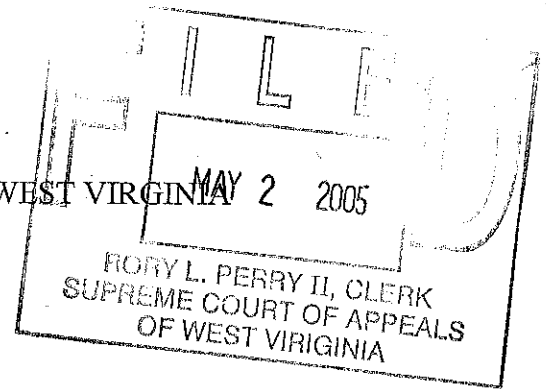


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

Supreme Court No. 32551

Circuit Court No. 99-F-213-H
(Raleigh)

MARVIN MILLS,

Appellant.

APPELLANT'S BRIEF

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PROCEEDINGS AND RULINGS BELOW

Marvin Steve Mills (hereafter Mills) was convicted by a jury in the Raleigh County Circuit Court of first-degree murder with no recommendation of mercy on November 7, 2003, and thereafter sentenced to life imprisonment without the possibility of parole. This was Mills second trial as his first conviction was reversed by this Court. State v. Mills, 211 W.Va. 532, 566 S.E.2d 891 (2002).

Mills did not dispute that he fatally shot Pamela Cabe on September 8, 1999, when he went to her place of employment to talk to her about a custody battle involving their mutual grandchild which had upset him. However, Mills was denied a fair trial on his guilt or innocence and the jury's fair consideration of mercy was substantially prejudiced by several trial court rulings and events.

First, Mills' right to a fair and impartial jury was denied when the trial court refused defense counsel's motion to strike for cause two jurors who expressed during voir dire that they could not consider granting mercy or a sentence of life with the possibility of parole. Their unequivocal responses disqualified these jurors and clearly indicated they would not fairly consider the issue of mercy.

Secondly, the State was granted a jury view of the crime scene. Local law enforcement blocked off the area on South Kanawha Avenue in Beckley for the safety of the jurors and to prevent any distractions. Nevertheless, as the jury walked through the area, the press was interspersed throughout. The jury view became a "walking parade" where the defendant and the jury were made the subjects of intense media interest. Defense counsel's motion for a mistrial due to the prejudicial nature of the press involvement in the jury view was denied.

The next day defense counsel brought to the trial court's attention a front page article in The Register-Herald, the local Beckley newspaper, about the Mills case which included a large photograph, reproduced on page 23 below, of the jury walking through the crime scene. Defense counsel requested that the trial court voir dire the jury to determine whether they were affected by the media involvement in the case. That motion was denied, and Mills was denied the opportunity to show the jury was prejudiced by this personal publicity.

The prosecutor also denied Mills his right to a fair trial by the unnecessary introduction, over defense objection, of evidence that the victim was afraid of him. This highly prejudicial character evidence had no probative value to the first-degree murder charge, and only served to prejudice the jury against Mills on both the issues of guilt and mercy.

Mills' right to have the jury fairly consider the issue of mercy was further prejudiced by the prosecutor when she argued in closing, over defense objection, that because West Virginia did not have a death penalty Mills "necessarily is getting mercy." This comment not only misrepresented West Virginia law, but also encouraged the jury to deny mercy based on an improper and emotionally charged issue --the death penalty-- that should not have been part of their deliberations.

STATEMENT OF FACTS

At trial, the parties agreed Mills fatally shot Pamela Cabe at Richmond Cleaners in Beckley, West Virginia. In a statement to police, Mills admitted impulsively shooting Ms. Cabe when he went to talk to her because he was upset about a custody dispute between his daughter, Christy Mills Cabe, and Ms. Cabe's son, Jimmy Cabe, over Mills' granddaughter, Kailey.

During voir dire, prospective jurors were questioned whether they could consider giving Mills mercy or a life sentence with the possibility of parole if convicted of first degree murder. Two jurors stated they could not consider granting mercy. Juror Haga indicated she thought persons convicted of first degree murder should "stay in prison for the rest of their life." (Transcript of Trial Proceedings on November 4-7, 2003 (Tr.) 106-07). Juror George similarly stated that she could not consider granting mercy for a malicious killing because "the victim gave her life." (Tr. 178-79). Upon further questioning by the prosecutor and the trial court, both jurors said they would follow the court's instructions and consider mercy. (Tr. 109, 179). Defense counsel's motions to strike jurors Haga and George for cause were denied. (Tr. 111-12, 181-82).

On the first day of trial, prior to opening statements, the jury was taken on a view of the crime scene, over the defense's objection. In preparation of the view, the city police blocked off the route the jury would be walking for its safety and to prevent distractions. (Tr. 328). However, when everyone arrived at the crime scene the news media were there waiting on them. (Tr. 353). Members of the press walked stride for stride with the jurors, commingling with them. (Tr. 353). The atmosphere became that of, not a controlled courtroom environment, but instead one, as described by defense counsel, of a "walking parade" where the jurors were acutely aware

of the fact that they were being photographed and filmed. (Tr. 354). Twice during the jury view the trial court had to order the press and camera people to get out of the way. (Tr. 356).

Defense counsel moved for a mistrial due to the prejudicial press interference with the jury view. (Tr. 352-55). Counsel argued the press interfered with the actual jury view itself and distracted jurors as jurors saw a cameraman when instructed to look at certain things (Tr. 353); that the media's filming and intense coverage of the jurors interfered with their thinking about the case and ability to look at the evidence; and that under those circumstances Mills could not receive a fair trial. (Tr. 352-55). The trial court denied defense counsel's motion, finding Mills was not prejudiced by the presence of "camera folk" at the jury view. (Tr. 356).

The media interference and influence in Mills' case did not stop there. The second day of trial, November 6, 2003, the Mills' case with a photograph of the jury, reproduced on page 23 below, was the front page cover story of The Register-Herald, the local Beckley newspaper. (Tr. 445). When defense counsel saw the photograph, he asked the trial court to voir dire the jurors to assess the impact of the article and the press' interference at the jury view on the jurors. (Tr. 445). The court denied that motion. (Tr. 450). Trial resumed without any inquiry into the possible prejudice of the jurors, even though they could not help but be acutely aware the public was watching the outcome of this trial with extreme interest.

During the State's case-in-chief, it called to the stand Danette Cabe, the daughter of the victim, and questioned her about whether her mother had ever expressed her state of mind concerning Mills. (Tr. 425). Defense counsel objected, arguing this was improper character evidence. (Tr. 426, 428). At a sidebar, the prosecutor argued this evidence was being used to show the state of mind of the victim because the State had to show use of the firearm without justification, excuse, or provocation. (Tr. 427). Defense counsel argued there was no evidence

of provocation, Mills was not relying on a defense of provocation, and would agree to a jury instruction explaining that. (Tr. 428). The trial court ruled Danette Cabe's testimony was admissible to rebut Mills' statement that the victim smirked and that he was afraid of the victim. (Tr. 429). Without the defense opening the door to Mills character, Danette Cabe testified that "my mom was very much afraid of Marvin Mills." (Tr. 429). This prejudicial testimony regarding Mills' character, painting him as a man to be feared, not only affected the jury's decision with respect to guilt or innocence, but was highly prejudicial on the issue of mercy.

Mills' right to a fair trial on the mercy issue was further prejudiced by the prosecutor's assertion twice during closing argument that West Virginia did not have the death penalty (Tr. 860, 862), and arguing because of that Mills "necessarily is getting mercy." (Tr. 860). These highly inflammatory comments about the death penalty were objected to by defense counsel, but the trial court overruled the objections (Tr. 860, 862), effectively sanctioning the prosecutor's argument that the jury's mercy decision had already been made for them.

ASSIGNMENTS OF ERROR

- I. The Trial Court Abused Its Discretion By Refusing To Strike Two Jurors For Cause Who Stated They Could Not Consider A Recommendation Of Mercy, Violating Mills' Right To A Trial By A Fair And Impartial Jury.
- II. The Prosecutor's Closing Argument, That Because West Virginia Doesn't Have The Death Penalty Mills' "Necessarily Is Getting Mercy," Improperly Misstated West Virginia Law And Unfairly Prejudiced The Jury's Critical Decision Whether To Recommend Mercy. This Prosecutorial Misconduct Denied Mills Due Process Of Law And A Fair Jury Trial.
- III. The Trial Court Denied Mills His Right To Due Process And A Fair Trial When It Denied His Motion For A Mistrial As A Result Of The Jury View Of The Crime Scene Which Became A "Walking Parade" Where The Press Walked With And Photographed The Jurors.
- IV. The Trial Court Denied Mills His Right To A Fair Trial By A Fair And Impartial Jury When It Refused To Individually Voir Dire The Jurors On The Impact Of The Media's Interference With The Jury View After The Jurors' Pictures Were Published On The Front Page Of The Local Newspaper.
- V. The Trial Court Erred In Allowing The State To Introduce Prejudicial Testimony Of Mills' Character In Its Case-In-Chief In Violation Of W.Va.R.Evid. 404(a) (1).

DISCUSSION OF LAW

I. The Trial Court Abused Its Discretion By Refusing To Strike Two Jurors For Cause Who Stated They Could Not Consider A Recommendation Of Mercy, Violating Mills' Right To A Trial By A Fair And Impartial Jury.

During individual voir dire questioning, two jurors (Haga and George) stated that if Mills was found guilty of first degree murder, they could not consider a recommendation of mercy. After extensive questioning by the defense, prosecutor, and the trial court, defense counsel moved to strike them for cause. Both motions were denied. (Tr. 110-12, 180-82). This forced Mills to use two peremptory challenges to excuse these jurors. (Tr. 239-42, 244-45). The trial court's refusals to strike jurors Haga and George were reversible error.

The standard of review for a trial court's decision denying challenges for cause is stated in State v. Miller, 197 W.Va. 588, 600-01, 476 S.E.2d 535, 547-48 (1996):

In reviewing the qualifications of a jury to serve in a criminal case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court.

The Miller Court further set forth the test for determining juror bias:

4. The relevant test for determining whether a juror is biased is whether the juror has such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

5. Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed.

Id. at Syl. Pts. 4, 5. Thus, when voir dire reveals a juror has a disqualifying bias or prejudice a challenge for cause must be granted.

Once a prospective juror has made a clear statement during voir dire reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair. (Emphasis added).

Syl. Pt. 5, O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002).

In this case, jurors Haga and George were biased and had such fixed opinions on the issue of mercy that neither could judge Mills impartially on that issue. These opinions were initially expressed by jurors Haga and George when they completed their juror questionnaires. Questions 44. through 46. on the questionnaire explained that the sentence for first degree murder is life in prison, that the jury must decide whether to recommend mercy, and what a recommendation of mercy and no mercy meant in terms of the sentence. Question 46. and jurors Haga's and George's negative responses regarding their willingness to consider mercy were as follows:

46. A recommendation of mercy results in a sentence of life in the state penitentiary with eligibility for parole consideration after serving fifteen years.

If you found the defendant guilty of First Degree Murder would you be able to consider a life sentence with the possibility of parole eligibility after fifteen years?

"No"

See Appendix A, pages 7-8 of juror Haga's questionnaire and Appendix B, pages 7-8 of juror George's questionnaire, attached in the Appendix at A-1 and A-3, respectively.

During voir dire, defense counsel questioned jurors Haga and George regarding their responses in the questionnaire. Juror Haga had the following discussion with defense counsel:

Counsel [Mr. Sullivan]: You answered that, if you found the defendant guilty of first degree murder, that you could not consider a life sentence with the possibility of

parole; is that correct?

Juror Haga: I think so.

Counsel: Okay, that you – you said that you couldn't consider giving mercy or having somebody be eligible for parole after fifteen years?

Juror Haga: Well, I was breaking it down into thoughts of. I was just reading what was there in black and white.

Counsel: Right. I'm just trying to make sure that – that, as far as you're concerned, if somebody is convicted of first degree murder, it's your opinion that they should never get out of jail again; is that your opinion?

Juror Haga: I think I feel that way yes.

Counsel: Okay. Now, why do you feel that way?

Juror Haga: Well, if it has been proven that they have done what they've done, then I just think they need to – to do what needs to be done.

Counsel: Which is stay in prison for the rest of their life?

Juror Haga: Right.

(Tr. 106-107).

This colloquy between Juror Haga and defense counsel clearly shows a bias or prejudice on the issue of mercy.

A very similar discussion was had between Mills' counsel and juror George.

Counsel [Mr. Sullivan]: You could not consider that Mr. Mills ever be eligible for parole if he was found guilty of first degree murder?

Juror George: Well, that's the way I feel. If a person is guilty of first degree murder, then they should do the time.

Counsel: Okay. And the time that we're talking about is the rest of their life in prison without ever being released; correct?

Juror George: The victim gave her life.

Counsel: And so you feel that you couldn't consider the possibility that the person would be eligible for parole after fifteen years?

Juror George: Well, if there were circumstances that would give that right, but just a malicious killing, no. I couldn't consider it.

Counsel: So for a malicious -- for a malicious killing, you could not consider it?

Juror George: No.

(Tr. 178-179).

In both instances the jurors expressed a strong bias against granting mercy, and that issue lies at the very heart of Mills' case. W.Va. Code §62-3-15 (1994) (2000 Repl. Vol.) provides that in the event the jury finds a defendant guilty of first degree murder, that same jury is to make a determination of mercy, which would make the defendant eligible for parole after fifteen (15) years. While the decision to grant mercy is not an element of the offense, it is clearly a very important decision to be made by the jury which is essential to the punishment. In State v. Williams, 172 W.Va. 295, 307, 305 S.E.2d 251, 263 (1983), this Court held that "the right of the defendant to an impartial jury includes the right to a jury free from prejudice respecting the penalties which may be imposed upon a finding of guilt." Therefore, any indication of bias or prejudice on the issue of mercy must be treated the same as the presence of bias on any issue relevant to guilt or innocence.

This Court has stated that a right to trial by an impartial, objective jury is fundamental and that "our system of law has always endeavored to prevent even the probability of

unfairness.” Syl. Pt. 2, State v. Varner, 212 W.Va. 532, 537, 575 S.E.2d 142, 147 (2002) (quoting State ex rel. Brown v. Dietrick, 191 W.Va. 169, 173, 444 S.E.2d 47, 51 (1994) (quoting Louk v. Haynes, 159 W.Va. 482, 499, 223 S.E.2d 780, 791 (1976) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942, 946 (1955))).

The object of jury selection is to secure jurors who are not only free from improper prejudice and bias, but who are also free from the suspicion of improper prejudice or bias. As far as is practicable in the selection of jurors, trial courts should strive to secure jurors who are not only free from prejudice or bias, but also are not even subject to any well-grounded suspicion of any prejudice or bias. (Emphasis added).

State v. Schermerhorn, 211 W.Va. 376, 380, 566 S.E.2d 263, 267 (2002) (citations omitted). Accord State v. Bennett, 181 W.Va. 269, 271, 382 S.E.2d 322, 324 (1989). Thus, even jurors who might be biased or prejudiced in a particular case are statutorily barred from service. Schermerhorn, 211 W.Va. at 380, 566 S.E.2d at 267. See W.Va. Code § 56-6-12 (1923) (1997 Repl. Vol.). Moreover, “[i]f the trial court has any doubt about a juror, that doubt should be resolved in favor of the defendant.” Bennett, 181 W.Va. at 271, 382 S.E.2d at 324. Accord O’Dell, 211 W.Va. at 288, 565 S.E.2d at 410.

In this case, as shown above, jurors Haga and George expressed an obvious bias against considering mercy for a defendant convicted of first degree murder. They were clearly not free from suspicion of improper bias or prejudice.

After these two jurors voiced their bias against mercy, the prosecutor and the trial court attempted to rehabilitate them. However, this Court has held that once a juror has made a statement indicating the presence of a disqualifying bias or prejudice, that juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, promises to be fair, or follow the law. Syl. Pt. 5, O’Dell, 211 W.Va. 285, 565 S.E.2d 407; Syl. Pt. 2, State v. Griffin, 211 W.Va. 508, 566 S.E.2d 645 (2002). Yet, when the defense made motions to strike these two

jurors for cause, the trial court denied the motions ruling that juror Haga indicated she would follow the court's instructions (Tr. 112), and juror George agreed to follow the instructions. (Tr. 181).

In State v. Johnston, 211 W.Va. 293, 295-96, 565 S.E.2d 415, 417-18 (2002), a prosecution involving driving under the influence of alcohol, a prospective juror expressed a bias against people who drink alcohol, but nonetheless told the trial court she could follow the court's instructions. This Court reversed the trial court's denial of a challenge for cause:

We are not persuaded by the fact that the trial court was able to get the juror to say that she would follow the instructions given by the court. Our cases have made clear that “[a] prospective juror who admits a prejudice to an issue central to the outcome of the case cannot negate the prejudice merely by stating [he or she] would follow the law as instructed by the court.” Syl. pt. 2, in part, *Davis v. Wang*, 184 W.Va. 222, 400 S.E.2d 230 (1990). (Emphasis added).

Id. at 296, 565 S.E.2d at 418.

Similarly, jurors Haga and George could not negate their evident bias against mercy by telling the trial court they would follow the court's instructions. These jurors further never retreated from their opinions that a person convicted of first degree murder should spend the rest of their life in prison. See Johnston, 211 W.Va. at 297 n.5, 565 S.E.2d at 419 n.5 (“Our concern rests squarely with the fact the juror, while stating she would follow the trial judge's instructions, never retreated from her position that she was biased against people who drink alcohol.”).

Because the challenges for cause were denied, Mills had to use two of his peremptory challenges to excuse these jurors. A criminal defendant is entitled to six peremptory challenges against a panel of twenty jurors who are free from challenges for cause. Because of this, “it is reversible error to deny a valid challenge for cause even if this disqualified juror is later struck by a peremptory challenge.” Bennett, 181 W.Va. at 272 n.2, 382 S.E.2d at 325 n.2. Therefore,

because two of the jurors on the panel believed mercy would not be appropriate in a first degree murder case, the panel of twenty was not free from bias and prejudice as required by law.

The trial court abused its discretion in refusing to strike these two jurors for cause once they exhibited their strong attitudes against considering mercy. They were disqualified as a matter of law, and therefore, they could not be rehabilitated by questions or promises to follow the court's instructions. The trial judge is the one person in the courtroom who is to ensure the defendant receives a fair and impartial trial, and he should have erred on the side of caution and struck the two jurors for cause. Failure to do so was an abuse of discretion and violated Mills' right to a fair and impartial jury guaranteed by Article III, §§ 10, 14 of the W.Va. Constitution and W.Va. Code §§ 56-6-12 (1923) (1997 Repl. Vol.) and 62-3-3 (1949) (2000 Repl. Vol.).

II. The Prosecutor's Closing Argument, That Because West Virginia Doesn't Have The Death Penalty Mills "Necessarily Is Getting Mercy," Improperly Misstated West Virginia Law And Unfairly Prejudiced The Jury's Critical Decision Whether To Recommend Mercy. This Prosecutorial Misconduct Denied Mills Due Process Of Law And A Fair Jury Trial.

Both the prosecutor and defense counsel acknowledged in closing argument that the jury would most likely have to decide the critical issue of whether to recommend mercy (upon a finding of guilty of first degree murder). (Tr. 844, 857). After defense counsel asked the jury to fairly consider the issue of mercy in its deliberations (Tr. 857), the prosecutor argued that fairness would mandate the death penalty, but since West Virginia does not have the death penalty, Mills "necessarily is getting mercy":

* * *

MS. KELLER [prosecutor]: The defense lawyer made a remark about fairness, and we often think of fairness is that people get what they give, and he said that one might say that, since he showed his victim no mercy as he gunned her down, then perhaps he should get no mercy. But, if we were talking fairness - if we were talking about him getting what he gave - we would have the death penalty in the state of West Virginia, or perhaps --

MR. SULLIVAN [defense counsel]: Objection, Your Honor.

THE COURT: Overruled.

MS. KELLER: We do not. We do not, so the defendant necessarily is getting mercy. He will get that life. Oh, I'm sure there are nasty smells in the prison, and I'm sure it's noisy in prison, but he'll be able to smell, and he'll be able to hear. And maybe their windows will be small, but he'll be able to look up at the sky, and his family can visit him. (Emphasis added).

* * *

(Tr. 859-60).

Shortly after this argument, the prosecutor again commented on the death penalty:

* * *

The West Virginia legislature has decided that first degree intentional deliberate premeditated murder will not result in the death penalty but will result --

MR. SULLIVAN [defense counsel]: Objection, Your Honor.

MS. KELLER [prosecutor]: -- in life imprisonment --

THE COURT: Overruled.

MS. KELLER: -- unless - unless -the jury, in its discretion - it's your job - if you decide, upon the evidence that there's a reason to do so, to grant what's called mercy, but what it means is giving the defendant a possibility of future release. Do not pass the buck.

* * *

(Tr. 862). As indicated, defense counsel's objection was again overruled.

The prosecutor's improper argument, that because West Virginia does not have the death penalty Mills is necessarily getting mercy, misrepresented West Virginia law and unfairly prejudiced the jury's decision whether to recommend mercy. The jury was effectively told that because there is no death penalty in this state, the mercy decision had already been made for them by the legislature. Moreover, the jury likely relied on this argument as it was reinforced by the trial court's overruling of counsel's objections to it. This improper prosecutorial argument denied Mills due process and a fair jury trial. Fourteenth and Sixth Amendments, U.S. Constitution, and Article III, §§ 10, 14, W.Va. Constitution, respectively.

This Court has stated that it will reverse a conviction when the improper remarks by a prosecuting attorney clearly prejudice the accused or result in manifest injustice. Syl. Pt. 5, State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995). The test is whether the remarks "' so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. at 405, 456 S.E.2d at 486 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974)).

The Sugg court further listed four factors that are considered in determining whether a prosecutor's improper comments are so damaging as to require reversal:

(1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Id. at Syl. Pt. 6. Accord State v Stephens, 206 W.Va. 420, 426-427, 525 S.E.2d 301, 307-08 (1999).

Application of the Sugg factors demonstrates that the prosecutor's closing arguments were prejudicial and denied Mills a fair trial. First, the prosecutor's remarks that because West Virginia did not have the death penalty, Mills was necessarily getting mercy (Tr. 860), clearly misled the jury and prejudiced the jury's consideration of mercy and its ultimate decision whether to recommend it. The prosecutor's repeated remarks about West Virginia not having a death penalty were a clear misrepresentation of West Virginia law in that it likely lead the jury to believe, as the prosecutor asserted, that murderers are already receiving mercy because there is no death penalty here; and that any further consideration of mercy is unnecessary and unwarranted. A prosecutor's misstatement of the law in closing argument is reversible error when the defendant is prejudiced. Syl. Pt. 1, State v. Starr, 158 W.Va. 905, 216 S.E.2d 242 (1975); Syl. Pt. 2, State v. Oxier, 175 W.Va. 760, 338 S.E.2d 360 (1985).

The prosecutor's argument there is no death penalty to persuade jurors not to recommend mercy is highly prejudicial as it places the mercy decision in a context or perspective different than that required by West Virginia law. It plants the seed in the jurors' minds that because there is no death penalty, West Virginia law has already extended mercy to murderers. This argument is particularly persuasive with jurors who may favor the death penalty and already view West Virginia's punishment for defendants convicted of murder as too lenient. The prosecutor's

argument improperly solicits jurors to act on an improper view of West Virginia law and deny mercy.

This improper argument is also highly prejudicial because it misleads the jury to believe that someone else, i.e., the legislature, has already made the mercy decision for them so therefore it is wrong for them to recommend mercy. This is very similar to the situation described in Romine v. Head, 253 F.3d 1349 (11th Cir. 2001), where the Court noted that it had previously condemned Georgia prosecutors' use at trials of a Georgia Supreme Court opinion containing a tirade against the granting of mercy in capital cases:

The reason its use is improper, as we have explained, is that invoking the authority of a court, judge, or legal scholar to persuade the jury that mercy can have no place in a capital sentencing proceeding is undeniably wrong. *Drake [v. Kemp]*, 762 F.2d [1449] at 1459; *Wilson [v. Kemp]*, 777 F.2d [621] at 626 (“[W]hen the prosecutor argues that it is mercy itself that is inappropriate; the jury is told that the concept of mercy--the most significant factor which might point toward a choice of life imprisonment--is illegitimate.”); cf. *Brooks [v. Kemp]*, 762 F.2d [1383] at 1410 (“Because the jury is empowered to exercise its discretion in determining punishment, it is wrong for the prosecutor to undermine that discretion by implying that he, or another high authority, has already made the careful decision required.”).

Id. at 1367. The prosecutor's argument that since West Virginia does not have a death penalty Mills was necessarily getting mercy, undermined the jury's discretion to consider mercy by implying that West Virginia law, via the legislature, had already made that decision for them.

Moreover, since the jury is not given any factors to consider, standards to use, or guidelines to follow in making the mercy decision, see State v. Miller, 178 W.Va. 618, 623, 363 S.E.2d 504, 509 (1987), jurors are particularly susceptible to an improper, prejudicial argument that mercy should be denied because West Virginia does not have the death penalty and defendant's convicted of first degree murder are necessarily getting mercy.

Finally, the death penalty is a very emotional issue for many jurors and to allow the prosecutor to even mention it in a case where it is not an issue is very prejudicial. The prosecutor's improper use of this very powerful, emotional argument quite likely motivated some of Mills' jurors to act on those emotions.

In addition, the prejudice to Mills was exacerbated by the trial court's overruling of defense counsel's two objections to the prosecutor's improper remarks regarding the death penalty. (Tr. 860, 862). "While it is possible that the circuit court 'could have cured the error if the Judge had responded to counsel's objection with a strongly-worded corrective statement,' State v. Starr, 158 W.Va. 905, 911, 216 S.E.2d 242, 246 (1975), that did not occur in this case." State v. Hatcher, 211 W.Va. 738, 741, 568 S.E.2d 45, 48 (2002). The trial court's overruling of defense counsel's objections sanctioned the prosecutor's argument and would lead a reasonable juror to believe the argument was valid and appropriate to consider in deciding the mercy issue.

As to the second Sugg factor, the prosecutor's comments regarding West Virginia not having a death penalty were not isolated as they were made twice. (Tr. 860, 862). On the first occasion, the prosecutor combined it with her remarks that Mills was necessarily getting mercy since West Virginia does not have a death penalty. (Tr. 860). Thus, the prosecutor's improper comments "were neither isolated nor fortuitous and can only be viewed as a calculated strategy[.]" State v. Stephens, 206 W.Va. 420, 427, 525 S.E.2d 301, 308 (1999) (quoting State v. Oxier, 175 W.Va. at 764, 338 S.E.2d at 364).

Regarding the third Sugg factor ("absent the remarks, the strength of competent proof introduced to establish the guilt of the accused"), this factor demonstrates that the prosecutor's comments were even more prejudicial to the jury's mercy decision because they were not blunted or rendered harmless by the strength of the State's evidence as they might be if the

prosecutor's comments were addressed to the issue of guilt. Instead, the prosecutor's comments were directed at the issue of mercy, which the jury can recommend for any reason. In addition, both the prosecutor and defense counsel pointed out that mercy was a critical issue for the jury to decide. (Tr. 844, 857).

The last Sugg factor shows the prosecutor's prejudicial comments were deliberately placed before the jury to divert its attention to extraneous matters, i.e., the absence of a death penalty in West Virginia and that defendants like Mills are, as a result, necessarily getting mercy. (Tr. 860).

It is important to recognize that the unfair prejudice to the defendant that is at issue in such cases is not the result of inadvertence or even neglect by the prosecution--such as a witness blurting out improper evidence. Rather, there is a choice by a prosecutor to use an argument that has been universally determined to be improper, in more than 100 years of jurisprudence.

If such an argument by a prosecutor has a substantial likelihood of being considered to be readily curable or harmless, the disincentive to choose to use the tactic will be minimal. In such circumstances, for a trial court or appellate court responding to a prosecutor's use of such an argument, the balance must be struck on the side of deterring the use of this tactic, and insuring that such an argument does not infect the jury that decides a defendant's fate, even if a mistrial is the only available choice.

Stephens, 206 W.Va. at 427 n.6, 525 S.E.2d at 308 n.6.

In Syllabus Points 3 and 4, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977), this Court emphasized that prosecutor's must deal fairly with the accused and that this duty is more elevated in cases that are particularly serious or repugnant in nature:

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.

4. The standard of fair and impartial presentation required of the prosecutor may become more elevated when the offense charged is of a serious or revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant by the very nature of the crime charged.

In State v. Swafford, II, 206 W.Va. 390, 397, 524 S.E.2d 906, 913 (1999), Justice Starcher, in a concurring opinion, further explained the prosecutor's duty to be fair and not raise issues with the jury which it has no right to consider:

* * *

The privilege of addressing the jury should never be taken as a license to state, or to comment upon, or to suggest that the jury draw an inference from, facts not in evidence, or for that matter to raise issues which a jury has no right to consider—issues such as race, religion, economic status, the accused's exercise of a constitutional right, or some other issue designed to encourage jurors to act with an improper motive.

Every citizen must be able to trust their criminal justice system. The public must be assured that the guilty will be punished and that the innocent will be exonerated. But when there is a reasonable question of guilt or innocence, the public should be assured that both sides will get a fair shot to prove their case. However, even the most conscientious prosecutors may be tempted to sneak their thumb onto the scale of justice to make it more certain that the jury reaches a guilty verdict.

* * *

Id. at 398, 524 S.E.2d 914. While the prosecutor's improper argument in this case concerned the issue of mercy rather than guilt or innocence, the same analysis is applicable.

The prosecutor in this first degree murder case, the most serious of criminal cases involving the harshest penalty under West Virginia law, improperly raised the emotional issue of the death penalty twice in closing argument to encourage jurors to improperly consider that issue and deny Mills mercy. This, of course, is not the first time this prosecutor has engaged in prosecutorial misconduct. Mills' conviction at his first trial was reversed due to the same prosecutor's improper violation of Mills' Fifth Amendment privilege by questioning a detective regarding Mills' failure at pretrial proceedings to express remorse and arguing in closing argument that he did not express remorse or sorrow over killing the victim. State v. Mills, 211

W.Va. 532, 566 S.E.2d 891 (2002). See also State v. Wyatt, 198 W.Va. 530, 544, 482 S.E.2d 147, 161 (1996) (same prosecutor's questioning of the defendant regarding her past participation in satanic rituals found to be plain error and the only purpose of this evidence was to prejudice the jury); State v. Leadingham, 190 W.Va. 482, 492, 438 S.E.2d 825, 835 (1993) (defendant argued, *inter alia*, on appeal that the same prosecutor made improper closing argument and the prosecutor was cautioned on remand of case for new trial that "a prosecuting attorney is in a quasi-judicial role and 'is required to avoid the role of partisan, eager to convict,' and must 'set a tone of fairness and impartiality[.]'" Id. at 492, 438 S.E.2d at 836 (quoting Syl. Pt. 1, in part, State v. Critzer, 167 W.Va. 655, 280 S.E.2d 288 (1981))).

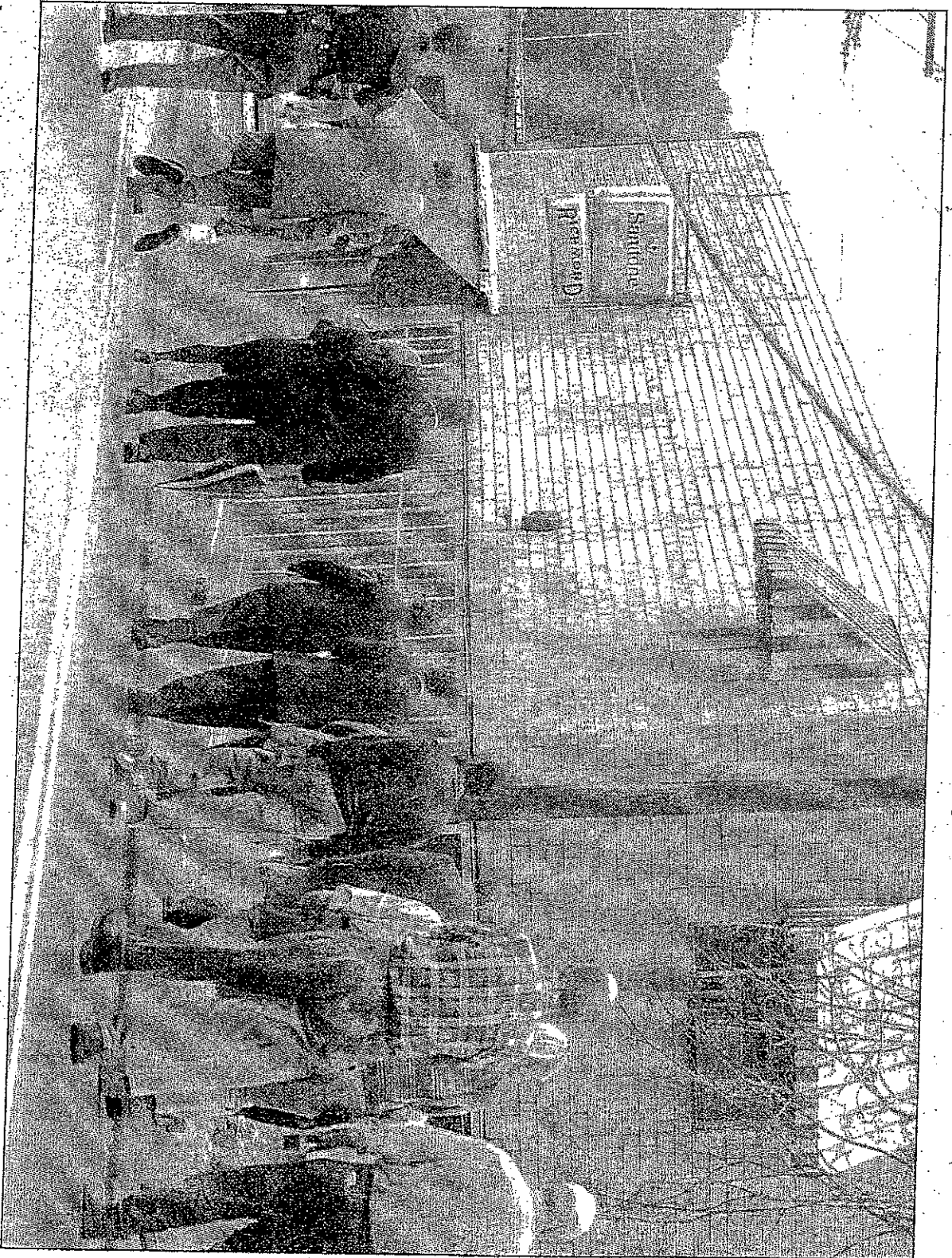
As demonstrated above, the same prosecutor has once again made an improper, prejudicial argument in a first degree murder case, this time to persuade the jury to not recommend mercy. Due to this prosecutorial misconduct, Mills asks this Court to reverse his conviction and fulfill its obligation, as recognized in State v. Guthrie, 194 W.Va. 657, 685, 461 S.E.2d 163, 191 (1995), "to see that the guarantee of a fair trial under Section 10 of Article III of the West Virginia Constitution is honored."

III. The Trial Court Denied Mills His Right To Due Process And A Fair Trial When It Denied His Motion For A Mistrial As A Result Of The Jury View Of The Crime Scene Which Became A "Walking Parade" Where The Press Walked With And Photographed The Jurors.

Mills was prejudiced by the jury view at the crime scene which became a "walking parade" where the news media walked with and photographed the jury. See Defense Exhibit 3 (Tr. 446), reproduced on page 23 below, a photograph of the jurors which appeared in the Beckley Register-Herald newspaper the next day, November 6, 2003. West Virginia Code §56-6-17 (1923) (1997 Repl. Vol.) states that in a felony case, when the jury goes to the crime scene, the judge shall control the proceedings. While the West Virginia Trial Court Rules (TCR) allow the news media to be present at judicial proceedings open to the public, TCR 8.07 requires that both the news media personnel and the equipment be situated in such a way so as not to disrupt the proceedings or call attention to their presence. The trial court did not enforce these rules and the news media did not abide by them, substantially interfering with the jury view. The jury's exposure to and coverage by the press resulted in a strong probability of prejudice to Mills. The trial court's refusal to grant a mistrial denied Mills his state and federal constitutional rights to due process, a fair trial, and a jury trial by a fair and impartial jury. Sixth and Fourteenth Amendments, United States (U.S.) Constitution, and Article III, §§ 10, 14, West Virginia (W.Va.) Constitution, respectively.

Whether to grant a mistrial is discretionary with the trial court, and a mistrial may only be granted where there is a "manifest necessity." State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983). The Williams Court also held that when a defendant seeks a mistrial on the grounds of prejudicial publicity, the defendant must make a showing that the jurors were exposed to the prejudicial publicity. Id. at 304, 305 S.E.2d at 261.

Testimony gets under way in Mills trial



Jurors in the Marvin Mills trial make their way down South Kanawha Street to the scene of the 1999 homicide at Richmond Cleaners.

LEW WHITENER/THE REGISTER-HERALD

Defense admits responsibility, is leaving punishment to jury

The view of the crime scene occurred after the jury was impaneled but prior to opening statements. Out of the presence of the jury, the prosecutor, defense counsel, and the judge discussed the logistics of the jury view, and at that time, the prosecutor informed the court that city police officers had blocked off the area for the convenience of the jury view to prevent distractions. (Tr. 328). Once at the crime scene, the prosecutor asked the jurors to observe certain locations. Twice during the jury view the trial court had to order the press and camera people to get out of the way. (Tr. 356).

Upon arriving back in the courtroom, defense counsel moved for a mistrial based on the press interference with the jury view. He described the scene:

When we got there, the press were waiting for us. As the jury walked around, the members of the press were walking stride-in-stride with the jurors, indistinguishable from the pack of people. They weren't separated in any way.

The jurors were told to look in certain directions, and they saw a cameraman there. There's a problem with that for a number of reasons. One is it interfered with the actual jury view itself. When a jury is on a view, the courtroom travels with them. It's a moving courtroom. It actually interfered with the taking of evidence. That is, they could not see whatever they were supposed to be seeing because they were distracted by the cameraman.

(Tr. 352-53). Counsel asserted that TCR 8.07(b)¹ requires the press' involvement in a case to be unobtrusive and free of distractions. (Tr. 353-54). Counsel then argued:

There is no way that the jury was not free of distractions. There is no way that the jury was not aware they, themselves, were being filmed, and we'll have to take it on faith that that film will not show up on TV, that there is high media coverage in this case. They were told not to watch media coverage, but now they're right in the middle of it themselves.

¹ TCR 8.07(b) provides: A still camera photographer shall position himself or herself in such location in the courtroom as shall be designated by the presiding officer. The photographer shall assume a fixed position within the designated area and shall act so as not to create a disturbance or call attention to himself or herself through further movement. The photographer shall not move about the courtroom.

The atmosphere of a walking parade instead of a controlled courtroom trial experience interfered with the way they think about this case. They know that there is intense interest in everything they do, every step they take apparently. There is no way that the jurors can experience that without it affecting their ability to look at the evidence in this trial where evidence really hasn't been started to be taking yet.

And, under those circumstances, Mr. Mills cannot receive a fair trial.

(Tr. 354-55).

After hearing arguments for both sides, the trial court ruled:

The record should reflect that there were camera individuals avail – or present at the jury view, and that, at least one time, were very close to the jury. The record will reflect that defense counsel objected, and, at that point in time, the Court ordered the camera folks to get back. He objected a second time when a camera person was across the street but in front of the building we were looking at, and I ordered that camera person to get out of the way, too. There has been no showing in my mind of prejudice, no showing of a taint on the jury or to the jury, and I do not believe the presence of camera folk in this courtroom or at the jury scene is sufficient to warrant my granting a mistrial in this case.

(Tr. 356).

When the jury is on a view, the courtroom travels with them. “[T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel, and public observers[.]” Estes v. Texas, 381 U.S. 532, 561, 85 S.Ct. 1628, 1642 (1965) (Warren, C.J., concurring). Therefore, the same rules restricting cameras and the media apply to the jury view, and in this case the media violated the rules by interspersing themselves with the jury and by distracting the jury from their task at hand.

The United States Supreme Court has recognized the damaging effect publicity can have on the jury's impartiality.

Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them.

Estes v. Texas, 381 U.S. 532, 545, 85 S.Ct. 1628, 1634 (1965). The Estes Court further recognized that publicity can adversely affect jurors by distracting them or making them less attentive. Id. at 546, 85 S.Ct. at 1634. While the Court was speaking of the effects of televising jurors, that logic is equally applicable to this case where the jurors must have been aware they were being filmed and photographed by the presence of film crews and photographers. In both situations the jurors readily understand they are the object of intense media interest which can easily distract them. Moreover, in this case the press walked right along with jurors at the jury view. The jurors were undoubtedly very conscious that the press was chronicling literally every step they made, creating an additional distraction.

With all of the media attention to Mills' case surrounding them, the jurors knew there was substantial public interest in the case and their ultimate decision. This situation is actually worse than a jury's exposure to prejudicial publicity as the jury became the object of the publicity. This intense media exposure the jury experienced created a substantial likelihood they not only would be distracted from their responsibilities as jurors but also influenced in their decisions due to the pressure of being in the public eye.

In Commonwealth v. Davis, 431 Pa.Super. 42, 52, 635 A.2d 1062, 1067 (1993), the court discussed the impact of media coverage of a criminal case and noted that the greatest concern is the effect the coverage has on the jury. The Pennsylvania Rules of Criminal Procedure prohibited any type of photographs or broadcasting from the courtroom or its environs. However, when a local radio personality was tried for criminal homicide, there was much community interest. On the second day of trial, the jury was taken to view the alleged crime scene. Id. at 45, 635 A.2d at 1063. During that view, a freelance photographer filmed the jurors departing from their vehicles and receiving instructions from the trial judge. Once the trial judge

realized what the photographer was doing, he ordered that the videotape be confiscated. The news station filed a motion to intervene, which was granted. The Superior Court of Pennsylvania upheld the trial court's decision to confiscate the video. Id.

Citing the United States Supreme Court's decision in Estes v. Texas, the Pennsylvania court noted that even when juries are likely to be sequestered, "the jury will still enter the jury box knowing that they will be subjects of great publicity and attention." Id. at 52, 635 A.2d at 1067 (citing Estes, 381 U.S. at 545, 85 S.Ct. at 1634). The court concluded that "[t]his knowledge of public sentiment, therefore may impact the jurors' decisions." Id. The Court also acknowledged that the presence of the news media may diminish the jury's attentiveness. In Commonwealth v. Davis, one juror was so concerned about the news coverage that he/she refused to leave his/her automobile until the photographer stopped taping. Id. at 53, 635 A.2d at 1067.

The jury in Mills was not sequestered, and by the media presence at the jury view they became acutely aware of the publicity and the community interest in the trial. Once the jury became the object of the press' gross interference with the jury view, the jury could not be free of this major interference by the press which created a manifest necessity for a mistrial.

Not only was there manifest necessity to declare a mistrial, but Mills was able to demonstrate that not only was the jury exposed to prejudicial publicity, they were the subject of it. The West Virginia Trial Court Rules were violated because the media walked with the jurors, and as a result the jurors were not free from distractions or the knowledge they were the subject of intense publicity. They became aware of the intense media interest in the case, and they were acutely aware that they themselves were being photographed and filmed as they attempted to view the crime scene in an objective manner. They also became aware that public attention was

focused on literally every step they took. That knowledge and accompanying pressure on the jury precluded Mills from being tried by a fair and impartial jury.

IV. The Trial Court Denied Mills His Right To A Fair Trial By A Fair And Impartial Jury When It Refused To Individually Voir Dire The Jurors On The Impact Of The Media's Interference With The Jury View After The Jurors' Pictures Were Published On The Front Page Of The Local Newspaper.

The morning after the jury view, the local Beckley newspaper, The Register-Herald, carried a feature story about Mills' trial on the front page (above the crease) with a picture of the jurors at the jury view. See photograph reproduced at page 23 above, Defense Exhibit 3. (Tr. 446). Upon discovering the picture, Mills' counsel requested the court to "voir dire the jurors on the impact of the media interference with the jury view." (Tr. 445). Counsel argued that while the picture was not of the jurors' faces, their identity would still be discernible to people who knew them, and that is exactly what West Virginia Trial Court Rule (TCR) 8.10,² which prohibits the broadcasting or publishing of the identity of any juror, was designed to prevent. (Tr. 446). Counsel further stated, "[t]he newspaper isn't the strongest basis for my motion . . . It's the events of yesterday." (Tr. 446). The trial court ruled that while the attorneys in the case could probably identify the jurors from an article of clothing, that picture did not invoke the requirements of the rule in such a way that identifying a juror would create a problem. (Tr. 448). The trial court erred.

TCR 8.10 prohibits the broadcasting or publishing of any material where a juror's face is shown or the juror's identity is stated or otherwise discernible without prior approval of the presiding judge. The news media did not obtain the trial judge's permission to publish that

² TCR 8.10 provides:

Without prior approval by the presiding officer, no person shall broadcast or publish any written report, film, videotape, photograph, audio tape, or other report of any kind or character, taken or made in or out of the courtroom where the face of a juror is shown or the identity of any juror is stated or is otherwise discernible. Nothing herein shall be interpreted to prohibit a juror from voluntarily disclosing his or her identity to the media, after the completion of such juror's term of service.

photograph on the front page of the local paper. The picture of the back of the jurors is prejudicial in that even the most conscientious juror is exposed to this press and could recognize himself/herself from a newsstand, gas station, snack bar, or any other public place where newspapers are disseminated. Also, there was the likelihood that individuals who knew the jurors would recognize them from the picture. In addition, the newspaper article under the photograph of the jurors contained the prejudicial information that “[a] jury convicted Mills in 2000, but the state Supreme Court overturned the decision and remanded his case back to circuit court due to technicalities.” Defense Exhibit 3 (November 6, 2003, Register-Herald newspaper article).

Given the press’ gross interference with the jury view the previous day, the publication of the jurors’ pictures along with the prejudicial information in the newspaper article created a likely possibility of juror prejudice. Under those circumstances, Mills was entitled to have the jury voir dire.

When the media is involved in a criminal case, this Court has held that “the trial court is obligated to conduct an inquiry if there is any possibility of prejudice.” State v. Williams, 160 W.Va. 19, 24, 230 S.E.2d 742, 746 (1976) (citing The American Bar Association’s Standards Relating to Fair Trial and Free Press § 3.5(f)).

If it is determined that material disseminated during trial raises serious questions of *possible prejudice*, the court may on its own motion or shall upon the motion of either party question each juror, out of the presence of the others, about his exposure to that material. (Emphasis added).

Syl. Pt. 5. State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (quoting State v. Williams, 160 W.Va. at 24, 230 S.E.2d at 746).

In Williams, 172 W.Va. at 305, 305 S.E.2d at 261, a prejudicial newspaper article appeared during trial giving details of a co-defendant's statement implicating the defendant that was never introduced into evidence and the prosecutor's comments that the co-defendant's acquittal indicated the jury believed the defendant committed the crimes. Defense counsel moved for a mistrial, and when that was denied, counsel declined to poll the jury. However, on a motion for new trial, defense counsel raised the issue again, supplying the court with two affidavits from the defendant's brothers saying they saw a juror carrying a copy of the newspaper in which the article appeared. This Court held that because the defendant has the burden of showing jurors were exposed to prejudicial publicity and in many instances it would be impossible to show this actual exposure without making inquiry of the jurors, the proper method of making such a showing is to poll the jury. Id. This Court further held that the appropriate time to raise this issue is during trial so the jurors can be questioned about the prejudicial effects of the publicity; otherwise, this issue is waived. Id., 305 S.E.2d at 262.

In the case at bar, Mills' attorneys brought the newspaper article to the court's attention immediately and requested the court voir dire the jury. The trial erred by denying the defense's motion. Under Williams, the trial court was required to voir dire the jury since there were serious questions of possible prejudice after the newspaper article with the jurors' pictures appeared along with prejudicial information about the case. Moreover, the jury had already been exposed to the damaging effects of publicity by the press' gross interference with the jury while attempting to objectively view the crime scene. Under these circumstances, there was clearly "serious questions of possible prejudice." Williams, 172 W.Va. at 305, 305 S.E.2d at 261.

Mills was denied the opportunity to even determine if any of the jurors in his case saw the newspaper article and what effect it and the jurors' exposure to the intense media coverage

the previous day had on them as they sat and decided his fate. This was error by the trial court because there was a strong possibility of prejudice that could have affected the outcome of the case. Mills was thereby denied his state and federal constitutional due process rights to a fair trial by a fair and impartial jury. Sixth and Fourteenth Amendments, U.S. Constitution, and Article III, §§ 10, 14, W.Va. Constitution, respectively.

V. The Trial Court Erred In Allowing The State To Introduce Prejudicial Testimony Of Mills' Character In Its Case-In-Chief In Violation Of W.Va.R.Evid. 404(a) (1).

In the State's case-in-chief, the prosecutor presented the testimony of Danette Cabe, the victim's daughter, about whether the victim was afraid of Mills.

BY MS. KELLER [prosecutor] (resuming):

Q Do you know, one way or the other, whether or not she [the victim] had ever met this defendant?

A Yes, she had.

Q And just answer yes or no first, okay, and then we'll go further if we need to. Did your mom, after she met the defendant, express her state of mind --

MR. SULLIVAN [defense counsel]: Objection, Your Honor --

* * *

BY MS. KELLER (resuming):

Q I believe your testimony was that your mom did express her state of mind concerning the defendant?

A Yes, she did.

Q And what did she express?

A My mom was very much afraid of Marvin Mills.

* * *

(Tr. 425, 429).

Defense counsel objected to this testimony on the ground it was character evidence that was being introduced to show Mills was a bad person. (Tr. 428). The State responded that it was being offered, not to show Mills' character, but to show the victim's state of mind and rebut Mills' statement that the victim smirked at him, even though at the time this testimony was elicited, the defendant's statement had not been offered into evidence by either party. (Tr. 428-

29). In response, defense counsel made it very clear that Mills was not relying on the defense of provocation based on a smirk, and was willing to agree to a jury instruction stating that. (Tr. 428). The trial court erroneously ruled that the State could rebut the defendant's statement. (Tr. 429).

West Virginia Rule of Evidence (W.Va.R.Evid.) 404(a) prohibits the introduction of character evidence to show conformity therewith. However, W.Va.R.Evid. 404(a)(1) allows the defendant to offer a pertinent character trait, and then allows the prosecutor to rebut the defendant's evidence. In Mills' case, his character was not placed in evidence by the defense, and the defendant's statement was not going to be offered into evidence by the defense, but was being offered by the prosecutor. The State cannot introduce testimony concerning defendant's character to rebut its own evidence.

This issue has been addressed with respect to the victim's character. In State v. Neuman, 179 W.Va. 580, 371 S.E.2d 77 (1988), the defendant was on trial for first degree murder. During the State's case-in-chief, three witnesses testified as to the victim's peaceful character over defense counsel's objection. The State argued that it offered the testimony in anticipation that the defense theory would be one of self-defense. This Court, relying on W.Va.R.Evid. 404(a)(2), held that it was improper for the State to offer evidence of the victim's peacefulness until the defense had first opened the door and reversed the conviction.

When looking at Rule 404(a) concerning character of the defendant and character of the victim, they are worded similarly. Both require the defense to place character into issue prior to allowing the State to rebut with its own character evidence. Therefore, what the State cannot do with respect to the victim's character, the State cannot do with respect to the defendant's character.

Character evidence is so damaging to the defendant that the law “simply closes the whole matter of character, disposition and reputation on the prosecution’s case-in-chief.” Michelson v. United States, 335 U.S. 469, 475, 69 S.Ct. 213, 218 (1948). “The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.” Id. at 475-476, 69 S.Ct. at 218. Accord State v. Richards, 190 W.Va. 299, 302, 438 S.E.2d 331, 334 (1993) (“The prosecution may come forward with evidence rebutting good character only when the accused has called character witnesses to testify to his character.”).

That is exactly what happened in Mills’ case. The State, knowing that it could not present character evidence, but wanting to inflame the jury against Mills, argued that the testimony went to rebut its own evidence. The defense made it very clear that the theory of defense was not one of provocation. Therefore, there was no need for the State to concern itself with rebutting or refuting provocation. This was a calculated move by the State to produce character evidence to bolster its case for not only a guilty verdict on first degree murder, but also for a verdict of life without mercy. This character assignation was prejudicial to Mills because when the jury is instructed on the mercy phase of their decision, there are no standards or guidelines for them to follow. Instead, twelve ordinary citizens make a decision about whether someone should ever be eligible for parole, possibly on a mere whim. By eliciting testimony that the victim was afraid of Mills, the State further prejudiced the jury against Mills. This evidence that Mills was feared by the victim prior to the homicide made it much more likely the jury would deny Mills mercy.

The character evidence presented by the State was very prejudicial and should not have been admitted. The trial court's admission of this evidence violated W.V.R.Evid. 404(a)(1) and denied Mills his right to a fair trial. Sixth and Fourteenth Amendments, U.S. Constitution; Article III, §§ 10, 14, W.Va. Constitution.

RELIEF REQUESTED

For the foregoing reasons, Mills requests this Court to reverse his conviction and sentence and remand his case for a new trial.

Respectfully submitted,

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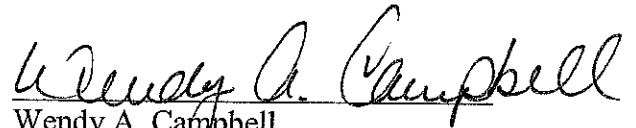


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CERTIFICATE OF SERVICE

I, Wendy A. Campbell, hereby certify that on the 2nd day of May, 2005, I mailed a copy of the foregoing Appellant's Brief to Kristen L. Keller, Chief Deputy Prosecuting Attorney, Raleigh County, P.O. Box 907, Beckley, West Virginia 25801.


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