IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 21-0114
Case No._19-F-107
Circuit Court of Cabell County

QUENTION A. SHEFFIELD,

Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. The lower court committed reversible error when, after submitting the case to the jury and over Petitioner's objections, it impaneled a discharged and unsworn alternate juror and allowed that alternate juror to participate in the jury's verdicts in both the guilt and penalty phases of Petitioner's bifurcated trial.

STATEMENT OF THE CASE

On December 08, 2020, following a six day trial, Petitioner was convicted of three offenses: (1) First Degree Murder; (2) Malicious Wounding; and, (3) Person Prohibited from Possessing a Firearm.[1] Petitioner's sentences, which are to run consecutively, include: (1) life without mercy; (2) two (2) to ten (10) years; and (3) five (5) years.[2] It is from these convictions that Petitioner appeals.

Petitioner's bifurcated trial began on September 29, 2020. The jury was sworn in, and Petitioner's trial began.[3] At the conclusion of the fifth day of trial, the lower court dismissed the sole alternate juror, Kathy Scott, and instructed the then-impaneled jury to begin deliberations.[4] Over an hour later, the lower court and the parties became aware of an issue; however, at this point the record did not indicate what the issue was. The lower court ordered that the jury was to recess and each juror would be called in before the parties and the court individually.[5] The jurors were all called in

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[1] A.R. 1895-96 (sentencing order).
[2] *Id.*
[3] A.R. 546.
[4] A.R. 1635-37.
[5] A.R. 1637.

individually and inquiries were conducted on whether any member of the jury had spoken to a witness on Thursday afternoon – the third day of trial – to which every juror indicated that they had not.[6] Petitioner then moved for a mistrial, to which the State objected.[7] Over Petitioner's objections, the lower court instructed the court's bailiff to review surveillance footage of the day in question, and instructed the court's clerk to have both the witness that spoke to the juror and the discharged alternate juror report to the court the following morning.[8] The lower court also held the jury in recess until the following morning, ordering them to report back at 9:00 AM.[9]

The next morning, the lower court and parties discussed the appropriate remedy in this case, given that all parties viewed video proof of the juror (Susan Beckett) speaking to a State's witness (Jamie Marlowe).[10] The lower court informed Petitioner that "[the court] will excuse this one (Juror Beckett) and [the court] will bring the alternate in and put her on the jury panel or [the parties] can agree to proceed with just 11 jurors."[11] Petitioner chose to proceed with the alternate juror being impaneled, while preserving his objection on the basis that "a mistrial is warranted and [did] not feel bringing in a 12th juror [was] any sort of remedy under these facts."[12] The lower court then called Mr. Marlowe and conducted a sworn inquiry

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[6] A.R. 1637-51.
[7] A.R. A.R. 1651-59
[8] *Id.*
[9] A.R. 1659.
[10] A.R. 1695.
[11] A.R. 1698.
[12] A.R. 1700-01.

regarding the conversation with Juror Beckett.[13] Following that inquiry, the lower court then called Juror Beckett and conducted a sworn inquiry about her conversation with Mr. Marlowe. After viewing video of her conversation with Mr. Marlowe, Juror Beckett stated "Oh, okay. Okay, I did, yeah."[14] Further, Juror Beckett stated "I didn't know that I wasn't allowed to speak to him." When asked why she said no when the lower court asked if she had spoken to any witnesses the prior day, Juror Beckett further indicated that she "did not understand that."[15] Following that comment, the lower court excused Ms. Beckett from the jury.[16]

After the excusal of Ms. Beckett, but prior to the recall and questioning of discharged alternate juror Ms. Scott, Petitioner asked the lower court if it was not going to issue a mistrial, and that court ruled that it was not.[17] The lower court then conducted an unsworn inquiry of Ms. Scott wherein she was asked if she was okay serving as a juror on this case, to which she responded yes.[18] Petitioner then asked if Ms. Scott had spoken to anyone about the case since she was discharged the day before, and she responded no.[19] The lower court then asked Ms. Scott if, considering that her notes had been destroyed upon her prior discharge, she "still feels like [she] can be a fair and impartial juror and participate and remember the testimony and discuss [the trial]

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[13] A.R. 1702-09.
[14] A.R. 1711.
[15] A.R. 1712.
[16] *Id.*
[17] A.R. 1713.
[18] A.R. 1714-15.
[19] *Id.*

with the other jurors?"[20] Ms. Scott's answer was yes.[21] Ms. Scott was then instructed to be seated as the lower court called the remaining eleven jurors in one by one to ask about their ability to remain on the jury.[22]

The lower court then conducted a colloquy with each individual juror wherein the court informed the jurors that it had excused Ms. Beckett and re-impaneled Ms. Scott. The court also asked each juror some version of the following question: "knowing what happened, would you still be able to sit as a fair and impartial juror in this case and render a decision?"[23] The court then instructed the reconstituted jury to:

> [B]egin [its] deliberations again from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations have not taken place.[24]

The jury began to deliberate at 9:50 AM.[25] During deliberations, the lower court advised the jury that the court's clerk was going to bring in the "(jury) charge, the instructions, everything."[26] The jury then asked the court who two phone numbers belonged to, which the parties and court agreed it could not answer while agreeing that neither the court nor the parties were certain that the referenced numbers were in evidence.[27] Less than an hour

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[20] A.R. 1715-16.
[21] *Id.*
[22] *Id.*
[23] A.R. 1717-29.
[24] A.R. 1733-34.
[25] A.R. 1736
[26] A.R. 1735-36.
[27] A.R. 1736-41.

after retiring to deliberate, during which deliberations were paused twice to receive instruction from the lower court, the jury informed the court that it had reached a verdict.[28] The jury returned a verdict of guilty on all three counts: (1) First Degree Murder; (2) Malicious Wounding; and, (3) Person Prohibited from Possessing a Firearm.[29] The jury later returned a recommendation of "No Mercy" during the mercy phase of Petitioner's bifurcated trial.[30] Following sentencing, wherein the lower court ran Petitioner's three sentences consecutively, Petitioner filed a post-trial motion that asserted error based on impaneling the discharged alternate juror.[31] The lower court denied that motion.[32] Petitioner then timely filed a Notice of Appeal with this Court, and this appeal is timely filed.

SUMMARY OF ARGUMENT

Petitioner's case presents a unique issue of law for this Court. The lower court's decision to recall the discharged alternate juror and impanel her after the jury began deliberating was erroneous on its face. The lower court's attempts to overcome any prejudice to Petitioner were ineffective. The resulting convictions occurred due to a violation of Petitioner's fundamental rights under both the United States and West Virginia Constitutions. Such

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[28] *Id.*
[29] A.R. 1741-43 (verdict on all counts); 1751-53 (verdict regarding use of a firearm in malicious wounding count.
[30] A.R. 1842-44.
[31] A.R. 1887-90.
[32] A.R. 1871.

violations are not harmless, for those rights go the heart of the fundamental fairness of trials, both criminal and civil, in West Virginia. For these reasons, Petitioner requests this Court to reverse and remand his convictions.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests a Rule 20 oral argument in this case due to the unsustainable exercise of power by the lower court. While, to Petitioner's knowledge, this Court has never addressed the issue of re-impaneling a discharged alternate juror in a decision, a plain language interpretation of the West Virginia Rules of Criminal Procedure appears to be dispositive of this case. The West Virginia Rules of Criminal Procedure do not provide for re-impaneling any discharged juror. However, as this is an issue of first impression, both an oral argument and signed opinion are necessary to provide unequivocal direction to all courts in West Virginia going forward.

ARGUMENT

I. The lower court committed reversible error by, over Petitioner's objections, substituting Ms. Scott, a discharged and unsworn alternate juror, after the jury retired and began deliberations. That post-submission substitution violated Petitioner's trial by jury rights under both the United States and West Virginia Constitutions.

Petitioner's sole contention in this case is that the lower court committed reversible error by violating West Virginia Rule of Criminal

Procedure 24(c).[33] Because this appeal requires this Court to interpret a rule of criminal procedure, the appropriate standard of review is *de novo.*[34]

1. West Virginia Rule of Criminal Procedure 24(c) does not permit a circuit court to substitute an alternate juror once the jury has retired to consider its verdict.

"Under article eight, section three of [the West Virginia] Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law."[35] Further, these rules are "the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect."[36] The "rules are interpreted using the same principles and canons of construction that govern the interpretation of statutes."[37] Therefore, just as with a statute, "where the language of a rule is clear and unambiguous, it should not be construed but applied according to its terms."[38]

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[33] Hereinafter Rule 24(c).
[34] *See* Syl. Pt. 1, in part, *State v. Head*, 198 W. Va. 298, 299, 480 S.E.2d 507, 508 (1996) (questions of law and interpretations of statutes and rules are subject to a de novo review).
[35] Syl. Pt. 1, Bennett v. Warner, 179 W. Va. 742, 743, 372 S.E.2d 920, 921 (1988) (overruled on other grounds by *State ex rel. Workman v. Carmichael*, 241 W. Va. 105, 819 S.E.2d 251 (2018)).
[36] Syl. Pt. 5, in part, *State v. Wallace*, 205 W. Va. 155, 156, 517 S.E.2d 20, 21 (1999).
[37] Syl. Pt. 3, *State v. Davis*, 236 W. Va. 550, 782 S.E.2d 423, 425 (2015) (quoting Syl. Pt. 2, *Casaccio v. Curtiss*, 228 W. Va. 156, 157, 718 S.E.2d 506, 507 (2011)).
[38] *Casaccio v. Curtiss*, 228 W. Va. 156, 162, 718 S.E.2d 506, 512 (2011) (quoting Syl. pt. 3, in part, *State v. Mason*, 157 W.Va. 923, 205 S.E.2d 819 (1974).

Rule 24(c) mandates that "[a]lternate jurors in the order in which they are called shall replace jurors who, *prior* to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties," and that "[a]n alternate juror who does not replace a regular juror *shall* be discharged after the jury retires to consider its verdict."[39] On two prior occasions, this Court ruled that a lower court commits clear error when it does not apply Rule 24(c) as written.[40] The clear and unambiguous language of Rule 24(c) does not permit the substitution of an alternate juror after the jury retires to consider its verdict *because* after the jury retires to consider its verdict there are no alternate jurors.[41] This Court provides two options when no alternate is available for substitution purposes and the defendant chooses not to waive the constitutional right to a twelve person jury: (1) declare a mistrial;[42] or, (2) qualify a new juror to fill the vacancy and begin the trial *de novo*;[43] however, instead of going forward in one of the aforementioned ways, the lower court chose to proceed in clear violation of Rule 24(c). For these reasons, the lower court's ruling, in clear violation of Rule 24(c), is erroneous.

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[39] Emphasis added.
[40] *See State v. Brown*, 210 W. Va. 14, 20, 552 S.E.2d 390, 396 (2001); *State v. Lightner*, 205 W. Va. 657, 659, 520 S.E.2d 654, 656 (1999).
[41] *E.g.*, *Cantrell v. State*, 265 Ark. 263, 577 S.W.2d 605 (1979); *Woods v. Commonwealth*, 287 Ky. 312, 152 S.W.2d 997, 999 (1941).
[42] W. Va. Code § 62-3-7.
[43] *E.g.*, *State v. Davis*, 31 W. Va. 390, 7 S.E. 24, 25 (1888).

2. Consideration of Other Jurisdictions.

As this is a case of first impression, Petitioner asserts that this Court should consider how other jurisdictions, with rules or statutes comparable to Rule 24(c), approach a post-submission alternate juror substitution. Courts in those jurisdictions generally address post-submission substitution in one of two ways: (1) automatic reversal;[44] or, (2) a presumption of prejudice.[45] In automatic reversal jurisdictions, the courts deem post-submission substitution of a alternate juror to be structural error because the erroneous substitution is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself[.]"[46] These jurisdictions deem the post-submission substitution of the alternate juror to be reversible on its face because once the alternate juror is discharged from the jury he/she is no longer a part of the jury.[47] In presumption of prejudice jurisdictions, a "presumption can be overcome only by a showing that the trial court took extraordinary precautions to ensure that the defendant would not be prejudiced and that under the circumstances of the case, the

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[44] *E.g.*, *State v. Amick*, 462 S.W.3d 413 (Mo. 2015) (violation of the applicable statute constitutes reversible error); *State v. Murray*, 254 Conn. 472, 757 A.2d 578 (2000); *State v. Bobo*, 814 S.W.2d 353 (Tenn. 1991); *Cantrell v. State*, 265 Ark. 263, 577 S.W.2d 605 (1979).

[45] *E.g.*, *State v. Sanchez*, 2000-NMSC-021, 129 N.M. 284, 6 P.3d 486; *People* v. Burnette, 775 P.2d 583 (Colo. 1989).

[46] *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549, 137 L. Ed. 2d 718 (1997) (internal citations omitted).

[47] *See State v. Bobo*, 814 S.W.2d at 355; *Cantrell v. State*, 577 S.W.2d at 607.

precautions were adequate to achieve that result."[48] The burden of proof falls on the State to overcome the presumption.[49]

3. The prejudice in Petitioner's case cannot be overcome.

Assuming, *arguendo*, that this Court adopts the presumption of prejudice standard, the State must overcome the following facts to establish that there was no prejudice to Petitioner: (1) the lower court *never* asked Ms. Scott if she had investigated the case (i.e. conducted an internet search, watched the news, read a newspaper), instead the court only asked Ms. Scott if she was okay serving as a juror on this case;[50] (2) the lower court *never* swore Ms. Scott in as a juror after her discharge;[51] (3) the lower court *never* asked any of the jurors if they could disregard previous deliberations;[52] (4) the foreperson did not change after deliberations were ordered to begin anew;[53] (5) the jury deliberated *longer* prior to Ms. Beckett's removal, approximately one hour and seven minutes,[54] than it did *after* Ms. Scott was impaneled, approximately 42 minutes, though deliberations were certainly

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[48] *People v. Burnette*, 775 P.2d at 590.
[49] *State v. Sanchez*, 6 P.3d at 495.
[50] A.R. 1714-15.
[51] A.R. 1635-37 (Ms. Scott was discharged as alternate juror); 1714-15 (Ms. Scott's examination after being recalled but prior to her substitution); 1733-34 (jury instructed to begin deliberations again).
[52] A.R. 1717-29.
[53] A.R. 1636 (the lower court instructs the jury to select a foreperson); 1716 (first time Mr. Foster is identified on the record as the foreperson); 1741 (Mr. Foster identified as foreperson during first poll of the jury); 1752 (Mr. Foster identified as foreperson during second poll of the jury); 1842-43 (Mr. Foster identified as foreperson during third poll of the jury); 1884-86 (Mr. Foster signed, and identified on, the verdict forms as the foreperson); 1897 (Mr. Foster signed, and identified a, the "find of no mercy" form as the foreperson).
[54] A.R. 1637.

less than that due to additional instructions from the lower court during the brief deliberations.[55] Assuming, for argument's sake, that none of the other issues are sufficiently prejudicial, there is no disputing that Ms. Scott was *never* sworn back in as a juror on the record.[56] Considering that alternate jurors are required to take the same oath as regular jurors,[57] and that a felony conviction returned by an unsworn jury is void,[58] it stands to reason that a felony conviction returned by a jury with an unsworn member would either also require reversal or constructively reduce the jury to eleven members. The record establishes that Petitioner refused to waive his right to a trial by twelve jurors;[59] therefore, even if Ms. Scott's vote is excluded, Petitioner's conviction is in violation of Article III, Section 14 of the West Virginia Constitution and requires reversal.[60] Such a violation of the right to a twelve person jury qualifies as structural error, and requires automatic reversal.[61]

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[55] A.R. 1734-41.
[56] A.R. 1635-37 (Ms. Scott was discharged as alternate juror); 1714-15 (Ms. Scott's examination after being recalled but prior to her substitution); 1733-34 (jury instructed to begin deliberations again).
[57] W. Va. Code § 62-3-7; *see also* W. Va. R. Crim. P. 24(c).
[58] *State v. Moore*, 57 W. Va. 146, 49 S.E. 1015 (1905) (verdict of a petit jury not shown to be sworn on the record required reversal).
[59] A.R. 1700-01.
[60] Syl., *State v. Wyndham*, 80 W. Va. 482, 92 S.E. 687 (1917) (a conviction of less than twelve people is void because it violates W. Va. Const. Art. III, § 14).
[61] "[S]ome constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error[.]" *Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S. Ct. 1246, 1264, 113 L. Ed. 2d 302 (1991) (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 827–28, 17 L. Ed. 2d 705 (1967)).

CONCLUSION

Given the flawed nature of the lower court's ruling and subsequent violation of Petitioner's constitutional rights, he requests this Honorable Court to reverse his convictions and remand this case for further proceedings. Furthermore, a signed decision from this Court is necessary to provide guidance to the lower courts of West Virginia when dealing with a post-submissions.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I, Robert F. Evans, counsel for Petitioner, Quenton A. Sheffield, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Brief"* and *"Appendix Record"* to the following:

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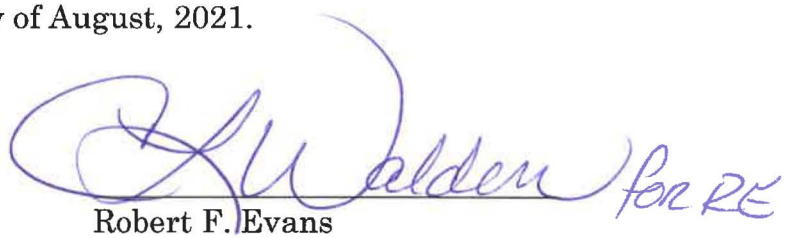
via hand delivery on the 23rd day of August, 2021.



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