
NO. 31857

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

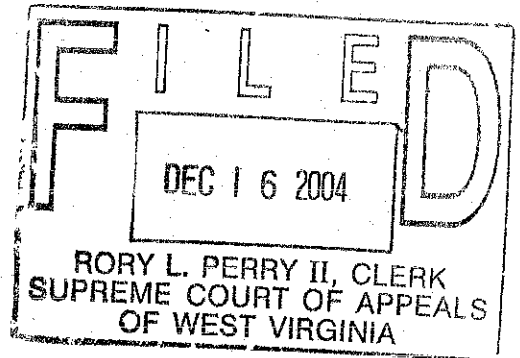
STATE OF WEST VIRGINIA,

Appellee,

v.

HARRY DAVID LEONARD,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

Appellant Harry David Leonard, defendant below (hereafter "Appellant"), was convicted of one count of first degree murder, without a recommendation of mercy, pursuant to West Virginia Code § 61-2-1, following a jury trial occurring between March 17 and March 26, 2003, in the Circuit Court of Jackson County, West Virginia, the Honorable David W. Nibert presiding. By order dated April 21, 2003, the court sentenced the Appellant to life with no possibility of parole. (R. at 635.)¹ This appeal is predicated upon this order and the trial court's refusal to grant the Appellant's Amended Motion for a New Trial, and Amended Motion for Post-Verdict Judgment of Acquittal. (R. at 682, 700-701.)

¹References to the record, as well as pages of the transcripts contained therein, are designated as "R. at ___."

II.

STATEMENT OF FACTS

On the afternoon of February 26, 2002, the Appellant strangled his 78-year-old mother, Geneva Leonard. The incident occurred at Ms. Leonard's home in Millwood, Jackson County, West Virginia. (R. at 1611, 1577, 1586, 1589, 1921.) Ms. Leonard's body was first discovered by Jackson County Deputy Sheriff Roger Rhodes sometime between 2:00 p.m. and 2:14 p.m., lying on her back across the doorway of her bedroom with her feet lying in a hallway running outside of her bedroom door.² (R. at 1616-17, 1684, 2005.) Jackson County Paramedic Peggy Sayre testified that she first viewed Ms. Leonard's body at 2:14 p.m.³ (R. at 2005.) By that time Ms. Leonard's hands were cyanotic, and her back displayed the onset of lividity. Medical Examiner James Kaplan (hereinafter "Dr. Kaplan") estimated the time of death at somewhere between 12:00 and 4:00 p.m.⁴ (R. at 1597-98.) He testified that it took the Appellant between five and ten minutes to strangle his mother. (R. at 1594-95.) Ms. Leonard lost consciousness at some point between five seconds and five minutes after the Appellant first placed his hands around her neck. The more she struggled the longer she

²Jackson County Deputy Sheriffs Al Mick and Roger Rhodes arrived at the Leonard home at approximately 2:00 p.m. (R. at 1706, 1777.) After discovering the Appellant in the home's garage, Deputy Mick sent Deputy Rhodes into the house. (R. at 1669.) Deputy Rhodes came back to the garage shortly thereafter and told Deputy Mick that he had found Ms. Leonard's body. (R. at 1671-72.) At that point, Deputy Mick called the paramedics, who were stationed outside Ms. Leonard's home, to come inside. (*Id.*)

³Paramedic Sayre first arrived at the Leonard home at 2:04 p.m. (R. at 2001.)

⁴Dr. Kaplan performed an autopsy on Ms. Leonard on February 27 at 9:15 A.M. (R. at 1575.) In determining the time of death, Dr. Kaplan testified that he examined non-medical evidence such as investigative notes by Jackson County Medical Examiner Harold Gibson, and medical factors such as changes to Ms. Leonard's body such as rigor mortis and livor mortis. Then based upon the totality of the circumstances arrived at an approximation of Ms. Leonard's time of death. (R. at 1597-98.)

remained conscious. (R. at 1594.) His examination of Ms. Leonard's body revealed bruising around both sides and the nape of her neck, a large bruise on the back of her left shoulder, a bruise on the upper inside surface of her right arm, bruises on her right forearm, and bruises on her left upper arm. (R. at 1582-83.) She also had a bruise on her scalp, which was discovered after Dr. Kaplan removed the top of her skull.

The Appellant, then in his mid-50s, moved into his mother's home in September 1998. (R. at 2494.) He continued to live in his mother's home, off and on, until the day she died. (R. at 2497-2501.) The Appellant described himself as "underemployed," receiving financial assistance from Ms. Leonard from time to time. (R. at 2500.) He characterized his relationship with his mother during the last two months of her life as "absolute turmoil," conceding that he and his mother would argue.⁵ (R. at 2507-08.)

⁵During his direct examination the following enlightening exchange occurred:

Q: During this time period were you drinking?

A: Yes, I was.

Q: What is your usual drink?

A: Most of the time beer. I occasionally would drink vodka.

Q: *What kind of drunk are you?*

A: Melancholy. More of a cry in your beer type of drunk I think.

(R. at 2509; emphasis added.)

Prior to defense counsel's question, the Appellant had not testified that he was a drunk of any sort.

The Appellant spent most of his free time drinking with his friends Cheryl Hysell and David Elkins. (R. at 1813, 2511.) Ms. Hysell described the Appellant as her “drinking buddy” and that they were “pretty good friends.” (R. at 1842.) The Appellant would often spend the night at their home after becoming too intoxicated to drive to his mother’s house. (R. at 1844.) In September of 2001, the Appellant became intimately involved with a married woman, Anita Jo Butcher. (R. at 2513, 2324.) A month later Ms. Butcher left her husband, and she and the Appellant moved in with Ms. Butcher’s mother, Anna Cain. (R. at 2522.) Five weeks later Ms. Butcher moved back in with her husband. (*Id.*) After Ms. Leonard ended the physical part of their relationship, the Appellant became angry. At trial she readily admitted that she still had “feelings for him.” (R. at 2324.)

Ms. Hysell testified that, prior to Ms. Leonard’s death, she heard the Appellant repeatedly refer to his mother as a “bitch” and “mother fucking bitch.” (R. at 1846.) Mr. Elkins testified that he had heard the Appellant state several times that he wanted to kill Ms. Leonard. The Appellant told Mr. Elkins that he resented having to abide by her household rules, and resented it when she eavesdropped on his telephone calls. (R. at 1820.) Ms. Butcher characterized the Appellant’s relationship with his mother as “terrible.” (R. at 2331.) She testified that he resented his mother, and resented having to abide by her house rules. The Appellant also resented the fact that Ms. Leonard would regularly eavesdrop on his calls. (R. at 2329.) Believing that she was nosy and controlling, he would refer to his mother in the same derogatory fashion he used with Ms. Hysell and Mr. Elkins. (*Id.*)

Both Ms. Hysell and Mr. Elkins testified that on one evening in 2002, the Appellant came to their home, became intoxicated, and repeatedly shouted that he intended to kill his mother. (R. at 1821-22.) He referred to “Plan A” and “Plan B.” (R. at 1848.) The Appellant told Ms. Hysell and

his son, Shawn, that Plan A involved murdering his mother, and then killing himself. (R. at 1848, 1862.)⁶

The evening before Ms. Leonard's death the Appellant and Ms. Butcher argued over her decision to return to her husband. This argument ended when Ms. Butcher hung up the telephone. (R. at 2335.) That same evening, the Appellant and his mother argued. During this argument, Ms. Leonard told the Appellant that he would have to move out of her house. (R. at 2052.) The Appellant left the home with his son, and drove to an isolated field. (R. at 2052-53.) He was so drunk that he left the car and began wandering about. Ralph Casto found him near a greenhouse he had built near his home at approximately 10:45.⁷ When Mr. Casto asked him what he was doing there, the Appellant claimed he was lost. (R. at 2121.) Mr. Casto allowed the Appellant to use his telephone to call his mother.⁸ He described the Appellant's part of the conversation as "angry," testifying that the Appellant yelled profanities at his mother. (R. at 2123.) Sometime shortly after this conversation, Mr. Casto dropped the Appellant at his mother's home. While driving to the house, the Appellant said that he and his mother "fought a lot" and that despite all of the work he did around the house, the Appellant did not feel that his mother "respected him."

After returning home the Appellant drafted a letter on his computer. (R. at 2267-72.) The letter stated:

⁶According to Shawn, the Appellant spoke of "Plan A" a few weeks before Ms. Leonard's death. (R. at 2046.)

⁷Mr. Casto had never met the Appellant before that evening.

⁸After the Appellant reached his mother, Mr. Casto spoke with her. (R. at 2124.)

Shawn stole my car tonight, my mother told me I have to leave tomorrow. Shawn was justified in stealing the car. I will leave tomorrow. Damn right I will go away. Now that I am gone maybe you can stop lying, maybe not. Bye Jo.

On the morning of his mother's death the Appellant drafted another letter:

Now wet, covered with mud, lost, kept walking and walking, no idea how long. Lights ahead, a greenhouse complex lit up like a beacon. Talked to one very nice man, let me use his phone.

No, mother wasn't interested in helping, but finally agreed to pick me up at the Marathon in Ripley Wonderful mother was just backing out of the drive when we pulled in Wonderful mom proceeded to tell me she wanted me out tomorrow. Maybe she would just call the Sheriff tonight. Why? Because my car was stolen? What about my car? Shawn was justified in taking it.

He later wrote:

The bitch from hell is up. No Shawn did not steal my car, I gave it to him. Now is the time for me to pack a bag, walk out into the rain. Get out, get out now. What do you think, Jo?⁹ What do you think I will do when confronted with the ultimate evil? Tie a rope around the chimney and bow out graceful over the edge of the roof? If one has to go, shouldn't one try to make the world a better place.

(R. at 2686-90.)

That afternoon, at approximately 12:43 p.m., Ms. Butcher received a telephone call from the Appellant.¹⁰ (R. at 2335.) The Appellant told her that he had to get out of his mother's house. (R. at 1115.) At some point during this conversation, Ms. Leonard began eavesdropping. The Appellant ordered her to "get off the fucking phone."¹¹ (R. at 2337-38.) Ms. Leonard replied by saying that

⁹The Appellant referred to Anita Jo Butcher as "Jo."

¹⁰According to telephone records introduced by the State, this telephone call originated at Ms. Leonard's home at 12:43 p.m. and lasted for 8 minutes and 48 seconds. (R. at 189; R. at 1888.) According to the testimony of AT&T Investigations Manager James Purks, the 12:43 call was the last call made from the Leonard home on February 26, 2002. (R. at 1896.)

¹¹The Appellant described himself as "unsettled, angry" when he discovered that his mother was listening to his conversation. (R. at 2555.)

she was "probably paying for the call," and that she wanted to tell Ms. Butcher the "truth about her son." (R. at 1117.) Ms. Butcher then heard a click, after which she continued to speak with Ms. Leonard. (*Id.*) Shortly after Ms. Butcher heard the click, Ms. Leonard exclaimed, "Oh my god, he's tearing the house down." Ms. Butcher then heard a rumbling sound, after which Ms. Leonard stated, "Oh lord.." The line then went dead. (R. at 2339.) Ms. Butcher called her friend Cheryl Hysell, and asked her to call the police. (R. at 1849.) After Ms. Butcher repeatedly tried to call Ms. Leonard's home, the Appellant answered 20 minutes later and told Ms. Butcher "it's done." (R. at 2342.)

After numerous attempts to contact local law enforcement, Ms. Butcher and Cheryl Hysell were directed to the Jackson County Sheriff's Department. At approximately 1:35 p.m., Jackson County Deputy Sheriff Al Mick was dispatched to Ms. Leonard's home. He arrived at 2:00 p.m. He and Deputy Sheriff Roger Rhodes proceeded to knock on the front door several times, announcing their presence. There was no response. (R. at 1659, 1764.) Both then walked towards the home's attached garage. (R. at 1742.) As they approached the garage, Deputy Rhodes heard a rattling sound coming from inside. (R. at 1661.) Although both Deputies tried to enter the garage, all of the doors were locked. It was not until Deputy Mick retrieved an axe from a Jackson County paramedic, and broke the window of a back garage door, that they were able to investigate (R. at 1663, 1702, 1766.)

Upon entering the garage, Deputy Mick found the Appellant lying under a car, with a garbage bag over both the exhaust pipe and his head. (R. at 1665.) Although the car was running, neither Deputy Mick nor Deputy Rhodes detected a strong presence of exhaust fumes. (R. at 1780.) The Appellant was lying on his back, with the car's bumper just even with his forehead. His legs were bent at the knees, with the feet facing towards the garage door, and his hands were interlaced on his

chest. (R. at 1665, 1770, 1790-91, 1807.) Deputy Mick testified that the Appellant was fully conscious when they found him, at one point stating, "Don't hurt me. I'm not a criminal."¹² (R. at 1668.) Deputy Mick then instructed Deputy Rhodes to go inside the house and search it. (R. at 1669.) Upon entering the home Deputy Rhodes found Ms. Leonard's body lying across the threshold of her bedroom. (R. at 1773.)

After finding the body, Deputy Rhodes went back to the garage to inform Deputy Mick that he had found Ms. Leonard's dead body. (R. at 1671-72.) Deputy Mick then notified two Jackson County EMS workers to follow Deputy Rhodes up the stairs and examine Ms. Leonard. After a brief examination Jackson County Paramedic Peggy Sayre pronounced Ms. Leonard dead at 2:21 p.m. (R. at 2010.)

III.

PROCEDURAL HISTORY

The Appellant was taken into custody on February 26, 2002. After a March 8, 2002, preliminary hearing, in which the Appellant was represented by counsel D.W. Bostic of the Jackson County Public Defender's Office, the magistrate dismissed the matter without prejudice because the State failed to obtain an arrest warrant before taking the Appellant into custody. (*See* Transcript of 3/8/02 Prelim. Hr'g at 718.) The Appellant was re-arrested and arraigned by Magistrate Jackie Casto on the same day. On March 11, 2002, the magistrate court again appointed the Public Defender Corporation of Jackson County as counsel for the Appellant. (R. at 7.) D.W. Bostic again represented the Appellant following a second preliminary hearing on March 13, 2002. (R. at 13.)

¹²The Appellant showed no signs of physical harm. (R. at 1675.)

At the conclusion of this hearing, the Appellant was bound over to the next term of the Jackson County Grand Jury. (*Id.*)

The Grand Jury of Jackson County, sitting in the June Term of 2002, returned a true bill of indictment against the Appellant charging him with first degree murder. (R. at 1.) The Circuit Court of Jackson County, (Niebert, J.), arraigned the Appellant on June 28, 2002. (R. at 50-51.) During this arraignment defense counsel served the State with a copy of its pretrial discovery motion. (R. at 22, 50.) During a second arraignment hearing occurring July 8, 2002, the Appellant moved for a trial within the same term of court. The court set a trial date of October 7, 2002. (R. at 53.) On August 7, 2002, the court, upon Appellant's request, removed Mr. Bostic as defense counsel, appointing Dennis Curry and F. John Oshoway to represent the Appellant. (R. at 122-23, 125.) By order dated September 9, 2002, the court granted the Appellant's motion to continue his trial to the next term of court. (R. at 213.) The court set a trial date of December 3, 2002. The court continued the matter upon motion of the State on December 3. Appellant's trial commenced on March 17, 2003, and ended on March 26. (R. at 230.) Upon instruction and after due deliberation of this matter, the jury found the Appellant guilty of first degree murder.¹³ (R. at 2747.)

On April 19, 2003, the Appellant filed a *pro-se* motion for a new trial, which he subsequently amended on May 15, 2003. (R. at 637, 657.). The court convened a hearing on the Appellant's post-trial motions on June 4, 2003. Appellant was represented by trial counsel. (R. at 763.) The Appellant did not offer any testimony, nor did he introduce any additional evidence. After mature consideration of the Appellant's motion, including arguments of counsel, and a review of the trial transcript, the court denied Appellant's motion by order dated June 17, 2003. (R. at 682-83.)

¹³The court instructed the jury on the elements of first and second degree murder.

IV.

ARGUMENT

A. THE STANDARD OF REVIEW.

A trial court's order denying a defendant's motion for a new trial is entitled to substantial deference on appeal. "The question of whether a new trial should be granted is within the discretion of the trial court and is reviewable only in the case of abuse." *State v. Joseph*, 214 W. Va. 525, 529, 590 S.E.2d 718, 722 (2003) (quoting *State v. Crouch*, 191 W. Va. 272, 275, 445 S.E.2d 213, 216 (1994)).

The standard of review for abuse of discretion is highly deferential. A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court, and a discretionary act or ruling under review is *presumptively correct*, the burden being on the party seeking reversal to demonstrate an abuse of discretion.

5 Am. Jur. 2d, Appellate Review, § 695 (emphasis added).

The trial court's findings of fact supporting this decision may only be reversed when the defendant proves that they are clearly erroneous. *See generally Proudfoot v. Dan's Marine Service*, 210 W. Va. 498, 501, 558 S.E.2d 298, 301 (2001) (discussion of clearly erroneous standard in civil context).

On appeal, the burden of showing that a finding is clearly erroneous, within the meaning of a rule of practice mandating application of the 'clearly erroneous' standard is placed on the appellant. The appellant must show that the findings as a whole are clearly erroneous or even inherently suspect. This burden is a heavy one, particularly where findings are primarily based upon oral testimony and the trial judge has viewed the demeanor and credibility of witnesses. The appellant must point out specifically where findings of the trial court are clearly erroneous.

5 Am. Jur. 2d, Appellate Review, § 671.

Appellant's petition for appeal urges this Court to retry his case. He asks this Court, *inter alia*, to make new factual findings, new credibility findings, and new discretionary legal rulings. In support of his position, Appellant cites to facts previously raised and litigated during his jury trial, facts which were available to the Appellant but not raised during trial for tactical reasons, and his own subjective observations supported by facts not present on the record. He does not explain why this Court should reverse the circuit court's findings; he simply ignores them.

B. THE STATE'S FAILURE TO PRESERVE THE 1:58 P.M. VOICE MAIL DOES NOT JUSTIFY ACQUITTAL.

The Appellant first contends that the trial court erroneously failed to grant his December 3, 2002, Motion to Dismiss based upon the State's failure to preserve a voice mail recording allegedly made by the victim at 1:58 p.m. on February 26, 2002. (R. at 552-55.) It was Appellant's position that evidence potentially proving that the decedent was alive almost an hour after Ms. Butcher overheard her arguing with the Appellant, undermined the State's theory of the case. On December 3, 2002, the court held a hearing on this matter, and after considering arguments of counsel took the matter under advisement. (R. at 928-29, 945.) By order announced from the bench on March 17, 2003, the court denied the Appellant's Motion to Dismiss. (R. at 1228.) The Appellant raised the same issue after the State had rested its case, in a motion for judgment of acquittal. The court again rejected it. (R. at 2395.)

At trial the defense called Anna Cain, Anita Butcher's mother. Ms. Cain testified that she received a voice mail message from Ms. Leonard at about 1:56 p.m., on February 26, 2002, stating, "I meant Shawn." (R. at 2402-03.) Ms. Cain testified that she was familiar with Ms. Leonard's

voice, and that she believed the voice on the message was that of the decedent.¹⁴ (R. at 2402.) Anita Jo Butcher testified that she had given a statement to Deputy A.J. Boggs of the Jackson County Sheriff's Department on February 27, 2002, claiming that she had heard the 1:58 p.m. voice mail, and that she believed it to be the voice of the decedent. (R. at 1126.) During cross-examination Ms. Butcher recanted her previous statement, stating that she no longer believed that the voice mail contained Geneva Leonard's voice. (R. at 2349.)

Jackson County Deputy Sheriff D.J. Martin testified that he drove to Ms. Cain's home in Ohio on February 27, 2002, with Jackson County Sheriff's Lieutenant A.J. Boggs in order to interview Ms. Cain.¹⁵ (R. at 2105, 2254.) The officers first listened to the voice mail message at Ms. Cain's home. Ms. Cain told them that she believed the voice on the message was that of the decedent. Ms. Butcher also stated that she believed the voice to be that of the decedent. (R. at 2105.) Neither Deputy Martin or Lieutenant denied the existence of the message, or the time it was received. They did testify that they could not make out the content of the message and did not immediately record it because they did not have the proper equipment. (R. at 2105, 2254.) Both reviewed the voice mail again on March 13, 2002.¹⁶ (R. at 2106.) According to Deputy Martin, they listened to this tape 15 or 25 times on that day. (*Id.*) The following day Lieutenant Boggs attempted to record the message using a device which connected directly to the telephone's receiver, but was

¹⁴Ms. Cain testified that Ms. Althea Morgan was also present when she first listened to the voice mail. (R. at 2405.) Appellant's private detective took a statement from Ms. Morgan on November 5, 2002, but she was not called by the State or the Defense as a witness. (R. at 2419.)

¹⁵Neither Lieutenant Boggs or Deputy Martin were familiar with Ms. Leonard's voice.

¹⁶Ms. Cain provided Lieutenant Boggs with her voice mail access code, allowing him to listen to the message from his own telephone. (R. at 2255.)

told by Anna Cain that Verizon had purged it pursuant to an internal policy stating that voice messages were only preserved for two weeks. (R. at 2107, 2254-55.)

Under the balancing test adopted by this Court in Syl. Pt. 2 *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995), this Court held:

When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either *West Virginia Rule of Criminal Procedure* 16 or case law; (2) whether the State had any duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach of its duty to preserve evidence a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.

Initially, the Appellant incorrectly argues that the trial court improperly applied the federal "bad faith" test to this issue. *See Arizona v. Youngblood*, 488 U.S. 51 (1988). The most in depth discussion by the trial court on this issue is contained in the transcript of the Appellant's post trial motions hearing.¹⁷

The issue raised by the defendant regarding the loss of the voice mail is certainly, I think using this word is an understatement, unfortunate, that the voice mail was lost or permitted to be automatically erased by the phone company after the expiration of the period of 14 days. However, the evidence is that the State of West Virginia did not intentionally cause the voice mail to be lost or destroyed.

The testimony of the investigating officers is that by the time they made an effort to preserve the voice mail, they then learned that the voice mail had been lost and automatically erased by the telephone company after a period of 14 days

¹⁷The court took Appellant's arguments under advisement after a June 4, 2003 hearing, and only issued his decision after reviewing arguments of counsel and the entire record. (R. at 776.) The court announced its decision nine days later. (R. at 778.)

The jury did have the opportunity to hear testimony as to the voice mail, the investigating officers gave their testimony that there was a voice mail and it was the subject and content of the message as well as other witnesses in the matter indicated a voice mail. The State of West Virginia presented evidence that there could not have been such a voice mail on that day in as much as the telephone records indicated no phone call from the Geneva Leonard residence to this, the number which she called which recorded the voice mail.

(R. at 785-86.)

Although the court did find that the State had not acted in bad faith, it also considered the importance of the missing evidence and the availability of secondary sources. Indeed, had the trial court adopted the federal "bad faith" test, its decision would have been much easier. There is no evidence that the police acted in bad faith in this case.

The State concedes that the evidence in question was in the State's possession. Once Ms. Cain provided Lieutenant Boggs with her access code number, the Lieutenant had unfettered access to the voice mail. But, unlike *Osakalumi*, the State did not have sole possession of the evidence. The Petitioner mistakenly claims that the "State by its various agents" caused the voice mail to be erased. (Appellant's Pet. for Appeal at 11; emphasis added.) In fact, the State played no role in the voice mail's destruction. The voice mail was erased by Verizon, pursuant to a pre-existing policy which the State did not know existed. Indeed, Anna Cain, the owner of the voice mail system, was not aware of Verizon's 14-day policy until after the voice mail message was destroyed. (R. at 2408, 2412, 2414.) There was no evidence that Verizon was an agent of the State, or that Verizon destroyed the voice mail at the behest of the State. Nor was there any evidence suggesting that the State deliberately waited until after the tape was destroyed to try and record it.

The Appellant's claim that he was "foreclosed from examining the voice mail to determine if it was Geneva Leonard's voice," and that "[b]y not preserving the evidence, the appellant was

unable to conduct testing on the message to determine if the voice was that of Geneva Leonard" is without merit. (Appellant's Brief at 15, 16.) If such a test existed, it was incumbent upon the Appellant to proffer this evidence to the court. See *State v. Osakalumi*, 194 W. Va. at 762, 461 S.E.2d at 507-08 ("Defendant presented expert testimony proving that, had the State not destroyed the couch, it would have been possible to more accurately determine the trajectory of the bullet which killed the victim."). Because they did not, the Appellant left the trial court to speculate about the existence of any such test. Indeed, if a conclusive voice print test existed, the State had potentially as much to gain from its results as the Appellant. See generally *Arizona v. Youngblood*, 488 U.S. 51 (1988) (Evidence that has not been examined or tested by government agents is not evidence with apparent exculpatory value.).

The most generally accepted "test" of voice identification consists of playing the tape for a competent witness, and having the witness opine as to the speaker's identity. See W. Va. R. Evid. 702, 901(b)(4). That is exactly what occurred in this case.¹⁸ The defense cross-examined several parties who had heard the tape, presented their own witness who testified that the message was in the decedent's voice, and introduced statements from a private investigator, from these very same witnesses, identifying the decedent's voice as the voice on the tape. Thus, Appellant's contention that "[t]here is no other evidence that can verify that the voice on the voice mail was that of Geneva Leonard" is simply untrue. (Appellant's Brief at 16.)

¹⁸The Appellant may argue that, by destroying the tape, the State precluded him from bringing independent witnesses who could provide lay witness voice identification testimony. Again, the Appellant's position assumes that all of these witnesses would have identified Ms. Leonard's voice as that present on the message. It is also possible that these witnesses would testify that it was not Ms. Leonard's voice. Therefore, once again, the State had an equal interest in preserving the message for trial.

There was nothing to be gained by playing the actual message to the jury. The issue was not so much the substance of the tape, but the identity of the speaker. The jury, not having met Ms. Leonard, would have no independent insight into this issue, and would have relied upon Ms. Cain's and Ms. Butcher's testimony. Although there were no telephone records reflecting a call from Ms. Leonard to Ms. Cain at 1:58 p.m., Appellant's counsel effectively cross-examined the State's two experts as to how Ms. Leonard might have placed this call without a corresponding notation on her telephone records. (R. at 189; R. at 1906-1907, 1972-73.) The effectiveness of this cross-examination was not impaired by the missing voice mail. The court properly assigned the task of witness credibility to the jury, and afforded determinative weight to their factual findings. The presence or absence of the voice mail would have played no part in their credibility determinations. The court's ruling was not an abuse of discretion.

Nor was the tape in any way material to the instant case. The Appellant does not contend, nor does the record suggest, that the tape was *Brady* material. See *Brady v. Maryland*, 373 U.S. 83 (1963). The message had no inherently exculpatory value. Indeed, defense counsel conceded as much at trial. (R. at 923.) Even if the voice on the message was that of Ms. Leonard, the message does not tend to exculpate the Appellant. It does not place him elsewhere at the time of the murder, nor does it place a third party at the Leonard home. Nor did the absence of the 1:58 message prejudice the Appellant's ability to mount a defense. See *State v. Delisle*, 648 A.2d 632, 643 (Vt. 1994) (test under state constitution requires balancing on state conduct vs. prejudice to the defendant); *State v. Morales*, 657 A.2d 585, 595, 596 (Ct. 1995) ("Put simply, a trial court must decide each case depending on its own facts, access the materiality of the unpreserved evidence and the degree of prejudice to the accused, and formulate a remedy that vindicates his or her rights.").

Defense counsel effectively placed the issue before the jury. Ms. Cain unequivocally testified that the voice on the 1:58 p.m. message was that of the decedent. Counsel subjected Deputy Martin and Lieutenant Boggs to extensive cross-examination as to the circumstances surrounding the tape's destruction.

At trial the Appellant claimed that a third party knocked him out at 12:00 p.m., strangled his mother at some point between 1:58 and 2:14 p.m., and ran away after the police arrived at about 2:00. He pointed to his son Shawn Leonard, but the State proved that Shawn was nowhere near the decedent's home between 12:00 and 2:00 p.m. (R. at 1933, 1935-36, 1938-39, 1950-51, 1976-77, 1987.) The Appellant has not presented this Court with a single cogent argument suggesting that the jury would have been more likely to accept his version of the facts over the State's had he been able to play the voice mail message for them.

Dr. Kaplan testified that it took five or ten minutes to asphyxiate Ms. Leonard. (R. at 1594-95.) Both Deputy Mick and Deputy Rhodes testified that they arrived at Ms. Leonard's house at 2:00 p.m. Before gaining entry, they surveyed the surroundings. None observed, or heard, anything unusual. Paramedic Peggy Sayre testified that by 2:14 p.m. Ms. Leonard's body had begun to stiffen, and blood had pooled into her lower back. These are not physical changes that occur immediately upon death. The Appellant was found in a highly unusual position, legs bent at the knee, knees touching together, and fingers interlaced across the front of his chest. It would have been difficult for a third person to place him in this position. The Appellant claimed that he was knocked unconscious at about 12:00 p.m., and that the next thing he remembered was awakening

on the garage floor, under his car.¹⁹ Yet, Deputies Mick and Rhodes testified that there were no exhaust fumes in the garage. Their actions supported their words. Neither ran out of the garage once they entered, nor did they attempt to obtain masks. Deputy Mick remained in the garage while Deputy Rhodes went upstairs to search the home.

Under these circumstances, it cannot be said that the trial court erred in refusing to grant the Appellant's motion to dismiss or for judgment of acquittal.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT EVIDENCE OF PREVIOUS ACTS OF DOMESTIC VIOLENCE BY ANITA BUTCHER'S HUSBAND TO IMPEACH MS. BUTCHER'S CREDIBILITY.

The Appellant next argues that the trial court erred by not allowing the defense to admit evidence of prior acts of domestic abuse perpetrated by Anita Butcher's husband in November 2001 against State witness Anita Jo Butcher in order to impeach her credibility. It is the Appellant's position that Ms. Butcher, who was involved in an extramarital affair with the Appellant, had tailored both her original witness statement and her subsequent testimony in order to minimize the risk that her husband would physically assault her again. There is no dispute that on the date of Ms. Leonard's death, Mr. Butcher was aware that his wife had been intimate with the Appellant. The State also concedes that Ms. Butcher's husband was present on February 27, 2002, when Ms. Butcher gave her statement to Jackson County Sheriff, Lieutenant A.J. Boggs. (R. at 2233.)

The Appellant concedes that this evidence was solely impeachment evidence, having no probative value as to the actual events which transpired on the date of Ms. Leonard's murder. This

¹⁹Thus, according to the Appellant's story, this alleged third party was present at 12:00, assaulted the decedent's son, and then waited an additional two hours before strangling Ms. Leonard.

Court has held that impeachment evidence is not sufficient to support the granting of a new trial. *Cf.* Syl. Pt. 1, in part, *State v. Crouch, supra*, ("[A] new trial will generally be refused when the sole object of the [newly discovered evidence] is to discredit or impeach a witness on the opposite side.") (citations omitted). Also, this Court has held,

The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court . . . in making . . . evidentiary rulings Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.

Syl. Pt. 1, in part, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995).

Although the Appellant argues that the court relied upon an erroneous interpretation of W. Va. R. Evid. 403 to support its decision; in fact, the court ruled that the Appellant's evidence was inadmissible hearsay. (R. at 2538.) Defense counsel attempted to introduce prior statements by Anita Butcher, and a photograph taken by the Appellant depicting her with a black eye, through the Appellant's direct examination. (R. at 2526.) The Appellant had not witnessed these prior assaults, and was solely relying upon out of court statements made by Ms. Butcher to support his testimony. (R. at 2536, 2538.) The court ruled:

It's the ruling of the court that the nature of this inquiry, both asking whether or not Anita Butcher was afraid of her husband and exhibiting why she might be afraid of her husband [by a photograph], are hearsay and I've ruled through hearsay after reviewing Rule 803 of the rules of evidence which relates to exceptions to hearsay certain statements are not hearsay which are also mentioned in Rule 801, it's hearsay. There we go

(R. at 2538.)

The court's decision was not an abuse of discretion. The Appellant's testimony was clearly hearsay. *See* W. Va. R. Evid. 801-804. It was based on an out-of-court statement by a third party,

offered for the truth of the matter asserted--that Ms. Butcher's husband had beaten her. Although the Appellant could have established a proper foundation for the introduction of the picture, since he had no firsthand knowledge as to who had assaulted Ms. Butcher, or why, the photograph was irrelevant. Defense counsel offered no argument regarding possible exceptions to the rule; thus, he has waived those objections. *See State v. Simmons*, 201 W. Va. 235, 239-240, 496 S.E.2d 185, 189-90 (1997) (failure to articulate a specific objection as to the admissibility of evidence acts as a waiver of those objections).

Although not assigned as error in his petition for appeal, in his brief the Appellant also claims that the trial court impermissibly restricted his cross-examination of Anita Butcher regarding specific acts of violence perpetrated by her husband against her. He argues that this evidence would show that Ms. Butcher "may have tailored her statements to the police out of fear that she would be harmed by her husband[.]" (Appellant's Brief at 17-18.) Although the trial court ruled that such questions were beyond the scope of the State's direct examination, the court advised the Appellant that he could present Ms. Butcher's testimony on this issue in his case-in-chief. (R. at 2364.) The Appellant chose not to do so. Moreover, the Appellant has neither argued, nor demonstrated, any reason why detailing this abuse would have been more effective evidence of bias than Ms. Butcher's testimony that she was afraid of her husband. (*See* R. at 2333-34, 2363.) Therefore, there was no error in the trial court's rulings.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE STATE'S MOTION FOR A CONTINUANCE.

The Appellant next argues that he was prejudiced by the court's decision to grant the State's motion for a continuance of the trial from December 2002 to March 2003, the second term of court

following his indictment. *See* Syl. Pt. 2 *State v. Bush*, 163 W. Va. 168, 255 S.E.2d 539 (1979) ("A motion for a 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.").

It is important to note at the outset that the Appellant's assignment of error does not comprehend the one- or three-term speedy trial statutes. *See* W. Va. Code §§ 62-3-1 and 62-3-21.²⁰ The Appellant had originally requested that his trial be held within the same term as his indictment. Then, in August 2002, at his request, the court appointed alternate defense counsel. In September 2002, the Appellant moved to continue his trial to the next term of court, thus waiving his right to a trial within the same term of court as his indictment.²¹ (R. at 213; R. at 1020.) The court, without objection from the state, granted the Appellant's request. (R. at 1027.) Appellant's trial was scheduled for December 3, 2002. (R. at 1028.)

The controlling law on this issue is found in *Barker v. Wingo*, 407 U.S. 514 (1972). There the United States Supreme Court adopted a balancing approach for

²⁰West Virginia Code § 62-3-1 states: "When an indictment is found in any county, against a person for a felony or misdemeanor, the accused, if in custody, . . . shall, unless good cause be shown for a continuance be tried in the same term." *See State ex. rel. Holstein v. Casey*, 164 W. Va. 460, 265 S.E.2d 530 (1980) (trial court may grant continuance beyond term of indictment at the request of either prosecutor or defense.).

West Virginia Code § 62-3-21 states, "Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found." *See State ex. rel. Boso v. Warmuth*, 165 W. Va. 247, 270 S.E.2d 631 (1980) (term in which indictment is returned is not to be counted in favor of discharge under W. Va. Code § 62-3-21).

²¹The Circuit Court of Jackson County is in the Fifth Judicial Circuit. Its terms of court begin on the fourth Tuesdays of February, June and October. *See* W. Va. Code § 51-2-1. The Appellant was indicted on June 25, 2002. (R. at 1.) The Appellant's trial began on March 17, 2003, during the February term of court. Therefore, the State tried him two terms after the term of his indictment.

speedy trial claims in which the conduct of the government and the defendant are weighed against one another on a case-by case basis. Four factors are to be considered in this balancing process: (1) length of delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The Court made it palpably clear in *Barker* that it regarded none of the factors alone as either necessary or a sufficient condition to support a finding that there has been a deprivation of the right to a speedy trial.

State v. Cox, 162 W. Va. 915, 918-19, 253 S.E.2d 517, 519 (1979).

The State moved for a continuance on November 26, 2002. (R. at 894.) The court held a hearing on the State's motion on the previously set trial date of December 3. At this hearing the State explained that the crime lab had not completed its analysis of the physical evidence submitted by the State.²² The State represented to the court that this delay was due to a backlog at the State

²²On February 26, Jackson County Deputy Sheriff Lieutenant A.J. Boggs obtained fingernail clippings and scrapings from the Appellant, and a hair fiber from a candleholder which had been knocked off of the wall in front of the decedent's bedroom. (R. at 2146, 2150, 2236.) After the autopsy Deputy DeWeese obtained samples from Ms. Leonard including left hand fingernails, right hand fingernails, right hand nail scrapings, left hand nail scrapings, pulled head hair, pulled pubic hair, foreign material from bra, slip, house shoes, bra, housecoat, body bag and sexual assault kit. (R. at 2154-55.) On March 6, Deputy DeWeese also obtained the clothes the Appellant was wearing the day he was arrested, including a gray jacket, brown pants, white underwear, a flannel shirt, one pair of brown shoes, two vials of the Appellant's blood, and a sample of his head hair. (R. at 2163-64, 2167.)

On that same day Deputy DeWeese turned over samples of the victim's hair, nail clippings, blood, and the hair fiber taken from the candleholder. He also turned over samples of nail clippings, and two vials of the Appellant's blood. (R. at 2169-2170.) He then transported the Appellant's computer, hair and fiber evidence, and both the Appellant's and victim's clothing to the FBI. (R. at 2170-71.)

The State Police Crime Lab mailed the evidence Deputy DeWeese had dropped off by sealed package on December 6, 2002. On December 11, 2002, Deputy DeWeese sent this evidence to an independent lab named Lab Corp for further testing. He received their results on January 2, 2003. (R. at 2176-2177.)

Lab Corp found no foreign DNA under Ms. Leonard's fingernails. It did find foreign material under the Appellant's nails. (R. at 2192.) The FBI tested the fiber taken from the candleholder against Ms. Leonard's clothing and the Appellant's clothing. The fiber did not match

Crime Lab. It also conceded that it had received a letter from the lab on May 7, 2002, informing them that blood samples submitted by the state were suitable for DNA analysis, and "[a] DNA report is pending further analysis." (R. at 896.) As of the State's motion to continue, the lab had not returned the results of the testing. The Appellant objected to the State's motion on the grounds of negligence and delay. After consideration of the arguments of counsel, the court granted the State's motion to continue and rescheduled the trial for March 17, 2003. The delay attributable to the State was three months.

In support of its ruling the trial court stated:

While I really don't feel that the laboratory can justify sitting on this evidence for this extended period of time, on the other hand, I think it would be foolish for the Court to insist this case be tried now when evidence which may be critical to the case could be forthcoming within two or three weeks.

I could visualize a scenario the case is tried, there's a conviction and you come back with evidence that would be exculpatory and as we all know from observations of this DNA litigation that's going on now, it's not automatic setting aside the verdict and moving on to a new trial or dismissal or acquittal or whatever. It could result in years of litigation.

(R. at 905.)

The court's reasoning was sound. There was good cause to grant the continuance. Indeed, had the trial resulted in a conviction, and subsequent DNA testing revealed the Appellant's innocence, counsel for the defense would have no basis for requesting a new trial. There is no evidence that the State intentionally delayed the Appellant's trial in order to gain a tactical advantage. Indeed, the continuance actually benefitted the Appellant. As the DNA testing was

either material. (R. at 2237.) The State Police Crime Lab stated that the hair samples were not suitable for DNA testing. (R. at 2239.)

inconclusive, the Appellant had another ground for reasonable doubt. At the time the court granted the State's request neither the State nor the court were aware of the actual outcome of the lab's testing. Defense counsel, seeking to hedge his bets, tried to have it both ways. Having no facts with which to establish prejudice, or deliberate misconduct by the State, defense counsel put a lengthy objection on the record, accepted the inevitable outcome, and awaited the results of the testing. The trial was delayed for exactly three months.²³

Either way, the defense wins. If the testing eliminated the Appellant, defense counsel's job was probably over. If the testing inculpated the Appellant, defense counsel would argue that the court's decision to continue the trial was a violation of his right to a speedy trial. As it turned out, the Appellant ended up on a middle ground. The physical evidence neither implicated him or exonerated him. The Appellant put this evidence to good use at trial. (R. at 2192-93, 2286-90, 2711-12, 2719.) He now alleges prejudice because the court provided him with the opportunity to do so. His claim is without merit.

Because the Appellant was not prejudiced by the continuance, the trial court's ruling should be affirmed.

E. THE TRIAL COURT'S DECISION NOT TO INSTRUCT THE JURY ON VOLUNTARY MANSLAUGHTER DID NOT CONSTITUTE AN ABUSE OF DISCRETION.

The question of whether a defendant is entitled to a lesser included offense involves a two part inquiry. The first inquiry is a legal one having to do with whether the lesser included offense is by virtue of its legal elements or definition included in

²³Part of this delay was caused by the respective schedules of the court and counsel.

the greater offense. The second inquiry is a factual one which involves a determination of whether there is evidence which would tend to prove such a lesser included offense.

Syl. Pt. 1, *State v. Jones*, 174 W. Va. 811, 364 S.E.2d 65 (1985).

"When called upon to review a trial court's rejection or acceptance of a specific jury instruction, this Court generally applies an abuse of discretion standard." *State v. McGuire*, 200 W. Va. 823, 828, 490 S.E.2d 912, 917 (1997) (citations omitted).

The State concedes that voluntary manslaughter is a lesser included offense of first degree murder. *State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E.2d 162, 177 (1995). Thus, there is no need for this Court to concern itself with the first of "legal" prong of the *Jones* test. The second prong is wholly factual:

In making this determination, we look only to the evidence concerning the element of murder that distinguishes it from involuntary manslaughter In Syllabus Point 5 of *State v. Demastus*, 165 W. Va. 572, 270 S.E.2d 649 (1980), this Court stated that "[j]ury instructions on possible guilty verdicts must only include those crimes for which substantial evidence has been presented upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt." The dispositive issue, therefore, is whether substantial evidence was presented below upon which a jury might have found the defendant guilty of in voluntary manslaughter.

State v. Davis, 205 W. Va. 569, 585, 519 S.E.2d 852, 868 (1999).

It is the presence of malice which differentiates murder from voluntary manslaughter. Syl. Pt. 3, *State v. McGuire*, 200 W. Va. 823, 490 S.E.2d 912 (1997) ("Gross provocation and heat of passion are not essential elements of voluntary manslaughter, and, therefore, they need not be proven by evidence beyond a reasonable doubt. It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter."); see Syl. Pt. 3, *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982) ("Where there has been an unlawful homicide by shooting and the State

produces sufficient evidence of malice or a specific intent to kill, and was deliberate and premeditated, this is sufficient to support a conviction of first degree murder.); *State v. Slonaker*, 167 W. Va. 97, 280 S.E.2d 212 (1981) (Second-degree murder is the unlawful killing of another with malice).

Regarding the definition of malice, the trial court instructed the jury:

The word malice, as used in these instructions, is used in a technical sense. It may be either expressed or implied and it includes not only anger, hatred or revenge, but other unjustifiable motives. It may be inferred or implied from all of the other evidence in this case, if you find such inference is reasonable from the facts and circumstances in this case It may be inferred by any deliberate and cruel act done by the defendant Harry David Leonard without any reasonable provocation²⁴ or excuse however sudden.

Malice appears when the circumstances show such a reckless disregard for human life as necessarily to include a formed design against the life of a person slain. Malice is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent under circumstances as carried in the plain indication of a heart heedless of social duty and fatally bent on mischief. It is not essential that the malice exist for any particular length of time before the killing. It is sufficient if malice springs into the mind at any time before the killing.

(R. at 2661-62.)

The Appellant contends that as a result of his 78-year-old mother's eavesdropping "the jury could infer that the defendant descended into an uncontrolled fury and further, may have been subject to uncontrolled impulses which caused him to commit a crime of passion." (Appellant's Brief at 24.) He further characterizes Ms. Leonard's eavesdropping as an act of "gross provocation." This position is wholly without merit. A single incident of eavesdropping is not sufficient to provoke a

²⁴See LaFave, *Substantive Criminal Law*, § 15.2(b)(10) at 504 (2d ed. 2003) ("reasonable provocation' is provocation which causes a reasonable man to lose his normal self-control; and, although a reasonable man who had lost control over himself would not kill, yet his homicidal reaction to the provocation is at least understandable").

reasonable person to kill. There was no evidence that the decedent's conduct actually provoked the Appellant's murderous conduct, it simply tapped into a well of pre-existing resentment. The Appellant reacted violently to one in a series of ongoing incidents. Within the context of his entire relationship with his mother, the Appellant's conduct demonstrates malice and premeditation, not a sudden loss of control. *See State v. Bongalis*, 180 W. Va. 584, 588, 378 S.E.2d 449, 453 (1989) (malice may be inferred "from any deliberate and cruel act done by the defendant without any reasonable provocation") (citation omitted).

Before strangling her, the Appellant spoke to several witnesses about his intentions, referring to his plan to strangle his mother as "Plan A." He threatened his mother's life on several occasions. Syl. Pt. 3, *State v. Flint*, 142 W. Va. 509, 96 S.E.2d 677 (1957) (evidence of threats by defendant against life of decedent admissible to prove intent). All of the witnesses, including the Appellant, characterized his relationship with his mother as antagonistic. All testified that the Appellant resented the fact that his mother would not allow him to smoke in the house, and that she eavesdropped on his telephone conversations. During a search of the home shortly after the Appellant's arrest, the State found a letter on the Appellant's computer monitor describing Ms. Leonard as "the bitch from hell." This letter ended with the following:

What do you think I would do when confronted by the ultimate evil. Tie a rope around the chimney and bow out gracefully over the edge of the roof. If one has to go, shouldn't one try to make the world a better place.

(R. at 2315-16, 2271.) Lieutenant Boggs transcribed the contents of the letter, and videotaped it.

(R. at 2271.)

At trial the Appellant denied murdering his mother, instead blaming her death on a third party. Against the advice of counsel, he refused to accept a voluntary manslaughter instruction. (R.

at 2620.) After a lengthy colloquy with the court, and further consultation with his counsel, he maintained his position. (R. at 2632.) He now seeks to reverse his conviction because the trial court failed to instruct the jury on a theory which he not only failed to ask for, but flat out rejected. Had the court instructed the jury on the elements of voluntary manslaughter, and the Appellant been convicted of the lesser included offense, he would be before this Court claiming that this instruction seriously undermined his defense strategy. *See State v. Sapp*, 207 W. Va. 606, 615, 535 S.E.2d 205, 614-15 (2000) (*per curiam*) ("The defendant's defense at trial was that he did not murder [the victim] but that Brian White did."). *See also State v. Davis*, 205 W. Va. at 585, 519 S.E.2d at 868-69 ("In addition, the defendant denied all involvement in murdering the victim.").

In *State v. Mullens*, 181 W. Va. 415, 421, 383 S.E.2d 47, 53 (1989), this Court held:

The appellants in this case, however, were not entitled to a lesser included offense instruction We have held that "[w]here 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. . . ." As stated in section III of this opinion, the evidence in this case established first degree arson. There is no insufficiency on the necessary elements of the greater offense, first degree arson in this case, which are different from those of the lesser included offense, second degree arson. There was no evidence presented at trial that sought to prove that the burned building was not a dwelling. Moreover, as stated previously in this opinion, the evidence overwhelmingly supported the first degree arson conviction because of the apartment units located within the burned building.

Thus, there is no evidentiary dispute on the elements of the greater or lesser included offense. The appellants deny committing the offense at all and claim to have been somewhere else when the burning occurred.

See also Gilson v. State, 8 P.3d 883, 918 (Ok. 2000) ("Further, this Court has held that a defendant is not entitled to instructions on any lesser included offense when he defends against the charge by proclaiming his innocence."); *United States v. Zapata-Tamallo*, 833 F.2d 25, 28-29 (2d Cir. 1987)

("When a defendant relies on an exculpatory defense that, if believed, would lead to acquittals on both the greater and lesser charges, it is not an abuse of discretion to refuse to instruct the jury on the lesser included offense.").

As the Appellant does not contest the sufficiency of the evidence supporting the jury's verdict, there is no need for this Court to address the sufficiency issue on appeal. *See* Syl. Pt. 3, *State v. Guthrie, supra*. The Appellant concedes that a reasonable juror could have found malice, premeditation and deliberation, none being elements of voluntary manslaughter, beyond a reasonable doubt. As there is no dispute as to the sufficiency of the evidence supporting the different elements of the greater offense, pursuant to *Mullens*, there was no need for the court to instruct the jury on the lesser-included offense. *See Mullens*, 181 W. Va. at 422, 387 S.E.2d at 53.

V.

CONCLUSION

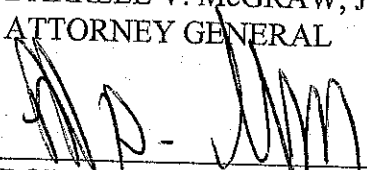
For the foregoing reasons, the judgment of the Circuit Court of Jackson County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By Counsel

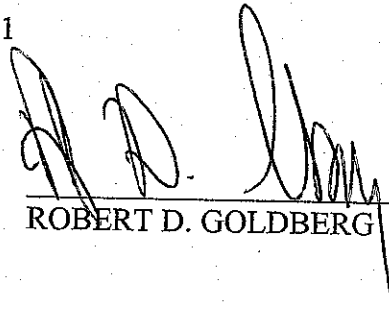
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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee State of West Virginia, upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this ¹⁴5 day of December, 2004, addressed as follows:

To: Eric J. Holmes, Esq.
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ROBERT D. GOLDBERG