion of topic.

Prejudicial

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

During appellant's trial on charges of child sexual assault testimony was allowed as to the victim's complaints and physical condition while at school. Appellant contended that the testimony was cumulative and prejudicial and therefore excludible pursuant to Rule 403 of the Rules of Evidence.

Admissibility (continued)

Prejudicial (continued)

State v. Murray, (continued)

The Court found that the evidence was sensitive but not prejudicial so as to require exclusion. Further, the physical complaints gave rise to the proof of a venereal disease, a clearly relevant factor in sexual abuse of a minor. The testimony of two witnesses was not cumulative. No error.

Prior DUI convictions

State v. Wilkinson, 381 S.E.2d 241 (1989) (Per Curiam)

See EVIDENCE Prior offenses, DUI convictions, (p. 241) for discussion of topic.

Prior inconsistent statement

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

Appellant was convicted of first-degree murder. At trial a prosecution witness' prior statement, in a sworn affidavit, that appellant admitted committing the murder was admitted to evidence. The witness admitted making the statement but claimed that he lied because of police coercion. No objection was made nor was a request made for a cautionary instruction.

A second prosecution witness was read a statement for "impeachment" purposes which she had given to the police. The statement contained a description of conversation the witness had with her mother which described a conversation the mother had with appellant.

Syl. pt. 1 - Under Rule 801(d)(1)(A) of the West Virginia Rules of Evidence, a witness's prior inconsistent statement is not hearsay and may be used as substantive evidence if it meets certain prerequisites. First, the statement must have been given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Second, the statement must be inconsistent with the witness's testimony at trial, and the witness must be subject to cross-examination.

State v. Collins, (continued)

Syl. pt. 2 - A prior statement of a witness, even if given under oath, during the course of a police interrogation is not a statement made subject to the penalty of perjury or during a trial, hearing, or other proceeding as required by Rule 801(d)(1)(A) of the West Virginia Rules of Evidence.

Syl. pt. 3 - Rule 607 of the West Virginia Rules of Evidence allows a party, including the one who called the witness, to impeach a witness by a prior inconsistent statement.

Syl. pt. 4 - Rule 607 of the West Virginia Rules of Evidence does not free either party to introduce otherwise inadmissible evidence into trial under the guise of impeachment.

Syl. pt. 5 - The balancing test in Rule 403 of the West Virginia Rules of Evidence should be used to determine whether impeachment evidence should be barred because its prejudicial effect outweighs its impeachment value.

Syl. pt. 6 - "The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syllabus Point 4, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

The first statement here was not given subject to perjury, nor at a trial, hearing, or as part of a deposition. *State v. Spadafore*, 159 W.Va. 236, 220 S.E.2d 655 (1975). Rule 801(d)(1)(A) is therefore not available to admit the statement. Moreover, if admission is sought under Rule 607 for impeachment purposes, the court must use a Rule 403 balancing test to determine whether the prejudicial effect outweighs the probative value of the evidence. No balancing was done here, nor was a cautionary instruction given as required. *State v. Caudill*, 170 W.Va. 74, 289 S.E.2d 748 (1982). Using the doctrine of plain error, the Court found error in the trial court's failure to give a cautionary instruction.

Admissibility (continued)

Prior inconsistent statement (continued)

State v. Collins, (continued)

The second statement was very prejudicial to appellant. Again, no balancing test was used. Reversed and remanded.

State v. Moore, 409 S.E.2d 490 (1990) (Per Curiam)

Appellant was convicted of two felony counts of delivery of a controlled substance and one misdemeanor count of possession of a controlled substance. At trial three of the five juveniles testifying against appellant recanted statements given to the arresting officer. One stated he did not remember his earlier statement. The prior inconsistent statements were admitted into evidence without objection.

During closing argument the prosecuting attorney characterized the prior statements as the "best evidence" and gave his opinion that the juveniles lied during their trial testimony.

Syl. pt. 1 - "Under Rule 801(d)(1)(A) of the West Virginia Rules of Evidence, a witness's prior inconsistent statement is not hearsay and may be used as substantive evidence if it meets certain prerequisites. First, the statement must have been given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Second, the statement must be inconsistent with the witness's testimony at trial, and the witness must be subject to cross-examination." Syl. pt. 1, *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (1990).

Syl. pt. 2 - "'The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice or error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.' Syllabus Point 4, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988)." Syl. pt. 6, *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (1990).

Admissibility (continued)

Prior inconsistent statement (continued)

State v. Moore, (continued)

Syl. pt. 3 - "'The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.' Syl. Pt. 3, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977)." Syl. pt. 1, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

Syl. pt. 4 - "It is improper for a prosecutor in this State to '[A]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness . . . or as to the guilt or innocence of the accused. . . .' ABA Code DR7-106(C)(4) in part." Syl. pt. 3, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

This evidence was clearly to be used only for impeachment purposes. The evidence was crucial to the prosecution and severely prejudiced appellant. The prosecuting attorney's references during closing argument compounded the prejudice. Reversed and remanded.

Prior voluntary statement

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

Defendant was convicted of first-degree murder. He was arrested in Florida on unrelated charges. After that arrest, but prior to returning to West Virginia, defendant made three confessions to police without counsel. The first confession was suppressed for all purposes. The second, made after defendant requested counsel, was a result of police- initiated questioning and was therefore ruled admissible only for cross-examination or impeachment purposes. Although held admissible, the third confession was used only for impeachment.

Admissibility (continued)

Prior voluntary statement (continued)

State v. Deskins, (continued)

Defendant contended on appeal that both statements were taken in violation of his Fifth and Sixth Amendment rights and should therefore have been inadmissible for all purposes.

Syl. pt. 1 - "'Where a person has been accused of committing a crime makes a voluntary statement that is inadmissible as evidence in the State's case in chief because the statement was made after the accused had requested a lawyer, the statement may be admissible solely for impeachment purposes when the accused takes the stand at his trial and offers testimony contradicting the prior voluntary statement knowing that such prior voluntary statement is inadmissible as evidence in the State's case in chief.' Syllabus Point 4, *State v. Goodmon*, 170 W.Va. 123, 290 S.E.2d 260 (1981)." Syllabus Point 1, *State v. Randle*, 179 W.Va. 242, 366 S.E.2d 750 (1988).

The Court held the use of the prior statements permissible here.

Rebuttal evidence

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

Appellant was convicted of first-degree murder. Appellant and the victim were alone in appellant's apartment at the time of the killing. Appellant claimed that the victim attacked him and that he killed her in self-defense. Both were intoxicated.

Testimony given by Dr. Irwin Sopher, the State's Chief Medical Examiner, indicated that the victim was strangled and that an earring was found in the victim's vagina. No evidence of sexual activity was found. The victim's blood alcohol level was .24. Dr. Sopher went on to testify, during rebuttal of appellant's expert witness, as to appellant's apparent psychosexual motive, based on the finding of the earring.

State v. Dietz, (continued)

Syl. pt. 1 - "The admissibility of evidence as rebuttal is within the sound direction of the trial court, and the exercise of such discretion does not constitute ground for reversal unless it is prejudicial to the defendant." Syl. pt. 4, *State v. Blankenship*, 137 W.Va. 1, 69 S.E.2d 398 (1952), *overruled on another point*, *State v. McAboy*, 160 W.Va. 497, 498 n.1, 236 S.E.2d 431, 432 n.1 (1977).

Syl. pt. 2 - Where a criminal defendant's witness on direct examination raises a material matter, and on cross-examination testifies adversely to the prosecution, it is proper for the trial court to allow the prosecution to present rebuttal evidence as to such matter.

Syl. pt. 3 - "Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Syl. pt. 5 *Overton v. Fields*, 145 W.Va. 797, 117 S.E.2d 598 (1960).

Syl. pt. 4 - In a homicide case a medical examiner may be qualified to state an opinion as to whether the homicide was of a psychosexual type. Such qualification should be based upon the medical examiner's: post- mortem examination or a review of the report thereof; knowledge of psychosexual types of homicide; and experience in post-mortem examinations upon similarly situated victims. Whether a medical examiner is qualified in this regard is a determination to be made by the trial court, and, unless the trial court has abused its discretion, this Court will not disturb the trial court's ruling.

The Court noted that the *Federal Rules of Evidence* provide that an expert witness may not state his opinion with regard to the state of mind of the defendant; this issue is for the trier of fact. *F.R.E.* Rule 704(b). West Virginia, although adopting subdivision (a) of this rule, does not presently embrace (b).

Here, the testimony of Dr. Sopher was clearly related to an issue raised by appellant's own witness as to the sexual motives of the killing. The post-mortem report included the finding of the earring. No error.

State v. White, 383 S.E.2d 87 (1989) (Per Curiam)

Appellant was convicted of grand larceny. She claimed that the trial court erred in admitting rebuttal evidence concerning the time when appellant was seen in the vicinity of the crime. A neighbor was allowed to testify that he heard a gunshot, found a dog which had been shot and was therefore on his porch at 1:00 a.m. when he saw appellant. Likewise, the arresting officer was allowed to testify that he was in the area investigating a report of a wounded dog at approximately 1:23 a.m. Appellant claimed that the evidence was prejudicial and irrelevant, since it seemed designed to show appellant was engaged in other crimes having no connection to the grand larceny charges.

Syl. pt. 1 - "'The admissibility of evidence as rebuttal is within the sound discretion of the trial court, and the exercise of such discretion does not constitute ground for reversal unless it is prejudicial to the defendant.' Syl. pt. 4, *State v. Blankenship*, 137 W.Va. 1, 69 S.E.2d 398 (1952), *overruled on other grounds*, *State v. McAboy*, 160 W.Va. 497, 236 S.E.2 431, 432 (1977)." Syllabus Point 4, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

Although the evidence here was capable of varying interpretations, the Court found no prejudice. No abuse of discretion.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

Appellant was convicted of various counts of sexual abuse, sexual assault, aggravated robbery and kidnaping. At trial, the court refused to allow defense testimony relating to whether appellant had a beard at the time of the incidents. Appellant had not presented the evidence in his case in chief. The prosecution was known to have witnesses to show that appellant was bearded.

Syl. pt. 12 - "The admissibility of evidence as rebuttal is within the sound discretion of the trial court, and the exercise of such discretion does not constitute ground for reversal unless it is prejudicial to the defendant." Syl. Pt. 4, *State v. Massey*, 178 W.Va. 427, 359 S.E.2d 865 (1983).

Admissibility (continued)

Rebuttal evidence (continued)

State v. Woodall, (continued)

The Court noted that appellant had made the contention that he was without a beard at the time the crimes were committed; since the defense could have called additional witnesses during its case in chief, refusing to allow those witnesses to testify on surrebuttal was not error.

Scientific tests

State v. Wilkinson, 381 S.E.2d 241 (1989) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Breathalyzer tests, Deficient samples, (p. 164) for discussion of topic.

Spontaneous declaration

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 114) for discussion of topic.

Standard for review

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Generally, (p. 241) for discussion of topic.

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

See EVIDENCE Admissibility, Error offered or solicited by counsel, (p. 192) for discussion of topic.

Admissibility (continued)

Statement at scene of accident

State v. Preece, 383 S.E.2d 815 (1989) (McHugh, J.)

See SELF-INCRIMINATION *Miranda* warnings, Traffic accident, (p. 572) for discussion of topic.

Trial court's discretion

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

Appellant was convicted of manufacturing a controlled substance and of possession with intent to deliver. The trial court permitted new evidence to be presented on redirect.

Syl. pt. 5 - "'Rulings on the admissibility of evidence are largely within a trial court's discretion and should not be disturbed unless there has been an abuse of discretion.'" Syl. pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983), *quoting*, *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596, 599 (1983).

The Court noted that matters introduced during cross-examination may be covered during redirect. Also, matters not covered during cross may be allowed at the discretion of the trial court. See *F. Cleckley*, *Handbook on Evidence for West Virginia Lawyers* (3.4(A), at 79 (2d.ed. 1986). Here, the trial court was within its discretion in allowing the evidence.

Admissibility (continued)

Video tapes and motion pictures

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

Appellant was convicted of incest. A videotape of a defense witness was admitted to evidence to show a prior inconsistent statement. At trial the witness, one of appellant's children, recanted her taped statements that her father had sexually assaulted her. She claimed at trial that she only made the statements because of coercion by the investigating officer.

The trial court admitted the tape into evidence and gave a limiting instruction that the tape was to be considered solely on the issue of the witness' credibility, not as to the truth or falsity of the statements.

Syl. pt. 1 - "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. 2 - A videotaped interview containing a prior inconsistent statement of a witness who claims to have been under duress when making such statement or coerced into making such statement is admissible into evidence if: (1) the contents thereon will assist the jury in deciding the witness' credibility with respect to whether the witness was under duress when making such statement or coerced into making such statement; (2) the trial court instructs the jury that the videotaped interview is to be considered only for purposes of deciding the witness' credibility on the issue of duress or coercion and not as substantive evidence; and (3) the probative value of the videotaped interview is not outweighed by the danger of unfair prejudice.

Syl. pt. 3 - "The balancing test in Rule 403 of the West Virginia Rules of Evidence should be used to determine whether impeachment evidence should be barred because its prejudicial effect outweighs its impeachment value." Syl. pt. 5, *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (1990).

The Court noted that the requirements of Rule 613 of the Rules of Evidence were met: the witness was available in court to testify as to the contents of the tape. The witness' acknowledgment of the prior statement did not make the admission of the tape cumulative; the tape allowed the jury to observe the witness and the officer immediately after the incident and compare her state-

Admissibility (continued)

Video tapes and motion pictures (continued)

State v. King, (continued)

ments then with her testimony in court. Because of the trial court's limiting instruction, the Court rejected appellant's claim that the tape was hearsay.

On balance, admission of the tape did not unduly prejudice appellant; the tape's probative value outweighed any possible prejudice. The mention of collateral crimes in the tape was not error because the tape was introduced on the issue of credibility, not to show appellant's lustful disposition toward the victim. See *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). No error.

View of premises

State v. Thomas, 374 S.E.2d 719 (1988) (Per Curiam)

See EVIDENCE Admissibility, After case presented, (p. 186) for discussion of topic.

Voluntary confession

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 113) for discussion of topic.

Admissions against interest

Proof of voluntariness

State v. Stewart, 375 S.E.2d 805 (1988) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Burden of proof, (p. 584) for discussion of topic.

EVIDENCE

Character of accused

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

Appellant was convicted of kidnaping, second-degree murder and third degree arson. The day of her disappearance, the victim had received a telephone call from a man claiming to be a magistrate, asking her to meet with him to discuss certain checks. She also received a call from a man claiming to be an undercover officer with information about investigation of the victim's business for liquor licensing violations. The victim left her business after receiving the calls and was never seen again.

At the time of the killing both local magistrates were female. Appellant was observed making telephone calls on public pay phones the day of the killing. Several other women in the area received unusual calls that day. In addition, two sets of calls were made to other young women in the area directing them to go to secluded places. These calls were made between 28 September 1987 and late November, 1987; and between 1 February 1988 and 17 February 1988, the day the victim disappeared.

The calls directed the women to areas near appellant's then-current residences.

Appellant's neighbor testified that she heard screams and a gunshot from appellant's trailer the same day. She also observed appellant burning something in his back yard.

Appellant objected to introduction of evidence of over 200 telephone calls to bookstores and libraries across the country, during which he posed as a doctor seeking information regarding anal sex.

Syl. pt. 2 - "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b), *W.Va.R.of Evid*. [1985].

Here, the evidence was offered merely to show motive and intent. In conjunction with the local calls to young women, the evidence was probative; even though it was prejudicial as to the murder and arson charges it was admissible with regard to kidnaping. No error.

Character of accused (continued)

Generally

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See EVIDENCE Collateral crimes, (p. 219) for discussion of topic.

State v. Marrs, 379 S.E.2d 497 (1989) (Neely, J.)

See EVIDENCE Reputation for selling drugs, (p. 245) for discussion of topic.

State v. Robinette, 383 S.E.2d 32 (1989) (Miller, J.)

See EVIDENCE Admissibility, Other crimes, (p. 198) for discussion of topic.

Limits on cross-examination

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

Defendant was convicted of involuntary manslaughter. She asserted that the trial court erred in allowing cross-examination of defense witnesses as to whether the witnesses were aware that defendant had shot at her ex-husband.

Syl. pt. 1 - "The cross-examination of a defendant's character witnesses with regard to questions as to the witness's knowledge of specific instances of the defendant's misconduct is confined by certain limitations. There must initially be, by way of an *in camera* hearing, a disclosure of the proposed specific misconduct questions. The State must produce documents or witnesses from which the court may determine whether there is a good faith basis in fact that the misconduct actually occurred and would have been known to some degree in the community.

A second limitation requires that the specific misconduct impeachment relate to facts which would bear upon the character traits that have been placed in issue by the character testimony on direct examination. Finally, the court must make the ultimate determination as to whether the probative value of the defendant's specific incident of misconduct, which is the subject of the cross-examination, outweighs its prejudicial value." Syllabus Point 4, *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987).

Character of accused (continued)

Limits on cross-examination (continued)

State v. Brown, (continued)

Here, no *in camera* hearing took place, nor did the trial court indicate that limiting instructions would be given. The Court found error, but held the error to be harmless.

Defendant was convicted of involuntary manslaughter. She asserts that the trial court unlawfully restricted her right to introduce evidence of the character and reputation of the decedent in order to show that she acted in self-defense.

The Court noted that evidence of a person's character may be introduced pursuant to Rule 405(b) of the West Virginia Rules of Evidence when that character is an essential element of a charge or defense. Here, the record showed that the decedent was violent toward many others, including his own mother. Rule 403 allows evidence to be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice...."

The excluded evidence was cumulative; no error.

Character of victim

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Character of victim (p. 188) for discussion of topic.

State v. Neuman, 371 S.E.2d 77 (1988) (McGraw, J.)

Appellant was found guilty of first-degree murder. At trial, the prosecution established that appellant had been injured in a fight with the victim one year before the killing. Over defense counsel's objection, three witnesses were allowed to testify as to the victim's peaceful character.

Character of victim (continued)

State v. Neuman, (continued)

Syl. pt. 1 - "Until attacked by the defense, the deceased's character for peaceable and quiet conduct is presumed to have been good, and the state may not make it a subject of primary proof." Syl. Pt. 4, *State v. Arrington*, 88 W.Va. 152, 106 S.E. 445 (1921).

Syl. pt. 2 - It is improper for the prosecution to offer evidence of the victim's peacefulness until after the defense has offered evidence which either attacks a pertinent character trait of the victim or tends to show that the victim was the first aggressor.

See also, *State v. Welker*, 178 W.Va. 47, 357 S.E.2d 240 (1987)

Here, since no claim of self-defense was raised, nor any attack made on the victim's character, this evidence was improper. Reversible error.

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

Appellant was convicted of unlawful assault. The trial court refused to allow into evidence the victim's prior burglary convictions, offered for the purpose of showing the victim's violent nature. Appellant assigned error on appeal.

Syl. pt. 2 - Rule 404(a)(2) of the West Virginia Rules of Evidence essentially codifies the common law rules on the admission of character evidence of the victim of a crime. In particular, under our traditional rule, a defendant in a homicide, malicious wounding, or assault case, who relies on self-defense or provocation, may introduce evidence concerning the violent or turbulent character of the victim, including prior threats or attacks on the defendant. This is reflected by Syllabus Point 2 of *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596 (1983):

> "In a prosecution for murder, where self- defense is relied upon to excuse the homicide, and there is evidence showing, or tending to show, that the deceased was at the time of the killing, making a murderous attack upon the defendant, it is competent for the defense to prove the character or reputation of the deceased as a dangerous and quarrelsome man, and also to prove prior attacks made by the deceased upon him as well

Character of victim (continued)

State v. Woodson, (continued)

> as threats made to another parties against him; and, if the defendant has knowledge of specific acts of violence by the deceased against other parties, he should be allowed to give evidence thereof." (Citations omitted).

Syl. pt. 3 - Under Rule 405(b) of the West Virginia Rules of Evidence, a defendant in a criminal case who relies on self-defense or provocation may introduce specific acts of violence or threats made against him by the victim and, if the defendant has knowledge of specific acts of violence against third parties by the victim, the defendant may offer such evidence.

Here, however, the prior convictions relate to crimes which do not involve violence to the person. No error.

Rebuttal to general character evidence

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

Appellant was convicted of sexual abuse. At trial appellant's twenty- nine year old niece testified that appellant had sexually molested her twenty years earlier and that he was neither a moral nor a law abiding person. The testimony was admitted in rebuttal to appellant's general character evidence, including his own testimony.

Syl. pt. 1 - When general character evidence is adduced, rebuttal character witnesses may testify only as to reputation and to opinion; rebuttal testimony pertaining to specific acts is not allowed.

See Rule 405(a) of the Rules of Evidence. The Court noted that cross-examination as to specific conduct is allowed; here, however, the specific instances were introduced in rebuttal. In addition, the acts alleged here were too remote in time from the alleged criminal acts at issue. Reversed and remanded.

EVIDENCE

Circumstantial

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 626) for discussion of topic.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 627) for discussion of topic.

Sufficiency for conviction

State v. Robinette, 383 S.E.2d 32 (1989) (Miller, J.)

Appellant was convicted of first-degree murder. On appeal he contested the sufficiency of the evidence to convict.

Syl. pt. 3 - "In a criminal case, a verdict of guilt will not be set aside on the ground that is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 4 - "'If, on a trial for murder, the evidence is wholly circumstantial, but as to time, place, motive, means, and conduct it concurs in pointing to the accused as the perpetrator of the crime, he (or she) may properly be convicted.' *State v. Beale*, 104 W.Va. 617, 632-33, 141 S.E. 7, 13 (1927)." Syllabus Point 4, *State v. Phillips*, 176 W.Va. 244, 342 S.E.2d 210 (1986).

The Court held the evidence here was sufficient to convict.

Circumstantial (continued)

Sufficiency of

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See EVIDENCE Sufficiency, For conviction, (p. 249) for discussion of topic.

Collateral cases

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

Appellant was convicted of two counts of first-degree sexual assault and two counts of first-degree sexual abuse involving two of his children. At trial evidence of appellant's sexually-related behavior was introduced: specifically, that appellant fondled his baby son; that he made long distance calls to sex clubs, at times making his children listen; that his wife found his infant daughter's underwear with semen stains; that he would frequently pat the front of his pants; that he would masturbate following sex with his wife; that he would lean against the spin cycle of a washing machine for sexual gratification; and that he would masturbate in front of his son while looking at pornographic magazines.

Appellant contended that the evidence was highly prejudicial and irrelevant.

Syl. pt. 1 - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *W.Va.R.Evid.* 404(b).

Syl. pt. 2 - Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. To the extent that this conflicts with our decision in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986), it is overruled.

Collateral cases (continued)

State v. Edward Charles L. Sr., (continued)

Syl. pt. 3 - "'Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.'

Syllabus Point 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979), *cert denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.E.2d 320 (1980)." Syl. Pt. 3 *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990) (quoting Syl. Pt. 6, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987)).

The Court found several of the collateral acts took place in the children's presence and close in time to the acts alleged here. No error in admitting them. Further, the probative value of the evidence outweighed any potential prejudice. No error.

However, the evidence of masturbation following sex with his wife and leaning against the washing machine was not relevant; error in admitting that evidence because the acts were not related to the children. Nonetheless, the error was harmless.

Collateral crimes

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

Appellant was convicted of kidnaping, abduction with intent to defile and burglary. On appeal he objected to the introduction of evidence that he had committed acts of violence against the victim in the past. These charges were not part of the indictment.

Citing Rule 404(b) of the West Virginia Rules of Evidence, the Court noted that:

Collateral crimes (continued)

State v. Hanna, (continued)

> "The purpose of the rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other crimes, and to preclude the inference that because he had committed other crimes previously, he was more liable to commit the crime for which he is presently being indicted an tried. *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974); *State v. Harris*, 166 W.Va. 72, 76, 272 S.E.2d 471, 474 (1980)."

The Court further noted that evidence of other crimes may always be excluded if its probative value is outweighed by the danger of prejudice. Rule 403, *W.Va.R.Evid*. *State v. Nicholson*, 162 W.Va. 750, 252 S.E.2d 894 (1979). *State v. Gum*, 172 W.Va. 534, 309 S.E.2d 32 (1983). *State v. Rector*, 167 W.Va. 748, 280 S.E.2d 597 (1981). *State v. Sette*, 161 W.Va. 384, 242 S.E.2d 464 (1978).

Here, the evidence of past violent behavior toward the victim was admissible to show that the victim's actions were not consenual. *State v. Lucas*, 178 W.Va. 686, 364 S.E.2d 12 (1987); *State v. Pancake*, 170 W.Va. 690, 296 S.E.2d 37 (1982). The Court found no abuse of discretion in admitting the evidence; its prejudicial effect did not outweigh its probative value.

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

Appellant was convicted of several felony offenses. Among other objections, he complained that evidence of collateral crimes was allowed at trial, in violation of a pretrial motion in limine.

Syl. pt. 3 - "Subject to exceptions, it is a well-established commonlaw rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, unless such other offenses are an element of or are legally connected with the offense for which the accused is on trial." Syllabus Point 11, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Collateral crimes (continued)

State v. Johnson, (continued)

Here, the Court held that the evidence was sufficiently connected with the crime at issue and was of sufficient probative value to outweigh any possible prejudice. The collateral crimes involved purchase and use of drugs and the offenses charged here were breaking and entering, grand larceny and conspiracy to commit breaking and entering and grand larceny. The prosecution introduced evidence to show that the breaking and entering was motivated by the desire to purchase drugs.

Admissibility

State v. Gilbert, 399 S.E.2d 851 (1990) (Per Curiam)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 604) for discussion of topic.

Competency of witness to testify

State v. Stacy, 371 S.E.2d 614 (1988) (Neely, J.)

See WITNESSES Competency, Children, (p. 656) for discussion of topic.

Confessions

Admissibility

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See CONFESSIONS Voluntariness, (p. 112) for discussion of topic.

Confessions (continued)

Proof of voluntariness

State v. Stewart, 375 S.E.2d 805 (1988) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Burden of proof, (p. 584) for discussion of topic.

Use by jury during deliberations

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See JURY Exhibits, Use during deliberation, (p. 415) for discussion of topic.

Contraband

State v. Forshey, 386 S.E.2d 15 (1989) (Workman, J.)

See SEARCH AND SEIZURE Exclusionary rule, Open fields exception, (p. 560) for discussion of topic.

Conviction

Of accomplice

State v. Mullens, 371 S.E.2d 64 (1988) (Brotherton, J.)

See EVIDENCE Accomplice's conviction, (p. 185) for discussion of topic.

EVIDENCE

Credibility of witnesses

Use of past conduct

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

During defendant's trial on child sexual assault, the victim's mother testified on cross-examination that she had whipped her daughter hard enough to leave a hand-print and admitted that she had not visited her since the child was placed in foster care. Defendant contended this cross-examination was improper.

Syl. pt. 6 - Rule 608(b) of the West Virginia Rules of Evidence limits the admissibility of evidence of specific instances of conduct for the purpose of attacking the credibility of a witness. Such evidence may not be proved extrinsically, but may be inquired into by cross-examination of the witness. Furthermore the evidence is admissible only if probative of truthfulness or untruthfulness.

Here, the Court held the testimony not probative and the questioning irrelevant and improper.

Cross-examination

Scope of

State v. Allman, 391 S.E.2d 103 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Witnesses' credibility, (p. 243) for discussion of topic.

Cumulative

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See EVIDENCE Admissibility, Prejudicial, (p. 200) for discussion of topic.

EVIDENCE

Defendant's statement

Prior to arrest

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 113) for discussion of topic.

DNA tests

Holdren v. MacQueen, No. 18973 (4/18/89) (Per Curiam)

See MANDAMUS Delay in rendering decision, (p. 444) for discussion of topic.

Documents

Discovery of

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See DISCOVERY Documents, Limits on, (p. 147) for discussion of topic.

Exculpatory

Duty to disclose

State v. Hoard, 375 S.E.2d 582 (1988) (Per Curiam)

See DUE PROCESS Withholding evidence, (p. 173) for discussion of topic.

EVIDENCE

Expert testimony

Admissibility

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SCIENTIFIC TESTS DNA tests, Admissibility, (p. 558) for discussion of topic.

Rape trauma

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

See EVIDENCE Expert witnesses, Rape trauma, (p. 227) for discussion of topic.

Expert witnesses

Admissibility of opinion

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

Appellant was convicted of first-degree murder. On appeal he complained that the prosecution's expert testified as to the trajectory of the bullet which killed the victim without being qualified as a ballistics expert.

The Court noted that appellant had stipulated to the expert's credentials as a "physician, pathologist doing forensic pathology." The Court found that the doctor's expertise as a forensic pathologist enabled him to testify as to the cause of death. No error.

Expert witnesses (continued)

Cross-examination based on treatise

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

Appellant was convicted of first-degree murder. At trial, appellant's expert witness, a psychiatrist, was cross-examined by the prosecution regarding the recommendation of the American Medical Association that the insanity defense be abolished. The recommendation was featured in an article in the American Journal of Psychiatry. Appellant claimed on appeal that the cross-examination improperly introduced the suggestion that appellant's insanity defense should be abolished.

Syl. pt. 1 - "Where a treatise is recognized by a medical expert witness as authoritative, then he can be asked about its statements for purposes of impeachment during cross-examination." Syl. Pt. 3, *Thornton v. CAMC, Etc.*, 172 W.Va. 360, 305 S.E.2d 316 (1983).

The questioning did not challenge whether the insanity defense is legally valid, but rather raised the issue of the medical validity of using appellant's later statements as to his condition at the time of the killing to indicate his state of mind. No error.

Psychologist's testimony in child sexual abuse case

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

Appellant was convicted of two counts of sexual abuse and two counts of sexual assault. At trial a psychologist was allowed to give his opinion that the victims were assaulted.

Syl. pt. 7 - Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury.

Testimony here was proper.

Expert witnesses (continued)

Qualifications of

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

Appellant was convicted of first-degree murder. The trial court refused to allow a witness to testify as an expert in counseling. The witness held a bachelor's degree in criminal justice and had taken four or five psychology courses. She worked at the Salem Industrial Home for Youth administering tests to children in her unit.

Syl. pt. 2 - Although a witness may be qualified as an expert by practical experience in a field of activity conferring special knowledge not shared by mankind in general, the question of whether a witness qualifies as an expert rests in the sound discretion of the trial court, whose decision will not be disturbed unless it is clearly wrong.

The Court noted that defense counsel said that the witness' testimony was for the purpose of introducing records and giving lay testimony regarding mental competency. No abuse of discretion in the trial court's refusal to qualify her as an expert.

Rape trauma

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

Appellant was convicted of sexual abuse. At trial an expert witness described the stages of sexual abuse and the effect on children the age of the alleged victims here. She also gave her opinion as to the validity of the victims' testimony, in light of their manifestation of the various stages.

Syl. pt. 3 - Qualified expert testimony regarding rape trauma syndrome is admissible in a rape prosecution to explain the State's direct evidence in its case in chief. Before such evidence is introduced, the expert must be properly qualified. The jury should be admonished and instructed that the evidence is for the purpose of explaining the other evidence in the case and cannot serve as the ultimate basis of the jury's verdict. Additionally, the court must not permit the expert to give an opinion, explicitly or implicitly, as to whether the alleged victim was raped.

Expert witnesses (continued)

Rape trauma (continued)

State v. Jackson, (continued)

See *State v. Armstrong*, 179 W.Va. 435, 369 S.E.2d 870 (1988). See also *State v. McCoy*, 179 W.Va. 223, 366 S.E.2d 731 (1988).

Although apparently reversed on other grounds, the Court reiterated that expert opinions cannot be given as to guilt or innocence, nor as to whether the victim was raped. Testimony on rape trauma syndrome is permissible but only to explain the case-in-chief.

Extradition

Sufficiency for

State ex rel. Drescher v. Hedrick, 375 S.E.2d 213 (1988) (Per Curiam)

See EXTRADITION Custody while awaiting, *Habeas corpus*, (p. 257) for discussion of topic.

Failure to disclose

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See DISCOVERY Failure to disclose, (p. 147) for discussion of topic.

Flight

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See EVIDENCE Admissibility, Defendant's flight, (p. 193) for discussion of topic.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See APPEAL Evidence, Objection to ruling, (p. 33) for discussion of topic.

EVIDENCE

Foundation

Tape recordings

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

Appellant was convicted of sexual assault and kidnaping. At trial a tape recording which he voluntarily made prior to arrest was improperly introduced into evidence. On appeal he claimed that no proper foundation for the introduction was laid.

State v. Harris, 169 W.Va. 150, 286 S.E.2d 251 (1982) set forth seven necessary elements for introduction of a tape recording of inculpatory statements:

> (1) A showing that the recording device was capable of taking testimony;
>
> (2) a showing that the operator of the device was competent;
>
> (3) an establishment of the authenticity and correctness of the recording;
>
> (4) a showing that changes, additions, or deletions have not been made;
>
> (5) a showing of the manner of the preservation of the recording;
>
> (6) an identification of the speakers; and
>
> (7) a showing that the testimony was voluntarily made without any kind of inducement.

Id., at 254-55.

The Court distinguished this case from Harris in that this tape was made voluntarily before arrest, not by police after arrest during interrogation. The tape was surrendered voluntarily to police and was not played to the jury nor was the jury allowed to read a transcript of the tape. Finally, the tape actually supports appellant's defense and is not inculpatory. No error.

EVIDENCE

Gruesome photographs

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

Appellant was convicted of first-degree murder and sexual assault of his wife. At trial, 3" x 5" color photographs of the victim were admitted to evidence. One showed a close-up view of the strangulation injuries to the victim's neck and mouth; another, the victim's torn and dilated anus; and the third an overhead view of the forehead with the lower eyelids pulled down to show hemorrhaged blood vessels, a condition consistent with strangulation.

Syl. pt. 3 - "In order for photographs to come within our gruesome photograph rule established *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979), there must be an initial finding that they are gruesome." Syllabus Point 6, *State v. Buck*, 170 W.Va. 428, 294 S.E.2d 281 (1982).

The Court noted that the photographs must "unduly prejudice or inflame a jury." *Rowe*, *supra*, at 28. The Court held that these photographs were not gruesome. They did not show unnatural or contorted positions or a great deal of blood. No error.

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

Appellant was convicted of burglary, grand larceny, aggravated robbery, arson and felony-murder. A photograph of the victim's burned home, with the victim's charred body visible in the background, was admitted to evidence at trial. The body was very difficult to distinguish.

Syl. pt. 4 - "In order for photographs to come within our gruesome photograph rule established in *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979), there must be an initial finding that they are gruesome." Syllabus Point 6, *State v. Buck*, 170 W.Va. 428, 294 S.E.2d 281 (1982).

The Court found that the trial court did not abuse its discretion by ruling that the photograph was not gruesome. No error.

EVIDENCE

Guilty conscience

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See EVIDENCE Admissibility, Defendant's flight, (p. 193) for discussion of topic.

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See EVIDENCE Admissibility, Flight, (p. 193) for discussion of topic.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See EVIDENCE Flight, (p. 195) for discussion of topic.

Hearsay

Generally

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

Appellant was convicted of two counts of first-degree sexual assault and two counts of first-degree sexual abuse of his two children. At trial, the court allowed the victims' mother and a psychologist to relate statements made by the victims. Appellant took exception on appeal but did not object at trial. The state contended that the statements were not hearsay because, as to the psychologist, the statements were given to a medical person for the purpose of diagnosis and treatment; and the statements were not offered to show the truth of the matters asserted but rather to support the psychologist's opinion. Both children testified at trial as to the matters related.

Syl. pt. 4 - The following [is] . . . not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (4) Statements for Purposes of Medical Diagnosis or Treatment. -- Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. *W.Va.R.Evid.* 803(4).

State v. Edward Charles L. Sr., (continued)

Syl. pt. 5 - The two-part test set for admitting hearsay statements pursuant to *W.Va.R.Evid.* 803(4) is (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.

Syl. pt. 6 - "The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statements must be offered to prove the material fact. Third, the statement must be shown to be more probative in the issue for which it is offered than any other evidence that the proponent can reasonably procure. Fourth, admission of the statement must comport with the general purposes of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence." Syl. Pt. 5, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987).

The statements here were admissible. The court placed great weight on the childrens' presence and availability for cross-examination and the fact that neither the mother nor the psychologist added any substantive matters to the childrens' testimony. The Court cautioned that the better practice is not to allow extrajudicial statements when the declarant is available in court.

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

Appellant was convicted of first-degree sexual assault. He contended on appeal that extra-judicial statements made by the victim, a minor child, were improperly admitted to evidence. These statements were admitted through witnesses who interviewed the victim approximately two weeks after the assault.

Hearsay (continued)

Generally (continued)

State v. Murray, (continued)

The prosecution contended that the statements were not offered for their truthfulness (and were therefore not hearsay) but rather to show that the witnesses responded reasonably to what was said.

The Court rejected that argument. Noting that the victim's statements were really admitted to show the truth of the matters asserted, the Court held them to be more prejudicial than probative. See *State v. Golden*, 175 W.Va. 551, 336 S.E.2d 198 (1985). Reversed.

Exceptions

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 201) for discussion of topic.

Prior inconsistent statement

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 201) for discussion of topic.

State v. Moore, 409 S.E.2d 490 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 203) for discussion of topic.

Hearsay-exceptions (continued)

Spontaneous declarations/excited utterance

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

Appellant was convicted of first-degree sexual assault. He contended on appeal that extra-judicial statements made by the victim, a minor child, were improperly admitted to evidence. These statements were admitted through witnesses who interviewed the victim approximately two weeks after the assault. The prosecution contended that the statements were not hearsay, but if hearsay, were admissible as excited utterances.

Syl. pt. 1 - "Rule 803(2) of the West Virginia Rules of Evidence correctly contains the heart of the hearsay exception that was formerly called a spontaneous declaration and which is now termed the excited utterance exception to the hearsay rule. The more detailed treatment of this exception contained in Syllabus Point 2, of *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1980), is helpful to further refine the contours of the rule." Syllabus Point 1, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188, 193 (1987).

Syl. pt. 2 - "An alleged spontaneous declaration must be evaluated in light of the following factors: (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation; and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made." Syllabus Point 2, *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1980).

Syl. pt. 3 - Out-of-court statements made by the victim of a sexual assault may not be introduced by a third party unless the statements qualify as an excited utterance under Rule 803(2) of the West Virginia Rules of Evidence.

Hearsay (continued)

Spontaneous declarations/excited utterance (continued)

State v. Murray, (continued)

Syl. pt. 4 - A prompt complaint made by the victim of a sexual offense is admissible independently of its qualifications as an excited utterance. However, the details of the event or the name of the perpetrator is ordinarily not admissible.

Here, the actual assault was held to be too far removed from the statements to make the statements excited utterances. Likewise, the substance of the statements was not admissible under the prompt complaint rule, only the fact that a statement was made. Reversed and remanded.

Identification of defendant

Admissibility

State v. Stewart, 375 S.E.2d 805 (1988) (Per Curiam)

See IDENTIFICATION In court, Independent basis for, (p. 306) for discussion of topic.

State v. Tincher, 381 S.E.2d 382 (1989) (Per Curiam)

See IDENTIFICATION Suggestive identification, (p. 312) for discussion of topic.

State v. Williams, 381 S.E.2d 265 (1989) (Neely, J.)

See IDENTIFICATION Out-of-court, Admissibility, (p. 307) for discussion of topic.

EVIDENCE

Impeachment

Prior inconsistent statements

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See IMPEACHMENT Prior inconsistent statements, Witness unable to remember, (p. 316) for discussion of topic.

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 201) for discussion of topic.

State v. Moore, 409 S.E.2d 490 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 203) for discussion of topic.

State v. Schoolcraft, 396 S.E.2d 760 (1990) (Brotherton, J.)

See IMPEACHMENT Prior inconsistent statements, Witness unable to remember, (p. 317) for discussion of topic.

Use of letter

Wagner v. Hedrick, 383 S.E.2d 286 (1989) (Brotherton, C.J.)

Petitioner in this *habeas corpus* proceeding was convicted of robbery and first-degree murder. His companion at the time wrote a letter to him while he was awaiting trial. In this letter she alleged that the "cops are actually trying to blame you for a murder you didn't commit" and other similar statements. At trial she testified that petitioner had told her that he had "robbed and shot a man." She further testified that the money she was found with related to a "date" with another man.

Her letter was in response to a letter from petitioner. Defense counsel objected to testimony from a letter not in evidence (petitioner's letter).

EVIDENCE

Impeachment

Use of letter (continued)

Wagner v. Hedrick, (continued)

The trial court allowed the companion to say that petitioner had instructed her to testify that the money was "prostitute money and how he had hustled by shooting pool and playing cards and shooting craps." She claimed that petitioner had asked her to lie.

The Court found that the testimony did not violate W.Va. Rule of Evidence 1002 (the best evidence rule) and found an applicable exception in Rule 1004(4), which allows other evidence than the original writing when the writing "is not closely related to a controlling issue." No error.

Use of prior confession

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See EVIDENCE Admissibility, Prior voluntary statement, (p. 204) for discussion of topic.

Instrument of crime

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

Appellant was convicted of second-degree murder. At trial a bumper jack was introduced which was allegedly used to deliver a blow to the victim. Testimony revealed that the jack had been in appellant's possession on the day of the killing.

Syl. pt. 4 - " ' "In the trial of an indictment for murder all instruments which the evidence tends to show were used in the perpetration of the crime, may be produced for the inspection of the jury." Syl. pt. 1, *State v. Henry*, 51 W.Va. 283, 41 S.E. 439 (1902).' Syllabus Point 8, *State v. Gum*, 172 W.Va. 534, 309 S.E.2d 32 (1983)." Syllabus Point 8, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

No error (remanded for development of other issues).

EVIDENCE

Judicial notice

Scientific tests

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SCIENTIFIC TESTS DNA tests, Admissibility, (p. 558) for discussion of topic.

Marijuana

State v. Forshey, 386 S.E.2d 15 (1989) (Workman, J.)

See SEARCH AND SEIZURE Exclusionary rule, Open fields exception, (p. 560) for discussion of topic.

Motive or intent

State v. Robinette, 383 S.E.2d 32 (1989) (Miller, J.)

See EVIDENCE Admissibility, Other crimes, (p. 198) for discussion of topic.

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See EVIDENCE Character of accused, (p. 212) for discussion of topic.

Newly discovered

Basis for new trial

State v. Catlett, 376 S.E.2d 834 (1988) (Neely, J.)

See NEW TRIAL Newly discovered evidence, Sufficiency for new trial, (p. 462) for discussion of topic.

EVIDENCE

Open fields doctrine

State v. Forshey, 386 S.E.2d 15 (1989) (Workman, J.)

See SEARCH AND SEIZURE Exclusionary rule, Open fields exception, (p. 560) for discussion of topic.

Opinion of expert

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

Photographs

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See EVIDENCE Gruesome photographs, (p. 230) for discussion of topic.

Polygraph tests

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

During appellant's trial on charges of first-degree murder the trial judge allowed the prosecution to question a police officer regarding administration of polygraph tests to another suspect who was previously indicted for the same crimes. The officer was allowed to say that the tests led him to believe that the prosecution had indicted the wrong man. Further, the other suspect's attorney was allowed to testify that the suspect's voluntary submission to the polygraph test resulted in his release from jail and dismissal of the indictment.

Even though the trial court instructed the jury to disregard the testimony, the Court considered the statements so prejudicial that instructions could not cure the error. Reversed.

EVIDENCE

Polygraph tests (continued)

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

Appellant was convicted of first-degree murder. On appeal he contended that admission of polygraph results constituted plain error, ineffective assistance of counsel and prosecutorial misconduct. During defense counsel's cross of a police officer, the officer was asked how certain other suspects were "cleared." The officer replied that polygraph tests were used. Defense counsel continued, going into detail as to each suspect and whether each one was "cleared" by use of the tests.

Upon recall of another police officer, defense counsel objected when the prosecution attempted to elicit testimony as to the "clearing" of another suspect by the use of polygraph tests.

Syl. pt. 2 - "Polygraph test results are not admissible in evidence in a criminal trial in this State." Syl. pt. 2, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979).

Syl. pt. 3 - "Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error." Syl. pt. 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).

Here, the Court found admission of the evidence permissible in that appellant's counsel elicited the evidence and a curative instruction was given. Further, appellant's counsel was not ineffective because the strategy was to show that one of the other suspects was not adequately investigated, thus implicating him instead of appellant. The Court noted that counsel objected when the State elicited the same sort of evidence. No prosecutorial error was committed because appellant's counsel introduced the issue of polygraph tests. No error.

Prejudicial

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See EVIDENCE Admissibility, Prejudicial, (p. 200) for discussion of topic.

EVIDENCE

Presumption of guilt

State v. Curry, 374 S.E.2d 526 (1988) (Per Curiam)

See CONSPIRACY Presumption of guilt, (p. 120) for discussion of topic.

Prior inconsistent statement

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 201) for discussion of topic.

Prior offenses

DUI convictions

State v. Wilkinson, 381 S.E.2d 241 (1989) (Per Curiam)

Appellant was convicted of driving under the influence of alcohol, second offense. He claimed that the prosecuting attorney should not have been allowed to introduce evidence of his prior conviction on account of prejudice.

The Court noted that appellant's credibility was not at issue; the prior offense was clearly part of the present charge of second offense DUI. See *State v. Cozart*, 177 W.Va. 400, 352 S.E.2d 152 (1986); *State v. Barker*, 179 W.Va. 194, 366 S.E.2d 642 (1988). No error.

Psychiatric or psychological disability

Generally

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

Appellant was convicted of malicious wounding and attempted murder. On appeal he complained of the admission of expert psychological testimony (among other issues). Appellant was tested for competency to stand trial by two psychologists and two psychiatrists. All four agreed that appellant was depressed but differed as to the effect of the depression on his ability to conform himself to the requirements of the law. One expert thought that

Psychiatric or psychological disability (continued)

Generally (continued)

State v. Neal, (continued)

appellant was able to appreciate the "directiveness" of his behavior but was unable to think about the consequences while the other three believed that appellant's depression did not indicate irrational or uncontrollable responses.

Appellant protested the use of the testimony on the issue of criminal responsibility at the time of the crime; the testing was performed by two of the three experts for the sole purpose of competency to stand trial. See *State ex rel. Smith v. Scott*, 167 W.Va. 231, 280 S.E.2d 811 (1981).

Syl. pt. 1 - "When the accused's mental condition at the time of the offense is an issue, evidence of the accused's mental condition either before or after the offense is admissible so far as it is relevant to the accused's mental condition at the time of the offense." Syl. pt. 5, *State v. McWilliams*, 177 W.Va. 369, 352 S.E.2d 120 (1986).

Syl. pt. 2 - "'The action of a trial court in admitting or excluding evidence in the exercise of its direction will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.' Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955)." Syl. pt. 4, *State v. Ashcraft*, 172 W.Va. 640, 309 S.E.2d 600 (1983).

Here, the Court upheld the admission of the psychological and psychiatric testimony and refused to disturb the trial court's ruling allowing the prosecuting attorney to comment during closing argument that the accused did not appear to be suffering from a mental illness during trial.

Cross-Examination

State v. Allman, 391 S.E.2d 103 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Witnesses' credibility, (p. 243) for discussion of topic.

Psychiatric or psychological disability (continued)

Scope of

State v. Allman, 391 S.E.2d 103 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Witnesses' credibility, (p. 243) for discussion of topic.

Witness' credibility

State v. Allman, 391 S.E.2d 103 (1990) (Per Curiam)

Appellant was convicted of first-degree sexual assault. On appeal he claimed that the prosecutrix had a psychological disorder affecting her credibility. Appellant's conviction was previously reversed and access to psychological records ordered upon trial following remand. *State v. Allman*, 177 W.Va. 365, 352 S.E.2d 116 (1986). The Circuit Court found that the records were not relevant and reimposed sentence.

Syl. pt. 1 - "'The extent of the 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 the case of manifest abuse or injustice.' Syl. pt. 4, *State v. Carduff*, 142 W.Va. 18, 93 S.E.2d 502 (1956). Syl., *State v. Wood*, 167 W.Va. 700, 280 S.E.2d 309 (1981)." Syllabus Point 10, *State v. Gum*, 172 W.Va. 534, 309 S.E.2d 32 (1983).

Syl. pt. 2 - "Evidence of psychiatric disability may be introduced when it affects the credibility of a material witness' testimony in a criminal case. Before such psychiatric disorder can be shown to impeach a witness' testimony, there must be a showing that the disorder affects the credibility of the witness and that the expert has had a sufficient opportunity to make the diagnosis of psychiatric disorder." Syllabus Point 5, *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980) rehearing denied.

No abuse of discretion here. No error.

EVIDENCE

Psychological tests

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See DUE PROCESS Right to hearing, Competency, (p. 173) for discussion of topic.

State v. Jenkins, 379 S.E.2d 156 (1989) (Per Curiam)

See COMPETENCY To stand trial, Generally, (p. 108) for discussion of topic.

Rebuttal

Admissibility

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

State v. White, 383 S.E.2d 87 (1989) (Per Curiam)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 207) for discussion of topic.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 207) for discussion of topic.

Character evidence

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

See EVIDENCE Character, Rebuttal to general character evidence, (p. 216) for discussion of topic.

EVIDENCE

Relevance

Application for foster child in sexual abuse case

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

See EVIDENCE Sexual attacks, Application for foster child, (p. 247) for discussion of topic.

Reputation for selling drugs

State v. Marrs, 379 S.E.2d 497 (1989) (Neely, J.)

During defendant's trial on charges of selling marijuana, the trial court refused to allow defense counsel to question a character witness about defendant's reputation for selling drugs.

Syl. pt. 5 - In a prosecution for the sale of illegal drugs, *W.Va.R.Evid.* 404 does not allow the defendant to introduce evidence of his reputation for not selling illegal drugs.

The Court distinguished character from habit. Selling drugs is too particular an activity to reflect one's permanent moral character.

Reputation for violence

Of victim

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

See EVIDENCE Character of victim, (p. 215) for discussion of topic.

Reputation of accused

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See EVIDENCE Character of accused, (p. 212) for discussion of topic.

EVIDENCE

Scientific tests

State v. Myers, 370 S.E.2d 336 (1988) (Per Curiam)

See DISCOVERY Failure to disclose, Scientific tests, (p. 148) for discussion of topic.

Admissibility

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SCIENTIFIC TESTS DNA tests, Admissibility, (p. 558) for discussion of topic.

Breathalyzer tests

State v. Wilkinson, 381 S.E.2d 241 (1989) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Breathalyzer tests, Deficient samples, (p. 164) for discussion of topic.

DNA test

Holdren v. MacQueen, No. 18973 (4/18/89) (Per Curiam)

See MANDAMUS Delay in rendering decision, (p. 444) for discussion of topic.

DNA typing

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SCIENTIFIC TESTS DNA tests, Admissibility, (p. 558) for discussion of topic.

Scientific tests (continued)

Psychiatric/psychological tests

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Generally, (p. 241) for discussion of topic.

Sexual attacks

Application for foster child

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

Appellant was convicted of sexual abuse of several girls aged six to eight. During cross-examination of appellant the prosecution asked whether appellant had made application for a foster child prior to the alleged incidents. Over objections, the prosecution then suggested that appellant had stated a preference for a "little girl" in his application.

The Court found this line of inquiry irrelevant.

Child's competency to testify

State v. Stacy, 371 S.E.2d 614 (1988) (Neely, J.)

See WITNESSES Competency, Children, (p. 656) for discussion of topic.

Use of deadly weapon

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 627) for discussion of topic.

Sexual attacks (continued)

Victim's statements out-of-court

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See EVIDENCE Hearsay-exceptions, Spontaneous declarations/excited utterance, (p. 234) for discussion of topic.

Sufficiency

Generally

State v. Perdue, 372 S.E.2d 636 (1988) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Homicide, First-degree murder, (p. 629) for discussion of topic.

State v. Richeson, 370 S.E.2d 728 (1988) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Negligent homicide, (p. 632) for discussion of topic.

State v. Robinette, 383 S.E.2d 32 (1989) (Miller, J.)

See EVIDENCE Circumstantial, Sufficiency for conviction, (p. 217) for discussion of topic.

Arson

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See SUFFICIENCY OF EVIDENCE Arson, (p. 625) for discussion of topic.

Sufficiency (continued)

For conviction

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

Defendant was convicted of murder. On appeal, he challenged the sufficiency of the evidence for conviction.

Syl. pt. 10 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 11 - "Circumstantial evidence will not support a guilty verdict, unless the fact of guilt is proved to the exclusion of every reasonable hypothesis of innocence; and circumstances which create only a suspicion of guilt but do not prove the actual commission of the crime charged, are not sufficient to sustain a conviction." Syllabus Point 2, *State v. Dobbs*, 163 W.Va. 630, 259 S.E.2d 829 (1979).

Here, the Court found the evidence to be sufficient to convince a jury beyond a reasonable doubt; and, conversely, that the evidence was not manifestly inadequate. No error.

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See APPEAL Standard for review, Setting aside verdict, (p. 46) for discussion of topic.

Instructions

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See INSTRUCTIONS Generally, (p. 353) for discussion of topic.

Sufficiency (continued)

Murder conviction

State v. Robinette, 383 S.E.2d 32 (1989) (Miller, J.)

See EVIDENCE Circumstantial, Sufficiency for conviction, (p. 217) for discussion of topic.

Tape recordings

Use by jury

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See JURY Exhibits, Use during deliberation, (p. 415) for discussion of topic.

Voluntary

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See EVIDENCE Foundation, Tape recordings, (p. 229) for discussion of topic.

Voluntarily made

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

Appellant was convicted of kidnaping and sexual assault. He voluntarily made an audio tape which he claimed would help him tell "his side." This tape was introduced into evidence. On appeal he claimed that the tape was improperly introduced since the arresting officer failed to give *Miranda* warnings before seizing it.

Syl. pt. 6 - The trial court did not commit reversible error in admitting a tape recording seized without the *Miranda* warning where the tape recording was voluntarily made prior to arrest and voluntarily surrendered without police interrogation.

Tape recordings (continued)

Voluntarily made (continued)

State v. Garrett, (continued)

Syl. pt. 7 - Where a tape recording was made and surrendered voluntarily and without any police influence, the tape may be admitted into evidence once the trial court is satisfied that it was properly seized, preserved by the police and identified, subject to the same rules applicable to other evidence.

Here, the Court found that the tape was made voluntarily prior to arrest and surrendered voluntarily. Although appellant was actually in custody when the tape was seized, the appellant had directed the police to retrieve the tape. Police neither questioned appellant nor solicited the tape and were on the premises pursuant to a valid arrest warrant, with permission from appellant's mother to search. No error.

Testimony

Narrative form

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

See ABUSE OF DISCRETION Testimony, Form of, (p. 14) for discussion of topic.

Victim's character

State v. Neuman, 371 S.E.2d 77 (1988) (McGraw, J.)

See EVIDENCE Character, of victim, (p. 214) for discussion of topic.

EVIDENCE

Witnesses

Competency to testify

State v. Stacy, 371 S.E.2d 614 (1988) (Neely, J.)

See WITNESSES Competency, Children, (p. 656) for discussion of topic.

EXCLUSIONARY RULE

Prior to arrest

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 113) for discussion of topic.

Retroactivity

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See JUVENILES Prompt presentment, (p. 427) for discussion of topic.

EXECUTIVE ORDER

Reprieves

County Commission of Mercer County v. Dodrill, 385 S.E.2d 248 (1989) (McHugh, J.)

See GOVERNOR Reprieve, Authority to grant, (p. 273) for discussion of topic.

County Commission of Mercer County v. Dodrill, 385 S.E.2d 248 (1989) (McHugh, J.)

See REPRIEVE Executive order, (p. 536) for discussion of topic.

EXPERT WITNESSES

Child sexual abuse

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Expert witnesses, Psychologist's testimony in child sexual abuse case, (p. 226) for discussion of topic.

Qualifications of

Admissibility of opinion

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

EXPUNGEMENT

Juveniles

White v. Hey, No. 18402 (7/1/88) (Per Curiam)

See JUVENILES Expungement of record, (p. 426) for discussion of topic.

EXTRADITION

Custody while awaiting

Habeas corpus

State ex rel. Drescher v. Hedrick, 375 S.E.2d 213 (1988) (Per Curiam)

Pursuant to the Interstate Compact on Detainers (*W.Va.Code* 62-14-1), the Governor of California demanded that appellant be sent to California to stand trial on charges of "murder with special circumstances." The demand was issued by a Los Angeles County magistrate and the investigating officer's properly sworn affidavit was attached.

The Governor of West Virginia issued a rendition warrant and appellant petitioned for writ of *habeas corpus*. Appellant produced witnesses at the subsequent hearing who testified that he was not in California at the time of the murder. The appellee produced evidence showing that appellant rented a car in Los Angeles, returning it on the day of the murder. A West Virginia state police documents examiner testified that the appropriate signatures on the rental agreement were written by appellant. The writ was denied but extradition stayed pending this appeal.

Syl. pt. - "'In *habeas corpus* proceedings instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers.' Point 2, Syllabus, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971)." *State ex rel. Gonzales v. Wilt*, 163 W.Va. 270, 256 S.E.2d 15 (1979).

Here, the appellant failed to prove by "clear and convincing evidence" that he was not the person sought; in the face of the documentary evidence showing that he was present in California, none of appellant's witnesses were able to say that they saw appellant at the time the murder was committed.

State ex rel. Sheppard v. Kisner, 394 S.E.2d 907 (1990) (Per Curiam)

See *HABEAS CORPUS* Extradition, Scope of hearing, (p. 283) for discussion of topic.

EXTRADITION

Fugitives

State ex rel. Moore v. Conrad, 371 S.E.2d 74 (1988) (Brotherton, J.)

Richard Allen Moore was arrested on 19 November 1985 pursuant to a fugitive from justice warrant issued by a Clay County magistrate. The warrant charged him with sexual battery, a capital offense, in Florida. Following commitment to allow Florida to extradite, he was arrested on 21 February 1986 on a governor's warrant of extradition, ninety-four days after the original arrest (beyond the ninety day limit for holding accused persons after arrest on a fugitive warrant).

Following a *habeas corpus* hearing on 21 March 1986 the circuit court ordered release because Moore was not proven to be in Florida at the time of the alleged offense. Nonetheless a second governor's warrant issued alleging the same offense at the same time. Moore was arrested 15 August 1987.

The circuit court now certifies the following two questions: (1) Is service of a governor's warrant for extradition within the specified statutory period a jurisdictional prerequisite for a *habeas corpus* hearing? and (2) Is a finding at a *habeas corpus* hearing that the defendant was not within the jurisdiction at the time of the offense *res judicata* so as to bar later warrants on the same offense?

The Court answered the first question in the negative, holding that Moore was properly subject to rearrest if he remained within the state. See *Brightman v. Withrow*, 172 W.Va. 235, 304 S.E.2d 688 (1983).

As to whether the original finding that the defendant was not in the demanding state at the time of the offense bars further proceedings, the Court also answered in the negative. ". . . where a criminal prosecution is halted due to lack of evidence showing presence in the demanding state, res judicata should not operate to bar a subsequent extradition proceeding if at some later date the demanding state can produce such evidence."

EXTRADITION

Hearing prior to

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

Appellant was serving a term of four to twenty-five years at the Ohio State Reformatory on charges unrelated to this proceeding when a West Virginia prosecuting attorney filed a detainer pursuant to an interstate agreement known as the Detainer Agreement for the purpose of a juvenile delinquency hearing on yet another set of charges. No pre-transfer hearing was held but appellant was brought to West Virginia where he made three inculpatory statements relating to the instant first-degree murder charges. All three statements were later admitted into evidence.

Syl. pt. 4 - A prisoner incarcerated in a jurisdiction that has adopted the Uniform Criminal Extradition Act is entitled to a hearing before being transferred to another jurisdiction pursuant to Article IV of the Interstate Agreement on Detainers. Syl. Pt. 4, *Cuyler v. Adams*, 449 U.S. 433 (1981).

Syl. pt. 5 - "Once a fugitive has been brought within the jurisdiction of West Virginia as the demanding state, the propriety of the extradition proceedings which occurred in the asylum state may not be challenged. The extradition proceedings may be challenged only in the asylum state." Syl. Pt. 4, *State v. Flint*, 171 W.Va. 676, 301 S.E.2d 765 (1983).

The Court noted that even when a pre-transfer hearing is required, the denial of a hearing does not void convictions obtained in the demanding state. See *Shack v. Attorney General State of Pennsylvania*, 776 F.2d 170 (3rd. Cir. 1985). Similarly, the Court refused appellant's challenge to the admissibility of evidence obtained after the transfer; the appellant was already in lawful custody in Ohio, so no Fourth Amendment issue was raised. No error.

Multiple proceedings

Newly discovered evidence

State ex rel. Moore v. Conrad, 371 S.E.2d 74 (1988) (Brotherton, J.)

See EXTRADITION Fugitives, (p. 258) for discussion of topic.

EXTRADITION

Proper forum for challenge

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See EXTRADITION Hearing prior to, (p. 259) for discussion of topic.

EXTRAORDINARY DERELICTION

Generally

Preast v. White, No. 18306 (7/22/88) (Per Curiam)

See APPEAL Denial of right to appeal, (p. 29) for discussion of topic.

Wolfe v. Hedrick, No. 18261 (7/20/88) (Per Curiam)

See APPEAL Denial of right to appeal, (p. 30) for discussion of topic.

EXTRAORDINARY REMEDIES

Prohibition

Deitzler v. Douglass, No. 18689 (2/17/89) (Per Curiam)

See SENTENCING Time of order, (p. 596) for discussion of topic.

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

State ex rel. Webb v. Wilson, 390 S.E.2d 9 (1990) (McHugh, J.)

[NOTE] This case involves two consolidated appeals. Included in the above is *State ex rel. Wellman v. Wilson*, No. 19279 (2/15/90).

See THREE-TERM RULE Generally, (p. 641) for discussion of topic.

FAILURE TO PRESERVE

Challenge to juror

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See JURY Disqualification, Employment with law enforcement agency, (p. 408) for discussion of topic.

Waiver of motion (Rule 12)

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See INDICTMENT Motion to dismiss, Prejudicing grand jury, (p. 320) for discussion of topic.

FELONY

As bar to jury service

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See JURY Disqualification, Felony conviction, (p. 409) for discussion of topic.

FELONY-MURDER

Generally

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

See LESSER INCLUDED OFFENSES Robbery, (p. 437) for discussion of topic.

Double jeopardy

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

See DOUBLE JEOPARDY Felony murder, (p. 153) for discussion of topic.

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 152) for discussion of topic.

Instructions

Distinguishing from other first-degree

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 152) for discussion of topic.

Underlying felony

Instructions on

State v. Stacy, 384 S.E.2d 347 (1989) (Workman, J.)

See HOMICIDE Felony-murder, Instructions, (p. 298) for discussion of topic.

FIFTH AMENDMENT

Dismissal of indictment for undue delay

Hundley v. Ashworth, 382 S.E.2d 573 (1989) (Miller, J.)

See DUE PROCESS Indictment delayed for strategic advantage, (p. 171) for discussion of topic.

Interrogation

Effect on

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

See INTERROGATIONS Right to remain silent, (p. 367) for discussion of topic.

Right to counsel

When attaches

State v. Bowyer, 380 S.E.2d 193 (1989) (Miller, J.)

See RIGHT TO COUNSEL When attaches, (p. 548) for discussion of topic.

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See POLICE OFFICERS Duty to advise of right to counsel, (p. 483) for discussion of topic.

Right to speedy trial

Hundley v. Ashworth, 382 S.E.2d 573 (1989) (Miller, J.)

See DUE PROCESS Indictment delayed for strategic advantage, (p. 171) for discussion of topic.

FIREARMS

Limits on right to bear

In re Application of Metheney, 391 S.E.2d 635 (1990) (Brotherton, J.)

See RIGHT TO BEAR ARMS Generally, (p. 541) for discussion of topic.

[NOTE] Four cases are consolidated in the summary of the above case. The other three cases are *In re Application of Goots*, 391 S.E.2d 635 (1990); *In re Application of Cueto*, 391 S.E.2d 635 (1990); and, *In re Application of Rinker*, 391 S.E.2d 635 (1990).

FIRST-DEGREE MURDER

Instructions to distinguish felony murder

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 152) for discussion of topic.

FORGERY

Elements of

State v. Kelly, 396 S.E.2d 471 (1990) (Miller, J.)

Appellant was convicted of forgery for causing her husband's name to be affixed to an appearance bond. She claimed that the evidence was insufficient to support a conviction in that she was authorized to sign her husband's name and no prejudice was thereby imparted to the legal rights of another.

Syl. pt. 1 - To sustain a conviction for forgery under *W.Va.Code*, 61-4- 5 (1961), the State must prove the following elements: (1) that the accused falsely made or altered a writing; (2) that he or she did so with intent to defraud; and (3) that the writing so created or altered is of such a nature that if it were genuine it could prejudice the legal right of another.

Syl. pt. 2 - It is not necessary to show actual prejudice to the rights of another to sustain a forgery conviction. It is sufficient if there is intent to defraud and potential prejudice to the rights of another.

Syl. pt. 3 - Ordinarily the subsequent ratification of a forgery will not excuse the crime.

Appellant actually brought another person to the circuit clerk's office who signed her husband's name. The Court noted that aiding and abetting was actually what appellant did but added that *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980) abolished the distinction between principals in the first and second-degrees and accessories before the fact for indictment purposes. See also, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989). The issue was not raised by appellant.

Here, even if authorization to sign had been given, appellant herself did not sign the document. No error.

[NOTE] If appellant did not actually sign the document, she was at most guilty of aiding and abetting, as the Court points out. The distinction seems artificial to allow principals in the first and second-degree to be tried under one (greater) charge and actually convicted when only the lesser charge has been committed.

FOURTH AMENDMENT

Generally

Wagner v. Hedrick, 383 S.E.2d 286 (1989) (Brotherton, C.J.)

See SEARCH AND SEIZURE Expectation of privacy, Hospital emergency room, (p. 562) for discussion of topic.

Plain view exception to

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

See SEARCH AND SEIZURE Warrantless search, Plain view exception, (p. 568) for discussion of topic.

FUGITIVES

Release and rearrest

State ex rel. Moore v. Conrad, 371 S.E.2d 74 (1988) (Brotherton, J.)

See EXTRADITION Fugitives, (p. 258) for discussion of topic.

GAMBLING

Devices

Electronic poker machines

Buzzo v. City of Fairmont, 380 S.E.2d 439 (1989) (Workman, J.)

Appellant owned and leased various electronic poker machines to bars. These devices were seized during raids on the bars and the prosecution sought to have the machines forfeited and destroyed. The trial court, in a declaratory judgement, ruled that the machines were illegal *per se* and subject to destruction pursuant to *W.Va.Code* 61-10-1.

Syl. pt. 1 - "Devices listed in *W.Va.Code* section 61-10-1 are *prima facie* contraband when seized on a warrant alleging use for gaming...." Syl. Point 1, in part, *State v. Twenty-Five Slot Machines*, 163 W.Va. 459, 256 S.E.2d 595 (1979).

Syl. pt. 2 - Electronic video poker machines are not illegal *per se*, but fall within the exemption of *W.Va.Code* Section 61-10-1 [1970] and are not subject to seizure and forfeiture under the statute unless evidence of use for illegal gambling purposes is established.

Syl. pt. 3 - "Before a gambling device may be destroyed under *W.Va.Code*, 61-10-1 notice must be given to those in whose possession the device was found, and hearing given anyone who appears and claims ownership. The possessor must prove by a preponderance of the evidence that the device was being kept or exhibited innocently, not for gambling purposes. If no one appears to vouch its purity or if those who do appear do not carry their burden of proof the device may be destroyed." Syllabus Point 2, *State v. Twenty-Five Slot Machines*, 163 W.Va. 459, 256 S.E.2d 595 (1979).

Here, no evidence was introduced to show that these particular machines were used for gaming purposes. Further, no showing was made that these particular machines fit the statutory definition of an illegal gaming device. Reversed; machines ordered returned.

GOVERNOR

Reprieve

Authority to grant

County Commission of Mercer County v. Dodrill, 385 S.E.2d 248 (1989) (McHugh, J.)

The Mercer County Commission sought a writ of mandamus to compel Commissioner of Corrections A.V. Dodrill to take custody of all prisoners held in the Mercer County jail who had been sentenced to the West Virginia Penitentiary. Respondent refused to take custody pursuant to executive orders directing him to refuse to take prisoners at state correctional facilities and establishing maximum numbers of prisoners at those facilities.

When these orders were held invalid (see *State ex rel. Dodrill v. Scott*, 177 W.Va. 452, 352 S.E.2d 741 (1986), the Governor granted reprieves to certain prisoners. Mercer County claimed that this refusal caused it to violate a federal court order limiting the number of inmates in the county jail. *Dawson v. Kendrick*, 527 F.Supp. 1252 (S.D. W.Va. 1981).

Syl. pt. 1 - "A governor's executive order which directs action on the part of the West Virginia Department of Corrections that is contrary to specific statutory mandates is invalid." Syl., *State ex rel. Dodrill v. Scott*, 177 W.Va. 452, 352 S.E.2d 741 (1986).

Syl. pt. 2 - Pursuant to *W.Va. Const. art.* VII, section 11, in a felony case, the governor is vested with the power to grant a reprieve after conviction. Syl. pt. 1, *State ex rel. Stafford v. Hawk*, 47 W.Va. 434, 34 S.E. 918 (1900).

Syl. pt. 3 - When the governor grants a reprieve to an individual held in a county jail, who has been convicted of a felony and has been lawfully sentenced to the custody of the State Department of Corrections, but the reprieve is granted merely to delay that individual's transfer to a state penal or correctional institution, the state will be required to pay the reasonable maintenance and medical expenses related to that individual which are incurred by the county due to that delay.

The Court noted that no statutory authority exists for maintenance of state prisoners in county jails. Balancing the monetary demands upon the state and the county, the Court held that the state must pay for reasonable maintenance and medical expenses prospectively from the date of this opinion (19 April 1989).

GRAND JURY

Indictments

Based on inaccurate information

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 160) for discussion of topic.

Effect of not voting on

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

See INDICTMENT Validity of, Grand jury does not approve text, (p. 324) for discussion of topic.

Sole responsibility for

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

See INDICTMENT Validity of, Grand jury does not approve text, (p. 324) for discussion of topic.

Standard for review

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 160) for discussion of topic.

Prejudicing

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See INDICTMENT Motion to dismiss, Prejudicing grand jury, (p. 320) for discussion of topic.

Prejudicing (continued)

Preventing vote on actual indictment

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

See INDICTMENT Validity of, Grand jury does not approve text, (p. 324) for discussion of topic.

Prosecuting attorney's role

State v. Pickens, 395 S.E.2d 505 (1990) (Per Curiam)

See PROSECUTING ATTORNEY Grand jury, presenting evidence to, (p. 524) for discussion of topic.

GUARDIAN AD LITEM

Prosecuting attorney serving for victim

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

See PROSECUTING ATTORNEY Duties, Generally, (p. 521) for discussion of topic.

GUILTY PLEAS

Withdrawal of plea

State v. Lake, 378 S.E.2d 670 (1989) (Per Curiam)

Appellant entered into a plea bargain whereby he pled guilty to felony-murder, aggravated robbery and assault during the commission of a felony. He received concurrent sentences of life with mercy, fifty years and two to ten years, respectively. The state agreed to stand silent at sentencing and not to seek enhancement of sentence for recidivism.

Appellant accepted the agreement and, during a lengthy sentencing hearing, indicated that he understood all conditions of sentencing and had considered these matters for several months. Following sentencing, appellant moved to withdraw his plea, citing the harsh sentences. On appeal he challenged the judge's refusal to set aside the plea agreement.

Syl. pt. 1 - "Where the guilty plea is sought to be withdrawn by the defendant after sentence is imposed, the withdrawal should be granted only to avoid manifest injustice." Syl. pt. 2, *State v. Olish*, 164 W.Va. 712, 266 S.E.2d 134 (1980).

Syl. pt. 2 - "The subjective but, in hindsight, mistaken belief of a defendant as to the amount of sentence that will be imposed, unsupported by any promises from the government or indications from the court, is insufficient to invalidate a guilty plea as unknowing or involuntary." Syl. pt. 1, *State v. Pettigrew*, 168 W.Va. 299, 284 S.E.2d 370 (1981).

Here, the Court found no manifest injustice. No error.

Duncil v. Kaufman, 394 S.E.2d 870 (1990) (Miller, J.)

See PLEA Guilty plea, Withdrawal of, (p. 473) for discussion of topic.

State v. Whitt, 395 S.E.2d 530 (1990) (Per Curiam)

See PLEA BARGAIN Sentencing, Withdrawal prior to, (p. 478) for discussion of topic.

GUILTY PLEAS

Without admitting guilt

State v. Whitt, 378 S.E.2d 102 (1989) (Per Curiam)

See PLEA BARGAINING Acceptance of, Without admission of guilt, (p. 476) for discussion of topic.

HABEAS CORPUS

Generally

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

Appellant was convicted of nighttime burglary. He was sentenced to life imprisonment as a recidivist. Following the denial of two petitions for appeal, he filed a petition for writ of *habeas corpus* in the circuit court, which petition was denied. He then filed another petition for writ of *habeas corpus* in circuit court, then petitioned the Court for a writ of mandamus to compel a ruling, which petition was denied. Following voluntary recusal of the circuit judges, appellant's writ of *habeas corpus* was rejected and appellant brought this appeal.

Syl. pt. 9 - "A *habeas corpus* proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syllabus Point 4, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979).

Abused infants

Custody of

State of Florida ex rel. W.Va. DHS v. Thornton, No. CC969 (7/20/89) (Brotherton, C.J.)

See ABUSE AND NEGLECT Custody of infant, (p. 2) for discussion of topic.

Bail

State ex rel. Keith v. Dodd, No. 18369 (5/19/88) (Per Curiam)

See BAIL Determination of, (p. 88) for discussion of topic.

Child custody

Abused infants

Baby Boy R. v. Velas DHS et al., 386 S.E.2d 839 (1989) (Brotherton, C.J.)

See *HABEAS CORPUS* Child custody, Relinquishing for adoption, (p. 280) for discussion of topic.

Relinquishing for adoption

Baby Boy R. v. Velas DHS et al., 386 S.E.2d 839 (1989) (Brotherton, C.J.)

Appellee is a protective service worker in the Department of Human Services. Relator Patricia R. is the natural mother of the child in question. Relator, then seventeen years old, had telephoned DHS while pregnant to request assistance. She had dropped out of high school. Respondent counseled relator but did not mention relinquishment of the child for adoption.

The day after the birth, respondent discussed relinquishment but relator signed only a foster care agreement giving the baby temporarily to DHS for a period of five days. Three days after this form was signed, respondent brought to relator a voluntary relinquishment form permanently terminating relator's parental rights. Relator signed, but later testified that she did not understand the permanence of her action and thought she had ten days in which to reconsider. The circuit court ruled the agreement could only be set aside in case of duress or fraud. Finding these circumstances absent, he found the agreement binding.

Syl. pt. 1 - "The term 'duress,' as used in *W.Va.Code*, 48-4-1a [1965], should be narrowly construed." Syllabus point 1, *Wooten v. Wallace*, 177 W.Va. 159, 351 S.E.2d 72 (1986).

Syl. pt. 2 - "The term 'duress,' as used in *W.Va.Code*, 48-4-1a [1965], means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child. Mere 'duress of circumstance' does not constitute duress under *W.Va.Code*, 48-4-1a [1965], Syllabus point 2, *Wooten v. Wallace*, 177 W.Va. 159, 351 S.E.2d 72 (1986).

Child custody (continued)

Relinquishing for adoption (continued)

Baby Boy R. v. Velas DHS et al., (continued

Syl. pt. 3 - The legislative purpose behind the seventy-two-hour period found in *W.Va.Code* § 48-4-6 (1986) was to provide the natural parent some protection against a too hurried decision to relinquish the child at a time when the physical and/or emotional stress of childbirth might limit or impair the parent's normal reasoning ability.

The Court noted that even the trial court found DHS's refusal to return the child "outrageous." Here, the signing of the foster care agreement clearly indicated that relator was not sure during the statutory 72 hour period whether she should keep the baby. Nonetheless, the Court found no fraud or duress sufficient to void the termination agreement. Whatever circumstances may have existed may have led to a misunderstanding but this tragic turn of events does not constitute fraud or duress by DHS. Affirmed.

Contempt of court

State ex rel. Ferrell v. Adkins, 394 S.E.2d 909 (1990) (Per Curiam)

See ATTORNEYS Contempt of court, (p. 64) for discussion of topic.

Distinguished from writ of error

Billotti v. Dodrill, 394 S.E.2d 32 (1990) (Brotherton, J.)

See *HABEAS CORPUS* Scope of, (p. 289) for discussion of topic.

DNA tests

Holdren v. MacQueen, No. 18973 (4/18/89) (Per Curiam)

See MANDAMUS Delay in rendering decision, (p. 444) for discussion of topic.

DNA tests (continued)

Woodall v. Legursky, No. 19524 (3/29/90) (Per Curiam)

Petitioner sought a writ of *habeas corpus* following dismissal by the Circuit Court of his writ of *habeas corpus* previously granted. He requested that the Court review his motion for DNA tests.

Petitioner was convicted of several counts of sexual assault (see *State v. Woodall*, 182 W.Va. 15, 385 S.E.2d 253 (1989). A DNA test was sought both before and after the trial. After a delay of nearly two years, a test was performed but was inconclusive. *Id.*, 385 S.E.2d at 260. He then sought a different DNA test that is more likely to render a result from old or deteriorated material.

The Court acknowledged that this second type of test does not meet the requirements for newly discovered evidence but ordered the second test because petitioner was denied his initial requests, made when the evidence would have rendered a result. Writ granted.

Double jeopardy

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

Appellant was convicted of receiving and transferring stolen property and of recidivism. In 1977, appellant was convicted of breaking and entering; because of a circuit clerk's failure to provide him with a transcript appellant filed for writ of *habeas corpus* in 1978, which writ was granted. After resentencing in 1978, appellant was not provided with appointed counsel and filed a second petition for writ of *habeas corpus* in 1979. The Court granted his request for discharge from custody in 1979 but did not rule out further prosecution. *Barlow v. Mohn*, No. 14462 (7/3/79).

Syl. pt. 3 - "An unconstitutional discharge from confinement upon the issuance of a writ of *habeas corpus* does not ordinarily operate to bar further prosecution under principles of double jeopardy." Syllabus point 3, *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977).

Although appellant could have been tried again, he apparently was not. The prior conviction cannot be used for recidivism purposes.

Extradition

Fugitives

State ex rel. Moore v. Conrad, 371 S.E.2d 74 (1988) (Brotherton, J.)

See EXTRADITION Fugitives, (p. 258) for discussion of topic.

Scope of hearing

State ex rel. Drescher v. Hedrick, 375 S.E.2d 213 (1988) (Per Curiam)

See EXTRADITION Custody while awaiting, *Habeas corpus*, (p. 257) for discussion of topic.

State ex rel. Sheppard v. Kisner, 394 S.E.2d 907 (1990) (Per Curiam)

Appellant was convicted of larceny in North Carolina. While on probation, he received a "travel pass" to travel to West Virginia which required him to return to North Carolina by January 4, 1985. Appellant never returned.

On March 17, 1988 appellant was served with a rendition warrant issued by the Governor of West Virginia pursuant to an arrest warrant issued in North Carolina. At the *habeas corpus* hearing in Circuit Court appellant testified that he believed his probation had been transferred to West Virginia, although he acknowledged that he deliberately violated the terms. The writ was denied and this appeal taken.

Syl. pt. - "'In *habeas corpus* proceedings instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers.' Point 2, Syllabus, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530 185 S.E.2d 355 (1971) *cert. denied*, 406 U.S. 946, 32 L.Ed. 2d 333, 92 S. Ct. 2048 (1972)." Syllabus Point 1, *State ex rel. Gonzales v. Wilt*, 163 W.Va. 270, 256 S.E.2d 15 (1979).

Extradition (continued)

Scope of hearing (continued)

State ex rel. Sheppard v. Kisner, (continued)

The Court rejected appellant's argument that he was not a "fugitive," in that he did not deliberately flee the jurisdiction. No error.

Health care

Thompson v. White, No. 18403 (7/18/88) (Per Curiam)

See MEDICAL CARE Right to, (p. 449) for discussion of topic.

Ineffective assistance

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 341) for discussion of topic.

Conflict of interest

Cole v. White, 376 S.E.2d 599 (1988) (Miller, J.)

Relator's attorney jointly represented him and his co-defendant. Relator attempted to raise the issue of ineffective assistance of counsel (see INEFFECTIVE ASSISTANCE Conflict of interest, (p. 336) this digest) by means of a petition for writ of *habeas corpus*.

Syl. pt. 7 - "'A *habeas corpus* proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.' Point 4, Syllabus, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979)." Syllabus Point 2, *Edwards v. Leverette*, 163 W.Va. 571, 258 S.E.2d 436 (1979).

Ineffective assistance (continued)

Conflict of interest (continued)

Cole v. White, (continued)

Syl. pt. 8 - The violation of Rule 44(c) of the West Virginia Rules of Criminal Procedure and its standard of a likely conflict is not an error which can be reached in a *habeas corpus* proceeding.

Syl. pt. 9 - A constitutional claim of ineffective assistance of counsel arising from joint representation of codefendants may be reached in a *habeas corpus* proceeding if an actual conflict is shown.

The Court found actual conflicts here and granted the writ.

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

Inadequate record to determine

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

See INEFFECTIVE ASSISTANCE Inadequate record, (p. 338) for discussion of topic.

Failure to rule on

State ex rel. Warth v. Ferguson, No. 19663 (7/11/90) (Per Curiam)

Petitioner sought a writ of mandamus to compel the respondent to rule on his *habeas corpus* petition pending in circuit court. The original habeas proceeding was filed July 23, 1982 and an evidentiary hearing held February 7, 1984. A letter from petitioner's attorney dated March 23, 1986 advised of repeated requests made to the judge to issue a ruling. Petitioner himself made requests on March 19, 1989 and June 22, 1989. Syllabus Points 1 and 2 of *State ex rel. Patterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984), state that the delay here is unreasonable to say the least:

Failure to rule on (continued)

State ex rel. Warth v. Ferguson, (continued)

1. Under article III, § 17 of the West Virginia Constitution, which provides that 'justice shall be administered without sale, denial or delay,' and under Canon 3A(5) of the West Virginia Judicial Code of Ethics (1982 Replacement Vol.), which provides that 'A judge should dispose promptly of the business of the court,' judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission.

2. 'Mandamus will not lie to direct the manner in which a trial court should exercise its discretion with regard to an act either judicial or quasi-judicial, but a trial court, or other inferior tribunal, may be compelled to act in a case if it unreasonably neglects or refuses to do so.' *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 130 S.E.2d 204 (1963).

Writ granted. Decision on habeas petition to be made within thirty days.

Nonconstitutional error

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

Here, the Court noted that a writ of *habeas corpus* "'will lie to test a denial of a constitutional right.'" *Carrico v. Griffith*, 165 W.Va. 812, at 821, 272 S.E.2d 235, at 240 (1980). Remanded.

Omnibus hearing

State ex rel. Cecil v. Frazier, No. 18267 (5/27/88) (Per Curiam)

Relator was convicted of first-degree murder. Following denial of his appeal, relator filed a petition for an omnibus *habeas corpus* hearing, alleging three grounds advanced in the unsuccessful appeal (failure to disclose exculpatory evidence, prosecutorial misconduct during closing argument and an erroneous instruction relating to intoxication), insufficiency of the evidence and

Omnibus hearing (continued)

State ex rel. Cecil v. Frazier, (continued)

ineffective assistance of counsel. The trial court denied relief, finding that all issues advanced had been fully adjudicated in the appeal or were without merit. Relator now seeks a writ of prohibition against the denial order.

The Court held that relator was entitled to a full evidentiary hearing on the issue of ineffective assistance of counsel. Citing *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984) and *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981), the Court noted that petitioner's claim involved disputed facts not adequately developed in the existing record, thus entitling petitioner to an omnibus *habeas corpus* hearing. Case remanded for hearing; writ of prohibition granted.

Scope of

State ex rel. Blake v. Chafin, 395 S.E.2d 513 (1990) (Workman, J.)

Petitioner sought a writ of mandamus to compel Judge Chafin to rule on his post-conviction *habeas corpus* petition. Petitioner had been convicted in 1968 of first-degree murder and sentenced to life without mercy. His sentence was commuted to life with mercy and he was paroled. While on parole he committed another first-degree murder and two counts of third degree sexual assault. He was sentenced to life without mercy for the murder and a concurrent sentence of one to five years for the sexual assault. He was also sentenced to life imprisonment for recidivism to be served consecutively with the other sentences.

His petition for *habeas corpus* challenged his 1968 conviction. The circuit court declined to hear the petition after determining that petitioner's incarceration on another valid conviction precluded any relief; even his parole status would not be affected.

Syl. pt. 1 - Although there may be occasions where the validity of one sentence has been upheld in review and the review of a separate conviction will not alter the circumstances of a defendant's confinement, a defendant is still entitled to a ruling on the merits when post-conviction *habeas corpus* relief is sought. A court cannot summarily dismiss a petition relying upon the concurrent sentence rule, since we refuse to adopt that rule.

Omnibus hearing (continued)

Scope of (continued)

State ex rel. Blake v. Chafin, (continued)

Syl. pt. 2 - "A court having jurisdiction over *habeas corpus* proceedings may deny a petition for a writ of *habeas corpus* without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief." Syl. Pt. 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).

Syl. pt. 3 - "An omnibus *habeas corpus* hearing as contemplated in *W.Va.Code*, 53-4A-1 *et seq.*, [1967] occurs when: (1) an applicant for *habeas corpus* is represented by counsel or appears pro se having knowingly and intelligently waived his right to counsel; (2) the trial court inquires into all the standard grounds for *habeas corpus* relief; (3) a knowing and intelligent waiver of those grounds not asserted is made by the applicant upon advice of counsel unless he knowingly and intelligent-ly waived his right to counsel; and, (4) the trial court drafts a comprehensive order including the findings on the merits of the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding." Syl. Pt 1, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

Since the circuit court did not consider any of the issues the writ was granted.

Right to appeal

Preast v. White, No. 18306 (7/22/88) (Per Curiam)

See APPEAL Denial of right to appeal, (p. 29) for discussion of topic.

Wolfe v. Hedrick, No. 18261 (7/20/88) (Per Curiam)

See APPEAL Denial of right to appeal, (p. 30) for discussion of topic.

HABEAS CORPUS

Right to counsel

State ex rel. Blake v. Chafin, 395 S.E.2d 513 (1990) (Workman, J.)

See *HABEAS CORPUS* Omnibus hearing, Scope of, (p. 287) for discussion of topic.

Scope of

Billotti v. Dodrill, 394 S.E.2d 32 (1990) (Brotherton, J.)

Petitioner was convicted of several counts of first-degree murder. On petition for writ of *habeas corpus* he argued several grounds of error which were not constitutionally based.

Syl. pt. 5 - "A *habeas corpus* proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syllabus point 4, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979).

The Court did not even set forth the alleged errors. Writ denied.

Sentencing

Review of

State ex rel. Blake v. Chafin, 395 S.E.2d 513 (1990) (Workman, J.)

See *HABEAS CORPUS* Omnibus hearing, Scope of, (p. 287) for discussion of topic.

Withdrawal of counsel

State ex rel. Dorton v. Ferguson, No. 18949 (4/6/89) (Per Curiam)

See APPEAL Denial of right to appeal, Withdrawal of counsel, (p. 31) for discussion of topic.

HABITUAL OFFENDERS

Identification

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See IDENTIFICATION Habitual offender, (p. 306) for discussion of topic.

Multiple convictions on same day

Treatment of

Hutchinson v. Dietrich, 393 S.E.2d 663 (1990) (Brotherton, J.)

See CONTROLLED SUBSTANCES Probation, (p. 128) for discussion of topic.

HARMLESS ERROR

Constitutional

Generally

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

Appellant was convicted of first-degree sexual assault and kidnaping. On appeal he alleged ineffective assistance of counsel in that his counsel did not raise an insanity defense at trial or request a competency hearing. The record showed that on at least two separate occasions counsel requested court ordered psychiatric examinations. At least three such examinations were performed, all of which showed that appellant was competent to stand trial, although he was mentally ill.

Syl. pt. 4 - "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Syl. pt. 20, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court held that *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), required only some sort of procedural safeguard prior to trial when a "bona fide doubt" exists as to defendant's competency. A full hearing is not required. Even assuming a hearing should have been held here, the failure to do so was clearly harmless error.

Cross-examination

Character witnesses

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See EVIDENCE Character, Limits on cross-examination, (p. 213) for discussion of topic.

Limiting defendant's cross

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See EVIDENCE Character, Limits on cross-examination, (p. 213) for discussion of topic.

HARMLESS ERROR

Cumulative effect

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See APPEAL Cumulative error, Effect of, (p. 28) for discussion of topic.

Nonconstitutional

Generally

State v. Masters, 373 S.E.2d 173 (1988) (Miller, J.)

See RECIDIVISM Information, Sufficiency of, (p. 534) for discussion of topic.

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Collateral cases, (p. 218) for discussion of topic.

Character evidence of decedent

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See EVIDENCE Character, Limits on use of decedent's character, (p. 213) for discussion of topic.

Citation error

State ex rel. Forbes v. McGraw, 394 S.E.2d 743 (1990) (Workman, J.)

Relator, prosecuting attorney for Kanawha County, sought a writ of mandamus to direct Magistrate McGraw to reinstate complaints and permit amendment of trespass charges in the complaints. The original charges incorrectly alleged trespass on property; the amendment would have corrected the charge to trespass on a structure. The Code citation would have changed from *W.Va.Code* 61-3B-3 to *W.Va.Code* 61-3B-2. Relator also sought to amend the penalty. Relator cited Rule 6 of Rules of Criminal Procedure for Magistrate Courts. Magistrate McGraw dismissed the charges.

Nonconstitutional (continued)

Citation error (continued)

State ex rel. Forbes v. McGraw, (continued)

Syl. pt. 1 - If a criminal defendant is charged with and detained on multiple offenses, the defendant cannot claim prejudice arising from incarceration when a statutory citation error is discovered, provided that one of the offenses with which he is charged is procedurally without defect and carries incarceration as a potential penalty.

Syl. pt. 2 - When a criminal defendant has not been prejudiced by an error in the citation of the statute with which he is charged, the error is harmless and shall not be ground for dismissal of the complaint.

Rule 6 clearly allowed amendment here. The Court noted that the defendants spent one week in jail when the correct charge did not carry a penalty of jail; nonetheless, no harm resulted because a related charge arising out of the same transactions carried a penalty of jail. No prejudice resulted.

Failure to enter plea

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

See PLEA Failure to enter plea, (p. 473) for discussion of topic.

Failure to order DNA test

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SCIENTIFIC TESTS DNA tests, Admissibility, (p. 558) for discussion of topic.

Nonconstitutional (continued)

Mitigation of sentence

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

See SENTENCING Mitigation, Failure to allow evidence of, (p. 593) for discussion of topic.

Prompt presentment of juveniles

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See JUVENILES Prompt presentment, (p. 427) for discussion of topic.

Test for

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

Appellant was convicted of kidnaping, second-degree murder and third degree arson. Testimony was given by a polygraph expert as to appellant's reactions before and after the polygraph test (no evidence of the test itself or of appellant's reactions during the test was admitted). The expert gave his opinion that appellant's nodding of his head was an admission of guilt. Appellant objected to admission of that testimony.

Syl. pt. 3 - "A verdict of guilty in a criminal case will not be reversed by this Court because of error committed by the trial court, unless the error is prejudicial to the accused." Syllabus point 5, *State v. Davis*, 153 W.Va. 742, 172 S.E.2d 569 (1970).

Syl. pt. 4 - "Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the

conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury." Syllabus point 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979).

The Court noted that the expert was extensively cross-examined and the possible other conclusions to be drawn from the nodding of one's head brought before the jury. Although the testimony was inadmissible, the error was harmless.

HEARSAY

Generally

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See EVIDENCE Hearsay, Generally, (p. 232) for discussion of topic.

Basis for search warrant

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 564) for discussion of topic.

Prior inconsistent statement

State v. Moore, 409 S.E.2d 490 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 203) for discussion of topic.

Spontaneous declarations/excited utterance

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See EVIDENCE Hearsay-exceptions, Spontaneous declarations/excited utterance, (p. 234) for discussion of topic.

Videotaped interview

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

See EVIDENCE Video tapes and motion pictures, (p. 210) for discussion of topic.

HOMICIDE

Attempted murder

By poison

State v. Weaver, 382 S.E.2d 327 (1989) (Miller, J.)

Appellant was convicted of first-degree sexual assault, attempt to kill or injure by poison and abduction of a minor child. Appellant gave the minor victim wine to drink; the testimony was in conflict whether he forced her to drink or whether she asked to taste the wine. When found, the victim was semi-clothed and the appellant was observed with his head in the victim's vaginal area. The victim registered a blood alcohol level of .21. She was treated by paramedics but suffered cardiac arrest after arriving at the hospital; she was resuscitated and survived. Testimony by the treating physician attributed the arrest to excessive consumption of alcohol. Appellant asserted that an alcoholic beverage is not a poison.

Syl. pt. 1 - A substance is a "poison or other destructive thing" under *W.Va.Code*, 61-2-7, if the defendant knows or reasonably should know that in the quantity administered it will have a poisonous or destructive effect on the victim such that it may injure or kill.

The Court noted that the statute in question included the phrase or other destructive thing." *W.Va.Code* 61-2-7. Clearly, therefore, the statute was never intended to be narrowly construed. It should be obvious to "the average person" that alcohol can be a toxic substance if consumed in excess. While not deciding that alcohol is clearly within the statute, the Court noted that the resultant substantial injury here served to make the jury's finding reasonable.

Evidence

Courtroom demonstrations

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See EVIDENCE Admissibility, Courtroom Demonstrations, (p. 191) for discussion of topic.

Evidence (continued)

Instruments of crime

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

See EVIDENCE Instrument of crime, (p. 237) for discussion of topic.

Felony-murder

Generally

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

See LESSER INCLUDED OFFENSES Robbery, (p. 437) for discussion of topic.

Double jeopardy

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 152) for discussion of topic.

Instructions

State v. Stacy, 384 S.E.2d 347 (1989) (Workman, J.)

Appellant was convicted of felony-murder in the shooting death of a police officer. The prosecution's theory of the case was that appellant had attempted an armed robbery, stolen a car, removed a tape deck from the car and was walking from the abandoned stolen car when the victim discovered them. The trial court gave instructions on first-degree murder and felony-murder. Appellant argued on appeal that the trial court erred in not instructing on each element of the underlying felony and that the felony must be proven beyond a reasonable doubt. No objection was made at trial.

Felony-murder (continued)

Instructions (continued)

State v. Stacy, (continued)

Syl. pt. 1 - "The plain error doctrine contained in Rule 30 and Rule 52 (b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syl. Pt. 4, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548, 550 (1988).

Syl. pt. 2 - Since the underlying felony is an essential element of felony-murder, the jury must be instructed as to the elements which constitute the underlying felony.

Syl. pt. 3 - Where an instruction is given which fails to define the elements of the underlying felony involved in felony-murder, such instructional error when not objected to at trial will be the subject of the plain error doctrine.

The Court noted that the prosecution placed substantial reliance on the theory of felony murder and that only circumstantial evidence connected appellant with the felony at issue. The need was therefore great for careful instructions on the underlying felony.

Instructions to distinguish from other first-degree

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 152) for discussion of topic.

HOMICIDE

First-degree

State v. Walker, 381 S.E.2d 277 (1989) (Per Curiam)

Appellant was convicted of first-degree murder and nighttime burglary. The trial court refused to instruct the jury on an element of first-degree murder by lying in wait, namely, waiting or watching with the intent of killing or inflicting bodily harm.

Syl. pt. 1 - "'Lying in wait' as a legal concept has both mental and physical elements. The mental element is the purpose or intent to kill or inflict bodily harm upon someone; the physical elements consist of waiting, watching and secrecy or concealment. In order to sustain a conviction for first-degree murder by lying in wait pursuant to *W.Va.Code*, 61-2-1 (1987), the prosecution must prove that the accused was waiting and watching with concealment or secrecy for the purpose of or with the intent to kill or inflict bodily harm upon a person." Syl. pt. 2, *State v. Harper*, 179 W.Va. 24, 365 S.E.2d 69 (1987).

Syl. pt. 2 - "'When instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict.' Syllabus Point 6, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976)." Syl. pt. 1, *State v. Martin*, 177 W.Va. 758, 356 S.E.2d 629 (1987).

Syl. pt. 3 - "'Where a trial court gives, over objection, an instruction which incompletely states the law, and the defect is not corrected by a later instruction, the giving of such incomplete instruction constitutes reversible error where the omission involves an element of the crime.' Syllabus, *State v. Jeffers*, 162 W.Va. 532, 251 S.E.2d 227 (1979)." Syl. pt. 3, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

Here, the prosecution indicted appellant for premeditated murder but proceeded on the theory of murder by lying in wait. At the conclusion of trial the prosecution did not offer instructions on murder by lying in wait and defense counsel's instructions were amended, over objection, to exclude the mental element of intent. Reversed and remanded.

First-degree (continued)

Instructions to distinguish felony murder

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 152) for discussion of topic.

Malice

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

Appellant was convicted of first-degree murder and malicious wounding. On appeal, the issue was whether the jury could properly infer malice from use of a deadly weapon (a pistol here) in light of Article III, Sec. 22, the "Right to Keep and Bear Arms" amendment to the West Virginia Constitution.

Syl. pt. 2 - "Malice, wilfulness and deliberation, elements of the crime of first-degree murder, may be inferred from the intentional use of a deadly weapon." Syllabus point 2, *State v. Ferguson*, 165 W.Va. 529, 270 S.E.2d 166 (1980).

Syl. pt. 3 - A jury instruction which infers malice and deliberation from the intentional use of a deadly weapon does not violate a West Virginia citizen's constitutional right to keep and bear arms.

No error. Nothing in the Constitution gives a citizen the right to use a weapon unlawfully. See *W.Va.Code* 61-7-11.

Indictment

Sufficiency

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

See INDICTMENT Sufficiency, Generally, (p. 321) for discussion of topic.

HOMICIDE

Instructions

Felony-murder

State v. Stacy, 384 S.E.2d 347 (1989) (Workman, J.)

See HOMICIDE Felony-murder, Instructions, (p. 298) for discussion of topic.

Involuntary manslaughter

Defined

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

Defendant was convicted of involuntary manslaughter. During closing argument the prosecuting attorney defined involuntary manslaughter as an "accidental killing." He further defined an accidental killing as an unlawful killing while committing a lawful act.

Syl. pt. 4 - "'A person may be guilty of involuntary manslaughter when he performs a lawful act in an unlawful manner, resulting in the unintentional death of another.' Syl. pt. 2, *State v. Lawson*, 128 W.Va. 136, 36 S.E.2d 26 (1945)." Syllabus Point 2, *State v. Cobb*, 166 W.Va. 65, 272 S.E.2d 467 (1980).

No error.

Malice

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See HOMICIDE Second-degree, Elements of, (p. 304) for discussion of topic.

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See HOMICIDE First-degree, Malice, (p. 301) for discussion of topic.

Involuntary manslaughter (continued)

Standard for applied to negligent homicide

State v. Storey, 387 S.E.2d 563 (1989) (Per Curiam)

See HOMICIDE Negligent homicide, Motor vehicles, (p. 303) for discussion of topic.

Negligent homicide

Motor vehicles

State v. Richeson, 370 S.E.2d 728 (1988) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Negligent homicide, (p. 632) for discussion of topic.

State v. Storey, 387 S.E.2d 563 (1989) (Per Curiam)

Appellant was convicted of negligent homicide for attempting to pass a line of vehicles while the victim was turning across traffic at an intersection. Appellant, a professional truck driver, struck the victim's car and she was killed. Testimony at trial showed that the area had recently been resurfaced and proper markings were absent. In addition, the intersection was partially obscured by a curve; there was, however, some indication that an intersection was ahead.

Appellant claimed that there was insufficient evidence to convict.

Syl. pt. 1 - "Our negligent homicide statute, *W.Va.Code*, 17C-5-1, requires the driving of '[a] vehicle in a reckless disregard of the safety of others,; and this means that more than ordinary negligence is required. It is compatible with the involuntary manslaughter standard set in *State v. Lawson*, 128 W.Va. 136, 36 S.E.2d 26 (1945)." Syllabus point 2, *State v. Vollmer*, 163 W.Va. 711, 259 S.E.2d 837 (1979).

HOMICIDE

Negligent homicide (continued)

Motor vehicles (continued)

State v. Storey, (continued)

Syl. pt. 2 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The Court noted that both involuntary homicide and negligent homicide by motor vehicle require operation of the motor vehicle in a reckless manner. A violation of any traffic statute clearly constitutes recklessness. The passing maneuver here was reckless under either *W.Va.Code* 17C-7-6(a) or under common law. *State v. Carter*, 451 S.W.2d 340 (Mo. 1970); *State v. Rice*, 269 P.2d 751 (1954); *Petcosky v. Bowman*, 89 S.E.2d 4 (W.Va. 1955). No error.

Poison

Use of

State v. Weaver, 382 S.E.2d 327 (1989) (Miller, J.)

See HOMICIDE Attempted murder, By poison, (p. 297) for discussion of topic.

Second-degree

Elements of

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

Appellant was convicted of second-degree murder. On appeal, he contended that the evidence failed to show malice. Appellant killed a Mike Hendricks. It was alleged that appellant was seeing Hendricks' ex-wife, who had begun

Second-degree (continued)

Elements of (continued)

State v. Bongalis, (continued)

to see Hendricks again. This romantic triangle resulted in an altercation in front of a bar which left the victim dead from two bullets fired from appellant's gun.

Syl. pt. 1 - "'Malice, express or implied, is an essential element of murder in the second-degree, and if absent the homicide is of no higher grade than voluntary manslaughter.' Syllabus Point 1, *State v. Galford*, 87 W.Va. 358, 105 S.E. 237 (1920)." Syllabus Point 2, of *State v. Clayton*, 166 W.Va. 782, 277 S.E.2d 619 (1981).

Following a brief discussion of what malice entails (see *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978); *State v. Morris*, 142 W.Va. 303, 95 S.E.2d 401 (1956); *State v. Matney*, 176 W.Va. 667, 346 S.E.2d 818 (1988); and *State v. Slonaker*, 167 W.Va. 97, 280 S.E.2d 212 (1981), the Court found sufficient evidence here to show malice.

Sufficiency of evidence

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See DIRECTED VERDICT Generally, (p. 146) for discussion of topic.

Circumstantial evidence

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 628) for discussion of topic.

IDENTIFICATION

Habitual offender

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

Appellant was convicted of receiving and transferring stolen property and of recidivism. On appeal he claimed that the state failed to prove his identity as the perpetrator of the prior crimes charged. The circuit clerk was unable to identify appellant as the same person previously convicted in 1983. In response, the prosecution offered to testify and suggested that the Court could take judicial notice of the appellant's identity as the same person. The Court declined and no cautionary instruction was given.

Syl. pt. 4 - "Where the issue of identity is contested in an habitual criminal proceeding, the State must prove identity beyond a reasonable doubt." Syllabus point 4, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

Syl. pt. 5 - "A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney . . . which do not clearly prejudice the accused or result in manifest injustice." Syllabus point 5, *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982).

The Court noted that the same name is insufficient to establish identity. *State v. Vance*, 164 W.Va. 216 at 226, 262 S.E.2d 423 at 429 n. 8,)1980) citing *State v. McKown*, 116 W.Va. 253, 180 S.E. 93 (1935). Further, because the issue of identity was clearly for the prosecution to prove, there was prejudicial error in the prosecution's remarks, compounded by the failure to give a cautionary instruction. Reversed.

In court

Independent basis for

State v. Stewart, 375 S.E.2d 805 (1988) (Per Curiam)

Appellant was convicted of sexual assault. After the assault took place, appellant voluntarily made a statement to the police claiming to have witnessed the crime. The police suspected that appellant was the assailant and presented him to the victim at the victim's home shortly after the assault. Even in that prejudicial environment, the victim was unable to identify appellant.

IDENTIFICATION

In court (continued)

Independent basis for (continued)

State v. Stewart, (continued)

Appellant claimed on appeal that the out of court procedure tainted the subsequent in court identification.

Syl. pt. 3 - "'Even though there is an impermissibly suggestive pretrial photographic array, an in-court identification could be made if the identifying witness has a reliable basis for making an identification of the defendant which basis is independent of the tainted pretrial identification procedures.' Syl. pt. 5, *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981)." Syl. pt. 4, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549 (1986).

Here, the Court found the victim's description of the car which appellant was driving formed an independent basis for the identification. No error.

Out-of-court

Admissibility

State v. Williams, 381 S.E.2d 265 (1989) (Neely, J.)

Appellant was convicted of bank robbery. He was identified by a bank employee at a lineup. Appellant protested that the lineup consisted of men who had lighter skin than he did; one particularly light-skinned man was removed.

Although an attorney appointed to represent appellant was present at the lineup he did not understand that he was representing appellant. Appellant's first trial ended in mistrial; the lineup identification was suppressed but an in-court identification was allowed. At the second trial an in-court identification took place, resulting in the present conviction.

State v. Williams, (continued)

Syl. pt. - "'In determining whether out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness; prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.' Syl. pt. 3, *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476 (1976)." Syllabus Point 2, *State v. Gravely*, 171 W.Va. 428, 299 S.E.2d 375 (1982).

Here, appellant had requested counsel prior to the lineup so the suppression of the lineup identification was proper. In addition, the subsequent in-court identification is tainted because the bank employee did not make an initially positive identification at the lineup (according to the attorney who later represented appellant), and was unable to identify appellant from photographs she saw prior to the lineup. Her testimony revealed that the robber wore sunglasses and a wig, that she saw him less than five minutes and that the robber was approximately four inches shorter and sixty-five pounds lighter than appellant. Reversed and remanded.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

Appellant was convicted of several counts of sexual abuse, sexual assault, aggravated robbery and kidnaping. Part of the evidence against him were blood samples and voice and a visual identification by one of the victims.

Syl. pt. 5 - The touchstone for admitting any out-of-court identifications is the reliability of the identification, considering the length of time since the crime, the level of certainty given by the victim, the opportunity during the crime to observe the trait in question, and the degree of attention to the trait during the crime.

Out-of-court (continued)

Admissibility (continued)

State v. Woodall, (continued)

Here, the Court found the scientific probabilities introduced with the blood samples to be neither misleading nor prejudicial. The voice identification was also allowed, even though overheard by the victim in a police barracks. The visual identification was made from behind the defendant, also in the police barracks. The Court allowed it, in light of a cautionary instruction later offered. No error.

Factors to be considered

State v. Stacy, 384 S.E.2d 347 (1989) (Workman, J.)

Appellant was convicted of felony-murder. Although reversed on other grounds (see HOMICIDE Felony-murder, Instructions, (p. 298)), the case involved out-of-court identifications which may have tainted the in-court identifications. One witness was shown a photo array; when he was unable to make a positive identification, he was shown a videotape of the defendant obtained from a television station. The tape was unrelated to the crime here and showed a heavily armed police force, complete with dogs and helicopters, and appellant in a jail uniform with handcuffs. The witness then made the identification.

Another witness made an identification only after seeing appellant on a television news program, which identified him as the man wanted for the killing of a police officer. The third witness was unable to identify appellant from a xerox copy of appellant's picture but was able to identify appellant from a photo array containing no other pictures of persons with appellant's general characteristics.

Syl. pt. 4 - "In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the

Out-of-court (continued)

Factors to be considered (continued)

State v. Stacy, (continued)

level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Syl. Pt. 3, *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476, 478 (1976).

The Court noted that these criteria would exclude the first witness' in-court identification but only the out-of-court identifications of the other two witnesses.

Photographs

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

Defendant was convicted of armed robbery of a convenience store. On appeal he complained that the photographic identification process was tainted.

Approximately one and one-half hours after the robbery, the store attendant viewed a photographic array which included pictures of persons whose general appearance matched that of the defendant. With police assistance, she wrote a statement describing the process and noting that she picked the defendant as her assailant. Ten days later the attendant again identified the defendant and described the defendant in greater detail.

Seven months later the attendant was unable to identify the defendant and could not remember many of the details of the crime. She admitted to suffering emotional distress, having difficulty eating and sleeping and being fearful to stay home alone. The evidence showed that the defendant had altered his appearance.

Syl. pt. 1 - "A pretrial identification by photograph will be set aside if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Syllabus Point 4, *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981).

State v. Spence, (continued)

Syl. pt. 2 - "Most courts have concluded that a photographic array will not be deemed excessively suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features. The fact that some of the photographs are dissimilar to the defendant's appearance will not taint the entire array." Syllabus Point 6, *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981).

Syl. pt. 3 - "In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification [or testimony as to the out-of-court identification itself] a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Syllabus Point 3, as amended, *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476 (1976).

Syl. pt. 4 - "[Under Rule 801(d)(1)(C) of the West Virginia Rules of Evidence,] [t]hird party testimony regarding an out-of-court identification may in certain circumstances be admissible when the identifying witness testifies at trial because both the identifying witness and the third party are then available for cross-examination." Syllabus Point 6, as amended, *State v. Carter*, 168 W.Va. 90, 282 S.E.2d 277 (1981).

The Court noted that all of the photographs showed white males of approximately the same height. No error in the choice of photographs. As to the suggestive nature of the procedure, the identifying witness testified that the police mentioned defendant's name but she did not know the defendant. The Court held that knowledge of defendant's name alone was not error; only if the witness had known the defendant would error occur.

Finally, both the declarant and the police officer who suggested the defendant's name were present for cross-examination; no error.

IDENTIFICATION

Suggestive identification

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See IDENTIFICATION Out of court, Photographs, (p. 310) for discussion of topic.

State v. Tincher, 381 S.E.2d 382 (1989) (Per Curiam)

Petitioner was convicted of unarmed robbery and sentenced to life imprisonment as a recidivist. On appeal he claimed that evidence of a photo show-up was improperly admitted. The victim was shown petitioner's photograph attached to an arrest card which detailed petitioner's arrest for the alleged offense. The other photographs had attached to them information on other offenses.

Syl. pt. - "A pretrial identification by photograph will be set aside of the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Syllabus point 4, *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981).

At trial, the victim admitted that he did not see well and identified a member of the jury as the person who robbed him. The Court found the initial photo display clearly suggestive and impermissible. Reversed and remanded.

Show-up at the victim's home

State v. Stewart, 375 S.E.2d 805 (1988) (Per Curiam)

See IDENTIFICATION In court, Independent basis for, (p. 306) for discussion of topic.

IMMUNITY

Grant of as inducement to confess

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

Appellant was convicted of first-degree arson, arson with intent to defraud, burglary, grand larceny, breaking and entering, perjury, petit larceny and conspiracy. Appellant was one of three suspects in the incident, the destruction of his mobile home by fire.

Approximately one month after the fire, a home in the area was burglarized and a substantial sum of coins and currency stolen. Police notified banks to look for musty-smelling bills. Two days after the burglary, appellant deposited foul-smelling money at a local bank; he also distributed musty-smelling bills at local businesses.

Appellant was asked to go to a local state police detachment to answer questions; he was given his *Miranda* rights at the station. Appellant denied any involvement with the burglary but admitted being present. The prosecuting attorney offered immunity in return for a statement and appellant's lawyer and the prosecutor reached an agreement. Appellant admitted to the burglary and a conspiracy to burn his own home for the insurance proceeds.

Appellant later refused to testify against the other defendants and was arrested. While in custody he relented and cooperated, even testifying at the trial of one of his codefendants. This testimony varied with his earlier statements and he was also arrested for perjury. He moved to suppress all incriminating statements he made, which motion was denied.

Syl. pt. 1 - "The plain error doctrine contained in Rule 30 and 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceeding, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances which substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syllabus Point 4, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

Grant of as inducement to confess (continued)

State v. Hanson, (continued)

Syl. pt. 2 - "The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into evidence of a criminal case." Syllabus Point 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975).

Syl. pt. 3 - "'When the representations of one in authority are calculated to foment hope or despair in the mind of the accused to any material degree, and a confession ensues, it cannot be deemed voluntary.' Syllabus, *State v. Parsons*, 108 W.Va. 705, 152 S.E. 745 (1930)." Syllabus Point 7, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982).

Syl. pt. 4 - A promise of immunity from prosecution is the type of inducement which will render a subsequent confession based on such promise involuntary and therefore inadmissible in evidence against the defendant at trial.

Syl. pt. 5 - "'[I]n the absence of some express constitutional or statutory provision, a prosecutor has no inherent authority to grant immunity against prosecution.' Syl. pt. 16 [in part], *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984)." Syllabus Point 2, in part, *State v. Pennington*, 179 W.Va. 139, 365 S.E.2d 803 (1987).

Syl. pt. 6 - The State is entitled to prosecute a defendant upon his failure to cooperate under the terms of an immunity agreement. It is not entitled to use his statements obtained as a result of such agreement against him in prosecuting him for crimes originally covered by the immunity grant.

Syl. pt. 7 - Where a grant of immunity by the prosecuting attorney does not comply with *W.Va.Code*, 57-5-2 (1931), the State is not entitled to prosecute the defendant for perjury or false swearing upon testimony arising from the immunity grant.

Grant of as inducement to confess (continued)

State v. Hanson, (continued)

The Court took notice of appellant's contention that the statements were made solely as a response to the promise of immunity even though objection was not made below. The Court rejected the State's contention that the agreement reached here was more in the nature of a plea bargain; the offer of immunity, though improvident, was clearly an inducement to testify so as to avoid any conviction. Even though appellant was able to discuss the offer with his attorney, the statements were coerced and therefore inadmissible. Reversed and remanded.

Standing to assert

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See WITNESSES Immunity, Standing to assert, (p. 662) for discussion of topic.

Use of statements obtained thereby

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

IMPEACHMENT

Prior inconsistent statements

State v. Moore, 409 S.E.2d 490 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 203) for discussion of topic.

Use as substantive evidence

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 201) for discussion of topic.

Use of letter not in evidence

Wagner v. Hedrick, 383 S.E.2d 286 (1989) (Brotherton, C.J.)

See EVIDENCE Impeachment, Use of letter, (p. 236) for discussion of topic.

Witness unable to remember

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

Defendant was convicted of involuntary manslaughter. On the night of the killing defendant had given police a statement which was used at trial for impeachment purposes.

Syl. pt. 6 - "Prior out-of-court statements may be used to impeach the credibility of a witness and a prior inconsistent statement may be introduced concerning any specific matter about which the witness has testified at trial; however, where the witness does testify contrary to his prior statement but demonstrates an absence of memory, such prior statement must be used sparingly to demonstrate lack of integrity in the witness or the reason for surprise to the party which calls him, but these legitimate purposes may not be used as a ruse for introducing inadmissible evidence." Syllabus Point 2, *State v. Spadafore*, 159 W.Va. 236, 220 S.E.2d 655 (1975).

Prior inconsistent statements (continued)

Witness unable to remember (continued)

State v. Brown, (continued)

Here, the prior statement was not used during the prosecution's case-in-chief. The defendant waived any objections as to the voluntariness of the statement. No error.

State v. Schoolcraft, 396 S.E.2d 760 (1990) (Brotherton, J.)

Appellant was convicted of two counts of sexual abuse of a minor. At trial the child did not remember a prior videotaped interview, during which she initially claimed no abuse took place. The trial court refused to allow use of the videotape for impeachment purposes.

Syl. pt. 3 - Where a witness testifies about events which are covered in a prior out-of-court statement and the witness denies making the out-of- court statement or indicates no present recollection of its contents, then impeachment by a prior statement is permissible.

Syl. pt. 4 - Where the witness cannot recall the prior statement or denies making it, then under *W.Va.R.Evid.* 613(b), extrinsic evidence as to the out-of-court statement may be shown -- that is, the out-of-court statement itself may be introduced or, if oral, through the third party to whom it was made. However, the impeached witness must be afforded an opportunity to explain the inconsistency.

Here, the witness testified as to some of the events discussed on the tape. Reversed and remanded.

INDICTMENT

Generally

Dismissal of

Hundley v. Ashworth, 382 S.E.2d 573 (1989) (Miller, J.)

See DUE PROCESS Indictment delayed for strategic advantage, (p. 171) for discussion of topic.

Amending or altering

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

See INDICTMENT Validity of, Grand jury does not approve text, (p. 324) for discussion of topic.

Arson

Sufficiency of

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See ARSON First-degree, Sufficiency of indictment, (p. 55) for discussion of topic.

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 160) for discussion of topic.

Citation error on complaint

State ex rel. Forbes v. McGraw, 394 S.E.2d 743 (1990) (Workman, J.)

See HARMLESS ERROR Non-constitution, Citation error, (p. 292) for discussion of topic.

INDICTMENT

Conviction of only certain charges

State v. Schoolcraft, 396 S.E.2d 760 (1990) (Brotherton, J.)

Appellant was convicted of two counts of first-degree sexual abuse. The jury was instructed on both sexual assault and sexual abuse. The indictment contained one count of first-degree sexual assault for each of two children but the trial involved only one child.

Syl. pt. 1 - "Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived." Syllabus point 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981).

Syl. pt. 2 - Although an indictment may contain more than one charge, a defendant can be convicted only of those charges which were prosecuted at trial.

Appellant raised a number of issues which were not argued in the brief. The Court found those assignments of error waived.

The Court held conviction of a charge not prosecuted at trial to be plain error. Reversed. *State v. Nicholson*, 162 W.Va. 750, 252 S.E.2d 894 (1979), *overruled on other grounds*, *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980).

Dismissal of

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 160) for discussion of topic.

Grand jury does not approve text

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

See INDICTMENT Validity of, Grand jury does not approve text, (p. 324) for discussion of topic.

INDICTMENT

Dismissal of (continued)

Prejudicing grand jury

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

Appellant was convicted of second-degree murder. On appeal he claimed that misstatements made to the grand jury required that the indictment be dismissed.

Syl. pt. 4 - Challenges to the indictment based on irregularities during grand jury deliberations must be raised under Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure prior to trial.

Syl. pt. 5 - Where trial counsel has filed a motion under Rule 12 of the West Virginia Rules of Criminal Procedure, the failure to press for a ruling on the motion prior to trial amounts to a waiver of the objections contained in the motion.

The Court noted that Rule 12 clearly requires that objections to an indictment be raised prior to trial. Although a motion was filed, no hearing was ever held and the Court deemed the objection waived. No error.

Juveniles

Basis for transfer

State v. Beaman, 383 S.E.2d 796 (1989) (Brotherton, C.J.)

See JUVENILES Transfer to adult jurisdiction, Indictment as basis for, (p. 429) for discussion of topic.

Multiple offenses

Tried together

State v. Hatfield, 380 S.E.2d 670 (1988) (McGraw, J.)

See JOINDER Multiple offenses, (p. 373) for discussion of topic.

INDICTMENT

Sufficiency

Generally

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See ARSON First-degree, Sufficiency of indictment, (p. 55) for discussion of topic.

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

Appellant was convicted of malicious wounding and attempted murder. On appeal he challenged the sufficiency of the attempted murder indictment, alleging that the indictment contained statutory elements of both attempted malicious wounding and attempted murder in one count, thus constituting insufficient notice of the crime.

Syl. pt. 3 - "'An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.' Syllabus Point 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983)." *State v. Neary*, 179 W.Va. 115, 365 S.E.2d 395 (1987).

The Court pointed out that the record clearly indicated that the accused was aware at all times that the count was for attempted murder. Counsel did not request a bill of particulars and referred to the count as for attempted murder.

The Court rejected appellant's contention that the count must be read as for attempted malicious wounding only, since malicious wounding is not a lesser included offense of attempted murder. See *State v. Watson*, 99 W.Va. 34, 127 S.E.2d 637 (1925) (no separate offense included in indictment).

Likewise, the Court also rejected appellant's contention that the evidence was insufficient.

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

See INDICTMENT Sufficiency, Controlled substances, (p. 322) for discussion of topic.

Sufficiency (continued)

Generally (continued)

State v. Satterfield, 387 S.E.2d 832 (1989) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Prior offenses, Sufficiency of indictment, (p. 168) for discussion of topic.

Arson

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See ARSON First-degree, Sufficiency of indictment, (p. 55) for discussion of topic.

Controlled substances

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

Appellant was convicted of delivery of a controlled substance pursuant to *W.Va.Code* 60A-4-401(a). On appeal he claimed that the indictment was fatally defective because it did not allege that the delivery took place "with remuneration."

Syl. pt. 1 - "An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based." Syl. pt. 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

Syl. pt. 2 - "An indictment that follows the language of *W.Va.Code*, 60A-4-401(a), is sufficient on its face." Syl. pt. 1, *State Meadows*, 170 W.Va. 191, 292 S.E.2d 50 (1982).

Syl. pt. 3 - An indictment alleging a violation of *W.Va.Code*, 60A-4-401 (a), as amended, is sufficient to sustain a conviction for delivery of marihuana, even though the indictment omits stating whether the alleged offense was committed with or without remuneration.

Sufficiency (continued)

Controlled substances (continued)

State v. Nicastro, (continued)

The Court noted that even though the indictment did not specify "with remuneration," the evidence showed that remuneration was given.

Driving under the influence

State v. Satterfield, 387 S.E.2d 832 (1989) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Prior offenses, Sufficiency of indictment, (p. 168) for discussion of topic.

Marijuana

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See CONTROLLED SUBSTANCES Sufficiency of indictment, Delivery of marijuana, (p. 127) for discussion of topic.

Withdrawal of

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 160) for discussion of topic.

INDICTMENT

Validity of

Grand jury does not approve text

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

Relators sought a writ of prohibition to prevent their trial on indictments stemming from labor unrest; all were indicted for attempted murder, all but two for conspiracy to commit malicious assault and petitioner *Starr* for malicious assault.

The prosecuting attorney gave forms to the grand jury. After hearing evidence the grand jury filled in the name of the victim, the alleged crime and date of commission, the names of witnesses and a summary of the evidence. The grand jury foreman signed the forms and circled the words "true bill" on each one. The prosecuting attorney thereupon drafted formal indictments, signed them and presented them to the grand jury foreman for his signature; the full grand jury did not see the indictments, nor did it hear their contents.

The forms charge petitioner Starr with malicious assault and "all others" with attempted murder. The actual indictments, however, charge *Starr* with malicious assault and attempted murder. Petitioners alleged that the procedure was constitutionally flawed in that the indictments were in fact returned by the prosecutor and the grand jury foreman, not the entire grand jury.

Syl. pt. 1 - "A valid indictment or presentment can be made only by a grand jury; and no court [or prosecutor] can [properly] make an indictment in the first instance or alter or amend the substance of an indictment returned by a grand jury." Syl. pt. 5, *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955), as modified.

Syl. pt. 2 - The failure of the grand jury as a body to vote upon the text of the indictment is a fundamental error so compromising the integrity of the grand jury proceedings as to constitute prejudice *per se*, and the indictment must be dismissed as void, without prejudice to the right of the state subsequently to seek a valid indictment. See, *W.Va. Const.* art. III, § 4; *W.Va.R.Crim.P.* 6(f).

Validity of (continued)

Grand jury does not approve text (continued)

State ex rel. Starr v. Halbritter, (continued)

Syl. pt. 3 - "[A]s the court to which a void indictment is returned does not have jurisdiction to try a person so indicted, prosecution of a defendant upon such void indictment will be prevented by a writ of prohibition." Syl. pt. 2, in part, *State ex rel. McCormick v. Hall*, 150 W.Va. 385, 146 S.E.2d 520 (1966), *overruled on another point*, *State v. Furner*, 161 W.Va. 680, 682-83, 245 S.E.2d 618, 619 (1978).

The Court noted that the prosecuting attorney added the conspiracy charges after the grand jury's return of the forms; even under the standard that dismissal is appropriate only if the error substantially influenced the grand jury, these indictments would be invalid. The fatal flaw is that the entire grand jury never voted on the actual indictments. Writ granted.

Grand jury sole power over

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

See INDICTMENT Validity of, Grand jury does not approve text, (p. 324) for discussion of topic.

INDIGENTS

Appointed counsel

Swisher v. Summerfield, No. 18739 (3/28/89) (McHugh, J.)

Petitioner sought a writ of prohibition to prevent his appointment as counsel in two felony cases involving an indigent. Petitioner alleged that he is not a member of the local or regional panels from which attorneys are appointed. Further, he said that the judge did not make a finding as to availability of public defenders from adjoining circuits.

The Court issued a rule to show cause. Respondent's answer included affidavits from public defenders of adjoining circuits stating that they would decline an appointment; and his own affidavit listing attorneys in his circuit available for appointment.

The Court deferred ruling on the permissible geographic limits of appointment (see *Jewell v. Maynard*, 181 W.Va. 571, 383 S.E.2d 536 (1989) (this digest), ruling instead that appointment was improper because of the absence of evidence to show the composition of panels available in the appointing judge's circuit.

Attorneys exempt

Rehmann v. Maynard, 376 S.E.2d 169 (1988) (Miller, J.)

See ATTORNEYS Appointment of, (p. 59) for discussion of topic.

Duty to appeal unless relieved

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See ATTORNEYS Appointment of, Duty to appeal unless relieved, (p. 61) for discussion of topic.

Appointed counsel (continued)

Payment of

Jewell v. Maynard, 383 S.E.2d 536 (1989) (Neely, J.)

This case tested the entire system of providing criminal representation for indigents. Petitioner Jewell was appointed by respondent Judge Maynard to sixty-one criminal cases in the year 1987. He claimed that this burden prevented him from effectively representing the accused persons. Petitioner sought a writ of prohibition to prevent further appointments.

The Court found that (1) the selection of lawyers for criminal appointment varied substantially from circuit to circuit; (2) some lawyers in some circuits were exempt from appointment; (3) a critical shortage existed of lawyers willing to represent indigents (and that shortage was directly related to inadequate compensation); (4) the current hourly rate did not meet the average hourly overhead of private law firms; (5) the current $1,000 limit required many lawyers to work without pay after the limit was reached; and (6) that a significant temptation existed for appointed counsel to advise clients to plead guilty in cases where private pay clients would be advised to go to trial. Further complicating the inadequate rate of pay was a chronic under funding of the system, resulting in several years of bills from one fiscal year carrying over into the next year.

Syl. pt. 1 - "The requirement that an attorney provide gratuitous service to the court for little or no compensation does not *per se*, constitute a violation of the due process clause of the Fourteenth Amendment. However, where the caseload attributable to court appointments is so large as to occupy a substantial amount of an attorney's time and thus substantially impairs his ability to engage in the remunerative practice of law, or where the attorney's costs and out-of-pocket expenses attributable to representing indigent persons charged with crime reduce the attorney's net income from private practice to a substantial and deleterious degree, the requirement of court appointed service will be considered confiscatory and unconstitutional." Syl. Pt. 3, *State ex rel. Partain v. Oakley*, 159 W.Va. 805, 227 S.E.2d 314 (1976).

Jewell v. Maynard, (continued)

Syl. pt. 2 - "In the interest of justice, to protect the rights of indigent persons charged with crime and to assure that the attorneys of this State will not be subjected to an unconstitutional taking of their time and financial resources, in the absence of legislative action to establish a system of providing counsel for indigent defendants which adequately protects these interests, the Court will, on July 1, 1990, order that the lawyers of this State may no longer be required to accept appointments as in the past." Syl. Pt. 4, *State ex rel. Partain v. Oakley*, 159 W.Va. 805, 227 S.E.2d 314 (1976) as modified with respect to date of order.

Syl. pt. 3 - It is an unconstitutional taking of property without just compensation to require a lawyer to devote more than ten percent of his or her normal work year involuntarily to court appointed cases.

Syl. pt. 4 - Hourly compensation for court appointed representation that is so low that it fails to cover a lawyer's overhead and makes no contribution to a lawyer's net income creates a conflict of interest between lawyer and client that implicates the Sixth Amendment right of the indigent client to effective assistance of counsel.

Syl. pt. 5 - Failure to pay for court appointed work promptly and to provide advances for out-of-pocket expenses places an unconstitutional burden on indigent clients in court- appointed cases because lawyers may be financially unable to advance costs or keep their offices operating properly.

Syl. pt. 6 - Circuit courts may appoint lawyers from in-circuit and out-of-circuit pursuant to the guidelines in *W.Va.Code*, 29-21-10 1981 to represent indigent defendants in court- appointed cases and the travel expenses of out-of-circuit lawyers are automatically payable as reasonable expenses in addition to the $500 limitation set forth in *W.Va.Code*, 29-21-14 1981; however, out-of-circuit lawyers should not be required to travel an unreasonable distance.

INDIGENTS

Appointed counsel (continued)

Payment of (continued)

Jewell v. Maynard, (continued)

Syl. pt. 7 - The rates of hourly pay, limits on number of compensable hours, limits on expenses, originally established by *W.Va.Code*, 29-21- 14 in 1977 for court appointed cases, are now so low that they fail to meet constitutional standards; however, the court's order with regard to a remedy will be stayed until 1 July 1990 in order to afford the legislature an opportunity to solve the problem.

The Court ordered that petitioner be relieved of further appointments to the extent that these appointments exceed "ten percent of his practice."

In this rehearing, the Court made only one change: the maximum amount payable to attorneys appointed to represent indigents was raised to $3,000.00 per case, or whatever higher amount the Legislature may deem appropriate.

Mental hygiene

Payment of experts

State ex rel. Bloom v. Keadle, No. 19052 (7/20/89) (Brotherton, C.J.)

The County Commissioners of Kanawha County asked for a writ of prohibition against Judge Keadle to prevent him from ordering Kanawha County to pay expenses for psychological examinations pursuant to involuntary commitment proceedings for indigents (*W.Va.Code* 27-5-4). The examination in question took place in Lewis County, at Weston State Hospital. The Kanawha County Commissioners argue that Lewis County should pay for expenses.

Lewis County protested that forty counties send persons to be examined and that forcing it to bear the costs of all such examinations is unfair and prohibitively expensive. Judge Keadle argued that the statute has extensive notice provisions directed to the examinee's county of residence; to interpret the statute as requiring the county wherein the hearing is held to pay for expenses is inconsistent.

Mental hygiene (continued)

Payment of experts (continued)

State ex rel. Bloom v. Keadle, (continued)

The Court agreed. Noting that the examinee's home county maintains continuing jurisdiction over the individual; that results of the commitment hearing must be sent to the home county for review; and that the circuit court of the home county actually orders commitment, the Court ordered Kanawha County to pay for the examination. Writ denied.

Parole

Eligibility

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

See PAROLE Eligibility, Payment of fines, (p. 464) for discussion of topic.

Right to appeal

Preast v. White, No. 18306 (7/22/88) (Per Curiam)

See APPEAL Denial of right to appeal, (p. 29) for discussion of topic.

Wolfe v. Hedrick, No. 18261 (7/20/88) (Per Curiam)

See APPEAL Denial of right to appeal, (p. 30) for discussion of topic.

INDIGENTS

Right to equal protection

Robertson v. Goldman, 369 S.E.2d 888 (1988) (McGraw, J.)

Petitioner James Wesley Robertson was charged with a first offense shoplifting pursuant to municipal ordinance of the City of Charleston. The maximum fine for this offense is $250.00. Bond was set at $500.00 real estate or $305.00 cash. Being unable to post any bond, petitioner spent the night in jail.

The next morning petitioner Wesley Neal Robertson posted $305.00 cash bond and James Wesley Robertson was released. Counsel was appointed and James Wesley was convicted of shoplifting and fined $205.00. Counsel informed the judge that an appeal would be taken and requested return of the $305.00 bond. The judge refused return of the bond pending posting of a $205.00 appeal bond.

Syl. pt. 1 - The right to the equal protection of the laws guaranteed by our federal and state constitutions blocks unequal treatment of criminal defendants based on indigency.

Syl. pt. 2 - When final judgment has been entered against a criminal defendant, the condition of an appearance bond has been satisfied, and the surety has a right to be exonerated and have any bail deposit returned.

Syl. pt. 3 - The concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution.

Syl. pt. 4 - Where a statute is susceptible of more than one construction, one which renders the statute constitutional, and the other which renders it unconstitutional, the statute will be given the construction which sustains constitutionality.

Syl. pt. 5 - The requirement of Code, 8-34-1 that an "appeal bond with surety deemed sufficient" be entered into before a defendant sentenced in a municipal court may be allowed an appeal *de novo* to the circuit court shall be interpreted to allow a recognizance where appropriate or where the defendant is an indigent.

Right to equal protection (continued)

Robertson v. Goldman, (continued)

The Court quoted at length from *Griffin v. Illinois*, 351 U.S. 12 (1956) and also cited *Williams v. Illinois*, 399 U.S. 235 (1970) (defendant cannot be held longer than his maximum sentence because of inability to pay fines or costs) and *Tate v. Short*, 401 U.S. 395 (1971) (defendant cannot be incarcerated in order to satisfy fine).

The Court also recognized the statutory right to bail (*W.Va.Code* 62-1C- 1 and 62-1C-4) and cited *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978) and *Kolvek v. Napple*, 158 W.Va. 568, 212 S.E.2d 614 (1975) for the principle that an indigent cannot be treated unequally, especially for purposes of incarceration for inability to make bond.

The Court noted that return of the appearance bond is required because petitioner did in fact appear. No appeal bond need be posted so long as a written promise to appear is made.

INEFFECTIVE ASSISTANCE

Generally

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

Appellant was convicted of first-degree murder and malicious wounding. He claimed on appeal that he was denied effective assistance of counsel because of the testimony of appellant's witness, intended to impeach a police officer, that resulted in the showing that the witness had forged her husband's name on appellant's bond. The witness also had a criminal record relating to drug offenses.

Syl. pt. 4 - "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense an accused." Syllabus point 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

No ineffective assistance. The Court found use of the witness to be trial strategy, not an error rising to the level of ineffective assistance. The witness claimed personal knowledge that may have helped appellant.

Basis for setting aside guilty plea

Duncil v. Kaufman, 394 S.E.2d 870 (1990) (Miller, J.)

See PLEA Guilty plea, Withdrawal of, (p. 473) for discussion of topic.

Burden of proof

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

Burden of proof (continued)

State ex rel. Wilson v. Hedrick, 379 S.E.2d 493 (1989) (Per Curiam)

Appellant was convicted of first-degree murder and is serving a life sentence. At a prior *habeas corpus* proceeding he contended that his plea bargain was not voluntary or knowing and that he was denied effective assistance of counsel (for discussion of voluntariness of the plea, see PLEA BARGAINING Voluntariness, Burden of proof, this digest).

Appellant's attorney testified that he had discussed with appellant all possible crimes of which appellant could be convicted, and the associated penalties. The prosecuting attorney made clear during the plea proceeding that only the Department of Corrections could determine appellant's place of incarceration; appellant's assertions that he was led to believe he would be sent to Huttonsville are not credible.

Appellant failed to establish ineffective assistance of counsel.

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 343) for discussion of topic.

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 345) for discussion of topic.

State v. Glover, 396 S.E.2d 198 (1990) (Per Curiam)

Appellant was convicted of malicious wounding and aggravated robbery. His attorney failed to file a timely notice of an alibi defense, resulting in the exclusion of corroborating testimony. On the first appeal, *State v. Glover*, 177 W.Va. 650, 355 S.E.2d 631 (1987), the Court found the record inadequate to make a determination of ineffective assistance.

Burden of proof (continued)

State v. Glover, (continued)

The evidentiary hearing on remand showed that counsel failed to respond to a demand for notice of alibi because he was expecting plea negotiations to result in a settlement. Discussion of an alibi defense did not commence until after plea negotiations ended. Counsel claimed that appellant even requested that he not discuss the possible defense with the witnesses until after appellant's girlfriend had talked with them; counsel subpoenaed all the witnesses and prepared the notice of alibi after that time. Appellant denied making the request and claimed that counsel never told him of the danger of failing to provide notice of an alibi defense.

The circuit court found no ineffective assistance.

Syl. pt. 1 - "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error." Syllabus Point 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 2 - "One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Syllabus Point 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Here, the prejudice which resulted from the inability to introduce alibi witnesses amounted to ineffective assistance. Reversed and remanded.

INEFFECTIVE ASSISTANCE

Conflict of interest

Cole v. White, 376 S.E.2d 599 (1988) (Miller, J.)

Relator asserted that his right to effective assistance of counsel was violated when trial counsel jointly represented him and his co-defendant on malicious assault charges. The victim testified that relator beat her and threatened future beatings if she testified in a pending case against his cousin. Relator's co-defendant sat in relator's nearby car and watched.

Syl. pt. 1 - The right of a criminal defendant to assistance of counsel includes the right to effective assistance of counsel.

Syl. pt. 2 - Where a constitutional right to counsel exists under *W.Va. Const.* art. III, section 14, there is a correlative right to representation that is free from conflicts of interest.

Syl. pt. 3 - When constitutional claims of ineffective assistance of counsel, due to a conflict of interest are raised, either on direct appeal of a criminal conviction or in a *habeas corpus* proceeding founded on similar allegations, we apply the standard of review embodied in Syllabus Point 3, of *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975), *cert denied*, 424 U.S. 909, 47 L.Ed.2d 312, 96 S.Ct. 1103 (1976):

> "The joint representation by counsel of two or more accused, jointly indicted and tried is not improper *per se*; and, one who claims ineffective assistance of counsel by reason of conflict of interest in the joint representation must demonstrate that the conflict is actual and not merely theoretical or speculative."

Syl. pt. 4 - In a case of joint representation, once an actual conflict is found which affects the adequacy of representation, then ineffective assistance of counsel is deemed to occur and the defendant need not demonstrate prejudice.

Syl. pt. 5 - Rule 44(c) of the West Virginia Rules of Criminal Procedure requires trial courts to "promptly inquire with respect to such joint representation and ... personally advise each defendant of his right to effective assistance of counsel, including separate representation."

Conflict of interest (continued)

Cole v. White, (continued)

Syl. pt. 6 - The standard for taking some affirmative action under Rule 44(c) of the West Virginia Rules of Criminal Procedure is the trial court's belief that a conflict of interest is likely to arise. This is a lower standard than the Sixth Amendment's requirement of demonstrating an actual prejudice.

The Court rejected the state's argument that the defendant waived his right to claim a conflict. Further, the Court pointed out that the conflict would have been easy to cure by appointment of new counsel or by separate trials. Writ granted.

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

Habeas corpus

Cole v. White, 376 S.E.2d 599 (1988) (Miller, J.)

See *HABEAS CORPUS* Ineffective assistance, Conflict of interest, (p. 284) for discussion of topic.

Failure to object

Statements by police

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, *In camera* hearing, (p. 585) for discussion of topic.

INEFFECTIVE ASSISTANCE

Inadequate record

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

Appellant was convicted of felony-murder and various underlying felonies. On appeal he claimed ineffective assistance of counsel at trial.

Syl. pt. 4 - "Where the record on appeal is inadequate to resolve the merits of a claim of ineffective assistance of counsel, we will decline to reach the claim so as to permit the defendant to develop an adequate record in *habeas corpus*." Syllabus point 11, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

Joint representation of co-defendants

State v. Haddix, 375 S.E.2d 435 (1988) (Per Curiam)

Appellant was convicted of burglary. Appellant's counsel also represented another individual connected with the burglary but separately indicted and plea bargained on a charge of receiving stolen property in return for testimony against appellant.

Syl. pt. - "'The joint representation by counsel of two or more accused, jointly indicted and tried is not improper *per se*; and, one who claims ineffective assistance of counsel by reason of conflict of interest in the joint representation must demonstrate that the conflict is actual and not merely theoretical or speculative.' Syl. pt. 3, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975)." Syl., *State v. Livingston*, 179 W.Va. 206, 366 S.E.2d 654 (1988).

Appellant claimed actual conflict here, resulting in harm to his defense, in that the dual representation caused counsel to select an inappropriate theory of defense. The Court rejected this contention, finding no actual harm.

The Court also rejected a similar argument regarding sentencing. Again, the Court found no actual conflict or harm.

INEFFECTIVE ASSISTANCE

Presumption of

Appointment one day prior to trial

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See ATTORNEYS Appointment of, One day prior to trial, (p. 62) for discussion of topic.

Standard of proof

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

Appellant was convicted of burglary. Since he had been convicted of two other felonies, a recidivist charge was brought and appellant was convicted and sentenced to life. Following two attempts to appeal and two writs of *habeas corpus*, appellant claimed here that his counsel was ineffective for failure to conduct *voir dire* with respect to jurors who disclosed relationships with law enforcement personnel; permitting cross-examination of him and his mother concerning pretrial silence; defense counsel's representation of a codefendant at sentencing; and failing to offer an alibi instruction when alibi was a defense.

Syl. pt. 1 - "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error." Syllabus Point 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 2 - "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syllabus Point 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Standard of proof (continued)

State ex rel. Boso v. Hedrick, (continued)

Syl. pt. 3 - "A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a *per se* disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has a right to obtain individual *voir dire* of the challenged juror to determine possible prejudice or bias arising from the relationship." Syllabus Point 6, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

Syl. pt. 4 - "Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross- examine a defendant in regard to his pretrial silence or to comment on the same to the jury." Syllabus Point 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Syl. pt. 5 - "When constitutional claims of ineffective assistance of counsel, due to a conflict of interest are raised, either on direct appeal of a criminal conviction or in a *habeas corpus* proceeding founded on similar allegations, we apply the standard of review embodied in Syllabus Point 3 of *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975), *cert. denied*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976):

> "'The joint representation by counsel of two or more accused, jointly indicted and tried is not improper *per se*; and, one who claims ineffective assistance of counsel by reason of conflict of interest in the joint representation must demonstrate that the conflict is actual and not merely theoretical or speculative.'"

Syllabus Point 3, *Cole v. White*, 180 W.Va. 393, 376 S.E.2d 599 (1988).

The Court held the failure to conduct *voir dire* acceptable in light of the circuit court's *sua sponte* inquiry (Note: Seems curious, especially because the issue was the attorney's effectiveness, not the circuit court's; similar to a harmless error analysis).

Standard of proof (continued)

State ex rel. Boso v. Hedrick, (continued)

As to the cross-examination of the appellant and his mother, the gravamen was that the prosecution asked both why they had not disclosed to the State the appellant's claim that he was at his mother's home during the time the crime was committed. The Court held that the appellant's voluntary surrender to police, which obviated the necessity for *Miranda* warnings, made cross-examination permissible. As to his mother, the cross was permissible because she was never a suspect, much less a defendant here.

Here, the law partner of the co-defendant's counsel represented appellant on appeal and also at sentencing. The Court held that no actual conflict existed, hence no error. *Cole v. White*, 180 W.Va. 393, 376 S.E.2d 599 (1988).

The Court found that the finders of fact were required to adjudge appellant's alibi false in order to convict him. Failure to offer an alibi under these circumstances was not tantamount to ineffective assistance of counsel.

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

Appellant was convicted of aggravated robbery and sentenced to life imprisonment. On appeal, he alleged that he was denied effective assistance of counsel in that counsel failed to object to a deficient instruction, failed to object to rebuttal testimony and argument by the prosecuting attorney, failed to offer an instruction that testimony of an accomplice is "inherently suspect," and failed to move for a judgment of acquittal.

Syl. pt. 9 - "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, § 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error." Syllabus Point 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Standard of proof (continued)

State v. England, (continued)

Syl. pt. 10 - "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syllabus Point 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 11 - Where the record on appeal is inadequate to resolve the merits of a claim of ineffective assistance of counsel, we will decline to reach the claim so as to permit the defendant to develop an adequate record in *habeas corpus*.

Here, the Court found the record to be inadequate and recommended that the matters complained of be developed in a *habeas corpus* action.

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

Defendant was convicted of first-degree sexual assault and kidnaping. On appeal he contended that his counsel was ineffective due to the failure to request a competency hearing or to raise an insanity defense.

Syl. pt. 3 - "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguably courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Here, the Court held that appellant failed to prove that no reasonably qualified attorney would have failed to request a hearing or to raise an insanity defense. Counsel had requested several psychiatric examinations, at least three of which found appellant mentally ill but competent to stand trial.

Standard of proof (continued)

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

Appellant was convicted of first-degree murder. On appeal she claimed that defense counsel was ineffective due to his failure to obtain independent scientific tests to rebut prosecution evidence. The prosecution's case was based on scientific evidence relating to blood on appellant's clothing and on the victim's bed, and ballistic tests relating to the murder weapon.

Syl. pt. 9 - "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 10 - "One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Syl. pt. 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Court found no record of how the missing expert testimony would have aided appellant. No error.

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

Following two separate trials for the killing of two half-brothers, appellant was convicted of first-degree murder. On appeal he claimed that his trial counsel was ineffective for failure to object to testimony of a witness from the first trial, which resulted in an acquittal, being introduced at the second trial; and for failure to join in the prosecution's motion for mistrial during closing argument.

Syl. pt. 6 - "One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Syl. pt. 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Standard of proof (continued)

State v. Porter, (continued)

Syl. pt. 7 - "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Here, the Court noted that the witness' testimony was allegedly given at the first trial while intoxicated. Appellant's counsel, however, did cross-examine the witness to no avail; the witness claimed that he simply did not remember his earlier testimony. Similarly, counsel's failure to join in the motion for mistrial does not constitute ineffective assistance since it was counsel himself who said "this case has been tried before, maybe three times." See *State v. Pelfrey*, 163 W.Va. 408, 256 S.E.2d 438 (1979) (ineffective assistance for counsel to fail to move for mistrial because of personal economic motivation). The record already reflected previous proceedings.

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

Appellant was convicted of armed robbery. On appeal he claimed that his counsel was ineffective in that counsel did not request an *in camera* hearing on the introduction of evidence of flight (see EVIDENCE Admissibility, Flight, (p. 194)); did not use two subpoenaed witnesses; and failed to request separate trials on two counts of robbery. Defendant also claimed that the indictment was defective and varied with the proof adduced at trial.

Syl. pt. 6 - "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, § 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the out come of the case, will be regarded as harmless error." Syllabus Point 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Standard of proof (continued)

State v. Spence, (continued)

Syl. pt. 7 - Where assignments of error are asserted on appeal, but are not discussed, in the absence of plain error, we will decline to address them. The plain error rule presupposes that the record is sufficiently developed to discern the error.

Syl. pt. 8 - "The joinder of related offenses to meet possible variance in the evidence is not ordinarily subject to a severance motion. In those other situations where there has been either a joinder of separate offenses in the same indictment or the consolidation of separate indictments for the purpose of holding a single trial, the question of whether to grant a motion for severance rests in the sound discretion of the trial court." Syllabus Point, *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

The Court viewed the failure to ask for a hearing as a matter of trial tactics; did not find any prejudice in the failure to call the witnesses; and found that the same defense was offered to both counts of robbery and that the defendant was acquitted on one count. No ineffective assistance.

Because the record did not contain even a copy of the indictment, the Court declined to discuss it.

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

Appellant was convicted of two counts of sexual abuse and two counts of sexual assault. On appeal, he claimed his counsel was ineffective in that counsel (1) argued denial of any misconduct; (2) failed to object to prosecutor's remarks during opening argument that appellant's divorce was a result of the alleged abuse; (3) questioned defense witnesses as to improper sexual acts; (4) failed to request an independent expert psychological examination of the victims; and (5) failed to offer expert testimony regarding the lack of physical evidence of abuse or assault.

Syl. pt. 8 - "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of

Standard of proof (continued)

State v. Edward Charles L. Sr., (continued)

skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error." Syl. Pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 9 - "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court noted that defense counsel had a weak case. No ineffective assistance.

State v. Glover, 396 S.E.2d 198 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Burden of proof, (p. 334) for discussion of topic.

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

Appellant was convicted of first-degree murder. On appeal, he claimed that he was denied effective assistance of counsel in that his trial counsel failed to challenge a witness' competency to testify and failure to seek an in camera hearing to determine competency.

Standard of proof (continued)

State v. Merritt,&Merritt v. Legursky, (continued)

Syl. pt. 3 - "'In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, § 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error.' Syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)." Syl. Pt. 1, *State v. Cecil*, 173 W.Va. 27, 311 S.E.2d 144 (1983).

No ineffective assistance. The Court noted that an *in camera* hearing is not required to assess competency.

INFANTS

Custody

Following abuse

State of Florida ex rel. W.Va. DHS v. Thornton, No. CC969 (7/20/89) (Brotherton, C.J.)

See ABUSE AND NEGLECT Custody of infant, (p. 2) for discussion of topic.

Standard of proof

State v. Snodgrass, 382 S.E.2d 56 (1989) (Per Curiam)

Appellant was convicted of aggravated robbery. Appellant's trial counsel did not object to the introduction of the wallet appellant allegedly stole. Trial counsel did not put on any witnesses, relying solely on cross-examination of the victim, the investigating officer and friends of the victim. Appellate counsel claimed that the wallet was "fruit of the poisonous tree" and should have been suppressed (the police officer testified that he located the wallet because appellant told him where it was hidden; that admission was suppressed as involuntary).

"Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court noted that appellant had an extensive criminal record, had told the police where the stolen wallet was located and had executed a waiver of rights and a confession. The oral and written confessions were suppressed but trial counsel was still without any witnesses. Insufficient to overcome the presumption of effectiveness.

INFORMATION

Multiple offenses

Tried together

State v. Hatfield, 380 S.E.2d 670 (1988) (McGraw, J.)

See JOINDER Multiple offenses, (p. 373) for discussion of topic.

Recidivism

State v. Masters, 373 S.E.2d 173 (1988) (Miller, J.)

See RECIDIVISM Information, Sufficiency of, (p. 534) for discussion of topic.

INSANITY

Competency to stand trial

Right to hearing

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See HARMLESS ERROR Constitutional, Generally, (p. 291) for discussion of topic.

Instructions

Disposition if found guilty

State v. Lutz, 395 S.E.2d 478 (1988) (Neely, J.)

See INSANITY Instructions, Disposition if found guilty (p. 350) for discussion of topic.

State v. Lutz, 395 S.E.2d 478 (1988) (Neely, J.)

Appellant was convicted of first-degree murder with a recommendation of mercy. Appellant's only defense was insanity. Following the presentation of evidence the jury requested information regarding whether appellant would receive medical treatment if found guilty with a recommendation of mercy. The judge refused to respond.

The jury then requested a written copy of the judge's charge to the jury. The prosecuting attorney objected; defense counsel wanted either to grant the request or have the judge re-read the charge. Because the judge was not aware of the amendment to Rule 30 of the W.Va. Rules of Criminal Procedure he erroneously believed that he could not give the written charge because of the prosecuting attorney's objection.

Syl. pt. 1 - "In any case where the defendant relies upon the defense of insanity, the defendant is entitled to an instruction which advises the jury about the further disposition of the defendant in the event of a finding of not guilty by reason of insanity which correctly states the law." Syllabus Point 1, *State v. Daggett*, 167 W.Va. 411, 280 S.E.2d 545 (1981).

Instructions (continued)

Disposition if found guilty (continued)

State v. Lutz, (continued)

Syl. pt. 2 - "Where it clearly and objectively appears in a criminal case from statements of the jurors that the jury has failed to comprehend an instruction on a critical element of the crime or a constitutionally protected right, the trial court must, on request of defense counsel, reinstruct the jury." Syllabus Point 2, *State v. McClure*, 163 W.Va. 33, 253 S.E.2d 555 (1979).

Reversed and remanded. Despite the trial court's giving of an instruction on the consequences of an insanity verdict the jury's apparent confusion required some attempt to clarify the law.

Insanity as defense

State v. Lutz, 395 S.E.2d 478 (1988) (Neely, J.)

See INSANITY Instructions, Disposition if found guilty, (p. 350) for discussion of topic.

Test for

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See HARMLESS ERROR Constitutional, Generally, (p. 291) for discussion of topic.

State v. Parsons, 381 S.E.2d 246 (1989) (Per Curiam)

Appellant was convicted of second-degree murder for shooting his ex- wife. His sole defense at trial was that he was insane at the time of the shooting. At trial, a neurosurgeon and a psychologist testified as to appellant's organic injuries, "borderline intelligence," and impulse control. Another expert also testified as to appellant's organic injuries as they related to his ability to premeditate and his general mental health.

Test for (continued)

State v. Parsons, (continued)

Syl. pt. 3 - "When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law . . ." Syllabus point 2, in part, *State v. Myers*, 159 W.Va. 353, 222 S.E.2d 300 (1976).

Syl. pt. 4 - "There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense." Syllabus point 2, *State v. Daggett*, 167 W.Va. 411, 280 S.E.2d 545 (1981).

The Court noted that testimony of experts in this area does not necessarily control. *State v. McWilliams*, 177 W.Va. 369, 352 S.E.2d 120 at 129 (1986). Here, the experts' testimony was equivocal and a neighbor thought appellant sane. A jury could have found appellant sane. No error.

INSTRUCTIONS

Generally

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

Defendant was convicted of murder. On appeal he objected generally to two instructions given and to eleven refused; more specifically, he objected to the refusal of instructions relating to being an accessory after the fact; being an aider or abettor; shared intent; and the elements of coercion and compulsion.

Syl. pt. 8 - "An instruction to the jury is proper if it is a correct statement of the law and if sufficient evidence has been offered at trial to support it." Syllabus Point 8, *State v. Hall*, 171 W.Va. 212, 298 S.E.2d 246 (1982).

Syl. pt. 9 - "'It is not error to refuse to give an instruction to the jury, though it states a correct and applicable principle of law, if the principle stated in the instruction refused is adequately covered by another instruction or other instructions given.' Syl. pt. 2, *Jennings v. Smith*, 165 W.Va. 791, 272 S.E.2d 229 (1980), quoting, syl. pt. 3, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966). Syl. pt. 2, *McAllister v. Weirton Hospital Co.*, 173 W.Va. 75, 312 S.E.2d 738 (1983)." Syllabus Point 4, *Jenrett v. Smith*, 173 W.Va. 325, 315 S.E.2d 583 (1983).

Here, the Court held the contents of the instructions to be legally incorrect, cumulative, or already given in other instructions. No error in refusing the instruction.

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See INSTRUCTIONS Confusing, (p. 355) for discussion of topic.

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See EVIDENCE Polygraph tests, (p. 240) for discussion of topic.

INSTRUCTIONS

Abstract proposition of law

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

Appellant was convicted of grand larceny, breaking and entering and conspiracy to commit grand larceny and breaking and entering. He complained that the following instruction was abstract and legally incorrect:

PRINCIPAL

In the First-Degree

> "If two or more persons share a common intent and purpose to commit a crime and each performs some act in the commission of the crime, one doing one thing and the other something else and the crime is committed, then each of such persons may be found guilty of the crime."

Syl. pt. 4 - "It is not reversible error for a trial court to give an abstract instruction where the instruction is not misleading or inapplicable to the case." Syllabus Point 7, *State v. Gangwer*, 169 W.Va. 177, 286 S.E.2d 389 (1982).

It is clear that the instruction actually explains the offense of principal in the second-degree. However, the distinction between the two has been abolished at both the indictment and instructional stages. See *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980) and *State v. Reedy*, 177 W.Va. 406, 352 S.E.2d 158 (1986).

Although the Court held the instruction to be abstract and improper, a new trial was not required. Note, however, that the Court disapproved of the general objection to the instruction, saying that a general objection is normally insufficient to preserve the error for appeal. See *State v. Gangwer*, 169 W.Va. 177, 286 S.E.2d 389 (1982); *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983); and Rule 30, *W.Va.R.Crim.P.*

INSTRUCTIONS

Aggravated robbery

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See ROBBERY Elements of, (p. 556) for discussion of topic.

Burden of proof

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See DENIAL OF FAIR TRIAL Charges not connected to evidence, (p. 141) for discussion of topic.

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See INSTRUCTIONS Non-binding, (p. 363) for discussion of topic.

Circumstantial evidence

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See INSTRUCTIONS Incomplete, (p. 358) for discussion of topic.

Confusing

State v. Lutz, 395 S.E.2d 478 (1988) (Neely, J.)

See INSANITY Instructions, Disposition if found guilty, (p. 350) for discussion of topic.

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

During appellant's trial on sexual assault charges he requested an instruction directing the jury to find that he did not have a venereal disease since no record of treatment existed. Further, he requested an instruction directing the jury not to consider the placement of the child after the case was over.

Confusing (continued)

State v. Murray, (continued)

Syl. pt. 9 - "'Instructions in a criminal case which are confusing, misleading or incorrectly state the law should not be given.' Syllabus Point 3, *State v. Bolling*, 162 W.Va. 103, 246 S.E.2d 631 (1978)." Syllabus Point 4, *State v. Neary*, 179 W.Va. 115, 365 S.E.2d 395 (1987).

Here, the Court noted that the appellant could easily have been treated for a venereal disease in another jurisdiction. Further, the placement of the child was clearly irrelevant to the criminal charges at issue. Both instructions were properly refused.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See INSTRUCTIONS Incomplete, (p. 358) for discussion of topic.

Controlled substances

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See CONTROLLED SUBSTANCES Intent, Delivery, (p. 127) for discussion of topic.

Intent

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

Appellant was convicted of delivery of a controlled substance. The prosecution's instruction on the elements of the crime included the word "intent" but omitted the concept of knowledge.

Syl. pt. 5 - "In a criminal trial for violation of *W.Va.Code*, 60A-4-401 (a), the jury must be instructed about each element of the crime including intent." Syl. pt. 2, *State v. Barnett*, 168 W.Va. 361, 284 S.E.2d 622 (1981).

Here, however, the instruction included the element of intent. No error.

INSTRUCTIONS

Cumulative

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See INSTRUCTIONS Generally, (p. 353) for discussion of topic.

Curative

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See EVIDENCE Polygraph tests, (p. 240) for discussion of topic.

Elements of offense

State v. Walker, 381 S.E.2d 277 (1989) (Per Curiam)

See HOMICIDE First-degree, (p. 300) for discussion of topic.

Felony-murder

Underlying felony

State v. Stacy, 384 S.E.2d 347 (1989) (Workman, J.)

See HOMICIDE Felony-murder, Instructions, (p. 298) for discussion of topic.

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

See LESSER INCLUDED OFFENSES Robbery, (p. 437) for discussion of topic.

INSTRUCTIONS

First-degree murder

Distinguished from felony murder

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 152) for discussion of topic.

Homicide

First-degree and felony murder distinguished

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 152) for discussion of topic.

Incomplete

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See ROBBERY Elements of, (p. 556) for discussion of topic.

State v. Walker, 381 S.E.2d 277 (1989) (Per Curiam)

See HOMICIDE First-degree, (p. 300) for discussion of topic.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

Appellant was convicted of first-degree murder and sexual assault of his wife. He objected to the giving of an instruction defining direct and circumstantial evidence and informing the jury that they could make inferences "if when taken as a whole or fairly and candidly weighed it convinces the guarded judgment." Another instruction complained of told the jury that appellant could be convicted if "as to time, place, motive, means and conduct (circumstantial evidence) concurs in pointing to the accused as the perpetrator of the crime." Appellant claimed that these instructions relieved the prosecution of its burden of proof.

Incomplete (continued)

State v. Parsons, (continued)

Syl. pt. 5 - "'The giving of a confusing or incomplete instruction does not constitute reversible error when a reading and consideration of the instructions as a whole cure any defects in the complained of instructions.' Syllabus Point 4, *State v. Stone*, 165 W.Va. 266, 268 S.E.2d 50 (1980)." Syllabus Point 4, *State v. Vance*, 168 W.Va. 666, 285 S.E.2d 437 (1981).

The Court found these instructions proper when read together. The instructions contained references to proof beyond a reasonable doubt. Reasonable doubt was defined. With virtually no discussion, the Court also rejected appellant's objection to a premeditation instruction.

Incorrect

Effect of

State v. Walker, 381 S.E.2d 277 (1989) (Per Curiam)

See HOMICIDE First-degree, (p. 300) for discussion of topic.

Inferences

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See INSTRUCTIONS Incomplete, (p. 358) for discussion of topic.

Insanity

State v. Lutz, 395 S.E.2d 478 (1988) (Neely, J.)

See INSANITY Instructions, Disposition if found guilty, (p. 350) for discussion of topic.

INSTRUCTIONS

Jury

Unanimity of

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

During appellant's trial on charges of driving with a revoked operator's license, the trial court refused to give his instruction that:

> "if, after due consideration of the evidence and consultation with his fellows, a juror has a reasonable doubt as to the guilt of the accused .... it is his duty not to surrender his own convictions simply because other jurors are of different opinions."

Syl. pt. 6 - "It is not error for a court to refuse to grant an instruction on the unanimity of the jury." Syllabus Point 8, *Browder v. County Court of Webster County*, 145 W.Va. 696, 116 S.E.2d 867 (1960).

The Court noted that instructions on the burden of proof and the juror's oath fully informed the jury as to their duties. No error in refusing this instruction.

Lesser included offenses

Generally

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See LESSER INCLUDED OFFENSES Generally, (p. 435) for discussion of topic.

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

Appellants were convicted of first-degree arson. On appeal they contended that the trial court erred in failing to give an instruction on second-degree arson, a lesser included offense. Defense counsel did not offer such an instruction.

Lesser included offenses (continued)

Generally (continued)

State v. Mullins & State v. Rodas, (continued)

Syl. pt. 4 - "Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Syl. pt. 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

The Court found the evidence here sufficient to prove first-degree arson, therefore the trial court had no duty to give a lesser included offense instruction on second-degree arson.

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

Appellant was convicted on charges of first-degree sexual assault. On appeal he complained that the trial court refused to instruct on lesser included offenses. Specifically, he noted that the victim testified that he inserted his finger, not his penis, thus allowing an instruction on first-degree sexual abuse (not assault).

Syl. pt. 10 - "Where there is no evidentiary dispute or insufficiency of the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Syllabus Point 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

The Court noted that the critical difference between abuse and assault is that the latter requires penetration. Here, there was no evidentiary conflict as to the penetration. No error.

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

Appellant was convicted of first offense delivery of marijuana. He argued on appeal that the trial court erred in not giving to the jury a verdict form as to the lesser included offense of possession.

Lesser included offenses (continued)

Generally (continued)

State v. Nicholas, (continued)

Syl. pt. 2 - "'As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.' Syl. pt. 17, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)." Syllabus Point 4, *State v. Nicastro*, 181 W.Va. 556, 383 S.E.2d 521 (1989).

Syl. pt. 3 - "Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Syllabus Point 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Appellant's request for a form was not preserved below, nor was there sufficient evidence on which the theory of delivery without remuneration could have gone to the jury. Appellant testified that no delivery occurred. No error.

Sexual assault

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See SEXUAL ATTACKS Lesser included offenses, First and third degree assault, (p. 603) for discussion of topic.

INSTRUCTIONS

Non-binding

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

Appellant was convicted of kidnaping, second-degree murder and third degree arson. The trial court instructed the jury that they should determine the guilt or innocence of the accused. The jury had already been told that they could choose between the verdicts of "guilty" or "not guilty" and that the presumption of innocence must be overcome by proof beyond a reasonable doubt.

Syl. pt. 5 - "An instruction in a criminal case which is not binding and does not require the jury to accept a presumption as proof beyond a reasonable doubt of any essential element of a crime, or require the defendant to introduce evidence to disprove an essential element of the crime for which he is charged, is not erroneous." Syllabus point 3, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 6 - "As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to here." Syllabus point 1, *State v. Smith*, 169 W.Va. 750, 289 S.E.2d 478 (1982).

Here, neither instruction complained of misstated the law or harmed appellant. The Court noted that no objection was made at trial. No error.

Plain error

State v. Fisher, 370 S.E.2d 480 (1988) (Per Curiam)

See APPEAL Failure to preserve, (p. 34) for discussion of topic.

Polygraph tests

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See EVIDENCE Polygraph tests, (p. 240) for discussion of topic.

INSTRUCTIONS

Refusal to give

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See INSTRUCTIONS Generally, (p. 353) for discussion of topic.

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See INSTRUCTIONS Right to, (p. 364) for discussion of topic.

Sexual attacks

State v. Davis, 376 S.E.2d 563 (1988) (Per Curiam)

See SEXUAL ATTACKS Instructions, (p. 602) for discussion of topic.

Right to

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

Defendant was convicted of involuntary manslaughter. The trial court refused to give defendant's proposed instruction on self-defense, which included the right to arm oneself; but gave a prosecution instruction on self-defense which required that the jury find that the defendant had reasonable grounds to believe, and did believe, that the killing was necessary to save her life or prevent great bodily harm.

Syl. pt. 3 - "'In this jurisdiction where there is competent evidence tending to support a pertinent theory of a case, it is error for the trial court to refuse a proper instruction, presenting such theory, when so requested.' Syllabus Point 4, *State v. Hayes*, 136 W.Va. 199, 67 S.E.2d 9 (1951)." Syllabus Point 2, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

The Court held the general self-defense instruction sufficient in light of the jury's finding of involuntary manslaughter. However, the Court noted that the failure to give defendant's instruction would have been reversible error if the verdict had been first-degree murder.

INSTRUCTIONS

Self-defense

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See SELF-DEFENSE Deadly force, (p. 571) for discussion of topic.

Sexual assault

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

During appellant's trial on charges of sexual assault, he requested an instruction that "the charge of sexual assault in the first-degree is an easy one to make and hard to disprove by one, be he ever so innocent."

Syl. pt. 8 - An instruction which cautions the jury that a charge of sexual assault or abuse is easy to make and difficult to defend should not be given.

The Court noted that the instruction is inappropriate because of the presumption of innocence, the requirement of proof beyond a reasonable doubt and procedural rights now available under the Fifth and Sixth Amendments. Further, the assumption that the charge is difficult to defend against is not supported by actual experience. See *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981) and *State v. Perry*, 41 W.Va. 641, 24 S.E. 634 (1896).

Sexual attacks

Refusal to give

State v. Davis, 376 S.E.2d 563 (1988) (Per Curiam)

See SEXUAL ATTACKS Instructions, (p. 602) for discussion of topic.

Taken together

State v. Walker, 381 S.E.2d 277 (1989) (Per Curiam)

See HOMICIDE First-degree, (p. 300) for discussion of topic.

INTENT

Generally

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See KIDNAPING Standard of proof, (p. 433) for discussion of topic.

Burglary

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See BURGLARY Elements of nighttime, (p. 94) for discussion of topic.

Element of offense

Controlled substances

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

See INSTRUCTIONS Controlled substances, Intent, (p. 356) for discussion of topic.

Evidence of

State v. Robinette, 383 S.E.2d 32 (1989) (Miller, J.)

See EVIDENCE Admissibility, Other crimes, (p. 198) for discussion of topic.

Robbery

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See ROBBERY Elements of, (p. 556) for discussion of topic.

INTERROGATION

Prior to arrest

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Request for counsel

Effect of

State v. Bowyer, 380 S.E.2d 193 (1989) (Miller, J.)

See RIGHT TO COUNSEL When attaches, (p. 548) for discussion of topic.

Right to remain silent

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

Appellant was convicted of unlawful assault. Police officers went to appellant's home in search of a van described by an eyewitness. They obtained appellant's written consent to search the van; while the search was in progress appellant "blurted out" that he had "kicked the faggot's ass."

Appellant was given his *Miranda* rights and executed a written form showing that he did not want to speak with the police. While waiting for a magistrate appellant said he did not want to make a written statement but would talk to the officer. He proceeded to tell about the altercation. The trial court suppressed the pre-*Miranda* statement but allowed the later conversation into evidence, along with clothing the appellant wore at the time of arrest.

Syl. pt. 1 - "Once a person under interrogation has exercised the right to remain silent guaranteed by *W.Va.Const.*, art. III § 5, and *U.S. Const.* amend. V the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial." Syllabus Point 3, *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980).

Reversed and remanded.

INTERROGATION

Use of to negate request for counsel

State v. Bowyer, 380 S.E.2d 193 (1989) (Miller, J.)

See RIGHT TO COUNSEL When attaches, (p. 548) for discussion of topic.

While awaiting counsel

State v. Gunnoe, 374 S.E.2d 716 (1988) (Neely, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Post-arrest, After requesting counsel, (p. 582) for discussion of topic.

INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

Custody of abused child

State of Florida ex rel. W.Va. DHS v. Thornton, No. CC969 (7/20/89) (Brotherton, C.J.)

See ABUSE AND NEGLECT Custody of infant, (p. 2) for discussion of topic.

INVOLUNTARY COMMITMENT

Least restrictive alternative

In re Sharon K., 387 S.E.2d 804 (1989) (Neely, J.)

See MENTAL HYGIENE Least restrictive alternative, (p. 451) for discussion of topic.

Payment of experts

State ex rel. Bloom v. Keadle, No. 19052 (7/20/89) (Brotherton, C.J.)

See INDIGENTS Mental hygiene, Payment of experts, (p. 329) for discussion of topic.

INVOLUNTARY MANSLAUGHTER

Defined

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See HOMICIDE Involuntary manslaughter, Defined, (p. 302) for discussion of topic.

Standard for

Applied to negligent homicide

State v. Storey, 387 S.E.2d 563 (1989) (Per Curiam)

See HOMICIDE Negligent homicide, Motor vehicles, (p. 303) for discussion of topic.

JAILS

Conditions of confinement

Facilities Review Panel v. McGuire, No. 19029 (12/20/90) (Per Curiam)

The Court's Facilities Review Panel, pursuant to *W.Va.Code* 31-20-9, brought a writ of mandamus to compel respondents to improve the conditions of the Greenbrier County Jail.

The Court found that the lack of adequate physical facilities; the lack of clear written policies for security, fire prevention, exercise and educational programs for prisoners and various other matters; and the lack of adequate staff violated Title 95 Legislative Rules, Jail and Prison Standards Commission, Series 1, West Virginia Minimum Standards for Construction, Operation and Maintenance of Jails (1988) and both the Eighth and Fourteenth Amendments to the United State Constitution.

Executive order

Reprieve

County Commission of Mercer County v. Dodrill, 385 S.E.2d 248 (1989) (McHugh, J.)

See REPRIEVE Executive order, (p. 536) for discussion of topic.

State prisoners

Responsibility for

County Commission of Mercer County v. Dodrill, 385 S.E.2d 248 (1989) (McHugh, J.)

See GOVERNOR Reprieve, Authority to grant, (p. 273) for discussion of topic.

JOINDER

Discretion of judge

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

Appellant was convicted of burglary, grand larceny, breaking and entering, petty larceny and four counts of conspiracy. On appeal he claimed that the various offenses should have been severed.

Syl. pt. 6 - "[W]here there has been either a joinder of separate offenses in the same indictment or the consolidation of separate indictments for the purpose of holding a single trial, the question of whether to grant a motion for severance rests in the sound discretion of the trial court." Syllabus Point 6, in part, *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

See also, Rules 8(a) and 14, *W.Va.R.Crim.P.*

No abuse of discretion here. Appellant was not denied the right to present defenses, nor did he assert that he wished to testify in relation to some charges but not others.

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 344) for discussion of topic.

Multiple offenses

State v. Hatfield, 380 S.E.2d 670 (1988) (McGraw, J.)

Appellant was convicted of abduction with intent to defile and sentenced to life imprisonment as an habitual offender. The trial court joined two separate indictments for two separate instances of abduction and tried them together.

Syl. pt. 2 - "'A trial court may in its discretion order two or more indictments, or informations, or both, to be tried together if the offense could have been joined in a single indictment or information, that is, the offenses are of the same or similar character or are based on the same act or transaction, or on two or more acts or transactions connected together or constituting a common scheme or plan.' Syl. pt. 5, *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981)." Syllabus, *State v. Eye*, 177 W.Va. 671, 355 S.E.2d 921 (1987).

Multiple offenses (continued)

State v. Hatfield, (continued)

Syl. pt. 3 - Even where joinder or consolidation of offenses is proper under the West Virginia Rules of Criminal Procedure, the trial court may order separate trials pursuant to Rule 14(a) on the ground that such joinder or consolidation is prejudicial. The decision to grant a motion for severance pursuant to *W.Va.R.Crim.P.* 14(a) is a matter within the sound discretion of the trial court.

The decision to grant a motion for severance pursuant to *W.Va.R.Crim. P.* 14(a) is a matter within the sound discretion of the trial court.

The Court noted that federal courts liberally interpret the equivalent federal rule and that offenses need not be related to the same transaction, nor near in time, nor identical in nature to be joined (see cases cited in full opinion). However, the Court acknowledged that joinder is not permissible when prejudice results. *State v. Clements*, 175 W.Va. 463, 334 S.E.2d 600 (1985), *cert. denied*, 474 U.S. 857, 106 S.Ct. 165, 88 L.Ed.2d 137 (1985); *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 at 383 (1981).

Here, the danger of prejudice outweighed the interests of judicial economy since the offenses were clearly separate and distinct and the nature of the offenses themselves increased the risk of prejudice. Reversed and remanded.

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See JOINDER Discretion of judge, (p. 373) for discussion of topic.

JOINDER

Offenses

Generally

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

Appellant was convicted of first-degree murder and sexual assault of his wife; and of obtaining money and attempting to obtain money by false pretenses. The charges were joined for trial. The victim's automatic teller card was used soon after the murder to obtain money. Appellant claimed prejudice from the murder and assault charges hampered his defense of the misdemeanor charges.

Syl. pt. 6 - "(W)here there has been either a joinder of separate offenses in the same indictment or the consolidation of separate indictments for the purpose of holding a single trial, the question of whether to grant a motion for severance rests in the sound discretion of the trial court." Syllabus Point 6, in part, *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

The Court found that the joinder did not prevent presentation of defenses, nor did it inhibit his ability to testify or result in impermissible cumulation of the evidence. No error.

Separate offenses

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See JOINDER Discretion of judge, (p. 373) for discussion of topic.

JOINT REPRESENTATION

Standard for review

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See MULTIPLE DEFENDANTS Standard for review, (p. 460) for discussion of topic.

JUDGES

Administrative acts

Disqualification for

State ex rel. Hash v. McGraw, 376 S.E.2d 634 (1988) (McGraw, J.)

See JUDGES Recusal, Administrative acts (assignment of special judges), (p. 395) for discussion of topic.

Administrative authority

Appointment of circuit clerk

Carter v. Taylor, 378 S.E.2d 291 (1989) (Workman, J.)

Relator was appointed by Judge Andrew N. Frye to the position of circuit clerk on January 3, 1989. On January 25, 1989, relator sought a writ of prohibition against Judge C. Reeves Taylor to prevent enforcement of his orders of January 6, 9, and 26, 1989 appointing another person to the position of circuit clerk.

Both judges claimed to be Chief Judge of their circuit. The Court resolved the dispute by letter of January 5, 1989 appointing Judge Taylor as Chief Judge. Judge Frye's order of January 3, 1989 was entered of record on January 6, 1989. Judge Taylor's orders of January 6 and 9, 1989 appointed a non-resident as temporary circuit clerk. These orders are therefore invalid. Judge Taylor subsequently appointed a resident on January 26, 1989.

Syl. pt. 1 - General supervisory control over all intermediate appellate, circuit, and magistrate courts resides in the Supreme Court of Appeals. *W.Va. Const.*, art. VIII, section 3.

Syl. pt. 2 - Local administrative authority in a multi-judge circuit reposes in the chief judge thereof.

Syl. pt. 3 - The authority to fill a vacancy created by resignation in the position of circuit court clerk reposes with the chief judge in a multi-judge circuit.

Administrative authority (continued)

Appointment of circuit clerk (continued)

Carter v. Taylor, (continued)

The Court rejected relator's argument that the power of appointment in case of resignation resides generally in the circuit court, irrespective of the Constitution's grant of power to the Chief Judge in case of incapacity. The Court held that, prior to the appointment of Judge Taylor as Chief Judge, neither judge had power to appoint a circuit clerk.

Appointment of attorneys

Rehmann v. Maynard, 376 S.E.2d 169 (1988) (Miller, J.)

See ATTORNEYS Appointment of, (p. 59) for discussion of topic.

Campaign contributions

In the Matter of Karr & McCarty, 387 S.E.2d 126 (1989) (McHugh, J.)

See JUDGES Discipline, Solicitation or acceptance of campaign funds, (p. 381) for discussion of topic.

Conduct at trial

Duty when juror doubts verdict

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

See JURY Polling the jury, Procedure when juror doubts verdict, (p. 416) for discussion of topic.

JUDGES

Conflict of interest

Generally

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

Duty to inquire

Cole v. White, 376 S.E.2d 599 (1988) (Miller, J.)

See INEFFECTIVE ASSISTANCE Conflict of interest, (p. 336) for discussion of topic.

Contempt

Attorneys subject to

State ex rel. Ferrell v. Adkins, 394 S.E.2d 909 (1990) (Per Curiam)

See ATTORNEYS Contempt of court, (p. 64) for discussion of topic.

Discretion in child support cases

State v. Lusk, 376 S.E.2d 351 (1988) (Miller, J.)

See CHILD SUPPORT AND ALIMONY Criminal contempt, Grounds for, (p. 100) for discussion of topic.

Discipline

Generally

In the Matter of Crislip, 391 S.E.2d 84 (1990) (Miller, J.)

See JUDGES *Ex parte* dismissal, (p. 389) for discussion of topic.

Discipline (continued)

Generally (continued)

Feltz v. Crabtree, 370 S.E.2d 619 (1988) (Brotherton, J.)

See MAGISTRATE COURT Judicial ethics, Candidacy for circuit clerk, (p. 441) for discussion of topic.

In the Matter of Jett, 370 S.E.2d 485 (1988) (Per Curiam)

Magistrate Douglas H. Jett appeared at an evening hearing intoxicated. He improperly issued a defective warrant and improperly filled out bail bond papers before releasing the accused.

Syl. pt. - "'The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial Hearing Board in disciplinary proceedings.' Syl. pt. 1, *W.Va. Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980)." Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985).

Here, the Court concurred with the findings of the Hearing Board that Magistrate Jett violated Canon 3A(1) and Canon 2A of the Judicial Code of Ethics. The Court suspended the magistrate for sixty days without pay.

In the Matter of Sommerville, 364 S.E.2d 20 (1987) (Per Curiam)

Judge Sommerville was charged with violation of Canon 3A(5) of the Judicial Code of Ethics for unreasonable delay in disposition of a case. On October 27, 1979, a teacher in Webster County filed a petition for a writ of certiorari to review her dismissal. The school board filed a response on November 6, 1979 and briefs were ordered on December 7, 1979.

The school board never filed a brief; the teacher's attorney filed one two months after the deadline. A motion to amend the complaint was granted on September 8, 1981. When the ethics complaint was filed on October 11, 1985, no decision had been reached.

The Court noted that the Judge worked full days, accepted special assignments and took very little vacation time. The Court found that undue delay was not present here. Charges dismissed.

Discipline (continued)

Family dispute within judge's family

In the Matter of Baughman, 385 S.E.2d 910 (1989) (Neely, J.)

Magistrate Baughman's daughter was once married to a deputy sheriff. During the deputy's visitation of their children at her home, an argument erupted, resulting in Magistrate Baughman's intervention. Subsequently, the deputy took the children for a period beyond that set forth in the divorce decree; Magistrate Baughman suggested that the deputy return the children or his daughter would seek a warrant. An argument ensued at the Magistrate's office. A warrant was issued by another Magistrate for harboring a minor child and a warrant against Baughman's daughter issued for harassment. Both charges were dismissed.

Syl. pt. 1 - In all cases arising under the Judicial Code of Ethics, the Supreme Court of Appeals reserves the prerogative to make an independent factual inquiry; however, the Court will in general defer to the factual findings below, unless there is some apparent irregularity in the proceedings, or the charged misconduct is especially serious.

Syl. pt. 2 - A judge who responds to the natural ties of family affection and chooses to act to protect his children must proceed with caution, in keeping with the dignity of his office and the power he has over others by virtue of his office.

The Court noted that a judge need not stand idle when his family is in need but that he must proceed with caution. However, although Magistrate Baughman's actions may have been ill-advised, they were insufficient to require sanctions.

Solicitation or acceptance of campaign funds

In the Matter of Karr & McCarty, 387 S.E.2d 126 (1989) (McHugh, J.)

Respondents Karr and McCarty were opponents in the general election for judge of the Fifth Judicial Circuit. Neither candidate established a campaign committee during the primary election to solicit or accept funds. Both candidates received unsolicited contributions.

Discipline (continued)

Solicitation or acceptance of campaign funds (continued)

In the Matter of Karr & McCarty, (continued)

The Judicial Investigation Commission adjudged respondents guilty of violating Canon 7B(2) of the Judicial Code of Ethics and recommended admonishment.

Syl. pt. 1 - When the language of a canon under the Judicial Code of Ethics is clear and unambiguous, the plain meaning of the canon is to be accepted and followed without resorting to interpretation or construction.

Syl. pt. 2 - When a candidate, including an incumbent judge, for a judicial office that is to be filled by public election between competing candidates personally solicits or personally accepts campaign funds, such action is in violation of Canon 7B(2) of the Judicial Code of Ethics. A committee established by a judicial candidate, including an incumbent judge, may solicit or accept funds for such candidate's campaign.

Noting that the purpose of the Canon is to minimize influence on prospective judges, and to prevent coercion by candidates, the Court admonished the respondents. No suggestion was made that the candidates were influenced by the contributions, that they engaged in coercion or that the funds were misused.

Standard of proof

In the Matter of Ferrell, 378 S.E.2d 662 (1989) (Per Curiam)

See JUDGES *Ex parte* communications, (p. 388) for discussion of topic.

In the Matter of Mendez & Evans, No. 19009 (7/12/89) (Per Curiam)

The complainant accused Magistrate Mendez of improperly discouraging her from seeking a warrant for battery against her neighbor; she accused Magistrate Evans of failure to be courteous to her and her lawyer at the subsequent hearing on the warrant.

Discipline (continued)

Standard of proof (continued)

In the Matter of Mendez & Evans, (continued)

The facts showed that Magistrate Mendez had encouraged complainant to settle her differences out of court but, at complainant's insistence had supplied the necessary forms and assisted complainant in filling them out. Complainant hired a private prosecuting attorney. At the subsequent trial Magistrate Evans told complainant and her lawyer to "get off his back" in response to comments made during a five minute recess. The accused was acquitted.

The Court ruled that complainant failed to prove by clear and convincing evidence any wrongdoing, as required by *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983). Complaint dismissed.

Suspension pending disposition

In the Matter of Bivens, 376 S.E.2d 161 (1988) (Per Curiam)

Respondent judge was charged with driving under the influence of alcohol on October 23, 1988. The Judicial Investigation Commission sought a decision regarding appropriateness of suspension pending formal investigation of the charges.

Absent present impairment, the Court ordered that Rule II.J(2), allowing for suspension due to threats to "the integrity of the legal system," did not apply in this case. No suspension until resolution of the charges.

Discretion

Admissibility of confessions

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See EVIDENCE Admissibility, (p. 185) for discussion of topic.

Discretion (continued)

Allowing evidence after case closed

State v. Thomas, 374 S.E.2d 719 (1988) (Per Curiam)

See EVIDENCE Admissibility, After case presented, (p. 186) for discussion of topic.

Competency of witnesses

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See WITNESSES Competency, (p. 655) for discussion of topic.

Continuances

State v. Wilkinson, 381 S.E.2d 241 (1989) (Per Curiam)

See CONTINUANCES Appeal of, Standard for review, (p. 123) for discussion of topic.

Evidentiary rulings

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Character of victim (p. 188) for discussion of topic.

Investigative services

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

Appellant was convicted of second-degree sexual assault and sentenced to ten to twenty years. Following conclusion of the trial, defense counsel requested a hearing based on newly-discovered evidence. That motion was denied but the circuit court authorized counsel to spend $500.00 for an investigator.

Discretion (continued)

Investigative services (continued)

State v. Sayre, (continued)

Appellant complained on appeal that lack of funds prevented hiring of the investigator; appellant was therefore discriminated against because of his indigent status. It was unclear whether the investigation was actually done.

Syl. pt. 1 - "'It is a matter within the sound discretion of the trial judge whether investigative services are necessary under *W.Va.Code*, 5-11-8, and the exercise of such discretion will not constitute reversible error unless the trial judge abuses such discretion. Syl. pt. 6, *State v. Less*, 170 W.Va. 259, 294 S.E.2d 62 (1982)." Syllabus point 6, *State v. Audia*, 171 W.Va. 568, 301 S.E.2d 199 (1983).

Since the circuit court did allow for additional investigative expenses, no abuse of discretion here.

Joinder

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 344) for discussion of topic.

Mistrial

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

See JURY Prejudicing, Sworn jurors allowed to leave courtroom, (p. 417) for discussion of topic.

New trial because of juror misconduct

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See JURY Misconduct, (p. 416) for discussion of topic.

Discretion (continued)

Opinion of expert

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

Questioning on racial bias

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See JURY Challenges, Special circumstances in murder case, (p. 405) for discussion of topic.

Rebuttal evidence

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

Testimony in narrative form

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

See ABUSE OF DISCRETION Testimony, Form of, (p. 14) for discussion of topic.

Voir dire

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See *VOIR DIRE* Abuse of discretion, (p. 650) for discussion of topic.

JUDGES

Duty

To appoint new counsel to pursue appeal

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See ATTORNEYS Appointment of, Duty to appeal unless relieved, (p. 61) for discussion of topic.

To examine jurors for prejudice

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See PROSECUTING ATTORNEY Comments out of court re: guilt of accused, (p. 513) for discussion of topic.

To hold hearing

Artrip v. White, No. 18492 (7/20/88) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Right to hearing, (p. 8) for discussion of topic.

To hold evidentiary hearing

State v. Gilbert, 399 S.E.2d 851 (1990) (Per Curiam)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 604) for discussion of topic.

To reinstruct jury

State v. Lutz, 395 S.E.2d 478 (1988) (Neely, J.)

See INSANITY Instructions, Disposition if found guilty, (p. 350) for discussion of topic.

Duty (continued)

To render decision

Holdren v. MacQueen, No. 18973 (4/18/89) (Per Curiam)

See MANDAMUS Delay in rendering decision, (p. 444) for discussion of topic.

Ethical misconduct

Feltz v. Crabtree, 370 S.E.2d 619 (1988) (Brotherton, J.)

See MAGISTRATE COURT Judicial ethics, Candidacy for circuit clerk, (p. 441) for discussion of topic.

***Ex parte* communications**

In the Matter of Ferrell, 378 S.E.2d 662 (1989) (Per Curiam)

Magistrate Charles L. Ferrell was charged with violating Canons 3A(1) and 3A(4) of the Judicial Code of Ethics. On April 8, 1986, a small business filed a civil action in magistrate court for nonpayment. On May 25, 1986 Magistrate Ferrell entered a default judgment in the amount of $775.24 plus $30.00 court costs. Following failure to satisfy the judgment, the defendant's personal car was seized.

The defendant thereupon approached Magistrate Witherell and pleaded extreme hardship in the loss of his vehicle, asking that the judgment be set aside. Magistrate Witherell contacted Magistrate Ferrell at home and the two agreed to stay the judgment pending a hearing regarding personal responsibility for a corporate debt. The order which issued, however, stated that the judgment was set aside and the defendant proceeded to retrieve his car. At a subsequent hearing on November 3, 1986, Magistrate Witherell determined that the debt owed was not personal and approved the release of the car.

The essence of the complaint charged that Magistrate Ferrell had *ex parte* communication with the defendant.

***Ex parte* communications** (continued)

In the Matter of Ferrell, (continued)

Syl. pt. 1 - "The Supreme Court of Appeals will make an independent evaluation of the record and recommendation of the Judicial Hearing Board in disciplinary proceedings." Syllabus point 1, *W.Va. Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

Syl. pt. 2 - "Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'" Syllabus point 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

The Court held that Magistrate Ferrell did not act improperly since his communications were with another magistrate, not directly with the defendant. Complaint dismissed.

***Ex parte* dismissal**

In the Matter of Crislip, 391 S.E.2d 84 (1990) (Miller, J.)

Magistrate Crislip was found guilty by the Judicial Hearing Board of violating Canon 3 of the Judicial Code of Ethics, requiring a judge to perform the duties of his office impartially and diligently. Upon review, the Judicial Investigation Commission recommended a sanction more severe than public reprimand.

Magistrate Crislip improperly acted in cases assigned to other magistrates, in some cases failing to require signature of the complainant in criminal cases before dismissal of the complaint and failing to make a final disposition. He dismissed criminal warrants without getting approval from the prosecuting attorney. He released a defendant on bond without filing the appropriate papers and he failed to assess the statutory minimum fine in a criminal case.

Syl. pt. 1 - "'The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.' Syl. pt. 1, *W.Va. Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233 271 S.E.2d 427 (1980." Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985).

JUDGES

***Ex parte* communications** (continued)

***Ex parte* dismissal** (continued)

In the Matter of Crislip, (continued)

Syl. pt. 2 - "The purpose of judicial disciplinary proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity, and efficiency of the members of the judiciary and the system of justice." *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 at 702 (1985).

Syl. pt. 3 - "Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'" Syllabus Point 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 4 - An *ex parte* dismissal by a magistrate of a criminal or civil case, without authorization by statute or rule or without other good cause shown, is a violation of Canon 3 of the Judicial Code of Ethics.

Syl. pt. 5 - A magistrate's violation of court rules or related administrative procedures can result in disciplinary action.

The Court found that the magistrate court rules, while local in nature, were not complex nor was Magistrate Crislip unaware of them. Holding irrelevant his claim that no harm was actually done, the Court imposed a one-month suspension without pay.

Grand jury

Authority over

State v. Pickens, 395 S.E.2d 505 (1990) (Per Curiam)

See PROSECUTING ATTORNEY Grand jury, presenting evidence to, (p. 524) for discussion of topic.

JUDGES

Invalid indictment

Effect of

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

See INDICTMENT Validity of, Grand jury does not approve text, (p. 324) for discussion of topic.

Investigations by

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

Respondent is Judge of the Circuit Court of Marion County. Petitioner, the prosecuting attorney of Marion County, dismissed a traffic warrant for operation of a "dirt bike" on public highways. After this practice was legalized a citizen of Marian County complained to respondent that the dismissal was improper.

Respondent appointed a special prosecuting attorney to investigate; the judge later expanded the duties of the prosecutor to include other alleged improprieties committed by petitioner. In this writ of prohibition, petitioner presented the question whether a circuit judge can initiate an investigation of a prosecuting attorney and then appoint a special prosecutor to indict the prosecutor.

Syl. pt. 1 - "Where there is no showing on the record that any party has properly instituted proceedings in a court of record, the court cannot exercise jurisdiction over the matter and any purported order or judgment entered is void and its enforcement may be restrained by prohibition." Syllabus Point 1, *State ex rel. Preissler v. Dostert*, 163 W.Va. 719, 260 S.E.2d 29 (1979).

Syl. pt. 2 - "As a general rule, any order promulgated *sua sponte* by a superior court which purports to control the judicial function in proceedings in a lower court is void *ab initio*." Syllabus Point 10, *State ex rel. Skinner v. Dostert*, 166 W.Va. 743, 278 S.E.2d 624 (1981).

Syl. pt. 3 - *Nemo debet esse judex in propria causa*: A judge may not both initiate an investigation and then enter dispositive judicial orders in furtherance of that investigation, nor may he appear to do so.

Investigations by (continued)

State ex rel. Brown v. Merrifield, (continued)

Syl. pt. 4 - "Before a prosecuting attorney may be disqualified from acting in a particular case and relieved of the duties imposed upon him by the Constitution and by statute, the reasons for his disqualification must appear on the record, and where there is any factual question as to the propriety of the prosecutor acting in the matter, he must be afforded notice and an opportunity to be heard." Syllabus Point 3, *State ex rel. Preissler v. Dostert*, 163 W.Va. 719, 260 S.E.2d 29 (1979).

Syl. pt. 5 - The statute that gives circuit courts the power to appoint special prosecutors, *W.Va.Code*, 7-7-8 [1972], contemplates such an appointment to handle only particular cases in which the prosecutor himself is disqualified. Such an appointment, therefore, must be narrowly drawn. An order purporting to appoint a special prosecutor to present "certain cases" to the grand jury is *ab initio*, because it does not by its terms limit the prosecutorial discretion of the appointee.

The Court noted that the circuit judge's motives may have been colored by animosity toward the prosecuting attorney. Although unclear from the record, it appears that the judge may have acted on his own initiative to investigate the prosecutor. The proper procedure would have been for the judge to present his findings to another judge of the same circuit or directly to the Chief Justice of the Court pursuant to Rule XVII of the W.Va. T.C.R. (1986).

Clearly, the prosecutor here was given neither notice nor opportunity to be heard concerning the alleged improprieties prior to being disqualified and the appointment of a special prosecutor. *W.Va.Code* 7-7-8 should be narrowly construed with regard to the purposes of appointing a special prosecutor; vague orders, such as here, to present "certain cases" to the grand jury are *void ab initio*.

JUDGES

Joinder

Discretion to grant

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See JOINDER Offenses, Generally, (p. 375) for discussion of topic.

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 344) for discussion of topic.

Magistrates

Ethics

In the Matter of Baughman, 385 S.E.2d 910 (1989) (Neely, J.)

See JUDGES Discipline, Family dispute within judge's family, (p. 381) for discussion of topic.

In the Matter of Crislip, 391 S.E.2d 84 (1990) (Miller, J.)

See JUDGES *Ex parte* dismissal, (p. 389) for discussion of topic.

Orders

Pursuant to own investigation

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

Orders (continued)

Timely entered

Deitzler v. Douglass, No. 18689 (2/17/89) (Per Curiam)

See SENTENCING Time of order, (p. 596) for discussion of topic.

Plea bargain

Acceptance thereof

State v. Whitt, 378 S.E.2d 102 (1989) (Per Curiam)

See PLEA BARGAINING Acceptance of, Without admission of guilt, (p. 476) for discussion of topic.

Setting aside

State ex rel. Miller v. Cline, No. 18579 (11/28/88) (Per Curiam)

See PLEA BARGAINING Setting aside, Witness indicted, (p. 479) for discussion of topic.

Polling the jury

Duty when juror doubts verdict

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

See JURY Polling the jury, Procedure when juror doubts verdict, (p. 416) for discussion of topic.

JUDGES

Procedure

Presumption of propriety

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See APPEAL Failure to preserve, Effect of, (p. 36) for discussion of topic.

Racial bias

Discretion on *voir dire*

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See JURY Challenges, Special circumstances in murder case, (p. 405) for discussion of topic.

Recusal

Administrative acts (assignment of special judges)

State ex rel. Hash v. McGraw, 376 S.E.2d 634 (1988) (McGraw, J.)

Petitioner, President of the Jackson County Bar Association, made a motion to remove Justice Darrell V. McGraw, Jr. from the case of *State ex rel. Crabtree v. Hash*, 180 W.Va. 425, 376 S.E.2d 631 (1988). Petitioner contended that Justice McGraw must recuse himself because his administrative acts resulted in litigation before the Court.

The circuit judge of Roane, Jackson and Calhoun counties (the Fifth Judicial Circuit) retired. Then-Chief Justice McGraw, in his administrative capacity, appointed a judge for temporary service. *W.Va. Const.* art. VIII, § 3. Petitioners, believing the appointment order had lapsed, elected a judge themselves (petitioner Skeen) pursuant to *W.Va.Code* 51-2-10.

State ex rel. Hash v. McGraw, (continued)

The administrative director of the Court, Paul Crabtree, then filed a writ of prohibition against the elected judge and the other petitioners herein alleging that *W.Va. Const.* art. VIII, § 3 superseded *W.Va.Code* 51-2- 10. In this action petitioners claimed that Justice McGraw caused the writ to be filed, thus prejudging the case; they further alleged that the writ is politically motivated, in that the resulting vacancy would force the Governor to appoint a new circuit judge.

Syl. pt. 1 - "Where a motion is made to disqualify or recuse an individual justice of this Court, that question is to be decided by the challenged justice and not by the other members of this Court." Syl. pt. 1, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984).

Syl. pt. 2 - The administrative actions of the Chief Justice of the Supreme Court of Appeals of West Virginia in a particular case do not necessarily represent a pecuniary or personal interest that would affect the Chief Justice's impartiality, nor render the Chief Justice incapable of hearing the same case in a judicial capacity.

Syl. pt. 3 - "The administrative rule promulgated by the Supreme Court of Appeals of West Virginia, setting out a procedure for the temporary assignment of a circuit judge in the event of a disqualification of a particular circuit judge, operates to supersede the existing statutory provisions found in *W.Va. Code*, 51-2-9 and 10 and *W.Va.Code*, 56-9-2, insofar as such provisions relate to the selection of special judges and to the assignment of a case to another circuit judge when a particular circuit judge is disqualified." Syl. pt. 2, *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977).

The Court found no bias or improper motives on the part of Justice McGraw and found the rule-making authority to have been properly exercised. Writ denied.

JUDGES

Self-incrimination

Duty to advise

State v. Robinson, 376 S.E.2d 606 (1988) (McGraw, J.)

See PRIVILEGES Marital, Waiver of, (p. 495) for discussion of topic.

Special or temporary judges

Appointment of

State ex rel. Crabtree v. Hash, 376 S.E.2d 631 (1988) (McHugh, J.)

Petitioner, administrative director of the Court, filed for writ of prohibition contending that respondents violated *W.Va. Const.* art. VIII, § 3 when they elected a judge for the Fifth Judicial Circuit to replace temporarily a retired judge. Respondents relied on *W.Va.Code* 51-2-10 and noted that *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977) gave the Chief Justice authority to assign temporary judges only when a sitting judge is "disqualified", not retired. Petitioner alleged that *W.Va. Const.* VIII, § 3 vests with the Chief Justice of the Court the exclusive power to appoint judges for temporary duty.

Syl. pt. 1 - "The administrative rule promulgated by the Supreme Court of Appeals of West Virginia, setting out a procedure for the temporary assignment of a circuit judge in the event of a disqualification of a particular circuit judge, operates to supersede the existing statutory provisions found in *W.Va. Code*, 51-2-9 and 10 and *W.Va.Code*, 56-9-2, insofar as such provisions relate to the selection of special judges and to the assignment of a case to another circuit judge when a particular circuit judge is disqualified." Syl. pt. 2, *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977).

Syl. pt. 2 - *W.Va.Const.* art. VIII, sections 3 and 8, and all administrative rules made pursuant to the powers derived from article VIII, supersede *W.Va.Code*, 51-2-10 (1931) and vest the Chief Justice of the Supreme Court of Appeals of West Virginia with the sole power to appoint a judge for temporary service in any situation which requires such an appointment.

JUDGES

Special or temporary judges (continued)

Appointment of (continued)

State ex rel. Crabtree v. Hash, (continued)

Syl. pt. 3 - "Orders of a special judge who has not met the constitutional prerequisites for holding that office are void." Syl. pt. 5 *Smoot v. Dingess*, 160 W.Va. 558, 236 S.E.2d 468 (1977).

Writ granted.

State ex rel. Hash v. McGraw, 376 S.E.2d 634 (1988) (McGraw, J.)

See JUDGES Recusal, Administrative acts (assignment of special judges), (p. 395) for discussion of topic.

When orders void

State ex rel. Crabtree v. Hash, 376 S.E.2d 631 (1988) (McHugh, J.)

See JUDGES Special or temporary, Appointment of, (p. 397) for discussion of topic.

***Sua sponte* actions**

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

JUDGES

Supreme court justices

Administrative powers

State ex rel. Crabtree v. Hash, 376 S.E.2d 631 (1988) (McHugh, J.)

See JUDGES Special or temporary, Appointment of, (p. 397) for discussion of topic.

Voir dire

Discretion in questioning on racial bias

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See JURY Challenges, Special circumstances in murder case, (p. 405) for discussion of topic.

JUDICIAL NOTICE

Scientific tests

DNA

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SCIENTIFIC TESTS DNA tests, Admissibility, (p. 558) for discussion of topic.

JURISDICTION

Absent pleadings

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

JURY

Bias

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See JURY Disqualification, (p. 406) for discussion of topic.

Employment with law enforcement agency

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See JURY Disqualification, Employment with law enforcement agency, (p. 408) for discussion of topic.

Juror

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See JURY Qualifications, Generally, (p. 418) for discussion of topic.

State v. Bates, 380 S.E.2d 203 (1989) (Per Curiam)

See JURY Disqualification, Relationship *per se*, (p. 410) for discussion of topic.

Prejudice against defendant

State v. Bennett, 382 S.E.2d 322 (1989) (Brotherton, C.J.)

See JURY Disqualification, Prejudice against defendant, (p. 410) for discussion of topic.

Relation to prosecuting or defense attorney

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See JURY Disqualification, Relation to prosecuting or defense attorney, (p. 414) for discussion of topic.

Bias (continued)

Sworn jurors allowed to leave courtroom

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

See JURY Prejudicing, Sworn jurors allowed to leave courtroom, (p. 417) for discussion of topic.

Challenges

Duty to discover

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See JURY Disqualification, Relation to prosecuting or defense attorney, (p. 414) for discussion of topic.

Employment with law enforcement agency

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See JURY Disqualification, Employment with law enforcement agency, (p. 408) for discussion of topic.

Exclusion of group

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

Appellant was convicted of incest. During jury selection two prospective jurors were excused because of religious beliefs. Appellant claimed on appeal that he was denied a jury comprised of a "cross-section" of the community. *W.Va.Code* 52-1-2 allows a judge to excuse or exempt a potential juror when service is "improper" or works an undue hardship: "...idiots, lunatics, paupers, vagabonds, habitual drunkards and persons convicted of infamous crimes" are excluded by the statute. Appellant alleged that since religious beliefs are not a statutory grounds for exemption the exclusion was improper.

Challenges (continued)

Exclusion of group (continued)

State v. King, (continued)

Syl. pt. 5 - "To establish a *prima facie* case of unconstitutional jury selection methods under the Sixth Amendment's fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process." Syl. pt. 2, *State v. Hobbs*, 168 W.Va. 13, 282 S.E.2d 258 (1981).

No error.

Prejudice against defendant

State v. Bennett, 382 S.E.2d 322 (1989) (Brotherton, C.J.)

See JURY Disqualification, Prejudice against defendant, (p. 410) for discussion of topic.

Relationship *per se*

State v. Storey, 387 S.E.2d 563 (1989) (Per Curiam)

See JURY Qualifications, Generally, (p. 419) for discussion of topic.

Relation to law enforcement officer

State v. Perdue, 372 S.E.2d 636 (1988) (Per Curiam)

See JURY Disqualification, Relation to law enforcement officer, (p. 412) for discussion of topic.

Challenges (continued)

Relation to law enforcement officer (continued)

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

See JURY Disqualification, Relation to a law enforcement officer, (p. 412) for discussion of topic.

Relation to prosecuting or defense attorneys

State v. Bennett, 382 S.E.2d 322 (1989 (Brotherton, C.J.)

See JURY Disqualification, Relation to prosecuting or defense attorney, (p. 413) for discussion of topic.

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See JURY Disqualification, Relation to prosecuting or defense attorney, (p. 414) for discussion of topic.

Special circumstances in murder case

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

Defendant, a black man, was found guilty of first-degree sexual assault and kidnaping of a white girl. During pretrial, appellant requested individual *voir dire* and that several specific questions be asked. The judge denied both requests; instead, he asked a general question about racial bias.

Syl. pt. 1 - A defendant in a capital case involving "special circumstances" is entitled to question the jury panel on the issue of racial bias and to advise the jury panel of the race of the parties involved.

Syl. pt. 2 - In cases involving "special circumstances," the trial judge retains the discretion to determine the form and number of questions on the subject of racial bias, as well as whether to question members of the jury panel collectively or individually.

Challenges (continued)

Special circumstances in murder case (continued)

State v. Garrett, (continued)

Noting that kidnaping is a capital offense, *Thomas v. Leverette*, 166 W.Va. 185, 273 S.E.2d 364 (1980), the Court held that the defendant was entitled to inform prospective jurors of the race of the victim and to question on racial bias. The Court held the general question asked by the trial judge to be sufficient, noting that it was very similar to the question refused in *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). *Turner* allowed the trial judge discretion; the Court found no abuse of discretion in the judge's refusal to ask counsel's specific questions.

Confused

Duty to reinstruct

State v. Lutz, 395 S.E.2d 478 (1988) (Neely, J.)

See INSANITY Instructions, Disposition if found guilty, (p. 350) for discussion of topic.

Disqualification

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See JURY Qualifications, Generally, (p. 418) for discussion of topic.

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

Defendant was convicted of murder. On appeal he claimed that two jurors should have been excluded because of prior law enforcement experience; five, because of a belief that the defendant had to prove his innocence; and one because of his close relationship to a law enforcement agency.

Disqualification (continued)

State v. Deskins, (continued)

Syl. pt. 2 - "'The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court.' Syl. pt. 1, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974). Syllabus Point 4, *State v. Wade*, 174 W.Va. 381, 327 S.E.2d 142 (1985)." Syllabus Point 3, *State v. Brown*, 177 W.Va. 633, 355 S.E.2d 614 (1987).

Syl. pt. 3 - "'Jurors who on *voir dire* of the panel indicate possible prejudice should be excused, or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse.' Syllabus Point 3, *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978)." Syllabus Point 5, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

Neither of the first two jurors complained of were currently employed by law enforcement or prosecutorial agencies. *Cf. State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973). Previous employment is not ground for exclusion. The five jurors who, during *voir dire*, mistakenly believed that the defendant had to prove his innocence were individually questioned by the trial court and found to understand the concept of innocent until proven guilty. The final juror was an occasional jail maintenance man; the trial court examined him for prejudice and had found none. No abuse of discretion.

Duty to discover

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See JURY Disqualification, Relation to prosecuting or defense attorney, (p. 414) for discussion of topic.

Disqualification (continued)

Employment with law enforcement agency

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

Appellant was convicted of first-degree murder. The prosecution claimed that appellant used a rifle to shoot the victim; prints of latex gloves matching those in appellant's kitchen were found on the rifle. One of the jurors was an employee of the Department of Public Safety (sic) prior to the trial and had been a fingerprint examiner.

Syl. pt. 1 - "In a criminal case, it is reversible error for a trial court to overrule a challenge for cause of a juror who is an employee of a prosecutorial or enforcement agency of the State of West Virginia." Syl. pt. 5, *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973).

Syl. pt. 2 - "As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there." Syl. pt. 17, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The juror here was removed by a peremptory strike following refusal of a challenge for cause. Although the Court noted that any relation to a prosecutorial or law enforcement office is sufficient to strike, *State v. West*, 157 W.Va. 209, at 219, 200 S.E.2d 859, at 866 (1973), and that any doubt is to be resolved in appellant's favor, *Id.,* at 219-20, 200 S.E.2d at 866, the error here was not preserved at trial. No error.

Exclusion of group

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

See JURY Challenges, Exclusion of group, (p. 403) for discussion of topic.

Disqualification (continued)

Felony conviction

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

Appellant was convicted of second-degree murder. He complained on appeal that one of the jurors would have been disqualified since he had been convicted of a felony. This fact was discovered several months after trial.

Syl. pt. 6 - A felony is an "infamous crime" as it is punishable by imprisonment in the State Penitentiary.

Syl. pt. 7 - "'The general rule, inhibiting allowance of a new trial for matter constituting a principal cause of challenge to a juror, existing before the juror was elected and sworn, unknown to the complaining party until after verdict, not disclosed on a thorough *voir dire* examination, and undiscoverable by the exercise of ordinary diligence, unless it appears from the whole case that the complaint suffered injustice by reason of the disqualification; applies in criminal cases * * *.' Syl. *State v. Harris*, 69 W.Va. 244, 71 S.E. 609 [1911]." Syllabus Point 9, *State v. Hayes*, 136 W.Va. 199, 67 S.E.2d 9 (1951).

Syl. pt. 8 - Where there is a recognized statutory or common law basis for disqualification of a juror, a party must during *voir dire* avail himself of the opportunity to ask such disqualifying questions. Otherwise the party may be deemed not to have exercised reasonable diligence to ascertain the disqualification.

The jury here was never asked if any of them had been convicted of a felony. Having defined a felony as an infamous crime, disqualifying one from jury service, the Court nonetheless held that this type of disqualification must be discovered on *voir dire* or the error is waived. No error.

Disqualification (continued)

Prejudice against defendant

State v. Bennett, 382 S.E.2d 322 (1989) (Brotherton, C.J.)

Appellant was convicted of incest and third-degree sexual assault. During individual *voir dire*, a prospective juror said he knew the defendant and his family, including the victim, and expressed the opinion that sentiment in the community was against the defendant. He also said he thought the defendant was probably guilty and preferred not to be a juror.

Syl. pt. 1 - When individual *voir dire* reveals that a prospective juror feels prejudice against the defendant which the juror admits would make it difficult for him to be fair, and when the juror also expresses reluctance to serve on the jury, the defendant's motion to strike the juror from the panel for cause should ordinarily be granted.

The Court noted that a juror should state "unequivocally and without hesitation" that his opinion as to defendant's guilt will not affect his decision in the case. Here, the juror was cajoled into saying he would be fair. Reversed.

Relationship *per se*

State v. Bates, 380 S.E.2d 203 (1989) (Per Curiam)

Appellant was convicted of manslaughter, possession of marijuana with intent to deliver and delivery to a person under eighteen. He protested that a member of the initial jury panel was the mother of a police officer whose police force investigated the crime.

During *voir dire* the juror volunteered her relationship but noted that her son did not live with her, she did not normally discuss police business with him and she had not discussed this particular case with him. Defense counsel declined further opportunity to question the juror. The trial judge did not strike her from the panel.

Disqualification (continued)

Relationship *per se* (continued)

State v. Bates, (continued)

Syl. pt. 2 - "A prospective juror's consanguineal, martial or social relationship with an employee of a law enforcement agency does not operate as a *per se* disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has a right to obtain individual *voir dire* of the challenged juror to determine possible prejudice or bias arising from the relationship." Syllabus point 6, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

No evidence was introduced to show that the juror's son was in any manner involved in the case at hand. No prejudice or bias was shown. No error.

State v. Storey, 387 S.E.2d 563 (1989) (Per Curiam)

See JURY Qualifications, Generally, (p. 419) for discussion of topic.

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

See JURY Disqualification, Relation to a law enforcement officer, (p. 412) for discussion of topic.

Relationship to a law enforcement officer

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

State v. Bennett, 382 S.E.2d 322 (1989 (Brotherton, C.J.)

See JURY Disqualification, Relation to prosecuting or defense attorney, (p. 413) for discussion of topic.

Disqualification (continued)

Relationship to a law enforcement officer (continued)

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

Appellant was convicted of incest. On appeal he claimed that the juror was improperly selected in that one juror was an employee of the Department of Human Services. Appellant alleged that the Department had a "law enforcement role" because it was involved in child abuse and neglect proceedings arising out of the acts alleged.

He also alleged that another prospective juror, who did not sit on the jury, was a friend of a police witness and should have been removed for cause. The juror was removed by a peremptory strike.

Syl. pt. 6 - "A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a *per se* disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has a right to obtain individual *voir dire* of the challenged juror to determine possible prejudice or bias arising from the relationship." Syl. pt. 6, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

No error as to the friend of the officer; individual *voir dire* was conducted (and, presumably, no bias found). As to the DHS allegation, the Court noted that DHS "... is neither a law enforcement agency nor a prosecutorial agency...and therefore the rule (requiring *per se* disqualification for cause) does not apply." *State v. Bailey*, 179 W.Va. 1, n. 7, 365 S.E.2d 46, 51 n. 7 (1987).

State v. Perdue, 372 S.E.2d 636 (1988) (Per Curiam)

Defendant was convicted of first-degree murder. He objected to the trial court's failure to exclude a prospective juror. The juror had admitted on *voir dire* that he was related to former law enforcement officers who had worked in the area; he further stated that this relation predisposed him to believe police testimony.

Disqualification (continued)

Relationship to a law enforcement officer (continued)

State v. Perdue, (continued)

Upon further questioning, the juror also said that he would not find a defendant guilty simply because a police officer testified against the defendant. The trial court asked the juror if he could render a verdict for or against the defendant based on the evidence alone and he answered yes.

Syl. pt. 1 - "A prospective juror's consanguineal, martial or social relationship with an employee of a law enforcement agency does not operate as a *per se* disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has a right to obtain individual *voir dire* of the challenged juror to determine possible prejudice or bias arising from the relationship." Syllabus point 6, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

See also, *State v. Finley*, 177 W.Va. 554, 355 S.E.2d 47 (1987); *State v. Bennett*, 172 W.Va. 123, 304 S.E.2d 28 (1983); *State v. White*, 171 W.Va. 658, 301 S.E.2d 615 (1983); and *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Here, individual *voir dire* took place. The Court concluded that a *per se* disqualification was inappropriate.

Relation to prosecuting or defense attorney

State v. Bennett, 382 S.E.2d 322 (1989 (Brotherton, C.J.)

Appellant was convicted of third-degree sexual assault and incest. During the general *voir dire*, one juror admitted he had heard appellant's case discussed; he then said during individual *voir dire* that his sister-in-law was the prosecuting attorney's secretary. The juror nonetheless claimed that he was not prejudiced against appellant.

Disqualification (continued)

Relation to prosecuting or defense attorney (continued)

State v. Bennett, (continued)

Syl. pt. 2 - "A potential juror closely related by blood or marriage to either the prosecuting or defense attorneys involved in the case or to any member of their respective staffs or firms should automatically be disqualified." Syl. pt. 4, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

Syl. pt. 3 - "A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a *per se* disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has a right to obtain individual *voir dire* of the challenged juror to determine possible prejudice or bias arising from the relationship." Syl. pt. 6, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

The juror should have been struck for cause. Reversed.

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

Appellant was convicted of first-degree murder. Following trial she learned that two jurors were related to law enforcement personnel; one was the first cousin of the husband of a deputy sheriff and the other an uncle of the prosecuting attorney's secretary.

Syl. pt. 3 - "A potential juror closely related by blood or marriage to either the prosecution or defense attorneys involved in the case or to any member of their respective staffs or firms should automatically be disqualified." Syl. pt. 4, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

Syl. pt. 4 - "Where there is a recognized statutory or common law basis for disqualification of a juror, a party must during *voir dire* avail himself of the opportunity to ask such disqualifying questions. Otherwise the party may be deemed not to have exercised reasonable diligence to ascertain the disqualification." Syl. pt. 8, *State v. Bongalis*, 180 W.Va. 584, 378 S.E.2d 449 (1989).

Disqualification (continued)

Relation to prosecuting or defense attorney (continued)

State v. Hardway, (continued)

The Court held the cousin to deputy sheriff's husband is not automatically disqualified. *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973); *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983). The sheriff's office was not involved with the investigation.

As to the uncle of the prosecutor's secretary, it was clear that the relationship was not established until after trial; nonetheless, the opportunity to challenge the juror had passed. Error waived. Affirmed.

Exhibits

Use during deliberations

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

Appellant was convicted of first-degree murder. Following trial, a tape-recorded confession and a transcript of the confession were taken into the jury room for replay during deliberations. Appellant claimed error.

Syl. pt. 11 - In a criminal case it is not reversible error for a trial court to allow a document, such as a transcript, a written statement, or a tape recording, any of which contains a confession or incriminating statement, and which has already been admitted into evidence, to be taken into the jury room for the jury's use during deliberations.

No error.

Instructions on unanimity of decision

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

See INSTRUCTIONS Jury, Unanimity of, (p. 360) for discussion of topic.

JURY

Misconduct

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

Appellant was convicted of malicious wounding. During trial, one of appellant's witnesses, a used car dealer, telephoned a juror to offer a discount to the juror's son if the juror would help appellant. The conversation was reported after the trial was over. The trial judge talked with the juror and concluded that no harm was done. Motion for mistrial denied. The issue here was whether it is per se reversible error to contact a juror when no actual prejudice has been found.

Syl. pt. 1 - "A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of. The question as to whether or not a juror has been subjected to improper influence affecting the verdict is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial; proof of mere opportunity to influence the jury being insufficient." Syllabus point 7, *State v. Johnson*, 111 W.Va. 653, 164 S.E. 31 (1932).

Here, appellant apparently did not induce the contact. Even if he had, the Court was loath to allow him to benefit from his own misconduct. Since no prejudice was shown, no error.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See DENIAL OF FAIR TRIAL Jury misconduct, (p. 141) for discussion of topic.

Polling the jury

Procedure when juror doubts verdict

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

At the announcement of the verdict during appellant's trial on charges of driving with a revoked operator's license, defense counsel requested that the jury be polled. One juror expressed some doubt but upon repeated questioning by the trial judge, concurred in the verdict.

Polling the jury (continued)

Procedure when juror doubts verdict (continued)

State v. Cole, (continued)

Syl. pt. 7 - "Federal cases have held that the language of Rule 31(d) of the Federal Rules of Criminal Procedure requires that when a juror indicates in a poll that he either disagrees with the verdict or expresses reservations about it, the trial court must either direct the jury to retire for further deliberations or discharge the jury. Although the rule does not explicitly so state, courts have also recognized that appropriate neutral questions may be asked of the juror to clarify any apparent confusion, provided the questions are not coercive. We adopt this procedure for Rule 31(d) of the West Virginia Rules of Criminal Procedure." Syllabus Point 2, *State v. Tennant*, 173 W.Va. 627, 319 S.E.2d 395 (1984).

Here, the juror expressed doubt three times. The trial judge had a duty to either direct the jury to continue to deliberate or declare a mistrial. Reversed and remanded.

Prejudicing

Pre-trial publicity

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See PROSECUTING ATTORNEY Comments out of court re: guilt of accused, (p. 513) for discussion of topic.

Sworn jurors allowed to leave courtroom

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

Appellant was convicted of second-degree and third degree sexual assault. On appeal, he argued that his motion for mistrial should have been granted because two members of the impaneled petit jury were dismissed, left the courtroom but later returned and served on the jury. Defense counsel had exercised only four of his six peremptory strikes; two alternates were therefore called back.

Sworn jurors allowed to leave courtroom (continued)

State v. Sayre, (continued)

Syl. pt. 2 - "The decision to declare a mistrial, discharge the jury, and order a new trial in a criminal case is a matter within the sound discretion of the trial court." Syllabus point 8, *State v. Davis*, 182 W.Va. 482, 388 S.E.2d 508 (1989).

The circuit court made considerable effort to determine whether the excused jurors were exposed to any impermissible matters while outside the courtroom. No abuse of discretion.

Qualifications

State v. Bates, 380 S.E.2d 203 (1989) (Per Curiam)

See JURY Disqualification, Relationship *per se*, (p. 410) for discussion of topic.

Generally

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

Defendant was convicted of involuntary manslaughter. She objected to the impaneling of nine jurors who served on a jury in a murder case prior to her trial.

Syl. pt. 5 - "'The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court.' Syllabus Point 4, *State v. Audia*, 171 W.Va. 568, 301 S.E.2d 199 (1983)." Syllabus Point 4, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

The Court found no record of bias or prejudice here. No error.

JURY

Qualifications (continued)

Generally (continued)

State v. Storey, 387 S.E.2d 563 (1989) (Per Curiam)

Appellant was convicted of negligent homicide as a result of a traffic accident. He claimed on appeal that the trial court improperly refused to disqualify for cause certain jurors. One juror was a complaining witness in several cases involving clients represented by appellant's trial counsel; one was a friend of the victim's boyfriend; one was a visitor to the victim's home, whose son had dated of the victim's sisters; one knew the victim's family and the victim's father was once his boss; and one stated that he had read the newspaper accounts of the accident.

Syl. pt. 3 - "'The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court.' Syllabus Point 7, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982); Syllabus Point 3, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981); Syllabus Point 1, *State v. Kilpatrick*, 158 W.Va. 289, 210 S.E.2d 480 (1974)." Syllabus point 2, *State v. White*, 171 W.Va. 658, 301 S.E.2d 615 (1983).

Each challenged juror swore that he could judge the case without prejudice. Finding no grounds for *per se* disqualification, the Court found no error here.

Racial bias

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See JURY Challenges, Special circumstances in murder case, (p. 405) for discussion of topic.

Racial imbalance

State v. Marrs, 379 S.E.2d 497 (1989) (Neely, J.)

See EQUAL PROTECTION Racial discrimination, Jury composition, (p. 179) for discussion of topic.

JURY

Right to

Gapp v. Friddle, 382 S.E.2d 568 (1989) (Per Curiam)

See RIGHT TO JURY TRIAL Generally, (p. 551) for discussion of topic.

Venire

Sufficient size of

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

Appellant was convicted of second-degree murder. On appeal she challenged the procedures used in selecting the jury venire in that the number of prospective jurors was not sufficient. No objection was made below.

Syl. pt. 6 - "This Court will not consider an error which is not preserved in the record nor apparent on the fact of the record." Syl. Pt. 6, *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726, 729 (1976).

The Court refused to consider the issue.

Voir dire

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

Appellant was convicted of second-degree murder. On appeal she contended that the *voir dire* was unreasonably restricted because the trial court refused to ask two questions pertaining to bias against mental health professionals and psychological disturbance relating to voluntariness of statements. The failure to ask these questions was not objected to until after the jury was impaneled and sworn.

Syl. pt. 6 - "This Court will not consider an error which is not preserved in the record nor apparent on the fact of the record." Syl. Pt. 6, *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726, 729 (1976).

Voir dire (continued)

State v. Gibson, (continued)

Syl. pt. 7 - "'In a criminal case, the inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused.' Syl. Pt. 2, *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944)." Syl. Pt. 2, *State v. Mayle*, 178 W.Va. 26, 357 S.E.2d 219, 221 (1987).

No error.

Individual

State v. Bennett, 382 S.E.2d 322 (1989 (Brotherton, C.J.)

See JURY Disqualification, Relation to prosecuting or defense attorney, (p. 413) for discussion of topic.

State v. Bennett, 382 S.E.2d 322 (1989) (Brotherton, C.J.)

See JURY Disqualification, Prejudice against defendant, (p. 410) for discussion of topic.

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See JURY Disqualification, (p. 406) for discussion of topic.

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See JURY Challenges, Special circumstances in murder case, (p. 405) for discussion of topic.

Voir dire (continued)

Judge's refusal to ask questions

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See *VOIR DIRE* Abuse of discretion, (p. 650) for discussion of topic.

Use of to discover disqualification

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See JURY Disqualification, Felony conviction, (p. 409) for discussion of topic.

JUVENILES

Arrest

Appearance before magistrate

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See JUVENILES Prompt presentment, (p. 427) for discussion of topic.

Detention

Between ages of 18 and 20

Facilities Review Panel, et al. v. Greiner, 382 S.E.2d 527 (1989) (Neely, J.)

See JUVENILES Detention, Between ages of 18 and 20, (p. 423) for discussion of topic.

Facilities Review Panel, et al. v. Greiner, 382 S.E.2d 527 (1989) (Neely, J.)

The Facilities Review Panel filed a writ of mandamus to force the Sheriff of Wood County to stop incarcerating for more than ninety-six hours juveniles not awaiting transport to a correctional facility nor charged with a violent crime. *W.Va.Code* 49-5-16. The Panel also objected to the conditions of the holding facility. See *W.Va.Code* 49-5-16a; Article III, §§ 5 and 10, W.Va. Constitution. The Sheriff answered that the Department of Human Services is responsible for providing holding facilities.

The situation was further complicated by the juvenile at issue having attained adult status (over eighteen years old); but the reason for being held was a revocation of his juvenile probation. The Sheriff noted that since the juvenile was over eighteen he cannot be held with juveniles.

Syl. pt. 1 - The duty of the Department of Human Services set forth in *W.Va.Code*, 49-2-16 (1988) to provide juvenile detention facilities does not extend to providing secure detention for youths between the ages of eighteen and twenty years who are under continuing juvenile jurisdiction who commit a technical violation of their juvenile probation.

Detention (continued)

Between ages of 18 and 20 (continued)

Facilities Review Panel, et al. v. Greiner, (continued)

Syl. pt. 2 - "Youths between the ages of eighteen and twenty years, who remain under juvenile court jurisdiction pursuant to West Virginia Code Section 49-5-2 (1986 Replacement Vol.), come within the definition of "child" as set forth in that Code section and must be afforded the same commitment and rehabilitation rights as delinquent children under the age of eighteen who are under juvenile court jurisdiction." Syllabus Point 3, *State ex rel. M.L.N. v. Greiner*, 178 W.Va. 479, 360 S.E.2d 554 (1987).

Syl. pt. 3 - Youths between the ages of eighteen and twenty years who remain subject to the juvenile jurisdiction of the court pursuant to *W.Va.Code*, 49-5-2 (1978) may be housed with juveniles under the age of eighteen.

Syl. pt. 4 - Youths between the ages of eighteen and twenty years who remain subject to the juvenile jurisdiction of the court may be incarcerated only in a facility that meets the minimum standards set forth in *W.Va.Code*, 49-5-16a (1978).

The Court noted that if no appropriate facility exists, even in another county, then the "juvenile" cannot be incarcerated. Writ granted.

For evaluation

Brenda G. v. W.Va. DHS, 390 S.E.2d 6 (1990) (Brotherton, J.)

See JUVENILES Evaluation of, Time to perform, (p. 425) for discussion of topic.

JUVENILES

Detention facilities

Standards for

Facilities Review Panel v. Coe, 420 S.E.2d 532 (1989) (Brotherton, C.J.)

The Facilities Review Panel requested that the Court adopt standards for juvenile detention facilities, require the circuit judge to cooperate in establishing in-home detention guidelines, and order various other procedural matters with respect to juveniles cases.

The Court noted that the juvenile facility at issue is overcrowded. Nonetheless, the Court considered the record to be inadequate and appointed Judge Starcher as special master to "investigate the need for standardized juvenile detention guidelines," and report by June 1, 1990.

Evaluation of

Time to perform

Brenda G. v. W.Va. DHS, 390 S.E.2d 6 (1990) (Brotherton, J.)

Petitioner brought a writ for *habeas corpus* on behalf of a minor temporarily placed in the custody of the Department of Human Services, then referred to a shelter and diagnostic facility. The juvenile was charged with arson of a dwelling, breaking and entering with intent to commit larceny, theft of a rifle and defacing personal property.

A non-custodial improvement period was requested. The circuit court, noting that the juvenile had engaged in alcohol abuse and that his father had recently been arrested on alcohol-related charges, ordered that custody of the juvenile be given to DHS and that the juvenile be placed in the shelter.

Three months later petitioner alleged that DHS had improperly retained custody beyond the thirty-day period allowed pursuant to *W.Va.Code* 49-5-13a. Respondent contended that the statute in question does not apply here.

Evaluation of (continued)

Time to perform (continued)

Brenda G. v. W.Va. DHS, (continued)

Syl. pt. 1 - In order to effectuate the stated purpose of providing for the best interest and welfare of both the juvenile and the public, *W.Va.Code* § 49-5-13 (1986) permits the court to order the child placed in a facility for a reasonable period of time in order that examinations necessary to aid in the disposition of the case can be performed.

Syl. pt. 2 - A reasonable period of time is defined as only that amount of time necessary to perform the testing permitted by *W.Va.Code* § 49-5-13 (1986).

The Court noted that the juvenile was released for a hearing on January 22 and 26, 1990, thereby mooting this petition. Nonetheless, the Court clarified that the time period set forth in *W.Va.Code* 49-5-13a is triggered only upon transfer of the juvenile to the Commissioner of Corrections, who may then transfer the child to a diagnostic or treatment center "for a period not to exceed thirty days."

Here, the disposition was not made under *W.Va.Code* 49-5-13a, but rather under *W.Va.Code* 49-5-13. No error.

Expungement of record

White v. Hey, No. 18402 (7/1/88) (Per Curiam)

Petitioner sought a writ to compel the respondent judge to expunge records of a prior juvenile conviction. While a juvenile, petitioner was arrested for armed robbery. He was transferred to adult jurisdiction and convicted.

Subsequent to petitioner's conviction *Thomas v. Leverette*, 166 W.Va. 185, 273 S.E.2d 364 (1980) held that transfer to adult jurisdiction was inappropriate in armed robbery cases. Following a *habeas corpus* hearing petitioner's conviction was held void *ab initio* and no further proceedings took place in juvenile court.

The Court held the petitioner still subject to juvenile jurisdiction and therefore eligible, pursuant to *W.Va.Code* 49-5-17, to have his records expunged.

JUVENILES

Prompt presentment

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

Appellant, a juvenile, was convicted of first-degree murder. He claimed on appeal that his confessions should be inadmissible because of the failure of the police to take him before a judicial officer immediately following his arrest.

Syl. pt. 9 - "Under *W.Va.Code*, section 49-5-8(d), when a juvenile is taken into custody, he must immediately be taken before a referee, circuit judge, or magistrate. If there is a failure to do so, any confession obtained as a result of the delay will be invalid where it appears that the primary purpose of the delay was to obtain a confession from the juvenile." Syl. Pt. 3, *State v. Ellsworth, J.R.*, 175 W.Va. 64, 331 S.E.2d 503 (1985).

The Court noted that this prompt presentment requirement is more stringent than presentment of an adult required by *W.Va.Code* 62-1-5. Even when *Miranda* warnings have been given, failure to comply may result in inadmissibility of the confession.

Syl. pt. 10 - The exclusionary rule established in Syllabus Point 3, of *State v. Ellsworth, J.R.*, 175 W.Va. 64, 331 S.E.2d 503 (1985), is not to be applied retroactively to a confession which was obtained prior to the date of that decision where no prompt presentment objection was made at trial.

Here, however, although the prompt presentment requirement was not met, the confessions were obtained prior to the *Ellsworth* case (above). Therefore, only the third confession is inadmissible since it was the only one of the three objected to at trial on the basis of prompt presentment.

Since the case was reversed on other grounds (see elsewhere, this digest), the Court declined to consider whether the admission of the confession was harmless error.

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

JUVENILES

Transfer from juvenile to adult jurisdiction

In the Interest of H.J.D., 375 S.E.2d 576 (1988) (Per Curiam)

H.J.D., a juvenile, committed grand larceny, a crime which would be punishable by imprisonment if committed by an adult. Prior to a hearing based on a delinquency petition, the State moved for transfer to criminal jurisdiction, alleging that H.J.D. was over sixteen, was charged with an offense which would be a felony if committed by an adult and that he had been previously adjudged delinquent for an adult felony. The trial court approved transfer, emphasizing that H.J.D. would not benefit from rehabilitation and that H.J.D. had reached the age of eighteen prior to the transfer hearing.

H.J.D. had spent ten years in more than a dozen foster homes, group homes and detention centers. Probation officers testified that H.J.D. refused to cooperate in his rehabilitation and would not benefit from additional programs. He was working satisfactorily in a fast food restaurant but was associating with unsavory persons at the time of his arrest.

Syl. pt. 1 - "Where the findings of fact and conclusions of law justifying an order transferring a juvenile proceeding to the criminal jurisdiction of the circuit court are clearly wrong or against the plain preponderance of the evidence, such findings of fact and conclusion of law must be reversed. *W.Va.Code*, 49-5-10(a) (1977) now, 49-5-10(e) (1978)." Syl. pt. 1, *State v. Bannister*, 162 W.Va. 447, 250 S.E.2d 53 (1978).

Syl. pt. 2 - "Probable cause for the purpose of transfer of a juvenile to adult jurisdiction is more than mere suspicion and less than clear and convincing proof. Probable cause exists when the facts and circumstances as established by probative evidence are sufficient to warrant a prudent person in the belief that an offense has been committed and that the accused committed it." Syl. pt. 1, *In re Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982).

The Court found neither the transfer nor the finding of probable cause were "clearly wrong" here. No error.

JUVENILES

Transfer to adult jurisdiction

Effect on expungement

White v. Hey, No. 18402 (7/1/88) (Per Curiam)

See JUVENILES Expungement of record, (p. 426) for discussion of topic.

Indictment as a basis for

State v. Beaman, 383 S.E.2d 796 (1989) (Brotherton, C.J.)

Petitioner was convicted of aggravated robbery and subsequent parole violations. On petition for writ of error and *super sedeas*, petitioner alleged that denial of a transfer hearing constituted a violation of due process of law and *W.Va.Code* 49-5-10.

Petitioner was brought before the circuit court by juvenile petition, at which time the prosecuting attorney moved to have him transferred to adult jurisdiction. Petitioner failed to appear at the first transfer hearing, whereupon he was arrested and detained at the Cabell County Youth Center. While awaiting the hearing petitioner was indicted for aggravated robbery. Because he was already subject to criminal jurisdiction pursuant to the indictment the circuit court found a transfer hearing unnecessary.

Petitioner was found guilty and sentenced to a term of ten years; he was sent to the Industrial Home for Youth until he reached the age of eighteen and subsequently placed on probation. Due to violations of the terms of probation, petitioner was arrested and held without bond. He escaped and upon apprehension was charged with escape and consorting with a known felon.

On appeal he claimed that no request for transfer was ever made and therefore the trial court never had criminal jurisdiction (*W.Va.Code* 49-5- 10(a). The Court agreed.

Syl. pt. - The return of an indictment against a juvenile defendant, while establishing probable cause, does not provide the necessary facts upon which the juvenile court should base its decision as to the propriety of transfer, and it does not preclude the defendant's right to a transfer hearing.

Transfer to adult jurisdiction (continued)

Indictment as a basis for (continued)

State v. Beaman, (continued)

See also *Arbogast v. R.B.C.*, 171 W.Va. 737, 301 S.E.2d 827 (1983) and *State ex rel. M.C.H. v. Kinder*, 173 W.Va. 387, 317 S.E.2d 150 (1984).

Here, however, the Court found that petitioner had waived his right to protest the lack of a transfer hearing by his failure to appear at the first transfer hearing and his failure to object to the court's later order transferring him to criminal jurisdiction. Petitioner even pled guilty to the charges following careful questioning by the court as to whether he understood that his plea effectively waived his right to a transfer hearing. No error.

State v. Beaman, 383 S.E.2d 796 (1989) (Brotherton, C.J.)

See JUVENILES Transfer to adult jurisdiction, Indictment as basis for, (p. 429) for discussion of topic.

Probable cause for

State v. Sonja B., 395 S.E.2d 803 (1990) (Per Curiam)

Appellant was transferred to adult jurisdiction following her arrest on charges of entering without breaking; grand larceny; forgery and uttering; and tampering with a vehicle. The prosecution presented two witnesses at the transfer hearing, a juvenile probation officer who knew appellant when she pled guilty to an earlier charge of grand larceny, and a deputy sheriff who filed the current complaint. The probation officer was unaware of appellant's current status or "mentality" and the deputy testified that appellant had confessed to writing and cashing the check at issue.

Syl. pt. 1 - "Probable cause for the purpose of transfer of a juvenile to adult jurisdiction is more than mere suspicion and less than clear and convincing proof. Probable cause exists when the facts and circumstances as established by probative evidence are sufficient to warrant a prudent person in the belief that an offense has been committed and that the accused committed it." Syl. pt. 1, *In the Interest of Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982).

Transfer to adult jurisdiction (continued)

Probable cause for (continued)

State v. Sonja B., (continued)

Syl. pt. 2 - "'Before transfer of a juvenile to criminal court, a juvenile court judge must make a careful, detailed analysis into the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and other similar personal factors.' *W.Va.Code*, 49-2-10(d)." Syl. Pt. 4, *State v. C.J.S.*, 164 W.Va. 473, 263 S.E.2d 899 (1980), *overruled in part on other grounds State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980) and *State ex rel. Cook v. Helms*, 170 W.Va. 200, 292 S.E.2d 610 (1981).

The Court noted that the findings of a juvenile referee are not sufficient, that the Circuit Court must make an independent finding of probable cause to transfer. The inquiry here was insufficient. Conclusory statements, unsupported by further evidence, are not enough. Reversed and remanded.

Waiver of rights

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

KIDNAPING

Incidental to another crime

State v. Weaver, 382 S.E.2d 327 (1989) (Miller, J.)

See ABDUCTION With intent to defile, As separate offense, (p. 1) for discussion of topic.

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See APPEAL Standard for review, Setting aside verdict, (p. 46) for discussion of topic.

Generally

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, Abduction with intent to defile and kidnaping, (p. 155) for discussion of topic.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

Appellant was convicted of multiple counts of sexual abuse, sexual assault, aggravated robbery and kidnaping. He claimed that separate convictions on rape and kidnaping arising out of the same incident violated double jeopardy principles.

Syl. pt. 6 - "Kidnapping has not been committed when it is incidental to another crime. In deciding whether the acts that technically constitute kidnaping were incidental to another crime, courts examine the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm." Syl. Pt. 2, *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985).

Syl. pt. 7 - The defendant's double jeopardy rights are not violated by convictions of separate counts of sexual assault, based on repeated violations of the victim within a relatively short period, when there is conclusive evidence of elapsed time between separate violations.

Incidental to another crime (continued)

Generally (continued)

State v. Woodall, (continued)

The Court noted that the evidence showed a sufficient amount of time elapsed between the acts as to allow for separate offenses. No error.

Standard of proof

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

Appellant was convicted of kidnaping, abduction with intent to defile and burglary. On appeal he contended that the state failed to prove all of the essential elements of abduction and kidnaping.

Syl. pt. 3 - "In order to secure a conviction the State must prove each and every element of the crime charged beyond a reasonable doubt." Syllabus Point 3, *State v. Knight*, 168 W.Va. 615, 285 S.E.2d 401 (1981).

Syl. pt. 4 - Where force or compulsion is an element of the offense of kidnaping under *W.Va.Code*, 61-2-14a, or abduction with intent to defile under *W.Va.Code*, 61-2-14, the State need not show that the accused used actual physical force or express threats of violence to accomplish the crime. It is sufficient if the victim submits because of a reasonable fear of harm or injury from the accused.

Syl. pt. 5 - Where an offense consists of an act of the accused combined with a particular intent, such specific intent is an essential element of the offense which the State must prove beyond a reasonable doubt.

Syl. pt. 6 - A sexual purpose or motivation is an essential element of the offense of abduction with intent to defile contained in *W.Va.Code*, 61-2-14.

The Court agreed that the victim here had ample reason to fear appellant, causing her to submit to involuntary departure. Sufficient proof of force or compulsion was therefore made as to the kidnaping charge.

As to the intent sufficient to support a conviction on abduction with intent to defile, the Court found no clear evidence that appellant was sexually motivated to remove the victim. Abduction conviction reversed.

LARCENY

Distinguished from breaking and entering

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, (p. 155) for discussion of topic.

Grand larceny

Sufficiency of evidence

State v. Masters, 373 S.E.2d 173 (1988) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 622) for discussion of topic.

LESSER INCLUDED OFFENSES

Generally

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

Appellant was convicted of first-degree murder. On appeal she claimed that the trial court erred in not instructing the jury on lesser included homicide offenses.

Syl. pt. 11 - "Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Syl. pt. 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Here, the appellant maintained that the shooting was an accident, while the State contended that it was first-degree murder. No error.

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

Appellant was convicted of grand larceny, aggravated robbery, burglary, arson and felony-murder. He claimed on appeal that his double jeopardy rights were violated since the aggravated robbery and the grand larceny charges involved the same property and the same transaction.

Syl. pt. - 3 "'The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.' Syllabus Point 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981)." Syllabus Point 1, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

The Court noted that *Neider*, *supra*, stated that "larceny is a lesser included offense in robbery," but that this principle does not apply necessarily to grand larceny and aggravated robbery. Appellant took a jar of coins of unspecified value by force or by putting the victim in fear of his life; appellant later took the victim's car, valued at more than $200.00 (the statutory minimum for grand larceny), without force or putting the victim in fear. The acts were clearly two separate offenses. No error.

LESSER INCLUDED OFFENSES

Generally (continued)

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

See LESSER INCLUDED OFFENSES Robbery, (p. 437) for discussion of topic.

Aggravated robbery

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See LESSER INCLUDED OFFENSES Generally, (p. 435) for discussion of topic.

Grand larceny

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See LESSER INCLUDED OFFENSES Generally, (p. 435) for discussion of topic.

Instructions

Generally

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See INSTRUCTIONS Lesser included offenses, Generally, (p. 360) for discussion of topic.

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, Generally, (p. 361) for discussion of topic.

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See INSTRUCTIONS Lesser included offenses, Generally, (p. 360) for discussion of topic.

LESSER INCLUDED OFFENSES

Robbery

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

Appellant was convicted of first-degree murder. Conflicting testimony was given as to whether appellant had the necessary intent to commit the crime due to intoxication. Some $300 was taken from the victim. Appellant claimed on appeal that the circuit court erred in not including in the verdict form the option of larceny. He claimed that this omission confused the jury with respect to the charge of felony-murder. The form included second-degree murder and voluntary manslaughter, as well as first-degree murder.

Syl. pt. 1 - "Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Syllabus point 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Syl. pt. 2 - "At common law, robbery is defined as (1) the unlawful taking and carrying away, (2) the money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods." Syllabus point 1, *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981).

Syl. pt. 3 - "Under the legal test set out in Syllabus Point 1 of *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981), larceny is a lesser included offense in robbery." Syllabus point 5, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Syl. pt. 4 - "The felony-murder statute applies where the initial felony and the homicide are parts of one continuous transaction, and are closely related in point of time, place, and causal connection, as where the killing is done in flight from the scene of the crime to prevent detection or promote escape." Syllabus point 2, *State v. Wayne*, 169 W.Va. 785, 289 S.E.2d 480 (1982).

The Court noted that felony-murder is a separate type of first-degree murder and that robbery is a lesser included offense of felony-murder where conviction of robbery is necessary for conviction of felony- murder. *State ex rel. Hall v. Stickler*, 168 W.Va. 496, 285 S.E.2d 143 (1981). Although larceny is a lesser included offense of robbery, the Court found no insufficiency of the elements of the greater offense (robbery) which necessitated the giving of an instruction on larceny.

LESSER INCLUDED OFFENSES

Sexual assault

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See INSTRUCTIONS Lesser included offense, Generally, (p. 361) for discussion of topic.

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See SEXUAL ATTACKS Lesser included offenses, First and third degree assault, (p. 603) for discussion of topic.

LIE DETECTOR TESTS

Admissibility

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See EVIDENCE Polygraph tests, (p. 239) for discussion of topic.

MAGISTRATE COURT

Appeal from

Notice required

State v. Molisee, 378 S.E.2d 100 (1989) (Per Curiam)

Appellant's dog injured a child and appellant was charged with harboring a vicious animal. *W.Va.Code* 19-20-19 and 20. Following a hearing, a magistrate ordered the dog destroyed. Stay of the order was granted pending appeal. Appellant appealed to circuit court. On 20 July 1988 the case was set for 2 September 1988. Although appellant was not present, an administrative assistant to the prosecuting attorney telephoned appellant the same day. Appellant requested a jury trial and the assistant promised to look into the matter. Some time later, a jury trial was set for 5 August 1988. The prosecuting attorney received notice on 28 July 1988, in the form of a copy of the 5 August 1988 docket; no certificate of service or explanatory letter was attached.

On the trial date, appellant failed to appear. The trial court reinstated the magistrate's order and issued a *capias* for appellant. On 10 August 1988 appellant appeared for a contempt hearing and testified that she never received notice of the trial. Based on testimony from an employee of the prosecuting attorney that another employee had requested appellant's mailing address when mailing notices to all parties with cases docketed on 5 August 1988, the trial court found that appellant had received notice and reinstated his order.

Syl. pt. - "When an appeal is taken from a judgment of a magistrate court to a circuit court, notice of the time when and place where the appeal is to be heard must be given to both parties and failure to afford such notice constitutes a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Art. III, § 10 of the Constitution of West Virginia." Syl. *State ex rel. Peck v. Goshorn*, 162 W.Va. 420, 249 S.E.2d 765 (1978).

Reversed and remanded.

MAGISTRATE COURT

Citation error on complaint

Effect of

State ex rel. Forbes v. McGraw, 394 S.E.2d 743 (1990) (Workman, J.)

See HARMLESS ERROR Non-constitution, Citation error, (p. 292) for discussion of topic.

Judicial ethics

Generally

In the Matter of Jett, 370 S.E.2d 485 (1988) (Per Curiam)

See JUDGES Discipline, Generally, (p. 380) for discussion of topic.

In the Matter of Baughman, 385 S.E.2d 910 (1989) (Neely, J.)

See JUDGES Discipline, Family dispute within judge's family, (p. 381) for discussion of topic.

In the Matter of Crislip, 391 S.E.2d 84 (1990) (Miller, J.)

See JUDGES *Ex parte* dismissal, (p. 389) for discussion of topic.

Candidacy for circuit clerk

Feltz v. Crabtree, 370 S.E.2d 619 (1988) (Brotherton, J.)

Magistrate James T. Feltz requested that the Court rule on the question whether a magistrate must resign his office before becoming a candidate for circuit clerk.

Syl. pt. - The office of circuit clerk is not a "judicial office" as that term is used in *W.Va.Const. art.* VIII, section 7 and Canon 7A(3) of the Judicial Code of Ethics.

Judicial ethics (continued)

Candidacy for circuit clerk (continued)

Feltz v. Crabtree, (continued)

The Court noted that both Article VIII, § 7 of the West Virginia Constitution and Canon 7A(3) of the Judicial Code of Ethics forbid a judge from being a candidate for a non-judicial office while serving as a judge. The magistrate should therefore resign in order to campaign for circuit clerk.

***Ex parte* dismissal**

In the Matter of Crislip, 391 S.E.2d 84 (1990) (Miller, J.)

See JUDGES *Ex parte* dismissal, (p. 389) for discussion of topic.

Family dispute within magistrate's family

In the Matter of Baughman, 385 S.E.2d 910 (1989) (Neely, J.)

See JUDGES Discipline, Family dispute within judge's family, (p. 381) for discussion of topic.

Rules violations

In the Matter of Crislip, 391 S.E.2d 84 (1990) (Miller, J.)

See JUDGES *Ex parte* dismissal, (p. 389) for discussion of topic.

MALICE

Element of murder

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See HOMICIDE Second-degree, Elements of, (p. 304) for discussion of topic.

Inference of from use of deadly weapon

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See HOMICIDE First-degree, Malice, (p. 301) for discussion of topic.

MANDAMUS

Appointment of counsel

State ex rel. Facemire v. Sommerville, No. 19047 (6/7/89) (Neely, J.)

See ATTORNEYS Appointment of, (p. 60) for discussion of topic.

Delay in rendering decision

Holdren v. MacQueen, No. 18973 (4/18/89) (Per Curiam)

On 31 July 1984 relator was convicted of six counts of sexual assault in the first-degree. He was sentenced on 13 March 1985 to sixty years. On 11 March 1986 the Court rejected his appeal.

In September, 1986 relator filed a petition for *habeas corpus*, which petition was assigned to respondent. Between December, 1986 and August, 1988 various proceedings were held. Following the August proceedings respondent was to have identified issues to counsel for briefing. On 2 February 1989, relator filed for a writ of mandamus directing respondent to identify the issues.

Relator contended that the delay was especially harmful in that he intended to request DNA tests of various body cells and that the passage of time rendered the cells unsuitable for testing.

The Court found the delay here unreasonable and issued the writ ordering respondent to establish a briefing schedule and to enter an order 30 days after receiving the briefs.

Habeas corpus

Compelling ruling

State ex rel. Warth v. Ferguson, No. 19663 (7/11/90) (Per Curiam)

See *HABEAS CORPUS* Failure to rule on, (p. 285) for discussion of topic.

MANDAMUS

Right to hearing

Artrip v. White, No. 18492 (7/20/88) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Right to hearing, (p. 8) for discussion of topic.

MANSLAUGHTER

Involuntary

Defined

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See HOMICIDE Involuntary manslaughter, Defined, (p. 302) for discussion of topic.

MARIJUANA

Delivery of

Sufficiency of indictment

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See CONTROLLED SUBSTANCES Sufficiency of indictment, Delivery of marijuana, (p. 127) for discussion of topic.

MARITAL PRIVILEGES

Scope of

State v. Robinson, 376 S.E.2d 606 (1988) (McGraw, J.)

See PRIVILEGES Marital, Scope of, (p. 495) for discussion of topic.

MEDICAL CARE

Right to

Thompson v. White, No. 18403 (7/18/88) (Per Curiam)

Relator is an inmate at Huttonsville Correctional Center. Subsequent to his incarceration he lost the remaining of his four front upper teeth. He requested dentures. The Department of Corrections refused on the grounds that dentures would be purely cosmetic.

The Court disagreed, holding that failure to provide dentures constituted unnecessary and wanton infliction of pain in violation of the Eighth Amendment to the United States Constitution. *Crain v. Bordenkircher*, 176 W.Va. 338, 342 S.E.2d 422 (1986). (See cases cited therein).

MENTAL HYGIENE

Competency

Determination of

Harper v. Rogers, 387 S.E.2d 547 (1989) (Per Curiam)

By order of August 14, 1987, the court below found the plaintiff below made a valid conveyance of his property to his son, Benjamin Ray Rogers, respondent here. (Plaintiff died prior to appeal; Emma Harper is his daughter.) The court found that Mr. Wine was competent to execute a deed conveying the property.

Appellant here moved to set aside the conveyance, which motion was denied.

Syl. pt. 1 - "The burden of proving that a grantor was not sane or competent at time of execution of an agreement conveying property is on the one attacking its validity. In judging grantor's capacity to execute such an agreement, the point of time to be considered is the time of its execution." Syllabus Point 3, *Ellison v. Lockard*, 127 W.Va. 611, 34 S.E.2d 326 (1945).

Syl. pt. 2 - "The testimony of a subscribing witness to the execution of a writing is entitled to peculiar weight in considering the capacity of the party executing it." Syllabus Point 4, *Ellison v. Lockard*, 127 W.Va. 611, 34 S.E.2d 326 (1945).

Syl. pt. 3 - "Mere failure to read a deed or other instrument before signing it, by a person who is able to read and understand it, being only negligence of the injured party, not importing fraudulent conduct on the part of him who obtains the benefit of it, is not ground for setting the instrument aside. Equity never relieves a party from his own deliberate acts, done with full knowledge of the facts." Syllabus Point 1, *Hale v. Hale*, 62 W.Va. 609, 59 S.E. 1056 (1907).

Syl. pt. 4 - "To set aside a deed for undue influence, it must appear that the influence was such to destroy the free agency of the grantor, and to substitute the will of another for his; and, unless such taking away of free agency appears, the showing of a motive and an opportunity to exert such undue influence, together with failing mental powers of the grantor, are sufficient to overthrow the deed." Syllabus Point 5, *Woodville v. Woodville*, 63 W.Va. 286, 60 S.E. 140 (1908), *overruled on other grounds*, *Winfree v. Dearth*, 118 W.Va. 71, 188 S.E. 880 (1936).

Competency (continued)

Determination of (continued)

Harper v. Rogers, (continued)

Syl. pt. 5 - "'A grantor in a deed may be extremely old, his understanding, memory, and mind enfeebled and weakened by age, and his action occasionally strange and eccentric, and he may not be able to transact many affairs of life, yet if age has not rendered him imbecile, so that he does not know the nature and effect of the deed, this does not invalidate the deed. If he be capable, at the time, to know the nature, character and effect of the particular act, that is sufficient to sustain it.' Point 5, *Buckey v. Buckey*, 38 W.Va. 168, 18 S.E. 383 (1893);" Syllabus Point 3, *Cyrus v. Tharp*, 147 W.Va. 110, 126 S.E.2d 31 (1962).

The evidence below showed that the grantor was able to testify as to his recollection of the events surrounding the signing of the deed prior to his death. There was evidence that he had executed a handwritten deed prior to the preparation of the instrument at issue. Medical testimony showed that he could function completely appropriately at times.

The grantor also referred to the instrument as both a deed and a will at trial. Nonetheless it was not established that the grantee had exercised undue influence over the grantor. No error.

Least restrictive alternative

In re Sharon K., 387 S.E.2d 804 (1989) (Neely, J.)

Sharon K. is a severely retarded, multiply-handicapped twenty-four year old woman who was admitted to Colin Anderson Center at age seven. At the time of this action she was living in an area of the Center which did not meet federal standards so as to receive Medicaid reimbursement.

During one of the regular periodic commitment proceedings brought against Sharon K., her advocate appointed under *Medley v. Miller*, (Civil Action No. 78-2099 CH (S.D. W.Va.)) contacted the West Virginia Advocates to ask for representation at the hearing. The advocate also claimed that appropriate community-based services were available but placement had not taken place because Sharon K.'s legal guardian had not consented.

Least restrictive alternative (continued)

In re Sharon K., (continued)

At the hearing, the Center claimed that no less restrictive alternative existed for Sharon K. No other testimony was taken as to consideration of alternatives. The advocate presented witnesses who testified that the Eastern Panhandle Training Center had developed a community placement for Sharon K. Sharon K's mother, her legal guardian, wanted her to remain at the Center. The mental hygiene commissioner recommended that Sharon K be committed to the Eastern Panhandle Training Center. The Circuit Court adopted the findings of fact but rejected the commitment recommendation, finding that both natural parents opposed the new commitment.

During a subsequent hearing, the natural parents testified that they still opposed the new placement. Substantially amended findings were filed with the Circuit Court. These findings were adopted by the Court but Sharon K. was committed to Colin Anderson Center again, with the finding that the proposed new placement does not meet Sharon K.'s needs, nor is it a less restrictive alternative than placement at the Center. The order stated that a less restrictive alternative does not exist.

Syl. pt. 1 - "The requirement of West Virginia Code, 27-5-4 (j), which mandates that the Mental Hygiene Commissioner shall determine if there are less restrictive alternatives available, has a corollary that a good faith effort must be made to find a placement in a less restrictive alternative, and that such search must encompass a reasonably broad geographic area." Syllabus Point 4, *Markey v. Watchel*, 164 W.Va. 45, 264 S.E.2d 437 (1979).

Syl. pt. 2 - One aspect of the humane treatment of involuntarily- committed patients is commitment to the least restrictive alternative; there are cases, however, that present such overwhelming medical problems that there is no choice but a hospital commitment, and the statutes recognize that such cases will exist and speak in terms of alternatives appropriate for the patient's medical needs. *W.Va.Code*, 72-5-4 [1981] 42 U.S.C. § 6009 [1984].

The Court noted that Sharon K.'s extreme disabilities make reasonable the Circuit Court's finding that the proposed placement is inappropriate. The Court found significant the fact that the Medley plan specifically required Sharon K.'s parents' participation. Their opposition was important to the decision.

MENTAL HYGIENE

Payment of experts

State ex rel. Bloom v. Keadle, No. 19052 (7/20/89) (Brotherton, C.J.)

See INDIGENTS Mental hygiene, Payment of experts, (p. 329) for discussion of topic.

MIRANDA WARNINGS

Insufficient after illegal arrest

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Proof of

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See CONFESSIONS Voluntariness, (p. 112) for discussion of topic.

Right to counsel

When attaches

State v. Bowyer, 380 S.E.2d 193 (1989) (Miller, J.)

See RIGHT TO COUNSEL When attaches, (p. 548) for discussion of topic.

When required

Scene of traffic accident

State v. Preece, 383 S.E.2d 815 (1989) (McHugh, J.)

See SELF-INCRIMINATION *Miranda* warnings, Traffic accident, (p. 572) for discussion of topic.

MISTRIAL

Discretion in granting

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

Appellant was convicted of sexual assault. On appeal, he claimed that he was improperly denied a motion for mistrial after a sexual assault counselor was allowed to approach the victim on the witness stand to comfort her in the jury's presence. The trial court noted that the victim was crying before adjournment and that the jury was leaving the courtroom when the counselor approached her.

Syl. pt. 8 - The decision to declare a mistrial, discharge the jury, and order a new trial in a criminal case is a matter within the sound discretion of the trial court.

No abuse of discretion.

Disqualified juror

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See JURY Disqualification, Felony conviction, (p. 409) for discussion of topic.

Manifest necessity

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 162) for discussion of topic.

Retrial following

State ex rel. Bass v. Abbot, 375 S.E.2d 590 (1988) (Neely, J.)

Petitioner sought to prohibit a second trial on charges of delivering cocaine. Petitioner moved successfully for mistrial during the first trial on the grounds that the prosecuting attorney supplied petitioner with an incorrect date and petitioner relied thereon in preparing an alibi defense. The trial court granted a mistrial without prejudice.

Retrial following (continued)

State ex rel. Bass v. Abbot, (continued)

Syl. pt. 1 - "'When a mistrial is granted on motion of the defendant, unless the defendant was provoked into moving for the mistrial because of prosecutorial or judicial conduct, a retrial may not be barred on the basis of jeopardy principles.' *Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416, 427 (1982)." *State v. Pennington*, 179 W.Va. 139, 365 S.E.2d 803 (1987).

Syl. pt. 2 - The determination of "intentional" in the test for the application of double jeopardy when a defendant successfully moves for a mistrial is a question of fact, and the trial court's finding on this factual issue will not be set aside unless it is clearly wrong.

The Court found no provocation by the prosecuting attorney. Writ denied.

Judge's discretion

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

See JURY Prejudicing, Sworn jurors allowed to leave courtroom, (p. 417) for discussion of topic.

MOTOR VEHICLES

Administrative hearings

Right to counsel

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

See RIGHT TO COUNSEL Administrative hearings, Revoked or suspended license, (p. 544) for discussion of topic.

MULTIPLE OFFENSES

Conspiracy

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See CONSPIRACY Proof of, (p. 120) for discussion of topic.

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See DOUBLE JEOPARDY Conspiracy, (p. 151) for discussion of topic.

Double jeopardy

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, (p. 155) for discussion of topic.

Sexual offenses

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, Abduction with intent to defile and kidnaping, (p. 155) for discussion of topic.

Simultaneous

Treatment of for recidivism

Hutchinson v. Dietrich, 393 S.E.2d 663 (1990) (Brotherton, J.)

See CONTROLLED SUBSTANCES Probation, (p. 128) for discussion of topic.

Statutory citation in error

State ex rel. Forbes v. McGraw, 394 S.E.2d 743 (1990) (Workman, J.)

See HARMLESS ERROR Non-constitution, Citation error, (p. 292) for discussion of topic.

MUNICIPAL COURT

Trial *de novo*

Robertson v. Goldman, 369 S.E.2d 888 (1988) (McGraw, J.)

See INDIGENTS Right to equal protection, (p. 331) for discussion of topic.

Right to jury trial

Gapp v. Friddle, 382 S.E.2d 568 (1989) (Per Curiam)

See RIGHT TO JURY TRIAL Generally, (p. 551) for discussion of topic.

MULTIPLE DEFENDANTS

Standard for review

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

Appellants were convicted of first-degree arson. They contended on appeal that the trial court should have advised them of their right to separate counsel.

Syl. pt. 6 - When a trial court fails to follow the requirements of Rule 44(c) of the West Virginia Rule of Criminal Procedure, this Court will review the record to determine if any conflict likely existed between the jointly represented parties rather than to determine whether there is an actual conflict. If, after reviewing the record, this Court determines no conflict likely existed between the jointly represented parties, such joint representation will not be deemed reversible error.

The Court found no conflict here. No error.

MURDER

Lying in wait

State v. Walker, 381 S.E.2d 277 (1989) (Per Curiam)

See HOMICIDE First-degree, (p. 300) for discussion of topic.

Malice as element of

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See HOMICIDE Second-degree, Elements of, (p. 304) for discussion of topic.

Inference of

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See HOMICIDE First-degree, Malice, (p. 301) for discussion of topic.

NEW TRIAL

Confession of error by prosecution

State v. Gibson, 394 S.E.2d 905 (1990) (Per Curiam)

See APPEAL Confession of error by prosecution, (p. 27) for discussion of topic.

Newly discovered evidence

Sufficiency for new trial

State v. Catlett, 376 S.E.2d 834 (1988) (Neely, J.)

Appellant was convicted of first-degree murder. He claimed on appeal that he should have been granted a new trial based on a post-conviction psychological examination which revealed that he had not fully cooperated with his appointed counsel because he thought that counsel was not on his side.

Syl. pt. 3 - "'A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. Point 1, syllabus, *Halstead v. Horton*, 38 W.Va. 727, (18 S.E. 953 [1894]).' Point 2, syllabus, *State v. Spradley*, 140 W.Va. 314, 84 S.E.2d 156 (1954)." Syllabus Point 10, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).

The Court noted that defendant's cooperation with his attorney was never at issue during the long pre-trial period. Appellant may have exercised poor judgement in not trusting his attorney but poor judgement did not make appellant legally incompetent so as to justify a new trial. No error.

OBSTRUCTION OF OFFICER

Defined

State ex rel. Wilmoth v. Gustke, 373 S.E.2d 484 (1988) (McHugh, C.J.)

Petitioner, accused of obstructing a police officer, sought a writ of prohibition to prevent his trial. The uncontroverted facts were that the officer pursued a vehicle with expired registration plates into petitioner's shopping center parking area. Petitioner asked that the officer leave the area and issue the citation elsewhere, saying that he feared that his customers would be scared away. An argument ensued, with the officer warning petitioner that he would be cited for obstructing an officer. Petitioner was found guilty in magistrate court and appealed his conviction to the circuit court.

Syl. pt. - A person, upon witnessing a police officer issuing a traffic citation to a third party on the person's property, who asks the officer, without the use of fighting or insulting words or other opprobrious language and without forcible or other illegal hindrance, to leave the premises, does not violate *W.Va.Code*, 61-5-17 (1931), because that person has not illegally hindered an officer of this State in the lawful exercise of his or her duty. To hold otherwise would create first amendment implications which may violate the person's right to freedom of speech. *U.S. Const.* amend. I, *W.Va. Const.* art. III, § 7. Reversed and remanded.

PAROLE

Denial of parole

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See PROPORTIONALITY Generally, (p. 510) for discussion of topic.

Eligibility

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See PROPORTIONALITY Generally, (p. 510) for discussion of topic.

Costs and attorney's fees

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

See PAROLE Eligibility, Payment of fines, (p. 464) for discussion of topic.

Payment of fines

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

Appellant was found guilty of manufacturing a controlled substance and of possession with intent to deliver. He was sentenced to one to five years on each count, sentences to run consecutively, fined $5,000 and assessed court costs and attorney's fees. The trial court also recommended that appellant not be eligible for parole until costs, fees and fines had been paid. Appellant was indigent.

Syl. pt. 1 - Before a trial court conditions its recommendation for a defendant's parole upon the defendant's payment of statutory fines, costs and attorney's fees, the trial court must consider the financial resources of the defendant, the defendant's ability to pay and the nature of the burden that the payment of such costs will impose upon the defendant.

The Court noted that the trial court did not have the authority to release the appellant on parole and that the order of confinement did not include the objectionable recommendation. See also, *Fox v. State*, 176 W.Va. 677, 347 S.E.2d 197 (1986) (unreasonable to require as condition of probation payment of restitution or court costs when creates undue hardship).

PATERNITY

Res judicata

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

Appellant complained of the dismissal of a paternity action below. Appellant's child was born in November, 1973. She brought a paternity action in September, 1976 but agreed to dismiss the action; an order was entered in July, 1977. In May, 1985, she refiled the suit. Respondent moved to dismiss based on the ground of *res judicata* and *W.Va.Code* 48-7-4(a), the ten-year statute of limitations.

Syl. pt. 1 - Most courts dealing with paternity statutes have construed them favorably toward the mother and her child with regard to a *res judicata* claim where there was no actual decision made on the merits in the prior proceeding.

Syl. pt. 2 - "Before the principles of *res judicata* can be involved, there must have been an adjudication on the merits of a case." Syllabus Point 6 of *Johnson v. Huntington Moving & Storage, Inc.*, 160 W.Va. 796, 239 S.E.2d 128 (1977).

The Court noted that the State has an interest in seeing that the natural father support his children. Further, the Court stressed that no record was available showing a compromise settlement and that the original suit was dismissed without prejudice.

The Court rejected the statute of limitations claim, holding it violated equal protection principles. Suit allowed.

State ex rel. DHS v. Benjamin, 395 S.E.2d 220 (1990) (McHugh, J.)

Appellant was adjudicated the natural father of a female child born to Mary C.M. The mother had caused a warrant charging appellant with fathering the child. Prior to blood testing as ordered by the circuit court, the court dismissed the action with prejudice. When the present action was filed appellant claimed the first dismissal should operate to bar the action under principles of *res judicata*. The circuit court allowed the action.

Res judicata (continued)

State ex rel. DHS v. Benjamin, (continued)

Syl. pt. 1 - "'An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata* .' Point 1, Syllabus, *Sayre's Adm'r v. Harpold et al.*, 33 W.Va. 553 [11 S.E. 16 (1890)]." Syl. pt. 1, *In re Estate of McIntosh*, 144 W.Va. 583, 109 S.E.2d 153 (1959) (emphasis in original).

Syl. pt. 2 - "'To justify the application of the doctrine of *res judicata*, ". . . there must be concurrence of four conditions, namely: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons, and of parties to the action; (4) identity of the quality in the person for or against whom the claim is made." Opinion. *Marguerite Coal Co. v. Meadow River Lumber Co.*, 98 W.Va. 698, 127 S.E. 644 (1925).' Syllabus, *Hannah v. Beasley*, 132 W.Va. 814, 53 S.E.2d 729 (1949)." Syl. pt. 1, *Pearson v. Dodd*, 159 W.Va. 254, 221 S.E.2d 171 (1975), appeal dismissed, 429 U.S. 396, 97 S.Ct. 581, 50 L.Ed.2d 574 (1977), *overruled on another point*, syl. pt. 3, *Lilly v. Duke*, 180 W.Va. 228, 376 S.E.2d. 122 (1988).

Syl. pt. 3 - "Where the principle of *res judicata*, is invoked[,] in order for it to apply it must appear either that the parties in the present case are identical with those in the former litigation or that their privity with them was such as to give them a common interest in the outcome thereof." Syl. pt. 1, *Gentry v. Farruggia*, 132 W.Va. 809, 53 S.E.2d 741 (1949).

Syl. pt. 4 - "Privity, in a legal sense, ordinarily denotes 'mutual or successive relationship to the same rights of property.' *Edward F. Gerber Co. v. Thompson*, 84 W.Va. 721, 727, 100 S.E. 733, 735, 7 A.L.R. 730, 734 (1919)]." Syl., *Cater v. Taylor*, 120 W.Va. 93, 196 S.E. 558 (1938).

PATERNITY

Res judicata (continued)

State ex rel. DHS v. Benjamin, (continued)

Syl. pt. 5 - The dismissal with prejudice of a paternity action initiated by a mother against a putative father of a child does not preclude the child, under the principle of *res judicata*, from bringing a second action to determine paternity when the evidence does not show privity between the mother and the child in the original action nor does the evidence indicate that the child was either a party to the original action or represented by counsel or guardian ad litem in that action.

Finding that reasons for the original dismissal were unclear, the Court nonetheless upheld the circuit court, because the child was not a party to the original suit. The mother's and the child's interests were not in privity so as to bar this action. Remanded for further proceedings.

Statute of limitations

Constitutionality

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

See EQUAL PROTECTION Sexual discrimination, Paternity actions, (p. 181) for discussion of topic.

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

See PATERNITY *Res judicata*, (p. 465) for discussion of topic.

PENAL STATUTES

Generally

State v. Hatfield, 380 S.E.2d 670 (1988) (McGraw, J.)

See STATUTES Penal statutes, Generally, (p. 612) for discussion of topic.

PERJURY

Immunity

Use of statement induced thereby

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Indictments

Dismissal of

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 160) for discussion of topic.

PHOTOGRAPHS

Admissibility into evidence

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See EVIDENCE Admissibility, Photographs, (p. 199) for discussion of topic.

Gruesome

Finding required

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

See EVIDENCE Gruesome photographs, (p. 230) for discussion of topic.

Identification by

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See IDENTIFICATION Out of court, Photographs, (p. 310) for discussion of topic.

PLAIN ERROR

Felony-murder

Failure to instruct on underlying felony

State v. Stacy, 384 S.E.2d 347 (1989) (Workman, J.)

See HOMICIDE Felony-murder, Instructions, (p. 298) for discussion of topic.

Findings of fact

Shingleton v. Romney, 382 S.E.2d 64 (1989) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Prior offenses, Forum to challenge, (p. 166) for discussion of topic.

Generally

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

State v. Fisher, 370 S.E.2d 480 (1988) (Per Curiam)

See SELF-INCRIMINATION Pre-trial silence, (p. 573) for discussion of topic.

State v. Marrs, 379 S.E.2d 497 (1989) (Neely, J.)

See EQUAL PROTECTION Racial discrimination, Jury composition, (p. 179) for discussion of topic.

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See CONTROLLED SUBSTANCES Intent, Delivery, (p. 127) for discussion of topic.

Generally (continued)

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 344) for discussion of topic.

State v. Stacy, 384 S.E.2d 347 (1989) (Workman, J.)

See HOMICIDE Felony-murder, Instructions, (p. 298) for discussion of topic.

State v. Moore, 409 S.E.2d 490 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 203) for discussion of topic.

Instructions

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See ROBBERY Elements of, (p. 556) for discussion of topic.

PLEA

Failure to enter plea

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

Appellant was convicted of felony-murder and several underlying felonies. Although reversed on the grounds of improper sentencing for both the felony-murder and the felonies (see DOUBLE JEOPARDY Felony-murder, (p. 152)), appellant also claimed that he was prevented from entering a plea, and therefore the issues to be tried were never formulated.

Syl. pt. 2 - "Where the record fails to show that the defendant entered a plea but does show affirmatively that he was fully advised and fully aware of the nature of the charge against him; that he had effective counsel who made many motions and filed many pleadings on his behalf and afforded him a reasonably good defense; that a jury trial was afforded the defendant and in fact was held, thereby permitting him to confront his accusers; that he was not, by such failure, deprived of any constitutional or statutory protections designed to afford him a fair trial; and that circumstances reveal that he received a fair trial, any such failure to enter a plea, will be considered harmless error." Syllabus point 3, *State v. Grimmer*, 162 W.Va. 588, 251 S.E.2d 780 (1979).

The Court noted that Rule 11(h) of the Rules of Criminal Procedure allows for variances which do not affect substantive rights. Since the defendant was clearly advised of his rights, allowed a jury trial, permitted to confront his accusers, confronted the evidence and in every way acted as if he had pled not guilty, the Court found harmless error.

Guilty plea

Withdrawal of

Duncil v. Kaufman, 394 S.E.2d 870 (1990) (Miller, J.)

Petitioner is Warden of Huttonsville Correctional Center. He brought this writ of prohibition against Judge Kaufman to prevent enforcement of an order allowing a defendant to be released on time served because of breach of a plea agreement.

Duncil v. Kaufman, (continued)

The defendant accepted a plea agreement which allowed him to plead guilty to only ten of twenty counts of forgery and uttering; the prosecution was also to recommend consecutive sentences for only five of the counts. The day of sentencing, defense counsel moved to withdraw the plea, claiming he was innocent of several charges. The request was denied and defendant sentenced to 5 to 50 years in prison.

Defendant claimed that he was denied effective assistance of counsel and that the prosecution breached its plea agreement.

Syl. pt. 1 - "Rule 32(-d) of the West Virginia Rules of Criminal Procedure as it relates to the right to withdraw a guilty or nolo contendere plea prior to sentence permits the withdrawal of a plea for 'any fair and just reason.'" Syllabus Point 1, *State v. Harlow*, 176 W.Va. 559, 346 S.E.2d 350 (1986).

Syl. pt. 2 - Notwithstanding that a defendant is to be given a more liberal consideration in seeking leave to withdraw a plea before sentencing, it remains clear that a defendant has no absolute right to withdraw a guilty plea before sentencing. Moreover, a trial court's decision on a motion under Rule 32(d) of the West Virginia Rules of Criminal Procedure will be disturbed only if the court has abused its discretion.

Syl. pt. 3 - A mere declaration of innocence does not entitle a defendant to withdraw his guilty plea. The general rule is that in the exercise of its discretion to permit withdrawal of a guilty plea before sentencing based on a defendant's assertion of innocence, a trial court should consider the length of time between the entry of the guilty plea and the filing of the motion to withdraw, why the grounds for withdrawal were not presented to the court at an earlier point in the proceedings, whether the defendant maintained his innocence throughout the plea proceedings, whether the State's case will be prejudiced, and whether the defendant has articulated some grounds in support of his claim of innocence.

Syl. pt. 4 - "'The burden of proving that a plea was involuntarily made rests upon the pleader.' Syllabus point 3, *State ex rel. Clancy v. Coiner*, 154 W.Va. 857, 179 S.E.2d 726 (1971)." Syllabus Point 1, *State ex rel. Wilson v. Hedrick*, 180 W.Va. 689, 379 S.E.2d 493 (1989).

Duncil v. Kaufman, (continued)

Syl. pt. 5 - "Before a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding process if the case had proceeded to trial; (3) the guilty plea must have been motivated by this error." Syllabus Point 3, *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978).

Here, the trial court carefully questioned and advised defendant prior to entry of his guilty plea; his education and mental state at the time of the plea agreement were explored. Defense counsel assured the court that all counts of the indictment were discussed. No error.

PLEA BARGAIN

Acceptance of

Without admission of guilt

State v. Whitt, 378 S.E.2d 102 (1989) (Per Curiam)

Appellant was found guilty of two counts of delivery of marijuana. Prior to trial appellant and the prosecuting attorney entered into a plea agreement by which appellant pled guilty to one count in return for dismissal of the other count. The trial court rejected the agreement because the defendant did not acknowledge his guilt and continued to maintain he was entrapped.

Syl. pt. 1 - "An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him." Syllabus Point 1, *Kennedy v. Frazier*, 178 W.Va. 10, 357 S.E.2d 43 (1987)."

Syl. pt. 2 - "Although a judge would be remiss to accept a guilty plea under circumstances where the weight of the evidence indicates a complete lack of guilt, a court should not force any defense on a defendant in a criminal case, particularly when advancement of the defense might end in disaster." Syllabus Point 2, *Kennedy v. Frazier*, 178 W.Va. 10, 357 S.E.2d 43 (1987).

The Court reversed and remanded.

Admissibility in trial of accomplice

State v. Mullens, 371 S.E.2d 64 (1988) (Brotherton, J.)

See EVIDENCE Accomplice's conviction, (p. 185) for discussion of topic.

PLEA BARGAIN

Breach of

Prosecution fails to stand silent at sentencing

Duncil v. Kaufman, 394 S.E.2d 870 (1990) (Miller, J.)

Petitioner brought a writ of prohibition to prevent release of an inmate for time served. Respondent found that the prosecution breached its plea agreement. The prosecution agreed to dismiss ten counts out of twenty and recommend that the sentences for five of the remaining counts be served consecutively. At sentencing, defense counsel argued for a lesser sentence in light of defendant's wrongful incarceration for an earlier offense. The prosecution stood by its earlier recommendation of consecutive sentences for five counts. Defendant claimed that he believed that the prosecution would remain silent, based on defense counsel's remarks during the hearing that he was free to argue any other sentence supported by the presentence report.

Syl. pt. 8 - A breach of a plea agreement may occur where the State, after having agreed to remain neutral to the sentence to be imposed, fails to do so.

Syl. pt. 9 - "Prohibition will lie to prohibit a judge from exceeding his legitimate powers." Syllabus Point 2, *State ex rel. Winter v. MacQueen*, 161 W.Va. 30, 239 S.E.2d 660 (1977).

No error. The prosecution did not agree to stand silent while a lesser sentence than agreed to was argued.

Guilty plea

Withdrawal of

Duncil v. Kaufman, 394 S.E.2d 870 (1990) (Miller, J.)

See PLEA Guilty plea, Withdrawal of, (p. 473) for discussion of topic.

PLEA BARGAIN

Sentencing

Withdrawal prior to

State v. Huff, 375 S.E.2d 438 (1988) (Per Curiam)

As a result of a plea agreement, appellant was sentenced to one to ten years for grand larceny; and to one year for petit larceny. Appellant's motion to withdraw from the plea agreement was denied, even though it was made prior to the judge's acceptance of the plea and prior to sentencing. Appellant stated at the acceptance hearing that he was innocent of the larceny charges and agreed to the plea bargain in order to escape prosecution on numerous other outstanding charges.

Syl. pt. 1 - "In a case where the defendant seeks to withdraw his guilty plea before sentence is imposed, he is generally accorded the right if he can show any fair and just reason." Syl. pt. 1, *State v. Olish*, 164 W.Va. 712, 266 S.E.2d 134 (1980).

Syl. pt. 2 - "'If the State will suffer substantial prejudice if the guilty plea is withdrawn prior to the time the sentence is imposed, this is a limiting factor which the court should consider in determining whether to grant the motion to withdraw the guilty plea.' Syllabus Point 3, *State v. Olish*, 164 W.Va. 712, 266 S.E.2d 134 (1980)." Syl. pt. 2, *State v. Harlow*, 176 W.Va. 559, 346 S.E.2d 350 (1986).

The Court noted that evidence was presented at the hearing of which defense counsel was apparently unaware and that the plea had not been accepted when the motion was made to withdraw it. These factors are "fair and just" reasons to withdraw the plea. Reversed.

State v. Whitt, 395 S.E.2d 530 (1990) (Per Curiam)

Appellant was indicted for two counts of distribution of marijuana without remuneration. He reached a plea agreement in which he pled guilty to one count in return for dismissal of the second count. The prosecution was to stand silent at sentencing.

PLEA BARGAIN

Sentencing (continued)

Withdrawal prior to (continued)

State v. Whitt, (continued)

When the plea was taken, appellant said he felt he had been entrapped and had done nothing wrong. The circuit court refused the agreement, whereupon a second agreement was reached which required appellant to plead guilty to the count originally to have been dismissed. That plea was also rejected and a jury trial found appellant guilty of both counts. He was sentenced to 1 to 5 years.

Upon remand after a first appeal, *State v. Whitt*, 180 W.Va. 553, 378 S.E.2d 102 (1989), the circuit court refused to allow a plea of guilty to the lesser of the two charges and found appellant guilty on the more serious charge and once more sentenced to 1 to 5 years with a fine of $5,000.00.

Syl. pt. - "In a case where the defendant seeks to withdraw his guilty plea before sentence is imposed, he is generally accorded the right if he can show any fair and just reason." Syllabus point 1, *State v. Olish*, 164 W.Va. 712, 266 S.E.2d 134 (1990).

The Court noted that the original plea bargain was rejected but that rejection was reversed by the first *Whitt* case. Since the status of the bargain was unclear, appellant should have been allowed to withdraw it. Reversed and remanded.

Setting aside

Witness indicted

State ex rel. Miller v. Cline, No. 18579 (11/28/88) (Per Curiam)

Relator was indicted for two counts of delivery of a controlled substance. He agreed to plead guilty to one count in exchange for dismissal of the other count, dismissal of another charge pending against relator's brother-in-law and an agreement not to oppose probation for relator.

Setting aside (continued)

Witness indicted (continued)

State ex rel. Miller v. Cline, (continued)

While relator was being evaluated prior to sentencing, he discovered that the chief witness against him had been indicted by a federal grand jury on charges of distributing controlled substances, conspiracy to distribute and jury tampering. Relator moved to vacate the conviction and set aside the guilty plea. The trial court denied both requests and set a sentencing date. Relator then filed a petition for writ of prohibition.

The Court cited Rule 32(d) of the West Virginia Rules of Criminal Procedure:

> If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under *W.Va.Code* 62-12-7(a), the court may permit withdrawal of the plea upon a showing of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by petition under *W.Va.Code* 53-4A-1.

The Court held that the circumstances here constituted "fair and just reason" for withdrawal of the plea. Writ granted.

Voluntariness

Burden of proof

State ex rel. Wilson v. Hedrick, 379 S.E.2d 493 (1989) (Per Curiam)

Appellant pled guilty to first-degree murder and is serving a life sentence. In an earlier *habeas corpus* proceeding, he contended that his plea was not voluntarily or intelligently made and that he was denied effective assistance of counsel. The circuit court denied the petition. Appellant raised the same issues on appeal.

Syl. pt. 1 - "The burden of proving that a plea was involuntarily made rests upon the pleader." Syllabus point 3, *State ex rel. Clancy v. Coiner*, 154 W.Va. 857, 179 S.E.2d 726 (1971).

Voluntariness (continued)

Burden of proof (continued)

State ex rel. Wilson v. Hedrick, (continued)

Syl. pt. 2 - "To be competent to stand trial, a defendant must exhibit a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the proceedings against him." Syllabus point 2, *State v. Arnold*, 159 W.Va. 158, 219 S.E.2d 922 (1975).

Pursuant to trial counsel's motion, appellant was examined by psychiatrists to determine his criminal responsibility and his competence to stand trial. Appellant was found competent to stand trial. Appellant was informed by the trial court of the nature of the charge against him and questioned as to whether he understood the elements of the offense. The Court found that appellant understood the charge and was informed of the possibility of life imprisonment. Further, defense counsel testified during the *habeas corpus* proceeding that he had discussed with appellant the nature of the charge and differences in first-degree murder, second-degree murder and manslaughter and the consequences of each. No error in denying the habeas petition.

The Court also found clear evidence that the appellant was competent to stand trial. No error.

Withdrawal of

Mistake by defendant

State v. Lake, 378 S.E.2d 670 (1989) (Per Curiam)

See GUILTY PLEAS Withdrawal of plea, (p. 277) for discussion of topic.

State v. Whitt, 395 S.E.2d 530 (1990) (Per Curiam)

See PLEA BARGAIN Sentencing, Withdrawal prior to, (p. 478) for discussion of topic.

POISON

As means of homicide

State v. Weaver, 382 S.E.2d 327 (1989) (Miller, J.)

See HOMICIDE Attempted murder, By poison, (p. 297) for discussion of topic.

POLICE OFFICER

Duty to advise of right to counsel

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

Appellant was convicted of first-degree murder. On the morning of the shooting, two state police officers interviewed her. Because these interviews were investigatory, no *Miranda* warnings were given. The interview with the first officer took approximately five to ten minutes after the officer surveyed the crime scene. The second interview lasted approximately thirty-five minutes and took place in the police cruiser. Both officers testified that at this point appellant was not under arrest and was free to leave.

Appellant admitted to the officers that she and the victim were the only ones home at the time of the shooting and said she was asked if the victim had life insurance. On appeal, she asked that the statements be suppressed as taken without *Miranda* warnings.

Syl. pt. 5 - "The obligation of police to warn a suspect of both his right to counsel and his right against self-incrimination applies only to custodial or other settings where there is a possibility of coercion." Syl. pt. 2, *State v. Andriotto*, 167 W.Va. 501, 280 S.E.2d 131 (1981).

Syl. pt. 6 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

The Court held that appellant was not deprived of her freedom and therefore was not in custody so as to require that *Miranda* warnings be given. The trial court's ruling is not plainly wrong, nor against the weight of the evidence. No error.

Interrogation by

Effect of invoking right to remain silent

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

See INTERROGATIONS Right to remain silent, (p. 367) for discussion of topic.

POLICE OFFICER

Interrogation by (continued)

Prior to arrest

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

POLYGRAPH TESTS

Admissibility

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See EVIDENCE Polygraph tests, (p. 239) for discussion of topic.

State v. Porter, 392 S.E.2d 216 (1990) (McHugh, J.)

See EVIDENCE Polygraph tests, (p. 240) for discussion of topic.

PRELIMINARY HEARING

Disclosure of informant

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

Appellant was convicted of manufacturing a controlled substance and possession with intent to deliver. At a preliminary hearing the prosecution withheld the identity of a police informant.

Syl. pt. 2 - During a preliminary hearing held for the purpose of determining the question of probable cause for an arrest or search, a trial court is not required to disclose the identity of a confidential informant, provided that there is a substantial basis for believing that the informant is credible, that there is a factual basis for the information furnished and that it would impose an unreasonable burden on one of the parties or on a witness to require that the identity of the informant be disclosed at the hearing.

The Court cited several United States Supreme Court decisions in support of its ruling. See *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); and *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

The Court noted that the standard for testimonial privilege set forth in *McCray* is essentially the same standard used in West Virginia for the admission of hearsay evidence at a preliminary hearing to determine probable cause. All criteria were met here. See also, *State v. Bennett*, 172 W.Va. 123, 304 S.E.2d 28 (1983) and *State v. Reedy*, 177 W.Va. 406, 352 S.E.2d 158 (1986).

PRESUMPTIONS

Confessions of accomplice

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

See CONFESSIONS Admissibility, Accomplice, (p. 110) for discussion of topic.

Court proceedings

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See APPEAL Generally, (p. 26) for discussion of topic.

Ineffective assistance

One day prior to trial

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See ATTORNEYS Appointment of, One day prior to trial, (p. 62) for discussion of topic.

Of guilt

State v. Curry, 374 S.E.2d 526 (1988) (Per Curiam)

See CONSPIRACY Presumption of guilt, (p. 120) for discussion of topic.

PRINCIPAL IN 1st DEGREE

Distinguished from aiding and abetting

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

See AIDING AND ABETTING Principal in 1st and 2d degree, (p. 23) for discussion of topic.

PRIOR OFFENSES

Forum for appeal

DUI

Shingleton v. Romney, 382 S.E.2d 64 (1989) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Prior offenses, Forum to challenge, (p. 166) for discussion of topic.

Introduction at trial

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See EVIDENCE Collateral crimes, (p. 220) for discussion of topic.

PRISON/JAIL CONDITIONS

Court's responsibility for

Crain v. Bordenkircher, 392 S.E.2d 227 (1990) (Per Curiam)

On November 30, 1988 the Court issued a show-cause order threatening receivership of the Penitentiary at Moundsville, construction of a new facility and ordering of financing. On May 2, 1989, respondents appeared and argued that appointment of a receiver was unnecessary because the Governor and the Legislature are now taking steps to insure a new prison by July 1, 1992 (the date given by the Court in previous rulings: see *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988); *Crain v. Bordenkircher*, 176 W.Va. 338, 342 S.E.2d 422 (1986). Respondents pointed to creation of the West Virginia Regional Jail and Correctional Facility Authority as proof of progress.

Syl. pt. - "'This court has a duty to take such actions as are necessary to protect and guard the Constitution of the United States and the Constitution of the State of West Virginia.' Syllabus Point 2, *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988)." Syl., *Crain v. Bordenkircher*, 181 W.Va. 231, 382 S.E.2d 68 (1989).

The Court noted that it retains jurisdiction and that the Regional Jail Authority is not a party to this litigation. The finding that present conditions at the Penitentiary are unconstitutional was never disputed. The Court deferred to the Legislature and the Governor but required submission of another plan for correction of prison conditions and set the matter for hearing on January 9, 1990.

The Court's own Special Master recommended that a new facility must be constructed. The Court deferred further action in light of the actions of the Legislature and the Governor to construct a new prison, but required that a specific plan be developed. The plan required by the last hearing (*supra*) was submitted and accepted.

Petitioner's motion to put the prison into receivership was denied and a hearing set for April 3, 1990 to review progress on the new prison.

A progress report was received on construction of the prison. The Court found the progress report satisfactory but retained jurisdiction and directed that the Special Master and the Court Monitor be allowed to review plans for the new facility. The Regional Jail and Correctional Facility Authority was made a party to this action and the case set for the January, 1991 docket.

PRISON/JAIL CONDITIONS

Conditions of confinement

Facilities Review Panel v. McGuire, No. 19029 (12/20/90) (Per Curiam)

See JAILS Conditions of confinement, (p. 372) for discussion of topic.

Medical care

State's responsibility for

County Commission of Mercer County v. Dodrill, 385 S.E.2d 248 (1989) (McHugh, J.)

See GOVERNOR Reprieve, Authority to grant, (p. 273) for discussion of topic.

Overcrowding

Executive orders

County Commission of Mercer County v. Dodrill, 385 S.E.2d 248 (1989) (McHugh, J.)

See GOVERNOR Reprieve, Authority to grant, (p. 273) for discussion of topic.

State prisoners

Responsibility for

County Commission of Mercer County v. Dodrill, 385 S.E.2d 248 (1989) (McHugh, J.)

See GOVERNOR Reprieve, Authority to grant, (p. 273) for discussion of topic.

PRISON/JAIL CONDITIONS

Venue (change of)

State ex rel. Kisner v. Starcher, No. 18520 (11/10/88) (Per Curiam)

See VENUE Change of venue, Abuse of discretion, (p. 647) for discussion of topic.

PRIVACY

Generally

Wagner v. Hedrick, 383 S.E.2d 286 (1989) (Brotherton, C.J.)

See SEARCH AND SEIZURE Expectation of privacy, Hospital emergency room, (p. 562) for discussion of topic.

PRIVATE PROSECUTING ATTORNEYS

Right to

Kerns v. Wolverton, 381 S.E.2d 258 (1989) (Brotherton, C.J.)

See PROSECUTING ATTORNEY Private prosecutors, Scope of authority, (p. 527) for discussion of topic.

Scope of authority

Kerns v. Wolverton, 381 S.E.2d 258 (1989) (Brotherton, C.J.)

See PROSECUTING ATTORNEY Private prosecutors, Scope of authority, (p. 527) for discussion of topic.

PRIVILEGES

Marital

Scope of

State v. Robinson, 376 S.E.2d 606 (1988) (McGraw, J.)

Appellant was convicted of manufacturing a controlled substance. Appellant's ex-wife was allowed to testify regarding the production of the substance during their marriage. Although oral communications between husband and wife were excluded, Mrs. Robinson testified as to her observations of her husband during the marriage.

Syl. pt. 1 - The privilege against disclosure of confidential marital communications embodied in *W.Va.Code* section 57-3-4 (1966) prohibits disclosure of knowledge derived from observation of the acts or conduct of one's spouse undertaken or performed in reliance on the confidence of the marital relation.

Syl. pt. 2 - The test of whether acts of a spouse come within the privilege against disclosure of confidential marital communications is whether the act or conduct was induced by or done in reliance on the confidence of the marital relation, *i.e.*, whether there was an expectation of confidentiality.

The Court held that the actions appellant took during the marriage were taken in reliance on the confidentiality of the marriage. Reversed and remanded.

Waiver of

State v. Robinson, 376 S.E.2d 606 (1988) (McGraw, J.)

Appellant was convicted of manufacturing a controlled substance. At trial he testified without being advised of his right to remain silent or of the consequences of his waiver of that right. Although defense counsel attempted to limit the scope of cross-examination to events taking place after appellant's marriage ended in divorce, the trial court ruled against appellant's assertion of his right against self-incrimination.

Syl. pt. 3 - "A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant's waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will

be allowed to cross-examine him. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about the right." Syllabus point 7, *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988).

The failure of the trial court to advise appellant required reversal.

PROBABLE CAUSE

Standard for

Misdemeanor arrest

Simon v. W.Va. Dep't of Motor Vehicles, 832 S.E.2d 320 (1989) (Neely, J.)

See ARREST Warrantless, Misdemeanor arrest, (p. 54) for discussion of topic.

Transfer of juvenile to adult jurisdiction

In the Interest of H.J.D., 375 S.E.2d 576 (1988) (Per Curiam)

See JUVENILES Transfer from juvenile to adult jurisdiction, (p. 428) for discussion of topic.

State v. Sonja B., 395 S.E.2d 803 (1990) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Probable cause for, (p. 430) for discussion of topic.

Warrantless arrest

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

Appellant, a juvenile, was convicted of first-degree murder and first- degree sexual assault. On the day the murder was discovered police obtained a knife from appellant's companion, along with a statement that he and appellant were intoxicated and unconscious for most of the evening the killing took place. The companion also alleged that appellant was seen near the victim's residence the same evening.

Appellant was picked up for questioning and taken to a "road office" at approximately 3:31 p.m. Testimony from the officer later indicated that appellant did not have a choice as to whether to go with the police. At 4:00 p.m. interrogation began. According to the interrogating officer, at that point appellant was not under arrest and could have left the office; only after questioning did the arrest allegedly take place.

Warrantless arrest (continued)

State v. Giles, (continued)

Throughout the interrogation appellant said he did not commit the crime and the officer repeatedly told appellant that he was lying. The officer finally asked appellant why he killed the victim and appellant responded that he did not know.

Appellant repeated the inculpatory statements twice since the first attempt to record the statements was unsuccessful. The second statements were recorded at approximately 5:30 p.m. and a detention hearing was held at approximately 7:30 p.m.

Appellant was assured by the officer between the first and second recording attempts that the officer would help him in return for his confession.

Appellant claimed that the confession was the fruit of an illegal arrest and should have been suppressed.

Syl. pt. 1 - "Under *W.Va.Code*, 49-5-8(d), when a juvenile is taken into custody, he must immediately be taken before a referee, circuit judge, or magistrate. If there is a failure to do so, any confession obtained as a result of the delay will be invalid where it appears that the primary purpose of the delay was to obtain a confession from the juvenile." Syllabus point 3, *State v. Ellsworth J.R.*, 175 W.Va. 64, 331 S.E.2d 503 (1985).

Syl. pt. 2 - "'probable cause to make an arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that an offense has been committed.' Syllabus Point 7, *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 46 (1980)." Syllabus point 1, *State v. Drake*, 170 W.Va. 169, 291 S.E.2d 484 (1982).

Syl. pt. 3 - "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syllabus point 1, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

Warrantless arrest (continued)

State v. Giles, (continued)

Syl. pt. 4 - " ' "[Subject to the provisions of *W.Va.Code*, 49-5-1(d)], [t]here is no constitutional impediment which prevents a minor above the age of tender years solely by virtue of his minority from executing an effective waiver of rights; however, such waiver must be closely scrutinized under the totality of the circumstances." Syllabus Point 1, as modified, *State v. Laws*, 162 W.Va. 359, 251 S.E.2d 769 (1978).' Syllabus Point 3, *State v. Howerton*, 174 W.Va. 801, 329 S.E.2d 874 (1985)." Syllabus point 1, *State v. Ellsworth J.R.*, 175 W.Va. 64, 331 S.E.2d 503 (1985).

Syl. pt. 5 - "Limited police investigatory interrogations are allowable when the suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go." Syllabus point 2, *State v. Mays*, 172 W.Va. 486, 307 S.E.2d 655 (1983).

Syl. pt. 6 - "A confession obtained by exploitation of an illegal arrest is inadmissible. The giving of *Miranda* warnings is not enough, by itself, to break the causal connection between an illegal arrest and the confession. In considering whether the confession is a result of the exploitation of an illegal arrest, the court should consider the temporal proximity of the arrest and confession; the presence or absence of intervening circumstances in addition to the *Miranda* warnings; and the purpose or flagrancy of the official misconduct." Syllabus point 2, *State v. Stanley*, 168 W.Va. 294, 284 S.E.2d 367 (1981).

Syl. pt. 7 - "Exclusion of a confession obtained as a result of an illegal arrest without a warrant is mandated unless the causal connection between the arrest and the confession has been clearly broken." Syllabus point 3, *State v. Canby*, 162 W.Va. 666, 252 S.E.2d 164 (1979).

Here, the State conceded that the police did not have probable cause to arrest appellant when he was first taken in for questioning; therefore, police had no duty to present appellant to a judge prior to his confession. The Court rejected that argument, noting that appellant was never told that he had a choice as to whether to accompany police and the manner of treatment he received indicated he was under arrest. The detention was improper.

The Court also concluded that the confession was a direct result of the illegal arrest; no break in causation was found. Reversed.

PROBATION

Controlled substances

Hutchinson v. Dietrich, 393 S.E.2d 663 (1990) (Brotherton, J.)

See CONTROLLED SUBSTANCES Probation, (p. 128) for discussion of topic.

DUI

State ex rel. Hagg v. Spillers, 382 S.E.2d 581 (1989) (Miller, J.)

See DUI Probation, (p. 175) for discussion of topic.

Revocation

Burden of proof

State v. Bowman, 375 S.E.2d 829 (1988) (Per Curiam)

Appellant's probation was revoked for failure to perform unpaid community service on three occasions. He was remanded to serve two consecutive one to ten year sentences for grand larceny.

Syl. pt. - "Where a probative violation is contested, the State must establish the violation by a clear preponderance of the evidence." Syl. pt. 4, *Sigman v. Whyte*, 165 W.Va. 356, 268 S.E.2d 603 (1980).

Appellant is twenty-two years old but has only an eighth grade education and reads at the third grade level. He was required to perform forty hours per week of service for the five year probation period. Appellant's supervisors were allowed to testify at the revocation hearing regarding appellant's work habits, even though one of them never observed appellant at work. Appellant's three absences in twelve days included one holiday.

Appellant testified that he was told that he did not have to work on rainy days; and that he hitchhiked the twelve miles from his home to work. Further, appellant's probation officer testified that neither supervisor ever informed the officer of any difficulties with appellant and that he was appearing at the hearing only because he read of it in the newspaper, having never received notice of it.

Revocation (continued)

Burden of proof (continued)

State v. Bowman, (continued)

The Court noted that the only clearly violated condition of probation was the missing of three days work, of which one was a holiday. Appellant testified that on those days it had rained and this testimony was unrefuted. Reversed.

Right to

State v. White, 383 S.E.2d 87 (1989) (Per Curiam)

Appellant was convicted of grand larceny. She claimed on appeal that the trial court abused its discretion in refusing to grant probation (appellant was sentenced to one to ten years).

Syl. pt. 2 - "Probations is a matter of grace and not a matter of right." Syllabus point 1, *State v. Rose*, 156 W.Va. 342, 192 S.E.2d 884 (1972).

The Court noted that a probation officer's report concluded that appellant was a poor candidate for probation. The trial court sent appellant to a diagnostic and classification unit and received a generally unfavorable report noting that appellant needed mental health counseling and should attend Al-Anon. Only a moderate likelihood was given of no further criminal involvement. No abuse of discretion.

PROCEDURE

Magistrate court

Notice of appeal

State v. Molisee, 378 S.E.2d 100 (1989) (Per Curiam)

See MAGISTRATE COURT Appeal from, Notice required, (p. 440) for discussion of topic.

PROFESSIONAL RESPONSIBILITY

Generally

See, generally, ATTORNEYS, Discipline, this Digest.

Also see, generally, JUDGES, Discipline, this Digest.

Committee on Legal Ethics v. Boettner, 394 S.E.2d 735 (1990) (Miller, J.)

See ATTORNEYS Professional responsibility, Mitigation hearing, (p. 80) for discussion of topic.

Burden of proof

Committee on Legal Ethics v. Lewis, 371 S.E.2d 92 (1988) (Per Curiam)

See ATTORNEYS Disbarment, Burden of proof, (p. 66) for discussion of topic.

Judges

Standard of proof

In the Matter of Mendez & Evans, No. 19009 (7/12/89) (Per Curiam)

See JUDGES Discipline, Standard of proof, (p. 382) for discussion of topic.

PROHIBITION

Habeas corpus

Denial of

State ex rel. Cecil v. Frazier, No. 18267 (5/27/88) (Per Curiam)

See *HABEAS CORPUS* Omnibus hearing, (p. 286) for discussion of topic.

Improper procedure

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

Invalid indictment

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

See INDICTMENT Validity of, Grand jury does not approve text, (p. 324) for discussion of topic.

Obstruction of officer

State ex rel. Wilmoth v. Gustke, 373 S.E.2d 484 (1988) (McHugh, C.J.)

See OBSTRUCTION OF OFFICER Defined, (p. 463) for discussion of topic.

Right to

Generally

State ex rel. Thomas v. Egnor, No. 19146 (10/27/89) (Per Curiam)

Relator was convicted of burglary but a mistrial was declared with respect to a first-degree sexual assault charge. A new trial was subsequently set on both charges, apparently after the burglary conviction was set aside. A second trial resulted in another burglary conviction and another mistrial on the sexual assault charge. Relator sought by writ of prohibition to prevent a new trial on the sexual assault charge.

Right to (continued)

Generally (continued)

State ex rel. Thomas v. Egnor, (continued)

The Court recognized that double jeopardy normally bars a retrial unless "manifest necessity" requires discharge of the first jury. *Porter v. Ferguson*, 174 W.Va. 253, 324 S.E.2d 397 (1984). Failure of the jury to agree may be a manifest necessity, *Adkins v. Leverette*, 164 W.Va. 377, 264 S.E.2d 154 (1980); and retrial may occur if, in the judge's discretion, a mistrial is granted. *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

Relator failed to establish that a mistrial was inappropriate in his two prior trials. Writ of prohibition denied.

Three-term rule

State ex rel. Webb v. Wilson, 390 S.E.2d 9 (1990) (McHugh, J.)

[NOTE] This case involves two consolidated appeals. Included in the above is *State ex rel. Wellman v. Wilson*, No. 19279 (2/15/90).

See THREE-TERM RULE Generally, (p. 641) for discussion of topic.

PROMPT PRESENTMENT

Generally

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Confessions to police, (p. 577) for discussion of topic.

Confessions made without

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

Appellant was convicted of first-degree murder. After his arrest, appellant was transported directly to police headquarters. He waived his *Miranda* rights and gave a statement to police, which he later testified was voluntary. He claimed on appeal that there was subsequent delay in presenting him before a judicial officer and therefore his statement should have been suppressed.

Syl. pt. 9 - "Ordinarily the delay in taking an accused who is under arrest to a magistrate [or neutral judicial officer] after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule." Syllabus Point 4, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

If delay did occur, it did not induce appellant's statement. No error in refusing to suppress appellant's statement to police.

Juveniles

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See JUVENILES Prompt presentment, (p. 427) for discussion of topic.

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

PROOF

Generally

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See KIDNAPING Standard of proof, (p. 433) for discussion of topic.

Defendant's presence

Factor for determining guilt

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See AIDING AND ABETTING Principal and accessory distinguished, (p. 21) for discussion of topic.

PROPERTY

Transferring stolen property

Elements of offense

State v. Tanner, 382 S.E.2d 47 (1989) (Brotherton, C.J.)

See TRANSFERRING STOLEN PROPERTY Elements of offense, (p. 644) for discussion of topic.

PROPORTIONALITY

Generally

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

Appellant was convicted of burglary and then subsequently sentenced to life imprisonment as a recidivist. On appeal, he claimed that the circuit court failed to make a proportionality analysis prior to imposing sentence.

Syl. pt. 6 - "'Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: "Penalties shall be proportioned to the character and degree of the offence."' Syllabus Point 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980)." Syllabus Point 3, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Syl. pt. 7 - "While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syllabus Point 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Syl. pt. 8 - "In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." Syllabus Point 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

The Court noted that the third felony is to be given a closer scrutiny. Here, appellant was convicted of nighttime burglary, an offense carrying a penalty of 1 to 15 years' imprisonment. His previous convictions were for delivery of a controlled substance and breaking and entering, punishable by 1 to 5 years' and one to ten years' imprisonment, respectively.

Quoting Solen v. Helm, 463 U.S. 277, 77 L.Ed.2d 637, 103 S.Ct. 3001 (1983), the Court held the proper analysis should take into account "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.*, at 286, 647 and 3007.

Generally (continued)

State ex rel. Boso v. Hedrick, (continued)

The Court found appellant's sentence disproportionate to his crime; particular weight was given to the nonviolent nature of all three offenses.

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

Appellant was convicted of aggravated robbery and sentenced to life imprisonment. On appeal, he claimed that his sentence is disproportionate to the crime.

Syl. pt. 12 - The rule of the Board of Probation and Parole, C.S.R. § 92-1-4 (1983), to the extent that it prohibits parole eligibility on a life sentence under the aggravated robbery statute, *W.Va.Code*, 61-2-12, is invalid.

Syl. pt. 13 - "Punishment may be constitutionally impermissible, although not cruel and unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, § 5 that prohibits a penalty that is not proportionate to the character and degree of an offense." Syllabus Point 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

Syl. pt. 14 - "In determining whether a given sentence violates the proportionality principle found in Article III, § 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." Syllabus Point 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

The Court found that the Board of Parole overstepped its authority here in that the controlling statute governing aggravated robbery (*W.Va.Code* 61-2-12) does not foreclose the possibility of parole. However, the Court found that appellant's sentence is not disproportionate in light of his prior criminal record and the circumstances of the aggravated robbery.

PROPORTIONALITY

Generally (continued)

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See SENTENCING Appropriateness, (p. 588) for discussion of topic.

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

See SENTENCING Reviewing sentence, Standard for, (p. 594) for discussion of topic.

Appropriateness of sentence

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

Appellant was convicted of armed robbery and sentenced to sixty years imprisonment. On appeal he claimed that the sentence violated Article III, § 5 of the West Virginia Constitution and the Eighth Amendment to the United States Constitution.

Syl. pt. 9 - "'Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, § 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.' Syllabus Point 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983)." Syllabus Point 1, *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406 (1984).

The Court noted that appellant had a prior conviction for armed robbery and had been arrested seventeen times, with eleven convictions, in the past eight and one-half years. Appellant's continuing violent behavior was similar to that of the defendant in *State v. Glover*, 177 W.Va. 650, 355 S.E.2d 631 (1987) wherein the Court found appropriate a sentence for seventy-five years. See also, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). No error.

PROSECUTING ATTORNEYS

Appeal by

State v. Adkins, 388 S.E.2d 316 (1989); ***State v. Goodwill Motors, Inc.,***; ***State v. Damron***,; ***State v. Kapourales***,; ***State v. Simpkins***,; ***State v. Sizemore***,; ***State v. Van Meter***,; and ***State v. Ward***, (Brotherton, C.J.)

Defendants were indicted for election law violations in April, 1988. In May, 1988 various motions to quash, dismiss and sever were filed. These motions were never answered by the prosecution, nor ruled on by the circuit court. One year later, in May, 1989, motions were filed to dismiss for failure to provide a speedy trial. In June, 1989, new indictments were issued. The 1988 indictments were dismissed for improper impaneling of the first grand jury.

Defendants moved to dismiss the new indictments, claiming that three terms of court had elapsed from the time of the original indictments to the time of their dismissal, thereby barring any new indictments. The circuit court dismissed.

Syl. pt. 1 - "Our law is in accord with the general rule that the State has no right of appeal in a criminal case, except as may be conferred by the Constitution or a statute." Syl. pt. 1, *State v. Jones*, 178 W.Va. 627, 363 S.E.2d 513 (1987).

Syl. pt. 2 - Given its plain and ordinary meaning, the phrase "bad or insufficient," as set forth in *W.Va.Code* Section 58-5-30 (1966), cannot be enlarged to encompass a situation in which the trial court ruled that the prosecution failed to prosecute within the three term rule pursuant to *W.Va.Code* Section 62-3-21 (1989).

The Court refused to embroider the statutory language so as to allow an appeal by the prosecution. See *State v. Jones*, 178 W.Va. 627, 363 S.E.2d 513 (1987).

PROSECUTING ATTORNEYS

Arrest

Participation in

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

Appellant was convicted of manufacturing a controlled substance and possession with intent to deliver. The prosecuting attorney who tried the case participated in the investigation and was present at the appellant's arrest.

Syl. pt. 3 - Even though the prosecuting attorney participated in the investigation surrounding the defendant's arrest and was present at the defendant's arrest, where the record failed to disclose any evidence which would indicate that the prosecutor's interest in prosecuting the case went beyond his or her ordinary dedication to his or her duty to see that justice is done, the trial court did not err in denying a defendant's motion for a special prosecutor.

See *State v. Pennington*, 179 W.Va. 139, 365 S.E.2d 803 (1987); *State v. Knight*, 168 W.Va. 615, 285 S.E.2d 401 (1981); and *State v. Jenkins*, 176 W.Va. 652, 346 S.E.2d 802 (1986). Here, the Court disapproved of the prosecuting attorney's actions but found no personal interest which would prejudice the appellant (the Court also noted that neither side attempted to call the attorney to testify).

Comments out of court re: guilt of accused

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

Appellant was convicted of three counts of first-degree murder. The trial court refused counsel's motions to declare a mistrial or to poll the jury regarding the effect of prejudicial comments made by the prosecuting attorney over a local radio station ("No doubt in my mind that he in fact is the murderer of Vanessa Reggettz and her two children.")

Syl. pt. 1 - "It is improper for a prosecutor in this State to '(a)ssert his personal opinion ... as to the guilt or innocence of the accused ....' ABA Code DR7-106(C)(4) in part." Syl. Pt. 3, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

Comments out of court re: guilt of accused (continued)

State v. Moss, (continued)

Syl. pt. 2 - "If it is determined that publicity disseminated by the media during trial raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material." Syl. Pt. 5, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

The Court noted that refusing to poll the jury left unanswered the question of whether jurors actually heard the prejudicial remark. Reversed.

Conduct at trial

Comments during closing argument

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

Appellant was convicted of first-degree murder. During closing argument the prosecuting attorney called four of the witnesses liars.

Syl. pt. 7 - "A prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." Syllabus Point 7, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

Syl. pt. 8 - "'It is improper for a prosecutor in this State to "assert his personal opinion as to the justness of a cause, as to the credibility of a witness . . . or as to the guilt or innocence of the accused. . . ." ABA Code DR 7-106(C)(4) in part.' Syllabus Point 3, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981)." Syllabus Point 8, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

Although no objections were made at trial, the Court did not engage in a plain error analysis because of reversal on other grounds. The message is nonetheless clear that comments of this nature are reversible error. See *State v. Moss*, 180 W.Va. 363, 376 S.E.2d 569 (1988).

Conduct at trial (continued)

Comments during closing argument (continued)

State v. Davis, 376 S.E.2d 563 (1988) (Per Curiam)

See APPEAL Failure to object, (p. 33) for discussion of topic.

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

During the closing arguments in appellant's trial on charges of sexual assault and kidnaping, the prosecuting attorney said that the victim "is a five and one half foot tall girl. He's better than six feet tall. Under the circumstances if he told me to shut up or I will kill you, if I was that size, I wouldn't say anything either." Citing *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981), the appellant contended that the remark required reversal.

The Court recited that "wide latitude must be given to all counsel in connection with final argument. . . . We do not say that every improper remark is a proper basis for a mistrial." *State v. Myers*, 159 W.Va. 353, 222 S.E.2d 300 (1976). The Court found that the remarks here were not prejudicial as in *Critzer* (where the prosecution called the defendant a "vulture" and attacked the veracity and motives of defendant's witnesses, while asserting his belief in the honesty of his own *Id.*, at 292). Finding no manifest injustice or prejudice (see *State v. Simon*, 132 W.Va. 322, 52 S.E.2d 725 (1949)), the Court found no reversible error. It did find a violation of Disciplinary Rule 7-106(c) of the Code of Professional Responsibility.

State v. Moore, 409 S.E.2d 490 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 203) for discussion of topic.

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

During closing argument at appellant's trial for first-degree murder, the prosecuting attorney expressed his personal opinion of the credibility of his witnesses, characterized the appellant as a "psychopath," with a "diseased

Conduct at trial (continued)

Comments during closing argument (continued)

State v. Moss, (continued)

criminal mind," asked for a verdict of guilty without mercy so that the appellant would "never be released to slaughter women and children of Kanawha County" and misstated crucial evidentiary matters.

Syl. pt. 3 - "The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial.

It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law." Syl. Pt. 3, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

The Court held that "manifest injustice" resulted from the remarks, denying appellant his right to a fair trial. Reversed.

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Generally, (p. 241) for discussion of topic.

Comments on identity in recidivist proceeding

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See IDENTIFICATION Habitual offender, (p. 306) for discussion of topic.

Cross-examination on pretrial silence

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

Conduct at trial (continued)

Personal opinion

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See PROSECUTING ATTORNEY Duties, Generally, (p. 520) for discussion of topic.

Confession of error

State v. Gibson, 394 S.E.2d 905 (1990) (Per Curiam)

See APPEAL Confession of error by prosecution, (p. 27) for discussion of topic.

Conflict in representation

Guardian *ad litem* for victim

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

See PROSECUTING ATTORNEY Duties, Generally, (p. 521) for discussion of topic.

Prior representation of co-defendant

State v. Catlett, 376 S.E.2d 834 (1988) (Neely, J.)

Appellant and his girlfriend were charged with murder. An attorney was appointed to represent the girlfriend; before plea bargaining could be completed, the attorney joined the prosecuting attorney's office. During appellant's subsequent trial, the girlfriend testified against appellant as part of a plea bargain allowing her to plead guilty to being an accessory before the fact.

Syl. pt. 1 - When a lawyer originally represents a co-defendant who later testifies in support of a conviction of the defendant, and when the lawyer has no contact with defendant during her representation of the co-defendant, employment of the lawyer by the prosecutor's office at the time of defendant's trial does not require the prosecutor's recusal.

Conflict in representation (continued)

Prior representation of co-defendant (continued)

State v. Catlett, (continued)

The Court distinguished this case from situations wherein the prosecuting attorney had direct dealings with the defendant prior to prosecution. Finding no contact with appellant during the prior representation of his co-defendant and no involvement in appellant's subsequent trial, the Court found no error.

Cross-examination on pretrial silence

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

Discretion

Charging accused

State v. Satterfield, 387 S.E.2d 832 (1989) (Neely, J.)

Defendant was arrested for driving under the influence and taken before a magistrate. She was charged with DUI, second offense and moved to dismiss. While awaiting trial the prosecuting attorney informed defendant that he was aware of her two previous convictions for DUI and offered to allow her to plead guilty to second offense rather than be charged with third offense.

The offer was rejected and defendant was indicted for third offense. At trial she alleged prior jurisdiction in magistrate court, a defective indictment and prosecutorial overreaching. The trial court dismissed.

Syl. pt. 1 - The prosecuting attorney is vested with discretion in the management of criminal causes, which discretion is committed to him or her for the public good and for vindication of the public interest. Thus, the prosecutor may decide which of several possible charges to bring against the accused.

Discretion (continued)

Charging accused (continued)

State v. Satterfield, (continued)

The Court rejected defendant's argument that she was entitled to a trial in magistrate court because of the prosecution's participation in the initial magistrate court proceedings.

Prosecutorial discretion extends to the type of forum in which to bring charges, as well as which charges to bring. The Court noted that the magistrate court hearing was a result of defendant's motion to dismiss, not prosecutorial action. Mere attendance at a hearing does not limit prosecutorial discretion; nor does the defendant here have any right to be charged with a particular offense.

Disqualification

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

See PROSECUTING ATTORNEY Arrest, Participation in, (p. 513) for discussion of topic.

State ex rel. Rutledge v. Maynard, No. 19621 (6/14/90) (Per Curiam)

Respondent judge disqualified relator, the prosecuting attorney of Mingo County, from prosecuting James Dary for murder. Relator had represented Dary's first wife in a divorce from Dary. An assistant prosecuting attorney represented the first wife.

The Court noted that disqualification is proper when the prosecutor has or had some attorney-client relationship with the defendant which allowed him to obtain privileged information adverse to the defendant's interest or when the prosecutor has some direct personal relationship with defendant sufficient to impair his objectivity. *Nicholas v. Sammons*, 178 W.Va. 631, 363 S.E.2d 516 (1987). See also, *State v. Pennington*, 179 W.Va. 139, 365 S.E.2d 803 (1987); *State v. Knight*, 168 W.Va. 615, 285 S.E.2d 401 (1981); and *State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974).

Disqualification (continued)

State ex rel. Rutledge v. Maynard, (continued)

Since this prosecution involved whether the defendant had a propensity for violence, the police questioned defendant's ex-wife as to his mental and emotional state, and the defendant's sanity was in question. The attorney-client relationships both the prosecuting attorney and his assistant had with the defendant and his ex-wife were sufficient to justify disqualification. Writ of prohibition denied.

Procedures for

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

Duties

Generally

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

Appellant was convicted of aggravated robbery and sentenced to life imprisonment. On appeal, he claimed that the prosecuting attorney misstated the evidence, vouched for a witness' credibility during closing argument and improperly stated an opinion.

Syl. pt. 6 - "The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law." Syllabus Point 3, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Syl. pt. 7 - A prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

State v. England, (continued)

Syl. pt. 8 - "It is improper for a prosecutor in this State to 'assert his personal opinion as to the justness of a cause, as to the credibility of a witness . . . or as to the guilt or innocence of the accused . . . . ' ABA Code DR 7-106(C)(4) in part." Syllabus Point 3, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

Here, the issue most in dispute was appellant's participation in the robbery, not whether a robbery took place. The prosecuting attorney attempted to reconcile one witness' inconsistent testimony as to the assailant's shoes by noting that the witness said he was "terrified" during the robbery. The Court found that the witness did not so testify but other witnesses did note the witness' shock during the robbery. The witness' fear was therefore a bona fide inference drawn from the evidence. No error.

As to stating his opinion as to a witness' veracity, the Court found that the prosecuting attorney had merely pointed out that the witnesses took an oath to tell the truth and claimed that they had done so. No error.

State v. King, 396 S.E.2d 402 (1990) (McHugh, J.)

Appellant was convicted of incest. His motion to recuse the local prosecuting attorney's office was denied. The assistant prosecuting attorney who tried the case had been appointed guardian *ad litem* to represent appellant's three daughters in child abuse and neglect proceedings arising out of the same activities which resulted in the criminal charge.

Syl. pt. 4 - "As the primary responsibility of a prosecuting attorney is to seek justice, his affirmative duty to an accused is fairness." Syl. pt. 2, *State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974).

Duties (continued)

Generally (continued)

State v. King, (continued)

The Court found no conflict. *Britton*, *supra*, and *State v. Knight*, 168 W.Va. 615, 285 S.E.2d 401 (1981), involved prosecutors who had contact with the defendant, not with the victims. A distinction also exists between a prosecuting attorney who defends an accused then prosecutes him and one who has represented a person in a civil matter against an accused and then prosecutes the accused. *State v. Riser*, 170 W.Va. 473, 294 S.E.2d 461 (1982). No error.

Disclosing exculpatory evidence

State v. Hoard, 375 S.E.2d 582 (1988) (Per Curiam)

See DUE PROCESS Withholding evidence, (p. 173) for discussion of topic.

Documents

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See DISCOVERY Documents, Limits on, (p. 147) for discussion of topic.

Prosecution within-three term

State v. Adkins, 388 S.E.2d 316 (1989); ***State v. Goodwill Motors, Inc.,***; ***State v. Damron***,; ***State v. Kapourales***,; ***State v. Simpkins***,; ***State v. Sizemore***,; ***State v. Van Meter***,; and ***State v. Ward***, (Brotherton, C.J.)

See PROSECUTING ATTORNEY Appeal by, (p. 512) for discussion of topic.

Duties (continued)

Quasi-judicial role

State v. Moore, 409 S.E.2d 490 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 203) for discussion of topic.

Scope of argument

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See PROSECUTING ATTORNEY Duties, Generally, (p. 520) for discussion of topic.

Failure to disclose

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See DISCOVERY Failure to disclose, (p. 147) for discussion of topic.

Failure to disclose documents

State v. Myers, 370 S.E.2d 336 (1988) (Per Curiam)

See DISCOVERY Failure to disclose, Scientific tests, (p. 148) for discussion of topic.

Failure to disclose witness

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See DISCOVERY Failure to disclose, Witnesses, (p. 149) for discussion of topic.

Failure to disclose witness (continued)

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 515) for discussion of topic.

State v. Weaver, 382 S.E.2d 327 (1989) (Miller, J.)

Appellant was convicted of first-degree sexual assault, abduction with intent to defile and attempt to kill or injure by poisoning. On appeal he claimed that the prosecution failed to disclose the identity of two witnesses during discovery, to appellant's prejudice.

Syl. pt. 3 - "When a trial court grants a pretrial discovery motion requiring the prosecution to disclose evidence in its possession, nondisclosure by the prosecution is fatal to its case where such nondisclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syllabus Point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980).

Here, the failure to disclose was not prejudicial. A psychologist and a licensed social worker were not disclosed as witnesses but the trial court allowed opportunity for interviewing the psychologist prior to cross-examination and the defense attorney adequately cross-examined the social worker. The Court sent a warning, however, that failure to disclose witnesses is not condoned herein. No error.

Grand jury

Presenting evidence to

State v. Pickens, 395 S.E.2d 505 (1990) (Per Curiam)

Appellant was convicted of battery. He claimed on appeal that the prosecuting attorney improperly influenced the grand jury. Only the investigating police officer presented sworn testimony. The grand jury told the prosecuting attorney that it wanted to return a misdemeanor indictment; in response, he

Grand jury (continued)

Presenting evidence to (continued)

State v. Pickens,)continued)

instructed them on the difference between a petit and a grand jury, emphasizing that they did not find guilt, only probable cause. The grand jury then returned a true bill on felony charges.

Syl. pt. 1 - "A prosecuting attorney can only appear before the grand jury to present by sworn witnesses evidence of alleged criminal offenses, and to render court supervised instructions, *W.Va.Code* § 7-4-1 (1976 Replacement Vol.); he is not permitted to influence the grand jury in reaching a decision, nor can he provide unsworn testimonial evidence." Syllabus point 2, *State ex rel. Miller v. Smith*, 168 W.Va. 745, 285 S.E.2d 500 (1981).

Syl. pt. 2 - "A prosecuting attorney who attempts to influence a grand jury by means other than the presentation of evidence or the giving of court supervised instructions, exceeds his lawful jurisdiction and usurps the judicial power of the circuit court and the grand jury . . . ." Part, syllabus point 3, *State ex rel. Miller v. Smith*, 168 W.Va. 745, 285 S.E.2d 500 (1981).

The Court found that the prosecuting attorney's remarks exceeded his powers and usurped the power of the court. Reversed and remanded.

Indictments

Altering or amending

State ex rel. Starr v. Halbritter, 395 S.E.2d 773 (1990) (McHugh, J.)

See INDICTMENT Validity of, Grand jury does not approve text, (p. 324) for discussion of topic.

Indictments (continued)

Failure to prosecute

State v. Schoolcraft, 396 S.E.2d 760 (1990) (Brotherton, J.)

See INDICTMENT Conviction of only certain charges, (p. 319) for discussion of topic.

Withdrawal of

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 160) for discussion of topic.

Immunity

Power to grant

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Misstating evidence

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 514) for discussion of topic.

PROSECUTING ATTORNEYS

Personal opinion

Stated at trial

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 514) for discussion of topic.

Power to grant immunity

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Private prosecutors

Right to

Kerns v. Wolverton, 381 S.E.2d 258 (1989) (Brotherton, C.J.)

See PROSECUTING ATTORNEY Private prosecutors, Scope of authority, (p. 527) for discussion of topic.

Scope of authority

Kerns v. Wolverton, 381 S.E.2d 258 (1989) (Brotherton, C.J.)

Petitioner sought a writ of prohibition to prevent prosecution by a private prosecutor and to compel dismissal of indictments. He was accused of stealing equipment from a former employer against whom he later competed, using the equipment.

Private prosecutors (continued)

Scope of authority (continued)

Kerns v. Wolverton, (continued)

Petitioner's accuser, his former employer, claimed that the prosecuting attorney had a conflict of interest in that he had previously represented a probable witness and that one of his assistants was currently representing the probable witness. A special prosecutor was appointed. The private prosecutor hired by the former employer then filed a motion to assist, which motion was granted.

Following a grand jury investigation, at which both the special and the private prosecutor appeared, petitioner was indicted. He moved to dismiss, claiming that the private prosecutor's appearance before the grand jury was unauthorized.

Syl. pt. 1 - "The right to obtain a private prosecutor in this State is not absolute and is subject to judicial control and review. A private prosecutor is subject to the same high standards of conduct in the trial of the case as is the public prosecutor." Syl. pt. 1, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979).

Syl. pt. 2 - A private prosecutor is not a person who is authorized to appear before a grand jury or participate in grand jury proceedings.

The Court noted that *State ex rel. Koppers Co. v. Int'l Union of Oil, Chemical and Atomic Workers*, 171 W.Va. 290, 298 S.E.2d 827 (1982) found a conflict in a lawyer who obtained an injunction also prosecuting criminal contempt charges for violation of the injunction. They dismissed the issue of whether the private prosecutor's actions were proper and found that even his appearance was improper.

Although unnecessary to the decision, the Court also ruled that both the special and the private prosecutors should have taken the constitutional oath of office required of prosecuting attorneys (see *W.Va.Code* 7-7-8; see also, *W.Va.Code* 6-1-3 and Article 4, Sec. 5 of the West Virginia Constitution).

PROSECUTING ATTORNEYS

Special prosecutor

Necessity for specific matters

State ex rel. Brown v. Merrifield, 389 S.E.2d 484 (1990) (Neely, C.J.)

See JUDGES Investigations by, (p. 391) for discussion of topic.

Withholding evidence

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See DUE PROCESS Prosecuting attorney withholding evidence, (p. 172) for discussion of topic.

PUBLIC OFFICIALS

Unethical conduct

Committee on Legal Ethics v. Roark, 382 S.E.2d 313 (1989) (Miller, J.)

See ATTORNEYS Discipline, Public official, (p. 71) for discussion of topic.

PUBLIC TRIAL

Publicity during

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See PROSECUTING ATTORNEY Comments out of court re: guilt of accused, (p. 513) for discussion of topic.

PUBLICITY

Prejudicial

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See PROSECUTING ATTORNEY Comments out of court re: guilt of accused, (p. 513) for discussion of topic.

Still cameras in the courtroom

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See DENIAL OF FAIR TRIAL Publicity, Still cameras in courtroom, (p. 142) for discussion of topic.

RACIAL DISCRIMINATION

Jury composition

State v. Marrs, 379 S.E.2d 497 (1989) (Neely, J.)

See EQUAL PROTECTION Racial discrimination, Jury composition, (p. 179) for discussion of topic.

RECIDIVISM

Appropriateness of sentence

Enhancement of simultaneous convictions

Hutchinson v. Dietrich, 393 S.E.2d 663 (1990) (Brotherton, J.)

See CONTROLLED SUBSTANCES Probation, (p. 128) for discussion of topic.

Identification

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See IDENTIFICATION Habitual offender, (p. 306) for discussion of topic.

Prior conviction

State v. Masters, 373 S.E.2d 173 (1988) (Miller, J.)

See RECIDIVISM Information, Sufficiency of, (p. 534) for discussion of topic.

Information

Sufficiency of

State v. Masters, 373 S.E.2d 173 (1988) (Miller, J.)

Appellant was convicted of grand larceny. He was then convicted of having previously committed another felony and was given an enhanced sentence. Appellant argued on appeal that the recidivist information was fatally flawed because it recited an incorrect docket number for the prior conviction.

Syl. pt. 3 - "An (information alleging a prior conviction for the purpose of augmenting the sentence to be imposed) filed pursuant to *W.Va.Code*, 61-11-19, is sufficient, as to such prior conviction, if it avers the former conviction with such particularity as to reasonably indicate the nature and character of the former offense, the court wherein the conviction was had and identifies the person so convicted as the person subsequently convicted." Syllabus Point 3, as amended, *State v. Loy*, 146 W.Va. 308, 119 S.E.2d 826 (1961).

Information (continued)

Sufficiency of (continued)

State v. Masters, (continued)

Syl. pt. 4 - "A verdict of guilty in a criminal case will not be reversed by this Court because of an error ... unless the error is prejudicial to the accused." Syllabus Point 5, in part, *State v. Davis*, 153 W.Va. 742, 172 S.E.2d 569 (1970).

The information here plainly advised appellant of the charges. Any error is clearly harmless.

Prior conviction

Sufficiency of information

State v. Masters, 373 S.E.2d 173 (1988) (Miller, J.)

See RECIDIVISM Information, Sufficiency of, (p. 534) for discussion of topic.

Simultaneous multiple convictions

Enhancement of sentence

Hutchinson v. Dietrich, 393 S.E.2d 663 (1990) (Brotherton, J.)

See CONTROLLED SUBSTANCES Probation, (p. 128) for discussion of topic.

REPRIEVE

Executive order

County Commission of Mercer County v. Dodrill, 385 S.E.2d 248 (1989) (McHugh, J.)

The Mercer County Commission sought a writ of mandamus against the Commissioner of Corrections to show cause why the Commissioner should not immediately take custody of prisoners sentenced to the penitentiary but still housed in the county jail.

Executive Order No. 11-86 had directed respondent not to accept prisoners until the Governor and respondent determined that the state facilities could accept them. Executive Order No. 14-86 set a maximum capacity for state correctional facilities. Both orders were held invalid in *State ex rel. Dodrill v. Scott*, 177 W.Va. 452, 352 S.E.2d 741 (1986). Thereafter, the Governor granted reprieves to persons sentenced to the penitentiary.

Petitioner claimed respondent's refusal to accept inmates caused it to be in violation of a federal court order setting a maximum number of prisoners allowable in the county jail. *Dawson v. Kendrick*, 527 F.Supp. 1252 (S.D. W.Va. 1981). Respondent claimed that the "reprieve" granted relieves him of the duty to incarcerate the persons held by the county.

Syl. pt. 1 - "A governor's executive order which directs action on the part of the West Virginia Department of Corrections that is contrary to specific statutory mandates is invalid." Syl., *State ex rel. Dodrill v. Scott*, 177 W.Va. 452, 352 S.E.2d 741 (1986).

Syl. pt. 2 - Pursuant to *W.Va.Const.* art. VII. Section 11, in a felony case, the governor is vested with the power to grant a reprieve after conviction. Syl. pt. 1, *State ex rel. Stafford v. Hawk*, 47 W.Va. 434, 34 S.E. 918 (1900).

Syl. pt. 3 - When the governor grants a reprieve to an individual held in a county jail, who has been convicted of a felony and has been lawfully sentenced to the custody of the State Department of Corrections, but the reprieve is granted merely to delay that individual's transfer to a state penal or correctional institution, the state will be required to pay the reasonable maintenance and medical expenses related to that individual which are incurred by the county due to the delay.

Executive order (continued)

County Commission of Mercer County v. Dodrill, (continued)

The Court found the reprieves issued here to be based on Constitutional grounds, unlike the earlier executive orders which were in violation of statutory mandates to incarcerate. Although the reprieve is valid, the State must reimburse the county for prisoners held.

RES JUDICATA

Paternity

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

See PATERNITY *Res judicata*, (p. 465) for discussion of topic.

State ex rel. DHS v. Benjamin, 395 S.E.2d 220 (1990) (McHugh, J.)

See PATERNITY *Res judicata*, (p. 465) for discussion of topic.

RETROACTIVITY

Generally

State v. Fisher, 370 S.E.2d 480 (1988) (Per Curiam)

See APPEAL Failure to preserve, (p. 34) for discussion of topic.

Exclusionary rule

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See JUVENILES Prompt presentment, (p. 427) for discussion of topic.

RIGHT TO APPEAL

Generally

Billotti v. Dodrill, 394 S.E.2d 32 (1990) (Brotherton, J.)

See APPEAL Right to, (p. 41) for discussion of topic.

RIGHT TO BEAR ARMS

Generally

In re Application of Metheney, 391 S.E.2d 635 (1990) (Brotherton, J.)

[NOTE] Four cases are consolidated in the summary of the above case. The other three cases are *In re Application of Goots*, 391 S.E.2d 635 (1990); *In re Application of Cueto*, 391 S.E.2d 635 (1990); and, *In re Application of Rinker*, 391 S.E.2d 635 (1990).

Four appeals were brought by individuals seeking permission to carry a concealed deadly weapon pursuant to *W.Va.Code* 61-7-4 (1989). The Circuit Court denied the petitions even though it appeared that the statutory prerequisites were met. Appellants claimed on appeal that the Code allows no discretion and that they have a constitutional right to carry a concealed weapon.

Syl. pt. 1 - Article III, Section 22 of the West Virginia Constitution gives a citizen the constitutional right to keep and bear arms; however, there is no corresponding constitutional right to keep and bear concealed deadly weapons.

Syl. pt. 2 - West Virginia Code § 61-7-4 (1989) sets out the eight specific requirements necessary to obtain a license to carry a concealed deadly weapon. If the judge determines that the specific requirements have been satisfied, then the circuit court must issue the license. However, the circuit court also has the power to examine the assertions made by the applicants to determine if the reasons are valid. If the court determines that the statute has not been satisfied, the petition for the license will be denied and an order issued with the court's findings of fact.

The Court found that requiring the Circuit Court to accept any assertion of the applicant circumvents the purpose of a hearing. Further, the statutory requirements in no way restrict the constitutional right to bear arms. Remanded.

State ex rel. City of Princeton v. Buckner, 377 S.E.2d 139 (1988) (McHugh, C.J.)

(Legislature can restrict right to keep and bear arms as valid exercise of police powers).

RIGHT TO CONFRONT

Generally

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

Appellant was convicted of first-degree sexual assault. He contended on appeal that extra-judicial statements made by the victim, a minor child, were improperly admitted to evidence. These statements were admitted through witnesses who interviewed the victim approximately two weeks after the assault. The defense contended that the statements were not hearsay, but if they were, the statements were admissible as excited utterances.

The Court reversed for improper admission of hearsay but also held the right to confront one's accuser was abridged. The victim was deliberately kept from viewing the defendant as she testified.

Syl. pt. 5 - Under *Coy v. Iowa*, 487 U.S. ___, 101 L.Ed.2d 857, 108 S.Ct. 2798 (1988), and *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975), the right to confrontation assured by the Sixth Amendment and *W.Va. Const.* art. III, section 14 is violated where a witness testifies at trial and the defendant is denied the opportunity to confront the witness face-to-face.

Confession of accomplice

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

See CONFESSIONS Admissibility, Accomplice, (p. 110) for discussion of topic.

Denial of right

State v. Mullens, 371 S.E.2d 64 (1988) (Brotherton, J.)

Appellant was convicted of being an accessory before the fact to first-degree murder and to malicious wounding; and conspiracy to commit first-degree murder. She was tried subsequent to the conviction of her accomplice. Despite warnings from the trial court, her accomplice refused to answer questions when called as a witness in appellant's trial. Appellant claimed loss of her Sixth Amendment right to confront her accuser.

Denial of right (continued)

State v. Mullens, (continued)

Syl. pt. 1 - The Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him. The Sixth Amendment right of confrontation includes the right of cross- examination.

Syl. pt. 2 - A confession of an accomplice which inculpates the accused is presumptively unreliable. Where the accomplice is unavailable for cross-examination, the admission of the confession, absent sufficient independent "indicia of reliability" to rebut the presumption of unreliability, violates the Sixth Amendment right to confrontation.

See *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); and *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

RIGHT TO COUNSEL

Generally

State v. Gunnoe, 374 S.E.2d 716 (1988) (Neely, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Post-arrest, After requesting counsel, (p. 582) for discussion of topic.

Administrative hearings

Revoked or suspended license

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

Appellant was convicted of driving with a revoked drivers license. The primary evidence against him was the testimony of two police officers who observed him operating a motor vehicle and an administrative order revoking his license for operating a vehicle while under the influence of alcohol.

On appeal he claimed that his conviction was improper because the record was silent as to whether he had counsel at the prior administrative hearing revoking his license.

Syl. pt. 1 - "Under the sixth amendment of the federal constitution and article III, section 14 of the West Virginia Constitution, unless an individual convicted of a misdemeanor was represented by counsel or knowingly and intelligently waived the right to counsel, such prior conviction may not be used to enhance a sentence of imprisonment for a subsequent offense." Syllabus Point 1, *State v. Armstrong*, 175 W.Va. 381, 332 S.E.2d 837 (1985).

Syl. pt. 2 - "West Virginia Constitution, Article III, Section 14, guarantees that, absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Syllabus Point 1, *State v. Blosser*, 158 W.Va. 164, 207 S.E.2d 186 (1974).

Syl. pt. 3 - A defendant who is charged under *W.Va.Code*, 17B-4-3(b), with driving a motor vehicle on a revoked or suspended operator's license cannot defeat this charge by claiming that he did not have appointed counsel at the administrative revocation hearing.

Administrative hearings (continued)

Revoked or suspended license (continued)

State v. Cole, (continued)

The Court made a clear distinction between the threat of the loss of liberty and the loss of a license to operate a motor vehicle. The Court also noted that an appeal was available from the administrative revocation hearing and was not taken. Reversed and remanded.

Appeal

Withdrawal of counsel

State ex rel. Dorton v. Ferguson, No. 18949 (4/6/89) (Per Curiam)

See APPEAL Denial of right to appeal, Withdrawal of counsel, (p. 31) for discussion of topic.

Duty of police to advise

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See POLICE OFFICERS Duty to advise of right to counsel, (p. 483) for discussion of topic.

Effective counsel

Conflict of interest

Cole v. White, 376 S.E.2d 599 (1988) (Miller, J.)

See INEFFECTIVE ASSISTANCE Conflict of interest, (p. 336) for discussion of topic.

RIGHT TO COUNSEL

Effective representation

Jewell v. Maynard, 383 S.E.2d 536 (1989) (Neely, J.)

See INDIGENTS Appointed counsel, Payment of, (p. 327) for discussion of topic.

Multiple defendants

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

See MULTIPLE DEFENDANTS Standard for review, (p. 460) for discussion of topic.

Payment for

Jewell v. Maynard, 383 S.E.2d 536 (1989) (Neely, J.)

See INDIGENTS Appointed counsel, Payment of, (p. 327) for discussion of topic.

Recanting request for counsel

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

See RIGHT TO COUNSEL Recanting request for counsel, (p. 546) for discussion of topic.

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

Appellant was convicted of first-degree murder and arson. Upon arrest he was read his *Miranda* rights and checked a box on the acknowledgment form indicating he wanted to have counsel appointed. Prior to appointment of counsel, he waived in writing his right to have a lawyer present during questioning. On appeal he sought to exclude evidence collected as a result of conversations with the police when counsel was not present.

Recanting request for counsel (continued)

State v. Marcum, (continued)

Syl. pt. 2 - "For a recantation of a request to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel." Syl. Pt. 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987).

The Court noted that the record did not show whether appellant initiated the conversations. Reversed and remanded on other grounds, with directions to make a finding on this point upon retrial.

State v. Parker, 383 S.E.2d 801 (1989) (Workman, J.)

Appellant was convicted of first-degree murder. He was questioned several times by police as part of preliminary investigations. Each time he was given *Miranda* warnings and told that he was not under arrest. He was finally arrested after one of the interrogations. Because the arrest was made on a Friday an attorney was not appointed until the following Monday. Before talking with his appointed attorney, appellant gave a full confession following *Miranda* warnings and execution of a written waiver. He was not advised of his Sixth Amendment right to counsel, nor did he waive that right.

On appeal, he contended that his Sixth Amendment rights were violated and that only a written waiver was sufficient to waive his right to counsel, even if he voluntarily initiated contact with police.

Syl. pt. 4 - "For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel." Syl. Pt. 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987).

Here, the Court noted that appellant repeatedly expressed a desire to talk with police between his original request for counsel on Friday and the time of the confession on Monday. Appellant executed a written *Miranda* waiver. Appellant had taken college courses in criminal justice and testified at trial that he knew he had a right to an attorney when he made his confession. This waiver was clearly knowing, intelligent and voluntary. No error.

RIGHT TO COUNSEL

Waiver

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

See RIGHT TO COUNSEL Recanting request for counsel, (p. 546) for discussion of topic.

State v. Parsons, 381 S.E.2d 246 (1989) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Mental condition, (p. 585) for discussion of topic.

Effect on subsequent proceedings

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

See RIGHT TO COUNSEL Administrative hearings, Revoked or suspended license, (p. 544) for discussion of topic.

When attaches

State v. Bowyer, 380 S.E.2d 193 (1989) (Miller, J.)

Defendant was arrested on suspicion of breaking and entering. Following the giving of *Miranda* warnings, the police officer asked if he were willing to answer questions without an attorney present. Defendant answered that he was not. The officer then gave defendant three alternatives: wait for a lawyer; go immediately to magistrate court; or, give a short statement. Defendant agreed to talk.

On appeal, defendant claimed his statement was inadmissible on the grounds that his Sixth Amendment right to counsel was violated.

Syl. pt. 1 - The Sixth Amendment right to counsel attaches at the time judicial proceedings have been initiated against a defendant whether by way of formal charges, preliminary hearing, indictment, information, or arraignment.

When attaches (continued)

State v. Bowyer, (continued)

Syl. pt. 2 - Once an accused asks for counsel during custodial interrogation, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Syl. pt. 3 - The State cannot use an accused's subsequent responses to custodial interrogation by the police to cast doubt on the adequacy of his initial request for counsel.

Here, the Court held that no charges had been filed (hence no judicial proceeding had been initiated) and therefore no Sixth Amendment right to counsel attached. However, the *Miranda*-based Fifth Amendment did attach since custody alone is sufficient.

Pursuant to *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 368, 101 S.Ct. 1880 (1981), the defendant could not be subjected to further interrogation following his request for counsel unless he initiated a conversation. (Even during conversations he initiates, the defendant can, under *Edwards*, reassert his right to have an attorney present.) Reversed and remanded.

RIGHT TO HEARING

Extradition

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See EXTRADITION Hearing prior to, (p. 259) for discussion of topic.

Termination of improvement period in abuse and neglect

Artrip v. White, No. 18492 (7/20/88) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Right to hearing, (p. 8) for discussion of topic.

RIGHT TO JURY TRIAL

Generally

Gapp v. Friddle, 382 S.E.2d 568 (1989) (Per Curiam)

Relator sought a writ of prohibition to prevent his prosecution on charges of battery, obstruction of a police officer and resisting arrest without a jury. The charges were brought in municipal court and relator's request for a jury trial was denied. The municipal court judge represented that relator was not in peril of a jail sentence but the applicable statutes clearly read otherwise. (See *W.Va.Code* 61-2-9 and 61-5-17.)

Syl. pt. - "Under art. 3, section 14 of the West Virginia Constitution, the right to a jury trial is accorded in both felonies and misdemeanors when the penalty imposed involves any period of incarceration." Syllabus, *Champ v. McGhee*, 165 W.Va. 567, 270 S.E.2d 445 (1980).

Writ granted. The Court acknowledged that *McGhee*, *supra*, appeared to allow dispensing with a jury trial where the judge signified that he would not impose a jail sentence. Apparently, this part of the holding is overruled.

RIGHT TO REMAIN SILENT

Generally

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

See INTERROGATIONS Right to remain silent, (p. 367) for discussion of topic.

RIGHT TO SPEEDY TRIAL

Prior to indictment

Hundley v. Ashworth, 382 S.E.2d 573 (1989) (Miller, J.)

See DUE PROCESS Indictment delayed for strategic advantage, (p. 171) for discussion of topic.

RIGHT TO TESTIFY

Waiver of

State v. Neuman, 371 S.E.2d 77 (1988) (McGraw, J.)

See DUE PROCESS Defendant's right to testify, Waiver of, (p. 170) for discussion of topic.

RIGHT TO TRANSCRIPT

Generally

Toler v. Sites, No. 19213 (11/29/89) (Per Curiam)

See TRANSCRIPTS Right to, (p. 642) for discussion of topic.

ROBBERY

Common law

Definition of

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See ROBBERY Elements of, (p. 556) for discussion of topic.

Elements of

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

Appellant was convicted of aggravated robbery and sentenced to life imprisonment. On appeal he challenged the sufficiency of the trial court's instruction regarding the elements of the crime of robbery. The instruction said that "aggravated robbery is when a person commits robbery by partial strangulation or suffocation, or by striking or beating, or by the threat or presenting of a firearms (sic) or other deadly weapon or instrumentality whatsoever."

Syl. pt. 1 - "At common law, the definition of robbery was (1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods." Syllabus Point 1, *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981).

Syl. pt. 2 - "Animus furandi, or the intent to steal or to feloniously deprive the owner permanently of his property, is an essential element in the crime of robbery," Syllabus Point 2, *State v. Hudson*, 157 W.Va. 939, 206 S.E.2d 415 (1974).

Syl. pt. 3 - "Where a trial court gives, over objection, an instruction which incompletely states the law, and the defect is not corrected by a later instruction, the giving of such incomplete instruction constitutes reversible error where the omission involves an element of the crime." Syllabus, *State v. Jeffers*, 162 W.Va. 532, 251 S.E.2d 227 (1979).

The Court noted that neither the unlawful taking of property nor the intent to permanently deprive the owner of his property were included in the instruction; however, no objection was raised at trial. Only under a theory of plain error could the Court address the issue.

Elements of (continued)

State v. England, (continued)

Syl. pt. 4 - The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.

Syl. pt. 5 - Where an instruction is given which improperly defines the crime of aggravated robbery, but there is substantial evidence introduced proving such robbery, and the defendant admits a robbery occurred and relies solely on an alibi defense, such instructional error when not objected to at trial will not be subject to the plain error doctrine.

Here, no other instruction was given which would have cured the error. Nonetheless, the Court found that appellant's defense was predicated on his lack of participation in the robbery; therefore, the error in the instruction was harmless and not subject to the plain error rule.

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

See LESSER INCLUDED OFFENSES Robbery, (p. 437) for discussion of topic.

Instructions

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See ROBBERY Elements of, (p. 556) for discussion of topic.

Lesser included offenses

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

See LESSER INCLUDED OFFENSES Robbery, (p. 437) for discussion of topic.

SCIENTIFIC TESTS

Child sexual abuse

Testimony by psychologist

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Expert witnesses, Psychologist's testimony in child sexual abuse case, (p. 226) for discussion of topic.

DNA tests

Admissibility

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

Appellant was convicted of sexual abuse, sexual assault, aggravated robbery, and kidnaping. The defense at trial centered on alibi testimony, while the prosecution relied on circumstantial evidence and analysis of blood, semen and hair to identify the defendant as the attacker.

The defendant requested a DNA print analysis of his blood. Based on the lack of expert testimony regarding the reliability of the test, the trial court denied the request. After conviction, the request was renewed and granted but the test proved inconclusive.

Syl. pt. 1 - Under *W.Va.R.Evid.*, Rule 702, expert testimony concerning generally recognized tests is presumptively admissible and the burden of excluding such testimony is upon the side seeking exclusion. However, when a test is novel or not generally accepted, that circumstance alone meets the threshold requirement of rebutting any presumption of admissibility under Rule 702 and, therefore, with regard to tests that are not generally accepted the burden of proof that the test is reliable remains on the proponent.

Syl. pt. 2 - When senior appellate courts have concluded that a test is generally accepted by the scientific community, a trial court may take judicial notice of a test's reliability.

Syl. pt. 3 - The reliability of DNA typing analysis is now generally accepted in this jurisdiction when such test is properly conducted by qualified personnel.

State v. Woodall, (continued)

Syl. pt. 4 - When a scientific test made after trial has proved so inconclusive as to be irrelevant, any error in not ordering the test initially is rendered harmless.

The Court discussed the *Frye* rule (*Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923)). Noting that Rules 702 and 403 of the W.Va. Rules of Evidence shift the burden concerning admission of generally recognized tests to the party seeking to exclude the test, the Court nonetheless returned to the *Frye* standard but leaped to allowing judicial notice of DNA tests. Here, however, the Court deemed the test irrelevant and held the original refusal to allow it harmless error, if error at all.

SEARCH AND SEIZURE

Generally

Wagner v. Hedrick, 383 S.E.2d 286 (1989) (Brotherton, C.J.)

See SEARCH AND SEIZURE Expectation of privacy, Hospital emergency room, (p. 562) for discussion of topic.

Clothing

Incident to lawful arrest

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

See SEARCH AND SEIZURE Warrantless search, Plain view exception, (p. 568) for discussion of topic.

Exclusionary rule

Generally

State v. Hefner, 376 S.E.2d 647 (1988) (McGraw, J.)

See SEARCH AND SEIZURE Warrantless search, Burden of state to show exception, (p. 566) for discussion of topic.

Open fields exception

State v. Forshey, 386 S.E.2d 15 (1989) (Workman, J.)

Appellant was found guilty of manufacturing marijuana. He assigned as error the admission of evidence, namely marijuana plants, seized from his property without a warrant following observation from a helicopter. Police seized a second set of plants from an area closer to appellant's house after landing.

Syl. pt. 1 - Under the open fields doctrine, when law enforcement officials through aerial observation identify contraband or evidence of a crime that is plainly visible on property which carries no indicia that the owner or possessor thereof had a reasonable expectation of privacy, the warrantless aerial observation and seizure of the contraband does not constitute a constitutional violation of the protections guaranteed by the Fourth Amendment.

Exclusionary rule (continued)

Open fields exception (continued)

State v. Forshey, (continued)

Syl. pt. 2 - A warrantless seizure of a person's property based on aerial observation made by law enforcement personnel is constitutionally permissible where an exception to the warrant requirement exists.

Syl. pt. 3 - "It is not a search for the police to discover evidence in plain sight and the warrantless seizure of such evidence is constitutionally permissible provided 1) the police observe the evidence in plain sight without the benefit of a search (without invading one's reasonable expectation of privacy); 2) the police have a legal right to be where they are when they make the plain sight observation; and, 3) the police have probable cause to believe that the evidence seen constitutes contraband or fruits, instrumentalities or evidence of crimes." Syllabus Point 3, *State v. Stone*, 165 W.Va. 266, 268 S.E.2d 50 (1980).

Here, the Court found that the *Stone* requirements were met. The Court rejected appellant's argument of an expectation of privacy within the curtilage of his home. See *California v. Ciraolo*, 476 U.S. 207 (1986), rehearing denied 478 U.S. 1014 (1986); *United States v. Dunn*, 480 U.S. 294 (1987), rehearing denied 481 U.S. 1024 (1987). The area under observation, containing the first set of plants, was not within the curtilage, but rather in an open field.

The Court also allowed introduction of the second set of marijuana plants seized after the helicopter landed, holding that these plants came within the plain view exception.

Plain view exception

State v. Forshey, 386 S.E.2d 15 (1989) (Workman, J.)

See SEARCH AND SEIZURE Exclusionary rule, Open fields exception, (p. 560) for discussion of topic.

Exclusionary rule (continued)

Plain view exception (continued)

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

See SEARCH AND SEIZURE Warrantless search, Plain view exception, (p. 568) for discussion of topic.

Expectation of privacy

Hospital emergency room

Wagner v. Hedrick, 383 S.E.2d 286 (1989) (Brotherton, C.J.)

Petitioner was convicted of first-degree murder and sentenced to life with mercy. By this *habeas corpus* petition he protested the admission of evidence obtained by a warrantless search of his clothing while he was being treated in a hospital emergency room.

Petitioner and his companion were involved in a motorcycle accident later the same day of the murder. The investigating officer took two duffel bags from the scene of the accident for safekeeping and proceeded to the emergency room where petitioner was taken. Petitioner registered a blood alcohol level of .170 and had fractures of the spine and clavicle.

The officer asked for identification but was unable to find even an admissions sheet; petitioner was either unable or unwilling to answer questions. The officer then examined petitioner's clothing which was in a basket under the emergency room bed. He observed some money, including a gold coin (later found to be identical to one taken from the victim's body). Upon receiving petitioner's Ohio drivers license from a nurse, the officer became suspicious because the motorcycle had a cardboard tag indicating that its Rhode Island tag had been stolen. After requesting a computer check of petitioner, the officer learned that a man with a similar name was wanted on charges of robbery and murder nearby earlier that day.

Expectation of privacy (continued)

Hospital emergency room (continued)

Wagner v. Hedrick, (continued)

Upon further communication with officers at the murder scene, the officer considered petitioner to be a suspect and felt probable cause existed to arrest petitioner. The officer and his immediate supervisor discussed obtaining a search warrant but decided to secure the gold coin without a warrant since no other officers were available and both were fearful that petitioner would dispose of the coin. The next day the officer obtained a warrant to search the duffel bags already in his possession. Grounds for the warrant were that petitioner had in his possession a gold coin belonging to the victim.

The trial court denied petitioner's motion to suppress, noting an officer's duty to preserve an accident victim's property and notify next of kin. The trial court found that the initial search was for the purpose of ascertaining petitioner's identity.

Syl. pt. 1 - "The Fourth Amendment to the United States Constitution, and Article III, Section 6 of the West Virginia Constitution protect an individuals reasonable expectation of privacy." Syl. pt. 7, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981).

Syl. pt. 2 - Although injured persons being treated in a hospital emergency room are entitled to Fourth Amendment protections, the degree of privacy they are reasonably entitled to expect may be diminished by the circumstances under which they are brought into the hospital.

The Court found this search reasonable under the circumstances. No error.

Open field doctrine

State v. Forshey, 386 S.E.2d 15 (1989) (Workman, J.)

See SEARCH AND SEIZURE Exclusionary rule, Open fields exception, (p. 560) for discussion of topic.

SEARCH AND SEIZURE

Probable cause hearing

Disclosure of informant

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

See PRELIMINARY HEARING Disclosure of informant, (p. 486) for discussion of topic.

Warrant

Informant's reliability

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

See PRELIMINARY HEARING Disclosure of informant, (p. 486) for discussion of topic.

Probable cause

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

Appellant was convicted of receiving and transferring stolen goods; and of recidivism. Various articles were stolen from a warehouse. Following an investigation, a warrant to search appellant's trailer issued, based on an affidavit by a state policeman alleging that appellant's vehicle fit the description of a vehicle described to the officer as present at the scene of the crime, and that another police officer had information that appellant was selling certain articles similar to those stolen. A search of appellant's trailer resulted in recovery of some of the stolen items, along with some cash.

Syl. pt. 1 - "Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers." Syllabus point 4 of *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986).

Warrant (continued)

Probable cause (continued)

State v. Barlow, (continued)

The Court held that the second police officer's information need not be verified here, rejecting appellant's argument that the information regarding selling of the articles was hearsay on hearsay. In the absence of a motion to suppress (Rule 12 (b)(3), there was no evidence developed to show whether the officer's knowledge was firsthand.

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

See PRELIMINARY HEARING Disclosure of informant, (p. 486) for discussion of topic.

Signature on affidavit for

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

Appellant was convicted of sexual assault. He claimed evidence was improperly admitted pursuant to a search warrant issued without a signed affidavit. The affidavit contained a typed name and was notarized but was not signed. At the suppression hearing the magistrate testified that the officer whose signature was missing swore to the accuracy of the affidavit.

Syl. pt. 7 - In order to uphold the validity of a warrant which is challenged because of the lack of the affiant's signature on the affidavit, it must be shown that the affiant was sufficiently identified in the affidavit itself. Additionally, it must be shown that the affiant was sworn before and known to the issuing magistrate and attested that the affidavit facts were true.

All conditions were met here. No error in admitting the evidence.

Warrant (continued)

Sufficiency of description

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

Appellant was convicted of manufacturing a controlled substance and possession with intent to deliver. The warrant authorizing search of his residence contained his legal address but the search focused on another address where appellant spent much of his time.

Syl. pt. 4 - The description contained in a search warrant is sufficient where a law enforcement officer charged with making a search may, by the description of the premises contained in the search warrant, identify and ascertain the place intended to be searched with reasonable certainty.

Warrantless search

Burden of state to show exception

State v. Hefner, 376 S.E.2d 647 (1988) (McGraw, J.)

Appellant was convicted of carrying a dangerous or deadly weapon without a license (the Court noted that the facts of this case arose prior to the amendment of Art. III, section 22 of the Constitution of West Virginia). The evidence showed that a county Sheriff observed appellant pick up a pistol and walk away. Without telling him the reason, the Sheriff sent a deputy to pick up the appellant.

Before the deputy reached appellant, a city police officer arrested appellant, having overheard a radio transmission that the Sheriff wanted to talk with the appellant. Appellant at first refused to go with the officer and was then arrested for disorderly conduct, in violation of a city ordinance.

Appellant was transported to the county jail by the deputy sheriff and was given *Miranda* warnings. During a search at the jail, the pistol was discovered and appellant was arrested for carrying a dangerous weapon without a license.

Warrantless search (continued)

Burden of state to show exception (continued)

State v. Hefner, (continued)

Syl. pt. 1 - "'The burden rests on the State to show by a preponderance of the evidence that the warrantless search falls within an authorized exception.' Syl. pt. 2, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980)." Syllabus point 4, *State v. Cook*, 175 W.Va. 185, 332 S.E.2d 147 (1985).

Syl. pt. 2 - "'Evidence obtained as a result of a search incident to an unlawful arrest cannot be introduced against the accused upon his trial.' Syl. Pt. 6, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)." Syllabus point 6, *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987).

Syl. pt. 3 - For the purposes of a search incident to an arrest, the validity of the arrest does not depend on whether the suspect is ultimately convicted of the crime. The test of the validity of the arrest is whether, at the moment of arrest, the officer had knowledge of sufficient facts and circumstances to warrant a reasonable man in believing that an offense had been committed.

Syl. pt. 4 - The use of the arrest power as a sham to apprehend a person for purposes of further investigation on another charge is so dangerous an intrusion of privacy as to require exclusion of any evidence seized as an incident of such pretextual arrest.

Here, the Court held that the city police officer did not act in good faith, having no probable cause to believe that a crime was committed. The fact that the city officer did not actually search appellant and that the search was delayed support the conclusion that the arrest was a pretext for further investigation by the sheriff. Therefore, since the arrest was improper, the fruits of the search incident thereto are inadmissible.

Hospital emergency room

Wagner v. Hedrick, 383 S.E.2d 286 (1989) (Brotherton, C.J.)

See SEARCH AND SEIZURE Expectation of privacy, Hospital emergency room, (p. 562) for discussion of topic.

Warrantless search (continued)

Incident to unlawful arrest

State v. Hefner, 376 S.E.2d 647 (1988) (McGraw, J.)

See SEARCH AND SEIZURE Warrantless search, Burden of state to show exception, (p. 566) for discussion of topic.

Open fields exception

State v. Forshey, 386 S.E.2d 15 (1989) (Workman, J.)

See SEARCH AND SEIZURE Exclusionary rule, Open fields exception, (p. 560) for discussion of topic.

Plain view exception

State v. Forshey, 386 S.E.2d 15 (1989) (Workman, J.)

See SEARCH AND SEIZURE Exclusionary rule, Open fields exception, (p. 560) for discussion of topic.

State v. Woodson, 382 S.E.2d 519 (1989) (Miller, J.)

Appellant was convicted of unlawful assault. On appeal he contended that the clothing he wore at the time of arrest was improperly admitted to evidence since it was the fruit of an unlawful arrest. The clothing was seized after appellant was arraigned before a magistrate. The prosecution claimed that the clothing was seized because of the blood on it and that the plain view doctrine allows admission into evidence.

Syl. pt. 4 - Where a police officer is present where he has a lawful right to be and sees in plain view an object that constitutes contraband or evidence of a crime, if this object is also in a public place, it may be seized without a warrant.

State v. Woodson, (continued)

Syl. pt. 5 - The initial detention or seizure of a person must be found to have been lawful in order to justify the subsequent seizure of his clothing.

The Court found probable cause to arrest; therefore, the seizure of the clothing was proper and the clothing was admissible. No error.

SELF-DEFENSE

Burden of proof

Prosecution's after *prima facie* showing

State v. Bates, 380 S.E.2d 203 (1989) (Per Curiam)

Appellant was convicted of manslaughter, possession of marijuana with intent to deliver and distribution to a person under eighteen. He claimed that evidence introduced showing self-defense made the manslaughter conviction unsupported by the evidence.

Syl. pt. 1 - "Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense." Syllabus Point 4, *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978).

The Court found that the appellant had occasionally sold marijuana. Several of his customers decided to rob him of his Social Security check so they pretended to want some marijuana. In the course of the transaction, one of the robbers displayed a gun and the appellant, following an attempt to retreat, proceeded to produce his own weapon and killed the robber.

The Court noted the right to defend oneself in ones own home without retreating, *State v. Phelps*, 172 W.Va. 797, 310 S.E.2d 863 (1983); *State v. W.J.B.*, 166 W.Va. 602, 276 S.E.2d 550 (1981), even when one is engaged in illegal activities (see cases cited). Since a *prima facie* case of self-defense was established, the prosecution had a duty to prove beyond a reasonable doubt that appellant did not act in self-defense. It did not. Reversed.

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See DEFENSES Self-defense, (p. 140) for discussion of topic.

SELF-DEFENSE

Deadly force

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

Appellant was convicted of second-degree murder. The trial court refused his instruction on self-defense on the grounds that there was insufficient evidence to warrant giving the instruction. He appealed.

Syl. pt. 3 - "The amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return." Syllabus Point 1, *State v. Baker*, 177 W.Va. 769, 356 S.E.2d 862 (1987).

Here, there was no evidence showing that the victim engaged in any conduct which could have led the appellant to believe that he was in danger of bodily harm. No error.

Instructions

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See SELF-DEFENSE Deadly force, (p. 571) for discussion of topic.

SELF-INCRIMINATION

Miranda warnings

Traffic accident

State v. Preece, 383 S.E.2d 815 (1989) (McHugh, J.)

Appellant was convicted of driving under the influence of alcohol and contributing to a fatality (*W.Va.Code* 17C-5-2 (a). When the investigating officer arrived at the scene of the accident, emergency personnel were attempting to extract appellant from the wreckage of his vehicle. After appellant was removed, the officer asked appellant if he were driving the vehicle. No *Miranda* warning was given.

Appellant admitted that he was driving, and then, in response to further questioning, described the accident. Appellant admitted to having been drinking. Three hours after the accident, appellant's blood alcohol level was measured as .24. Shortly afterwards, appellant denied having driven the car, claiming that a friend, with whom he had been drinking, was driving. There was evidence that a passenger in appellant's car had left the scene of the accident.

Appellant was neither arrested nor taken into custody. One month after the accident appellant was indicted by the grand jury. The trial court ruled that the initial question as to who was operating the car was admissible but suppressed all subsequent statements for failure to warn appellant of his *Miranda* rights.

Syl. pt. 1 - *Miranda* warnings are required whenever a suspect has been formally arrested or subjected to custodial interrogation, regardless of the nature or severity of the offense.

Syl. pt. 2 - When ruling upon a motion to suppress a statement made by a suspect pursuant to a traffic investigation due to the investigating officer's failure to provide *Miranda* warnings, the trial court must determine whether the statement was the result of custodial interrogation.

Syl. pt. 3 - The sole issue before a trial court in determining whether a traffic investigation has escalated into an accusatory, custodial environment, requiring *Miranda*, warnings, is whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest.

***Miranda* warnings** (continued)

Traffic accident (continued)

State v. Preece, (continued)

Syl. pt. 4 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

The Court noted that the coercive nature of detainment which *Miranda* was designed to address is not present in an "on-the-scene" accident investigation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 at 725 (1966). The Court found a significant distinction between a police-initiated traffic stop and a situation, as here, where police are called to the scene of an accident. The Court also listed a number of factors to be taken into account in determining whether a reasonable person would feel that he was in custody.

No error in admitting the statement here.

Pre-trial silence

State v. Fisher, 370 S.E.2d 480 (1988) (Per Curiam)

Appellant was convicted of possession with intent to distribute a controlled substance. At trial the prosecution improperly cross-examined appellant concerning his pre-trial silence following arrest.

Syl. pt. 1 - "Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury." Syllabus Point 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Pre-trial silence (continued)

State v. Fisher, (continued)

Syl. pt. 2 - "'The plain error doctrine of *W.Va.R.Crim.P.* 52 (b), whereby the court may take notice of plain errors or defects affecting substantial rights although they were not brought to the attention of the court, is to be used sparingly and only in those circumstances in which a miscarriage of justice would otherwise result.' Syllabus Point 2, *State v. Hatala*, 176 W.Va. 435, 345 S.E.2d 310 (1986)." Syllabus Point 4, *State v. Grubbs*, 178 W.Va. 811, 364 S.E.2d 824 (1987).

The Court apparently agreed with the State's argument that the error was not properly preserved, defense counsel having objected only on the basis of leading the witness, not on constitutional grounds. The Court held that no miscarriage of justice would result if they refused to recognize the error as plain error.

Tape recordings

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See EVIDENCE Foundation, Tape recordings, (p. 229) for discussion of topic.

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See EVIDENCE Tape recordings, Voluntarily made, (p. 250) for discussion of topic.

Unreasonable delay in taking before magistrate

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Confessions to police, (p. 578) for discussion of topic.

SELF-INCRIMINATION

Waiver of right

Duty of judge to advise

State v. Robinson, 376 S.E.2d 606 (1988) (McGraw, J.)

See PRIVILEGES Marital, Waiver of, (p. 495) for discussion of topic.

SELF-INCRIMINATION - PSYCHOLOGICAL TESTS

Questioning psychologist

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

Appellant was convicted of first-degree murder. He raised an insanity defense. At trial the prosecution questioned the defendant, the defense's psychologist and the prosecution's psychologist regarding appellant's refusal to discuss the circumstances of the crime with the psychologists. The prosecution further asked whether this refusal indicated that the appellant was smart enough to refuse to give information regarding the crime. Appellant's objections were overruled.

On appeal, appellant alleged that the questioning violated his right to remain silent.

Syl. pt. 5 - When a defendant who pleads insanity and introduces evidence to support his plea refuses to speak with a court-ordered psychologist, it does not violate such a defendant's right not to incriminate himself for the state to question the psychologist regarding defendant's refusal to speak.

The Court noted that an insanity defense does not bar the prosecution from using compulsion to counter the claim. Statements to one's own psychologist are not protected but statements to the prosecution's psychologist have Fifth Amendment protection.

The Court found no violation here. Appellant spoke with his own psychologist voluntarily; the prosecution's questioning was in response to appellant's insanity claim; and appellant made no statements about the crime.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Confessions

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 113) for discussion of topic.

Admissibility

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 114) for discussion of topic.

Presumption of trial court's ruling on

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See POLICE OFFICERS Duty to advise of right to counsel, (p. 483) for discussion of topic.

Confessions to police

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

Appellant was convicted of abduction with intent to defile; kidnaping; sexual assault, second-degree; and sexual abuse, first-degree. He sought to have his tape-recorded confession suppressed for failure to take him before a magistrate until after the confession.

Syl. pt. 1 - "'The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.' Syllabus Point 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), as amended." Syllabus Point 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

Confessions to police (continued)

State v. Fortner, (continued)

Syl. pt. 2 - "'Ordinarily the delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule.' Syllabus Point 4, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986)." Syllabus Point 8, *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706, *cert. denied*, __ U.S. __, 102 L.Ed.2d 226, 109 S.Ct. 236 (1988).

Syl. pt. 3 - "'A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.' Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978)." Syllabus Point 1, *State v. Haller*, 178 W.Va. 642, 363 S.E.2d 719 (1987).

The delay here was attributable to time spent transcribing the taped confession and taking appellant to the police station. Pretrial suppression hearings were held and the trial court admitted the confession. No error.

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

Appellant was convicted of burglary, grand larceny, breaking and entering, petty larceny and four counts of conspiracy. Immediately upon arrest appellant was given his *Miranda* rights. While at the police station appellant asked to talk with a police officer. Upon being advised that he was forbidden to do so, he voluntarily made a statement which was later used to refute an alibi defense.

Syl. pt. 3 - "Volunteered admissions by a defendant are not inadmissible because the procedural safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were not followed, unless the defendant was both in custody and being interrogated at the time the admission was uttered." Syllabus Point 2, *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979).

Confessions to police (continued)

State v. Judy, (continued)

Syl. pt. 4 - "'The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.' Syllabus Point 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), as amended." Syllabus Point 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

Here, no interrogation was taking place, no coercion was involved and no unreasonable delay occurred in taking appellant before a magistrate (he appeared before the magistrate approximately one hour after arrest); neither did the delay induce the statement.

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See CONFESSIONS Voluntariness, Hearing not required, (p. 114) for discussion of topic.

Admissibility

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Voluntariness

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See POLICE OFFICERS Duty to advise of right to counsel, (p. 483) for discussion of topic.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Cross-examination of defendant

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

Delay in taking before magistrate

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Confessions to police, (p. 577) for discussion of topic.

State v. Parker, 383 S.E.2d 801 (1989) (Workman, J.)

Appellant was convicted of first-degree murder. The day after the victim's body was found appellant went to the police voluntarily, was advised of his *Miranda* rights and signed a waiver. He was told he was not under arrest and was free to leave.

Appellant remained at the station and voluntarily answered questions. The next day appellant returned to the police station and was again advised of his *Miranda* rights; again he was told he was not under arrest and was free to leave. Appellant admitted to witnessing the murder and said he had tied the victim prior to the murder. The police again asked appellant if he understood his rights, and reiterated that he was free to leave.

Appellant stated that he did not want an attorney present and that his statement was voluntary. He gave a detailed description of the murder and was placed under arrest Friday evening. Several hours elapsed between appellant's first description and a version taped later the same evening. An attorney was not appointed until the following Monday. Before the attorney could speak with him appellant requested to speak with the investigating officer and confessed that he had committed the murder. The officer warned him to remain silent. Appellant was once more given a *Miranda* warning and signed a written waiver. He then gave a full confession which he recanted prior to trial.

Delay in taking before magistrate (continued)

State v. Parker, (continued)

Syl. pt. 1 - "The delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant." Syl. Pt. 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261, 263 (1982).

Syl. pt. 2 - The delay in presenting an individual before a magistrate caused by tape recording an otherwise undocumented statement made by the individual does not count on the unreasonableness of the delay where a prompt presentment issue is involved.

Syl. pt. 3 - "Ordinarily the delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule." Syl. Pt. 4, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613, 614 (1986).

Here, the delay was clearly in order to tape record the statements. No coercive elements were present. Also, appellant was given his *Miranda* rights several times.

Immunity

As inducement to confess

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Use of statement induced thereby

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Post-arrest

After requesting counsel

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See EVIDENCE Admissibility, Prior voluntary statement, (p. 204) for discussion of topic.

State v. Gunnoe, 374 S.E.2d 716 (1988) (Neely, J.)

Appellant was arrested on charges of uttering checks (issuing worthless checks). While incarcerated, he was questioned with regard to a murder. He repeatedly denied any knowledge of the murder. When the police requested that he take a polygraph examination, he requested his attorney's advice.

The attorney told police that since he represented the appellant only on the check charges he had no objection to questioning on the other crime. Appellant was informed, signed a written waiver of his *Miranda* rights and confessed to the murder after taking the polygraph test.

The trial court found that the appellant's waiver was voluntary and refused to suppress the confession. The appellant denied involvement in the killing and alleged that his confession was made under duress and that his requests for an attorney were denied.

Syl. pt. - "'When a criminal defendant requests counsel, it is the duty of those in whose custody he is, to secure counsel within a reasonable time. In the interim, no interrogation shall be conducted, under any guise or by any artifice.' Syl. pt. 1, *State v. Bradley*, 163 W.Va. 148, 255 S.E.2d 356 (1979)." Syl. Pt. 2, *State v. Green*, 172 W.Va. 727, 310 S.E.2d 488 (1983).

Here, the Court held that appellant was clearly denied counsel concerning the polygraph test. Since the police failed to obtain counsel for appellant, it was error to question him concerning the murder charges. The waiver of *Miranda* rights was not knowing, voluntary and intelligent and the confession must be suppressed. Reversed.

Post-arrest (continued)

***Miranda* warnings (when required)**

State v. Preece, 383 S.E.2d 815 (1989) (McHugh, J.)

See SELF-INCRIMINATION *Miranda* warnings, Traffic accident, (p. 572) for discussion of topic.

Statements after *Miranda* warnings

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Confessions to police, (p. 578) for discussion of topic.

Statements induced by offer of immunity

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

See IMMUNITY Grant of as inducement to confess, (p. 313) for discussion of topic.

Pre-arrest

***Miranda* warnings not given**

State v. Preece, 383 S.E.2d 815 (1989) (McHugh, J.)

See SELF-INCRIMINATION *Miranda* warnings, Traffic accident, (p. 572) for discussion of topic.

Violation of *Miranda* rights

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Confessions to police, (p. 578) for discussion of topic.

Violation of *Miranda* rights (continued)

Burden of proof

State v. Stewart, 375 S.E.2d 805 (1988) (Per Curiam)

Appellant was convicted of second-degree sexual assault. Appellant told the police that he had witnessed a man chasing a woman near the scene of the crime. Testimony at trial showed that the police suspected appellant of the crime; that appellant remained with the police for several hours, during which time the victim was unable to identify him; and that appellant finally confessed to the crime after waiving his constitutional rights in writing. The trial judge held the confession to be voluntary.

Appellant claimed on appeal that communications by the police during custody fomented "hope and despair" in his mind, making the confession involuntary. See *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982).

Syl. pt. 1 - "'The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.' Syllabus Point 5*State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975)." Syl. pt. 3, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982).

Syl. pt. 2 - "'A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.' Syllabus Point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978)." Syl. pt. 7, *State v. Hickman*, 175 W.Va. 709, 338 S.E.2d 188 (1985).

The Court noted that the trial court carefully weighed the credibility of the witnesses and the totality of the circumstances. The decision was not "plainly wrong or clearly against the weight of the evidence."

Violation of *Miranda* rights (continued)

***In camera* hearing**

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

Appellant was convicted of second-degree murder. Immediately prior to arrest he gave a statement to police and then made two additional statements after arrest. Appellant refused to sign the statements and at trial claimed that they were coerced by physical means. Defense counsel did not move for an *in camera* hearing on voluntariness, nor did the trial court fulfill its duty to hold a hearing.

Syl. pt. 3 - "Where there is a failure to hold an *in camera* hearing on the defendant's inculpatory statements, we recognize under *Jackson v. Denno*, 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774 (1964), that the case will not be reversed for a new trial on this basis alone. Instead, it will be remanded for a voluntariness hearing before the trial court. If the trial court finds the statements are voluntary the verdict will stand. If, on the other hand, he finds the statements to be involuntary, the verdict will be set aside unless the trial court determines that this constitutional error is harmless beyond a reasonable doubt." Syllabus Point 5, *State v. Clawson*, 165 W.Va. 588, 270 S.E.2d 659 (1980).

The Court ordered the case remanded for further development.

Voluntariness

Mental condition

State v. Parsons, 381 S.E.2d 246 (1989) (Per Curiam)

Appellant was convicted of second-degree murder for shooting his ex-wife following an argument. Appellant and several others had been drinking alcohol the entire day of the shooting.

When the police officer arrived at the scene, appellant asked him to help appellant's ex-wife. Following a brief conversation, the officer handcuffed appellant, placed him in the police cruiser and read him *Miranda* warnings. Appellant showed the officer where the weapon was hidden. On the way to the jail, appellant was again read *Miranda* rights. Upon arrival, appellant once again was read his *Miranda* rights.

Voluntariness (continued)

Mental condition (continued)

State v. Parsons, (continued)

Appellant admitted shooting his ex-wife but claimed the shooting was accidental (he didn't know the gun was loaded).

Appellant claimed on appeal that he was not able to give a knowing and intelligent waiver of his rights because of "borderline intelligence" and organic brain damage cause by an injury.

Syl. pt. 1 - "Confessions elicited by law enforcement authorities from persons suspected of crimes who because of mental condition cannot knowledgeably and intelligently waive their right to counsel are inadmissible." Syllabus point 1, *State v. Hamrick*, 160 W.Va. 673, 236 S.E.2d 247 (1977).

Syl. pt. 2 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syllabus point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Here, testimony was given at trial that appellant had an I.Q. of 75 and suffered from "mixed organic brain syndrome" as a result of his injury. The same expert witness also testified that appellant might be capable of understanding his rights if he were not intoxicated; and that appellant's confession seemed coherent. Although testimony was given that appellant had been drinking the day of the killing, no evidence was adduced to show that appellant was intoxicated at the time of his confession.

The arresting officer testified that the third reading of *Miranda* rights was done one sentence at a time, with a pause to ascertain if appellant understood each line. Appellant stated that he did and signed and corrected each page of the transcription of his confession. No error.

Proof required

State v. Moss, 376 S.E.2d 569 (1988) (McGraw, J.)

See CONFESSIONS Voluntariness, (p. 112) for discussion of topic.

Violation of *Miranda* rights (continued)

Unreasonable delay in taking before magistrate

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Confessions to police, (p. 578) for discussion of topic.

SENTENCING

Generally

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See PROPORTIONALITY Generally, (p. 510) for discussion of topic.

Alternative sentencing

Electronic monitoring

State v. Kerns, 394 S.E.2d 532 (1990) (McHugh, J.)

See STATUTES Statutory construction, Sentencing, (p. 616) for discussion of topic.

Work release

State v. Kerns, 394 S.E.2d 532 (1990) (McHugh, J.)

See STATUTES Statutory construction, Sentencing, (p. 616) for discussion of topic.

Appropriateness

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

Appellant was convicted of abduction with intent to defile; kidnaping; sexual assault, second-degree; and sexual abuse, first-degree. He was sentenced to consecutive and concurrent terms of thirty-six to eighty- five years in prison. He contended that the cumulative effect constitutes cruel and unusual punishment.

Syl. pt. 16 - "While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syllabus Point 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

The sentences here were within the statutory penalties. The trial court had the discretion to direct that they run consecutively. No error.

Appropriateness (continued)

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

See SENTENCING Reviewing sentence, Standard for, (p. 594) for discussion of topic.

Co-defendants

Conflict of interest

State v. Haddix, 375 S.E.2d 435 (1988) (Per Curiam)

See INEFFECTIVE ASSISTANCE Joint representation of codefendants, (p. 338) for discussion of topic.

Controlled substances

Elements to consider

State v. Nicastro, 383 S.E.2d 521 (1989) (McHugh, J.)

Appellant was convicted of delivery of a controlled substance (less than 15 grams of marijuana) and sentenced to one to five years in the state penitentiary. Appellant objected that the trial court did not consider letters written on appellant's behalf, nor a recommendation of probation by the probation officer; and alleged that the court routinely denied probation for drug offenses for a particular series of indictments. The trial court also allegedly ignored the fact that the crime was nonviolent and that appellant is not a drug trafficker.

Syl. pt. 6 - Prior to imposition of a sentence of incarceration for a defendant convicted of delivery of less than 15 grams of marihuana in violation of *W.Va.Code*, 60A-4-401-(a), as amended, who, although not within the "without remuneration" exception of *W.Va.Code*, 60A-4-402 (c), as amended, has no prior criminal record, a trial court must consider: (1) whether the defendant has a history of involvement with illegal drugs; (2) whether the

State v. Nicastro, (continued)

defendant is a reasonably good prospect for rehabilitation; (3) whether incarceration would serve a useful purpose; and (4) whether available alternatives to incarceration, such as probation conditioned upon community service, would be more appropriate.

The Court noted that probation is within the discretion of the sentencing court, *State v. Miller*, 172 W.Va. 718, 310 S.E.2d 479, 481 (1983), but held that the facts in this case warranted full consideration of the above factors. Remanded for reconsideration of sentencing.

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

Appellant was convicted of first offense delivery of marijuana. On appeal he claimed the trial court erred in not granting him probation.

Syl. pt. 7 - "Prior to imposition of a sentence of incarceration for a defendant conviction of delivery of less that 15 grams of marihuana in violation of *W.Va.Code*, 60A-4-401(a), as amended, who, although not within the 'without remuneration' exception of *W.Va.Code*, 60A-4-402 (c), as amended, has no prior criminal record, a trial court must consider: (1) whether the defendant has a history of involvement with illegal drugs; (2) whether the defendant is a reasonably good prospect for rehabilitation; (3) whether incarceration would serve a useful purpose; and (4) whether available alternatives to incarceration, such as probation conditioned upon community service, would be more appropriate." Syllabus Point 6, *State v. Nicastro*, 181 W.Va. 556, 383 S.E.2d 521 (1989).

The Court noted that the trial court did not have the benefit of the guidelines set forth above (the case cited had not been decided at the time of trial). Remanded for reconsideration of sentencing.

SENTENCING

Cruel and unusual punishment

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See PROPORTIONALITY Generally, (p. 509) for discussion of topic.

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See PROPORTIONALITY Appropriateness of sentence, (p. 511) for discussion of topic.

Disproportionate sentence

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See PROPORTIONALITY Appropriateness of sentence, (p. 511) for discussion of topic.

DUI

Third offense

State ex rel. Hagg v. Spillers, 382 S.E.2d 581 (1989) (Miller, J.)

See DUI Probation, (p. 175) for discussion of topic.

Enhancement

Prior invalid conviction

Duncil v. Kaufman, 394 S.E.2d 870 (1990) (Miller, J.)

Petitioner brought a writ of prohibition to prevent release of a prisoner for time served as ordered by respondent. The prisoner brought a writ of *habeas corpus*, which was granted by respondent on the grounds that the prisoner should have been allowed to withdraw his guilty plea because of ineffective assistance of counsel a breach of the plea bargain by the prosecuting attorney and improper enhancement of sentence because of use of prior void conviction.

Enhancement (continued)

Prior invalid conviction (continued)

Duncil v. Kaufman, (continued)

Syl. pt. 6 - It is constitutionally impermissible for a sentence to be enhanced based on a prior invalid conviction.

Syl. pt. 7 - Where a defendant claims that his sentence should be set aside because it was enhanced based on a prior invalid conviction, before the sentence will be vacated, the following requirements must be met: (1) the prior conviction must be unconstitutional; (2) the sentencing judge must have mistakenly believed it was valid; and (3) the prior conviction must have been used to enhance the challenged sentence.

Here, the presentence report mentioned an armed robbery conviction which was later dismissed. The trial court was aware of the dismissal. There was no evidence that this charge influenced the sentence; the plea bargain sentence was imposed. No error.

Habeas corpus

Scope of

State ex rel. Blake v. Chafin, 395 S.E.2d 513 (1990) (Workman, J.)

See *HABEAS CORPUS* Omnibus hearing, Scope of, (p. 287) for discussion of topic.

Habitual offenders

Simultaneous multiple offenses

Hutchinson v. Dietrich, 393 S.E.2d 663 (1990) (Brotherton, J.)

See CONTROLLED SUBSTANCES Probation, (p. 128) for discussion of topic.

SENTENCING

Mitigation

Failure to allow evidence of

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

Appellant was convicted of felony-murder and various underlying felonies. He alleged on appeal that he was not allowed a chance to speak in his own behalf during sentencing.

The Court noted appellant was convicted under *W.Va.Code* 62-3-15, which mandates a life sentence without possibility of parole. Since the trial court was without authority to mitigate appellant's sentence, the Court found only harmless error in appellant's not being allowed to speak.

Plea bargaining

Prosecution fails to stand silent

Duncil v. Kaufman, 394 S.E.2d 870 (1990) (Miller, J.)

See PLEA BARGAIN Breach of, Prosecution fails to stand silent at sentencing, (p. 477) for discussion of topic.

Withdrawal prior to sentence

State v. Huff, 375 S.E.2d 438 (1988) (Per Curiam)

See PLEA BARGAINING Sentencing, Withdrawal prior to, (p. 478) for discussion of topic.

Prior conviction

Use of

Duncil v. Kaufman, 394 S.E.2d 870 (1990) (Miller, J.)

See SENTENCING Enhancement, Prior invalid conviction, (p. 591) for discussion of topic.

SENTENCING

Proportionality

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See PROPORTIONALITY Generally, (p. 509) for discussion of topic.

Recidivism

Simultaneous multiple offenses

Hutchinson v. Dietrich, 393 S.E.2d 663 (1990) (Brotherton, J.)

See CONTROLLED SUBSTANCES Probation, (p. 128) for discussion of topic.

Reviewing of sentence

Standard for

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See PROPORTIONALITY Generally, (p. 509) for discussion of topic.

State v. England, 376 S.E.2d 548 (1988) (Miller, J.)

See PROPORTIONALITY Generally, (p. 510) for discussion of topic.

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

Appellant was convicted of malicious wounding and attempted murder. On appeal he alleged that his sentence was disproportionate to his crime.

Syl. pt. 4 - "'Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review.' Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syl. pt. 6, *State v. Bennett*, 172 W.Va. 123, 304 S.E.2d 28 (1983).

Reviewing of sentence (continued)

Standard for (continued)

State v. Neal, (continued)

Appellant was sentenced to two to ten years for malicious wounding and one to five years for attempted murder with the sentences to run consecutively. The trial court denied motions for reduction of sentence and to run the sentences concurrently. The jury answered affirmatively to firearms interrogatories for both counts. *W.Va.Code* 62-12-13(a)(1)(A) (ii).

The Court found that no impermissible factors had been considered and that the sentences were in accord with the appropriate statutes. No error.

Severe sentences

State v. Spence, 388 S.E.2d 498 (1989) (Miller, J.)

See PROPORTIONALITY Appropriateness of sentence, (p. 511) for discussion of topic.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See CRUEL AND UNUSUAL PUNISHMENT Severe sentence, (p. 137) for discussion of topic.

Simultaneous multiple offenses

Enhancement of sentences

Hutchinson v. Dietrich, 393 S.E.2d 663 (1990) (Brotherton, J.)

See CONTROLLED SUBSTANCES Probation, (p. 128) for discussion of topic.

SENTENCING

Time of order

Deitzler v. Douglass, No. 18689 (2/17/89) (Per Curiam)

The defendant, Dean Ray Buckley, was convicted of first-degree sexual assault and sentenced to two concurrent terms of fifteen to twenty-five years. His initial appeal to the Court was denied without prejudice and a supplemental petition filed.

Just prior to the supplemental's being denied, the defendant filed a motion for reduction of sentence, which ultimately resulted in a suspension of sentence and five years probation.

The prosecuting attorney, petitioner here, contended that the probation order was beyond the jurisdiction of the circuit court and sought a writ of prohibition. He argued that *W.Va.Code* 62-12-3 prohibits suspension of sentence "after the convicted person has been imprisoned for sixty days...." In addition, Rule 35(b) of the Rules of Criminal Procedure, he claims, prevents reduction of sentence more than 120 days following imposition.

The Court refused both arguments. *W.Va.Code* 62-12-3 relates to the initial time period for consideration of whether probation should be granted; it does not relate to a reduction of sentence. Rule 35(b) controls the time period for reductions.

Here, the petition for reduction was filed more than 120 days after the first petition for appeal was denied but one week before the supplemental petition was denied. The Court held that the 120 day time period did not begin to run until the denial of the supplemental petition; petitioner's motion was actually somewhat premature, not late. No error.

Work release

DUI

State v. Kerns, 394 S.E.2d 532 (1990) (McHugh, J.)

See STATUTES Statutory construction, Sentencing, (p. 616) for discussion of topic.

SEXUAL ASSAULT

DNA tests

Holdren v. MacQueen, No. 18973 (4/18/89) (Per Curiam)

See MANDAMUS Delay in rendering decision, (p. 444) for discussion of topic.

SEXUAL ATTACKS

Abuse

Distinguished from assault

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See INSTRUCTIONS Lesser included offense, Generally, (p. 361) for discussion of topic.

Assault

Consent

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Same offense, (p. 158) for discussion of topic.

Distinguished from abuse

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See INSTRUCTIONS Lesser included offense, Generally, (p. 361) for discussion of topic.

Second and third degree distinguished

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Same offense, (p. 158) for discussion of topic.

Child's capacity to testify

State v. Stacy, 371 S.E.2d 614 (1988) (Neely, J.)

See WITNESSES Competency, Children, (p. 656) for discussion of topic.

SEXUAL ATTACKS

Collateral crimes

State v. Gilbert, 399 S.E.2d 851 (1990) (Per Curiam)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 604) for discussion of topic.

Consent

Relevancy in second and third degree assault

State v. Sayre, 395 S.E.2d 799 (1990) (Brotherton, J.)

See DOUBLE JEOPARDY Same offense, (p. 158) for discussion of topic.

Counselor

Comforting victim in courtroom

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

See MISTRIAL Discretion in granting, (p. 455) for discussion of topic.

Evidence

Character of defendant

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

See EVIDENCE Character, Rebuttal to general character evidence, (p. 216) for discussion of topic.

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Collateral cases, (p. 218) for discussion of topic.

SEXUAL ATTACKS

Evidence (continued)

Collateral crimes

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Collateral cases, (p. 218) for discussion of topic.

State v. Gilbert, 399 S.E.2d 851 (1990) (Per Curiam)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 604) for discussion of topic.

Expert witnesses

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

See EVIDENCE Expert witnesses, Rape trauma, (p. 227) for discussion of topic.

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Hearsay, Generally, (p. 231) for discussion of topic.

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Expert witnesses, Psychologist's testimony in child sexual abuse case, (p. 226) for discussion of topic.

First and second-degree assault

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 627) for discussion of topic.

Evidence (continued)

Lesser included offenses

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See INSTRUCTIONS Lesser included offense, Generally, (p. 361) for discussion of topic.

Prior foster child application

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

See EVIDENCE Sexual attacks, Application for foster child, (p. 247) for discussion of topic.

Prompt complaint

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See EVIDENCE Hearsay-exceptions, Spontaneous declarations/excited utterance, (p. 234) for discussion of topic.

Use of deadly weapon

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 627) for discussion of topic.

Victim's statements out of court

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See EVIDENCE Hearsay-exceptions, Spontaneous declarations/excited utterance, (p. 234) for discussion of topic.

SEXUAL ATTACKS

Evidence (continued)

Victim's statements out of court (continued)

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Hearsay, Generally, (p. 231) for discussion of topic.

Instructions

State v. Davis, 376 S.E.2d 563 (1988) (Per Curiam)

Appellant was convicted of first-degree sexual abuse, second-degree sexual assault and abduction with intent to defile. The trial court refused to give an instruction advising the jury to scrutinize the victim's testimony with care.

Syl. pt. 4 - "'Where the testimony of the victim of a sexual offense is corroborated to some degree, it is not reversible error to refuse a cautionary instruction that informs the jury that they should view such testimony with care and caution.' Syllabus point 2, *State v. Ray*, 171 W.Va. 383, 298 S.E.2d 921 (1982)."

The Court noted that some corroborating evidence was present here in the testimony of two neighbors, police and medical personnel who viewed the victim shortly after the alleged attacks. The corroboration need not rise to the level of independent evidence. See *State v. Ray*, 171 W.Va. 383, 298 S.E.2d 921 (1982).

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See INSTRUCTIONS Sexual assault, (p. 365) for discussion of topic.

Assault and abuse

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See INSTRUCTIONS Lesser included offense, Generally, (p. 361) for discussion of topic.

SEXUAL ATTACKS

Lesser included offenses

Assault and abuse

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See INSTRUCTIONS Lesser included offense, Generally, (p. 361) for discussion of topic.

First and third degree assault

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

Appellant was convicted of first-degree sexual assault. The trial court denied his request for an instruction defining the elements of third degree sexual assault.

The Court noted that third degree sexual assault was not an element of first-degree sexual assault. *State v. Daggett*, 167 W.Va. 411, 280 S.E. 2d 545 (1981). Here, the appellant could have been indicted on either charge, due to overlapping provisions that "are inartfully drafted." *Id.*, 167 W.Va. at 433, 280 S.E.2d at 580. He is not, however, entitled to an instruction on both offenses, having only been indicted for one.

Multiple charges for one attack

State v. Davis, 376 S.E.2d 563 (1988) (Per Curiam)

See DOUBLE JEOPARDY Same offense, (p. 157) for discussion of topic.

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See DOUBLE JEOPARDY Multiple offenses, Abduction with intent to defile and kidnaping, (p. 155) for discussion of topic.

SEXUAL ATTACKS

Sufficiency of evidence

State v. Gilbert, 399 S.E.2d 851 (1990) (Per Curiam)

Appellant was convicted of eight counts of third degree sexual assault. At trial the victim testified as to sexual fondling and other actions which were not charged in the indictment. After a conference at the bench, the court instructed the jury that this testimony was not to be considered as part of the acts charged but rather "solely for the purposes of showing motive, intent, or a common plan or scheme."

Appellant's witnesses testified as to his good character; several persons denied that appellant ever committed sexual improprieties. Appellant claimed on appeal that the conviction was improperly based on the uncorroborated testimony of the victim, that the evidence of conduct not charged was improperly admitted and that the court reporter should have recorded the conference regarding admission of other acts.

Syl. pt. 1 - "A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is ordinarily a question for the jury." Syllabus point 5, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

Syl. pt. 2 - "'The exceptions permitting evidence of collateral crimes and charges to be admissible against an accused are recognized as follows: the evidence is admissible if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial.' Syllabus Point 12, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)." Syllabus point 2, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986).

Syl. pt. 3 - "Before a trial court can determine that evidence of collateral crimes is admissible under one of the exceptions, an *in camera* hearing is necessary to allow a trial court to carefully consider the admissibility of collateral crime evidence and to properly balance the probative value of such evidence against its prejudicial effect." Syllabus point 3, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986).

Sufficiency of evidence (continued)

State v. Gilbert, (continued)

Here, the victim's testimony was clearly corroborated by appellant's own conversation during a taped telephone call, which recording was admitted into evidence. The testimony relating to other acts was reviewed prior to admission and a cautionary instruction given. Testimony as to one alleged act was so near in time to the charged offenses, that it was also admissible. Other evidence was admissible in rebuttal to appellant's own witnesses since they introduced the issue of appellant's sexual morality.

The Court also found that appellant's trial counsel was never denied the opportunity to make any record. No error.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

Appellant was convicted of various counts of sexual abuse, sexual assault, aggravated robbery and kidnaping. A total of nineteen counts were filed, involving two victims. The evidence supported the use of knife with the first victim but the evidence was insufficient to show a knife was used with the second victim. *W.Va.Code* 61-8B-3 requires that a conviction for first-degree sexual assault involve serious bodily injury or use of "a deadly weapon in the commission of the act."

The Court found that the jury should not have been instructed on first-degree sexual assault as to the second victim; an instruction on second-degree sexual assault would have been proper. Reversed and remanded.

Generally

State v. Davis, 376 S.E.2d 563 (1988) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual attacks, (p. 636) for discussion of topic.

State v. McPherson, 371 S.E.2d 333 (1988) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual attacks, (p. 635) for discussion of topic.

SEXUAL ATTACKS

Sufficiency of evidence (continued)

Generally (continued)

State v. Weaver, 386 S.E.2d 496 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual attacks, (p. 637) for discussion of topic.

Witnesses

Competency

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See WITNESSES Competency, Examination with expert, (p. 657) for discussion of topic.

State v. Stacy, 371 S.E.2d 614 (1988) (Neely, J.)

See WITNESSES Competency, Children, (p. 656) for discussion of topic.

Psychologist's testimony

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Expert witnesses, Psychologist's testimony in child sexual abuse case, (p. 226) for discussion of topic.

SEXUAL DISCRIMINATION

Paternity actions

Statute of limitations

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

See EQUAL PROTECTION Sexual discrimination, Paternity actions, (p. 181) for discussion of topic.

SIXTH AMENDMENT

Dismissal of indictment for undue delay

Hundley v. Ashworth, 382 S.E.2d 573 (1989) (Miller, J.)

See DUE PROCESS Indictment delayed for strategic advantage, (p. 171) for discussion of topic.

Recanting request for counsel

State v. Parker, 383 S.E.2d 801 (1989) (Workman, J.)

See RIGHT TO COUNSEL Recanting request for counsel, (p. 547) for discussion of topic.

Right to confront

Generally

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See RIGHT TO CONFRONT Generally, (p. 542) for discussion of topic.

Confession of accomplice

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

See CONFESSIONS Admissibility, Accomplice, (p. 110) for discussion of topic.

Right to counsel

Conflict of interest

Cole v. White, 376 S.E.2d 599 (1988) (Miller, J.)

See INEFFECTIVE ASSISTANCE Conflict of interest, (p. 336) for discussion of topic.

Right to counsel (continued)

Generally

State v. Gunnoe, 374 S.E.2d 716 (1988) (Neely, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Post-arrest, After requesting counsel, (p. 582) for discussion of topic.

Waiver of

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

See RIGHT TO COUNSEL Recanting request for counsel, (p. 546) for discussion of topic.

Right to cross-examine

State v. Mullens, 371 S.E.2d 64 (1988) (Brotherton, J.)

See RIGHT TO CONFRONT Denial of right, (p. 542) for discussion of topic.

Right to speedy trial

Hundley v. Ashworth, 382 S.E.2d 573 (1989) (Miller, J.)

See DUE PROCESS Indictment delayed for strategic advantage, (p. 171) for discussion of topic.

Waiver of right to counsel

Effect on subsequent proceedings

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

See RIGHT TO COUNSEL Administrative hearings, Revoked or suspended license, (p. 544) for discussion of topic.

Waiver of right to counsel (continued)

When attaches

State v. Bowyer, 380 S.E.2d 193 (1989) (Miller, J.)

See RIGHT TO COUNSEL When attaches, (p. 548) for discussion of topic.

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

See RIGHT TO COUNSEL Recanting request for counsel, (p. 546) for discussion of topic.

STANDARD OF PROOF

Generally

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See KIDNAPING Standard of proof, (p. 433) for discussion of topic.

Forgery

State v. Kelly, 396 S.E.2d 471 (1990) (Miller, J.)

See FORGERY Elements of, (p. 269) for discussion of topic.

STATUTES

Administrative rules supersede

Assignment of judges

State ex rel. Hash v. McGraw, 376 S.E.2d 634 (1988) (McGraw, J.)

See JUDGES Recusal, Administrative acts (assignment of special judges), (p. 395) for discussion of topic.

Conspiracy

Unconstitutional

State v. Curry, 374 S.E.2d 526 (1988) (Per Curiam)

See CONSPIRACY Presumption of guilt, (p. 120) for discussion of topic.

Indictment based on

Sufficiency

State v. Neal, 371 S.E.2d 633 (1988) (Per Curiam)

See INDICTMENT Sufficiency, Generally, (p. 321) for discussion of topic.

Penal statutes

Generally

State v. Hatfield, 380 S.E.2d 670 (1988) (McGraw, J.)

Appellant was convicted of abduction with intent to defile, resulting in his being sentenced to life imprisonment as an habitual offender. Appellant claimed that the statute (*W.Va.Code* 61-2-14(a) relating to abduction is unconstitutionally vague in that it fails to define the word "defile."

Penal statutes (continued)

Generally (continued)

State v. Hatfield, (continued)

Syl. pt. 1 - "'A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.' Syl. pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974)." Syllabus point 1, *State v. Reed*, 166 W.Va. 558, 276 S.E.2d 313 (1981).

The Court held that the definition of the word "defile" is well-settled and that the trial record clearly showed that the appellant was aware of the meaning of the word. No error.

Presumption of constitutionality

Billotti v. Dodrill, 394 S.E.2d 32 (1990) (Brotherton, J.)

See APPEAL Right to, (p. 41) for discussion of topic.

Statutory construction

Dangerous or deadly weapons

State ex rel. City of Princeton v. Buckner, 377 S.E.2d 139 (1988) (McHugh, C.J.)

After arresting a driver for driving under the influence a municipal police officer discovered a pistol in the driver's pocket. Since the driver did not have a license to carry the pistol, the police officer went before a magistrate and requested a warrant for carrying a dangerous or deadly weapon.

The magistrate refused to issue the warrant, citing Article III, § 22 of the West Virginia Constitution as nullifying *W.Va.Code* 61-7-1. The prosecuting attorney then filed a writ of mandamus asking the circuit court to compel issuance of the warrant. The circuit court refused but certified the following questions to the Supreme Court:

Statutory construction (continued)

Dangerous or deadly weapons (continued)

State ex rel. City of Princeton v. Buckner, (continued)

1. Is *W.Va.Code* Chapter 61, Article 7, § 1 constitutional in light of the subsequent adoption of Article 3, § 22 of the Constitution of West Virginia?

2. May the Legislature of the State of West Virginia by proper legislation regulate the right of a person to keep and bear arms in the State of West Virginia?

Following a lengthy discussion of the historical antecedents of regulating the right to bear arms, the Court held the statute unconstitutional but left the door open for the Legislature to redraft the statute.

Syl. pt. 1 - "Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Syl. pt. 3, *State ex rel. Smith v. Gore*, 150 W.Va. 71, 143 S.E.2d 791 (1965).

Syl. pt. 2 - *W.Va.Code*, 61-7-1 [1975], the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." It infringes upon the right of a person to bear arms for defensive purposes, specifically, defense of self, family, home and state, insofar as it prohibits the carrying of a dangerous or deadly weapon for any purpose without a license or other statutory authorization.

Syl. pt. 3 - "The police power is the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. The police power is difficult to define precisely, because it is extensive, elastic and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the power of the state to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health and general welfare of the community. It cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past. As society becomes increasingly complex and

Statutory construction (continued)

Dangerous or deadly weapons (continued)

State ex rel. City of Princeton v. Buckner, (continued)

as advancements are made, the police power must of necessity evolve, develop and expand, in the public interest, to meet such conditions." Syl. pt. 5, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965).

Syl. pt. 4 - The West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment."

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See HOMICIDE First-degree, Malice, (p. 301) for discussion of topic.

State ex rel. LeMasters v. Narick, No. 18300 (7/6/88) (Per Curiam)

Relator was convicted of carrying a dangerous or deadly weapon without a license in violation of *W.Va.Code* 61-7-1. He sought to prohibit the circuit court from prosecution, claiming that the statute under which he was charged was unconstitutional pursuant to Art. III, § 22 of the West Virginia Constitution.

The court agreed, citing syllabus point 2 of *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988) (see above).

Syl. pt. 2 - *W.Va.Code*, 61-7-1 (1975) the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." It infringes upon the right of a person to bear arms for defensive purposes, specifically, defense of self, family, home and state, insofar as it prohibits the carrying of a dangerous or deadly weapon for any purpose without a license or other statutory authorization.

Statutory construction (continued)

Obstruction of officer

State ex rel. Wilmoth v. Gustke, 373 S.E.2d 484 (1988) (McHugh, C.J.)

See OBSTRUCTION OF OFFICER Defined, (p. 463) for discussion of topic.

Sentencing

State v. Kerns, 394 S.E.2d 532 (1990) (McHugh, J.)

Appellant pled guilty in magistrate court to second offense, driving under the influence of alcohol. He was sentenced to six months in jail. Pursuant to *W.Va.Code* 62-12-4 he petitioned the circuit court for an alternative sentence of work release or home confinement or both. The circuit court denied the petition, ruling that it could not impose an alternative sentence because appellant was not convicted in a court of record. Home confinement was not possible because appellant was incarcerated in a county facility.

Syl. pt. 1 - "That which is plainly within the spirit, meaning and purpose of a remedial statute, though not herein expressed in terms, is as much a part of it as if it were so expressed." Syl. pt. 1, *Hasson v. City of Chester*, 67 W.Va. 278, 67 S.E. 731 (1910).

Syl. pt. 2 - A circuit court has the authority under *W.Va.Code*, 62-12-4 [1943] to apply the work release provisions of *W.Va.Code*, 62-11A-1 [1988] in lieu of a sentence of ordinary confinement imposed by a magistrate court in a misdemeanor case.

Syl. pt. 3 - "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938).

Syl. pt. 4 - A circuit court has the authority under *W.Va.Code*, 62-12-4 [1943] to order electronically monitored home confinement, in a county having the equipment therefor, in lieu of incarceration imposed by a magistrate court in a misdemeanor case.

Statutory construction (continued)

Sentencing (continued)

State v. Kerns, (continued)

The Court noted that under both the prior and current versions of the DUI sentencing provisions either probation or an alternative sentence are possible; neither does the DUI statute distinguish between conviction in a court of record or magistrate court.

W.Va.Code 62-11A-1 requires sentencing, not necessarily conviction, of less than one year in a court of record to be eligible for other sentencing alternatives. Since the sentence was six months, work release is an alternative available here.

Further, since *W.Va.Code* 25-1-14 permits electronic monitoring of inmates released from prisons, even though the statute applies to felons, the Court extended the availability of electronic monitoring to misdemeanants. Reversed and remanded.

Statute of limitations

Paternity actions

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

See EQUAL PROTECTION Sexual discrimination, Paternity actions, (p. 181) for discussion of topic.

STATUTORY CONSTRUCTION

Conspiracy

State v. Johnson, 371 S.E.2d 340 (1988) (Miller, J.)

See CONSPIRACY Proof of, (p. 120) for discussion of topic.

STATUTES OF LIMITATION

Paternity actions

Shelby v. George, 381 S.E.2d 269 (1989) (Miller, J.)

See EQUAL PROTECTION Sexual discrimination, Paternity actions, (p. 181) for discussion of topic.

STOLEN PROPERTY

Transference of

Elements of offense

State v. Tanner, 382 S.E.2d 47 (1989) (Brotherton, C.J.)

See TRANSFERRING STOLEN PROPERTY Elements of offense, (p. 644) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Generally

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See APPEAL Standard for review, Sufficiency of evidence, (p. 48) for discussion of topic.

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

Appellant was convicted of second-degree sexual assault, abduction and first-degree sexual abuse. The abduction and abuse charges were found incidental to the assault and reversed in *State v. Davis*, 180 W.Va. 357, 376 S.E.2d 563 (1988). The issue here was whether sufficient evidence existed for the assault conviction.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The evidence showed that appellant was in the same room with his son when the son assaulted the victim. The victim pleaded with appellant to help her but he refused and actually lay down on the bed with her while his son committed the offense. The Court found this evidence sufficient to support a conviction of principal in the second-degree. See AIDING AND ABETTING (p. 20) this Digest.

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See AIDING AND ABETTING Principal and accessory distinguished, (p. 21) for discussion of topic.

Generally (continued)

State v. Masters, 373 S.E.2d 173 (1988) (Miller, J.)

Appellant was convicted of grand larceny. He was later convicted of having been previously found guilty of a felony and was given an enhanced sentence. He contended that the evidence was insufficient to support the grand larceny conviction.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and the consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "Circumstantial evidence will not support a guilty verdict, unless the fact of guilt is proved to the exclusion of every reasonable hypothesis of innocence; and circumstances which create only a suspicion of guilt but do not prove the actual commission of the crime charged, are not sufficient to sustain a conviction." Syllabus Point 2, *State v. Dobbs*, 163 W.Va. 630, 259 S.E.2d 829 (1979).

Here, viewing the evidence in the light most favorable to the prosecution, it was shown that a VCR and carrying case were stolen from a small retail business. The store owner testified that appellant was the only person in the room where the VCR was kept during the period when it disappeared. The owner also testified that she confronted appellant later and he promised to return the machine or pay for it. The VCR, with case, was valued at $299.95 by the owner (a sufficient amount for grand jury larceny). An expert witness placed the value at $199.95, but admitted that value was based on a machine without a warranty in effect (the stolen machine's warranty was still in effect.)

The Court viewed the evidence as sufficient to sustain the verdict. No error.

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 626) for discussion of topic.

Generally (continued)

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

Appellant was convicted of grand larceny, burglary, aggravated robbery, arson and felony-murder. On appeal he claimed that the evidence was insufficient to support the burglary and arson counts.

Syl. pt. 2 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Here, there was considerable circumstantial evidence and testimony by appellant's accomplice. No error.

State v. Richeson, 370 S.E.2d 728 (1988) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Negligent homicide, (p. 632) for discussion of topic.

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

Appellant was convicted of first-degree felony-murder. He claimed that the evidence was insufficient for conviction in that it was lacking in "hard physical evidence." The Court noted that circumstantial evidence is sufficient for conviction, *State v. Meadows*, 172 W.Va. 247, 304 S.E.2d 831 (1983), *State v. Knotts*, 156 W.Va. 748, 197 S.E.2d 93 (1973); but should be viewed cautiously. *State v. McHenry*, 93 W.Va. 396, 117 S.E. 143 (1923).

Syl. pt. 5 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, when the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to

Generally (continued)

State v. Ruggles, (continued)

the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent unjustice has been done." Syllabus point 2, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Here, the evidence was adequate. No error.

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

Appellant was convicted of felony-murder and various underlying felonies. On appeal, he alleged that the evidence was insufficient to support conviction.

Syl. pt. 3 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The evidence here was sufficient. Affirmed.

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

See APPEAL Standard for review, Sufficiency of evidence, (p. 49) for discussion of topic.

Accessory before the fact

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See AIDING AND ABETTING Principal and accessory distinguished, (p. 21) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Arson

State v. Hanson, 382 S.E.2d 547 (1989) (Miller, J.)

Appellant was convicted of first-degree arson, arson with intent to defraud, burglary, grand larceny, breaking and entering, perjury, petit larceny and conspiracy. On appeal, he contended that the prosecution failed to prove the arson charges in that the fire was not shown to be of incendiary origin.

Syl. pt. 8 - "To sustain a conviction of arson, when the evidence offered at trial is circumstantial, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime." Syllabus Point 5, *State v. Mullins*, 181 W.Va. 415, 383 S.E.2d 47 (1989).

Syl. pt. 9 - "'An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case.' Syl. pt. 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971)." Syllabus Point 2, *State v. McWilliams*, 177 W.Va. 369, 352 S.E.2d 120 (1986).

The Court noted that the investigating state police officer stated that both another state police officer and the state fire marshal had stated that "an accelerant" had been used to start the fire. Other witnesses testified as to appellant's solicitation of the arson and a co-defendant's possession of kindling and kerosene at the scene shortly before the fire. Appellant solicited the state police officer's testimony on cross-examination. No error.

State v. Mullins & State v. Rodas, 383 S.E.2d 47 (1989) (McHugh, J.)

Appellants were convicted of first-degree arson. They contended on appeal that the circumstantial evidence offered at trial was insufficient to support the conviction.

Syl. pt. 5 - To sustain a conviction of arson, when the evidence offered at trial is circumstantial, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime.

The evidence here was sufficient; no error.

SUFFICIENCY OF EVIDENCE

Circumstantial evidence

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

Appellant was convicted of first-degree murder and sexual assault of his wife and obtaining money by false pretenses. On appeal he claimed that the evidence was not sufficient to convict.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "'Circumstantial evidence will not support a guilty verdict, unless the fact of guilt is proved to the exclusion of every reasonable hypothesis of innocence; and circumstances which create only a suspicion of guilt but do not prove the actual commission of the crime charged, are not sufficient to sustain a conviction.' Syl. pt. 2, *State v. Dobbs*, 163 W.Va. 630, 259 S.E.2d 829 (1979)." Syllabus Point 2, *State v. Phillips*, 176 W.Va. 244, 342 S.E.2d 210 (1986).

Here, the Court found that the evidence showed that the victim was last seen with appellant; that appellant made several unsuccessful attempts to get the victim to return to their home the night before the murder; that several persons observed signs of an argument between the appellant and the victim the morning the victim was last seen; that appellant's clothing, worn the night prior to the murder, was found near the victim's body; that the clothing bore blood and saliva matching those of the victim; and that appellant's car was seen outside the trailer (the scene of the murder) the morning the victim was last seen. The medical examiner believed the cause of death to be strangulation.

The evidence also showed that some person used the victim's automated teller card to withdraw money on the day of the murder.

The Court noted that substantial evidence of motive, means and opportunity was introduced. No error.

SUFFICIENCY OF EVIDENCE

Circumstantial evidence (continued)

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 628) for discussion of topic.

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

Appellant was convicted of various counts of sexual assault, sexual abuse, aggravated robbery and kidnaping. On appeal he claimed that the circumstantial evidence used was insufficient for conviction.

Syl. pt. 10 - "If circumstantial evidence concurs in pointing to the accused as the perpetrator of the crime, he may properly be convicted." Syl. Pt. 4, *State v. Phillips*, 176 W.Va. 244, 342 S.E.2d 210 (1986).

No error.

Competency

State v. Parsons, 381 S.E.2d 246 (1989) (Per Curiam)

See INSANITY Test for, (p. 351) for discussion of topic.

Directed verdict

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See DIRECTED VERDICT Generally, (p. 146) for discussion of topic.

Extradition

State ex rel. Drescher v. Hedrick, 375 S.E.2d 213 (1988) (Per Curiam)

See EXTRADITION Custody while awaiting, *Habeas corpus*, (p. 257) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Forgery

State v. Kelly, 396 S.E.2d 471 (1990) (Miller, J.)

See FORGERY Elements of, (p. 269) for discussion of topic.

Homicide

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See HOMICIDE Second-degree, Elements of, (p. 304) for discussion of topic.

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See DIRECTED VERDICT Generally, (p. 146) for discussion of topic.

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

Appellant was convicted of second-degree murder. The victim was found by passerby on a railroad track with a severe head wound, unconscious; before authorities could arrive, he was struck and killed by a train. Appellant complained on appeal that the evidence was insufficient to support the conviction and that trial counsel was ineffective.

The evidence showed that the victim spent the day in appellant's company, ingesting drugs and alcohol. A witness who was at one point in the same car with appellant and the victim testified that he saw appellant standing with a bumper jack in his hand. Another witness testified that she saw appellant's car traveling toward the railroad tracks where the victim was killed. Finally, a third witness who saw appellant late the same day testified that appellant was nervous and insisted that the time was one hour earlier than it actually was.

The investigating officer testified that appellant became belligerent when asked to release blood-stained pants. Blood found on the pants and on appellant's boots matched that of the victim. The officer recovered the missing bumper jack and testified that he saw blood and hair particles on it but none was later found.

Homicide (continued)

State v. Smith, (continued)

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "'If, on a trial for murder, the evidence is wholly circumstantial, but as to time, place, motive, means, and conduct it concurs in pointing to the accused as the perpetrator of the crime, he (or she) may properly be convicted." *State v. Beale*, 104 W.Va. 617, 632-33, 141 S.E. 7, 13 (1927)." Syllabus Point 4, *State v. Phillips*, 176 W.Va. 244, 342 S.E.2d 210 (1986).

The Court found this evidence sufficient. No error.

First-degree murder

State v. Parsons, 380 S.E.2d 223 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 626) for discussion of topic.

State v. Perdue, 372 S.E.2d 636 (1988) (Per Curiam)

Defendant was convicted of first-degree murder. On appeal he claimed that the evidence was insufficient to support a finding of malice or premeditation.

At trial, evidence was adduced which showed a physically violent romantic relationship between the defendant and the deceased, at times involving firearms. The defendant made several conflicting statements concerning the events leading to the killing. The Chief Medical Examiner testified that the killing could not have been accidental.

Homicide (continued)

First-degree murder (continued)

State v. Perdue, (continued)

The Court noted that the evidence must be viewed in the light most favorable to the prosecution. *State v. Stiff*, 177 W.Va. 241, 351 S.E.2d 428 (1986); *State v. Riser*, 170 W.Va. 473, 294 S.E.2d 461 (1982); *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982); *State v. Dobbs*, 169 W.Va. 284, 286 S.E.2d 918 (1982); *State v. Dye*, 167 W.Va. 652, 280 S.E.2d 323 (1981).

Syl. pt. 2 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The defendant relied upon a self-defense theory which in turn required that malice be shown in some manner other than the use of a deadly weapon. The jury, however, could have concluded from the evidence that the attack was unprovoked and therefore have inferred malice from the use of the weapon. In addition, the history of the relationship could have been a factor in their conclusion that malice was involved. The Court held the evidence sufficient.

Negligent homicide (motor vehicle)

State v. Storey, 387 S.E.2d 563 (1989) (Per Curiam)

See HOMICIDE Negligent homicide, Motor vehicles, (p. 303) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Indictments

Standard for review

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 160) for discussion of topic.

Ineffective assistance

Habeas corpus

State v. Tesack, 383 S.E.2d 54 (1989) (Per Curiam)

See INEFFECTIVE ASSISTANCE Inadequate record, (p. 338) for discussion of topic.

Insanity

State v. Parsons, 381 S.E.2d 246 (1989) (Per Curiam)

See INSANITY Test for, (p. 351) for discussion of topic.

Instruction to be given where evidence supports

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See INSTRUCTIONS Right to, (p. 364) for discussion of topic.

Involuntary manslaughter

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See DIRECTED VERDICT Generally, (p. 146) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Kidnapping

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See APPEAL Standard for review, Setting aside verdict, (p. 46) for discussion of topic.

Malice

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See HOMICIDE Second-degree, Elements of, (p. 304) for discussion of topic.

Murder

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See HOMICIDE Second-degree, Elements of, (p. 304) for discussion of topic.

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 628) for discussion of topic.

Negligent homicide

State v. Richeson, 370 S.E.2d 728 (1988) (Per Curiam)

Appellant was convicted of negligent homicide as a result of an automobile accident. He complained that the evidence was insufficient.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Negligent homicide (continued)

State v. Richeson, (continued)

Syl. pt. 2 - "Our negligent homicide statute, *W.Va.Code*, 17C-5-1, requires the driving of '(a) vehicle in reckless disregard of the safety of others,' and this means that more than ordinary negligence is required. It is compatible with the involuntary manslaughter standard set in *State v. Lawson*, 128 W.Va. 136, 36 S.E.2d 26 (1945)." Syllabus point 2, *State v. Vollmer*, 163 W.Va. 711, 259 S.E.2d 837 (1979).

The appellant was operating a vehicle which crossed the center line and struck another, causing the other car to strike a utility pole, killing the driver. The appellant was not shown to have been speeding nor was he under the influence of alcohol or drugs. The intersection was lit by a street lamp and the other vehicle's lights were lit. Apparently neither car swerved or skidded in an attempt to avoid impact.

The mere fact of crossing the center line is insufficient for negligent homicide. See *State v. Lawson*, 128 W.Va. 136, 36 S.E.2d 26 (1945). Nor can failure to see the other car be sufficient. *Duncan v. Hixon*, 223 Va. 373, 288 S.E.2d 494 (1982). The appellant was driving with a broken arm or wrist and had taken a Tylenol III capsule several hours earlier. These factors were, however, also insufficient for negligent homicide. (See cases cited in opinion).

Noting that retrial is barred by double jeopardy, the Court ordered a judgment of acquittal.

Motor vehicle

State v. Storey, 387 S.E.2d 563 (1989) (Per Curiam)

See HOMICIDE Negligent homicide, Motor vehicles, (p. 303) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Nonconstitutional error

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See HARMLESS ERROR Nonconstitutional, Test for, (p. 294) for discussion of topic.

Principal in first-degree

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See AIDING AND ABETTING Principal and accessory distinguished, (p. 21) for discussion of topic.

Principal in second-degree

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See AIDING AND ABETTING Principal and accessory distinguished, (p. 21) for discussion of topic.

Probable cause for search warrant

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 564) for discussion of topic.

Setting aside judgment

State v. Hoselton, 371 S.E.2d 366 (1988) (Per Curiam)

See AIDING AND ABETTING Distinguished from witnessing, (p. 21) for discussion of topic.

Setting aside judgment (continued)

State v. Judy, 372 S.E.2d 796 (1988) (Per Curiam)

Appellant was convicted of burglary, breaking and entering, grand larceny, petty larceny and four counts of conspiracy. On appeal he claimed that the evidence was insufficient for conviction.

Syl. pt. 7 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Here, the Court concluded that substantial evidence supported the convictions.

State v. Smith, 384 S.E.2d 145 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 628) for discussion of topic.

Sexual assault

State v. McPherson, 371 S.E.2d 333 (1988) (Per Curiam)

Appellant was convicted of third degree sexual assault. At trial the alleged victim gave testimony inconsistent with prior statements and with testimony from other witnesses.

Physical evidence was inconclusive as was testimony from an examining physician. Appellant's motion for acquittal based on insufficiency of the evidence was denied.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to

Sexual assault (continued)

State v. McPherson, (continued)

the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is ordinarily a question for the jury." Syl. pt. 5, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

The Court noted that the trial court was not to weigh the credibility of witnesses; inherent incredibility must be more than contradiction and lack of corroboration. See *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986). Denial of the motion was proper.

First-degree distinguished from second

State v. Woodall, 385 S.E.2d 253 (1989) (Neely, J.)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 627) for discussion of topic.

Sexual attacks

State v. Davis, 376 S.E.2d 563 (1988) (Per Curiam)

Appellant was convicted of first-degree sexual abuse, second-degree sexual assault and abduction with intent to defile. On appeal he contended that scientific evidence adduced at trial proved his innocence. Tests performed on both the victim's and appellant's clothing, bed sheets and vaginal swabs. All of these samples showed presence of seminal fluid containing genetic characteristics of both type A and type O blood. Both the victim and appellant had type O blood. The experts disagreed testifying that the type A markers were the result of contamination and the appellant's expert stating that appellant could not have been the attacker. Each, however, admitted that the other's conclusion may have been correct.

Sexual attacks (continued)

State v. Davis, (continued)

Syl. pt. 3 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The Court held that the scientific evidence did not demonstrate appellant's innocence. The evidence was sufficient to sustain a conviction.

State v. Weaver, 386 S.E.2d 496 (1989) (Per Curiam)

Appellant was convicted of second-degree sexual assault. The conviction was based primarily on the victim's testimony, along with the observations of persons who saw the victim soon after the event. Appellant claimed that the sexual intercourse was voluntary.

Syl. pt. - "A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim. Unless such testimony is inherently incredible, the credibility is ordinarily a question for the jury." Syl. pt. 5, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

No error.

Generally

State v. Gilbert, 399 S.E.2d 851 (1990) (Per Curiam)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 604) for discussion of topic.

SUPPORT

Child support and alimony

Criminal contempt

State v. Lusk, 376 S.E.2d 351 (1988) (Miller, J.)

See CHILD SUPPORT AND ALIMONY Criminal contempt, Grounds for, (p. 100) for discussion of topic.

SUPREME COURT

Administrative authority

Carter v. Taylor, 378 S.E.2d 291 (1989) (Workman, J.)

See JUDGES Administrative authority, Appointment of circuit clerk, (p. 377) for discussion of topic.

Disciplinary authority

In the Matter of Ferrell, 378 S.E.2d 662 (1989) (Per Curiam)

See JUDGES *Ex parte* communications, (p. 388) for discussion of topic.

TAPE RECORDING

Voluntary

State v. Garrett, 386 S.E.2d 823 (1989) (Per Curiam)

See EVIDENCE Tape recordings, Voluntarily made, (p. 250) for discussion of topic.

THREE-TERM RULE

Generally

State ex rel. Webb v. Wilson, 390 S.E.2d 9 (1990) (McHugh, J.)

Petitioners were two of several persons indicted for political corruption in Mingo County. They objected that their trial was not held within the required three terms of court. Article III, § 14, *W.Va. Constitution*; *W.Va.Code* 62-3-21.

Petitioners were indicted on October 26, 1987. On June 30, 1989, after more than three unexcused regular terms of court, the indictments were dismissed as void ab initio due to an improperly impaneled grand jury. On July 18, 1989, petitioners were reindicted for the same offenses.

Syl. pt. 1 - *W.Va.Code*, 62-3-21 [1959] limits the state to three unexcused regular terms of court, calculated in accordance with *State ex rel. Spadafore v. Fox*, 155 W.Va. 674, 186 S.E.2d 833 (1972), in which to bring an accused to trial on the charges contained in an indictment. Once three unexcused regular terms of court have lapsed, and the state has failed to bring the accused to trial on the charges contained in the indictment, the state may not further proceed on the charges contained in the indictment, for, under the plain meaning of the statute, the accused must be "forever discharged" and the indictment dismissed.

Syl. pt. 2 - Once an accused is indicted, an entire panoply of constitutional rights attaches, including the right to trial without unreasonable delay, as implemented by *W.Va.Code*, 62-3-21 [1959], regardless of whether the indictment is dismissed as void after three unexcused regular terms of court.

The Court agreed with petitioner's argument that the dismissal of the original indictments had no effect on their right to dismissal for failure to prosecute. See *State ex rel. Farley v. Kramer*, 153 W.Va. 159, 169 S.E.2d 106, *cert. denied*, 396 U.S. 986, 90 S.Ct. 482, 24 L.Ed.2d 451 (1969) (indictment dismissed prior to expiration of three terms).

The Court noted that *State v. Adkins*, 182 W.Va. 443, 388 S.E.2d 316 (1989) "tacitly ruled" that the three-term rule is activated by an indictment, regardless of whether the indictment is subsequently dismissed. Here, unlike the case in *Farley*, the original indictments were not dismissed within the requisite three terms. Subsequent action to reindict is therefore improper. Writs of prohibition granted.

TRANSCRIPT

Right to

Short v. Workman, No. 18494 (7/18/88) (Per Curiam)

Petitioner here was the respondent in a neglect petition. Her parental rights were subsequently terminated on October 10, 1986. Although the respondent judge granted petitioner's counsel's request for a transcript on October 20, 1987, the judge's court reporter has refused to provide a record of critical hearings which took place in 1986. The judge now asserts that the time to perfect an appeal has expired.

The Court disagreed. The request for a transcript was timely and *W.Va.Code* 51-7-4 provides that a transcript shall be available on request. Noting that court reporters are ultimately responsible to the Court (see *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985)), the Court ordered the production of the requested transcript.

Toler v. Sites, No. 19213 (11/29/89) (Per Curiam)

This was an original proceeding in mandamus to force a court reporter to produce a transcript for relator's appeal.

"In Syllabus Point 3, *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985), we stated:

> Although subject to the direction and supervision of the circuit judges to whom they are assigned, court reporters, as employees of the Supreme Court of Appeals, whose primary functions consist of recording, transcribing, and certifying records of proceedings for purposes of appellate review, are subject to the ultimate regulation, control and discipline of the Supreme Court of Appeals.

"In Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), we stated:

> A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy."

Right to (continued)

Toler v. Sites, (continued)

Relator had a clear legal right to his transcript and the respondent a nondiscretionary duty to provide it. Writ granted.

TRANSFERRING STOLEN PROPERTY

Elements of offense

State v. Tanner, 382 S.E.2d 47 (1989) (Brotherton, C.J.)

Appellant was convicted of transferring stolen property. He had received a Dodge van from an unidentified person. Appellant already owned an earlier model Dodge van so the two agreed to a trade, with appellant to pay the man a certain amount. The titles to the two vans were not exchanged so that when appellant subsequently gave the van to his father-in-law, he transferred the title to the van no longer in his possession. The title was then transferred to appellant's son-in-law and sold by the son-in-law to an innocent buyer who discovered that the van was stolen.

Appellant was convicted based on the transfer to his son-in-law. The prosecution argued at trial that when this transfer occurred appellant knew the van was stolen.

Syl. pt. 1 - "The elements of transferring stolen property are: (1) the property must have been stolen by someone other than the accused; (2) the accused must have transferred the property knowing or having reason to believe that the property was stolen; (3) the property must have been transferred to someone other than the owner; and (4) the accused must have transferred the property with a dishonest purpose." *State v. Taylor*, 176 W.Va. 671, 346 S.E.2d 822, 827 (1986).

Syl. pt. 2 - The existence of a "dishonest purpose" is an essential element of the offense of transferring stolen property, and it must be proven beyond a reasonable doubt in order to sustain a conviction.

The Court noted that "the element of dishonest purpose is distinct from the element of knowledge." *State v. Barker*, 176 W.Va. 553, 346 S.E.2d 344, 349 (1986). The Court found no dishonest purpose here. Reversed; retrial barred by double jeopardy.

TRIAL

Bail requirements in trial *de novo*

Robertson v. Goldman, 369 S.E.2d 888 (1988) (McGraw, J.)

See INDIGENTS Right to equal protection, (p. 331) for discussion of topic.

Change of venue

Basis of

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

See VENUE Change of venue, Factors to consider, (p. 647) for discussion of topic.

New trial

State v. Daniel, 391 S.E.2d 90 (1990) (Brotherton, J.)

See JURY Misconduct, (p. 416) for discussion of topic.

Newly-discovered evidence

State v. Catlett, 376 S.E.2d 834 (1988) (Neely, J.)

See NEW TRIAL Newly discovered evidence, Sufficiency for new trial, (p. 462) for discussion of topic.

Still cameras in the courtroom

State v. Hanna, 378 S.E.2d 640 (1989) (Miller, J.)

See DENIAL OF FAIR TRIAL Publicity, Still cameras in courtroom, (p. 142) for discussion of topic.

TRIAL

Voir dire

Standard for review

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See JURY *Voir dire*, (p. 420) for discussion of topic.

When jeopardy attaches

State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 160) for discussion of topic.

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See DOUBLE JEOPARDY When jeopardy attaches, (p. 162) for discussion of topic.

VENUE

Change of venue

Abuse of discretion

State ex rel. Kisner v. Starcher, No. 18520 (11/10/88) (Per Curiam)

Petitioners sought a writ of prohibition to prevent transfer of venue of a civil action concerning conditions of confinement brought against them by the inmates and former inmates of the Berkeley County jail. The movants below alleged that a fair trial was impossible in Berkeley County; they cited newspaper articles critical of the suit and attached affidavits from a former Circuit Clerk and a local pastor. They also alleged that the present Circuit Clerk, one of the original defendants as a county commissioner, would have charge of the jury in his current capacity. The respondent judge concluded that "good cause" was demonstrated pursuant to *W.Va.Code* 56-9-1 and granted the motion.

The Court agreed that a change of venue was proper, citing *Shay v. Rinehart & Dennis*, 116 W.Va. 24, 178 S.E. 272 (1935) and *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). However, the Court concluded that the judge erred in transferring the matter to his home circuit. Judicial economy is not to "... outweigh injury to the litigants in a circumstance where the economical procedure is at direct odds with overall fairness or equity. . . ." *Hinkle*, *supra*, 164 W.Va. at 125, 262 S.E.2d at 751. Concluding that Judge Starcher's circuit was too far away, the Court granted the writ and removed the case to the Circuit Court of Mineral County.

Factors to consider

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

Appellant was convicted of first-degree murder. In support of his motion for change of venue appellant submitted three affidavits from local residents stating that he could not get a fair trial, video tapes of local television coverage and newspaper clippings.

Syl. pt. 1 - "Widespread publicity, of itself, does not require change of venue, and neither does proof that prejudice exists against an accused, unless it appears that the prejudice against him is so great that he cannot get a fair trial." Syllabus Point 2, *State v. Young*, 173 W.Va. 1, 311 S.E.2d 118 (1983).

Change of venue (continued)

Factors to consider (continued)

State v. Baker, (continued)

The Court also noted that sufficiency of a motion for change of venue is a matter for the discretion of the trial court and will not be disturbed unless clearly wrong. No error here.

State v. Plumley, 384 S.E.2d 130 (1989) (Neely, J.)

Appellant was convicted of grand larceny, burglary, aggravated robbery, arson and felony-murder. He alleged that the trial court's failure to allow a change of venue denied him a fair trial.

Syl. pt. 5 - "'To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.'" Syl. pt. 2, *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946)." Syllabus Point 2, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

The Court noted that the "good cause" requirement is defined as "proof that a defendant cannot get a fair trial in the county where the offense occurred because of the existence of locally extensive present hostile sentiment against him." Syllabus Point 1, *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978). The Court found that the trial court did not abuse its discretion in finding that the defendant did not make a showing of good cause here. No error.

VERDICT

Forms

Delivery of marijuana

State v. Nicholas, 387 S.E.2d 104 (1989) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, Generally, (p. 361) for discussion of topic.

Juror differs with

State v. Cole, 376 S.E.2d 618 (1988) (Miller, J.)

See JURY Polling the jury, Procedure when juror doubts verdict, (p. 416) for discussion of topic.

Setting aside

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

See EVIDENCE Sufficiency, For conviction, (p. 249) for discussion of topic.

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See APPEAL Standard for review, Setting aside verdict, (p. 46) for discussion of topic.

State v. Ferrell, 399 S.E.2d 834 (1990) (Neely, C.J.)

See HARMLESS ERROR Nonconstitutional, Test for, (p. 294) for discussion of topic.

VOIR DIRE

Abuse of discretion

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

Appellant was convicted of first-degree murder in the killing of a woman he met at a bar. During *voir dire*, the trial court advised the jury that the case involved "very explicit sexual activity." The statement was later retracted and the panel advised that sexual activity may be inferred but was not necessarily involved.

The trial court further commented that appellant "will state that the decedent did threaten to attack and attacked him in such a way." Appellant now claimed that this statement misled the jury to expect appellant to testify, by implication forcing him to relinquish his constitutional right to remain silent.

The Court further inquired as to whether jurors would feel "uncomfortable" returning a "not guilty" verdict if appellant acted in self-defense. Appellant's questions on self-defense were rejected.

Syl. pt. 8 - "This Court will not consider an error which is not preserved in the record nor apparent on the face of the record." Syl. pt. 6, *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976).

Syl. pt. 9 - "In a criminal case, the inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused." Syl. pt. 2, *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944), *overruled on another point*, syl. pt. 8, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986).

Syl. pt. 10 - In a criminal case the trial court's conduct of the *voir dire* is not reversible error if it is conducted in a manner which safeguards the right of a defendant to be tried by a jury free of bias and prejudice. Accordingly, it is not reversible error in a criminal case for a trial court to refuse to ask questions submitted for *voir dire* by the defendant if such questions are substantially covered by other questions asked by the trial court.

The record did not show why appellant did not testify. Since it was possible that appellant's failure to testify could have been based on tactics, the Court found no error.

Further, the Court held the trial court's questions during *voir dire* generally safeguarded appellant's right to a jury free of prejudice. No error.

VOIR DIRE

Duty to discover grounds for disqualification

State v. Hardway, 385 S.E.2d 62 (1989) (McHugh, J.)

See JURY Disqualification, Relation to prosecuting or defense attorney, (p. 414) for discussion of topic.

Individual

Prejudice against defendant

State v. Bennett, 382 S.E.2d 322 (1989) (Brotherton, C.J.)

See JURY Disqualification, Prejudice against defendant, (p. 410) for discussion of topic.

Relation to law enforcement officer

State ex rel. Boso v. Hedrick, 391 S.E.2d 614 (1990) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 339) for discussion of topic.

Standard for review

State v. Gibson, 384 S.E.2d 358 (1989) (Workman, J.)

See JURY *Voir dire*, (p. 420) for discussion of topic.

WAIVER

Failure to develop on appeal

State v. Schoolcraft, 396 S.E.2d 760 (1990) (Brotherton, J.)

See INDICTMENT Conviction of only certain charges, (p. 319) for discussion of topic.

Failure to preserve

State v. Bongalis, 378 S.E.2d 449 (1989) (Miller, J.)

See INDICTMENT Motion to dismiss, Prejudicing grand jury, (p. 320) for discussion of topic.

Failure to prosecute on all charges

State v. Schoolcraft, 396 S.E.2d 760 (1990) (Brotherton, J.)

See INDICTMENT Conviction of only certain charges, (p. 319) for discussion of topic.

Juvenile's ability to waive

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Right to counsel

Voluntariness

State v. Parsons, 381 S.E.2d 246 (1989) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Mental condition, (p. 585) for discussion of topic.

WAIVER

Right to testify

State v. Neuman, 371 S.E.2d 77 (1988) (McGraw, J.)

See DUE PROCESS Defendant's right to testify, Waiver of, (p. 170) for discussion of topic.

Self-incrimination

Right to be advised

State v. Robinson, 376 S.E.2d 606 (1988) (McGraw, J.)

See PRIVILEGES Marital, Waiver of, (p. 495) for discussion of topic.

WARRANTS

Arrest without

Probable cause for

State v. Giles, 395 S.E.2d 481 (1990) (Brotherton, J.)

See PROBABLE CAUSE Warrantless arrest, (p. 497) for discussion of topic.

Probable cause to issue

Sufficiency of affidavit

State v. Barlow, 383 S.E.2d 539 (1989) (Per Curiam)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 564) for discussion of topic.

Sufficiency of

Affidavit unsigned

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

See SEARCH AND SEIZURE Warrants, Signature on affidavit for, (p. 565) for discussion of topic.

Description

State v. Haught, 371 S.E.2d 54 (1988) (McHugh, C.J.)

See SEARCH AND SEIZURE Warrant, Sufficiency of description, (p. 566) for discussion of topic.

WITNESSES

Accomplice as witness

State v. Marcum, 386 S.E.2d 117 (1989) (Neely, J.)

See CONFESSIONS Admissibility, Accomplice, (p. 110) for discussion of topic.

State v. Mullens, 371 S.E.2d 64 (1988) (Brotherton, J.)

See RIGHT TO CONFRONT Denial of right, (p. 542) for discussion of topic.

Competency

State v. Merritt,&Merritt v. Legursky, 396 S.E.2d 871 (1990) (Workman, J.)

Appellant was convicted of first-degree murder. During trial a controversy arose over the use of a previously-taped statement to refresh a witness' memory. Both defense counsel and the prosecuting attorney expressed doubts about the witness' competency to testify due to his low intelligence.

Syl. pt. 2 - "'The question of the competency of a witness to testify is left largely to the discretion of the trial court and its judgment will not be disturbed unless shown to have been plainly abused resulting in manifest error.' Point 8, Syllabus, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974)." Syl. Pt. 3, *State v. Butcher*, 165 W.Va. 522, 270 S.E.2d 156 (1980).

No abuse of discretion here. The Court noted that leading a witness of limited intelligence is permissible. *F. Cleckley*, *Handbook on Evidence for West Virginia Lawyers* § 3.5 (B)(e)(4), citing *State v. Golden*, 90 W.Va. 496, 111 S.E.2d 320 (1922).

Competency (continued)

Children

State v. Stacy, 371 S.E.2d 614 (1988) (Neely, J.)

Appellant was convicted of first-degree sexual abuse. The five-year old victim testified following a competency hearing *in camera*. At that competency hearing the court and both attorneys directed questions to her concerning her ability to remember and relate facts and her understanding of the need to tell the truth. On appeal defendant complained that under *Burdette v. Lobban*, 174 W.Va. 120, 323 S.E.2d 601 (1984), the child should also have been interviewed by an independent psychologist or psychiatrist (defense counsel had repeatedly requested such an interview and made motions to set aside the verdict).

Syl. pt. 1 - At common law, trial courts assessed the admissibility of infant testimony in terms of the child's competency to testify, leaving juries to determine the credibility of the witness. In reality, with child witnesses the distinction between the competency and credibility is blurred. With the adoption of *W.Va. Rules of Evidence* 601, which tracks its federal counterpart, the analysis of competency is replaced by a balancing of the probative value of the testimony against any unfair prejudice resulting from it under *W.Va. Rules of Evidence* 403. While the adoption of the *W.Va. Rules of Evidence* has changed the terminology of the analysis, the underlying problems of child witness testimony in sexual abuse cases remain substantially unchanged.

Syl. pt. 2 - "When a child's capacity to testify that she was the victim of a sexual abuse or neglect is [in question], the courts should appoint a neutral child psychologist or psychiatrist to conduct a transcribed or otherwise recorded interview." Syllabus Point 2, *Burdette v. Lobban*, 174 W.Va. 120, 323 S.E.2d 601 (1984).

Although the Court reiterated that a psychological examination is not mandatory, this case was reversed for lack of one.

Competency (continued)

Examination with expert

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

Ten days prior to appellant's trial on child sexual assault charges he requested that a psychologist accompany him to an interview with the victim. This request was denied, which denial was appealed on the grounds of denial of due process.

The Court denied the appeal, deeming it an unwarranted attack on the appellant's inability to obtain expert assistance at a witness interview. No legal right to such assistance was found.

Credibility

Past conduct

State v. Murray, 375 S.E.2d 405 (1988) (Miller, J.)

See EVIDENCE Credibility of witnesses, Use of past conduct, (p. 223) for discussion of topic.

Psychiatric or psychological disorder

State v. Allman, 391 S.E.2d 103 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Witnesses' credibility, (p. 243) for discussion of topic.

Sexual attacks

State v. Gilbert, 399 S.E.2d 851 (1990) (Per Curiam)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 604) for discussion of topic.

Credibility (continued)

Sexual offenses

State v. Weaver, 386 S.E.2d 496 (1989) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual attacks, (p. 637) for discussion of topic.

Cross-examination

Criminal record

State v. Hoard, 375 S.E.2d 582 (1988) (Per Curiam)

See WITNESSES Cross-examination, Reputation evidence, (p. 658) for discussion of topic.

Rebuttal following

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

Reputation evidence

State v. Hoard, 375 S.E.2d 582 (1988) (Per Curiam)

Appellant was convicted of petit larceny and breaking and entering. The appellant and Earnest Walker met at the appellant's home with two others, where Walker allegedly overheard appellant and the others discuss plans to kill several persons involved in prosecuting a rape case. Walker reported the conversation and later reported that appellant and others planned to steal dynamite from an explosives company to use in the killings. Appellant and Walker were arrested while leaving the named place with the stolen dynamite.

Cross-examination (continued)

Reputation evidence (continued)

State v. Hoard, (continued)

Walker had a prior theft of dynamite charge against him which was dropped before his arrest. Similarly, the charges pursuant to the arrest with appellant were also dropped. Appellant complained that the trial court refused to allow cross-examination of Walker concerning his prior misdemeanors, dismissals and pending cases.

Syl. pt. 1 - "Questions may be asked of witnesses as to convictions, both felonies and misdemeanors, in order to test the witness' credibility." (Emphasis added). Syllabus Point 3, *State v. Woods*, 155 W.Va. 344, 184 S.E.2d 130 (1971), *overruled on other grounds*, *State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431 (1977).

Syl. pt. 2 - "The fact that a witness has been arrested or charged with a crime may be shown or inquired into where it would reasonably tend to show that his testimony might be influenced by interest or bias." (Emphasis added). Syllabus Point 4, *State v. Woods*, 155 W.Va. 344, 184 S.E.2d 130 (1971), *overruled on other grounds*, *State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431 (1977).

Here, the trial court's limitation of cross-examination to prior felony convictions effectively foreclosed inquiry concerning prosecutorial favor (the prior theft of dynamite). Reversed and remanded.

Scope of

State v. Allman, 391 S.E.2d 103 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Witness' credibility, (p. 243) for discussion of topic.

WITNESSES

Defendant's right to testify

Waiver of

State v. Neuman, 371 S.E.2d 77 (1988) (McGraw, J.)

See DUE PROCESS Defendant's right to testify, Waiver of, (p. 170) for discussion of topic.

Distinguished from aiding and abetting

State v. Davis, 388 S.E.2d 508 (1989) (Miller, J.)

See AIDING AND ABETTING Principal in 1st and 2d degree, (p. 23) for discussion of topic.

State v. Fortner, 387 S.E.2d 812 (1989) (Miller, J.)

See AIDING AND ABETTING Principal and accessory distinguished, (p. 21) for discussion of topic.

State v. Hoselton, 371 S.E.2d 366 (1988) (Per Curiam)

See AIDING AND ABETTING Distinguished from witnessing, (p. 21) for discussion of topic.

Expert

Cross-examination based on treatise

State v. Bennett, 396 S.E.2d 751 (1990) (Per Curiam)

See EVIDENCE Expert witnesses, Cross-examination based on treatise, (p. 226) for discussion of topic.

Expert (continued)

Psychologist's opinion in child sexual abuse

State v. Edward Charles L. Sr., 398 S.E.2d 123 (1990) (Workman, J.)

See EVIDENCE Expert witnesses, Psychologist's testimony in child sexual abuse case, (p. 226) for discussion of topic.

Qualification of

State v. Baker, 376 S.E.2d 127 (1988) (Neely, J.)

See EVIDENCE Expert witnesses, Qualifications of, (p. 227) for discussion of topic.

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

See EVIDENCE Expert witnesses, Admissibility of opinion, (p. 225) for discussion of topic.

Rape trauma

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

See EVIDENCE Expert witnesses, Rape trauma, (p. 227) for discussion of topic.

Scope of testimony

State v. Ruggles, 394 S.E.2d 42 (1990) (Brotherton, J.)

See EVIDENCE Expert witnesses, Admissibility of opinion, (p. 225) for discussion of topic.

WITNESSES

Immunity

Standing to assert

State v. Deskins, 380 S.E.2d 676 (1989) (Per Curiam)

Defendant was convicted of murder. At trial, the judge refused to grant immunity to defendant's accomplice. On appeal, defendant claimed that the accomplice's testimony would have exonerated him.

Syl. pt. 7 - "A prosecution witness who has purportedly been afforded immunity from prosecution pursuant to *W.Va.Code*, 57-5-2 [1931], and who testifies against a defendant in a criminal proceeding is the only person who may assert the protection of that statute in regard to that grant of immunity. The defendant, however, in that criminal proceeding may not assert irregularities in regard to the granting of that immunity from prosecution." Syllabus Point 3, *State v. Pennington*, 179 W.Va. 139, 365 S.E.2d 803 (1987).

The Court noted that the record did not show that the witness' testimony was exculpatory; the witness had previously testified in his own defense at a separate trial and claimed that he was not present at the murder. The Court refused to extend the protection accorded to a prosecution witness. No error.

Impeachment

Prior inconsistent statement

State v. Collins, 409 S.E.2d 181 (1990) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 201) for discussion of topic.

Letter not in evidence

Wagner v. Hedrick, 383 S.E.2d 286 (1989) (Brotherton, C.J.)

See EVIDENCE Impeachment, Use of letter, (p. 236) for discussion of topic.

WITNESSES

Rebuttal

Scope of

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

Trial court's discretion

State v. Dietz, 390 S.E.2d 15 (1990) (McHugh, J.)

See EVIDENCE Admissibility, Rebuttal evidence, (p. 205) for discussion of topic.

Testimony

Form of

State v. Jackson, 383 S.E.2d 79 (1989) (Brotherton, C.J.)

See ABUSE OF DISCRETION Testimony, Form of, (p. 14) for discussion of topic.

Witness unable to remember

State v. Brown, 371 S.E.2d 609 (1988) (Per Curiam)

See IMPEACHMENT Prior inconsistent statements, Witness unable to remember, (p. 316) for discussion of topic.

State v. Schoolcraft, 396 S.E.2d 760 (1990) (Brotherton, J.)

See IMPEACHMENT Prior inconsistent statements, Witness unable to remember, (p. 317) for discussion of topic.

WRITS

Prohibition

Deitzler v. Douglass, No. 18689 (2/17/89) (Per Curiam)

See SENTENCING Time of order, (p. 596) for discussion of topic.

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