

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v.

Case Nos. CR17000296-01 to 10

JAMES A. FIELDS

**DEFENDANT'S OBJECTION TO THE COMMONWEALTH'S MOTION IN LIMINE
ON THE ADMISSIBILITY OF TEST MESSAGES AND PHOTO OF ADOLF HITLER**

COMES NOW the Defendant James Alex Fields ("Fields"), by counsel, and pursuant to Virginia Rule of Evidence 2:401 and 2:403 objects to the admission at trial of an image of Adolf Hitler attached to a MMS text message sent to his mother on August 11, 2017 at 3:31 pm.

RELEVANCY

Rule 2:401 of the Virginia Rule of Evidence defines "Relevant Evidence as evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence". It is the Commonwealth's argument that the image of Adolf Hitler assists in proving beyond a reasonable doubt that on August 12, 2017 the Defendant acted with malice in the killing and wounding of the alleged victims. The Commonwealth further argues that the image contextualizes a statement from the Defendant to his mother that "we're not the one who have to be careful" by implying aggression and violent towards people Fields perceived to be "opponents".

In support of this argument the Commonwealth references cases which can be distinguished from the current matter. The material admitted in *State v. Crumb*, 307 N.J. Super. 704 A.2d 952 (App. Div. 1997), clearly evidenced the defendant's support of Hitler's actions and specifically stated that he would have done the same thing if he was in a similar position as Hitler. In this case, the meme's meaning is far more ambiguous and does not indicate either

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approval or disapproval of Hitler or his actions. It is also of note that the Court allowed for the admission of material related to Hitler and Neo-Nazism in *Crumb* and *People v. Ritchie*, No. B262575, 2017 Cal. App. Unpub. LEXIS 341 (Jan. 17, 2017), because it was indicative of racial hatred of the victims, who were black. In this case, Fields is not alleged to have targeted the supposed victims based on their race, but based on their political ideology, making a reference to Hitler far less probative than in either *Crumb* or *Ritchie*.

UNFAIR PREJUDICE

Rule 2:403 of the Virginia Rule of Evidence states that relevant evidence may be excluded if “the probative value of the evidence is substantially outweighed by the danger of unfair prejudice”. “In determining whether relevant evidence should be admitted, the trial court must apply a balancing test to assess the probative value of the evidence and any undue prejudicial effect of that evidence. The determination to admit such relevant evidence rests within the trial court's sound discretion and will be disturbed on appeal only upon a showing of an abuse of that discretion. *Juniper v. Commonwealth*, 271 Va. 362,413 (2006)

Adolf Hitler is one of the most if not the most hated man in the history of western civilization and perhaps the world. As the Commonwealth has conceded in its motion, identifying a defendant with Hitler presents the possibility for prejudice to the defense. This Court must therefore be very careful in weighing this prejudice against the probative value of the image tending to prove the Defendant's intent and state of mind.

In making this decision the court should consider the following:

1. The image was transmitted almost 24 hour prior to the alleged criminal activity; and
2. The image was one of “a least a hundred of pro-Hitler images and writing” found by the Commonwealth in the Defendant's social media posts; and

3. There is no other evidence of the Defendant's intent to commit acts of violence prior to August 12, 2017; and

4. The image could be interpreted to define who the Defendant meant were the ones who did not need to be careful, i.e. the followers of Adolf Hitler's philosophy who were planning to attend the rally.

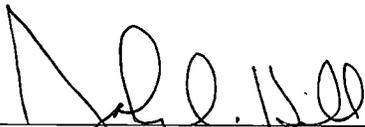
Courts have declined to admit evidence of the defendant's affinity for Adolf Hitler and prior statements by the defendant suggesting they dislike particular racial groups in other cases. In *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), the Supreme Court of Appeals of West Virginia found that the admission of the prior statements of a defendant in a first-degree murder case revealing his political and racial views, including his admiration of Hitler, violated his due process rights, explaining that "[t]o achieve substantial justice in our courts, a trial judge must not permit a jury's finding to be affected or decided on account of . . . whether one holds an unpopular political belief or opinion. If Rule 403 is ever to have a significant and effective role in our trial courts, it must be used to bar the admission of this highly prejudicial evidence." *Id.* at 189. Not only did the court find the evidence to be prejudicial, but it also noted that introducing the evidence created the risk of "confusing or misleading the jury" into placing "undue emphasis on the defendant's racial, gender, and/or political views" and distracting from the determination of whether the defendant had committed the alleged act. *Id.* The court went on to note that "when coupled with its potential for unfair prejudice, this evidence becomes overwhelmingly dangerous." *Id.* Similarly, in *United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995), the Ninth Circuit reversed the conviction of a defendant in part because the trial court allowed for the admission of evidence that he "disliked Mexicans," which was substantially more prejudicial than probative to the case.

III. Conclusion

The possible unfair prejudice to the Defendant caused by the admission of the image of Adolf Hitler substantially outweighs the limited probative value that the image will assist in proving his malicious intent. The Defendant therefore respectfully requests that the Commonwealth be precluded from admitting the image at trial or mentioning it in their opening statements to the jury.

Respectfully submitted,

JAMES ALEX FIELDS
By Counsel



John I Hill, Esq. (VSB 30381)
Denise Y. Lunsford, Esq. (VSB 31833)
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that on ^{December 3rd} ~~November~~ __, 2018, the foregoing document was hand-delivered to Joseph Platania, Commonwealth Attorney for the City of Charlottesville, and Nina Alice-Antony, Assistant Commonwealth's Attorney for the City of Charlottesville, at 605 Main Street, Room 331, Charlottesville, Virginia, 22902.



Denise Y. Lunsford

Document:United States v. Kallin, 50 F.3d 689

United States v. Kallin, 50 F.3d 689

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United States Court of Appeals for the Ninth Circuit

January 10, 1995, Argued and Submitted, San Francisco, California ; March 17, 1995, Filed

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Reporter

50 F.3d 689 * | 1995 U.S. App. LEXIS 13691 ** | 95-1 U.S. Tax Cas. (CCH) P50,162 | 95 Cal. Daily Op. Service 4193 | 95 Daily Journal DAR 7246 | 42 Fed. R. Evid. Serv. (Callaghan) 434

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JACK P. KALLIN, Defendant-Appellant.

Subsequent History: [**1] As Amended June 6, 1995.

Prior History: Appeal from the United States District Court for the District of Arizona. D.C. No. CR-91-423-CLH. Charles L. Hardy ▼, District Judge, Presiding.

Original Opinion Previously Reported at: 1995 U.S. App. LEXIS 5301.

Core Terms

returns, silence, district court, innocent, counts, questioning, records, guilt, receipts, warning, admits, business record, tax return, impermissible, retention, argues, jury's, curative instruction, corporate

tax, fiscal year, first time, credibility, contends, harmless, register, advice, rights

Case Summary

Procedural Posture

Appellant sought review of a judgment of the United States District Court for the District of Arizona which convicted him of attempted tax evasion and subscribing to a false tax return. Appellant argued that the government's comments concerning the exercise of his rights to remain silent and to retain counsel constituted prejudicial error and that copies of corporate tax returns and testimony of a government witness were improperly admitted.

Overview

Appellant owned and operated hobbies stores. Appellant did not report personal income of more than \$ 6,000 for any year from 1982 through 1986. For the years 1985 through 1987, appellant signed corporate tax returns reporting operating losses; however, he owned an airplane, and purchased a home and a Cadillac during that time. Appellant was indicted on eight counts of attempted tax evasion under 26 U.S.C.S. § 7201 and a ninth count of subscribing to a false 1987 corporate tax return, under 26 U.S.C.S. § 7206(1). Following a jury trial, appellant was convicted on five of the counts. Appellant sought review. In reversing the conviction, the court held that appellee government's repeated comments before the jury about appellant's retention of counsel and his exercise of his right to remain silent were unlawful, prejudicial, and were not cured by the trial court's instruction to the jury. The court held that appellant's tax returns for years that were not at issue were properly admitted because they were inextricably intertwined in the larger scheme, but that appellant's daughter's testimony that he disliked Mexicans was not relevant and should not have been admitted.

Outcome

The court reversed the conviction and held that appellee government's repeated comments before the jury about appellant's retention of counsel and his exercise of his right to remain silent were unlawful, prejudicial, and were not cured by the trial court's instruction to the jury. The court held that appellant's tax returns for years that were not at issue were properly admitted, but that the government witness's testimony was not relevant.

▼ LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > General Overview ▼

Criminal Law & Procedure > Appeals ▼ > Prosecutorial Misconduct ▼ > General Overview ▼

HN1  **Standards of Review, Harmless & Invited Error**

Whether improper references to a defendant's silence and retention of counsel are harmless is reviewed under a "harmless-beyond-a-reasonable-doubt" standard.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > Abuse of Discretion ▼ > Evidence ▼

Evidence > Admissibility ▼ > Conduct Evidence ▼ > Prior Acts, Crimes & Wrongs ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Abuse of Discretion ▼ >

General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > De Novo Review ▼ >

General Overview ▼

HN2  **Abuse of Discretion, Evidence**

The issue of whether evidence falls within the scope of Fed. R. Evid. 404(b) is reviewed de novo. A trial court's decision to admit evidence of other crimes pursuant to Fed. R. Evid. 404(b) is reviewed for abuse of discretion. The court reviews the district court's decisions balancing the probative value of evidence against its prejudicial effect for abuse of discretion. The district judge is given wide latitude in determining the admissibility of evidence under this standard.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > Abuse of Discretion ▼ > Evidence ▼

Evidence > Relevance ▼ >  Relevant Evidence ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Abuse of Discretion ▼ >
 General Overview ▼

HN3  **Abuse of Discretion, Evidence**

The district court's determination of whether or not evidence is relevant under Rule 402 is also reviewed for abuse of discretion.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > Abuse of Discretion ▼ >
 General Overview ▼

HN4  **Standards of Review, Abuse of Discretion**

Under the abuse of discretion standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the district court committed a clear error of judgment in reaching its conclusion or based its decision on an erroneous conclusion of law.  More like this Headnote

Shepardize - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ > Criminal Process ▼ > 
 Assistance of Counsel ▼

Criminal Law & Procedure > Counsel ▼ > Right to Counsel ▼ > General Overview ▼

Criminal Law & Procedure > Appeals ▼ > Prosecutorial Misconduct ▼ > General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ >
 General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ >
 Silence of Defendant ▼

HN5  **Criminal Process, Assistance of Counsel**

It does not comport with due process to permit the prosecution during trial to call attention to the defendant's silence. This rule extends to comments on a defendant's decision to retain counsel. The right to counsel is included in the Miranda warnings, and as such is covered by the implicit assurance that invocation of the right will carry no penalty.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Counsel ▼ > Right to Counsel ▼ > General Overview ▼

Criminal Law & Procedure > ... > Interrogation ▼ >  Miranda Rights ▼ > 

Notice & Warning ▼

Criminal Law & Procedure > ... >  Miranda Rights ▼ >  Self-Incrimination Privilege ▼ > 

Right to Counsel During Questioning ▼

Tax Law > Federal Tax Administration & Procedures ▼ > Criminal Offenses & Penalties ▼ >

General Overview ▼

HN6 **Counsel, Right to Counsel**

Internal Revenue Service warnings, like Miranda warnings, contain an implicit assurance that the assertion of the right to remain silent will carry no penalty.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > Burdens of Proof ▼ > General Overview ▼

Legal Ethics > Prosecutorial Conduct ▼

Criminal Law & Procedure > Appeals ▼ > Prosecutorial Misconduct ▼ > General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ >

General Overview ▼

Evidence > Burdens of Proof ▼ > Proof Beyond Reasonable Doubt ▼

HN7 **Trials, Burdens of Proof**

The government bears the burden of proving that the admitted errors pass muster under the harmless-beyond-a-reasonable-doubt standard. The court must determine whether the prosecutor's conduct was harmless by considering the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant's guilt.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Jury Instructions ▼ > Particular Instructions ▼ >

Use of Particular Evidence ▼

Criminal Law & Procedure > Trials ▼ > Jury Instructions ▼ > General Overview ▼

Criminal Law & Procedure > ... > Jury Instructions ▼ > Particular Instructions ▼ >

General Overview ▼

HNS  **Particular Instructions, Use of Particular Evidence**

The court normally presumes that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions. This presumption, however, is rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation. With regard to an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt.

 More like this Headnote

Shepardize - Narrow by this Headnote

Evidence > Relevance ▼ > Exclusion of Relevant Evidence ▼ > 

Confusion, Prejudice & Waste of Time ▼

Evidence > Relevance ▼ >  Relevant Evidence ▼

HN9  **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Relevant evidence is evidence that has a tendency to make the existence of any material fact more or less probable.  More like this Headnote

Shepardize - Narrow by this Headnote

Counsel: Michelle R. Hamilton ▼, Phoenix, Arizona, for the defendant- appellant.

Stephen G. Winerip ▼, Assistant United States Attorney, Phoenix, Arizona, for the plaintiff-appellee.

Judges: Before: Alfred T. Goodwin ▼ and Mary M. Schroeder ▼, Circuit Judges, and

A. Wallace Tashima ▼, District Judge.  Opinion by Judge Tashima ▼.

Opinion by: A. WALLACE TASHIMA ▼

Opinion

[*691] ORDER AND AMENDED OPINION

TASHIMA ▼, District Judge:

Defendant-appellant Jack P. Kallin ("Kallin") appeals his conviction for attempted tax evasion and subscribing to a false tax return. His primary contention is that the government's extensive questioning and comments regarding his exercise of his rights to remain silent and to retain counsel constituted prejudicial error. He also contends that the district court improperly admitted copies of corporate tax returns [**2] from years in which he was not charged with tax evasion in violation of Fed. R. Evid. 404(b). Finally, Kallin contends that the district court erred in allowing a government

witness to testify that he does not like Mexicans. We reverse the conviction.

FACTS

Kallin owned and operated three Desert Hobbies stores in Phoenix and Tempe, Arizona. Desert Hobbies was incorporated in 1982 as Kallin Enterprises, Inc., with Kallin as president, but continued to operate as Desert Hobbies. Kallin did not report personal income of more than \$ 6,000 for any year from 1982 through 1986. He and his wife reported a joint income of \$ 800 for 1985, and in 1986 they did not file a return. To qualify for a home mortgage, however, Kallin submitted to the lender copies of 1982 and 1983 tax returns reporting earnings of more than \$ 50,000 per year. He purchased a \$ 150,000 home in 1985, purchased a Cadillac in 1985, and owned an airplane as early as 1983. For the years 1985 through 1987, Kallin signed corporate tax returns indicating net operating losses for Kallin Enterprises.

Kallin separated from his wife in 1986 and his daughter Sharla initially remained with him. Sharla eventually left to live [**3] with her mother, taking Kallin's business records with her. The district court permitted Sharla to testify that Kallin dislikes Mexicans and told her to leave the house when he discovered that she had a Mexican boyfriend. In March, 1988, Sharla furnished the Desert Hobbies business records to the Internal Revenue Service ("IRS"). These records included a spiral notebook indicating receipts in excess of those reported on the corporate tax returns. Kallin claims that Sharla sought to extort \$ 30,000 from him and delivered the records to the IRS after he refused to pay her extortionate demand.

The IRS initiated a criminal investigation and contacted Kallin concerning the business records. Before asking any questions, IRS agents advised Kallin of his non-custodial rights, including his right to remain silent and his right to retain counsel. Kallin exercised those rights by not answering any questions and seeking the advice of an attorney. The government obtained an indictment on November 27, 1991, charging Kallin and his accountant with eight counts of attempted tax evasion under 26 U.S.C. § 7201. [1] Kallin was arrested by IRS agents on December 5, 1991, and given a Miranda warning. [**4] He indicated at that time his desire to consult an attorney. On March 31, 1993, a superseding indictment was returned, adding a ninth count of subscribing to a false fiscal year 1987 corporate tax return, under 26 U.S.C. § 7206(1). [2]

At trial, the government presented evidence that the Desert Hobbies stores had two cash registers and the receipts of each were recorded separately. An expert witness testified that none of the receipts from the second registers were reported to the IRS, resulting in an under-reporting of approximately \$ 1 million. Kallin testified that the records the government attributed to the second register were actually records of total [**5] receipts and the government was double-counting the receipts from the second register. [*692] The government rebutted this assertion with testimony that the records Kallin had identified as total receipts corresponded to the tapes from the first register.

During cross-examination of Kallin and during its closing argument, the government repeatedly commented on Kallin's retention of counsel and his failure to come forward with his explanation of the two sets of records until trial. [3] [**6] Defense counsel moved for a mistrial based on this line of questioning. The district court denied the motion the following day and instructed the jury to disregard the previous day's testimony concerning Kallin's silence and retention of counsel. [4]

In closing argument, the government urged that the jury not believe Kallin:

Five years after the investigation began, Mr. Kallin came up with this story for the first time. And then he didn't wait - he waited until one week after the trial began, till the last moment of [**7] the trial. The idea, I submit to you, was to concoct a story and reveal, at the last moment, when the Government could do the least to respond to him. He's tried to fool you.

Defense counsel's timely objection to this statement was overruled.

Kallin was convicted on counts four and five (covering personal returns for 1985 and 1986) and counts seven, eight and nine (covering corporate returns for fiscal years 1986 and 1987). He was acquitted of the remaining counts. Kallin then moved for a new trial. The court denied the motion, stating, [*693] "I believe that the evidence against Mr. Kallin is overwhelming. To be honest, I

really don't understand how the jury could have acquitted him of any of the counts. And I think that my instruction to the jury was pretty emphatic. . . ."

STANDARDS OF REVIEW

HN1 Whether improper references to a defendant's silence and retention of counsel are harmless is reviewed under a "harmless-beyond-a-reasonable-doubt" standard. *Brecht v. Abrahamson*, 123 L. Ed. 2d 353, 113 S. Ct. 1710, 1717 (1993).

HN2 The issue of whether the evidence falls within the scope of Rule 404(b) is reviewed de novo." *United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993); *United States v. Mundi*, 892 F.2d 817, 820 (9th Cir. 1989), *cert. denied*, 498 U.S. 1119, 112 L. Ed. 2d 1178, 111 S. Ct. 1072 (1991). A trial court's decision to admit evidence of other crimes pursuant to Fed. R. Evid. 404(b) is reviewed for abuse of discretion. *Id.*; *United States v. Hill*, 953 F.2d 452, 455 (9th Cir. 1991). "We review the district court's decisions balancing the probative value of evidence against its prejudicial effect for abuse of discretion." *United States v. Kessi*, 868 F.2d 1097, 1107 (9th Cir. 1989). "The district judge is given wide latitude in determining the admissibility of evidence under this standard." *United States v. Kinslow*, 860 F.2d 963, 968 (9th Cir. 1988), *cert. denied*, 493 U.S. 829, 107 L. Ed. 2d 60, 110 S. Ct. 96 (1989). **HN3** The district court's determination of whether or not evidence is relevant under Rule 402 is also reviewed for abuse of discretion. *United States v. Schaff*, 948 F.2d 501, 505 (9th Cir. 1991).

HN4 Under the abuse of discretion standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the district court committed a clear error of judgment in reaching its conclusion or based its decision on an erroneous conclusion of law. *United States v. Plainbull*, [**9] 957 F.2d 724, 725 (9th Cir. 1992); *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1546 (9th Cir. 1988).

DISCUSSION

I. Prosecutorial Comment on Kallin's Silence and

Retention of Counsel

The government admits that it violated Kallin's due process rights by repeated references to his retention of counsel and failure to come forward earlier with his explanation of innocence, but argues that the error was harmless. **HN5** It does not comport with due process to permit the prosecution during trial to call attention to [the defendant's] silence. . . ." *Doyle v. Ohio*, 426 U.S. 610, 619, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976); *United States v. Foster*, 985 F.2d 466 (9th Cir. 1993). The reasoning of *Doyle* extends to comments on a defendant's decision to retain counsel. *United States v. Daoud*, 741 F.2d 478, 480-81 (1st Cir. 1984); *United States v. McDonald*, 620 F.2d 559, 562-63 (5th Cir. 1980). "The right to counsel is included in the *Miranda* warnings, and as such is covered by the implicit assurance that invocation of the right will carry no penalty." **5** *Daoud*, 741 F.2d at 480.

[**10] **HN7**

The government bears the burden of proving that the admitted errors pass muster under the harmless-beyond-a-reasonable-doubt standard. *Brecht*, 113 S. Ct. at 1717. The court must determine "whether the prosecutor's conduct was harmless by 'considering the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant's guilt.'" *Foster*, 985 F.2d at 468 (quoting *United States v. Newman*,

943 F.2d 1155, 1158 (9th Cir. 1991)).

The mandate of *Doyle* is that the prosecution not call attention to a defendant's silence. Where one impermissible question about a defendant's silence was asked and an [*694] immediate objection was sustained before the question was answered, the court did not find a violation of *Doyle* because, through this minor slip, the prosecutor had not been allowed to impeach the defendant or call attention to his silence. *Greer v. Miller*, 483 U.S. 756, 764, 97 L. Ed. 2d 618, 107 S. Ct. 3102 (1987). This Circuit has found that three improper questions and answers required reversal, despite a strong jury instruction to disregard the questions. *Newman*, 943 F.2d at 1158. Seven questions about [**11] a defendant's silence, answered after an objection was overruled, followed by a comment during closing argument, were sufficiently harmful to require reversal. *Foster*, 985 F.2d at 468-69. Only five impermissible questions and a comment in closing argument formed the error in *Doyle* itself. 426 U.S. at 613-14.

The extent of error in the case at bench far exceeds these examples. The prosecutor's line of questioning and closing remarks were not inadvertent but were calculated so that an inappropriate "inference of guilt from silence was stressed to the jury. . . ." *Foster*, 985 F.2d at 468 (citing *Newman*, 943 F.2d at 1158). An impermissible implication again was permitted, without any curative instruction, when the prosecutor argued in closing that "Mr. Kallin came up with this story for the first time" at trial.

At the hearing on Kallin's motion for a mistrial, the prosecutor stated:

Obviously what I'm trying to do is show that it's mighty late in the day to be coming up with a story that you're innocent, if in fact you're innocent. . . . There's certainly an implication that can be drawn . . . that if you don't go to the government and tell them that you're innocent, [**12] then perhaps you're lying at trial when you say for the first time that you're innocent.

This is precisely the inference that *Doyle* forbids. "Notwithstanding the instructions from the trial judge, the effect of those statements, . . . was to suggest to the jury that [the defendant] must have been guilty because an innocent person would not have remained silent." *Newman*, 943 F.2d at 1158. In this case, the government did not simply bring Kallin's silence and retention of counsel to the attention of the jury, but actively encouraged the jury to draw an inference of guilt.

Although the government admits that the error was "extensive," it argues that the error was harmless in the overall context of the trial, including the district court's curative instruction and definitive evidence of guilt.

A. The Curative Instruction

The district court instructed the jury to disregard Kallin's testimony that Kallin "had never denied anything before this trial, and he hired a lawyer." The instruction was not contemporaneous with the error and was not given until the day following the improper line of questioning, long after the impermissible inference was implanted in the minds [**13] of the jury. In giving his instruction to the jury, the judge reiterated the impermissible content of the testimony, again calling attention to defendant's silence.

HNS The court "normally presumes that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions. . . ." *Greer*, 483 U.S. at 766 n.8 (citing *Richardson v. Marsh*, 481 U.S. 200, 208, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987)). This presumption, however, is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation. . . ." *Richardson*, 481 U.S. at 211. With regard to "an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it [*695] in assessing the defendant's guilt." *Id.* at 208.

The government argues that the jury's ability to follow the court's instruction is evidenced by its

failure to convict on all counts. ⁶ In support of drawing such an inference from the split verdict, the government cites cases dealing with a jury's ability to compartmentalize information in ¹⁴ multiple defendant cases. *United States v. Unruh*, 855 F.2d 1363, 1374 (9th Cir. 1987) ("The best evidence of the jury's ability to compartmentalize the evidence is its failure to convict all defendants on all counts."), *cert. denied*, 488 U.S. 974 (1988); *United States v. Baker*, 10 F.3d 1374, 1390 (9th Cir. 1993), *cert. denied*, 130 L. Ed. 2d 289, 115 S. Ct. 330 (1994).

In the context of this case, where the information to be disregarded applied equally to *all* counts, the split verdict is ambiguous; it could just as well indicate that the jury was predisposed to acquit on all counts but was influenced to partially convict by the *Doyle* violation. The partial acquittal indicates that the government's case was not definitive and that the jury's consideration of the impermissible ¹⁵ inference may have been a factor resulting in conviction on some counts. This court cannot conclude that the jury's split verdict provides any evidence of its ability to follow the district court's curative instruction. Given the extent of the error and the delay in the curative instruction, we do not believe that the jury could "possibly be expected to forget it in assessing the defendant's guilt. . . ." *Richardson*, 481 U.S. at 208.

B. Extent of Other Evidence

The government argues that the error was harmless because, as the district court stated, the evidence of Kallin's guilt was overwhelming. The evidence included the personal income and business losses that Kallin reported in contrast to his substantial purchases during the same time period, the alternate tax returns that Kallin produced to qualify for a mortgage, testimony of Kallin's family and employees, and Kallin's business records.

The government admits that Kallin presented an alternative version of the facts and that "if defendant's account were true, as he insisted, the business receipts reported on the Desert Hobbies returns were not false at all." However, it claims its rebuttal case demonstrated that Kallin's ¹⁶ version could not be true. Still, the government's admission concerning the importance of the jury's credibility assessment "only serves to underscore the critical nature of [defendant's] own testimony and the prejudicial effect of the government's use of the post-arrest silence." *Foster*, 985 F.2d at 469. The inference of guilt based on Kallin's silence was firmly planted in the minds of the jurors and undoubtably contributed to the government's undermining of Kallin's credibility.

The error in this case infected the jury on the crucial issue of credibility and the government has not proven beyond a reasonable doubt that the error did not influence the outcome of the case. We have noted our concern "that appropriate steps be taken to assure a high level of professional advocacy for prosecutors. . . . We perceive no valid excuse for this violation of [Kallin's] rights and reverse [his] conviction because of it." *Id.* The prosecutorial misconduct in the instant case was similarly inexcusable and a conviction based on such egregious error cannot be allowed to stand. We reverse and remand for a new trial.

II. Admission of Tax Returns and Statement of

Racial Bias

¹⁷ Because the same issues will likely arise on remand, we find it necessary to rule on Kallin's remaining assignments of error.

A. Admission of Tax Returns

Kallin argues that the district court erred in admitting into evidence the Kallin Enterprises corporate tax returns for the fiscal years 1982 through 1984. The statute of limitations prevented prosecution based on [*696] Kallin Enterprises taxes for fiscal years 1982 through 1984, but Kallin was indicted concerning his personal income taxes for this period. Kallin contends that the challenged returns were utilized at trial to establish defendant's propensity to file false corporate returns in violation of Fed. R. Evid. 404(b).

The government contends that Kallin's under-reporting of income on corporate returns was integral to his scheme to evade his personal income taxes and "evidence should not be treated as 'other crimes' evidence when 'the evidence concerning the [other] act and the evidence concerning the crime charged are inextricably intertwined.'" *Mundi*, 892 F.2d at 820 (quoting *United States v. Aleman*, 592 F.2d 881, 885 (5th Cir. 1979)).

The 1982 through 1984 corporate returns showed corporate losses and reported [**18] no salary paid to Kallin, so that the government had to establish that these returns were false before it could establish Desert Hobbies as a source of Kallin's alleged unreported personal income. Kallin asserts that the government never linked the challenged returns to Kallin's personal returns. Despite alleged inconsistencies in the government's actual use of the returns at trial, Kallin's personal and corporate returns were prepared by the same accountant throughout the period in question and the government contention that the various returns were linked is persuasive. Because the challenged returns are inextricably intertwined in the larger scheme, they are not 404(b) evidence and the district court did not err in admitting them.

B. Admission of Statement Concerning Racial Bias

Kallin argues that the district court erred in allowing Sharla to testify that he dislikes Mexicans. The government contends that the statement was relevant to Sharla's credibility because it explained why she left Kallin's home and took his business records. However, Sharla's credibility was not in issue. Her only part in the case was to supply certain of Kallin's business records to the IRS. The [**19] authenticity of these records was never questioned. Thus, the reason Sharla left Kallin was not probative of any matter at issue in the case. The challenged testimony was not relevant. Fed. R. Evid. 401 (**HN9** relevant evidence is evidence that "has a tendency to make the existence of *any material fact* more . . . or less probable" (emphasis added)). The district court abused its discretion in admitting it. *Schaff*, 948 F.2d at 505. Even if the evidence had some slight probative value, its prejudicial effect far outweighed any probative value and it should not have been admitted under Fed. R. Evid. 403. **7**

[**20] *REVERSED and REMANDED.*

ORDER

The slip opinion filed March 17, 1995, is amended as follows:

On page 2918, footnote 4, line 3, delete "Mr. Winerip".

On page 2922, delete footnote 6.

Plaintiff-Appellee's Motion to recall the mandate is denied as moot.

Footnotes

* 

Honorable A. Wallace Tashima ▼, United States District Judge for the Central District of California, sitting by designation.

1 

Five of these counts related to Kallin's personal income taxes for 1982 through 1986 and three related to Kallin Enterprises' corporate taxes for fiscal years 1985 through 1987.

2 

The long delay before trial was caused by the withdrawal of Kallin's counsel due to a conflict of interest and proceedings to determine Kallin's competency to stand trial.

3 

The district court overruled timely objections by defense counsel to the following line of questioning:

"Q. Mr. Kallin, you didn't tell the IRS at that time [of initial contact with the IRS in 1988] that you were innocent, did you? . . .

"A. Oh. No, sir, I didn't tell them I was innocent. . . .

"Q. And you hired an attorney, a Mr. Silver. Isn't that correct? . . .

"Q. And he was a criminal defense attorney? . . .

"A. I don't know what Mr. Silver's credentials are. . . . He's an attorney. . . .

"Q. And you retained him for more than a year. Isn't that correct? . . .

"A. Yeah. I'm going to say yes. I don't know.

"Q. And over that year, or thereabouts, you never approached the IRS, with or without the advice of counsel, to tell them that you were innocent. Isn't that correct? . . .

"A. Okay. I'm not sure, you know. Then fine, we'll go that route. You know, that sounds to me like good advice, I guess. That's from an attorney, so it must be good advice, to keep my mouth shut . . .

"Q. At that time [of arrest], you didn't tell anybody that you were innocent and ask to be heard on that matter? . . .

"A. I didn't say a thing to Mr. Shupnik [the arresting officer]. I think he thought I was the most dangerous person -

"Q. Well, you didn't say anything to Mr. Shupnik, right?

"A. No, sir, I didn't. . . . I was told to keep my mouth shut, in fact. . . .

"Q. And . . . in that time did you come forward to say that you were not guilty in this matter?

"A. I don't remember doing that, no.

"Q. Okay. In five or six years since its been brought - first suggested by the government, after Sharla took your records, this is the first time that you have told an entire story explaining how and why it is that you're innocent. Isn't that correct?

"A. Well, if I can say something. At the time I was arrested, okay, I was told - I was read my rights. . . .

"Q. But in all the time since this matter was undertaken, this is the first time you've told a comprehensive story indicating that you are innocent. Isn't that right?

"A. Yes, sir."

4

The judge instructed the jury:

Ladies and gentlemen, you remember yesterday, during the cross-examination of Mr. Kallin, [the prosecutor] was - went into the fact that he had never denied anything before this trial, and he hired a lawyer. I want to instruct you to disregard that testimony. He doesn't have to talk to the Internal Revenue Service. He doesn't - if he knows that the Internal Revenue Service is checking him, he has - certainly has the right to seek the advice of a lawyer as to what to do.

And he was asked yesterday, "even in the past two years you haven't denied it." Well, he did deny it. He pleaded not guilty to the charge, and that's why we're here to decide it. But the fact that he has not denied it to the Internal Revenue, the fact that he's hired a lawyer, really has nothing to do with this case.

5

The government concedes error as to impeachment based on both post-Miranda warning silence and pre-Miranda warning silence because the IRS administered a non-custodial warning at the outset which advised Kallin of his right to remain silent and his right to counsel. **HN6** The IRS warnings, like Miranda warnings, contain an implicit assurance that the assertion of the right will carry no penalty. *Doyle*, 426 U.S. at 618.

6

The district court agreed with this reasoning and noted that the "fact that the jury acquitted him of three or four counts suggests to me that they followed my instructions. In other words, they did not let his silence affect them."

7

At least one member of the jury has a Hispanic surname, but that is not the point.

It does not take much imagination to understand how such grossly biased comments would be viewed by the jury. We need not know the racial composition of the jury, for nearly all citizens find themselves repelled by such blatantly racist remarks and resentful of the person claimed to have uttered them.

United States v. Ebens, 800 F.2d 1422, 1434 (6th Cir. 1986). The only purpose this evidence could serve would be to prejudice the jury against Kallin.

Content Type: Cases

Terms: United States v. kallin

Narrow By: -None-

Date and Time: Nov 23, 2018 11:09:00 a.m. EST



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State v. Guthrie, 194 W. Va. 657

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Supreme Court of Appeals of West Virginia

May 10, 1995, Submitted ; July 19, 1995, Filed

No. 22710

Reporter

194 W. Va. 657 * | 461 S.E.2d 163 ** | 1995 W. Va. LEXIS 169 ***

STATE OF WEST VIRGINIA, Plaintiff Below, Appellee V. DALE EDWARD GUTHRIE, Defendant Below,
Appellant

Subsequent History: [***1] Concurring Opinion Filed July 21, 1995.

Writ of habeas corpus denied Guthrie v. Plumley, 2014 W. Va. LEXIS 679 (W. Va., June 6, 2014)

Prior History: Appeal from the Circuit Court of Kanawha County. Honorable Paul Zakaib, Jr. ▼, Judge.
No. 93-F-105.

Disposition: REVERSED AND REMANDED

Core Terms

premeditation, killing, deliberation, instructions, intent to kill, murder, first degree murder, trial court,

circumstantial evidence, cases, guilt, prejudicial, convict, jury's, prosecuting attorney, degree of murder, cross-examination, recommendation, beyond a reasonable doubt, admissibility, penalties, witnesses, harmless, homicide, stabbing, weigh, standard of review, jury instructions, appellate court, criminal case

Case Summary

Procedural Posture

Defendant appealed the jury verdict of the Circuit Court of Kanawha County (West Virginia), which found him guilty of first-degree murder under W.Va. Code § 61-2-1. Defendant was sentenced to serve a life sentence with a recommendation of mercy. Defendant asserted cumulative error based on erroneous jury instructions and improper questions and comments made by the prosecution.

Overview

After being harassed by a co-worker, defendant fatally stabbed the man with a knife. Defendant was convicted of first-degree murder under W.Va. Code § 61-2-1 and sentenced to life in prison. The court reversed, holding that the trial court erroneously admitted prejudicial statements allegedly made by defendant about blacks, women, and Hitler that inferred he was a racist, sexist, and Nazi. The doctrine of curative admissibility did not apply because the statements had no relation to the crime. The prosecution's failure to disclose before cross-examination a statement allegedly made by defendant was also prejudicial and the cumulative error denied defendant his constitutional right to a fair trial. After adopting a new standard for determining the sufficiency of the evidence that permitted circumstantial evidence to support a conviction, the court determined that there was sufficient evidence of first-degree murder and remanded the case for a new trial. The court also adopted a new instruction defining premeditation for first-degree murder, holding that there must be some evidence that defendant considered and weighed his decision to kill to establish premeditation.

Outcome

The court reversed defendant's conviction for first-degree murder and remanded the case for a new trial. The court established new definitions for premeditation and the sufficiency of the evidence.

▼ LexisNexis® Headnotes

Evidence > Weight & Sufficiency ▼

HN1 Evidence, Weight & Sufficiency

In a sufficiency of the evidence claim, an appellate court, while reviewing the record in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 🔍 More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors ▼ > Province of Court & Jury ▼ >

General Overview ▼

Evidence > Weight & Sufficiency ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Substantial Evidence ▼ >

General Overview ▼

HN2 Juries & Jurors, Province of Court & Jury

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. 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. Appellate review is not a device for the appellate court to replace a jury's finding with its own conclusion. On review, an appellate court will not weigh evidence or determine credibility. Credibility determinations are for a jury and not an appellate court. 🔍 More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > Substantial Evidence ▼ >

General Overview ▼

HN3 Standards of Review, Substantial Evidence

On appeal, an appellate court will not disturb a verdict in a criminal case unless it finds that reasonable minds could not have reached the same conclusion. Finally, a jury verdict should be

set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that the prior cases of the Supreme Court of West Virginia are inconsistent with its decision, they are expressly overruled. [More like this Headnote](#)

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors ▼ > Province of Court & Jury ▼ >
General Overview ▼

Criminal Law & Procedure > Appeals ▼ > Standards of Review ▼ > General Overview ▼

HN4 [📌](#) **Juries & Jurors, Province of Court & Jury**

An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact. It is for the jury to decide which witnesses to believe or disbelieve. Once the jury has spoken, the appellate court may not review the credibility of the witnesses. [More like this Headnote](#)

Shepardize - Narrow by this Headnote

Evidence > Weight & Sufficiency ▼

HN5 [📌](#) **Evidence, Weight & Sufficiency**

When reviewing a sufficiency of the evidence claim, an appellate court is entitled to review all the evidence that was actually admitted rightly or wrongly. [More like this Headnote](#)

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > De Novo Review ▼ >
Jury Instructions ▼

Criminal Law & Procedure > Trials ▼ > Jury Instructions ▼ > Objections ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > De Novo Review ▼ >
General Overview ▼

HN6 [📌](#) **De Novo Review, Jury Instructions**

If an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, the appellate court will exercise de novo review. [More like this Headnote](#)

Shepardize - Narrow by this Headnote

Civil Procedure > Appeals ▼ > Standards of Review ▼ > De Novo Review ▼

Criminal Law & Procedure > Juries & Jurors ▼ > Jury Questions to the Court ▼ >
Judicial Discretion ▼

Civil Procedure > ... > Jury Trials ▼ > Jury Instructions ▼ > General Overview ▼

Criminal Law & Procedure > Trials ▼ > Jury Instructions ▼ > Requests to Charge ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Abuse of Discretion ▼ >
General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > De Novo Review ▼ >
General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > De Novo Review ▼ >
Jury Instructions ▼

HN7 Standards of Review, De Novo Review

The appellate court reviews a trial court's refusal to give or the actual giving of a certain instruction under an abuse of discretion standard. Where, however, the question is whether the jury instructions failed to state the proper legal standard, the appellate court's review is plenary. Whether jury instructions were properly or legally given is a question of law. [More like this Headnote](#)

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > Plain Error ▼ >
Definition of Plain Error ▼

Evidence > Admissibility ▼ > Procedural Matters ▼ > Rulings on Evidence ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Plain Error ▼ > General Overview ▼

HN8 Plain Error, Definition of Plain Error

Where a party does not make a clear, specific objection at trial to the charge that he challenges as erroneous, he forfeits his right to appeal unless the issue is so fundamental and prejudicial as to constitute "plain error." [More like this Headnote](#)

Shepardize - Narrow by this Headnote

Civil Procedure > Appeals ▼ > Standards of Review ▼ > Abuse of Discretion ▼

Criminal Law & Procedure > Trials ▼ > Jury Instructions ▼ > General Overview ▼

Civil Procedure > Trials ▼ > Jury Trials ▼ > General Overview ▼

Civil Procedure > ... > Jury Trials ▼ > Jury Instructions ▼ > General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Abuse of Discretion ▼ >
General Overview ▼

HN9 Standards of Review, Abuse of Discretion

The 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. The 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 the 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.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > Abuse of Discretion ▼ >
General Overview ▼

Criminal Law & Procedure > Trials ▼ > Jury Instructions ▼ > Objections ▼

HN10 Standards of Review, Abuse of Discretion

When an objection to a jury instruction involves the trial court's expression and formulation of the jury charge, the appellate court will review under an abuse of discretion standard. Therefore, the appellate court reviews jury instructions to determine whether, taken as a whole and in light of the evidence, they mislead the jury or state the law incorrectly to the prejudice of the objecting party. So long as they do not, the appellate court reviews the formulation of the instructions and the choice of language for an abuse of discretion. The appellate court will reverse only if the instructions are incorrect as a matter of law or capable of confusing and thereby misleading the jury.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder ▼ > Definitions ▼ > Deliberation & Premeditation ▼

Criminal Law & Procedure > ... > Murder ▼ >  Capital Murder ▼ > General Overview ▼

HN11 Definitions, Deliberation & Premeditation

Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing was by prior calculation and design. It is not necessary to prove

premeditation existed for any definite period of time. But it is necessary to prove that it did exist. This means there must be an opportunity for some reflection on the intention to kill after it is formed. The accused must kill purposely after contemplating the intent to kill.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder ▼ >  Second-Degree Murder ▼ > Elements ▼

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder ▼ > Murder ▼ > General Overview ▼

Criminal Law & Procedure > ... > Murder ▼ > Definitions ▼ > Deliberation & Premeditation ▼

Criminal Law & Procedure > ... > Murder ▼ >  First-Degree Murder ▼ > General Overview ▼

Criminal Law & Procedure > ... > Murder ▼ >  First-Degree Murder ▼ > Elements ▼

Criminal Law & Procedure > ... > Murder ▼ >  Second-Degree Murder ▼ > General Overview ▼

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder ▼ >  Voluntary Manslaughter ▼ > General Overview ▼

HN12 **Second-Degree Murder, Elements**

There must be some evidence that the defendant considered and weighed his decision to kill in order for the state to establish premeditation and deliberation under our first degree murder statute. This is what is meant by a ruthless, cold-blooded, calculating killing. Any other intentional killing, by its spontaneous and nonreflective nature, is second degree murder.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder ▼ >  First-Degree Murder ▼ > Elements ▼

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder ▼ > Murder ▼ > General Overview ▼

Criminal Law & Procedure > ... > Murder ▼ >  First-Degree Murder ▼ > General Overview ▼

HN13 **First-Degree Murder, Elements**

In the absence of statements by the accused which indicate the killing was by prior calculation and design, a jury must consider the circumstances in which the killing occurred to determine whether it fits into the first degree category. Relevant factors include the relationship of the accused and the victim and its condition at the time of the homicide; whether plan or

preparation existed either in terms of the type of weapon utilized or the place where the killing occurred; and the presence of a reason or motive to deliberately take life. No one factor is controlling. Any one or all taken together may indicate actual reflection on the decision to kill. This is what W. Va. Code § 61-2-1 means by "willful, deliberate and premeditated killing."  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder ▼ >  First-Degree Murder ▼ > Elements ▼

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder ▼ > Murder ▼ > General Overview ▼

Criminal Law & Procedure > ... > Murder ▼ >  First-Degree Murder ▼ > General Overview ▼

Criminal Law & Procedure > ... > Jury Instructions ▼ > Particular Instructions ▼ > General Overview ▼

HN14 **First-Degree Murder, Elements**

A jury should be instructed that murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ, and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder.  More like this Headnote

Shepardize - Narrow by this Headnote

Governments > Courts ▼ > Judicial Precedent ▼

HN15 **Courts, Judicial Precedent**

A "new rule" should not be given retroactive effect.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > Prosecutorial Misconduct ▼

Evidence > Admissibility ▼ > Procedural Matters ▼ > Rulings on Evidence ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ >

General Overview ▼

HN16  **Harmless & Invited Error, Prosecutorial Misconduct**

The appellate court's review for harmless error is fact specific.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > Evidence ▼

Legal Ethics > Prosecutorial Conduct ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > Prosecutorial Misconduct ▼

HN17  **Harmless & Invited Error, Evidence**

The inquiry for harmless error focuses on the fairness of the trial and not the culpability of the prosecutor. In determining whether a statement made or evidence introduced by the prosecution represents an instance of misconduct, an appellate court first looks at the statement or evidence in isolation and decide if it is improper. If it is, the appellate court then evaluates whether the improper statement or evidence rendered the trial unfair. Several factors are relevant to this evaluation, among them are: (1) The nature and seriousness of the misconduct, (2) the extent to which the statement or evidence was invited by the defense, (3) whether the statement or evidence was isolated or extensive, (4) the extent to which any prejudice was ameliorated by jury instructions, (5) the defense's opportunity to counter the prejudice, (6) whether the statement or evidence was deliberately placed before the jury to divert attention to irrelevant and improper matters, and (7) the sufficiency of the evidence supporting the conviction.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Sentencing Alternatives ▼ > Probation ▼ > General Overview ▼

Criminal Law & Procedure > Trials ▼ > Defendant's Rights ▼ >  Right to Fair Trial ▼

HN18  **Sentencing Alternatives, Probation**

Outside the context of cases involving a recommendation of mercy, it is improper for either party to refer to the sentencing possibilities of the trial court should certain verdicts be found or to refer to the ability of the trial court to place a defendant on probation. The defendant is likewise prohibited from informing the jury of the possible sentences he may face if convicted.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > Closing Arguments ▼ > General Overview ▼

Criminal Law & Procedure > Juries & Jurors ▼ > Province of Court & Jury ▼ >
General Overview ▼

Criminal Law & Procedure > Juries & Jurors ▼ > Province of Court & Jury ▼ >
Sentencing Issues ▼

Criminal Law & Procedure > ... > Jury Instructions ▼ > Particular Instructions ▼ >
Lesser Included Offenses ▼

Criminal Law & Procedure > Sentencing ▼ > General Overview ▼

HN19 📌 **Trials, Closing Arguments**

Punishment is the trial court's role and is not a proper matter for the jury. The jury's sole function in a criminal case is to pass on whether a defendant is guilty as charged based on the evidence presented at trial and the law as given by the jury instructions. The applicable punishments for the lesser-included offenses are not elements of the crime; therefore, the question of what punishment the defendant could receive if convicted is not a proper matter for closing argument. 🔍 More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > Closing Arguments ▼ > General Overview ▼

HN20 📌 **Trials, Closing Arguments**

A proper closing argument in a criminal case involves the summation of evidence, any reasonable inferences from the evidence, responses to the opposing party's argument, and pleas for law enforcement generally. 🔍 More like this Headnote

Shepardize - Narrow by this Headnote

Legal Ethics > Prosecutorial Conduct ▼

HN21 📌 **Legal Ethics, Prosecutorial Conduct**

ABA Standard for Criminal Justice 3-5.8(d) (1980) explains: The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. ABA Standard for Criminal Justice 3-5.9 further advises: It is unprofessional conduct for the prosecutor to intentionally to refer to or argue on the basis of facts outside the record. 🔍 More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > Direct Examinations ▼

Evidence > ... > Testimony ▼ > Credibility of Witnesses ▼ > General Overview ▼

Criminal Law & Procedure > Trials ▼ > Witnesses ▼ > General Overview ▼

Criminal Law & Procedure > Trials ▼ > Witnesses ▼ >  Impeachment ▼

Evidence > ... > Credibility of Witnesses ▼ > Impeachment ▼ > General Overview ▼

Evidence > ... > Impeachment ▼ > Bad Character for Truthfulness ▼ > General Overview ▼

Evidence > ... > Impeachment ▼ > Bad Character for Truthfulness ▼ > Specific Instances ▼

Evidence > ... > Impeachment ▼ >  Convictions & Other Criminal Process ▼ >

General Overview ▼

HN22 **Trials, Direct Examinations**

A party may not present extrinsic evidence of specific instances of conduct to impeach a witness on a collateral matter. W.Va. R. Evid. 608(b). A matter is considered noncollateral if the matter is itself relevant in the litigation to establish a fact of consequence.  More like this Headnote

Shepardize - Narrow by this Headnote

Civil Procedure > Appeals ▼ > Standards of Review ▼ > Abuse of Discretion ▼

Evidence > ... > Hearsay ▼ > Credibility of Declarants ▼ > Impeachment ▼

Civil Procedure > Appeals ▼ > Standards of Review ▼ > De Novo Review ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Abuse of Discretion ▼ >

General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > De Novo Review ▼ >

General Overview ▼

HN23 **Standards of Review, Abuse of Discretion**

Although most rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard, an appellate court reviews de novo the legal analysis underlying a trial court's decision. A trial court's discretion is not unbounded, and the scope of the trial court's discretion varies according to the issue before it. In considering the admissibility of impeachment evidence, the appellate court applies the same standards of relevance that it applies to other questions of admissibility.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Appeals ▼ > Reversible Error ▼ > General Overview ▼

HN24  **Appeals, Reversible Error**

Appellate courts give strict scrutiny to cases involving the alleged wrongful injection of race, gender, or religion in criminal cases. Where these issues are wrongfully injected, reversal is usually the result.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > General Overview ▼

HN25  **Criminal Law & Procedure, Trials**

Counsel should not be permitted to appeal to the jury's passions or prejudices.  More like this Headnote

Shepardize - Narrow by this Headnote

Evidence > Relevance ▼ > Exclusion of Relevant Evidence ▼ > 

Confusion, Prejudice & Waste of Time ▼

Evidence > Relevance ▼ > Preservation of Relevant Evidence ▼ >

Exclusion & Preservation by Prosecutors ▼

HN26  **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Under the first step of our inquiry, an appellate court must determine whether the evidence is relevant to an issue of consequence. Where race, gender, or religion is a relevant factor in the case, its admission is not prohibited unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Normally, in order to be probative, evidence must be "relevant" under W. Va. R. Evid. 401, that is, it must tend to make an issue in the case more or less likely than would be so without the evidence. Other factors that bear on the probative value are the importance of the issue and the force of the evidence.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > Witnesses ▼ >  Impeachment ▼

Evidence > ... > Credibility of Witnesses ▼ > Impeachment ▼ > Religious Beliefs ▼

Evidence > Types of Evidence ▼ > Testimony ▼ > General Overview ▼

HN27  **Witnesses, Impeachment**

W.Va. R. Evid. 610 states: Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > Examination of Witnesses ▼ >  Cross-Examination ▼

Evidence > Relevance ▼ > Exclusion of Relevant Evidence ▼ > 

Confusion, Prejudice & Waste of Time ▼

Criminal Law & Procedure > Trials ▼ > Witnesses ▼ > General Overview ▼

Evidence > ... > Testimony ▼ > Examination ▼ > General Overview ▼

HN28  **Examination of Witnesses, Cross-Examination**

No party has a right on cross-examination to offer irrelevant and incompetent evidence. Even the right to cross-examine witnesses may, in an appropriate case, bow to accommodate other legitimate interests in the criminal trial process. W.Va. R. Evid. 403 is one of those other legitimate interests.  More like this Headnote

Shepardize - Narrow by this Headnote

Civil Procedure > ... > Defenses, Demurrers & Objections ▼ > Motions to Strike ▼ > Irrelevant Matters ▼

Evidence > Admissibility ▼ > Procedural Matters ▼ > Curative Admissibility ▼

Civil Procedure > ... > Defenses, Demurrers & Objections ▼ > Motions to Strike ▼ > General Overview ▼

Evidence > Relevance ▼ > Preservation of Relevant Evidence ▼ >

Exclusion & Preservation by Prosecutors ▼

Evidence > Relevance ▼ > General Overview ▼

HN29  **Motions to Strike, Irrelevant Matters**

The doctrine of curative admissibility states that in order to be entitled as a matter of right to present rebutting evidence on an evidentiary fact: (a) the original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence must be similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence.  More like this Headnote

Shepardize - Narrow by this Headnote

Evidence > Relevance ▼ > Exclusion of Relevant Evidence ▼ > 

Confusion, Prejudice & Waste of Time ▼

Evidence > Relevance ▼ > Preservation of Relevant Evidence ▼ >

Exclusion & Preservation by Prosecutors ▼

HN30  **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

The second inquiry under W.Va. R. Evid. 403 is whether the probity of the objected to evidence was substantially outweighed by its prejudice.  More like this Headnote

Shepardize - Narrow by this Headnote

Evidence > Relevance ▼ > Exclusion of Relevant Evidence ▼ > 

Confusion, Prejudice & Waste of Time ▼

Evidence > Relevance ▼ > Preservation of Relevant Evidence ▼ >

Exclusion & Preservation by Prosecutors ▼

HN31  **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

To perform the W.Va. R. Evid. 403 balance, an appellate court must assess the degree of probity of the evidence, which, in turn, depends on its relation to the evidence and strategy presented at trial in general.  More like this Headnote

Shepardize - Narrow by this Headnote

Evidence > Relevance ▼ > Exclusion of Relevant Evidence ▼ > 

Confusion, Prejudice & Waste of Time ▼

Evidence > Relevance ▼ > Preservation of Relevant Evidence ▼ >

Exclusion & Preservation by Prosecutors ▼

HN32  **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

The prejudice that the trial court must assess under W.Va. R. Evid. 403 is the prejudice that lies in the danger of jury misuse of the evidence.  More like this Headnote

Shepardize - Narrow by this Headnote

Evidence > Relevance ▼ > Exclusion of Relevant Evidence ▼ > 

Confusion, Prejudice & Waste of Time ▼

HN33  **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Evidence is unfairly prejudicial if it has an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Succinctly stated, evidence is unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case.  More like this Headnote

Shepardize - Narrow by this Headnote

Evidence > Relevance ▼ > Exclusion of Relevant Evidence ▼ > 

Confusion, Prejudice & Waste of Time ▼

Evidence > Relevance ▼ > Preservation of Relevant Evidence ▼ >

Exclusion & Preservation by Prosecutors ▼

HN34  **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

A trial judge must not permit a jury's finding to be affected or decided on account of racial or gender bias and whether one holds an unpopular political belief or opinion. W. Va. R. Evid. 403 must be used to bar the admission of this highly prejudicial evidence.  More like this Headnote

Shepardize - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▼ >  Procedural Due Process ▼ >

General Overview ▼

Criminal Law & Procedure > Trials ▼ > Defendant's Rights ▼ >  Right to Due Process ▼

Evidence > Relevance ▼ > Preservation of Relevant Evidence ▼ >

Exclusion & Preservation by Prosecutors ▼

HN35  **Fundamental Rights, Procedural Due Process**

While due process does not confer upon a criminal defendant a right to an error-free trial, it unquestionably guarantees a fundamental right to a fair trial. It is a fundamental guarantee under the Due Process Clause of W.Va. Const. art. III, § 10 that these factors, race, religion, gender, political ideology, when prohibited by West Virginia's laws shall not play any role in West Virginia's system of criminal justice.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > General Overview ▼

Criminal Law & Procedure > Appeals ▼ > Prosecutorial Misconduct ▼ > General Overview ▼

HN36  **Standards of Review, Harmless & Invited Error**

A conviction will not be set aside because of improper remarks and conduct of the prosecution in the presence of a jury which do not clearly prejudice a defendant or result in manifest injustice. Given the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and the Constitution does not guarantee such a trial. An appellate court should not exercise its supervisory power to reverse a conviction when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > Constitutional Rights ▼

Criminal Law & Procedure > Appeals ▼ > Reversible Error ▼ > Prosecutorial Misconduct ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > Evidence ▼

Evidence > Admissibility ▼ > Procedural Matters ▼ > Rulings on Evidence ▼

HN37  **Harmless & Invited Error, Constitutional Rights**

The harmless error doctrine requires an appellate court to consider the error in light of the record as a whole, but the standard of review in determining whether an error is harmless depends on whether the error was constitutional or nonconstitutional. It is also necessary for the appellate court to distinguish between an error resulting from the admission of evidence and other trial error. As to error not involving the erroneous admission of evidence, nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment. On the other hand, when dealing with the wrongful admission of evidence, the appropriate test for harmlessness is whether the appellate court can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict and the jury was not substantially swayed by the error.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > Jury Instructions ▼ > Curative Instructions ▼

Legal Ethics > Prosecutorial Conduct ▼

Criminal Law & Procedure > Appeals ▼ > Prosecutorial Misconduct ▼ > General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > Evidence ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > Prosecutorial Misconduct ▼

HN38 **Jury Instructions, Curative Instructions**

In determining prejudice, an appellate court considers the scope of the objectionable comments and their relationship to the entire proceedings, the ameliorative effect of any curative instruction given or that could have been given but was not asked for, and the strength of the evidence supporting the defendant's conviction. A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments or conduct standing alone, for the statements or conduct must be viewed in context.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Appeals ▼ > Reversible Error ▼ > General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > General Overview ▼

HN39 **Appeals, Reversible Error**

An appellate court is obligated to see that the guarantee of a fair trial under the Constitution is honored. Thus, only where there is a high probability that an error did not contribute to a criminal conviction will the appellate court affirm. "High probability" requires that the appellate court possess a sure conviction that the error did not prejudice the defendant. Where there is "grave doubt" regarding the harmless nature of errors affecting substantial rights, reversal is required.  More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Trials ▼ > Examination of Witnesses ▼ >  Cross-Examination ▼

Evidence > ... > Testimony ▼ > Examination ▼ > General Overview ▼

HN40 **Examination of Witnesses, Cross-Examination**

Trial courts should preclude questions for which the questioner cannot show a factual and good faith basis. Manifestly, mere inquiries by the prosecutor as to rumors may be highly prejudicial

even though answered in the negative. [More like this Headnote](#)

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Discovery & Inspection ▼ > Discovery Misconduct ▼ > General Overview ▼

HN41 [📌](#) **Discovery & Inspection, Discovery Misconduct**

When a trial court grants a pretrial discovery motion requiring the prosecution to disclose evidence in its possession, nondisclosure by the prosecution is fatal to its case where such nondisclosure is prejudicial. The nondisclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case. [More like this Headnote](#)

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Appeals ▼ > Reversible Error ▼ > General Overview ▼

Criminal Law & Procedure > ... > Standards of Review ▼ > Harmless & Invited Error ▼ > General Overview ▼

HN42 [📌](#) **Appeals, Reversible Error**

Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error. [More like this Headnote](#)

Shepardize - Narrow by this Headnote

Syllabus

SYLLABUS BY THE COURT

1. The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.
2. There should be only one standard of proof in criminal cases and that is proof beyond a reasonable doubt. Once a proper instruction is given advising the jury as to the State's heavy burden under the guilt beyond a reasonable doubt standard, an additional instruction on circumstantial evidence is no longer required even if the State relies wholly on circumstantial evidence.
3. A criminal defendant challenging the sufficiency of the evidence [***2] to support a conviction

takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. 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 a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

4. 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 [***3] 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.

5. Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.

6. In criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies [***4] as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder. To the extent that *State v. Schrader*, 172 W. Va. 1, 302 S.E.2d 70, (1982), is inconsistent with our holding today, it is expressly overruled.

7. Outside the context of cases involving a recommendation of mercy, it is improper for either party to refer to the sentencing possibilities of the trial court should certain verdicts be found or to refer to the ability of the trial court to place a defendant on probation.

8. The jury's sole function in a criminal case is to pass on whether a defendant is guilty as charged based on the evidence presented at trial and the law as given by the jury instructions. The applicable punishments for the lesser-included offenses are not elements of the crime; therefore, the question of what punishment a defendant could receive if convicted is not a proper matter for closing [***5] argument. To the extent the decision in *State v. Myers*, 159 W. Va. 353, 222 S.E.2d 300 (1976), is inconsistent with our holding, it is expressly overruled.

9. Appellate courts give strict scrutiny to cases involving the alleged wrongful injection of race, gender, or religion in criminal cases. Where these issues are wrongfully injected, reversal is usually the result. Where race, gender, or religion is a relevant factor in the case, its admission is not prohibited unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

10. The curative admissibility rule allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has "opened the door" by introducing similarly inadmissible evidence on the same point. Under this rule, in order to be entitled as a matter of right to present rebutting evidence on an evidentiary fact: (a) The original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence must be similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence.

11. An appellate [***6] court is obligated to see that the guarantee of a fair trial under Section 10 of Article III of the West Virginia Constitution is honored. Thus, only where there is a high probability that an error of due process proportion did not contribute to the criminal conviction will an appellate court affirm. High probability requires that an appellate court possess a sure conviction that the error

did not prejudice the defendant.

12. "'Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.' Syl. pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972)." Syllabus Point 5, *State v. Walker*, 188 W. Va. 661, 425 S.E.2d 616 (1992).

Counsel: Mary Beth Kershner ▼, Assistant Prosecuting Attorney, Charleston, West Virginia, Attorney for Appellee.

Stephen D. Warner ▼, Deputy Public Defender, Charleston, West Virginia, Attorney for Appellant.

Judges: JUSTICE CLECKLEY delivered the Opinion of the Court. JUSTICE BROTHERTON and JUSTICE RECHT ▼ did not participate. [***7] RETIRED JUSTICE MILLER ▼ and JUDGE FOX sitting by temporary assignment. JUSTICE WORKMAN ▼ concurs and reserves the right to file a concurring opinion.

Opinion by: CLECKLEY

Opinion

[**171] [*665] Cleckley, Justice:

The defendant, Dale Edward Guthrie, appeals the January, 1994, jury verdict of the Circuit Court of Kanawha County finding him guilty of first degree murder. In May of 1994, the defendant was sentenced to serve a life sentence with a recommendation of mercy. The defendant cites as error several instructions given to the jury and improper questions and comments made by the prosecutor. Cumulative error is asserted. He also contends there is insufficient evidence to support the verdict.

I.

FACTS AND PROCEDURAL BACKGROUND

It is undisputed that on the evening of February 12, 1993, the defendant removed a knife from his pocket and stabbed his co-worker, Steven Todd Farley, in the neck and killed him. The two men worked together as dishwashers at Danny's Rib House in Nitro and got along well together before this incident. On the night of the killing, the victim, his brother, Tracy Farley, and James Gibson were joking around while working in the kitchen of the restaurant. The victim [***8] was poking fun at the defendant who appeared to be in a bad mood. He told the defendant to "lighten up" and snapped him with a dishtowel several times. Apparently, the victim had no idea he was upsetting the defendant very much. The dishtowel flipped the defendant on the nose and he became enraged.

The defendant removed his gloves and started toward the victim. Mr. Farley, still teasing, said: "Ooo, he's taking his gloves off." The defendant then pulled a knife from his pocket and stabbed the victim in the neck. He also stabbed Mr. Farley in the arm as he fell to the floor. Mr. Farley looked up and cried: "Man, I was just kidding around." The defendant responded: "Well, man, you should have never hit me in my face." The police arrived at the restaurant and arrested the defendant. He was given his *Miranda* rights. The defendant made a statement at the police station and confessed to the killing. [REDACTED] The police officers [REDACTED] [REDACTED] described him as calm and willing to cooperate.

[REDACTED] It is also undisputed that the defendant suffers from a host of psychiatric problems. He experiences up to two panic attacks daily and had received treatment for them at the Veterans Administration Hospital in Huntington for more than a year preceding the killing. He suffers from chronic depression (dysthymic disorder), an obsession with his nose (body dysmorphic disorder), and borderline personality disorder. The defendant's father shed some light on his nose fixation. He stated that dozens of times a day the defendant stared in the mirror and turned his head back and forth to look at his nose. His father estimated that 50 percent of the time he observed his son he was looking at his nose. The defendant repeatedly asked for assurances that his nose was not too big. This obsession began when he was approximately seventeen years old. The defendant was twenty-nine years old at the time of trial.

The defendant testified he suffered a panic attack immediately preceding the stabbing. He described the attack as "intense"; he felt a lot of pressure and his heart beat rapidly. In contrast to the boisterous atmosphere in the kitchen that evening, the defendant was quiet and kept to himself. [REDACTED] He stated that Mr. Farley kept irritating him that night. The defendant could not understand why Mr. Farley was picking on him because he had never done that before. Even at trial, the defendant did not comprehend his utter overreaction to the situation. In hindsight, the defendant believed the better decision would have been to punch out on his time card and quit over the incident. However, all the witnesses related that the defendant was in no way attacked, as he perceived it, but that Mr. Farley was playing around. The defendant could not bring himself to tell the other workers to leave him alone or inform them about his panic attacks.

In contrast to his written statement, the defendant testified he was unable to recall stabbing the victim. After he was struck in the nose, he stated that he "lost it" and, when he came to himself, he was holding the knife in his hand and Mr. Farley was sinking to the floor.

A psychiatrist, Dr. Sidney Lorfald, testified on behalf of the defendant. He diagnosed the various disorders discussed above. Dr. Lorfald felt the defendant's diagnoses "may have affected his perception somewhat." Nevertheless, it was his opinion the defendant was sane at the [REDACTED] time of the offense because he was able to distinguish between right and wrong and could have conformed his actions accordingly.

It was the State's position that the facts supported a first degree murder conviction. At the close of the State's case-in-chief, the defense moved for a directed verdict contending the State failed to present evidence of malice and premeditation. This motion was denied. The defense argued the facts of the case supported voluntary manslaughter or, at worse, second degree murder. The jury returned a verdict finding the defendant guilty of first degree murder with a recommendation of mercy.

II.

DISCUSSION

In his appeal, the defendant raises several assignments of error: (1) whether the evidence was sufficient to support the verdict; (2) whether the trial court erred in giving instructions covering first degree murder; (3) whether the trial court erred in refusing to give defendant's instruction on circumstantial evidence; (4) whether the trial court erred in permitting the prosecution to argue the penalties of each lesser-included offense; (5) whether the trial court erred in permitting the prosecution to inject irrelevant evidence of racial, gender, and [REDACTED] political prejudices in the case; and (6) whether reversal is required under the cumulative error rule. At the outset, we find

some of the errors asserted by the defendant are without merit. Therefore, our review of this case will be limited to the three areas discussed below.

[**173] [*667] A.

Sufficiency of the Evidence

First, the defendant strives to persuade us that the record in this case does not support the verdict of guilty of first degree murder beyond a reasonable doubt. Because this exhortation challenges the sufficiency of evidence to support a jury's verdict, our authority to review is limited.

We have not addressed the criminal standard of review concerning the sufficiency of evidence since 1978. Syllabus Point 1 of *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978), states our rule with respect to such a claim:

"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. [***13] 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."

A year after *Starkey* was decided, the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), [2] articulated, at least linguistically, a different standard of review under the United States Constitution. [3] **HN1** In a sufficiency of the evidence claim under *Jackson*, an appellate court, while reviewing the record in the light most favorable to the prosecution, must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319, 99 S. Ct. at 2789, 61 L. Ed. 2d at 573. (Emphasis in original).

[***14] After contrasting *Starkey* and its progeny with the standard of review announced in *Jackson*, we believe it is desirable to reconcile our differences and to adopt the federal standard of review both as to *Jackson* generally and as to the standard of review in circumstantial evidence cases. [4] [***15] By doing so, however, we continue a highly deferential approach: Appellate courts can reverse only if no rational jury could have found the defendant guilty beyond a reasonable doubt. [5] This standard is a strict one; a [**174] [*668] defendant must meet a heavy burden to gain reversal because a jury verdict will not be overturned lightly.

Under the *Jackson* standard, when reviewing a conviction, we may accept any adequate evidence, including circumstantial evidence, as support for the conviction. It is possible that we, as an appellate court, may have reached a different result if we had sat as jurors. However, under *Jackson*, it does not matter how we might have interpreted or weighed the evidence. Our function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light [***16] most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

In adopting *Jackson*, we necessarily overturn our long established rule that when the State relies upon circumstantial evidence, in whole or in part, for a court to sustain the verdict all other *reasonable* hypotheses need be excluded by the prosecution save that of guilt. In *State v. Noe*, 160 W. Va. 10, 15, 230 S.E.2d 826, 829-30 (1976), we stated:

"Circumstantial evidence will not support a guilty verdict unless the fact of guilt is proved to the exclusion of every reasonable hypothesis of innocence; and circumstances

which create a mere suspicion of guilt but do not prove the actual commission of the crime charged, are not sufficient to sustain a conviction."

State v. Robinette, 181 W. Va. 400, 383 S.E.2d 32 (1989); *State v. Dobbs*, 163 W. Va. 630, 259 S.E.2d 829 (1979). In *State v. Frasher*, 164 W. Va. 572, 265 S.E.2d 43 (1980), however, we recognized the application of this rule is limited to cases where the State relied wholly upon circumstantial [***17] evidence. See Syl. pt. 3, *State v. McHenry*, 93 W. Va. 396, 117 S.E. 143 (1923).

However, under *Jackson*, the mere existence of other reasonable hypotheses is not enough to reverse a jury verdict. This new circumstantial evidence rule that we adopt today originated in *Holland v. United States*, 348 U.S. 121, 139-40, 75 S. Ct. 127, 137-38, 99 L.Ed. 150, 166 (1954), where the United States Supreme Court stated:

"The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, . . . but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. . . .

"Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In [***18] both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." (Citations omitted).

The circumstantial evidence rule of *Holland* was reaffirmed in *Jackson*:

"Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past. . . . We decline to adopt it today." 443 U.S. at 326, 99 S. Ct. at 2792-2793, 61 L. Ed. 2d at 578. (Citation omitted).

Facing the same dilemma, the Supreme Court of Ohio also abandoned the requirement that in circumstantial evidence cases the prosecution's evidence need exclude all other reasonable hypotheses of innocence. In *State v. Jenks*, 61 Ohio St. 3d 259, 272, 574 [**175] [*669] N.E.2d 492, 502 (1991), [6] relying on the language in *Holland*, the Ohio court [***19] stated:

"Circumstantial evidence and direct evidence inherently possess the same probative value. In some instances certain facts can only be established by circumstantial evidence. Hence, we can discern no reason to continue the requirement that circumstantial evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt. We agree with those courts that have held that an additional instruction on the sufficiency of circumstantial evidence invites confusion and is unwarranted. Since circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt. Nothing more should be required of a factfinder."

These precedents illuminate our path. We find the logic [***20] and analysis of *Holland* and *Jenks* to be forceful. Therefore, we hold there should be only one standard of proof in criminal cases and that is proof beyond a reasonable doubt. We start along this route by acknowledging that there is no

qualitative difference between direct and circumstantial evidence. **7** Thus, it follows *a fortiori* that once a proper instruction is given advising the jury as to the State's heavy burden under the guilt beyond a reasonable doubt standard, an additional instruction on circumstantial evidence is no longer required even if the State relies wholly on circumstantial evidence. **8**

[***21] In summary, **HN2** a criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. 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. As we have cautioned before, appellate review is not a device for this Court to replace a jury's finding with our own conclusion. On review, we will not weigh evidence or determine credibility. **9** Credibility determinations are for a jury and not an appellate court. **HN3** On appeal, we will not disturb a verdict in a criminal case unless we find that reasonable minds could not have reached the same conclusion. Finally, a jury verdict should be set aside only when the record contains no evidence, **[**176] [*670]** regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent with our decision **[***22]** announced today, they are expressly overruled. With the scope of our review thus defined, we move to the defendant's claims.

We begin by emphasizing that our review is conducted from a cold appellate transcript and record. For that reason, we must assume that the jury credited all witnesses whose testimony supports the verdict. The essential facts of this case--those that the jury was unquestionably entitled to find--are rather simple: The defendant became irritated with the "horseplay" of the victim; when the victim in jest hit the defendant with a wet dishtowel on his nose, the defendant became angry and drew a four-inch-long lock blade knife from his pocket and **[***23]** stabbed the victim fatally in the neck. After the defendant was confronted with his deed, he made a statement that could be interpreted to mean he was not remorseful but, to the contrary, was unconcerned about the welfare of the victim. **10** In addition to the jury hearing testimony from eyewitnesses to the killing, the defendant confessed.

There is no doubt what inferences and findings of fact the jury had to draw in order to convict the defendant of first degree murder. The jury must have believed **[***24]** that: (1) The "horseplay" provocation was not sufficient to justify a deadly attack; (2) the defendant was under no real fear of his own from being attacked; (3) the stabbing was intentional; and (4) the time it took the defendant to open his knife and inflict the mortal wound was sufficient to establish premeditation. **11**

The difficult factual question must have been the mental state of the defendant at the time of the stabbing. The evidence **[***25]** was somewhat conflicting on this point. While the evidence offered by the defendant is not impossible to believe, some of his explanations seem unlikely. Guilt beyond a reasonable doubt cannot be premised on pure conjecture. However, a conjecture consistent with the evidence becomes less and less conjecture and moves gradually toward proof, as alternative innocent explanations are discarded or made less likely. The beyond a reasonable doubt standard does not require the exclusion of every other hypothesis or, for that matter, every other *reasonable* hypothesis. It is enough if, after considering all the evidence, direct and circumstantial, a reasonable trier of fact could find the evidence established guilt beyond a reasonable doubt.

After reviewing the record, this Court has some doubt as to whether this is a first degree murder case; but, at this point, *Jackson's* own objective standard turns against the defendant. It makes absolutely no difference whether we on the appellate bench as jurors would have voted to convict the defendant of a lesser-included offense or whether we would have thought there was some reasonable doubt. To the contrary, the question posed by *Jackson* **[***26]** is whether any rational jury could on the evidence presented think the defendant premeditated and intentionally killed the victim. We do not find the evidence so weak as to render the verdict irrational. A rational jury may well have found the defendant guilty of some lesser-included crime without violating its oath; but, drawing all favorable inferences in favor of the prosecution, a rational jury could also convict. We end by suggesting that variations **[**177] [*671]** in human experience suggest it is not unexpected to see a considerable range of reasonable verdicts or estimates about what is likely or unlikely. Thus, we find the evidence sufficient under either the *Jackson* or the *Starkey* standard.

B.

Jury Instructions

The principal question before us under this assignment of error is whether our instructions on murder when given together deprive a criminal defendant of due process or are otherwise wrong and confusing. Because the instructions given in this case conform to what we have already approved in this area, the essence of what the defendant asks us to decide is whether our previously approved instructions in first degree murder cases are legally correct. [***27] In concluding his presentation, the defendant asks us "to write an opinion which clearly and specifically defines (1) the term wilful, (2) the term deliberate, and (3) the term premeditated."

The jury was charged in this case on the offenses of first and second degree murder and the lesser-included offenses of voluntary and involuntary manslaughter. These instructions were consistent with the law developed in past decisions. The defendant virtually concedes there is no available affirmative defense, other than an argument for the lesser-included offense of voluntary manslaughter. Because of the unavailability of self-defense or insanity, the defendant contends "the precise definitions of these terms is [*sic*] critical." We will review the various arguments of the defendant in turn.

1. Standard of Review

The extent of the grounds for defense counsel's objection to the challenged instructions is not entirely clear from the record. The objection could be construed as a challenge to the trial court's inclusion of certain instructions as a matter of law. Alternatively, the objection could be read as a challenge merely to the confusing nature of the instructions. The basis [***28] of the objection determines the appropriate standard of review. **12** Giving the defendant the benefit of the doubt, we will consider the issue first as a review of the legal propriety of the instructions. In this light, **HN6** if an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, this Court will exercise *de novo* review. **13** More recently, we stated in *State v. Bradshaw*, ___ W. Va. ___, ___, 457 S.E.2d 456, 480 (1995):

[***29]

HN9 "The 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. The 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 the [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."

Under *Bradshaw*, **HN10** when an objection to a jury instruction involves the trial court's expression and formulation of the jury charge, this Court will review under an abuse of discretion standard. Therefore, we review jury instructions to determine whether, taken [**178] ***672** as a whole and in light of the evidence, they mislead the jury or state the law incorrectly to the prejudice of the [***30] objecting party. **14** So long as they do not, we review the formulation of the instructions and the choice of language for an abuse of discretion. We will reverse only if the instructions are incorrect as a matter of law or capable of confusing and thereby misleading the jury.

2. Adequacy of Jury Instructions

as to the Elements of First Degree Murder

The purpose of instructing the jury is to focus its attention on the essential issues of the case and inform it of the permissible ways in which these issues may be resolved. If instructions [***31] are properly delivered, they succinctly and clearly will inform the jury of the vital role it plays and the

decisions it must make. As we said in note 20 of *State v. Miller*, ___ W. Va. at ___, ___ S.E.2d at ___ (No. 22571 5/18/95) (Slip op. at 25): "Without [adequate] instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusions based on the facts." **15** [***32] This is, in essence, what the defendant argues in this case, *i.e.*, the instructions were inadequate and failed to inform the jury of the difference between first and second degree murder. **16** More precisely, the defendant asserts the trial court's instructions regarding the elements of first degree murder were improper because the terms wilful, deliberate, and premeditated were equated with a mere intent to kill. **17**

The jury was instructed that in order to find the defendant guilty of murder it had to find five elements beyond a reasonable doubt: "The Court further instructs the jury that murder in the first degree [***33] is when one person kills another person unlawfully, willfully, maliciously, deliberately and premeditatedly[.]" **18** In its effort to define these terms, the trial court gave three instructions. **19** State's Instruction No. 8, commonly referred to as the *Clifford* instruction, stated:

[***34]

"The Court instructs the jury that to constitute a willful, deliberate and premeditated killing, it is not necessary that the intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that such intention should have come into existence for the first time at the time of such killing, or at any time previously."

See *State v. Clifford*, 59 W. Va. 1, 52 S.E. 981 (1906). State's Instruction No. 10 stated: " [**179]

***673** The Court instructs the jury that in order to constitute a 'premeditated' murder an intent to kill need exist only for an instant." State's Instruction No. 12 stated: "The Court instructs the jury that what is meant by the language willful, deliberate and premeditated is that the killing be intentional." State's Instruction Nos. 10 and 12 are commonly referred to as *Schrader* instructions.

See *State v. Schrader*, 172 W. Va. 1, 302 S.E.2d 70 (1982).

The linchpin of the problems that flow from these instructions is the failure adequately to inform the jury of the difference between first and second degree murder. Of particular concern is the lack of guidance [***35] to the jury as to what constitutes premeditation and the manner in which the instructions infuse premeditation with the intent to kill.

At common law, murder was defined as the unlawful killing of another human being with "malice aforethought." Because the common law definition of "malice aforethought" was extremely flexible, "it became over time an 'arbitrary symbol' used by trial judges to signify any of the number of mental states deemed sufficient to support liability for murder." John S. Baker, Jr., Daniel H. Benson, Robert Force, & B.J. George, Jr., *Hall's Criminal Law* 268-69 (5th ed. 1993). Nevertheless, most American jurisdictions maintained a law of murder built around common law classifications. Pertinent to this case, the most significant departure from the common law came on April 22, 1794, when the Pennsylvania Legislature enacted a statute dividing murder into degrees. **20** It decreed that the death penalty would be inflicted only for first degree murder. West Virginia, like most other states, followed the Pennsylvania practice. Indeed, the 1794 Pennsylvania statute is nearly identical to W. Va. Code, 61-2-1 (1991), our murder statute. **21** [***36]

The West Virginia Legislature [***37] chose not to define the term "premeditated" in W. Va. Code, 61-2-1. As a result, this Court consistently has resorted to the common law. See *State v. Clifford*, *supra*. See also *State v. Belcher*, 161 W. Va. 660, 245 S.E.2d 161 (1978); *State v. Shaffer*, 138 W. Va. 197, 75 S.E.2d 217 (1953); *State v. Painter*, 135 W. Va. 106, 63 S.E.2d 86 (1950); *State v. Burdette*, 135 W. Va. 312, 63 S.E.2d 69 (1950); *State v. Porter*, 98 W. Va. 390, 127 S.E. 386 (1925); *State v. Wilson*, 95 W. Va. 525, 121 S.E. 726 (1924).

In addition to *Clifford*, there are several cases that have made specific attempts to further define

premeditation. In *State v. Dodds*, 54 W. Va. 289, 297-98, 46 S.E. 228, 231 (1903), we said:

"The next ingredient of the crime is that it must be deliberate. To deliberate is to reflect, with a view to make a choice. If a person reflects, though but for a moment before he acts, it is unquestionably a sufficient *deliberation* within the meaning of the statute. The last requisite is that the killing must be [***38] *premeditated*. To *premeditate* is to think of a matter before it is executed. The word, *premeditated*, would seem to imply something more than deliberate, and may mean that the party not only deliberated, but had formed in his mind the plan of destruction." (Emphasis added to last sentence).

In *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982), we made an effort to distinguish the degrees of murder by indicating that the elements that separate first degree murder and second degree murder are deliberation and premeditation in addition to [**180] [*674] the formation of the specific intent to kill. Deliberation and premeditation mean to reflect upon the intent to kill and make a deliberate choice to carry it out. Although no particular amount of time is required, there must be at least a sufficient period to permit the accused to actually consider in his or her mind the plan to kill. In this sense, murder in the first degree is a calculated killing as opposed to a spontaneous event. After noting the above language in *Dodds*, Justice Miller ▼ stated in *Hatfield*:

"The terms 'deliberate' and 'premeditated' have not often been defined [***39] in our cases but do carry a certain degree of definitional overlap. This point is made in LaFave & Scott, *Criminal Law* § 73, at 563 (1972 ed.):

"To be guilty of this form of first degree murder the defendant must not only intend to kill but in addition he must premeditate the killing and deliberate about it. It is not easy to give a meaningful definition of the words "premeditate" and "deliberate" as they are used in connection with first degree murder. Perhaps the best that can be said of "deliberation" is that it requires a cool mind that is capable of reflection, and of "premeditation" that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing.' (Footnotes omitted)

"But, as LaFave & Scott also point out: 'The intention may be finally formed only as a conclusion of prior premeditation and deliberation.' *Id.*" 169 W. Va. at 200-01, 286 S.E.2d at 409.

Although we approved the jury instruction from *Clifford* that "it is only necessary that the intention to kill should have come into existence for the first time at the time of the killing" in *Hatfield*, Justice [***40] Miller ▼ explained this instruction was merely intended to convey the notion that it is possible for deliberation and premeditation to precede the formation of the actual intent to kill. Justice Miller ▼ further stated:

"Here, the *Clifford* instruction refers primarily to the intention to kill not existing for any particular time and arising at the moment of the killing. This means the specific intent to kill and is to be distinguished from the elements of deliberation and premeditation which are the state of mind conveying the characteristics of reflection." 169 W. Va. at 201, 286 S.E.2d at 409.

This is the meaning of the so-called *Clifford* instruction and, when it is given, its significance should be explained to the jury.

The source of the problem in the present case stems from language in *State v. Schrader*, 172 W. Va. 1, 302 S.E.2d 70 (1982). While this Court elaborated on the meaning of premeditation, we gave it a

different definition than that approved in *Hatfield and Dodds*. In *Schrader*, we stated:

"Hence, when the West Virginia Legislature adopted the Virginia murder statute in 1868, the meaning of 'premeditated' [***41] as used in the statute was essentially 'knowing' and 'intentional.' Since then, courts have consistently recognized that the mental process necessary to constitute 'willful, deliberate and premeditated' murder can be accomplished very quickly or even in the proverbial 'twinkling of an eye.' . . . *The achievement of a mental state contemplated in a statute such as ours can immediately precede the act of killing. Hence, what is really meant by the language 'willful, deliberate and premeditated' in W. Va. Code, 61-2-1 [1923] is that the killing be intentional.*" 172 W. Va. at 6, 302 S.E.2d at 75. (Emphasis added).

The language emphasized above supplied the legal authority and basis for State's Instruction Nos. 10 and 12.

While many jurisdictions do not favor the distinction between first and second degree murder, [22](#) given the doctrine of separation of [**181] [*675] powers, we do not have the judicial prerogative to abolish the distinction between first and second degree murder and rewrite the law of homicide for West Virginia; unless, of course, we were to declare this classification a violation of due process and force [***42] the Legislature to rewrite the law--a bold stroke that we refuse to do. On the other hand, we believe within the parameters of our current homicide statutes the *Schrader* definition of premeditation and deliberation is confusing, if not meaningless. To allow the State to prove premeditation and deliberation by only showing that the intention came "into existence for the first time at the time of such killing" completely eliminates the distinction between the two degrees of murder. Hence, we feel compelled in this case to attempt to make the dichotomy meaningful by making some modifications to our homicide common law.

[***43] Premeditation and deliberation should be defined in a more careful, but still general way to give juries both guidance and reasonable discretion. *HN11* Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. As suggested by the dissenting opinion in *Green v. State*, 1 Tenn. Crim. App. 719, 735, 450 S.W.2d 27, 34 (1970): "True, it is not necessary to prove premeditation existed for any definite period of time. But it is necessary to prove that it did exist." This means there must be an opportunity for some reflection on the intention to kill after it is formed. The accused must kill purposely after contemplating the intent to kill. Although an elaborate plan or scheme to take life is not required, our *Schrader's* notion of instantaneous premeditation and momentary deliberation is not satisfactory for proof of first degree murder. In *Bullock v. United States*, 74 App. D.C. 220, 221, 122 F.2d 213, 214 (1941), *cert. denied*, 317 U.S. 627, 63 S. Ct. 39, 87 L.Ed. 507 (1942), [***44] the court discussed the need to have some appreciable time elapse between the intent to kill and the killing:

"To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second degree murder. At common law there were no degrees of murder. If the accused had no overwhelming provocation to kill, he was equally guilty whether he carried out his murderous intent at once or after mature reflection. Statutes like ours, which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder. The deliberate killer is guilty of first degree murder; the impulsive killer is not. The quoted part of the charge was therefore erroneous."

Thus, *HN12* there must be some evidence that the defendant considered [***45] and weighed his decision to kill in order for the State to establish premeditation and deliberation under our first degree murder statute. [23](#) This is what [**182] [*676] is meant by a ruthless, cold-blooded,

calculating killing. Any other intentional killing, by its spontaneous and nonreflective nature, is second degree murder. **24**

[***46] We are asked to overrule the language appearing in *Schrader*, as reflected in State's Instruction No. 8 and, particularly, the language of State's Instruction Nos. 10 and 12, so that there might be some clarity and coherence to the law of homicide. We naturally are reluctant to overrule prior decisions of this Court. No court likes to acknowledge a mistake, and adherence to precedent is based on deeper reasons than *amour propre*; rather, it is in fact a cornerstone of Anglo-American adjudication. Additionally, the more recent a precedent, the more authoritative it is because there is less likelihood of significantly changed circumstances that would provide a "special justification" for reassessing the soundness of the precedent. Nevertheless, the circumstances of this case are different, and we agree with the defendant that the language in our opinion in *Schrader* virtually eliminates the distinction in this State between first and second degree murder, equating as it does premeditation with the formation of the intent to kill. We have tried to clarify the difference between the degrees of murder in the preceding paragraphs. We find that *Schrader* wrongly equated premeditation [***47] with intent to kill and in so doing undermined the more meaningful language of *Hatfield* and *Dodds*. To the extent that the *Schrader* opinion is inconsistent with our holding today, it is overruled. In overruling *Schrader*, we do not take lightly the policy underlying *stare decisis*. However, we believe:

"Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation 'special justification' exists to depart from the recently decided case." *Adarand Constr., Inc. v. Pena*, ___ U.S. ___, ___, 115 S. Ct. 2097, 2115, ___ L. Ed. 2d ___, ___ (1995).

Overturning precedent with a long standing in the law that has become an integrated fabric in the law is different. Therefore, we leave in tact the *Clifford* rule as amplified by *Hatfield*. So by refusing to follow *Schrader* but continuing *Clifford* and *Hatfield* [***48] , "we do not depart from the fabric of the law; we restore it." *Adarand Construction, Inc. v. Pena*, ___ U.S. at ___, 115 S. Ct. at 2116, ___ L. Ed. 2d at ___.

Finally, we feel obligated to discuss what instruction defining premeditation is now acceptable. What came about as a mere suggestion in *Hatfield*, we now approve as a proper instruction under today's decision. Note 7 of *Hatfield*, 169 W. Va. at 202, 286 S.E.2d at 410, states:

"A more appropriate instruction for first degree murder, paraphrased from 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 41.03, at 214, is:

HN14 "The jury is instructed that murder in the first degree consists of an intentional, deliberate and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ, and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is [***49] of sufficient duration for the accused to be fully conscious of what he [**183] [***677**] intended, is sufficient to support a conviction for first degree murder."

Having approved a new instruction in the area of homicide law, we do not believe today's decision should be applied retroactively. Applying the test articulated in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), **HN15** a "new rule" should not be given retroactive effect. More precisely, the rules we announce are "not *dictated* by precedent existing at the time" of our opinion. *Gilmore v. Taylor*, ___ U.S. ___, ___, 113 S. Ct. 2112, 2116, 124 L. Ed. 2d 306, 316 (1993), quoting

Teague, 489 U.S. at 301, 109 S. Ct. at 1070, 103 L. Ed. 2d at 349. (Emphasis in original). Nevertheless, we need not apply the "new rule" to the defendant's case on this appeal because this case is being reversed on other grounds. The defendant is entitled, however, to the benefit of this decision on remand.

As a more general matter, the failure to follow precisely what we are now prescribing could, under certain circumstances, be harmless error. We note that the trial [***50] court continuously reinforced the notions that the burden of proof in a criminal case is always upon the prosecution; that the defendant is protected by a presumption of innocence; and that, unless he is proven guilty beyond a reasonable doubt, the defendant must be acquitted. In addition, the trial court instructed the jury to consider the charge as whole rather than singling out any one instruction. These actions reinforce our belief that it is unlikely the defendant was prejudiced to the point of reversible error.

C.

Misconduct of the Prosecuting Attorney

We turn next to the defendant's argument that the prosecutor prejudiced his right to a fair trial when he was permitted to argue the penalties of the different offenses and to cross-examine the defendant's father on the defendant's racial and gender biases and his political beliefs. Because we conclude the prosecutor's remarks and his cross-examination were improper, we also will go on to weigh the error under our harmless error standard. We look at each of the defendant's contentions separately because **HN16** our review for harmless error is fact specific. **25** See *McDougal v. McCammon*, ___ W. Va. ___, ___, 455 S.E.2d 788, 798 (1995). [***51]

[***52] 1. Disclosing the Possible Penalties

During the rebuttal portion of closing arguments, the prosecuting attorney informed the jury that the punishment for second degree murder is five to eighteen years imprisonment; a voluntary manslaughter conviction carries a punishment of one to five years in the penitentiary; and involuntary manslaughter could lead to imprisonment for up to a year. He also told the jury that should the defendant be convicted of first degree murder, he would be eligible for parole in ten years, but he would not necessarily receive parole at that time. Defense counsel's timely objection to these comments was overruled.

The defendant asserts that such practice rises to the level of constitutional error because the jury may have determined the degree of homicide by what it believed the appropriate punishment to be. The State contends the prosecuting attorney may inform the jury of the applicable penalties for the possible convictions as long as a correct statement of the law is made.

Both parties to this appeal seem to acknowledge that our cases are not entirely [**184] **[*678]** consistent in reference to the relevance of penalty evidence and penalty [***53] comment during closing arguments. We believe our prior rulings can be placed into two broad categories. The first category concerns cases involving a recommendation of mercy. We have said, for example, in first degree murder cases, it is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to such verdict and to explain to the jury the legal implications of such a recommendation. To this extent, a prosecuting attorney is permitted to comment on the significance of this recommendation and to make appropriate argument against such a recommendation. However, even here, we limit the scope of the permissible argument: The prosecuting attorney cannot argue that a recommendation of mercy would enable the defendant to *receive parole* in ten years. *State v. Lindsey*, 160 W. Va. 284, 233 S.E.2d 734 (1977). Nor have we authorized the prosecutor to argue beyond the first degree murder penalties. Of course, in the case *sub judice*, the prosecuting attorney did not violate this rule in that he stated the defendant may be *eligible for parole* in ten years should he be convicted of first degree murder with a recommendation of [***54] mercy. In fact, the jury was properly instructed by State's Instruction No. 11 that stated, in part:

"First degree [murder] is punishable by confinement in the penitentiary of this state for life and the accused shall not be eligible for parole except and unless the jury shall add its recommendation of mercy in their verdict and if such recommendation is added to their verdict, such person shall then be eligible for consideration for parole after serving a minimum of ten years of such sentence, such eligibility in no way guaranteeing immediate release."

The second category concerns the mentioning of penalties in cases other than those involving recommendations of mercy. The issue we must address is whether the prosecuting attorney may inform the jury of the appropriate penalties for convictions when, as in this case, the jury must choose between varying degrees of an offense. Our cases generally hold that such penalty information is irrelevant. Directly addressing the issue in *State v. Parks*, 161 W. Va. 511, 516, 243 S.E.2d 848, 852 (1978), we stated that placing sentencing matters before the jury is "an issue prejudicial to the fact-finding function [***55] of the jury." The right to fix punishment rests exclusively within the discretion of the trial court, and neither party has the right outside of "capital" cases to have the jury informed of the possible penalties. See generally *State v. Massey*, 178 W. Va. 427, 432 n.2, 359 S.E.2d 865, 870 n.2 (1987). This is so because a jury is not permitted to concern itself with sentencing matters outside of a recommendation of mercy. See *State v. Lindsey, supra* (jury should not concern itself with irrelevant matters such as parole); *State v. Loveless*, 139 W. Va. 454, 80 S.E.2d 442 (1954). Therefore, we hold that **HN18** outside the context of cases involving a recommendation of mercy, it is improper for either party to refer to the sentencing possibilities of the trial court should certain verdicts be found or to refer to the ability of the trial court to place a defendant on probation. [26] See *U.S. v. Meredith*, 824 F.2d 1418, 1429 (4th Cir.), cert. denied, 484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987) and 485 U.S. 991, 108 S. Ct. 1297, 99 L. Ed. 2d 507 (1988).

[***56] The universal rule is that **HN19** punishment is the trial court's role and is not a proper matter for the jury. The jury's sole function in a criminal case is to pass on whether a defendant is guilty as charged based on the evidence presented at trial and the law as given by the jury instructions. See *Chambers v. State*, 337 Md. 44, 650 A.2d 727 (1994). The applicable punishments for the lesser-included offenses are not elements of the crime; therefore, the question of what punishment the defendant could receive if convicted is not a proper matter for closing argument. See *Rowe v. Indiana*, 250 Ind. 547, 237 N.E.2d 576 (1968). [27]

[***57] [**185] [*679] Both parties cite *State v. Myers*, 159 W. Va. 353, 222 S.E.2d 300 (1976), where we stated it was not error for the prosecuting attorney to say the defendant could be eligible for parole after five years if convicted of second degree murder. The State relies heavily upon *Myers*, at least to the extent that it creates a vacillation in our decisions. We do not find that *Myers* is persuasive authority to support the arguments of the State. [28]

[***58] We believe that any substantial reliance on *Myers* is misplaced. First, it appears that the language used in *Myers* was nothing but a means of distinguishing between what the Court considered the least offensive as opposed to the more egregious remark:

"In view of the fact that this Court finds no error in an instruction which embodies in statutory language the penalties which will be imposed by law for the various offenses of which a defendant may be found guilty, such ruling by the trial court was *probably technically correct*. The same cannot be said with reference to the court's treatment of the Prosecutor's remark:

"When they talk about keeping somebody in Weston Hospital or even at the V.A., we know they get out right and left."

159 W. Va. at 362, 222 S.E.2d at 306.

The bottom line is that the conviction in *Myers* was reversed because the prosecuting attorney argued matters to the jury that were irrelevant for its consideration. [29](#) In short, we believe that the Court's discussion on this point in *Myers* was purely an anomaly. It is doubtful the Court would have reached this same conclusion had that issue [***59] alone been its focus, and we refuse to do so here.

Likewise, **HN21** Standard 3-5.8(d) of the American Bar Association Standards for Criminal Justice (2nd ed. 1980) explains: "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." Standard 3-5.9 further advises: "It is unprofessional conduct for the prosecutor to intentionally to refer to or argue on the basis of facts outside the record."

It is quite obvious that the prosecution improperly injected "issues broader than the guilt or innocence" of the defendant and argued "facts outside [***60] the record." To do either is improper and, to the extent the decision in *Myers* is inconsistent with our holding, it is expressly overruled. To rule otherwise would permit a jury to base its finding as to the degree of guilt on irrelevant factors.

2. Questions Relating to the Defendant's Prejudices

During the cross-examination of the defendant's father, the prosecuting attorney inquired about prejudicial statements allegedly made by the defendant. Bobby Lee Guthrie was asked if the defendant told him that men were better than women and women should stay at home, that whites were better than blacks, and whether the two of them discussed the Ku Klux Klan. Defense counsel objected to this line of questioning because of its highly prejudicial effect, particularly with [**186] **[*680]** the women on the jury and the one African-American juror.

The State asserted it was proper cross-examination because the defense opened the door when it portrayed the defendant as a good, quiet, Bible-reading man when, in fact, he had made some bigoted comments to the State's psychiatrist, Dr. Ralph Smith. [30](#) [***62] The State also argues the defendant was not prejudiced by these few questions [***61] concerning his views because Dr. Smith was not called as a witness and this issue was not raised further. [31](#) Nevertheless, a curative instruction was not requested by either party and none was given.

HN23 Although most rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard, *see McDougal v. McCammon, supra*, an appellate court reviews *de novo* the legal analysis underlying a trial court's decision. *See Hottle v. Beech Aircraft Corp.*, 47 F.3d 106 (4th Cir. 1995). [***63] A trial court's discretion is not unbounded, and the scope of the trial court's discretion varies according to the issue before it. In considering the admissibility [**187] **[*681]** of impeachment evidence, we apply the same standards of relevance that we apply to other questions of admissibility.

HN24 Appellate courts give strict scrutiny to cases involving the alleged wrongful injection of race, gender, or religion in criminal cases. Where these issues are wrongfully injected, reversal is usually the result. *See Miller v. N.C.*, 583 F.2d 701 (4th Cir. 1978); *Weddington v. State*, 545 A.2d 607 (Del. Sup. 1988). In *State v. Bennett*, 181 W. Va. 269, 274, 382 S.E.2d 322, 327 (1989), this Court condemned the practice of attorneys making unnecessary racial remarks in the presence of the jury:

"Although Mr. Perrill referred to Dr. Arrieta as 'the colored lady' only once, it should not have been said for the obvious reason that it may be construed as an appeal to prejudice. 'To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that [***64] is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended.' *McFarland v. Smith*, 611 F.2d 414, 417 (2d Cir. 1979)."

The same rationale applies to the prosecuting attorney drawing the jury's attention to racial, gender, and political comments made by the defendant which in no way relate to the crime. **32**

[**65] **HN26** Under the first step of our inquiry, we must determine whether the evidence is relevant to an issue of consequence. Where race, gender, or religion is a relevant factor in the case, its admission is not prohibited unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. See *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988); *State v. Crockett*, 164 W. Va. 435, 265 S.E.2d 268 (1979). Normally, in order to be probative, evidence must be "relevant" under Rule 401, that is, it must tend to make an issue in the case more or less likely than would be so without the evidence. Other factors that bear on the probative value are the importance of the issue and the force of the evidence. 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5214 (1978). In this case, the State's most difficult problem throughout this appeal is explaining how this evidence is relevant to an issue of consequence in the case.

The prosecution argues that such evidence is relevant as impeachment evidence in light of the father's comments on direct examination when he portrayed the defendant as a good, [**66] quiet, Bible-reading man. In analyzing the contentions of the parties, we first observe that only the evidence of the defendant's quiet and peaceful character was admissible under Rule 404(a)(1) of the West Virginia Rules of Evidence. **33** [**67] Quite clearly, evidence that the defendant was a "Bible-reading man" and his religious beliefs are not admissible under the same rule because they simply do not concern a pertinent character trait. See *State v. Marrs*, 180 W. Va. 693, 379 S.E.2d 497 (1989) (defendant's reputation for not selling drugs is inadmissible). See also W.Va.R.Evid. 610. **34** This issue is in this case only because [**188] ***682** the prosecution chose not to object to the inadmissible evidence. **35** Thus, we must decide whether the prosecution should have been permitted to rebut this evidence under our curative admissibility rule. We hold the prosecution evidence was barred under the doctrine of curative admissibility and Rule 403.

The doctrine of curative admissibility is to be evaluated under our relevancy rules. To some extent, this rule is a restatement of the general rule that when [**68] a party opens up a subject, there can be no objection if the opposing party introduces evidence on the same subject. The most significant feature of the curative admissibility rule, however, is that it allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has "opened the door" by introducing similarly inadmissible evidence on the same point. Perhaps, the clearest statement of curative admissibility came in *Danielson v. Hanford*, 352 N.W.2d 758, 761 (Minn. App. 1984), where the Minnesota court, quoting from *Busch v. Busch Construction, Inc.*, 262 N.W.2d 377, 387 (Minn. 1977), stated:

HN29 "In order to be entitled as a matter of right to present rebutting evidence on an evidentiary fact: (a) the original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence must be similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence." **36**
(Footnote omitted).

[**69] We believe the prosecution faces two hurdles in this case. First, was the evidence offered by the defendant prejudicial? This case was not one in which Bible reading had any relevancy. The defendant confessed to the killing and there were eyewitnesses. The only issue that the jury seriously had to consider was the degree of guilt. Certainly, whether the defendant read the Bible could have little impact on the degree of homicide. Second, the prosecution sought to go far beyond the evidence originally offered by the defendant. The fact that the defendant read the Bible and walked through the woods is hardly related to his affinity for Adolph Hitler, his dislike of African-Americans, and his chauvinistic feelings toward women.

HN30 The second inquiry under Rule 403 is whether the probity of the objected to evidence was substantially outweighed by its prejudice. In this regard, the defendant argues that even if the evidence had some probative value, it is clearly inadmissible under Rule 403. In *State v. Derr*, 192 W. Va. 165, ___, 451 S.E.2d 731, 744 (1994), we stated "that although Rules 401 and 402 strongly encourage the admission of as much evidence as [***70] possible, Rule 403 restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence." Rule 403 calls upon the trial court to weigh the probative evidence against the harm that it may cause--unfair prejudice, confusion, misleading the jury, delay, or repetition--and to exclude the evidence if the probative value is "substantially outweighed" by the harm.

Thus, **HN31** to perform the Rule 403 balance, we must assess the *degree* of probity of the evidence, which, in turn, depends on its relation to the evidence and strategy presented at trial in general. The mission of Rule 403 is to eliminate the obvious instance [**189] [**683**] in which a jury will convict because its passions are aroused rather than motivated by the persuasive force of the probative evidence. Stated another way, the concern is with any pronounced tendency of evidence to lead the jury, often for emotional reasons, to desire to convict a defendant for reasons other than the defendant's guilt. In *United States v. Ham*, 998 F.2d 1247, 1252 (4th Cir. 1993), the court stated:

"We have defined undue prejudice as "a genuine [***71] risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence." . . .

". . . When evidence of a defendant's involvement in several of these activities is presented to the jury, the risk of unfair prejudice is compounded. In such a case, we fear that jurors will convict a defendant based on the jurors' disdain or their belief that the defendant's prior bad acts make guilt more likely. Furthermore, we are especially sensitive to prejudice in a trial where defendants are members of an unpopular religion." (Citations omitted).

HN32 The prejudice that the trial court must assess is the prejudice that "lies in the danger of jury misuse of the evidence." *U.S. v. Brown*, 160 U.S. App. D.C. 190, 490 F.2d 758, 764 (D.C.Cir. 1973). (Emphasis in original). **37**

[***72] Prejudice is not the only threat. There is also a potential for confusing and misleading the jury. Quite apart from prejudice, there is a risk that undue emphasis on the defendant's racial, gender, and/or political views could direct the jury's attention from whether the defendant inflicted the fatal wound because of the "horseplay" or whether the defendant believed the victim was a threat to the defendant's philosophy or way of life. This deflection might seem like a minor matter easy to guard against in the instructions so far as confusion is concerned, but, when coupled with its potential for unfair prejudice, this evidence becomes overwhelmingly dangerous. Even if we concede that this evidence had some relevance on the impeachment issue, the risk of undue prejudice and the risk of confusion are alone enough to justify setting aside this verdict.

Our discussion thus far has not touched on the prosecution's need for this evidence and the closely related question of alternatives available. In note 15 of *Derr*, 192 W. Va. at ___, 451 S.E.2d at 744, we stated that "one important factor under Rule 403 is the prosecutor's need for the proffered evidence." Here, as discussed [***73] above, the evidence of the defendant's prejudices was not only unnecessary, but was not very helpful from a probative value standpoint. In applying Rule 403, it is pertinent whether a litigant has some alternative way to deal with the evidence that it claims the need to rebut that would involve a lesser risk of prejudice and confusion. 22 Wright & Graham, *supra*, § 5214 (citing cases). Obviously, we do not know what other means the prosecution had to prove the defendant was not a Bible reader or a person of peaceful character. What is important to us, however, is that the trial court failed to ascertain alternatives to this evidence before permitting the prosecution to use it. What we do know is that this issue arose because the prosecution did not object to some clearly irrelevant evidence. Nor did the trial court consider an instruction to the jury advising it to

disregard all evidence of the defendant that the prosecution claimed needed rebutting. These failures strengthen our determination to declare error in this case.

To achieve substantial justice in our courts, **HN34** a trial judge must not permit a jury's finding to be affected or decided on account of racial or gender bias [***74] and whether one holds an unpopular political belief or opinion. If Rule 403 is ever to have a significant and effective role in our trial courts, it must be used to bar the admission of this highly prejudicial evidence. *See, e.g., U.S. v. [**190] [*684] Kallin*, 50 F.3d 689 (9th Cir. 1995) (reversible error under Rule 403 to allow witness to testify to defendant's dislike for Mexicans). **HN35** While due process does not confer upon a criminal defendant a right to an error-free trial, *see U.S. v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983), **38** it unquestionably guarantees a fundamental right to a fair trial. *See Lutwak v. U.S.*, 344 U.S. 604, 73 S. Ct. 481, 97 L. Ed. 593 (1953). We emphasize that it is a fundamental guarantee under the Due Process Clause of Section 10 of Article III of the West Virginia Constitution that these factors--race, religion, gender, political ideology--when prohibited by our laws shall not play any role in our system of criminal justice.

[***75] 3. Harmless Error Standard

Prosecutorial misconduct does not always warrant the granting of a mistrial or a new trial. The rule in West Virginia since time immemorial has been that **HN36** a conviction will not be set aside because of improper remarks and conduct of the prosecution in the presence of a jury which do not clearly prejudice a defendant or result in manifest injustice. *State v. Beckett*, 172 W. Va. 817, 310 S.E.2d 883 (1983); *State v. Buck*, 170 W. Va. 428, 294 S.E.2d 281 (1982). Similarly, the United States Supreme Court has acknowledged that given "the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." *U.S. v. Hastings*, 461 U.S. at 508-09, 103 S. Ct. at 1980, 76 L. Ed. 2d at 106. Thus, the Supreme Court has held that an appellate court should not exercise its "supervisory power to reverse a conviction . . . when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." *Hastings*, 461 U.S. at 506, 103 S. Ct. at 1979, 76 L. Ed. 2d at 104. [***76]

HN37 The harmless error doctrine requires this Court to consider the error in light of the record as a whole, but the standard of review in determining whether an error is harmless depends on whether the error was constitutional or nonconstitutional. It is also necessary for us to distinguish between an error resulting from the admission of evidence and other trial error. As to error not involving the erroneous admission of evidence, we have held that nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment. *State v. Hobbs*, 178 W. Va. 128, 358 S.E.2d 212 (1987) (prosecutor's remarks although improper must be sufficiently prejudicial to warrant reversal); *State v. Brewster*, 164 W. Va. 173, 261 S.E.2d 77 (1979). On the other hand, when dealing with the wrongful admission of evidence, we have stated that the appropriate test for harmlessness articulated by this Court **39** is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict and the jury was not substantially swayed by the error.

[***77] **HN38** In determining prejudice, we consider the scope of the objectionable comments and their relationship to the entire proceedings, the ameliorative effect of any curative instruction given or that could have been given but was not asked for, and the strength of the evidence supporting the defendant's conviction. *See McDougal v. McCammon, supra*. As the United States Supreme Court explained "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments [or conduct] standing alone, for the statements or conduct must be viewed in context[.]" *U.S. v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044, 84 L. Ed. 2d 1, 9-10, *on remand*, 758 F.2d 514, *on reconsideration*, 767 F.2d 737 (1985) (finding harmless error where the prosecutor made an [**191] [*685] improper statement that the defendant was guilty and urged the jury to "do its job").

Notwithstanding the above discussion, **HN39** this Court is obligated to see that the guarantee of a fair trial under our Constitution is honored. Thus, only where there is a high probability that an error did not contribute to the criminal conviction will we affirm. [***78] "High probability" requires that this Court possess a "sure conviction that the error did not prejudice the defendant." *U.S. v. Jannotti*, 729 F.2d 213, 220 n.2 (3rd Cir.), *cert. denied*, 469 U.S. 880, 105 S. Ct. 243, 83 L. Ed. 2d 182, 105 S.

Ct. 244 (1984). Indeed, the United States Supreme Court recently stated that where there is "'grave doubt' regarding the harmlessness of errors affecting substantial rights," reversal is required. *O'Neal v. McAninch*, ___ U.S. ___, ___, 115 S. Ct. 992, 997, 130 L. Ed. 2d 947, 956 (1995) ("grave doubt" about harmlessness of the error to be resolved in favor of the defendant). [40] Therefore, we will reverse if we conclude that the prosecutor's conduct and remarks, taken in the context of the trial as a whole, prejudiced the defendant.

[**79] In this case, we have "grave doubt" as to whether the errors can be considered harmless. The primary issue in this case was not one of guilt or innocence, but was the degree of homicide for which the defendant would ultimately be convicted. To influence the jury's evaluation and decision, the prosecution was permitted to suggest that any conviction less than first degree murder would permit the defendant to be released in five years and the defendant was a racist, a sexist, a Nazi, and a KKK sympathizer. [41] These errors in combination compel setting aside the verdict, and we do not hesitate to do so on these grounds alone. In fact, it is difficult to imagine any evidence that would have a more powerful impact upon a jury or which would be more likely to deter it from fairly finding the defendant guilty of a lesser offense.

[**80] However, there is more. On cross-examination, the prosecuting attorney asked the defendant if he, upon learning of the victim's death, replied to the police officer: "That's too bad, buddy. Do you think it'll snow?" Defense counsel objected because the alleged statement was not disclosed during discovery. Furthermore, the prosecuting attorney offered no factual basis for the question at trial. [42] The defendant [**192] [*686] argues the State's nondisclosure of this statement, pursuant to Rule 16 of the West Virginia Rules of Criminal Procedure, was prejudicial because it hampered the preparation and presentation of his case. Syllabus Point 3 of *State v. Weaver*, 181 W. Va. 274, 382 S.E.2d 327 (1989), states:

[**81]

HN41 "'When a trial court grants a pretrial discovery motion requiring the prosecution to disclose evidence in its possession, nondisclosure by the prosecution is fatal to its case where such nondisclosure is prejudicial. The nondisclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case.' Syllabus Point 2, *State v. Grimm*, 165 W. Va. 547, 270 S.E.2d 173 (1980)."

See *State v. Myers*, *supra*. The defendant contends the issue of malice was critical at trial and the alleged statement was very damaging in proving a "heart regardless of social duty," as the jury was instructed on malice. We agree with the defendant. [43] We conclude that this line of questioning was extremely inappropriate. There seems to have been little, if any, justification for this line of questioning other than to inflame the jury through insinuation. Although we would be hesitant to reverse on this error alone, when coupled with the other errors discussed above, our decision to reverse is fortified. Syllabus Point 5 of *State v. Walker*, 188 W. Va. 661, 425 S.E.2d 616 (1992), [**82] states:

HN42 "'Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.' Syl. pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972)."

III.

CONCLUSION

In this case, our voyage is complete. "Having navigated the waters" of burden of proof, standards of review, new guidance for instruction in homicide cases, prosecutorial misconduct, and harmless error,

"we now steer this case into the [***83] port of judgment and unload the cargo we have hauled."
 [44] For the foregoing reasons, we are compelled to hold the admission of the evidence discussed above and the prosecution's failure to disclose the alleged oral statement of the defendant before cross-examination violated the defendant's constitutional right to a fair trial. In so doing, we merely apply settled principles of law to the facts of this case. [45]

Based on the foregoing, the judgment [***84] of the Circuit Court of Kanawha County is reversed, and this case is remanded for a new trial.

Reversed and remanded.

Concur by: Workman ▼

Concur

[**193] Workman ▼, J., concurring:

I concur with the holding of the majority, but write this separate opinion to reiterate that the duration of the time period required for premeditation cannot be arbitrarily fixed. Neither the jury instruction approved by the majority, created from our past decisions in *State v. Clifford*, 59 W. Va. 1, 52 S.E. 981 (1906) and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982) (as amplified by the majority opinion), nor the new instruction approved in the majority opinion [1] affix any specific amount of time which must pass between the formation of the intent to kill and the actual killing for first degree murder cases. Given the majority's recognition that these concepts are necessarily incapable of being reduced formulaically, I am concerned that some of the language in the opinion may indirectly suggest that some appreciable length of time must pass before premeditation can occur.

[***85] I agree with the majority in its conclusion that our decision in *State v. Schrader*, 172 W. Va. 1, 302 S.E.2d 70 (1982), incorrectly equated premeditation with intent to kill. However, I must point out that the majority's suggested basis for defining premeditation and deliberation in terms of requiring some "appreciable time elapse between the intent to kill and the killing" and "some period between the formation of the intent to kill and the actual killing which indicates that the killing is by prior calculation and design" may create confusion in suggesting that premeditation must be the deeply thoughtful enterprise typically associated with the words reflection [2] [***86] and contemplation. [3] The majority's interpretation may create ambiguity, if not clarified, by adding arguably contradictory factors to the law enunciated by the majority in the approved instruction, as well as the language in the *Hatfield* and *Dodds* cases that the majority upholds. See *Hatfield*, 169 W. Va. at 202, 286 S.E.2d at 410 n.7; see also *State v. Dodds*, 54 W. Va. 289, 297-98, 46 S.E. 228, 231 (1903).

For instance, nowhere in *Hatfield*, which upholds the *Clifford* instruction, is the notion that an "appreciable" amount of time must lapse in order for premeditation to occur. Neither is such a suggestion evident from the majority's new instruction, derived from *Hatfield*:

""The jury is instructed that murder in the first degree consists of an intentional, deliberate and premeditated killing which means that the killing is done after a period of time for prior consideration. *The duration of that period cannot be arbitrarily fixed.* The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ, and according to the circumstances in which they may be placed. *Any interval of time between the forming of the intent to kill and the execution of that intent*, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder.""

[**87] 169 W. Va. at 202, 286 S.E.2d at 410 (quoting 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 41.03, at 214). Finally, even syllabus point five of the majority provides only that "although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing"

Accordingly, it is necessary to make abundantly clear that premeditation is sufficiently demonstrated as long as "any interval of time [,no matter how short that interval is, [**194] [*688] lapses] between the forming of the intent to kill and the execution of that intent[.]" See *Hatfield*, 169 W. Va. at 202, 286 S.E.2d at 410 (quoting 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 41.03, at 214).

Footnotes

1

The confession, which was read to the jury, stated, in part:

"I arrived at work, at 4:00 o'clock, and was looking forward to another evening of work, I was looking forward to it, because I do enjoy working at Danny's Rib House. Upon my arrival at work I immediately observed the verbal and physical aggression of Mr. Farley. During the evening of work I heard him calling certain employee's 'Boy' and during the evening he referred to me as 'Boy' many times, I did and said nothing, continuing my work, letting it pass. He was really loud, and obnoxious, as I'm sure many employee's noticed. As the evening was coming to a close Mr. Farley walked very close by me and said 'that I had an "attitude problem.'" It was verbal, I let it pass, continuing my work. After bringing some dishes to the cook, I walked back to the dishwasher to begin drying off some dishes, Mr. Farley approached me and made a sarcastic comment about me being a quiet person, he walked ever closer, to me until he was in my face, as I was trying to carry out my responsibilities. After all these things were said, and even though he was exhibiting physical aggression by coming up to my face, and putting forth what I interpreted to be a challenge, again I did nothing, continuing to carry out my responsibilities. Standing a few inches from my face he took his wet dishrag and hit me once, on the forearm, I did nothing continuing my work. Standing in the same area, he hit me again on the forearm, obviously wanting a confrontation, I gave him none, continuing my work. Standing in the same place he hit me, hard, two times in the face, it really hurt, it was soaking wet, and it stung, as he brought it to bear upon my face, at that moment I thought he was going to go further and hit me, so I reached in my right pants pocket, and retrieved my lock blade knife, that I use for skinning rabbits and squirrels [*sic*] during hunting season. I swung at Mr. Farley with my right hand in which was my knife, he backed up, so I didn't swing twice, he slowly sunk to [the] floor, I ran to the front of the restaurant and yelled out, call the ambulance. All I came to work for, was to work, and carry out my obligations, having ill will toward no one, and I still have none, but I feel I had the right to respond, finally, to this act of aggression that was perpetrated

against me, I do not exhibit aggressive, violent behavior but I felt I had no alternative, or recourse."

2

Rehearing denied by 444 U.S. 890, 100 S. Ct. 195, 62 L. Ed. 2d 126 (1979).

3

There is some question as to whether *Jackson* reflects the current thinking of the United States Supreme Court. In the practical context, *Jackson* was a five-to-three decision; every member of the majority is gone from the Supreme Court; and the concurring trio, Justice Stevens joined by Chief Justice Burger and Justice Rehnquist ▼, argued for a standard that asked whether there was *some* evidence to support the disputed finding. Since both opinions in *Jackson* held the evidence was adequate to convict, the choice between the two calibrations of the standard did not matter in that case. Also, neither of the two sequels to *Jackson* is illuminating. *Herrera v. Collins*, ___ U.S. ___, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (the majority opinion by Chief Justice Rehnquist ▼ capsulized *Jackson* solely in order to distinguish it); *Wright v. West*, 505 U.S. 277, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (involved a fractured Supreme Court with no majority opinion).

While we are not certain as to how the United States Supreme Court will ultimately resolve this issue, the majority position in *Jackson* represents the pole most favorable to the defendant, and this stated position of the majority of justices has never been overruled. Accordingly, we proceed to consider whether on the record made in the trial court *any* rational trier of fact could have found the defendant guilty beyond a reasonable doubt.

4

The reconciliation that we choose to do is consistent with a similar approach we took in *State v. Kopa*, 173 W. Va. 43, 49, 311 S.E.2d 412, 418 (1983), where we observed that adopting a different standard in criminal cases might "create the problem of sustaining convictions in the state court with predictable release through habeas corpus in the federal court." Although the two standards would not necessarily lead to different results, we believe it is unnecessary to have a criminal defendant subjected to different standards of review should the case ultimately end up in federal court. See *York v. Tate*, 858 F.2d 322 (6th Cir. 1988), *cert. denied*, 490 U.S. 1049, 109 S. Ct. 1960, 104 L. Ed. 2d 428 (1989).

5

While the language in *Jackson* seems to support a *de novo* review, see 443 U.S. at 324-26, 99 S. Ct. at 2792-93, 61 L. Ed. 2d at 577-78, the review is only *de novo* as to decisions made by the trial court. As to the jury's verdict, we are required to review all inferences in favor of the verdict, thus making deferential review appropriate.

6

Rehearing denied by 62 Ohio St. 3d 1410, 577 N.E.2d 362 (1991).

7

See *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967).

8

Our conviction that the *Holland* rule is the better rule is not weakened by the fact that there is substantial conflict among the states as to whether the standard announced in *Noe* is preferable to that of *Holland*. According to our rough count, for states following the *Noe* rule, see *Ex parte Williams*, 468 So. 2d 99 (Ala. 1985); *Smith v. State*, 282 Ark. 535, 669 S.W.2d 201 (1984), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1331, 122 L. Ed. 2d 716 (1993); *Murdix v. State*, 250 Ga. 272, 297 S.E.2d 265 (1982); *State v. Lilly*, 468 So. 2d 1154 (La. 1985); *State v. Andrews*, 388 N.W.2d 723 (Minn. 1986); *State v. Easley*, 662 S.W.2d 248 (Mo. 1983); *State v. Williams*, 657 S.W.2d 405 (Tenn. 1983), *cert. denied*, 465 U.S. 1073, 104 S. Ct. 1429, 79 L. Ed. 2d 753 (1984); *State v. John*, 586 P.2d 410 (Utah 1978); *State v. Wyss*, 124 Wis. 2d 681, 370 N.W.2d 745 (1985). For states rejecting the *Noe* rule, see *Des Jardins v. State*, 551 P.2d 181 (Alaska 1976); *State v. Harvill*, 106 Ariz. 386, 476 P.2d 841 (1970); *Henry v. State*, 298 A.2d 327 (Del. 1972); *State v. Bush*, 58 Haw. 340, 569 P.2d 349 (1977); *Gilmore v. State*, 275 Ind. 134, 415 N.E.2d 70 (1981); *State v. Morton*, 230 Kan. 525, 638 P.2d 928 (1982); *State v. Cowperthwaite*, 354 A.2d 173 (Me. 1976); *Finke v. State*, 56 Md. App. 450, 468 A.2d 353 (1983), *cert. denied*, 299 Md. 425, 474 A.2d 218 (Md. 1984), *cert. denied sub nom. Finke v. Maryland*, 469 U.S. 1043, 105 S. Ct. 529, 83 L. Ed. 2d 416 (1984); *People v. Johnson*, 146 Mich. App. 429, 381 N.W.2d 740 (1985); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981); *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835 (1981); *State v. Stokes*, 299 S.C. 483, 386 S.E.2d 241 (1989).

9

HN4 An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact. *State v. Bailey, supra*. It is for the jury to decide which witnesses to believe or disbelieve. Once the jury has spoken, this Court may not review the credibility of the witnesses.

10

On cross-examination, the prosecuting attorney asked the defendant if, upon learning of the victim's death, he replied to the police officer: "That's too bad, buddy. Do you think it'll snow?" This Court does not suggest this evidence should have been admitted. However, **HNS** when reviewing a sufficiency of the evidence claim, an appellate court is entitled to review all the evidence that was actually admitted rightly or wrongly. See *Lockhart v. Nelson*, 488

U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988).

11

The evidence shows the victim's actions were irritating to the defendant well before the stabbing took place. His anger was building with each comment and flip of the towel. Furthermore, witnesses testified the defendant attempted to stab the victim a second time as he fell to the ground. The evidence shows the victim was slashed in the arm during this attempt. Finally, the defendant's statement that he "had the right to respond, finally, to this act of aggression that was perpetrated against [him]" is considered probative evidence of premeditation and deliberation.

12

Generally, **HN7** we review a trial court's refusal to give or the actual giving of a certain instruction under an abuse of discretion standard. Where, however, the question is whether the jury instructions failed to state the proper legal standard, this Court's review is plenary. "Whether jury instructions were properly [legally] given is a question of law[.]" *U.S. v. Morrison*, 991 F.2d 112, 116 (4th Cir. 1993).

13

In connection with a review of the legal sufficiency of the instructions, if we were to determine, as the State urges, that the defendant did not object to one or more of the trial court's instructions regarding the legal standard, we would review its legal propriety under a "plain error" standard. *See State v. Miller*, ___ W. Va. ___, ___ S.E.2d ___ (No. 22571 5/18/95). In *Miller*, we suggested that **HNS** where a party does not make a clear, specific objection at trial to the charge that he challenges as erroneous, he forfeits his right to appeal unless the issue is so fundamental and prejudicial as to constitute "plain error."

14

In Syllabus Point 8 of *State v. Walls*, 170 W. Va. 419, 294 S.E.2d 272 (1982), we stated:

"When instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict." Syllabus Point 6, *State v. Milam* 159 W. Va. 691, 226 S.E.2d 433 (1976)."

15

Furthermore, we have stated on different occasions that "the jury is the trier of the facts and 'there is no presumption that they are familiar with the law.'" *State v. Lindsey*, 160 W.

Va. 284, 291, 233 S.E.2d 734, 739 (1977), quoting *State v. Loveless*, 139 W. Va. 454, 469, 80 S.E.2d 442, 450 (1954).

16

The defendant raises several other assignments of error regarding the jury instructions, but we find his arguments without merit.

17

A form of this argument was made to this Court before when similar instructions were challenged and we found the contention to be without merit. See *State v. Schrader*, 172 W. Va. 1, 302 S.E.2d 70 (1982); *State v. Riser*, 170 W. Va. 473, 294 S.E.2d 461 (1982); *State v. Belcher*, 161 W. Va. 660, 245 S.E.2d 161 (1978). Actually only *Schrader* deals with the exact issue raised *sub judice*. For purposes of convenience, we will refer to instructions regarding the length of time necessary to form an intent to kill as the *Clifford* instruction, see *State v. Clifford*, 59 W. Va. 1, 52 S.E. 981 (1906), and those equating the intent to kill with premeditation as the *Schrader* instruction.

18

As to the other offenses, the jury instruction stated:

"Murder in the second degree is when one person kills another person unlawfully and maliciously, but not deliberately or premeditatedly; that voluntary manslaughter is the intentional, unlawful and felonious but not deliberate or malicious taking of human life under sudden excitement and heat of passion; that involuntary manslaughter is where one person while engaged in an unlawful act, unintentionally causes the death of another person, or when engaged in a lawful act unlawfully causes the death of another person."

19

We note that defense counsel did not object to State's Instruction No. 8, and, under our standard of review, the instruction would ordinarily be reviewed only for "plain error."

20

The 1794 Pennsylvania statute provided that "all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree[.]" 1794 Pa. Laws, Ch. 1766, § 2, quoted in *Commonwealth v. Jones*, 457 Pa. 563, 570-71, 319 A.2d 142, 147

(1974).

21

W. Va. Code, 61-2-1, states, in part:

"Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody . . . is murder of the first degree. All other murder is murder of the second degree."

22

The Model Penal Code and many of the modern state criminal codes abolish the first and second degree murder distinction in favor of classifications based on more meaningful criteria. Interestingly, defining premeditation in such a way that the formation of the intent to kill and the killing can result from successive impulses, *see Schrader, supra* (intent equals premeditation formula), grants the jury complete discretion to find more ruthless killers guilty of first degree murder regardless of actual premeditation. History teaches that such unbridled discretion is not always carefully and thoughtfully employed, and this case may be an example. In 1994, the Legislature raised the penalty for second degree murder to ten-to-forty years (from five-to-eighteen years), making it less important to give juries the unguided discretion to find the aggravated form of murder in the case of more ruthless killings, irrespective of actual premeditation. The penalties are now comparable.

23

HN13 In the absence of statements by the accused which indicate the killing was by prior calculation and design, a jury must consider the circumstances in which the killing occurred to determine whether it fits into the first degree category. Relevant factors include the relationship of the accused and the victim and its condition at the time of the homicide; whether plan or preparation existed either in terms of the type of weapon utilized or the place where the killing occurred; and the presence of a reason or motive to deliberately take life. No one factor is controlling. Any one or all taken together may indicate actual reflection on the decision to kill. This is what our statute means by "willful, deliberate and premeditated killing."

24

As examples of what type of evidence supports a finding of first degree murder, we identify three categories: (1) "planning" activity--facts regarding the defendant's behavior prior to the killing which might indicate a design to take life; (2) facts about the defendant's prior relationship or behavior with the victim which might indicate a motive to kill; and (3)

evidence regarding the nature or manner of the killing which indicate a deliberate intention to kill according to a preconceived design. The California courts evidently require evidence of all three categories or at least extremely strong evidence of planning activity or evidence of category (2) in conjunction with either (1) or (3). See *People v. Anderson*, 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968). These examples are illustrative only and are not intended to be exhaustive.

25

HN17 The inquiry focuses on the fairness of the trial and not the culpability of the prosecutor because allegations of prosecutorial misconduct are based on notions of due process. In determining whether a statement made or evidence introduced by the prosecution represents an instance of misconduct, we first look at the statement or evidence in isolation and decide if it is improper. If it is, we then evaluate whether the improper statement or evidence rendered the trial unfair. Several factors are relevant to this evaluation, among them are: (1) The nature and seriousness of the misconduct; (2) the extent to which the statement or evidence was invited by the defense; (3) whether the statement or evidence was isolated or extensive; (4) the extent to which any prejudice was ameliorated by jury instructions; (5) the defense's opportunity to counter the prejudice; (6) whether the statement or evidence was deliberately placed before the jury to divert attention to irrelevant and improper matters; and (7) the sufficiency of the evidence supporting the conviction. See *generally Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *State v. Sugg*, ___ W. Va. ___, 456 S.E.2d 469 (1995).

26

We note the defendant is likewise prohibited from informing the jury of the possible sentences he may face if convicted. See *generally U.S. v. Chandler*, 996 F.2d 1073 (11th Cir. 1993); *Commonwealth v. Bowser*, 425 Pa. Super. 24, 624 A.2d 125 (1993).

27

HN20 A proper closing argument in a criminal case involves the summation of evidence, any reasonable inferences from the evidence, responses to the opposing party's argument, and pleas for law enforcement generally. See *Coleman v. State*, 881 S.W.2d 344 (Tex. Cr. App. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 763, 130 L. Ed. 2d 660 (1995).

28

Precedent does not cease to be authoritative merely because counsel in a later case advances a new argument. See *generally Matter of Penn Central Transp. Co.*, 553 F.2d 12 (3rd Cir. 1977). But, as a practical matter, a precedent-creating opinion that contains no extensive analysis of an important issue is more vulnerable to being overruled than an opinion which demonstrates that the court was aware of conflicting decisions and gave at

least some persuasive discussion as to why the old law must be changed.

29

It appears the Court in *Myers* was under the assumption that a trial court had authority to instruct generally on the penalties in criminal cases. No authority is cited for that proposition, and we know of none to support such a sweeping statement.

30

The transcript reveals the following exchange between the prosecuting attorney and the defendant's father:

"Q. When you all would have these discussions, political, all kinds of discussions, did he ever tell you that women should be in the home and that men were better than women?

"A. No.

"Q. You never heard him say that, never heard him comment on that?

"A. No.

"Q. Did you ever hear him comment that whites are better than blacks?

"MR. CLINE: Objection, Your Honor. Move to approach the bench.

"A. No, he did not.

"THE COURT: Just a moment. Let's not get into those areas. I don't think they're needed. I don't recall any blacks being involved in this case.

* * *

"(Conference at the bench)

"MR. BROWN: This is the psychological report.

"THE COURT: Is this Smith's report?

"MR. BROWN: Yes. Here's the quote right here (indicating). This is where they talked about all kinds of things and where he alluded to the blacks and the KKK and --

"THE COURT: Well, I agree; but don't get into it. I agree that they talked about Hitler and blacks and things of that nature. I don't want that crap in here.

* * *

"MR. BROWN: Let me explain. They're portraying this guy as a nice, calm, Bible reading man, takes long walks in the woods, a nice young man. And that's not what we really have here. What we have is a bigoted, prejudiced individual. And I've got witnesses who will testify to that. We've got a witness up here now who's trying to say he's a nice guy, quiet, and they're very serious people.

"THE COURT: I'll let you get it in through Smith.

* * *

". . . You can ask him if he ever talked about blacks, talked about -- Knock it off there.

* * *

". . . Yes, you can bring back Smith and Gibson.

"MR. CLINE: Note our objection and exception for the record.

"MR. WARNER: Judge, before he brings it up we want to be heard at the bench or out of the hearing of the jury specifically on that issue, just what they've got, which are statements someone told to him, nothing to do with this crime. It has nothing to do with this crime, and it's highly prejudicial because it's --

* * *

"(In open court)

"Q. Did you and your son ever have discussions about the Klu [sic] Klux Klan?

"A. Not discussions, no.

"Q. Did you ever hear him express views on the Klu [sic] Klux Klan?

"A. From the news that he has heard on TV.

"Q. Did you ever hear him express any opinion about Hitler?

"A. No."

31

We consider the purpose of the prosecution's cross-examination was to impeach the witness by confronting him with information about his son that was inconsistent with the witness's testimony on direct examination. We note the prosecution made no effort to introduce the testimony of Dr. Smith. In this connection, however, it is well settled that **HN22** a party may not present extrinsic evidence of specific instances of conduct to impeach a witness on a collateral matter. See W.Va.R.Evid. 608(b). A matter is considered noncollateral if

"the matter is itself relevant in the litigation to establish a fact of consequence[.]" 1

McCormick On Evidence § 49 at 167 (4th ed. 1992). See also *Michael on Behalf of Estate of Michael v. Sabado*, ___ W. Va. ___, 453 S.E.2d 419 (1994).

32

There is a plethora of authority supporting the notion that matters such as race, religion, and nationality should be kept from a jury's consideration. See *Peck v. Bez*, 129 W. Va. 247, 40 S.E.2d 1 (1946), where counsel for the plaintiff made reference to the defendant's religion and foreign nationality. This Court reversed stating "these matters, of course, were not pertinent to the matters in issue and had no place in the argument." 129 W. Va. at 263, 40 S.E.2d at 10. With uniform regularity, we have held that **HN25** counsel should not be permitted to appeal to the jury's passions or prejudices. See generally *Crum v. Ward*, 146 W. Va. 421, 122 S.E.2d 18 (1961); *State v. Summerville*, 112 W. Va. 398, 164 S.E. 508 (1932); *Hendricks v. Monongahela West Penn Public Serv. Co.*, 111 W. Va. 576, 163 S.E. 411 (1932); *State v. Hively*, 108 W. Va. 230, 150 S.E. 729 (1929).

33

The prosecution chose not to rebut evidence of the defendant being quiet or peaceful, which was permitted under Rule 404(a)(1), Rule 404(a)(2), and/or Rule 405.

34

HN27 Rule 610 states: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."

35

Although we recognize that the scope and extent of cross-examination lie within the discretion of the trial court, we believe it is important to underscore the principle of evidentiary law that **HN28** no party has a right on cross-examination to offer irrelevant and incompetent evidence. See *Doe v. U.S.*, 666 F.2d 43 (4th Cir. 1981). The United States Supreme Court has noted that even the right to cross-examine witnesses may, in an appropriate case, "bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046, 35 L. Ed. 2d 297, 309 (1973). We believe Rule 403 is one of those "other legitimate interests."

36

Professor McCormick addressed the question as to how the curative admissibility rule is triggered: "If the [irrelevant] evidence . . . is so prejudice-arousing that an objection or motion to strike cannot have erased the harm, then it seems that the adversary should be entitled to answer it as of right." *McCormick on Evidence* § 57 at 84 (4th ed. 1992). Certainly,

any prejudice flowing from the father's testimony could have been cured by a motion to strike and by an instruction to disregard.

37

HN33 Evidence is unfairly prejudicial if it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Note, Fed.R.Evid. 403. Succinctly stated, evidence is unfairly prejudicial if it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case." 1 J. Weinstein & M. Berger, *Weinstein's Evidence* P 403[03] at 403-15 to 403-17 (1978).

38

Cert. denied sub nom. Hastings v. U.S., 469 U.S. 1218, 105 S. Ct. 1199, 84 L. Ed. 2d 343 (1985); *Williams v. U.S.*, 469 U.S. 1218, 105 S. Ct. 1199, 84 L. Ed. 2d 343 (1985); *Anderson v. U.S.*, 469 U.S. 1218, 105 S. Ct. 1199, 84 L. Ed. 2d 343 (1985); *Gibson v. U.S.*, 469 U.S. 1218, 105 S. Ct. 1199, 84 L. Ed. 2d 343, 105 S. Ct. 1200 (1985); *Stewart v. U.S.*, 469 U.S. 1218, 105 S. Ct. 1200, 84 L. Ed. 2d 343 (1985).

39

See *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979), *cert. denied*, 445 U.S. 904, 100 S. Ct. 1081, 63 L. Ed. 2d 320 (1980).

40

In *O'Neal*, the Supreme Court quoted with approval the following test of harmless error from the earlier case of *Kotteakos v. United States*, 328 U.S. 750, 764-65, 66 S. Ct. 1239, 1248, 90 L.Ed. 1557, 1566-67 (1946):

"If, when all is said and done, the [court] . . . is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand[.] . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

41

The only purpose this evidence could serve would be to prejudice the jury against the defendant. The defendant advises that at least one of the jurors was an African-American.

"It does not take much imagination to understand how such grossly biased comments would be viewed by the jury. We need not know the racial composition of the jury, for nearly all citizens find themselves repelled by such blatantly racist remarks and resentful of the person claimed to have uttered them." *U.S. v. Ebens*, 800 F.2d 1422, 1434 (6th Cir. 1986).

42

A recess was held at the close of the defendant's cross-examination. Out of the presence of the jury, defense counsel moved for a mistrial:

"MR. WARNER: Your Honor, first of all, right before we closed, the Prosecutor cross examined my client on an alleged prior statement that he had made while sitting in the back of the police cruiser, immediately following the time that he apparently knew the person had died. The Prosecutor cross examined him, 'Didn't you say something to the effect, "Isn't that too bad",' or that type of statement.

"THE COURT: I think he said, 'Isn't that too bad. Do you think it will snow', or something like that.

* * *

"MR. WARNER: Now that my thoughts are more clear, that statement was never, ever disclosed to us. I don't know if there is any foundation in fact for that statement at all. And I think it was terribly prejudicial at the same time. If I'm wrong on any of those points, the Prosecutor can correct me. And I would move for a mistrial based on that.

"MR. MORRIS: Judge, as I understood, that question was more or less a rebuttal question. He denied it. We are not able to prove by extraneous evidence anything he denies. That's pretty much --

"THE COURT: I think it was proper cross examination. The record will reflect what is in the transcript. Motion for a directed verdict [mistrial] is denied. I'll note your objection and exception."

HN40 Trial courts should preclude questions for which the questioner cannot show a factual and good faith basis. *See generally State v. Banjoman*, 178 W. Va. 311, 359 S.E.2d 331 (1987). Manifestly, mere inquiries by the prosecutor as to rumors may be highly prejudicial even though answered in the negative.

43

Actually, this is not a real case of late disclosure; it is a case of no meaningful disclosure. From reading the record, it appears the first time this statement was disclosed was during cross-examination. At the very least, the prosecution should have approached the bench and revealed the existence of the statement before using it in the cross-examination of the defendant.

44

E.E.O.C. v. Steamship Clerks Union Local 1066, 48 F.3d 594, 610 (1st Cir. 1995).

45

"This is as it should be. Such . . . will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Kyles v. Whitley*, ___ U.S. ___, ___, 115 S. Ct. 1555, 1568, 131 L. Ed. 2d 490, 509 (1995), quoting *Berger v. U.S.*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935).

1

The new instruction is essentially an adoption of the instruction previously offered by the Court in note 7 of *Hatfield*. See 169 W. Va. at 202, 286 S.E.2d at 410 n.7.

2

The word "reflect" is defined by Webster's as "to think quietly and calmly."

3

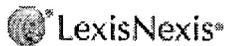
The word "contemplate" is defined by Webster's as "to view or consider with continued attention."

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