
NO. 32665

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

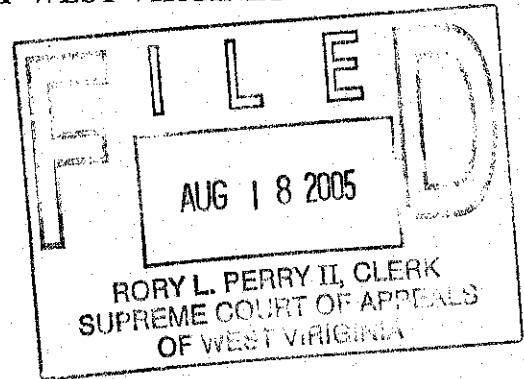
STATE OF WEST VIRGINIA,

Appellee,

v.

MICHELLE L. McCracken,

Appellant.



BRIEF OF APPELLEE
STATE OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,
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v.

MICHELLE L. McCracken,
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BRIEF OF APPELLEE
STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

This is an appeal by Michelle L. McCracken, hereinafter Appellant, from her November 7, 2003, jury conviction in the Circuit Court of Marshall County (Madden, J.) of three counts of first degree murder with recommendations of mercy. By order entered December 24, 2003, the circuit court sentenced Appellant to serve two of the life-with-mercy sentences concurrently with the third to be served consecutively, an effective minimum sentence of 30 years.

On appeal, Appellant alleges five assignments of error: that the circuit court erred in allowing the State's expert witness to do a courtroom demonstration when conditions did not replicate those of the actual alleged event; in admitting Appellant's pre-trial statements; in allowing the prosecuting

attorney to project an enlarged picture of the deceased on the courtroom wall for extended periods during the proceedings, to refer to a prayer recited by the deceased child at bedtime, and to argue that the jury's job was to convict the Appellant; and in denying Appellant's motions for judgment of acquittal at the close of the States case-in-chief, and the close of all evidence, and after conviction.

II.

STATEMENT OF FACTS

A. **FACTUAL HISTORY.**

During the night and early morning hours of January 14-15, 2003, a raging fire killed Eugene and Ruth Evans and their seven-year-old granddaughter, Breanna Evans, and destroyed the family's home. Greg Evans, son of Eugene and Ruth and father of Breanna, had just begun a new job and was working the evening shift; he returned from work to find his family home in flames. By the next morning, Greg knew that the people closest to him, his parents, and the girl he describes as his reason for getting up in the morning, his young daughter, Breanna, were gone. (TR 3: 714.) This occurrence was a monumental tragedy by any standards.

The Appellant, who lived nearby, had been dating Greg Evans since August 2002. Their relationship was experiencing some problems as a result of Appellant's jealousy and manipulative behavior. According to the testimony of Greg and his brothers, Appellant tried not to allow Greg to leave her sight, becoming more and more possessive as the relationship progressed. On many occasions Appellant made comments suggesting that Ruth, Greg's 70-year-old mother, and Breanna, his seven-year-old daughter, needed to "learn to let go a little bit . . . she is getting too attached." Appellant also remarked that "your mom's not going to be around forever." (TR 3: 728.) Only after

Appellant had committed this shocking crime did Greg realize that she had not just been making idle remarks.

On January 14, 2003, Greg Evans went to work with his uncle until noon and then had a few free hours before leaving for his new job. Appellant urged him to stop by her place and spend that time with her, but Greg declined because Breanna had been sick that day and he wanted to be with his daughter. This enraged Appellant, who glared at Greg to show her disgust. (TR 3: 733.) That night Appellant was, by her own admission, present at the scene of the fire at Greg's parents' home both before it began and after the house was consumed by flames. She offered as an explanation for her presence that she had stopped by to speak to Ruth, saw the family was in bed, and drove on in her white, four-door Chevy to her friend Stephanie Lamb's house, where she remained until she heard over Stephanie's police scanner that Greg's parents' home was on fire.

Appellant made certain to recite this alibi to anyone who would listen, from her boyfriend Greg and his brothers to the police. Problems with the story developed, however; Stephanie Lamb denied that Appellant was at her house that night, and told police that neither she nor any other nearby family member owned a police scanner. Thereafter, Appellant changed her version of the facts over and over again, all the while providing comfort and solace for a vulnerable, distressed, and grieving Greg Evans.

At the request of Deputies Lockhart and Younger, Greg Evans and the Appellant voluntarily visited the sheriff's station. In this regard, testimony demonstrated that because the station houses confidential information, security at the facility is strict and no one can simply enter and walk the building freely. Everyone must be buzzed in and out of the building and have an escort through the areas containing sensitive material.

Once at the sheriff's station, Appellant was advised that she was not under arrest and that she was free to go at any time. Consistent with this advice, Appellant not only took a restroom break but in fact left the station of her own free will and then returned again voluntarily. It was at this point that the Appellant provided a written account of her version of events concerning the evening of the fire, and was confronted by the deputies about the inconsistencies in her original story. Throughout the course of her varying statements, the Appellant showed no emotion about this horrific tragedy. (TR 2: 388-389, 417.) The final version of her story had her being present at the Evans home peering through windows, tripping over what she believed could be a gasoline can, and flicking her lit cigarette on the ground as she walked away from the scene. On her way back to her vehicle, she said, she heard a "whoosh sound like gasoline makes when it goes up or when it ignites." (TR 2: 392.) The deputies inquired to whether or not she called 911 after she realized that a fire had started, a question to which she never responded. (TR 2: 395.) It was after this videotaped statement that the Appellant was advised of her Miranda rights and arrested.

At the trial, Assistant West Virginia Fire Marshal John Oliver testified that he found no smoke detectors in the Evans home. (TR 3: 716.) He further testified that the cause of the fire was "undetermined" and that it was an accidental fire (two seemingly contradictory conclusions). (TR 3: 665-666.) However, during his testimony Mr. Oliver admitted that upon revisiting the scene with the State's expert witness, David Campbell, he should have excavated the back porch. He also admitted that had he dug out the porch area, he too would have seen the "ghosting patterns" and the "run-down patterns" that Mr. Campbell found both in the pictures of the scene and at the scene itself. (TR 3: 809-810.) Further, Mr. Oliver agreed that in his initial investigation he had "tunnel vision" with respect to the wood burner and that the fire did start on the porch. (TR 3: 808, 810.)

During David Campbell's testimony, Mr. Campbell demonstrated the combustibility of gasoline via a burning cigarette, a demonstration which the court instructed the jury was not intended to duplicate the conditions on the night of the fire. (TR 2: 584.) Mr. Campbell testified that the wood burner was not the cause of that tragic fire, that the fire started on the back porch, and that Appellant, who was at the scene and explained the fire as resulting from an accidental "trip n' flick" of her cigarette butt, could not have started the fire accidentally as she claimed.

The evidence taken in its totality showed that there was nothing accidental about the fire that killed Eugene, Ruth, and little Breanna Evans. As the jury found, this family was murdered by a jealous, possessive, and manipulative person: the Appellant.

B. PROCEDURAL HISTORY.

On January 14, 2003, a Marshall County Grand Jury indicted Appellant, charging her with three counts of first degree murder and one count of first degree arson. (TR 1: 67-70.)

On November 7, 2003, a Marshall County Petit Jury found Appellant guilty on all counts but added a recommendation of mercy to the murder convictions. On December 22, 2003, the circuit court imposed three life-with-mercy sentences to be served concurrently, as well as an indeterminate sentence of two to twenty years for the arson to be served consecutively. However, by order of December 24, 2003, the circuit court found that under the facts and circumstances of this case, sentencing Appellant on the arson charge would violate the Double Jeopardy Clause. Therefore, the court sentenced Appellant to the West Virginia Penitentiary for Women for two concurrent life sentences with mercy for a period of fifteen years to life and a third consecutive life sentence with mercy for an additional fifteen years to life.

It is from these convictions and sentences that Appellant prosecutes this appeal.

III.

ASSIGNMENTS OF ERROR

Appellant assigns the following grounds as error:

- A. The Trial Court erred in allowing, over objection, a demonstration by the State's expert witness as the conditions in the court did not replicate those conditions of the actual event.
- B. The Trial 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 Trial 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 Trial 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 motions for post-judgment acquittal.

IV.

STANDARD OF REVIEW

On all issues, this Court should review the rulings on the court below in accordance with Syl. Pt. 7, *State v. Hutcheson*, 177 W. Va. 391, 352 S.E.2d 143 (1986):

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

(Emphasis supplied.)

With respect to Issue No. 1, this Court should analyze the evidentiary rulings of the court below under the abuse of discretion standard set out in Syl. Pt. 3, *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993):

Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Point 5, syllabus, *Overton v. Fields*, 145 W. Va. 797 [117 S.E.2d 598 (1960)].' Syllabus Point 4, *Hall v. Nello Teer Co.*, 157 W. Va. 582, 203 S.E.2d 145 (1974)." Syllabus Point 12, *Board of Education v. Zando, Martin & Milstead*, 182 W. Va. 597, 390 S.E.2d 796 (1990).

With respect to Issue No. 2, this Court should review the voluntariness of Appellant's confession under the mixed standard set forth in Syl. Pt. 2, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994):

This Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to the factual findings as opposed to legal conclusions.

With respect to Issue No. 3, this Court reviews the propriety of prosecutorial comment under the standard set forth in Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995):

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

See also Syl. Pt. 3, *State v. Adkins*, 209 W. Va. 212, 544 S.E.2d 914 (2001).

V.

ARGUMENT

A. **THE COURT PROPERLY ALLOWED A DEMONSTRATION BY THE STATE'S EXPERT WITNESS.**

In *State v. Leep*, 212 W. Va. 57, 68, 569 S.E.2d 133, 144 (2002), this Court wrote that "[t]he 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 Appellate review of the trial court's rulings under the relevancy requirement is under an abuse of discretion standard." Syl. Pt. 3, in part, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171."

Appellant contends that the trial court committed error when it allowed a demonstration by the State's expert witness because the conditions in the courtroom did not replicate the conditions on the evening of the fire. This argument ignores the carefully crafted limiting instruction that the court gave to the jury; specifically, that the demonstration was intended to demonstrate the "combustible qualities of gasoline," not to replicate the conditions that tragic night. (TR 2: 584.) Additionally, Appellant ignores the proverbial "great engine of truth," cross-examination, which is the perfect vehicle for exploring a "differing conditions" issue.

The State's expert witness, David Campbell, is a retired lead fire and arson investigator from the North Carolina State Bureau of Investigation and is currently working as the Assistant Chief of the Wallace Fire Department, as well as a consultant in fire and arson investigation. Mr. Campbell has been a fireman for over 40 years. He has been a county fire marshal in western North Carolina and a special deputy for the Sheriff's Department. He has been trained as Level(s) 1, 2 and 3 fire fighter by the National Fire Academy and he has taught about the physical properties of

hydrocarbons, and the ignition qualities of gasoline, in all of the United States except Hawaii. Mr. Campbell also taught a class on cause and origin of fires at the 49th Annual Ohio Arson School (TR 2: 549-551.) There is no question whatsoever that Mr. Campbell is qualified as an expert witness under West Virginia Rule of Evidence 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

The State called Mr. Campbell to determine whether an accidental flick of a burning cigarette could have ignited gasoline and caused the fire at the Evans home, which was Appellant's (latest) version of what happened on the night of the deaths. The trial court clearly issued a disclaimer to the jury that Mr. Campbell's demonstration was not intended to replicate the conditions on the night of the fire, but rather to "demonstrate the combustible qualities of gasoline." (TR 2: 584.) Faithful to Judge Madden's limitations, Mr. Campbell carried out his demonstration to prove – and succeeding in proving – that the heat given from a burning cigarette butt would not ignite gasoline. He further supported his findings by showing "ghosting patterns" and "run-down patterns" at the scene of the fire, telltale signs of the use of an accelerant. (TR 2: 566-567.) (Significantly, John Oliver, defense witness and Marshall County Fire Marshal, testified that upon revisiting the scene he also saw these "patterns" that Mr. Campbell described.) Mr. Campbell concluded that the fire at the Evans home started on the cement back porch and was ignited with the use of an accelerant.

"The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong." Syllabus Point 6, *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991), *cert.*

denied, 502 U.S. 908, 112 S.Ct. 301, 116 L.Ed.2d 244 (1991)." *State v. Leep*, 212 W. Va. at 68, 569 S.E.2d at 144 (quoting Syl. Pt. 1, *West Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 516 S.E.2d 769 (1999)). The unpublished Fourth Circuit case relied upon by Appellant discusses only those courtroom demonstrations that are meant to replicate a specific situation, which is not the situation in this case. Here, the trial court stated both in limine and during the trial that Mr. Campbell's demonstration and testimony might be helpful to the jury; "he would be able to testify to what he did and explain what he did, so [the court saw] no reason why he [couldn't] do that in front of a jury." (TR 2: 457, 545.) And, in any event, the propriety of permitting such a demonstration was in the sound discretion of the trial court, *State v. Taft*, 144 W. Va. 704, 712, 110 S.E.2d 727, 734 (1959), and the trial court's decision must be clearly wrong for this Court to reverse it. *State v. Leep*, 212 W. Va. at 68, 569 S.E.2d at 144. Furthermore, "[Appellant] could adequately challenge the weight and credibility of the State's scientific evidence through cross examination and rebuttal, to which methods this Court has previously alluded with favor[,]" *id.* at 69, 569 S.E.2d at 145, where the Court noted that "'[c]onventional devices,' like vigorous cross-examination, careful instructions on the burden of proof, and rebuttal evidence, may be more appropriate instead of 'wholesale exclusion' of expert testimony under Rule 702." *Gentry v. Magnum*, 195 W. Va. 512, 525-26, 466 S.E.2d 171, 184-85 (1995) (internal citation omitted).

Under the totality of the circumstances in this case, where the trial court limited the purpose of the demonstration and so instructed the jury, where the demonstration was helpful to the fact-finder, and where Appellant's counsel had a full and fair opportunity to cross-examine the expert, the trial court did not err in permitting the State's expert witness to testify at trial and to do a courtroom demonstration.

B. THE COURT PROPERLY ADMITTED THE PRE-TRIAL STATEMENTS OF APPELLANT MADE ON OR ABOUT FEBRUARY 25, 2003, AND THE EVIDENCE SHOWS THAT APPELLANT WAS PROMPTLY TAKEN BEFORE A MAGISTRATE.

"The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case. Syl. Pt. 5, *State v. Starr*, 158 W. Va. 905, 216 S.E.2d 242 (1975). In this case, the trial court did not err in admitting Appellant's statements to the police, as the evidence taken during the suppression hearing showed that Appellant was not under arrest or in custody at the time the statements were given. In short, Appellant's statements were voluntary and there was no *Miranda* violation.

This Court has held that "[a] trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. Pt. 1, *State v. Farley, supra* (citations omitted). "Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for *clear error*.'" Syl. Pt. 3, *State v. Milburn*, 204 W. Va. 203, 511 S.E.2d 828 (1998) (quoting Syl. Pt. 1 *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996)) (emphasis added).

In this case, a reasonable review of the evidence, taken in a light most favorable to the verdict winner, Syl. Pt. 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978), supports the court's finding that Appellant voluntarily gave a statement. It is undisputed that on February 25, 2004, Deputy Lockhart asked both Appellant and Greg Evans to come to the Sheriff's Department. They

arrived between 9:30 and 9:45 a.m. and were separated shortly after their arrival. (TR 2: 6.) Detective Mike Younger was also present that morning. (TR 2: 7.) Appellant was not given *Miranda* warnings because "[s]he wasn't under arrest." (TR 2: 8). Although it is undisputed that Lockhart lied to Appellant when she asked about Greg's whereabouts, telling her that Greg had left to go speak to the Fire Marshal (TR 2: 62), it has long been the law that "[m]isrepresentations made to a defendant or other deceptive practices by police officers will not necessarily invalidate a confession unless they are shown to have affected its voluntariness or reliability." Syl. Pt. 6, *State v. Worley*, 179 W. Va. 403, 452 S.E.2d 706 (1988). The police were not obligated to tell Appellant about Greg's whereabouts, nor were his whereabouts in any way relevant to the voluntariness or reliability of Appellant's statements that day.

Appellant contends that a reasonable person in her circumstances – at the police station, though not under arrest, for approximately seven hours – would have thought she was in custody, and therefore she was denied the constitutional right to be warned against self-incrimination. (Appellant's Brief at 17.) However, the facts get in the way of the inference that Appellant would have this Court draw. She visited the Sheriff's Department voluntarily. (TR 2:8.) She was informed on several occasions that she was free to leave, and in fact she did leave the station on her own accord after her statement had been videotaped. She later returned to the station in her own vehicle. (TR 2: 505.) The only circumstances that are even slightly ambiguous here are the fact that she was escorted around the station and the fact that Deputy Cecil asked if he could let her leave the station. (Appellant's Brief at 17.) The State's evidence provided reasonable explanations for both of these circumstances. As to the first, Deputy Lockhart testified that it was the regular security practice of the Sheriff's Department to escort everyone through the station because of the highly

confidential and sensitive material that is located in the building. (TR 2: 520-521.) As to the second, Deputy Lockhart explained that Deputy Cecil was not, and at no time had been, a part of the Evans' fire investigation. Because of his noninvolvement in the case, Deputy Cecil did not know who Appellant was or why she was there, so it was only prudent for him to contact the officer dealing with Appellant to inquire if she was permitted to leave the premises. (TR 2: 509.)

The second prong of Appellant's argument is that because she was at the police station for seven hours, and was not arrested and taken to the magistrate until 4:23 p.m., the police violated the prompt presentment rule. However, this Court has consistently held that "[o]rdinarily the delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him [or her] does not vitiate the confession under our prompt presentment rule." *State v. Milburn*, 204 W. Va. at 212, 511 S.E.2d at 837 (citations omitted). As was the case in *Milburn*, here the Appellant arrived at the Sheriff's voluntarily. She was advised that she was not under arrest and was free to leave – and in fact she was free to leave, because she did so. The fact that the Appellant gave several versions of her story is also strikingly similar to what happened in *Milburn*.

The circumstances shown in this case were that the Appellant began lying before the police even thought to consider her as a suspect, when she fabricated and circulated an alibi. She came to the station voluntarily, twice, on February 25, 2003. When Deputy Lockhart confronted her with evidence showing that her alibi was false, she recanted and revised her story. During the suppression hearing, Deputy Lockhart explained that the police continued interviewing Appellant until the statement she gave corroborated the other evidence they had to that point and more closely matched what they believed to be true. (TR: Supp. hearing, 53.) Appellant was allowed to leave the Sheriff's station and did leave, returning in her own vehicle on her own accord. Shortly after Appellant's

arrest she was taken before a magistrate. (TR: Supp. hearing, 74.) There was no violation of the prompt presentment rule, and the Appellant's argument to the contrary is based on a version of events not credited by the circuit court (and not credited by the jury, either).

C. THE PROSECUTING ATTORNEY'S CLOSING ARGUMENT DID NOT RESULT IN MANIFEST INJUSTICE.

This Court held in Syl. Pt. 5, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995), that a judgment of conviction will not be set aside [or reversed] because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice. See also Syl. Pt. 1, *State v. Adkins*, 209 W. Va. 212, 544 S.E.2d 914 (2001); Syl. Pt. 5, *State v. Ocheltree*, 170 W. Va. 68, 289 S.E.2d 742 (1982):

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters

In applying this principle of law, this Court has held that prosecutorial remarks are indeed misleading to a jury and prejudicial to the accused when the prosecutor makes statements about his personal belief, role and conviction in the case. *State v. Hamrick*, 216 W. Va. 477, 607 S.E.2d 806 (2004). In *State v. Moss*, 180 W. Va. 363, 376 S.E.2d 569 (1988), this Court held that manifest injustice resulted from a prosecutor's remarks because the prosecutor expressed his personal opinion, misstated crucial evidence, and attacked the defendant by characterizing him as a criminal.

In this case, by way of contrast, the prosecuting attorney stated during his rebuttal closing argument that Appellant was "[g]uilty as charged." (TR 3: 721); however, unlike *Hamrick* and *Moss*,

this statement was not made as a personal opinion of Mr. Lantz. Rather, a review of the transcripts makes it clear Mr. Lantz was arguing that the evidence proved guilt - a perfectly permissible argument. Furthermore, the Appellant was not unduly, improperly or unfairly prejudiced; what sunk her at trial was the evidence, not the prosecutor's argument.

That evidence is, in brief: Appellant's white four-door vehicle was seen by three different people at the scene of the fire. Ms. Gatha "Shelly" Cecil witnessed the car go to the Evans home at 10:30 p.m., before the fire began, and leave abruptly moments later without headlights on (TR 2: 341-342); Clarence Tubaugh saw the same vehicle approach and quickly leave the property (TR 2: 357-360); Volunteer Fireman Richard Parsons noted the car even while he was busily clearing space for the emergency vehicles after the fire was roaring (TR 1: 293). Stephanie Lamb testified to Appellant's failed attempt to create an alibi for herself long before she was even considered as a suspect. (TR 2: 371.) The State's expert witness demonstrated that the fire initiated on the back porch, was ignited with the use of an accelerant, and was likely to be intentional, not accidental, all in stark contrast to the Appellant's version of events. Even the defense expert, conceded after revisiting the fire scene with State's expert that the fire began on the back porch and appears to have been intentional with the use of an accelerant. (TR 3: 809-810.)

Beyond this evidence from non-family members and outsiders, Terry Evans testified that Appellant was very possessive of Greg Evans and jealous of other family members, including Breanna's mother, at the funeral. Appellant showed no emotion after this horrific tragedy. (TR 3: 694-695.) Greg Evans confirmed these observations and testified as to Appellant's comments about his daughter and his mother. (TR 3: 728.) Breanna's mother, Stacy Losh, testified that Appellant called her the night after the fire and threatened to "kick her ass" if she did not have her daughter

cremated; she told Ms. Losh she was glad that Breanna was gone and that Ms. Losh was hurting. (TR 3: 781-782.)

In addition to all of this evidence, the State also had Appellant's confession. Appellant confessed to being at the Evans home both prior to the fire and after it began. She admitted to driving her white four-door vehicle, which was seen by others in the vicinity, to the Evans property. She admitted that gasoline was involved in the fire and that as the house burned she could hear the screams of Ruth Evans from within the house. Deputy Lockhart testified that during her interview, Appellant showed no emotion. (TR 2: 417.) He further testified that when asked whether she called 911 after realizing there was a fire, Appellant never answered the question. (TR 2: 395-396.) In her taped confession, Appellant admitted to fabricating an alibi in order to keep her boyfriend Greg from knowing she was at the scene while his parents and his daughter died. (TR 2: 495-496.) With all this evidence, the prosecutor had strong, competent proof to establish the guilt of the Appellant, and his closing argument, even if error, was harmless beyond a reasonable doubt.

Finally, the final comments of the prosecuting attorney's closing argument were not deliberately placed before the jury to divert attention to extraneous matters. The objective of "the *Critzer* [*State v. Critzer*, 167 W. Va. 655, 280 S.E.2d 288 (1981)] rule is to prevent the use of the prosecutor's *status* as a means to bolster witness credibility." *State v. Hamrick*, 216 W. Va. 477, 607 S.E.2d 806 (2004). This Court has held that the focus on review is whether the prosecutor stated or implied his or her personal beliefs, argued facts and matters outside the record, made unjustifiable comments on the character or credibility of witnesses, or substituted his or her opinion for the evidence. Such arguments are improper and prejudicial because they imply to the jury that there is something they don't know about. See *State v. Barker*, 168 W. Va. 1, 281 S.E.2d 142 (1991); *State*

v. Critzer, 167 W. Va. 655, 280 S.E.2d 288 (1981); *United States v. Sawyer*, 347 F.2d 372 (4th Cir. 1965).

Appellant's second argument concerning the prosecuting attorney's closing argument is that he impermissibly recited what he contended to be the last words of little Breanna Evans: a prayer. In this regard, Greg Evans testified that his daughter, Breanna, recited a prayer every night before she went to sleep. (TR 3: 721.) Therefore, the closing argument, although admittedly dramatic and powerful, was based on the evidence.

There is little, if any, pertinent case law concerning a prosecutor's recitation, in the 'voice' of a decedent, of a prayer. The Supreme Court of North Carolina, although noting its disapproval of prosecutorial arguments that make improper use of religious sentiment, referred to "the wide latitude allowed [to] counsel in arguing hotly contested cases . . .," and concluded that it "has found biblical arguments to fall within permissible margins more often than not." *North Carolina v. Ingle*, 445 S.E.2d 880 (N.C. 1994) (citations omitted). In *Ingle*, the statement at issue also occurred in the prosecutor's closing argument: "I've done all I can do. And I'll lay my head down on my pillow and when I say my prayers, that what I'll say to the Lord and I'll have a good conscience about it." *Id.* at 896. The North Carolina Court disagreed with the defendant's contentions that this was an improper appeal to the jurors' religious beliefs. *Id.* at 896-97.

Similarly, the Court of Appeals of Missouri, Eastern District, Division Two, held that "[a]lthough the argument of the prosecutor [containing a prayer] is not the type we wish to condone, it does not rise to the level where it has prejudiced the defendant. In a criminal prosecution, the trial court has broad discretion in the control of closing argument. In addition, considerable latitude is accorded to counsel in such argument. Counsel should not misstate or pervert the evidence; however,

he may "draw non-evidentiary conclusions fairly justified as inferences from the evidence. *Missouri v. Jackson*, 750 S.W.2d 576 (1988) (citations omitted). And in *Bell v. Mississippi*, 725 So. 2d 836 (1998), during the guilt phase of a trial in which the prosecutor repeatedly made statements that defendant "didn't have a prayer" for lenient punishment, the Supreme Court of Mississippi stated that "an impassioned argument is not in itself an improper argument. Furthermore, the prosecutor, as any other counsel is free to recall and comment on testimony offered in evidence and to draw inferences." The Mississippi court held, however, that "[a]n appeal to emotion or for sympathy for a victim can reach a point at which it is prejudicial . . . , although the prosecutor's comments did not transgress the limits of fair argument in *Bell*. *Id.* at 851.

The instant case is different from these precedents in that the prosecuting attorney was not praying on his own behalf; he was arguing that Breanna's last words had been a prayer. As noted *infra*, there was testimony to the fact that Breanna said the prayer every night and it is undisputed that she, as well as her grandparents, died that night after laying down to sleep. It is not surprising that this case inspired impassioned arguments from all counsel. But impassioned argument is not reversible error where, as here, the argument was based on the evidence, did not divert the jury's attention from the case at hand, was not made to shore up an otherwise weak case, and did not clearly prejudice the Appellant.

D. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF THE STATE'S CASE, THE CLOSE OF ALL EVIDENCE AND POST CONVICTION.

In order to obtain a conviction of felony-murder, the State is required to prove the "commission or attempt to commit one or more of enumerated felonies, defendant's participation

in such commission or attempt, and death of victim as a result of injuries received during course of commission or attempt." *State v. Wade*, 200 W. Va. 637, 490 S.E.2d 724 (1997). Appellant contends that "[t]he evidence presented at trial was manifestly inadequate to establish the underlying prerequisite offense for the charge of Felony Murder," (Appellant Brief at 22), which in this case was arson.

"Any person who willfully and maliciously sets fire to or burns, or who causes to be burned, or who aids, counsels, procures, persuades, incites, entices or solicits any person to burn, any dwelling, whether occupied, unoccupied or vacant, or any outbuilding, whether the property of himself or herself or of another is guilty of arson." W. Va. Code § 61-3-1. This Court has held that when the State proves arson with circumstantial evidence, the evidence must show that the fire was of incendiary origin and the defendant must be connected with the actual commission of the crime. *State v. Adkins*, 191 W. Va. 480, 482, 446 S.E.2d 702, 704 (1994), citing *State v. Mullins*, 181 W. Va. 415, 383 S.E.2d 47 (1989) and *State v. Yates*, 169 W. Va. 453, 288 S.E.2d 522 (1982).

In *Adkins*, the State presented evidence that the defendant was seen going toward the homes that was later burned, although no one actually saw him at either of the scenes, and the State Fire Marshal, though he could not say for certain with respect to one of two blazes, could not rule out an incendiary origin. This evidence, correctly deemed by this Court to be "rather limited," was still held sufficient to sustain the jury's conclusion that the fires were arsons. *Id.* at 482-83, 446 S.E.2d at 704-05.

In the instant case, the State's evidence was circumstantial but very strong. Witnesses described a vehicle at or near the scene that matched that of the Appellant. Stephanie Lamb testified that Appellant lied about her whereabouts the night of the blaze and attempted to set up a false alibi.

(TR 2: 371.) The State's expert witness established that the fire was ignited on the back porch with the use of an accelerant, and the defense expert witness ultimately agreed with much of the State's expert's testimony. (TR 3: 809-810.)¹

Additionally, there was evidence that Appellant was possessive and jealous of Greg Evans, her boyfriend, to the extent that she commented to him that his 70-year-old mother and his little girl needed to let him go. (TR 3: 728.) Witness after witness described the Appellant as emotionless in dealing with what to anyone close to Greg would have been a staggering tragedy. Incredibly, Appellant called Stacy Losh, mother of seven-year-old Breanna, on the night after the fire and told her that she wanted to have Breanna cremated and that if Ms. Losh did not agree she was going to "kick [her] ass at the funeral home." Ms. Losh also testified that Appellant, on that same night, called back and told her "she was glad that Breanna was gone and she was glad that [Ms. Losh] was hurting." (TR 3: 782.)

Viewing all of this evidence in the light most favorable to the prosecution, the verdict winner, the evidence was more than sufficient to sustain the jury's verdict finding Appellant guilty beyond a reasonable doubt of three counts of felony murder.

¹In this regard, Appellant contends that "the jury was not given *any* instruction concerning the weight to be given to the conflicting expert testimony." (Appellant's Brief: 22, emphasis added.) This is buncombe. A review of the jury charge shows that the trial court clearly and correctly addressed the issue of expert witness. He advised the jurors that they were "not bound by the opinion of an expert witness . . . the credibility of all witnesses is for [the jury] to decide based upon all evidence in the case." (TR 3: 962-963.)

VI.

CONCLUSION

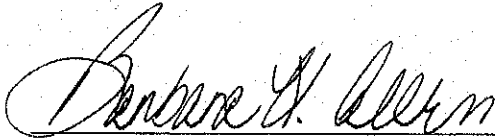
For all the reasons set forth in this brief and apparent on the face of the record, the judgment of the Circuit Court of Marshall County should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA
Appellee,

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

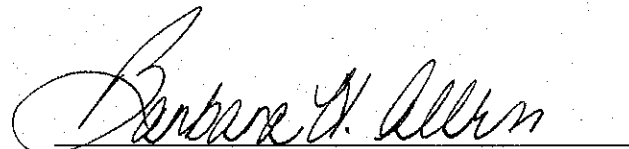


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CERTIFICATE OF SERVICE

I, Barbara H. Allen, Managing Deputy Attorney General and counsel for Appellee, do hereby certify that a copy of the within "Brief of Appellee State of West Virginia" was served on counsel for Appellant by United States mail, first-class postage prepaid, on this the 18th day of August, 2005, addressed as follows:

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