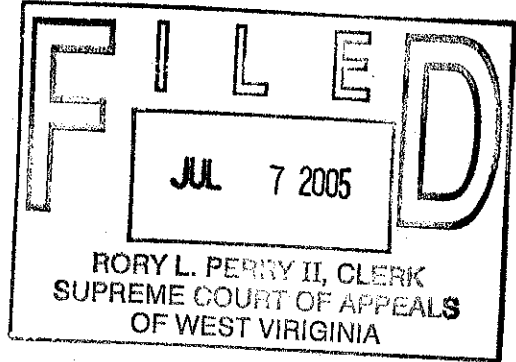


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA,
Plaintiff below, Appellee,

v.

Underlying Proceeding
Case No. 03-F-32
Marshall County Circuit Court

MICHELLE L. McCracken,
Defendant below, Appellant.

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

INTRODUCTION

When a tragic fire cost three lives, Michelle McCracken fell under suspicion. When it became clear that she was at the scene just before the fire, they obtained admissions that made her their sole suspect. Undeterred by the Fire Marshall's opinion that the fire was accidental, the State hired an expert who supported their theory and whose bogus courtroom demonstration deflected attention from their weak evidence. The State then made a shameless appeal to the jurors' emotions and obtained a wrongful conviction.

I. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

The fire that is the subject of this case took place on January 14 and 15, 2003. Eugene and Ruth Evans, and their granddaughter Breanna Evans died in the fire. Assistant Fire Marshal John Oliver investigated the burnt structure and its surroundings as soon as the scene was cool enough to permit. Despite a

finding by the Assistant Fire Marshall that the fire was accidental in origin, the State pursued an arson theory.

Appellant accompanied her boyfriend, Greg Evans¹ to the Sheriff's office at 9:30 to 9:45 am on February 25, 2003; she was arrested at the conclusion of her interview. Deputy Younger's investigation report was filed on March 4, 2003. The porch area was not excavated until March 27, 2003. Also, on June 13, 2003 the Law-Science Technologies Corporation of West Milton, Ohio completed a fire report on the burnt home. All tests came back negative for use of an accelerant.

The State was represented in these proceedings by Herman Lantz, Prosecuting Attorney and Randy Gossett, Assistant Prosecuting Attorney. Appellant was represented by counsel David Zehnder and Fred Gardner. Trial commenced November 3, 2003 and concluded November 7, 2003. The jury began its deliberations but at 5:11 p.m., sent a note saying, "Please let us view the booking tape." The Court brought the jury into the court room and they watched, under the supervision of the bailiff (TR 3²: 1063-1067). The jury returned to their room; at 7 p.m. they inquired whether "mercy" meant that Appellant would see the parole board in fifteen years or in forty-five years (TR 3: 1068). The Court's response was: "The request of whether sentences run concurrent or consecutive is a question answered and decided by the judge at a

¹ Greg is the son of Eugene and Ruth Evans, the father of Breanna, and the brother of Steve and Terry.

sentencing hearing.” (TR 3: 1068-1069)³ At 8:37 p.m. the jury returned with verdicts of guilty of First Degree Arson, and three counts of First Degree Murder with recommendations of mercy. The jury was polled and each member assented to the verdicts (TR 3: 1070-1071).

On December 22, 2003 the Court imposed sentences for three counts of murder and one count of First Degree Arson. By its Order of December 24, 2003, following a hearing on the same day, the Court found that the Arson sentence had been inadvertently imposed, as it is a lesser included offense. Therefore; the Court Ordered that two of the “life with mercy” sentences be served concurrently and that the third be served consecutively.

II. STATEMENT OF FACTS

Three persons died when their home was destroyed by fire the night of January 14, 2003. Michelle McCracken, who lived nearby, arrived at the rear of the Evans home and found it on fire. Since the back of the house was engulfed in flames, she went to the front door. She went into the residence a few feet; the flames and smoke were so intense that she retreated.

The outside air temperature was so cold that water from the fire trucks iced the road (TR 1: 295). There are no water mains near the Evans home, so the Volunteer Fire Department brought in tanker trucks (TR 1: 298). “There wasn’t

² The trial was reported in three volumes but pages were numbered consecutively from 1 to 1073. “TR” refers to trial transcripts. T1 is a pretrial hearing held on August 27; T2 refers to September 4, T3 to October 27 and T4 to October 31.

much of a moon,” so the firefighters used portable lights (TR 1: 300). The last of the three bodies was found at about 3:40 am (TR 1: 328-329). There was snow and wind (from West to East) intermittently throughout the four hours he was on the scene (TR 1: 334).

John Oliver, Assistant West Virginia Fire Marshal, found that there were no smoke detectors in the home (TR 3: 716). Plastic gas cans were stored under a metal lawn chair on the concrete back porch, between the window and the door. The porch sloped back toward the driveway (TR 3: 719). Family members told him, “The breaker for the dryer would trip constantly . . .” (TR 3: 757-758). Oliver took photographs on January 15, 2003 between 12:24 am and 4:00 am when he left the scene (TR 3: 660).

Oliver returned later on January 15 to try to determine the cause of the fire. He cleared the area around the wood-burning stove and interviewed witnesses Steve and Greg Evans (TR 3: 661-664). He labeled the cause of the fire as “undetermined,” and concluded that it was an accidental fire (TR 3: 665-66).

Unusually heavy snows and weeks of cold weather made further investigation impossible for weeks afterward. Detective Michael Younger visited the scene in February and conducted a further investigation. He found that a freezer was plugged into an inside receptacle in the basement. Rodents chewed through the wires under the stairs at one time, but it had been repaired. Evans

3 See *Blakely v. Washington*, 124 S.Ct. 2531, 159 L.Ed.2d 403, 72 USLW 4546 (2004). Does the discretion

family members told Younger that a breaker often “popped” on the dryer. The fireplace seemed to be of good construction and Younger could find no reason for a fire to have started there. Gas lines run to the living room, dining room and kitchen. The dining room line and one that went to the fireplace had been shut off.

Larry Dehus, an expert of fire causes and origin, was employed by the defense to conduct an independent examination. Dehus said his investigation showed that there was an improper gas line connection to a gas fired water heater; it had an improper flue; a water valve was used instead of a gas valve as a shutoff valve (TR 3: 833-834). Furthermore, the Court observed that the fire scene had “been compromised. . . . [T]hat place would be a poster child for the attractive nuisance doctrine.” (TR 2: 546)

The State continued to view the fire as having been deliberately set. At first, they focused upon a labor dispute as the motivation. Greg Evans told them he was having problems with the union at the nearby Lesco plant where he and his brothers had worked during a strike; he had received death threats for crossing the picket lines (TR 3: 757-758). Eventually, however, Michelle became the focus of the investigation.

Michelle was confident when she came to the police station for questioning. She had skipped her antidepressant medication and she had a lot of coffee.

allowed to the sentencing court involve a finding of facts that should be determined by a jury?

(Psych. Evaluation, Fremou, p. 5). She spoke with Deputy Ross Lockhart, who said: "At first she told us that she had been at the house but the house was already on fire by the time she got there. [T]hen she told us she was there before the fire started and it was around the back porch of the residence." (T2: 12-13; TR 2: 389)

Michelle told Detective Lockhart that she sat in her car, smoking cigarettes, and then walked to the house and looked in the windows. As she left, she tripped over what she thought was a gas can. "[A]s I was leaving, I flicked my cigarette."(T2: 14-15; TR 2: 391-392)

The porch area was excavated on March 27, 2003. The rear (East side) of the house had the most damage; a gas grill and propane tank, a riding mower, two chain saws and two gas cans were stored there. The back porch is a cement slab. Remains of a gas grill, a propane tank, a riding mower and chain saws were found in the debris on the porch. The report concluded that "[I]t would appear that the fire originated in the northeast side of the home. It is absolutely impossible to conclude whether or not the fire originated exterior to the structure or in the interior of the structure. (Law-Science Technologies Corporation, West Milton, Ohio, June 13, 2003)

Trial Facts

At trial, the State relied upon the investigation and testimony of David Campbell. He testified: "I'm not a scientist. I'm a practical fire investigator, and

under practical fire conditions, cigarettes simply do not ignite gasoline vapors.” (TR 2: 471-472) Campbell said the cause of the fire was liquid ignited on the back cement porch on the outside of the dwelling by an open-flamed device (TR 2: 576). John Oliver said Campbell told him a hole in the floor, near the stove, might have been caused by the wood drying out over the years of having the wood burner above it. Asked whether he agreed with that conclusion, Oliver said: “It could be, but I – you know, I’m not sure.” (TR 3: 670)

Larry Dehus was asked about his opinion on the cause of the fire, and he was unable to say within a reasonable degree of scientific certainty (TR 3: 849):

There is absolutely no physical evidence of an accelerant being used at this scene, and the reports from the sheriff’s office and the State Fire Marshal’s Office show that samples that were collected and analyzed for trace accelerants were negative.

Dehus, a forensic scientist specializing in fire cause and origin, has a B.S. in biology with a chemistry minor from Otterbein College, an M.A. in biology with an emphasis on biochemistry from Wright State University, and specialized training in forensic sciences from Crone’s Research Institute, the FBI Academy, and North Florida University. He was trained in fire cause and origin by the Canadian Association of Forensic Sciences and Eastern Kentucky University. His experience includes ten years at the Miami Valley Regional Crime Laboratory in Dayton, Ohio, three years as a Criminalist and seven years as the technical supervisor for the laboratory (TR 3: 825-826).

The wood burning stove was not there when Dehus visited the fire scene, but he examined the photographs. He determined that the hearth in front of the wood stove extended only about eight to ten inches in front of the opening, and it should have been at least sixteen inches (TR 3: 846). He could not rule out the wood-burning stove as the point of origin of the fire (TR 3: 848).

He opined that since natural gas is lighter than air, a gas leak in the basement would cause the gas to rise to the rafters. He found evidence of intense burning where the flex-gas line came through the floor from the basement (TR 3: 840). He eliminated the gas water heater in the basement as a cause of the fire, but he could not eliminate the gas supply system as a possible cause. He could not fix the point of origin of the fire (TR 3: 841). He also examined the wiring in areas where it was not completely destroyed. He found numerous improper splices and safety violations (TR 3: 843).

Dehus was unable to say whether the tractor, chain saws and lawn mowers were an ignition source because of the "total destruction" of the back porch area. He made no attempt to collect hydrocarbon samples on April 30 because, ". . . the area had been cleared off, had been exposed to the air and the sunlight, and it would not be feasible to collect samples . . . after that length of time."

Dehus dismissed Campbell's analysis by saying soot patterns could have been caused by any organic material (TR 3: 858). Gardner showed Dehus the fire scene photographs (State's Exhibits 24, 26-31) and asked if anything therein

indicated that a liquid accelerant was poured on the back porch: "No, there absolutely is not. The patterns that I see on this concrete are obviously consistent with any type of organic material burning on the surface and subsequent thermal shock." (TR 3: 858-859)

Dehus said that no one could say to a reasonable scientific certainty that there was evidence to prove that an accelerant was used. Gardner asked if his opinion was the same with the natural gas delivery system, the electrical system and the wood-burning stove. He answered, "Correct." (TR 3: 859) In response to Gardner's observation, "So we have four possible ignitions or burns," Dehus responded: "There's any variety of possible causes for this fire. . . It's undetermined. I do not know. I cannot tell. There's not enough evidence . . ." (TR 3: 859-860)

III. ASSIGNMENTS OF ERROR AND THE MANNER IN WHICH THEY WERE DECIDED

A. The Court erred in allowing over objection a demonstration by the State's expert witness as the conditions in court did not replicate the conditions of the actual event.

B. The Court erred in admitting the pre-trial statements of Appellant, all of which were made on or about February 25, 2003. Appellant was not warned that she need not give self-incriminating statements, and she was not promptly taken before a magistrate.

C. The Court erred in permitting the State, over objection, to twice recite a prayer taught to the child and to argue during closing that the jury's job was to convict Appellant.

D. The Court erred when it denied Appellant's motions for judgment of acquittal at the close of the State's case, at the close of all evidence and when it denied Appellant's motion for post-judgment acquittal.

IV. POINTS AND AUTHORITIES

1. The burden is on the party offering a courtroom demonstration or experiment to lay a proper foundation establishing a similarity of circumstances and conditions. *U.S. v. Scurry*, 120 F.3d 263 (4th Cir., 1997).

2. The trial court must consider whether an expert's testimony is based on an assertion or inference derived from the scientific methodology. The testimony must be relevant to a fact at issue. The Court must determine (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community. *West Virginia Rules of Evidence*, Rule 702, Syllabus 1, *State v. Leep*, 212 W.Va. 57, 569 S.E.2d 133 (2002).

3. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence

against him, and that he has a right to the presence of an attorney. The defendant may waive that right provided the waiver is made voluntarily, knowingly and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

4. The burden is on the State to prove an intentional relinquishment or abandonment of a known right or privilege, and courts indulge in every reasonable presumption against waiver. *State v. Moore*, 193 W.Va. 642; 457 S.E.2d 801 (1995); *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

5. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made. *West Virginia Code*, §62-1-5(a) (1) (1997); *West Virginia Rules of Criminal Procedure*, Rule 5(a); *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982).

6. The delay in taking a defendant to a magistrate may be a critical factor in the totality of circumstances making a confession involuntary where it appears that the primary purpose of the delay was to obtain a confession from the defendant. *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

7. In determining whether improper prosecutorial comment is reversible error the Court should consider: (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) 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. *State v. Stephens*, 206 W.Va. 420, 525 S.E.2d 301 (1999).

8. Egregious remarks by the prosecutor constitute plain error and violate Due Process of Law. Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt. *State v. Moss*, 180 W.Va. 363, 376 S.E.2d 569 (1988); Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

9. *Corpus delicti* may not be established solely with the accused extrajudicial admission. An admission must be corroborated in a material and substantial manner by independent evidence. *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995), Syl. Pt. 5.

VI. STANDARD OF REVIEW

“The trial court's determination regarding whether the scientific evidence is properly the subject of scientific, technical, or other specialized knowledge is a question of law that we review *de novo*. On the other hand, the relevancy requirement compels the trial judge to determine, under *Rule 104(a)*, that the scientific evidence ‘will assist the trier of fact to understand the evidence or to determine a fact in issue.’” *West Virginia Rules of Evidence*, Rule 702. Appellate review of the trial court's rulings under the relevancy requirement is under an

abuse of discretion standard. *State v. Beard*, 194 W.Va. 740, 746 [n. 5], 461 S.E.2d 486, 492 [n. 5] (1995). See *State v. Leep*, 212 W.Va. 57, 569 S.E.2d 133 (2002).

A trial Court's rulings on admissibility of evidence is reviewed under an abuse of discretion standard. *State v. Brooks*, 214 W.Va. 562, 591 S.E.2d 120 (2003). Constitutional issues are reviewed under a *de novo* standard.

VI. ARGUMENT

A. The Court erred in allowing over objection a demonstration by the State's expert witness as the conditions in court did not replicate the conditions of the actual event. David Campbell said that a temperature of roughly 880 degrees was required to ignite gasoline, and that a cigarette burned at no more than 350 degrees. "As a result of that, you simply do not have enough heat from a cigarette to reach the ignition temperature of gasoline." (TR 2: 581-582) He then set up his demonstration, pouring gasoline into a container partially filled with water. He then dropped in a lighted cigarette and demonstrated that the gasoline did not ignite. The Court instructed the jury that the demonstration was not intended to duplicate the conditions that existed: "[I]t's to demonstrate the combustible qualities of gasoline (TR 2: 584).

In *U.S. v. Scurry*, 120 F.3d 263 (4th Cir., 1997) the Court said the burden is on the party offering a courtroom demonstration or experiment to lay a proper foundation establishing a similarity of circumstances or conditions. While the

Court said the conditions need not be identical: "[T]hey must be so nearly the same in substantial particulars as to afford a fair comparison in respect to the particular issue to which the test is directed." If the conditions are too dissimilar, the demonstration is irrelevant.

There was no similarity between the fire scene and courtroom conditions. By all accounts, the wind was blowing at the scene. In her statement, Michelle said she tripped over something and may have splashed gasoline on the porch. Asked if a cigarette could start a fire under such conditions, Larry Campbell said: "It would have had to have been a gas can with no cap on it and just laid there and gurgled out for a period of time."

Dehus said the ignition temperature of gasoline is as low as 570 degrees Fahrenheit and as high as 880 degrees Fahrenheit, depending upon octane ratings. For burning cigarettes, NFPA 921 gave a range of 350 to 1220 degrees Fahrenheit, and Kirk's Fire Investigation found a range of 770 to 1400 degrees Fahrenheit. The latter source stated that due to the variability from brand to brand they can't be eliminated as an ignition source (TR 3: 873-875). Dehus noted, "I don't think all these years that fire marshals around the country have placed 'no smoking' signs in gas stations . . . for no reason at all. It does present a hazard." (TR 3: 876)

Larry Campbell's carefully staged demonstration took no account of the possible variations in circumstances and conditions, and it was an abuse of

discretion to permit it without a proper foundation. In fact, Campbell's qualifications as an expert are in question, as is the helpfulness of his testimony.

As Justice Davis pointed out in *State v. Leap*, 212 W.Va. 57; 569 S.E.2d 133 (2002), "[o]ne of the dangers inherent in expert testimony in regard to scientific tests is that the jury may not understand the exact nature of the test and the particular methodology of the test procedure and accord an undue significance to the expert testimony."

When asked about the conditions of the tests for the NFPA 921 guide, concerning the ignition temperatures for cigarettes, Campbell replied: "I do not know . . . what conditions they were measured under. . . . *I'm not a scientist*. I'm a practical fire investigator, and under practical fire conditions, cigarettes simply do not ignite gasoline vapors." (TR 2: 471-472)

In analyzing the admissibility of expert testimony under Rule 702 of the *West Virginia Rules of Evidence*, this Court said the trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether

the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community."

Syllabus 1, *State v. Leep supra*.

The State was permitted to perform a demonstration that did not conform to the conditions found at the Evans home on the night of the fire. Although the Court permitted it to show "the combustible qualities of gasoline," the effect was to discredit any explanation except a deliberately set fire. While acknowledging that he is not a "scientist," Campbell was likely to be seen as possessing expertise on the causes of fires. The result that he gave opinion testimony that was far more prejudicial to Appellant than any enlightenment provided concerning the amount of heat generated by burning cigarettes and the combustible qualities of gasoline as an accelerant. The jury appears to have accorded an undue significance to his flawed demonstration and his opinion testimony.

B. The Court erred in admitting the pre-trial statements of Appellant, all of which were made on or about February 25, 2003. Appellant was not warned that she need not give self-incriminating statements, and she was not promptly taken before a magistrate. At the request of Deputy Lockhart, Michelle came to the Sheriff's Department, along with Greg Evans, at 9:30 to 9:45 am on February 25, 2003 (T2: 6). Detective Mike Younger was also present (T2: 7) Appellant was not given *Miranda* warnings because, "She wasn't under arrest." (T2: 8) Lockhart had Younger take her to the interview room while he

took Greg into an office and told him "what was going on." (TR 2: 381)

He then rejoined Younger and Appellant. She kept asking about Greg's whereabouts; Lockhart lied to her, telling her Greg had left to go speak to the Fire Marshal (T2: 62). At that point, the officers had decided to get a written statement from Michelle. Lockhart said she was the only suspect by that date (T2: 74). He did not tell her that he was investigating what he thought might be a murder of three people. They still did not give her *Miranda* warnings. Lockhart says he told her she was free to leave at any time because she was not under arrest. He did not have her sign a *Miranda* rights form until 4:23 p.m., about seven hours after she arrived (T2: 28-31).

A reasonable person in Michelle's circumstances would have thought she was in custody. Lockhart asked her a few times if she wanted to take a break or use the rest room. The officers offered to go get her something to eat. "We did take her to the rest room at one point." (T2: 18)

Appellant's counsel established that "you can't just walk out. . . ." because there is a door buzzer you have to push, and then the dispatchers open the door. Deputy Cecil called to ask if he should let her go before she could leave (T2: 61). At about 11:30 am Appellant executed a written statement, in her own handwriting (T2: 10, 42).

The right to be warned against self-incrimination is Constitutionally based. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966),

Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). This Court suppressed a statement over the State's claim that there had been a waiver of rights under *Miranda* in *State v. Moore*, 193 W.Va. 642; 457 S.E.2d 801 (1995): "[T]he United States Supreme Court in *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) . . . restated that the burden is on the State to prove an intentional relinquishment or abandonment of a known right or privilege." [citations omitted].

In *State v. Persinger*, 169 W.Va. 121, at 133 to 135, 286 S.E.2d 261, at 269-270 (1982) this Court said that an unreasonable delay in taking the defendant before a magistrate . . . is treated as one factor in evaluating the voluntariness of a confession. Likewise, in Syllabus point 1 of *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984), this Court stated that the delay, ". . . in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant."

In explaining the delay, Lockhart said, "We continued interviewing her until the statement she gave matched the belief that we had . . ." (T2: 53) She was then taken to a magistrate (T2: 74). The circumstances surrounding the Appellant's detention indicate the officers used the delay in taking the Appellant before the magistrate in an effort to obtain a confession. They had decided that

the fire had been deliberately started and she was the only suspect. Frustrated by the lack of scientific evidence of the cause of the fire, the officers needed a confession to fit the theory they had developed, and they needed time to elicit such a statement. They were only partially successful, but Appellant's admissions were combined with unscientific opinion and an unabashed appeal to the emotions to produce an unfounded conviction.

C. The Court erred in permitting the State, over objection, to twice recite a prayer taught to the child and to argue during closing that the jury's job was to convict Appellant. In his opening statement, Mr. Gossett said Breanna "... could hear her grandmother screaming in the next room. *You will hear testimony from the defendant that she went to the house – .*" Zehnder objected, arguing "... [H]e's telling the jury she will testify." (T1: 226). Gossett promised and was directed by the Court, to "Clear it up, then." His statement continued, as follows: "Ladies and Gentlemen, by 'testimony,' what I mean is you will get a chance to watch a tape, and in that tape the defendant will give a statement. *That statement amounts to pretty much a confession, and in that you will hear her on the tape say that she heard Ruth scream.*" (TR 1: 227)

When Greg Evans testified, the Prosecutor inquired, "Did you teach Breanna to say her prayers before bedtime?" Evans responded, "I taught her the little prayer about –." Zehnder objected and the Court sustained him. At the ensuing bench conference, the Court noted that an appeal to a deity was

prohibited (TR 3: 721).

Lantz concluded his closing argument to the jury as follows:

Guilty as charged. She is guilty, and there should be no mercy. It's time for me to sit down. I've done my job. It's up to you. You will decide. It's time for you to do your job, and I want you to think about this: "Now I lay me down to sleep. I pray the Lord – "

Zehnder objected, citing his earlier arguments. In *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981) this Court reversed a conviction due, in part, to the Prosecutor's expression of his personal opinion that the Defendant was guilty. The Court took no corrective action: "You may continue." Lantz resumed, reprising his appeal to a deity that the Court had previously ruled to be inappropriate: "Now I lay me down to sleep. I pray the Lord my soul to keep. If I die before I wake, pray the Lord my soul to take.' She never woke up. They never woke up. Hopefully, they're in God's hands. They are. Justice is in yours." (TR 3: 1060-1061)

The Court had a duty to see that Appellant received a fair trial, but he took no action, despite having previously sustained an objection to the same issue. See *State v. Kennedy*, 162 W.Va. 244, 249 S.E.2d 188 (1978); *State v. Moss, supra at 368*. This case, like *Moss*, had a great potential for prejudice. *Moss* was a case involving the murder of children; this case involved the horrific deaths of a child and two elderly adults. The trial Court committed reversible error when it failed to intervene for the purpose of limiting and correcting improper remarks

made by the prosecuting attorney during closing.

D. The Court erred when it denied Appellant's motions for judgment of acquittal at the close of the State's case, at the close of all evidence and when it denied Appellant's motion for post-judgment acquittal. The State's case is predicated upon the premise that the fire could not have started accidentally. With no eye witnesses and no scientific evidence as to how the fire started, the only non-speculative evidence comes from Appellant's statement that she was there on that evening, before the fire started.

The mere presence of the defendant at what may have been the scene of a crime is not in and of itself evidence of guilt. In the proof of substantive crime of arson the fire must be of an incendiary origin and the defendant must be personally connected to the fire. *State v. Davis*, 178 W.Va. 87, 357 S.E.2d 769 (1987)

In *State v. Taylor*, 174 W.Va. 225, 324 S.E.2d 367 (1984) this Court held that, "The confession must be corroborated in a material and substantial manner by evidence *aliunde* of the *corpus delicti*." There were admissions that helped the State make a case, but there was no confession in this case. In *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1987), Syl. Pt 5 you said, "*Corpus delicti* may not be established solely with the accused extrajudicial confession or admission. A confession or admission must be corroborated in a material and substantial manner by independent evidence . . ."

In syllabus point 4 of *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983), you said to prove the *corpus delicti* in a case of homicide two facts must be established: (1) The death of a human being and (2) a criminal agency as its cause. "While the former need be proven by either direct evidence or presumptive evidence 'of the strongest kind,' the latter "may be established by circumstantial evidence or by presumptive reasoning from the adduced facts and circumstances." (citations omitted)

Furthermore, the experts were operating under different constraints, and Campbell's disclaimer ("I am not a scientist.") freed him to give opinion testimony *without being held to the standard of "to a reasonable scientific certainty."* He should not have been permitted to testify, without qualification, that "the cause of the fire was liquid ignited on the back cement porch on the outside of the dwelling by an open-flamed device." (TR 2: 576) It is human nature to prefer certainty over uncertainty, and the jury was not given any instruction concerning the weight to be given to the conflicting expert testimony.

The State's expert does, however, discredit their theory of the case; he disproved wanton disregard. The State failed to prove arson by even a preponderance of the evidence. The evidence presented at trial was manifestly inadequate to establish the underlying prerequisite offense for the charge of Felony Murder. The classic version of felony murder is where a perpetrator of a robbery wantonly or recklessly but not intentionally kills another during the

commission of the robbery or while fleeing the scene. The statute includes several other felonies that might give rise to a conviction of felony murder, but the State argued for and had the Court instruct the jury on the theory that the predicate felony in this case was a robbery.

This Court decided a case with a similar scenario twenty-two years ago. In *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983) the appellant and an accomplice were indicted together. The accomplice was acquitted of murder and arson but convicted of robbery. Williams was convicted on all counts. Someone saw both men near the victim's home a few hours prior to the crimes.

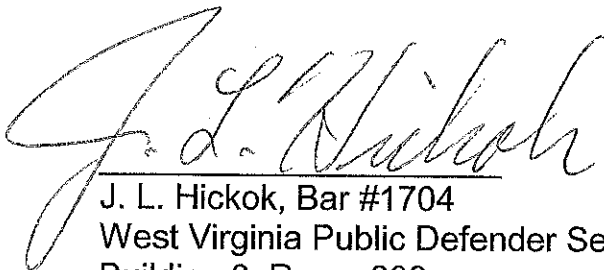
This Court, in *Williams*, said the State had to prove the elements of a predicate felony, including the commission of that felony, or an attempt, the defendant's participation and that the victim's death was due to injuries received in the commission or the attempt. Here, the State offered evidence suggesting that Appellant's statements to the police were inconsistent, but that she admitted only to being present shortly before the fire was discovered. The only eyewitness was Michelle McCracken. Her videotaped statement, taken under constitutionally suspect conditions, fell short of proving the elements of arson. The two "experts" disagreed on cause and origin of the fire. All that was proven was that the victims died in a house fire that might have been caused by arson, or could have been caused accidentally, and that Appellant was present just before the fire started.

CONCLUSION

Without Michelle's illegally obtained statement, she could not have been convicted. While it was not a confession, it was the only evidence that she was at the Evans home just before the fire started. The only reliable expert testimony is inconclusive as to the cause of the fire; the motion for judgment of acquittal should have been granted. Appellant was prejudiced by the emotional references to the child's prayers and by a showy but unscientific demonstration that "proved" only that she did not start the fire accidentally. Appellant prays that this Court reverse her convictions and remand her case to the Circuit Court of Marshall County for a new trial, free of the errors that led to her wrongful conviction.

Respectfully submitted,

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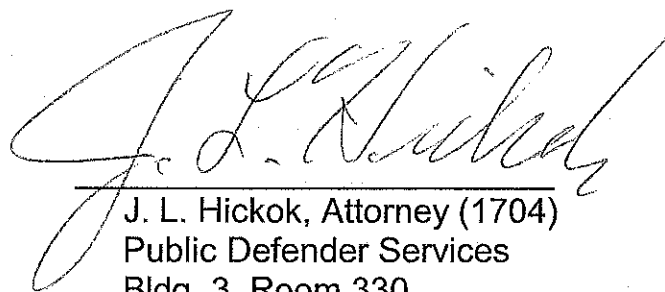
Certificate Of Service

I, the undersigned, Appellate Attorney for Petitioner, Michele L. McCracken, do certify that on the **7th** day of **July, 2005** served a copy of the foregoing **Appellant's Brief** on the following persons at their respective addresses, via First Class US Mail, postage pre-paid:

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