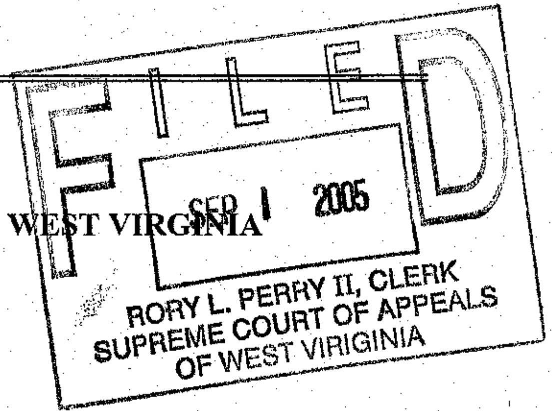
NO. 32694

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

LARRY G. DINGER,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

ROBERT D. GOLDBERG
DEPUTY ATTORNEY GENERAL
STATE BAR ID NO. 7370
STATE CAPITOL, ROOM 26E
CHARLESTON, WEST VIRGINIA 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

Page

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW 1

II. STATEMENT OF THE FACTS 1

III. PROCEDURAL HISTORY 7

IV. ARGUMENT 8

A. THE TRIAL COURT'S INSTRUCTIONS TO THE GRAND JURY DO NOT CONSTITUTE REVERSIBLE ERROR 8

B. THE TRIAL COURT'S DECISION TO ADMIT POSTMORTEM PHOTOGRAPHS OF THE VICTIM WAS NOT AN ABUSE OF DISCRETION 10

C. THE TRIAL COURT'S DECISION NOT TO GIVE THE APPELLANT'S "ACCIDENT" AND "INABILITY TO RETREAT" INSTRUCTION WAS NOT ERROR 12

D. THE TRIAL COURT'S DECISION TO DENY APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL WAS NOT ERROR 17

E. THE RESULT OF THE GUNSHOT RESIDUE TESTING IS NOT NEWLY DISCOVERED EVIDENCE 17

F. THE STATE INTRODUCED SUFFICIENT EVIDENCE TO SUPPORT THE APPELLANT'S CONVICTION 22

V. CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Laney v. United States, 294 F. 412 (1923) 24

Old Chief v. United States, 519 U.S. 172 (1997) citing
Parr v. United States, 255 F.2d 86 (5th Cir. 1958) 12

Proudfoot v. Dan's Marine Service, 210 W. Va. 498,
558 S.E.2d 298 (2001) 18

State ex rel. State v. Hill, 201 W. Va. 95, 491 S.E.2d 765 (1997) 9

State v. Boggess, 204 W. Va. 267, 512 S.E.2d 189 (1998) 13

State v. Cobb, 166 W. Va. 65, 272 S.E.2d 467 (1980) 16

State v. Derr, 192 W. Va. 165, 451 S.E.2d 731 (1994) 10, 11

State v. Miller, 197 W. Va. 588, 476 S.E.2d 535 (1996) 12

State v. Frazier, 162 W. Va. 935, 253 S.E.2d 534 (1979) 19

State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995) 13, 22, 25

State v. Hinkle, 200 W. Va. 280, 489 S.E.2d 257 (1996) 13

State v. Hulbert, 209 W. Va. 217, 544 S.E.2d 919 (2001) 16

State v. Joseph, 214 W. Va. 525, 590 S.E.2d 718 (2003) 18

State v. Justice, 191 W.Va. 261, 445 S.E.2d 202 (1994) 10

State v. Kirtley, 162 W. Va. 249, 252 S.E.2d 374 (1978) 23

State v. Lytton, 355 S.E.2d 485 (N.C. 1987) 16

State v. McMillion, 104 W. Va. 1, 138 S.E. 732 (1927) 22

State v. Miller, 197 W. Va. 588, 476 S.E.2d 535 (1996) 12

State v. Miller, 772 S.W.2d 782 (Mo. 1989), *overruled on other grounds by by State v. Beeler*, 12 S.W.3d 294 (Mo. 2000) 15

State v. Osakalumi, 194 W. Va. 758, 461 S.E.2d 504 (1995) 21

State v. Starkey, 161 W. Va. 517, 244 S.E.2d 219 (1978) 17, 22

State v. Vollmer, 163 W. Va. 711, 259 S.E.2d 837 (1979) 16

State v. Whitchurch, 96 S.W.2d 30 (Mo. 1936) 25

United States v. Conley, 249 F.3d 38 (1st Cir. 2001) 19

United States v. Peterson, 483 F.2d 1222 (D.C. 1973) 14, 23

Wallace v. State, 725 N.E.2d 837 (Ind. 2000) 11

STATUTES:

W. Va. Code § 61-7-11 16

W. Va. Code § 61-7-12 16

OTHER:

Am. Jur. 2d, *Appellant Review*, § 695 18

Am. Jur. 2d, *Appellate Review*, § 672 18

West Virginia Pattern Jury Instructions, *Wrongful Killing*, <http://www.state.wv.us.wvsca/jury/crimwrongful/.htm> citing *State v. Hose*, 187 W. Va. 429, 419 S.E.2d 490 (1992) 15

W. Va. R. Crim. P. 33 1

NO. 32694

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

LARRY G. DINGER,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Larry G. Dinger (after this "Appellant") appeals the Circuit Court of Monroe County's (Irons, J.) September 17, 2004, order denying his motion for a new trial. *See* W. Va. R. Crim. P. 33. Appellant also appeals the court's July 2, 2003, sentencing order. (R. 39.)

II.

STATEMENT OF THE FACTS

On April 20, 2002, the Appellant shot and killed 19-year-old Mac Burton Lilly (after this "Mr. Lilly" or "the victim.") in a rural area of Summers County, West Virginia, with a double-action .357 handgun. (Trial Tr. 40-43.) The investigating officer, Deputy Sheriff Garry Wheeler, arrived

at the scene of the murder at approximately 12:47 p.m., and found Mr. Lilly's lifeless body in Mr. Gary Pack's front yard, lying in front of the home's front porch.[1] (Trial Tr. 29.)

The shooting was the culmination of a series of confrontations between the Appellant, his son Matthew, Mark McBride (the former husband of the Appellant's then girlfriend Tasha Pack), and the victim. (Trial Tr. 187) On the evening of the 19th, the Appellant, his sons, and Ms. Pack decided to go to the Bobcat Lounge (after this "lounge") for dinner. Once they arrived, they met Mark McBride and the victim.

At approximately 10:00 that same evening Summers County Deputy Bircham was dispatched to the lounge in response to a complaint from some servers regarding Mr. McBride.[2] (Trial Tr. 146.) After a brief conversation, he agreed to leave the lounge, accepting a ride from the Appellant. Ms. Pack remained at the club awaiting the Appellant's return. (Trial Tr. 189-90.) At Mr. McBride's request, the Appellant dropped him off at a service station. The Appellant then returned to the lounge. (Trial Tr. 147, 189-90.)

Upon his return, the Appellant sat with Ms. Pack and began to eat. The victim came to their table for a brief discussion. The atmosphere was amicable. (Trial Tr. 190-91.) That same evening Deputy Bircham returned to the club, this time responding to a complaint regarding the victim's

[1]Tasha Pack was the Appellant's girlfriend on the date of the shooting. Mr. Pack is her father. The Appellant and his two sons had been living with Ms. Pack since January. (Trial Tr. 184, 264.)

[2]The Appellant claims that Mr. McBride had been barred from the lounge for bad behavior. There is no record evidence to support this allegation. Also, there is no evidence that Mr. McBride was anything but cooperative with Deputy Bircham.

behavior.[3] At approximately midnight the Appellant, his son, Ms. Pack, and the victim drove to the victim's home.[4] Ms. Pack testified that the victim was well behaved during the ride. (Trial Tr. 192.) We cannot say the same of the Appellant's son Matthew. On his way home Deputy Bircham pulled Matthew over citing him for reckless driving. Because Matthew had been drinking, the deputy asked Ms. Pack to drive the rest of the way. (Trial Tr. 192-93, 464.)

When they arrived at the victim's father's house, no one was home, so they drove to a campsite along the New River. Upon their return they found the victim's father, "Bouncer" Lilly, and Mark McBride together.[5] The victim got out of the Appellant's car, and walked inside. The Appellant then drove back to the Pack's house.

Shortly after the Appellant arrived at Ms. Pack's home, Mr. McBride and the victim came to the door. Ms. Pack agreed to let them into her living room. Sometime after they arrived, Mr. McBride began to argue with the Appellant's son Matthew.[6] The Appellant then punched Mr. McBride, who was seated at the time. After he fell on the floor the Appellant and his son Matthew

---

[3]Deputy Bircham testified that the victim was completely cooperative with him, and that he "didn't have a bit of problem with him." (Trial Tr. 149.) Although the deputy believed that the victim had been drinking, in his professional opinion as a certified law enforcement officer, he did not believe that the victim was intoxicated. (*Id.*)

[4]Matthew Dinger, the Appellant's 23-year-old son, drove.

[5] The Appellant claims that Bouncer was drunk when they dropped the victim off. In fact, Ms. Pack testified, "[I] believe he'd been drinking." (Trial Tr. 196.) The Appellant's son testified that Mr. Lilly appeared angry, not intoxicated, when he dropped the victim off. (Trial Tr. 465.)

[6]Mr. McBride posed no danger to the Appellant or his son. At the time of the argument, he was seated. He remained sitting in the chair until the Appellant punched him in the face.

stomped him, causing him to blackout.[7] (Trial Tr. 202, 260-61, 279.) Although both he and the victim were present, Mr. McBride did not attempt to retaliate. Mr. McBride sat in the chair for a few seconds, and then left the house with the intent of walking home.[8] (Trial Tr. 201, 467.) He returned to the Pack's house early the next morning, woke the victim, who had slept on Ms. Pack's couch, and told him what had happened. Both the victim and Mr. McBride left the Pack house together. (Trial Tr. 205, 279.)

Before they left, Mr. McBride allegedly stated, "We'll be back." Matthew Dinger immediately confronted Mr. McBride who denied ever saying that. Matthew accused Mr. McBride of calling him a liar, and pushed him across the Pack's coffee table. After Mr. McBride had fallen on the Pack's couch, Matthew picked him up and pushed him onto the floor. (Trial Tr. 468.) Ms. Pack testified that after she heard Mr. McBride's statement, she retrieved two rifles from her father's house. Neither she nor the Appellant called the law or left the premises. They simply armed themselves and waited.

Later that morning Mark McBride's brother Jason and his cousin Kenny Ray arrived at the Pack's house. The Appellant claims that Jason forced his way into the Pack house, characterizing his conduct as a "burglary." According to Matthew Dinger, after he heard Jason knock, he unlocked the door and let them in. (Trial Tr. 470.) After Jason demanded to know what had happened to his

---

[7]The Appellant claims that he punched Mr. McBride twice, bloodying his nose. Defense witness Doug Hartwell testified that he saw Mr. McBride the morning of the 20th. He stated that Mr. McBride appeared as though he had been through a "rough one," and that his injuries were more serious than those caused by a few punches to the face. (Trial Tr. 384.)

Mike McBride testified that he saw his brother early in the morning of the incident, and he appeared "black and blue from his head to his waistline." (Trial Tr. 346.)

[8]He never made it home, and ended up sleeping outside.

brother, both parties began to argue. Both voluntarily left the Pack house shortly after that. (Trial Tr. 209.) Neither Jason nor Kenny Ray initiated any violence. (Trial Tr. 470.)

Some two or three hours later Mark McBride, the victim, and several others drove to Ms. Pack's home. (Trial Tr. 211.) The victim, and three other individuals came onto Ms. Pack's front porch. (Trial Tr. 212.) Upon hearing that the victim and his companions had parked in front of the house the Appellant grabbed his pistol, and walked out to confront them. (Trial Tr. 219.) Appellant's son Matthew testified, "And my little brother (Brandon) come back inside, and said there were two carloads of people outside. And I got up kind of angry, because they kept coming back." (Trial Tr. 472.) He later testified that, although he was on the same porch as his father, surrounded by the same people, he was not afraid, nor did he believe that his life was in danger. He wanted to fight. (Trial Tr. 474.) According to Ms. Pack the Appellant began arguing with the victim and Mark McBride.

> Q: So is it fair to say that [the Appellant] was intense?
>
> A: Yeah, I mean, [the Appellant, the victim, and Mark] was hot and heavy arguing, having words, yes, sir.

(Trial Tr. 225.)

According to Mr. McBride, the Appellant drew his gun and pointed it at the victim. (Trial Tr. 285.) The victim walked back away from the Appellant, and placed his hands up. After waiting a few seconds, the Appellant shot the victim in the head. (Trial Tr. 281, 300.) Alex Cline testified that he arrived at the Pack house with the victim, and walked up to the front porch. The Appellant and his son came outside, and began arguing with the victim and Mark McBride. (Trial Tr. 317.)

The Appellant drew his gun, aimed it at the victim, cocked the trigger, stood there for a couple of seconds, and shot him. (Trial Tr. 332-33.)

According to Michael McBride, the victim grabbed the Appellant's hand, the Appellant then jerked his hand back, and after the victim had stepped away from the porch, the Appellant shot him. (Trial Tr. 355.)

The State Medical Examiner James Kaplan testified that the victim died of a gunshot wound over his right eyebrow, five inches to the right of the center of his face, and three and 3/4 of an inch below his scalp. (Trial Tr. 67-68, 83.) Dr. Kaplan also found "sparse gunpowder stippling"[9] radiating two and three quarters inches from the center of the wound. (Trial Tr. 69.) The bullet's trajectory was straight; Dr. Kaplan found fragments inside the victim's skull. The doctor did not find an exit wound. (Trial Tr. 107.)

According to Dr. Kaplan the Appellant did not shoot Mr. Lilly at close range. (Trial Tr. 93-95.) The gunpowder stippling was sparse; he found no traces of gunpowder soot or seared skin surrounding the wound; nor was there evidence of splattered blood on the murder weapon. (Trial Tr. 70, 77.) Dr. Kaplan found a "trivial laceration" on the victim's left ring finger that, he believed, occurred immediately after he was shot. (Trial Tr. 84-85.)

Dr. Kaplan also conducted a gunshot residue test on the victim's hands. After he had conducted the test, he marked the kit and mailed it to State Trooper J. Miller. (Trial Tr. 110.) Dr. Kaplan noted this test on his autopsy report that they turned over to the defense on November 25,

---

[9]Stippling describes the imprinting of unburned gun powder flakes which come out of the barrel of the gun with the bullet, and become embedded in the victim's face. It is used to determine how far the barrel of the gun was from its target at the time of the shooting. (Trial Tr. 83-84, 93-94.)

2002. (R. 5; Trial Tr. 170.) At trial Sheriff Wheeler testified that they never sent the gunshot residue kit to the police lab for testing. (Trial Tr. 455-56.)

Expert Firearms/Toolmark Examiner James "Rocky" Lane testified that he test fired the murder weapon at several known distances. (Trial Tr. 157.) He compared the resulting stippling patterns with the information he received from Dr. Kaplan, including the autopsy photographs. (Trial Tr. 158.) In his opinion, the Appellant was standing approximately 15 to 27 inches from the victim when he shot him. When asked to narrow it down, Mr. Lane testified that the stippling patterns on the Appellant's head suggested a firing range of 18 to 24 inches. (Trial Tr. 163, 164.)

At trial it was the Appellant's position that the victim had grabbed the gun, and during the ensuing wrestling match, the gun had discharged accidentally. He claimed that the victim's hands were on the gun's cylinder when he pulled the trigger.

The jury found the Appellant guilty of voluntary manslaughter.

III.

PROCEDURAL HISTORY

The Appellee incorporates by reference the procedural history recited in the trial court's order of September 17, 2004, denying Appellant's Motion for a New Trial. (R. 60-60c.)

The petit jury convicted the Appellant on May 16, 2003. The Appellant filed a Motion for a New Trial or to Set Aside the Verdict on May 22, 2003, in which he raised the same five assignments of error which he presented to this Court. (R. at 32.) On July 2, 2003, the trial court filed its sentencing order. Although the court denied Petitioner's Motion for a New Trial, it ruled that the gunshot residue kit be preserved and tested by both the State and the Appellant. (R. 40.) The

Appellant filed his Notice of Intent to Appeal on June 18, 2003. The trial court granted him a two-month extension on October 7, 2003. (R. 48.)

On May 16, 2003, this Court granted the Appellant's motion to amend his petition for appeal to include the results of post-trial gunshot residue tests, remanded the case back to the circuit court for a hearing on the Appellant's motion, with leave to file a petition for appeal following entry of an order deciding the motion, or subsequent final order, as the case may be.

The trial court issued its final order denying the Appellant's Motion for a New Trial based on newly discovered evidence on September 17, 2004. Appellant filed his Petition for Appeal on February 16, 2005.

IV.

ARGUMENT

A. THE TRIAL COURT'S INSTRUCTIONS TO THE GRAND JURY DO NOT CONSTITUTE REVERSIBLE ERROR.

After extensive quotation from the grand jury transcript, the Appellant finally quotes the trial court's instructions to the grand jury:

JUDGE IRONS: Is there a question?

GRAND JUROR J: We want you to define murder.

JUDGE IRONS: Lesser included –

MR. MCNEELY: What an indictment for murder would include.

JUDGE IRONS: What lesser included offenses there are?

GRAND JUROR B: Uh-huh.

JUDGE IRONS: Murder is murder. You got first degree murder, you got second degree murder, you got voluntary manslaughter, you got involuntary manslaughter, typically.

> The court went on to instruct the jury as to the essential elements of first degree murder, and all of its lesser included offenses.

(Grand Jury Tr. 41-42.)

After a grand juror asked if they could indict on one of the lesser-included offenses, Judge Irons responded, "You can ask [the prosecutor] to go back and draft an indictment for one of the lesser offenses." In response to a grand juror's question, the court then stated, "Typically, what happens is when a person is charged with murder, there is an indictment for simple murder and the petit jury sorts out what it is."

The trial court's statement to the grand jury was legally correct. It informed them that they could indict on a lesser-included offense. (Grand Jury Tr. 42.) It then stated that they could also return a general murder indictment. If they did so, the petit jury would decide what offense, if any, had been committed.

> "In West Virginia, we do not have indictments for first and second degree murder. *State v. Justice*, 191 W.Va. 261, 267, 445 S.E.2d 202, 208 (1994) citing *State v. Schnelle*, 24 W.Va. 767 (1884). Instead, we permit indictments for 'murder', with the degree of murder contingent upon the proof presented at trial. *Id.* (citing *State v. Johnson*, 49 W.Va. 684, 39 S.E. 665 (1901)). 'A general form of indictment for murder' is sufficient for a first or second degree murder conviction, *or a conviction for any lower grade of homicide*. *Id.* (citing *State v. Douglass*, 41 W.Va. 537, 23 S.E. 724 (1895))."

State ex rel. State v. Hill, 201 W. Va. 95, 491 S.E.2d 765 (1997) (emphasis added.)

After the judge left a juror stated, "I do not think there is any doubt, based on what [the prosecutor] said. There is a man dead and this man says he shot him. We were concerned about whether it's a cold-blooded murder or self defense." To which a second juror responded, "that is not

for us to say." (Grand Jury Tr. 44.) Clearly, the juror's primary concern was whether the Appellant acted in self-defense, perhaps believing that self-defense reduced the seriousness of the charge. This motivated them to ask the judge to define murder, and its lesser-included offenses. Once the court did that, the jury returned a general murder indictment, leaving it to the jury to sort out the self-defense issue.

The Appellant claims that the trial court permitted the grand jury to "pass the buck" to the petit jury. That is exactly what the law permits them to do. *See State v. Justice*, 191 W.Va. 261, 445 S.E.2d 202 (1994). Thus, the court's instructions were proper.

B. THE TRIAL COURT'S DECISION TO ADMIT POSTMORTEM PHOTOGRAPHS OF THE VICTIM WAS NOT AN ABUSE OF DISCRETION.

In Syl. pt. 10, *State v. Derr,* 192 W. Va. 165, 451 S.E.2d 731 (1994), this Court ruled that a trial court's exercise of its discretion in ruling to admit potentially gruesome photographs should not be overturned absent a clear showing of abuse. The Appellant limited his objections to two photographs labeled State's Exhibit 7 and State's Exhibit 8. State Medical Examiner James Kaplan took both photographs, and made them part of his autopsy report. (Trial Tr. 62.) Both Dr. Kaplan and Firearms Expert Rocky Lane used these photographs as demonstrative exhibits during their testimony.

State's Exhibit 7 depicted the condition of the victim's body when the medical examiner received it. (Trial Tr. 62.) They depict the victim's hands wrapped in paper bags, with some blood distributed on his body. (*Id.*) State's Exhibit 8 was a shot of the bullet wound and the stippling pattern around it. (*Id.*) At trial the Appellant claimed that these photographs were unnecessary and immaterial. He argued that he was ready to stipulate to the cause of death, and had no objections to

testimony from the firearm expert regarding the stippling pattern found on the victim's face. (Trial Tr. 6.)

The trial court convened an *in camera* hearing on the Appellant's motion, permitting defense counsel substantial leeway in his cross-examination of Dr. Kaplan. After analysis of counsel's arguments the trial court stated:

> All right, the Court having considered the matter, the pictures are really not gruesome. They do show a dead body.[10] From the evidence brought forth here today in the *in camera* hearing, the Court finds that there is – may be some probative value. The photographs show that there's an absence of wounding, and would also have some probative value from the standpoint of establishing the distance between the two persons involved in the incident at the time the shooting took place because of the location or absence of powder burns and the way powder burns are displayed in the photograph. So the Court feels that the probative value is not outweighed by any prejudicial value due to the fact that the photographs might be seen as having some gruesomeness about them.

(Trial Tr. 73.)

The trial court's decision was not an abuse of discretion. *See Wallace v. State,* 725 N.E.2d 837, 839 (Ind. 2000) (Admission of postmortem photograph depicting a gunshot wound to the victim's left eyelid admissible to prove nature of the wound, and to illustrate the pathologist's testimony about the stippling pattern near the wound.). It applied the correct standard of law as articulated in *Derr*, and its factual findings were reasonable. Appellant's willingness to stipulate to certain facts did not render the photographs irrelevant. Dr. Kaplan used Exhibit 8 to illustrate the idea of stippling to the jury, and the significance of the patterns found on the victim's face. (Trial Tr. 83, 93-95.) Clearly, a lay juror would have found these pictures helpful, despite the Appellant's

---

[10]Several other pictures admitted into evidence also depicted the victim's dead body at the scene. (Trial Tr. 30.) Although he objected to the photographs, the Appellant did not object to them as overly gruesome. (*Id.*)

stipulation. Mr. Lane testified that he compared the stippling pattern depicted in State's Exhibit 8 with the stippling from his test firings. (Trial Tr. 158.) He also used the photographs to illustrate his testimony to the jury. (Trial Tr. 161-63.)

The prosecution is entitled to prove its case by evidence of its own choice. *Old Chief v. United States*, 519 U.S. 172, 186 (1997) citing *Parr v. United States*, 255 F.2d 86, 89 (5th Cir. 1958) ("A party is not required to accept a judicial admission of his adversary but may insist on proving the fact.") (Citation omitted.) The State's decision to show the jury pictures, as opposed to reading from dry reports was well within its discretion. The Appellant could not stipulate away this specific evidence.

C. THE TRIAL COURT'S DECISION NOT TO GIVE THE APPELLANT'S "ACCIDENT" AND "INABILITY TO RETREAT" INSTRUCTION WAS NOT ERROR.

It is the Appellant contention that he offered two jury instructions to the trial court. These instructions are not in the record. Since the Appellant chose not to transcribe the trial court's reading of the instructions, there is no evidence from the transcript that the Appellant ever offered these specific instructions.[11] This Court has ruled that it will not decide issues in instances where they have not developed the record below. *C.f. State v. Miller*, 197 W. Va. 588, 611, 476 S.E.2d 535, 558 (1996) (Appeals court ordinarily will not review ineffective assistance of counsel claims on direct appeal because there are not sufficient facts to conduct an effective review.).

In the instant case, the Appellant has deliberately chosen not to give this Court a sufficient record. His transcript request states, "Trial. Everything from the end of opening statements to the

---

[11]Counsel for the Appellee has called the Circuit Clerk of Monore County, and the Prosecuting Attorney. Neither had full copies of the jury instructions offered by the Appellant.

beginning of jury instructions." (R. 43.) Given the nature of this assignment of error, his decision not to include these instructions in the record is bad faith. What makes his conduct especially egregious is his decision to characterize the court's jury instructions as insufficient without including them in the record. The Appellant's assignment of error is wholly unsupported by facts in the record, and this Court should not consider it.

Even if this Court were to consider this assignment, it is without merit. The refusal of a trial court to give an instruction is reviewed for abuse of discretion. Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). It is the Appellant's position that the court's charge did not sufficiently instruct the jury on the Appellant's duty to retreat. His proposed instruction reads:

> A person who is without fault in an altercation has no duty to retreat while acting in self-defense. If the person is in a substantial degree at fault, he must retreat if able to do so, however, if from fierceness of the attack or if they are prevented from retreating, or for other reasons they are unable to retreat, they will be excused by the law from not doing so.

(Appellant's Brief at 25.)

A trial court is under no obligation to give instructions that are incorrect as a matter of law. Syl. pt. 4, *State v. Guthrie*, 194 W. Va. 657, 672, 461 S.E.2d 163, 178 (1995). Nor is it required to give instructions that are duplicative or irrelevant. *State v. Boggess*, 204 W. Va. 267, 273, 512 S.E.2d 189, 195 (1998).

The trial court instructed the jury:

> [I]f the defendant was not the aggressor, and had reasonable grounds to believe and actually did believe that he or others were in imminent danger of death or serious bodily harm from which he could save himself or others only by using deadly force against his assailant or assailants then he had the right to employ deadly force in order to defend himself or others.

> In order for the Defendant to have been justified in the use of deadly force in self-defense or in defense of others he must not have provoked the assault on him or have been the aggressor. Mere words, without more, do not constitute provocation of aggression.
>
> The circumstances under which he acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the reasonable belief that the other person or persons, then about to kill them or to do them serious bodily harm. In addition, the Defendant must have actually believed that he or they were in imminent danger of death or serious bodily harm and that deadly force must be used to repel it. The mere fact the victim or others have not used a deadly weapon during the altercation does not deprive the defendant. Larry Dinger of the right of self-defense or defense of others.
>
> If evidence of self-defense or defense of others, the State must prove beyond a reasonable doubt that the Defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the Defendant did not act in self-defense, or defense of others you must find the defendant not guilty. In other words, if you have a reasonable doubt as to whether or not the Defendant acted in self-defense or defense of others, your verdict must be not guilty.

The Appellant does not object to the court's instruction as worded; he argues that it should also have given his "retreat" instruction. The trial court ruled that its charge sufficiently covered the law, *i.e.*, that if the Appellant could have safely retreated, but did not do so, that failure was a circumstance that the jury might consider, with all others in determining whether he went further in repelling the danger, real or apparent, then he was justified in going. *United States v. Peterson*, 483 F.2d 1222, 1234 (D.C. 1973). The court instructed the jury that a defendant, who was not the aggressor - *i.e.*, was without fault - had reasonable grounds to believe and actually did believe[12] he was in danger of death or serious bodily harm, could respond by using deadly force.

Appellant's Instruction F reads:

---

[12]Appellant's instruction is wholly subjective and, therefore, a misstatement of the law.

> Manslaughter or murder are the result of some intentional act.[13] Negligent or accidental homicide are neither manslaughter nor murder. If the jury finds that the State has not proven beyond a reasonable doubt that Larry Dinger intentionally pulled the trigger the weapon causing it to fire, they you must find him not guilty, as he could not be held criminally responsible.

(Appellant's Brief at 26.)

The Appellant seeks to have it both ways: On one hand he claims that he intentionally killed the victim in self-defense; on the other he claims that the gun went off accidentally. If this is true, then was no reason to instruct the jury that the Appellant acted in self-defense. If he shot the victim by accident, the events occurring before the shooting were irrelevant. *See State v. Miller*, 772 S.W.2d 782 (Mo. 1989), *overruled on other grounds by State v. Beeler*, 12 S.W.3d 294 (Mo. 2000) ("The issues which defendant raised in his defense included self-defense and accident. These issues are inconsistent. Self-defense in a homicide matter involves a claim that a life was taken by an intentional act necessary because of apprehension of great bodily harm while accidental homicide involves an unintentional taking of human life.").

Also, the Appellant's instruction is incorrect as a matter of law. The Appellant claims that "manslaughter or murder are the result of some intentional act." He then claims, "If the jury finds that the State has not proven beyond a reasonable doubt that Larry Dinger intentionally pulled the trigger the weapon causing it to fire, they you must find him not guilty, as he could not be held criminally responsible." This instruction misstates the law. Involuntary manslaughter is the accidental causing of death of another person, although unintended, which death is the proximate result of negligence so gross, wanton, and culpable as to show a reckless disregard for human life. *See* West Virginia Pattern Jury Instructions, *Wrongful Killing*, <http://www.state.wv.us.wvsca/jury/

---

[13]The Appellant does not differentiate between voluntary and involuntary manslaughter.

crimwrongful/.htm> citing *State v. Hose*, 187 W. Va. 429, 419 S.E.2d 490 (1992); *State v. Cobb*, 166 W. Va. 65, 272 S.E.2d 467 (1980); *State v. Vollmer*, 163 W. Va. 711, 259 S.E.2d 837 (1979).

Both the Legislature and this Court have recognized that firearms are inherently dangerous instruments. *See* W. Va. Code § 61-7-11 (a defendant commits brandishing if he carries, brandishes or uses a firearm enough to cause or threaten a breach of the peace.); W. Va. Code § 61-7-12 (A defendant commits wanton endangerment, a felony, if he wantonly does any act with a firearm which creates a substantial risk of death or serious bodily injury to another.). In *State v. Hulbert*, 209 W. Va. 217, 544 S.E.2d 919 (2001), this Court, citing to the plain meaning of the wanton endangerment statute, ruled that a defendant may create a substantial risk of death or serious bodily injury without discharging his firearm.

The Appellant's instruction relives him of any criminal liability unless he intentionally pulled the trigger. That is not an accurate statement of law. It is not just the pulling of the trigger that determines the Appellant's culpability, but the nature of his conduct before the fatal event. *State v. Lytton*, 355 S.E.2d 485, 488 (N.C. 1987). The jury found that the Appellant left the Pack's house with a loaded weapon, unlawfully brandished it, put his finger on the trigger, and pointed it at the victim in a menacing manner. The victim's death was not from an unknown cause or from an unusual or unexpected event from a known cause. *See State v. Lytton*, 355 S.E.2d at 486-87 (North Carolina pattern jury instruction states that accidental killing involves conduct that was unintentional, occurs during lawful conduct, and does not involve culpable negligence.). Loaded guns tend to go off. The death of the victim was entirely foreseeable from the time the Appellant came out of the Pack's home with a loaded firearm.

D. THE TRIAL COURT'S DECISION TO DENY APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL WAS NOT ERROR.

In Syl. pt. 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978), this Court ruled:

> 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.

Taken in a light most favorable to the State, the evidence suggested that the Appellant came out of his home, pointed a loaded firearm at the victim, waited a few seconds, and then shot him. (Trial Tr. 281, 317, 355, 397-98.) Defense counsel's motions were denied in short order by the trial court at the close of the State's case, and at the close of trial. (Trial Tr. 447, 514.) The court ruled:

> I am going to deny that motion or that particular grounds for the motion. There was evidence that, taken in a light most favorably to the State, that the – your client pulled out a gun, pointed a gun at the decedent, that there was some conversation that took place, that your client pulled the trigger and killed him.
>
> It's not clear what period of time there was for reflection, but its obvious there was a period of some several seconds there in which your client had to reflect over it before he pulled the trigger. Under the case of – I want to call it Danny Ribshot case – *State v. Guthrie*, there's no specific time period, but there must be some period for the accused to deliberate and think about it in order to be premeditation. I thing the State has met its burden in that regard.

(Trial Tr. 447-448.)

The court's decision was in conformity with the law.

E. THE RESULT OF THE GUNSHOT RESIDUE TESTING IS NOT NEWLY DISCOVERED EVIDENCE.

The Appellant next claims that the trial court's decision to deny his motion for a new trial was wrong. A trial court's order denying a defendant's motion for a new trial is entitled to

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

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

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

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

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

5 Am. Jur. 2d, *Appellate Review*, § 672.

The Appellant contends that he was unable to obtain test results of the gunshot residue kit until after trial. The State had no duty to perform the gunshot residue test before going to trial. Although the results may have been helpful, a prosecutor may decide to go to trial without them. There is no support in the law for the proposition that defense counsel may compel the State to conduct testing before trial. The consequences of such a decision should be self-evident.

Appellant claims that the test results were exculpatory, and thus newly discovered evidence. *See* Syl, in part, *State v. Frazier*, 162 W. Va. 935, 253 S.E.2d 534 (1979) ("It must appear in the affidavit that the Appellant was diligent in ascertaining or securing the evidence his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict."). Newly discovered evidence must have been unknown or unavailable to the defendant at the time of trial. *United States v. Conley*, 249 F.3d 38 (1st Cir. 2001). In fact, the tests were neutral. The State's expert found no traces of gunshot residue on the victim's face. The Appellant's expert did. Thus, the evidence was not purely exculpatory. To state that the Appellant's evidence would have changed the outcome of the trial is pure speculation.

Clearly, the Appellant knew about the residue kit before trial. He knew, months before the trial, that the Sheriff bagged the victim's hands to preserve any gunshot residue. He also knew that Dr. Kaplan removed the gunshot residue from the victim's hand and prepared a test kit.[14] He did not ask for a continuance, or request the court order the test or produce the test kit itself. Nor did he move for an opportunity to conduct his own tests before trial. Although Appellant compelled the State to turn over the test results,[15] since the State never conducted the test, it had nothing to divulge.

Thus, the Appellant attempts to convince this Court that the post-trial results of the test kit are newly discovered evidence. Although he had every opportunity to conduct this test before trial,

---

[14]The fact that Dr. Kaplan had performed the test was included in his autopsy report which the Appellant received in November 2002. (R. 5.)

[15]Appellant's brief is misleading on this issue. He claims that he compelled the State to conduct the tests, and then provide the results. This is not true. (R. 16.) The Appellant compelled the State to turn over, "State Police Lab reports regarding bullet caliber, fingerprints and/or gunpowder residue tests." (R. 15.) Nowhere does he demand that the State actually conduct the test.

he failed to act upon that knowledge. The Appellant tries to do an end run around the "newly discovered" requirement of Rule 33 by stating that the results were newly discovered, not the kit itself. He ignores the fact that they did not reach the results before trial because he chose not to push the issue.

Appellant seems to argue that, since the test results were lost, they were not available to him pre-trial, and, therefore constitute newly discovered evidence. The State never told Appellant that they had lost the evidence because the Appellant never asked. Had the State responded to a legitimate defense discovery request by stating that the kit had been lost, and was not available for testing the Appellant's argument might be more compelling. The State sent the opposite message. Its' discovery responses, served on the Appellant almost four months before trial claimed that it would introduce the test results at trial. (R. 25-A.)

Dr. Kaplan sent an unopened package with the victim's personal effects and the gunshot residue test kit to State Trooper Reed. Without opening the box, Trooper Reed forwarded it to the Summers County Sheriff's Department. (Trial Tr. 137.) The kit remained in this box, at the Sheriff's Department. Once the State found out that the lab did not have the kit results, it quickly found them. Had the Appellant asked to inspect the test kit, or to run an independent examination, the issue could have been cleared up before trial. He chose not to.

Also, the Appellant made good use out of the missing test results during his cross-examination of State's expert Rocky Lane. (Trial Tr. 170-71, 175.) In his summation counsel argued:

> Circumstantial evidence is a gunshot residue test kit, which was requested by the defense to be done, and that sheriff, right away, because of the conflict in what he heard, knew was important. He put the bags on the [victim's] arms and insisted

> that test be done, because that would've been circumstantial evidence that would have decided that matter, as to whether his hands were on that gun, wouldn't it, if it had been done. And I'm not saying it was anything other than inadvertence. It's a damn shame it wasn't done, because then you wouldn't have that question in your mind to decide.

(Closing Argument at 5.)

> There was a test kit prepared. It would be submicroscopic to find out settle [the question of whether the victim's hands were on the barrel of the gun at the time it fired], which we will never know the answer to.

(Closing Argument at 7.)

The Appellant did not diligently pursue either the test kit, or the results of the test before trial. He had no interest in either. Instead, he argued that the State had chosen not to conduct the test because it had something to hide. He now seeks to argue from the other side of the fence. His claim has no merit.

Appellant tries to compare this case with *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995). In *Osakalumi* the State destroyed actual, not derivative, evidence before the defendant had the opportunity to conduct its own tests. This Court found that, although the State had acted in good faith, given the critical nature of the evidence, the State had violated the defendant's due process right to a fair trial when it destroyed the couch.

In the instant case, they never destroyed the test kit. The Appellant could have conducted his own testing whenever he wanted. Although the Appellant moved to compel the test results from the State, he did not compel the State to do the test, nor did he move for the production of the test kit. The defense, in effect, never asked to see the "couch" until after trial. Any post-trial testing results are hardly newly discovered evidence.

Thus, the trial court's decision to deny Appellant's motion for a new trial was a sound exercise in judicial discretion.

F. THE STATE INTRODUCED SUFFICIENT EVIDENCE TO SUPPORT THE APPELLANT'S CONVICTION.

The Appellant next claims that the State failed, as a matter of law, to adduce sufficient evidence to support the Appellant's conviction. In Syl. pt. 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978), this Court ruled:

> 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.

See also Syl. pt. 3, in part, *State v. Guthrie,* 194 W. Va. 657, 461 S.E.2d 163 (1995) ("A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden . . . . The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for the jury and not an appellate court.").

"It is peculiarly within the province of the jury to weigh the evidence upon the question of self-defense, and the verdict of the jury adverse to that defense will not be set aside unless it is manifestly against the weight of the evidence." Syl. pt. 5, *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927).

In the instant case, the Appellant claimed that he shot the victim to defend himself from the imminent danger of death or serious bodily injury. This Court has ruled, "once there is sufficient

evidence to create reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense." Syl. pt. 4, *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978).

In *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. 1973), Judge Spotswood Robinson eloquently outlined the law of self-defense, defining its purpose and limitations. Since time immemorial, the law has stated that deadly force is only justified when there are no other options:

> But the law of self-defense is a *law of necessity*; the right of self-defense arises *only when the necessity begins, and equally ends with the necessity*; and never must the necessity be greater than when the force employed defensively is deadly. The necessity must bear all semblance of reality, and appear to admit no other alternative before taking the life will be justifiable or excusable. Hinged on the exigencies of self-preservation, the doctrine of homicidal self-defense emerges from the body of the criminal law as limited though important exception to legal outlawry of the arena of self-help in the settlement of potentially fatal personal conflicts.

(Citations omitted.)

The court went on to state:

> So it is that necessity is the pervasive theme of the well defined conditions which the law imposes on the right to kill or maim in self-defense. There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances.

Id. at 1229-1230 (emphasis added.)

The Appellant's conduct affirmatively proves that he did not believe he needed to use deadly force in order to protect himself. Neither the victim, nor any of the others were armed. It was the Appellant's decision to draw his gun from his waistband, and point it at the unarmed victim. A

reasonable juror could find that the Appellant went from a place of relative safety, his home,[16] out onto the porch armed with a loaded .357 magnum. When he grabbed this gun and walked out onto that porch, he had every reason to believe that his presence would further aggravate the situation. *See Laney v. United States*, 294 F. 412 (1923) (Defendant could not rely on self-defense when he came from a place of safety, armed with a firearm, and deliberately placed himself in the middle of a dangerous situation.) He did not leave the house with the intention of being a peacemaker. He traded insults withe the men gathered there, even though he knew that these words would only escalate a potentially deadly situation. He ignored his girlfriend when she told him that she was going to contact the police.[17]

It was not fear of death or serious bodily injury that caused the Appellant to leave the Pack's house with a loaded .357. It was fear of appearing unmanly. He knew that he was the only person armed, as he stood on that porch. He was older, bigger, and stronger then the individuals confronting him.[18] The Appellant knew that he had abused Mr. McBride the night before. Even if he did not believe it, maybe he could have diffused the situation with an apology. Clearly, if he had taken a less aggressive stand, it is unlikely that they would have harmed him. Instead, he chose to confront force

---

[16]There was evidence that the Pack's home had a front door with a lock.

[17]The Appellant falsely claims that the victim and his friends knew it would take at least 20 minutes for the Sheriff to arrive. This would be true if they knew where the Sheriff was coming from--they did not.

In fact, the Summers County Sheriff received his dispatch at 12:31, he received a second message at 12:33 that shots had been fired, he arrived on the scene at 12:47. (Trial Tr. 14.) The Pipestem Fire Department arrived seven minutes after the first. (Trial Tr. 32.)

[18]On the day of the incident the Appellant was 40, his son was 23, the victim was 19, Mark McBride was 20, his stepbrother Alex Cline was 18, and his cousin Kenny Steele was 17. (Trial Tr. 275, 290.)

with deadly force. The circumstances did not justify his display of deadly force. The victim and his friends were unarmed when they arrived at the Pack's house. Although loud and obnoxious, they were not aggressive. They did not threaten the Appellant, they challenged him. Had he backed down, the victim would be alive today.

Appellant claims that "there is absolutely no evidence [the Appellant] planned on shooting [the victim]. . . ." (Appellant's Brief at 30.) If this is true, then the Appellant offered inconsistent defenses. The Appellant's witnesses sought to bring the killing within the province of an accidental homicide. The taking of another person's life is an intentional act; the law should not recognize the anomalous doctrine of accidental self-defense. *See State v. Whitchurch*, 96 S.W.2d 30, 35-36 (Mo. 1936). If a defendant did not use deadly force in self-defense, but, rather, the gun discharged accidentally, a trial court is under no obligation to give a self-defense instruction.

More importantly, the Appellant's assertion is incorrect. The State produced the testimony of three witnesses who observed the Appellant point his gun at the victim, stand there for a few seconds, and then pull the trigger. The Appellant's characterization of their testimony as false is irrelevant. It is for the jury, and not the appellate court to decided the relative credibility of a witness. Syl. pt. 3, in part, *State v. Guthrie, supra* ("Credibility determinations are for the jury and not an appellate court.").

The jury chose to credit the State's witnesses over the Appellant's. The fact that the Appellant went for the front door does not militate a finding of malice. The Appellant left the Pack house with a gun in his pants, he was also aware that there were two rifles inside the house, which had been placed there by Tasha Pack earlier that morning. Appellant also claims that the victim grabbed the barrel of the Appellant's gun before it discharged, and either tried to point it toward the

Appellant, or to wrest it away. The evidence suggested that the victim either wrestled over the gun after the Appellant drew it, or merely touched it, and then took two steps back. Again the jury chose to credit this testimony; again it is not within this Court's province to re-weigh the credibility of the witnesses. This live testimony was presented three years ago to a jury sitting in a courtroom almost 200 miles away.

Indeed, the Appellant's claims that Rocky Lane's testimony explicitly refuted the eyewitness testimony is simply wrong. (Appellant's Brief at 30.) Mr. Lane testified that, based upon his experience, the gun was shot from 15 to 27 inches from the wound. (Trial Tr. 162-63.) On cross-examination he conceded that the victim's hands, if his arms were fully extended, could have been on the gun when it discharged. (Trial Tr. 174-75.) Although several State's witnesses testified that the victim was approximately eight feet from the Appellant when he was shot, these distance were rough estimations. Clearly, none of these witnesses had the time or inclination to accurately measure how far the victim was standing from the Appellant when he was shot. A reasonable juror could believe that the shock of the moment did not lend itself to spontaneous, accurate measurements. Several witnesses testified that the victim and the Appellant wrestled over the gun, the victim let go, stepped back and pulled his hands out. The Appellant paused a few seconds, aimed, and with one hand extended shot him in the head. (Trial Tr. 281, 306, 333.)

Mr. Lane's testimony did not conclusively prove that the victim's hands were on the Appellant's gun when it went off. Indeed, even if they were, this piece of evidence standing alone is not materially exculpatory. Whether the victim's hands were on the gun or not, it was the Appellant who pulled the trigger. This act, which caused the victim's death, occurred after a long series of adversarial confrontations between the Appellant, the victim, and Mark McBride.

Appellant's own son testified that upon seeing these six individuals pulling up to the Pack's house, his first feeling was anger. These very same feelings may very well have motivated the Appellant to pull the trigger. Given the entire context that would be a fair and reasonable inference.

V.

CONCLUSION

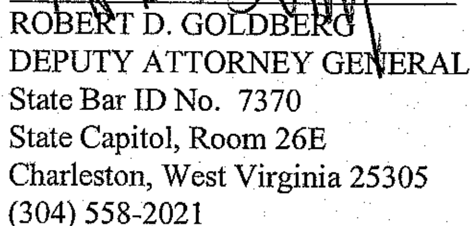
WHEREFORE, for the foregoing reasons the judgment of the Circuit Court of Monroe County denying the Appellant's motion for a new trial should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

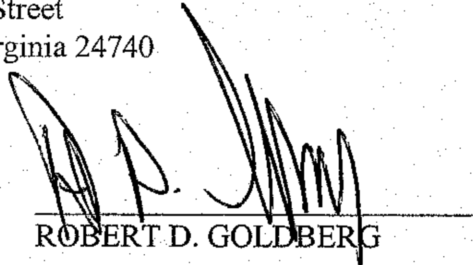


ROBERT D. GOLDBERG
DEPUTY ATTORNEY GENERAL
State Bar ID No. 7370
State Capitol, Room 26E
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee, upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 1st day of ~~August~~ September, 2005, as follows:

To: R. Thomas Czarnik, Esq.
R. Thomas Czarnik & Associates
205 South Walker Street
Princeton, West Virginia 24740



ROBERT D. GOLDBERG