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NO. 32786

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

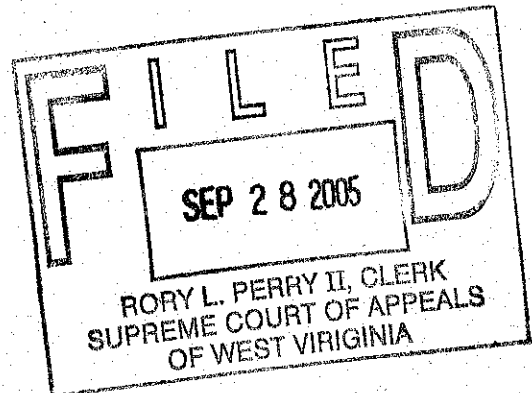
STATE OF WEST VIRGINIA,

*Appellee,*

v.

CHRISTOPHER FRYE,

*Appellant.*



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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

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

On May 10, 2004, the Grand Jury for Logan County, West Virginia, returned an indictment charging Christopher Frye, defendant below (hereinafter "Appellant"), with one count of breaking and entering, one count of grand larceny, and one count of receiving stolen property. (R. 8-10.) On August 17, 2004, a petit jury convicted the Appellant of one count of grand larceny under West Virginia Code § 61-3-13(a), which provides, in part, that "[i]f any person commits larceny of goods or chattels of the value of \$1,000.00 or more, such person is guilty of a felony designated grand larceny . . . ." (R. 747.) The conviction followed a two-day jury trial in the Circuit Court of Logan County, West Virginia, the Honorable Roger Perry presiding.

By amended sentencing order entered October 27, 2004, the court sentenced the Appellant to an indeterminate sentence of 1-10 years in the penitentiary. (R. 481.) It is from this judgment that the Appellant now appeals.

## II.

### STATEMENT OF FACTS

On July 14, 2003, the Appellant stole four factory custom chrome wheels from James Frye Sr.'s<sup>1</sup> (hereinafter "victim") 1994 Jeep Grand Cherokee, a Campbell Hausfeld water pressure washer, and a 1999 yellow Honda four-wheel recreational vehicle belonging to the victim's brother, Randy Frye Sr.<sup>2</sup> (R. 52; Trial Tr. Vol. I 45, 46-47, 48, 50-51, 53, 98, 101-103.) The Appellant conceded that the value of these items exceeded \$1,000.

The victim first discovered that his property was missing the morning of the 15th, at which point he immediately called the State Police. West Virginia State Trooper Pursley was the first officer to arrive at the victim's home. Trooper Pursley testified that he found a footprint and some cigarette butts at the scene, but could not link them to the Appellant. (Trial Tr. Vol. I 58-59.) After canvassing the victim's neighborhood, he identified next-door neighbor Jason Lambert as a potential suspect. (Trial Tr. Vol. I 59.) Upon further investigation, Trooper Pursley found that Mr. Lambert had an alibi and removed him from the list of suspects. (Trial Tr. Vol. I 60.) The State took no further action October.

In early October 2003, co-defendant Robert Fields (hereinafter "co-defendant" or "Mr. Fields") approached Omar resident Everett Borders. Earlier, Mr. Borders had spread the word that

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<sup>1</sup>The Appellant is not related to the victim.

<sup>2</sup>Randy Frye Sr. stored his four wheeler in his brother's garage.

he was looking for spare parts for his four wheeler. (Trial Tr. Vol. I 63.) According to Mr. Borders the co-defendant escorted him to the Appellant's house where he observed several spare parts from a four wheeler. (Trial Tr. Vol. I 63, 65, 66.) After looking through the parts, Mr. Borders said he was not interested. Sometime after this meeting, Mr. Borders spoke with the Appellant again. At this meeting the Appellant told Mr. Borders that the parts in his residence came from a "State Police's four wheel drive."<sup>3</sup> (Trial Tr. Vol. I 67.)

Mr. Borders then told State Trooper R. L. Frye that the parts to his father's stolen four wheeler were at the Appellant's house. (Trial Tr. Vol. I 68-69.) Trooper Frye drove to Appellant's home. After briefly speaking with the Appellant and his then-girlfriend Tammy Smith, the Appellant voluntarily led Trooper Frye to the stolen parts. (Trial Tr. Vol. I 84-85.)

The Appellant claimed that he accepted the stolen parts from the co-defendant, and that he had taken tires from the stolen four wheeler and mounted them on his own four wheeler. (Trial Tr. Vol. I 87.) At trial, the Appellant conceded that the wheels recently mounted on his girlfriend's jeep were the same wheels stolen from the victim. (Trial Tr. Vol. I 88.)

Later that evening, the Appellant and Ms. Smith voluntarily accompanied Trooper Frye to the Gilbert State Trooper Detachment.<sup>4</sup> (Trial Tr. Vol. I 114.) The Appellant stipulated that his resulting statement was voluntary. (Trial Tr. Vol. I 117.) In his statement he claimed that on the evening of the incident the co-defendant came to him with parts from a stolen four wheeler. (*Id.*) He asked the Appellant if he could store them at his house. Knowing the parts were stolen, the

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<sup>3</sup>The stolen four wheeler belonged to Randy Frye, Sr. Mr. Borders knew that Mr. Frye's son, R. L. Frye, was a West Virginia State Trooper.

<sup>4</sup>Although the Appellant provided the State with a written statement, it was not designated as part of the record on Appeal.

Appellant offered to buy the wheels. Mr. Fields offered to give them to the Appellant if he could keep the rest of the parts at his house. (Trial Tr. Vol. I 118.) Approximately two days later Mr. Fields returned to the Appellant's house with the stolen jeep wheels. (*Id.*) The Appellant, knowing the wheels were stolen, placed them on Ms. Smith's jeep. (*Id.*) After providing his statement, Trooper Frye sent the Appellant home.

Trooper Frye again contacted Mr. Fields. (Trial Tr. Vol. I 120.) Not surprisingly, the co-defendant voluntarily told him that he had not participated in the theft of the four wheeler, but was present when the Appellant stole the wheels off of the victim's truck. (Trial Tr. Vol. I 106, 111-12.) At trial he testified that sometime in the evening of July 14, 2003, he and the Appellant drove Tammy Smith's jeep to the victim's home in Chauncey.<sup>5</sup> The Appellant removed the wheels from the victim's jeep, and stored them in his girlfriend's jeep. (Trial Tr. Vol. I 98, 100-01.) The Appellant then climbed on top of the victim's garage, unscrewed a motion-sensitive lightbulb, and pushed Randy Frye Sr.'s yellow four wheeler out onto his driveway.<sup>6</sup> (Trial Tr. Vol. I 101.) After seeing the Appellant push the four wheeler from the garage, Mr. Fields drove Ms. Smith's jeep, loaded with the stolen tires, back to the Appellant's home in Mud Fork. (Trial Tr. Vol. I 103.) Later that evening he saw the Appellant drive the stolen four wheeler into the Appellant's garage. (*Id.*)

Armed with this new information, that same day Trooper Frye asked Mr. Fields to return to the Gilbert Detachment. When the Trooper asked the Appellant to provide a responsive written statement, he refused. (Trial Tr. Vol. I 121.) He did verbally admit to the Trooper that he had been

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<sup>5</sup>Mr. Fields had no prior relationship with Ms. Fields.

<sup>6</sup>The victim confirmed that his motion sensitive lighting had been tampered with after he had gone to bed. (Trial Tr. Vol. I 52.)

at the victim's house at the time of the theft, but claimed that Mr. Fields was responsible for stealing the victim's property<sup>7</sup> and that he had been a mere bystander. (Trial Tr. Vol. I 122.)

To bolster his position at trial, the Appellant called his father, Ocil Frye, and his mother, Emma Jean Frye, as alibi witnesses. Mr. Frye testified that on the evening of the incident he went to bed at approximately 11:00.<sup>8</sup> Immediately before going into his bedroom he saw the Appellant on his living room couch. (Trial Tr. Vol. II. 15.) He awoke twice during the early morning hours of the next day, leaving his bedroom at 1:30 and 3:30, and then again at 6:00 to prepare for work. Each time he saw the Appellant lying on his couch. (Trial Tr. Vol. II. 16.) Mr. Frye woke up at 6:00 the next morning, finding his son still lying on the living room couch. (Trial Tr. Vol. II. 17.)

Ms. Frye testified that she went to bed some time between 10:30 and 11:00. (Trial Tr. Vol. II. 21.) Before she went into her bedroom she observed her son sitting on the couch watching television. (*Id.*) The Appellant did not raise this alibi defense until trial. Although questioned twice by the police, the Appellant previously claimed that he was home sleeping the evening of the theft. Nor did he suggest that Trooper Frye talk to his parents. (Trial Tr. Vol II 41.)

The Appellant also called his neighbor, Shirley Cox. (Trial Tr. Vol II. 4) Ms. Cox testified that on the day before her vacation (September 10, 2003), the co-defendant came to her house on a four wheeler and asked her if she wanted to buy it. Mr Fields then told her he had stolen it. Immediately after making this statement, he laughed and said, "No, I didn't." (Trial Tr. Vol. II. 5.)

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<sup>7</sup>In order to take the tires, someone had to jack up the truck.

<sup>8</sup>Mr. Frye was able to recall certain details because his birthday was the following day. (Trial Tr. Vol II. 14.)

On cross-examination Ms. Cox conceded that counsel for the State had called her two days before her testimony. At that time she denied having any relevant information. (Trial Tr. Vol. II. 8.)

### III.

#### STANDARD OF REVIEW

“With regard to the Appellant’s assertion of the claim of ineffective assistance of counsel we explained the following standard of review in *State ex. rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995), ‘[a]n ineffective assistance of counsel claim presents a mixed question of law and fact; we review the circuit court’s findings of historical fact for clear error and its legal conclusions *de novo*.’ 195 W. Va. at 320, 465 S.E.2d at 422.” *State v. Hinchman*, 214 W. Va. 624, 620, 591 S.E.2d 182, 187 (2003).

### IV.

#### ARGUMENT

##### **A. THE APPELLANT’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT RIPE FOR REVIEW.**

Assignments of error alleging ineffective assistance of counsel are, by necessity, fact intensive. In reviewing an attorney’s performance under the two-pronged test first articulated in *Strickland v. Washington*, 466 U.S. 668, 690 (1984), this Court must first judge the reasonableness of counsel’s conduct within the context of the facts of the case, viewed at the time of the conduct, without the benefit of hindsight. There exists a “strong presumption” that counsel rendered reasonably effective assistance, and counsel is afforded “wide latitude” in making tactical decisions. *Id.* at 689. The Court must also find that counsel’s conduct prejudiced the appellant’s defense. In order to establish prejudice the appellant must prove “a reasonable probability that, but for counsel’s

unprofessional errors, the result of the proceeding would have been different.” *Strickland* at 691. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. An appellate court need not address each issue independently. Once the Court finds that the Appellant has failed to meet his burden of proof on either prong, it need inquire no further.

Oftentimes the most relevant facts, such as trial counsel’s tactical decisions, the atmosphere in the courtroom, the witnesses’s demeanor, the jury’s demeanor, or the existence of evidence not presented to the jury, are not found in the trial transcript. Taking this into account, this Court has repeatedly held that claims of ineffective assistance of counsel generally are not ripe for appellate review. *State v. Miller*, 194 W. Va. 3, 12, 459 S.E.2d 114, 125 (1995). In Syl. pt. 10, *State v. Triplett*, 187 W. Va. 760, 762-763, 421 S.E.2d 511, 513-514 (1992), this Court ruled:

It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas proceeding before a lower court, and may appeal is such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.

In the case at bar, the Appellant argues *per se* rules of ineffectiveness wholly unsupported by legal or factual citation.<sup>9</sup> He merely recites the *Strickland* test, and then asks this Court to

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<sup>9</sup>Under certain circumstances an appellate court may presume prejudice without subjecting counsel’s conduct to an individualized inquiry. *See United States v. Cronin*, 466 U.S. 648, 658-662 (1984) (“[t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.”). The Court has ruled that a complete denial of counsel, or the denial of counsel at a critical stage constitute *per se* violations of a defendant’s right to counsel. *Id.* at 659. Circumstances in which the court has placed counsel in an almost impossible situation, such as appointing counsel on the day of trial, may also fall under the *Cronin* presumption. *Id.* at 659-60.

“If counsel entirely fails to subject the prosecutions case to meaningful adversarial testing, than there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *Id.* at 659. *See Moss v. Hofbauer*, 286 F.3d 851, 860-862 (6th Cir. 2002)

speculate, solely from the results of the trial, that counsel's conduct could not have been strategic.<sup>10</sup> This is contrary to the law. *See United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987) (Decisions whether to engage in cross-examination, and if so to what extent and in what manner, are strategic in nature and if reasonably made will not support an ineffective assistance of counsel claim.); *Moss v. Hofbauer*, 286 F.3d 851, 864 (6th Cir. 2002) (Strategic decision not to cross-examine witness after review of the relevant law and facts is "virtually unchallengeable.") (quoting *Strickland*, 466 U.S. at 690). As this issue was never presented to the trial court, there is no legal judgment to appeal. *See W. Va. R. Crim. P. 37(a)* (An appellant may only appeal a "judgment, decree or order" of the circuit court.). Also, this Court has yet to hear from defense counsel. Without his testimony the Appellant's supporting facts are insufficient as a matter of law. *State v. Hutchinson*, 215 W. Va. 313, 599 S.E.2d 736 (2004) (*per curiam*) ("Indeed, intelligent

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(and cases cited therein). This exception is a narrow one. *See Dows v. Wood*, 211 F.3d 480, 485 (9th Cir. 2000) (State court's refusal to presume prejudice from fact that defense counsel may have been suffering from Alzheimer's disease at the time of trial, instead focusing on counsel's performance, consistent with *Cronic*.).

In the case at bar defense counsel was present and attentive during the Appellant's trial. He conducted discovery, presented an effective closing argument to the jury, investigated the case's background leading to one witness--Ms. Cox--who testified that the Appellant's co-defendant had admitted to stealing the four wheeler, and two alibi witnesses who placed him at his house on the evening of the theft. Defense counsel's direct examination of the Appellant's parents was particularly effective. He addressed the issue of bias, instead of leaving it to the State. By getting each witness to concede the obvious fact that neither could have observed the Appellant for the entire night he effectively bolstered their credibility, creating the feeling that these were responsible members of the community who had come to testify truthfully, and not to protect their son. Neither witness was hostile or defensive on cross-examination. Thus, it cannot be said that counsel's performance "was so inadequate that, in effect, no assistance of counsel [was] provided." *Cronic* at 654 n.11.

<sup>10</sup>The Appellant claims that counsel failed to: (1) cross-examine the state's witnesses; (2) failed to properly bolster his alibi defense by establishing the time of the crime; (3) failed to move for a directed verdict at the close of the State's case, and at the close of trial; (4) failed to adequately conduct *voir dire*.

review is rendered impossible because the most significant witness, the trial attorney, has not been given the opportunity to explain the motive and reason behind his or her trial behavior.”) (*quoting Miller*, 194 W. Va. at 12-13, 459 S.E.2d at 125-126); *Dows v. Wood*, 211 F.3d at 487 (Defense counsel’s failure to cross examine majority of State’s witnesses did not constitute ineffective assistance of counsel, “Moreover counsel’s tactical decisions at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference, and must similarly meet only objectively reasonable standards.”).

The Appellant contends that trial counsel should have cross-examined the State’s witnesses. While at first blush this may seem reasonable, the Appellant is in no position to tell this Court what specific facts defense counsel would have elicited, from which witness, how he would have elicited these facts, how these facts would have been relevant to the case at bar, or how the Appellant was prejudiced by these facts not coming to light. There is no post-trial record suggesting that any one of the State’s witnesses possessed exculpatory evidence which he or she would have divulged if asked.

Appellant also argues that defense counsel’s failure to cross-examine these witnesses somehow created an impression in the jury’s mind that he believed his client to be guilty. (Appellant’s Brief at 7.) This is speculation based on generalizations--not facts. The facts reveal that the Appellant challenged the State’s case during his case-in-chief, and by an effective closing argument, in which he attacked the State’s witnesses.

The dissent’s position that cross-examination might have led to a different outcome at trial is simply speculative because [the defendant] did not provide any evidence that [the witness] would have testified any differently even if [defense counsel] had cross-examined him. We believe that the dissent’s reliance upon hypotheticals

contradicts *Strickland's* admonition against second-guessing the performance of counsel. *Strickland*, 466 U.S. at 689. . . .

. . . Moreover, we disagree with the dissent's implication that the only way to discredit a witness is through cross-examination. Finally, we believe that the dissent fails to take into account the potential risk of having the damaging testimony repeated during cross examination, a risk which could easily outweigh the possibility of identifying weaknesses in the witnesses' account.

*Moss v. Hofbauer*, 286 F.3d at 864-865.

**B. THE APPELLANT'S FACTS DO NOT SUPPORT A FINDING OF INEFFECTIVENESS OF COUNSEL.**

To substantiate his claim the Appellant cites this Court to eight potential grounds of inquiry, which he believes trial counsel should have developed on cross-examination:

Instead, numerous questions could and should have been asked to make certain that the jury was well aware of the role played by each witness, what little they knew about the alleged involvement of the defendant, their failure to gather evidence properly and run tests available on it, for that matter even what tests could have been run, the fact that no individual placed the defendant at the crime scene other than the co-defendant at the time of the crime, pin down exactly when the crime occurred to assist the defendant in his alibi, question the co-defendant as to his own criminal record so that the jury would know that the co-defendant had a prior criminal record when considering his testimony (See Rule 609(a)(2)(A) of the *West Virginia Rules of Evidence*), objected and required the prosecution to make the witnesses testify from their own knowledge as opposed to being led through the case by the prosecution, and question prospective jurors in a voir dire process . . . .

(Appellant's Brief at 7.)

This list of possibilities falls far short of the Appellant's burden of proof. Every attorney viewing a cold transcript, with the benefit of hindsight, may find some fault in the best attorney's trial performance. That is not the point: Indeed, it is this sort of generalized second-guessing which *Strickland* expressly prohibits. The information which the Appellant claims was not properly developed by cross-examination was squarely before the jury when they made their decision.

Each witness testified to his or her knowledge regarding the Appellant's role in the theft. The Appellant's co-defendant admitted that he was drunk that evening,<sup>11</sup> that he drove the jeep away from the victim's house after the Appellant had loaded the tires, that he had taken these tires to the Appellant's house. Evidence of his potential bias was also before the jury. The co-defendant testified that he had struck a plea-agreement with the State in which he pled to grand larceny, and in return for his testimony the State would not oppose probation.<sup>12</sup> (Trial Tr. Vol. I 97, 98, 99, 101, 103, 108-10.) Indeed, on direct examination the co-defendant stated that he had agreed to cooperate in hopes of receiving probation. (Trial Tr. Vol. I 110.)

The Appellant claims, "While some might argue that it is strategy, no reasonable attorney would agree especially when the co-defendant was the *only* witness who placed the defendant at the crime scene." (Appellant's Brief at 5.) Appellant omits the exchange the Appellant's counsel had with the court immediately after Mr. Field's testimony:

THE COURT:           Mr. Esposito?

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<sup>11</sup>The co-defendant testified no less than three times on direct that he was drunk that evening.

<sup>12</sup>The Appellant claims that the co-defendant had a prior criminal history which would have been admissible under Rule 609(a)(2)(A), W. Va. R. Evid. Apart from his guilty plea, there is no evidence from the record that the co-defendant had any prior convictions. Instead of making assertions from vague facts culled from the record, the Appellant is now asking this Court to infer something that is not contained in the record.

The Appellant's pre-sentence report, including his criminal history, is part of the record. It includes a 1994 arrest for breaking and entering and grand larceny, a 1996 arrest for malicious assault and accomplice to malicious assault, and a 1996 arrest for giving false information to a State Trooper. (R. 80.)

The Appellant's unsupported allegations constitute an improper attempt to amend the Appellate record. The Appellee respectfully requests that any cites to the co-defendant's alleged prior convictions not contained in the designated record be stricken from the Appellant's brief. *Napoleon S. v. Walker*, 2005 WL 1384090 (2005) (Maynard, J., dissenting.)

MR. ESPOSITO: Could I have like 30 seconds in the hallway?

THE COURT: Yes.

MR. ESPOSITO: I promise 30 seconds.

(Recess)

MR. ESPOSITO: I don't have any questions for [the co-defendant], but I may call him. But I don't have any questions for him at this time.

(Trial Tr. Vol. I 112.)

The record suggests that defense counsel weighed the pros and cons of cross-examination, and chose to wait until his case-in-chief. His conduct suggests that his decision was tactical. Since the Appellant has not developed the record, this Court has no evidence before it as to what occurred during this recess. Therefore, the Appellant has failed to overcome the strong presumption of competence as a matter of law. *Strickland*, 466 U.S. at 689.

The record clearly established that the State had no physical evidence connecting the Appellant to the crime scene. Trooper Pursley photographed the scene, and preserved some evidence for fingerprint and DNA analysis. (Trial Tr. Vol. I 58.) The jury heard that this evidence was never submitted to the crime lab. In his summation, defense counsel emphasized this fact. (Trial Tr. Vol. II 82.)

The Appellant claims that defense counsel should have nailed down the time of the incident in order to bolster his alibi defense. The co-defendant provided the only evidence on this issue. He claimed that they went to the victim's house late that night or early the next morning. (Trial Tr. Vol. I 97.) The Appellant has not presented this Court with any concrete evidence suggesting that cross-examination of any of the State's witnesses would have "pinned down" the exact time of the

theft. Nor has he suggested the existence of other witnesses who could identify when the theft took place.

Next, the Appellant argues that trial counsel explicitly permitted counsel for the State to improperly lead the co-defendant.<sup>13</sup> During direct examination of the co-defendant, the following exchange occurred:

Q: Were you given a plea agreement by the State?

A: No, sir.

Q: When I say given a plea agreement, when you entered . . . .

A: Oh, yes. I pled guilty, yes.

Q: You pled guilty to what?

A: Grand larceny.

Q: As part of that, though, you got some consideration from the State in order to cooperate; is that right?

A: I don't know until the 29th of next month.

Q: Well, you're getting where I'm going. What's going to happen to you for cooperating?

A: I don't know anything yet. I got a plea for probation.

Q: Well, let me ask you this. When you say you don't know until the 29th, what are you talking about? You know what the sentence you're facing?

A: Grand Larceny.

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<sup>13</sup>The Appellant complains, in general, about the prosecutor's use of leading questions. Since this is the only example he has quoted from the record, the Appellee contends that he has waived this objection to any of the State's other questions. *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) (Issues which are not raised, and those mentioned only in passing, but are not supported by pertinent authority, are not considered on appeal.).

Q: You plead to a felony?

A: Yes, sir.

Q: What are you saying you don't know until the 29th, explain that?

A: I don't know. I haven't been sentenced or nothing until the 29th of next month.

Q: So, did the State give you that they would not object to you getting an alternative sentence?

A: No.

Q: An alternative sentence is probation?

A: Yeah, Probation. Yeah.

MR. ESPOSITO: I'm not going to object to him leading him. Just go ahead and tell him what you want him to say.

(Trial Tr. Vol. I 108-09.)

In *State v. Fairchild*, 171 W. Va. 137, 150, 298 S.E.2d 110, 124 (1982), this Court ruled,

As a general rule, the use of leading questions is not permitted on direct examination. See, e.g., *Hendricks v. Monoghalia West Penn. Service Co.*, 111 W. Va. 576, 163 S.E. 411 (1932). However there are numerous exceptions to the general rule, see F. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, supra 55-56, and the allowance of leading questions is largely in the discretion of the trial court. *State v. Davis*, 139 W. Va. 645, 81 S.E.2d 95 (1954).

By permitting counsel for the State to lead the witness, defense counsel accomplished two things: First, by phrasing his objection as "Just go ahead and tell him what *you* want him to say" (Trial Tr. Vol. I 109, emphasis added), he left the jury with the impression that the State had rehearsed this witness, who had forgotten his lines, or that the prosecution was not above putting words into his mouth; secondly, the Appellant was able to crystalize what must have been a growing sense of exasperation on the part of every person in that courtroom. He let the prosecutor go on just

long enough to look foolish, and then he cut him off. His tactical decision cannot be described as objectively unreasonable. The terms and conditions of the co-defendant's plea agreement were a matter of record and benefitted the Appellant. Counsel had no reason to object to leading questions on this specific topic.

Appellant then argues that counsel did not effectively participate in voir dire. Specifically, he faults counsel for not questioning the jury, and for not providing a list of questions to the judge. Of course, there is no evidence to support the latter accusation. As to the former, the Appellant has failed to present this Court with any evidence suggesting that had defense counsel voir dired the panel, it would have made any difference. There is no evidence that any of the jurors picked to serve were incompetent. The court conducted a thorough voir dire of the panel in which several jurors revealed pre-existing relationships with certain people involved in the trial. The court struck these jurors from the panel. (Trial Tr. Vol. I 5-18, 19.)

One juror claimed that she knew the Appellant by reputation. (Trial Tr. Vol. I 8.) Appellant argues that his counsel was ineffective for failing to request individual voir dire of this juror. (Appellant's Brief at 9.) He also faults counsel for allowing this juror to remain on the panel while the court conducted individual voir dire on several other jurors. "How can one be certain that Juror [M.] did not discuss his knowledge of the 'reputation' of the defendant with one or more of those members at that time." (*Id.*) It would seem that merely asking this juror would have been a good place to start. Unfortunately, the Appellant failed to do so before filing this appeal.

Appellant's claim that the juror's comment infected the entire panel is equally meritless. "Doing nothing robbed the defendant of a fair trial as well as effective assistance of counsel. In essence, it allowed the jurors to hear a comment about the defendant's reputation in the voir dire

process that **WOULD NOT HAVE BEEN ALLOWED AS TESTIMONY FROM A WITNESS DURING THE TRIAL ITSELF.**" (Appellant's Brief at 10.) This argument ignores one simple fact--the juror never commented on the substance of her opinion, only that she had one. Common experience dictates that most people have reputations, some good, some bad. To possess an opinion on another's reputation demonstrates nothing; it is the substance of that opinion that counts.

Defense counsel did not ignore the juror's comments. The record demonstrates that he had every intention of peremptorily striking this juror. (Trial Tr. Vol. I 13.) There was no need for individual voir dire, all counsel need do is ask his client whether this juror's opinion was favorable or unfavorable. The Appellant does not argue that he was forced to waste one of his peremptory strikes on an obviously biased juror, nor does he object to the panel as constituted. Therefore, his claim is wholly without merit.

Finally, the Appellant argues that counsel was ineffective for failing to move for a directed verdict at the close of the State's case, and at the close of trial. The Appellant has not provided this Court with any reason why this motion would have succeeded. He does not argue that the evidence against him was insufficient as a matter of law, thus depriving him of a meaningful ground for appellate review. Indeed, the trial court stated that had the Appellant moved for a directed verdict at the close of the State's case, it would have been denied.

V.

CONCLUSION


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

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Appellee,*

By counsel

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL



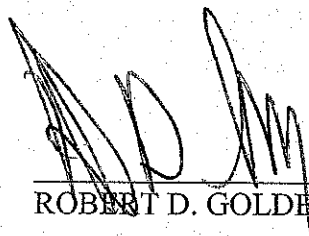
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CERTIFICATE OF SERVICE

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 ~~22~~<sup>23</sup> day of September, 2005, addressed as follows:

To: John W. Bennett, Esq.  
Eiland & Bennett  
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ROBERT D. GOLDBERG