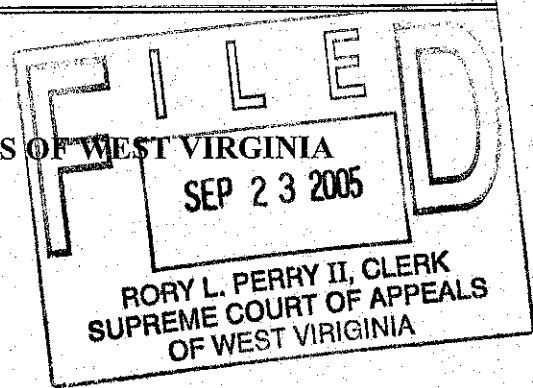


NO. 32693

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

*Appellee,*

v.

JAMES BLAINE WALDRON,

*Appellant.*

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**BRIEF OF APPELLEE STATE OF WEST VIRGINIA**

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**DARRELL V. McGRAW, JR.**  
**ATTORNEY GENERAL**

**DAWN E. WARFIELD**  
**DEPUTY ATTORNEY GENERAL**  
**STATE BAR ID NO. 3927**  
**STATE CAPITOL, ROOM 26-E**  
**CHARLESTON, WEST VIRGINIA 25305**  
**(304) 558-2021**

*Counsel for Appellee*

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**BRIEF OF APPELLEE  
STATE OF WEST VIRGINIA**

---

**I.**

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

James Blaine Waldron (hereinafter “the Appellant”) appeals the July 23, 2004, order of the Circuit Court of McDowell County (Judge Booker T. Stephens) sentencing him to seven years confinement in the penitentiary upon his conviction for voluntary manslaughter.

Although he assigns other trial errors, the Appellant’s principal claim on appeal is that the trial court abused its discretion when it refused to accept a plea agreement permitting the Appellant to plead to a misdemeanor charge of being an accessory after the fact to a murder in exchange for his cooperation in the prosecution of his co-defendant Mose Douglas Mullins, Jr.

## II.

### STATEMENT OF FACTS

In the spring of 2001, Mose Douglas (“Doug”) Mullins faced a dilemma. Mullins was an OxyContin addict and dealer, and had fallen into substantial debt to his supplier, local drug “kingpin” Gabe Hicks. Hicks offered Mullins a chance to clear the debt and to make some money – all he had to do was kill four people that Hicks suspected of breaking into his trailer and stealing guns and drugs. Mullins agreed to do this, but delayed the execution of this plan for some time. By May of 2001, Mullins was out of OxyContin, and owed Hicks for the drugs he was supposed to have sold for Hicks but had consumed himself. In the face of this pressure, Mullins decided to kill the people Hicks wanted dead.

Around mid-day on May 13, 2001, Doug Mullins met the Appellant so they could “ride around.” (Tr. 269.) Mullins and the Appellant had known each other for their entire lives, and were neighbors at the Brit Day Trailer Camp. (Tr. 254.) Mullins was looking for Jeffrey Mullins and Chantel Webb. Mullins and Webb, along with Melissa Osborne and Stevie Coleman, were the individuals suspected of breaking into the trailer of Gabe Hicks. (Tr. 259-60.) Hicks had promised Doug Mullins the sum of \$20,000 to kill Jeffrey Mullins, Webb, Osborne and Lulabell Webb, Chantel Webb’s grandmother. (Tr. 263.)

After driving aimlessly for some time, Doug Mullins saw “Jeffrey [Mullins] and Don [Ball]<sup>1</sup> [along with Chantel Webb], at the mouth of Three Forks at S & M Market.” (Tr. 271.) In the presence of the Appellant, Doug Mullins then told Jeffrey Mullins to “meet me up on the mountain

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<sup>1</sup>Don Ball was a classic “wrong place, wrong time” participant. He was driving because Chantel Webb’s “Mamaw told her not to be driving because she didn’t have no license.” (Tr. 223.)

... that I would do some pills with them.” (Tr. 272.) After sending the future victims to a location on Bradshaw Mountain, Doug Mullins and the Appellant drove off as if Mullins was going to get the promised drugs. Instead, he drove up Three Forks to Dewey’s Video and parked. (Tr. 273.) While parked at Dewey’s Video, Doug Mullins pulled a gun from under the driver’s seat of the car. Holding the gun, Mullins told the Appellant, “Look, I have to take care of some business.” (Tr. 273-74.) Doug Mullins and the Appellant then drove up Bradshaw Mountain to meet their victims.

While waiting for the victims to arrive at the scene of the shootings, Doug Mullins then told the Appellant, “I’ll give you a thousand dollars (\$1,000.00) . . . if you’ll just tell me -- if you’ll just tell me if you hear traffic or when I ask you if there’s traffic or something on the above road, on the main road . . . ,’ and he [the Appellant] said ‘Okay.’” (Tr. 275.)

After the Appellant agreed to act as a lookout, Jeffrey Mullins and Chantel Webb arrived at the scene in Lulabell Webb’s car, driven by Don Ball, having been enticed there by Doug Mullins’ representation that they could all snort some OxyContin that Doug Mullins said he had. When they arrived, Doug Mullins got out of his car, spoke briefly to the occupants of the other car, and acted as if he were getting the drugs out of his trunk. He then asked the Appellant if everything was okay, and the Appellant responded that “Yeah. Everything’s okay.” (Tr. 278.) Having been given an “all clear” by the Appellant, Doug Mullins then returned to the other vehicle and began shooting, killing Chantel Webb, and severely wounding Don Ball and Jeffrey Mullins. (Tr. 279-80.) Although Don Ball eventually recovered from his wounds, Jeffrey Mullins is paralyzed and can move only his left arm and his head. (Tr. 128.)

Don Ball recalled that while the shootings were taking place, the Appellant was standing at the front fender of the car Doug Mullins had driven to the scene. (Tr. 235.) In his statement that

was read to the jury, the Appellant said that, to the contrary, he remained in the vehicle and heard a "pop" and "Well, I pay no attention, you know what I'm saying, I pay no attention." (R. 428.) Not to be distracted by the sounds of gunfire, the Appellant returned to the task at hand: "Uh, . . . so I go back to breaking the pot up." (*Id.*) Meanwhile, the Appellant's fellow traveler Doug Mullins has emptied his weapon at the occupants of the other vehicle, Chantel Webb is in her agonal moments, Jeffrey Mullins has been rendered a lifelong paraplegic, and Don Ball is fleeing the scene with five gunshot wounds. The Appellant is rolling a joint.

After being shot, Don Ball managed to run to a nearby house and asked the occupants to call the police. When paramedic Susie Shelton arrived at the house, she asked Ball who shot him. Ball replied "Rusty [the Appellant] and Doug." (Tr. 198.)

Back at the scene of the carnage, Doug Mullins dragged the two remaining victims off the road (Tr. 286), and Mullins and the Appellant then left the scene. Doug Mullins admitted that he shot Don Ball because he was a witness (Tr. 280), and that he did not shoot the Appellant because "I didn't feel Rusty was a threat." (Tr. 281.) Doug Mullins and the Appellant then drove to a car wash, where Mullins washed bloodstains off the car. They drove to a convenience market, disposed of the murder weapon and articles of bloodstained clothing along the roadside, and then drove to the Brit Day Trailer Camp where they both resided. (Tr. 291.) They were arrested as they arrived at the trailer camp. (*Id.*)

In July of 2001, some three months after the shootings, the Appellant agreed to assist law enforcement in their investigation, in exchange for an offer of leniency from the prosecuting attorney. The Appellant cooperated with the investigation, and gave officers a statement on July 27, 2001. (R. 424.)

On December 23, 2002, co-defendant Mose Douglas Mullins entered a plea of guilty of second degree murder and two counts of malicious assault (Tr. 293), and was sentenced to a term of 40 years for the murder and 2-10 years for each of the malicious assaults, to run consecutively. (Tr. 253.)

On March 5, 2003, Judge Stephens rejected the proposed plea agreement. (R. 135.) Suddenly, the Appellant found himself in a legal "no man's land." He had cooperated with the State in providing evidence against Doug Mullins. Mullins had decided to plead guilty. The State no longer needed the Appellant to testify and the Court had rejected the Appellant's plea agreement.

For reasons that can only be speculated about,<sup>2</sup> in December of 2003 Doug Mullins decided to cooperate with law enforcement. On December 29, 2003, he gave a statement detailing the Appellant's role in the crimes (R. 516), and ultimately testified against the Appellant at trial. (Tr. 253-422.)

### III.

#### PROCEDURAL HISTORY

The Appellant was charged by criminal complaint with the murder of Jamie Shantel [sic] Webb. (R. 7-8.) On October 23, 2001, the Grand Jury of McDowell County returned a joint indictment charging the Appellant with one count of murder, and charging his co-defendant, Mose Douglas Mullins, Jr. with one count of murder and two counts of malicious assault. (R. 38-39.) Circuit Judge Rudolph J. Murensky, II, arraigned the Appellant on November 2, 2001, setting a court date of February 13, 2002. This date was subsequently continued. The Appellant's trial did not

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<sup>2</sup>Mullins ascribes it to finding the Lord while incarcerated.

begin until May 5, 2004. After his co-defendant plead guilty to second degree murder, the Appellant stood trial for murder and was found guilty of voluntary manslaughter.<sup>3</sup> (R. 906-07.)

The most pertinent portions of the procedural history occurred between the Appellant's arrest and the circuit court's rejection of his plea agreement. On July 26, 2001, almost three months before the Appellant was indicted, the Prosecuting Attorney for McDowell County, Sid Bell, sent a letter to Appellant's counsel<sup>4</sup> stating, in part:

According to [investigating officer] Sgt. J.R. Pauley and James Waldron's relatives, Mr. Waldron has decided to accept our plea offer and cooperate with the State Police [in the prosecution of Doug Mullins]. Sgt. Pauley advised me this week that he communicated to you our willingness to consider more leniency for your client if his cooperation is given in good faith and produces good results.

(R. 492.)

Mr. Bell later represented that he had cleared this plea agreement with law enforcement, Chantel Webb's grandmother, and Jeffrey Mullins before writing the letter to the Appellant. (3/3/03 Hr'g at 3; Tr. 534, 539, 560-61.)

The following day, the prosecutor attorney informed the court that he had struck a bargain with the Appellant which required him to cooperate in the State's prosecution of his co-defendant.

(R. 494.) Chief Judge Booker T. Stephens signed an order prepared by the State placing the Appellant in the temporary custody of State Trooper D.W. Miller, Jr., and reducing bail to \$10,000.

(R. 21.) The prosecutor told the court that he had requested the Appellant's release to facilitate his

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<sup>3</sup>This was clearly a compromise verdict. The jury was instructed on the elements of first and second degree murder, and on the law regarding aiding and abetting. During cross-examination the co-defendant testified that the State had pled his case down from first degree murder to second degree murder. (Tr. 324.)

<sup>4</sup>Appellate counsel Charles B. Mullins II also represented the Appellant at trial.

cooperation under a "written offer of a plea agreement that the parties will later present to the Court."<sup>5</sup> (R. 29.)

Although he signed the temporary release order, Judge Stephens made no promises or representations regarding his willingness to accept or reject any proposed plea agreement. Neither side described the terms of the agreement, nor informed the court that the tentative plea agreement contemplated the Appellant's plea to a misdemeanor.

With the consent of his attorney, the following day the Appellant led police to the secluded location where the officers found the gun used to murder Ms. Webb, and to another area where the police found bloodstained clothing belonging to the co-defendant. Also with his lawyer's consent, the Appellant then gave law enforcement officers a 40-page statement in which he described the events which had transpired on the day of the murder. (R. 424-63.)

On February 6, 2003, Judge Murensky convened a plea hearing in the Appellant's case, pursuant to an order dated January 22, 2003. (R. 123.) During the hearing, the parties presented the court with a written plea agreement dated February 6, 2003, and signed by the Appellant, his counsel, and the prosecuting attorney. The proposed plea bargain contemplated that the Appellant would fully cooperate in the prosecution of the co-defendant. In return the Appellant would plead guilty, by information, to accessory after the fact to first degree murder and malicious assault. The State would not oppose probation. (R. 132-34; *See* R. 668, 2/6/03 Hr'g.)

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<sup>5</sup>As later related by the prosecuting attorney, the plea offer was that if the Appellant would assist the State in the prosecution of the co-defendant, the prosecutor would propose to the court a plea agreement under which the Appellant would plead guilty to being an accessory after the fact to murder. (Tr. 534.)

The circuit court then spoke with Chantel Webb's grandmother, Lulabell, and shooting victim Donald Ball. Both objected to the plea agreement. (2/6/03 Hr'g at 13-16.) The court then informed both parties that he had represented Mr. Ball in a legal matter in 2000, and that he had been acquainted with Ms. Webb's grandmother and other members of her family, including the victim, for more than 25 years. Judge Murensky recused himself, and the case was assigned to Judge Stephens.

On March 3, 2003 Judge Stephens convened another hearing. The prosecuting attorney advised the court that they had offered the Appellant a tentative plea agreement, whereby he would be allowed to plead guilty to the misdemeanor offense of accessory after the fact to murder. (R. 664, 3/3/03 Hr'g.) After hearing the representations by the State, Judge Stephens announced that he was unwilling to accept a misdemeanor plea, and that the least he would take was a felony such as unlawful assault. The court expressed concern about the nature of the crime: "It's a little more serious to me here because a person lost their life, one person that's in a wheelchair for life, and you got another person who God just smiled on, this Ball fellow." (3/3/03 Hr'g at 6-7.) While discussing the Appellant's role in the crime, the court observed, "I think Mr. Waldron and correct me if I'm wrong, was there every step of the way with Mr. Mullins." (*Id.* at 6.) After expressing his reservations, and further noting that he had not rejected a proposed plea in 19 years on the bench, Judge Stephens advised counsel: "Under this set of circumstances, I choose not to accept a plea to a misdemeanor in this case." (*Id.* at 8.) As a prior felon, the Appellant was unwilling to plead to a felony, and Judge Stephens set a trial date.

Prosecuting Attorney Sid Bell then moved to disqualify himself, claiming that his role in the plea negotiations might necessitate his appearance as a witness for the Appellant. The court granted

his motion and appointed as special prosecutor Fred J. Giggenbach of the West Virginia Prosecuting Attorneys Institute. (R. 138-41, 146-47.)

On April 29, 2004, five days before his trial was to commence, the Appellant petitioned this Court for a writ of prohibition, seeking to prohibit Judge Stephens from disallowing the plea agreement. (R. 772-854.) This Court refused the petition, by order entered May 4, 2004 (Docket No. 040755).

On May 7, 2004, at the conclusion of a three-day trial before Judge Stephens, the Appellant was found guilty of voluntary manslaughter. On June 9, 2004, the special prosecutor filed a recidivist information that the Appellant was previously convicted of the felony offense of unlawful wounding on September 16, 1997. (R. 949.) On July 14, 2004, the circuit court sentenced the Appellant to seven years in the penitentiary. (R. 996-98.)<sup>6</sup> On September 30, 2004, upon a finding that the Appellant was a recidivist, the court sentenced him to an additional five years. (R. 1017.)

#### IV.

#### ARGUMENT

##### **A. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO ACCEPT THE APPELLANT'S PLEA AGREEMENT.**

The Appellant's first assignment of error claims that the trial court abused its discretion by failing to accept the Appellant's plea agreement. It is axiomatic that a trial court may, in its discretion, refuse to accept a plea bargain. *See* W. Va. R. Crim. P. 11(e)(4); Syl. Pt. 5, *State v. Guthrie*, 173 W. Va. 290, 315 S.E.2d 397 (1984) ("West Virginia Rules of Criminal Procedure, Rule 11, gives a trial court discretion to refuse a plea bargain."). It is also clear that a defendant does not

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<sup>6</sup>*See* West Virginia Code § 61-2-4 (sentence for voluntary manslaughter is a definite term ranging from three to 15 years).

have the right to enter a plea, and cannot compel a court to accept one. *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 498 (1971) (“There is, of course, no absolute right to have a guilty plea accepted. . . . A court may reject a plea in exercise of sound judicial discretion.”); *State v. Sears*, 208 W. Va. 700, 703, 542 S.E.2d 863, 866 (2000) (“[D]efendants do not have an absolute right to have a guilty plea accepted.”); Syl. Pt. 2, *State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 465 S.E.2d 185 (1991) (A court has no constitutional obligation to accept a plea agreement.) Ultimately, the decision to reject or accept a plea bargain is vested in the sound discretion of the trial court.

The Appellant contends that his tendered plea should have been accepted by the trial court because he had substantially performed his part of the bargain. However, “[a]n implicit condition of every plea agreement is its acceptance by the trial court.” *United States v. McGovern*, 822 F.2d 739, 743 (8th Cir. 1987). Additionally, “a defendant is not justified in relying substantially on the terms of the plea agreement until the trial judge approves it and accepts the guilty plea.” *Id.* at 746 (citations omitted). In the present case, the parties neglected to obtain the trial court’s approval of their tentative bargain before they acted upon it. “While we do not require that a plea bargain agreement be written, although that is the far better course, we do require substantial evidence that the bargain was, in fact, a consummated agreement, and not merely a discussion. Court approval, whether formal or informal, is advised.” *State v. Wayne*, 162 W. Va. 41, 42, 245 S.E.2d 838, 840, 841 (1978) (footnotes omitted). Nothing in the record indicates that the trial court ever gave even *implied* approval of a proposed misdemeanor plea by the Appellant. *Cf. State ex rel. Gray v. McClure*, 161 W. Va. 488, 242 S.E.2d 704 (1978) (holding that defendant was entitled to present evidence of detrimental reliance on inchoate plea agreement with former prosecutor which had been orally approved by the circuit court).

"A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant's prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant." Syl. Pt. 6, *Myers v. Frazier*, 173 W. Va. 658, 319 S.E.2d 782 (1984). In addition, "consideration must be given not only to the general public's perception that crimes should be prosecuted, but to the interests of the victim as well." Syl. Pt. 5, in part, *Myers, supra*. In the case at bar, the trial court reviewed all of the relevant factors and determined that a misdemeanor plea by the Appellant to a murder charge did not serve the interests of justice.

Judge Stephens rejected the proposed plea after an on-the-record review considering the seriousness of the crimes, the nature of the injuries and death of the victims, the role of the Appellant in the crimes, and the opinion of the victims and family members. Having done all of this, for the first time in his 19 years on the bench, Judge Stephens rejected the proposed plea agreement. That Judge Stephens exercised sound discretion is abundantly clear as a matter of record, the judge having elucidated his reasoning for all to hear. (*See* R. 663, 3/3/03 Hr'g.)

In certain limited instances a defendant may be entitled to specific performance of a plea agreement *breached by the State* if he has detrimentally relied upon the State's representations. *Santobello*, 404 U.S. at 262, 92 S.Ct. at 499; Syllabus, *State ex. rel. Gray v. McClure, supra* ("A prosecuting attorney or his successor is bound to the terms of a plea agreement once the defendant enters a plea of guilty or otherwise acts to his substantial detriment in reliance thereon.") However, in the instant case, the tentative plea agreement was never accepted by the Court, and there could therefore be no breach.

To determine the prejudice, if any, that inured to the Appellant, one need only look to the State's evidence that they had as a result of the Appellant's cooperation. They found the murder weapon. There is not any evidence of the Appellant's guilt to be derived from introduction of the weapon in the case against him. There was no contention that the Appellant used the gun, nor was there any issue about the make, type of caliber of the weapon. The introduction of the weapon was superfluous and, frankly, unnecessary. The articles of clothing found with the Appellant's cooperation were likewise superfluous, and added nothing to the State's case. It is clear that there was no prejudice to the Appellant from the information he provided to the State. What is apparent is that upon learning of the Appellant's cooperation, co-defendant Mullins turned on the Appellant.

What is further apparent is that the use of the Appellant's statement at trial, the only additional piece of evidence obtained by the Appellant's cooperation, was perhaps the single most effective part of the Appellant's defense. By not objecting to the introduction of the statement, defense counsel managed to get the Appellant's version of the day's events before the jury without exposing the Appellant to cross-examination. This was just good lawyering by trial counsel, as evidenced by the jury verdict. A verdict for voluntary manslaughter upon a trial for murder is a "win" for the defense, no matter how one characterizes it. No prosecutor, however zealous, would put this verdict in the "W" column. The Appellant should be forever grateful to his trial counsel.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING PHOTOGRAPHS OF THE VICTIM.**

The Appellant's next assignment of error claims that the trial court abused its discretion by allowing the State to introduce postmortem photographs of Ms. Webb. (R. 1021-25.)<sup>7</sup> In Syllabus Point 10 of *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994), this Court held:

Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.

Given the deferential standard of review afforded the trial court on this issue, the court's ruling should not be reversed on appeal. The photographs in question, although perhaps unsettling, are not overly gruesome. The circuit court, in advance of trial, conducted a hearing and undertook the balancing test contemplated by Rule 403. Of the ten photographs objected to by defense counsel, the trial court excluded five. Regarding the ones admitted into evidence, the court found:

And the Court finds that the five, which the State has selected out of the ten which the Defendant objected to, they are not gruesome or inflammatory to the extent that it would bring about unfair prejudice to the jury and that they are not cumulative now that the Court has reduced them down.

(R. 665, 3/22/04 Pre-trial Hr'g at 4.)

Although the State may have introduced these photos in an overly dramatic fashion, this Court has no substantial reason to interfere with the trial court's discretionary ruling in this case.

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<sup>7</sup>The record contains copies of numerous photographs which were not admitted at trial by order of the court. (R. 739-43.) The photos admitted at trial are State's Exhibits 2 through 6, at pages 1021-25 of the record. (See 3/22/04 Pre-trial Hr'g at 4.)

(See Tr. 116, 133-34.) It must be remembered that murder is a gruesome business, and that its victims do not often appear in positions of slumber-like, peaceful repose. This is the danger one runs when participating in the killing of people.

**C. THE TRIAL COURT'S FAILURE TO PRESERVE THE NOTES TAKEN BY AN OBSERVER DID NOT VIOLATE THE APPELLANT'S DUE PROCESS RIGHTS.**

The Appellant's third assignment of error asserts that a trial observer improperly took notes during the testimony of certain witnesses allegedly with the intent of showing these notes to a State's witness before she was called. There was no objection at trial. "This Court has consistently held that '[o]bjections on non-jurisdictional issues, must be made in the lower court to preserve such issues for appeal.' *Loar v. Massey*, 164 W. Va. 155, 159, 261 S.E.2d 83, 86 (1979)." *State v. Shrewsbury*, 213 W. Va. 327, 334, 582 S.E.2d 774, 781 (2003) (*per curiam*).

After Trooper Miller testified, the trial court noted that an individual named Quinton Dawson, Sr., was scribbling on a notebook. The court admonished Mr. Dawson, confiscated his scribbles, and instructed him not to do it again. (Tr. 530.) Dawson then handed the notes to the bailiff. (*Id.*) That same morning the court threw the notes in the trash. The Appellant never asked to view the scribbles, nor did he ask the trial court to preserve them. He now claims that Mr. Dawson's scribbles were summaries of testimony which Mr. Dawson intended to present to his daughter, State's witness April Dawson. There is no evidence of record to support such a claim, nor were any of the "scribbles" shown to any witness. This was a non-event. Not only is it not plain error, it is not even error.

The Appellant also asserts that the failure of the trial court to preserve these "notes" somehow violated his due process rights. Although the Appellant failed to object to the court's

actions during the trial, the trial court gave the Appellant an opportunity to be heard on this issue during post-trial motions. The trial court found that there was little or no evidence describing what was in these notes, and that the Appellant had been afforded every opportunity to impeach Ms. Dawson's trial testimony using an inconsistent statement which she had given prior to trial. (R. 1011, 6/14/04 Motion for New Trial Hr'g at 52-55.) Thus, the trial court's destruction of the notes did not prejudice the Appellant.

**D. THE TRIAL COURT'S REMARKS AND INSTRUCTION TO THE JURY DID NOT DENY THE APPELLANT A FAIR TRIAL.**

The Appellant's fourth assignment of error asserts that the trial court denied the Appellant a fair trial by use of an "Allen charge" and by telling the jury that the court was "duty bound" to finish the trial by a certain date and time.

A trial court has broad discretion in formulating its charge to the jury, and this Court reviews a challenge to the giving of a specific instruction under an abuse of discretion standard. *State v. Bell*, 211 W. Va. 308, 310, 565 S.E.2d 430, 432 (2002); *State v. Lease*, 196 W. Va. 318, 322, 472 S.E.2d 59, 63 (1996). "By contrast, the question of whether a jury was properly instructed is a question of law, and the review is de novo." Syl. Pt. 1, in part, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is

given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syl. Pt. 4, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

The Appellant asserts that the trial court improperly instructed the jury under *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896). This claim is also without merit.

The jury deliberated from 11:06 a.m. to 6:45 p.m. (Tr. 661.) During this period they took an hour lunch. The trial court delivered its supplemental charge at 5:52 p.m., after calling the panel into his court room *sua sponte*. (Tr. 659-60.) The Appellant did not object to the trial court's instruction, nor has he argued that the charge was plain error. *See* W. Va. R. Crim. P. 30. Accordingly, this claim is waived.

The Appellant does not allege that the language contained in the trial court's supplemental charge was insufficient as a matter of law. In *United States v. Paniagua-Ramos*, 135 F.3d 193, 197 (1st Cir. 1998), the United States Court of Appeals for the First Circuit ruled that a proper *Allen* charge should contain three elements: "A district court should instruct jurors in substance that (1) members of both the majority and the minority should reexamine their positions, (2) a jury has the right to fail to agree, and (3) the burden of proving guilt beyond a reasonable doubt remains with the government." (quoting *United States v. Manning*, 79 F.3d 212, 222 (1st Cir. 1996)).

The trial court read its supplemental instruction to the jurors after they had deliberated for four and one-half hours. (Tr. 658-60.) The text of the instruction read:

Ladies and Gentlemen of the Jury, the Court instructs you that you have informed the Court of your inability to reach a verdict in this case. The Court does not wish to know, and you are not to indicate how you stand or whether you entertain a predominant view. At the outset, the Court wishes you to know that, although you

have a duty to reach a verdict if that is possible, the Court has neither the power nor the desire to compel agreement upon a verdict.

The purpose of these remarks is to point out to you the importance and desirability of reaching a verdict in this case, provided, however, that you, as individual jurors, can do so without surrendering or sacrificing your conscientious scruples or personal convictions. You will recall that, upon assuming your duties in this case, each of you took an oath. That oath places upon you, as individuals, the responsibility of arriving at a true verdict upon the basis of your own opinion and not merely upon the acquiescence in the conclusions of your fellow jurors.

However, it, by no means, follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to reach a verdict by a comparison of views and by a consideration of the proofs of your fellow jurors.

You may retire to the jury room and continue your deliberations.

(Tr. 660-61.) There was no objection by the Appellant to this instruction.

The Appellant contends that the supplemental charge, coupled with the trial court's other alleged errors, denied the Appellant a fair trial. He claims that the *per curiam* decision of *State v. Spence*, 173 W. Va. 184, 313 S.E.2d 461 (1984), supports this contention. In *Spence*, the trial court advised the jury after less than an hour of deliberations that "I'm going to give you ladies and gentlemen a few more minutes to resolve your differences." *Id.* at 186, 313 S.E.2d at 464. In the instant case the trial court, after some four and one-half hours of deliberation, gave a time-honored and widely accepted supplemental instruction to the jury. These cases are factually distinguishable, and *Spence* has no application herein.

The trial court's supplemental instruction in the present case was taken from the instruction approved by this Court in *State v. Blessing*, 175 W. Va. 132, 331 S.E.2d 863 (1985). The court's supplemental instruction was a modified *Blessing* charge – NOT an *Allen* "dynamite" charge. The instruction given, while taken from *Blessing*, was also a toned-down version of the *Blessing* charge.

Although the court's instruction did not emphasize that the State maintained the burden of proof in this matter, nor did it clearly state that both the majority and the minority should review their positions, it fully informed the jury that they were under no obligation to reach a verdict. Given this, there are no reasonable grounds upon which this Court could find plain error. Even if the Appellant had objected and preserved this ground – which he didn't – there is no evidence to support a claim that the trial court abused its discretion.

The Appellant also seems to argue that the trial court erred in some fashion during voir dire, by excusing jurors who felt they might have problems attending court sessions as described by the trial court. There is no suggestion in the brief as to what sort of prejudice this worked on the Appellant, nor is there any authority cited for such proposition. Interestingly, after the trial court advised the prospective jurors of the anticipated trial schedule, one juror asked to be excused. After excusing the juror, the following exchange took place between the trial court and Appellant's counsel:

THE COURT: Now do you-all want to put anything on the record for me letting that juror go?

MR. MULLINS: No, Your Honor.

(Tr. 34.)

Suffice to say, counsel has waived any claim of prejudice from excusing this prospective juror.

The Appellant further asserts a vague claim that the trial court somehow rushed the proceedings. There is no assertion by the Appellant of just how he was prejudiced by this. There is nothing in the record of this case that indicates the Appellant was not allowed to offer, examine

or cross-examine any witness, or was in any way prevented from mounting a defense. The trial court has wide latitude in conducting trials. This is inherent in the power of the court. Again, there was no objection by the Appellant to any of the trial court's actions, and his recently-asserted claims should be deemed waived.

V.

**CONCLUSION**

Perhaps the best evidence of the fair and evenhanded manner in which this trial was conducted is the verdict itself. After hearing the evidence of a gruesome murder-for-hire, in which the Appellant was a willing and highly-paid lookout, the jury returned a verdict of voluntary manslaughter. This may well be the strongest indication that the trial court did not abuse its authority in refusing the misdemeanor plea – when confronted with the facts, a jury found the Appellant guilty of a felony.


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

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Appellee,*

By Counsel

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

  
DAWN E. WARFIELD, State Bar ID 3927  
DEPUTY ATTORNEY GENERAL  
State Capitol, Room 26-E  
Charleston, West Virginia 25305  
(304) 558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 23<sup>rd</sup> day of September, 2005, addressed as follows:

To: Charles B. Mullins II  
Mullins and Morgan, P.L.L.C.  
Rte.10 North, Post Office Box 490  
Pineville, West Virginia 24874

  
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DAWN E. WARFIELD