Evidence

Robin Jean Davis
West Virginia Supreme Court of Appeals

Louis J. Palmer Jr.

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II. EVIDENCE

A. Evidence of Flight by Defendant

In *State v. Payne,* Justice McHugh confronted the issue of introducing evidence that a criminal defendant fled the scene of the crime. Justice McHugh wrote:

In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant’s guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect.

B. Incriminating Evidence Not Associated with Defendant

Justice McHugh held in *State v. Rector.* It is reversible error for a trial judge to admit into evidence in a criminal trial of a defendant charged with a marihuana violation drug paraphernalia and marihuana belonging to a state witness when such drug paraphernalia and marihuana have not been associated with the defendant and have no probative value relating to the guilt of the defendant.

C. Testimony of Accomplice

Justice McHugh addressed the issue of permitting an accomplice to testify against a defendant in *State v. Caudill.* The court held that

[i]n a criminal trial an accomplice may testify as a witness on behalf of the State to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the issue of the witness-accomplice’s credibility. The failure by a trial

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6 Id. at Syl. Pt. 6.
8 Id. at Syl. Pt. 3 (alteration in original).
9 289 S.E.2d 748 (W. Va. 1982).
judge to give a jury instruction so limiting such testimony is, however, reversible error.\textsuperscript{10}

\textbf{D. Credibility of Witness}

In \textit{State v. Kopa},\textsuperscript{11} Justice McHugh stated that “[t]he credibility of a witness may be attacked by any party, including the party calling him and prior cases that expound a contrary principle are hereby overruled.”\textsuperscript{12}

\textbf{E. Prior Inconsistent Statement}

Justice McHugh set out guidelines for using a prior inconsistent statement of a witness in the case of \textit{State v. King}.\textsuperscript{13} The court held as follows:

A videotaped interview containing a prior inconsistent statement of a witness who claims to have been under duress when making such statement or coerced into making such statement is admissible into evidence if: (1) the contents thereon will assist the jury in deciding the witness’ credibility with respect to whether the witness was under duress when making such statement or coerced into making such statement; (2) the trial court instructs the jury that the videotaped interview is to be considered only for purposes of deciding the witness’ credibility on the issue of duress or coercion and not as substantive evidence; and (3) the probative value of the videotaped interview is not outweighed by the danger of unfair prejudice.\textsuperscript{14}

\textbf{F. Evidence of Defendant’s Sexual Predilections}

Justice McHugh stated in \textit{State v. Adkins}\textsuperscript{15} that “[e]vidence regarding sexual predilections or conduct is not admissible at trial unless it is clearly relevant.”\textsuperscript{16}

\begin{footnotesize}
\textsuperscript{10} \textit{Id.} at Syl. Pt. 3.
\textsuperscript{11} 311 S.E.2d 412 (W. Va. 1983).
\textsuperscript{12} \textit{Id.} at Syl. Pt. 4.
\textsuperscript{13} 396 S.E.2d 402 (W. Va. 1990).
\textsuperscript{14} \textit{Id.} at Syl. Pt. 2.
\textsuperscript{15} 289 S.E.2d 720 (W. Va. 1982).
\textsuperscript{16} \textit{Id.} at Syl. Pt. 7.
\end{footnotesize}
G. Husband-Wife Communication Privilege

Justice McHugh ruled in State v. Evans that "[t]he privilege against adverse spousal testimony contained in W.Va. Code, 57-3-3 [1931] applies only where the parties stand in the relation of husband and wife."18

H. Attorney Work Product

In State ex rel. United Hospital Center, Inc. v. Bedell,19 Justice McHugh addressed several matters pertaining to the attorney work doctrine. Initially he ruled that "[t]o determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation."20

Justice McHugh concluded the opinion by stating:

When a corporation, partnership, association or governmental agency designates an attorney to testify on its behalf at a deposition pursuant to West Virginia Rule of Civil Procedure 30(b)(6), such corporation, partnership, association or governmental agency waives the attorney-client privilege and work product doctrine with regard to matters, set forth in the notice of deposition, about which the attorney was designated to testify.21

I. Evidence of Juvenile Record

In State v. Van Isler,22 Justice McHugh held that "W.Va. Code, 49-5-17(d) [1978], does not authorize a court to permit juvenile law enforcement records to be used in a criminal case as evidence in chief in the State's case."23 Van Isler concluded that "[t]he use of a juvenile fingerprint card, or testimony derived from it, as evidence in a criminal trial of the person fingerprinted after that person has become an adult is reversible error because such use of juvenile records is not permitted by W.Va. Code, 49-5-17 [1978]."24

18 Id. at Syl. Pt. 5.
19 484 S.E.2d 199 (W. Va. 1997).
20 Id. at Syl. Pt. 7.
21 Id. at Syl. Pt. 9.
23 Id. at Syl. Pt. 1.
24 Id. at Syl. Pt. 2.
J. Use of Inadmissible Evidence to Impeach

In *State v. Goodmon*, Justice McHugh examined the use of inadmissible evidence to impeach a defendant who testifies. Justice McHugh held that

[w]here a person who has been accused of committing a crime makes a voluntary statement that is inadmissible as evidence in the State’s case in chief because the statement was made after the accused had requested a lawyer, the statement may be admissible solely for impeachment purposes when the accused takes the stand at his trial and offers testimony contradicting the prior voluntary statement knowing that such prior voluntary statement is inadmissible as evidence in the State’s case in chief.

K. Authentication of Evidence

Justice McHugh addressed issues involving authenticating evidence in the case of *State v. Jenkins*. Justice McHugh stated:

Preliminary questions of authentication and identification pursuant to W.Va.R.Evid. 901 are treated as matters of conditional relevance, and, thus, are governed by the procedure set forth in W.Va.R.Evid. 104(b). In an analysis under W.Va.R.Evid. 901 a trial judge must find that the party offering the evidence has made a prima facie showing that there is sufficient evidence “to support a finding that the matter in question is what its proponent claims.” In other words, the trial judge is required only to find that a reasonable juror could find in favor of authenticity or identification before the evidence is admitted. The trier of fact determines whether the evidence is credible. Furthermore, a trial judge’s ruling on authenticity will not be disturbed on appeal unless there has been an abuse of discretion. Lastly, a finding of authenticity does not guarantee that the evidence is admissible because the evidence must also be admissible under any other rule of evidence which is applicable.

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26 *Id.* at Syl. Pt. 4.
27 466 S.E.2d 471 (W. Va. 1995).
28 *Id.* at Syl. Pt. 1.
L. **Bite-Mark Evidence**

Justice McHugh stated in *State v. Armstrong*\(^\text{29}\) that "[t]he general reliability of bite-mark evidence as a means of positive identification is sufficiently established in the field of forensic dentistry that a court is authorized to take judicial notice of such general reliability without conducting a hearing on the same."\(^\text{30}\)

M. **Evidence of Defendant's Tattoo**

Justice McHugh addressed the issue of forcing a defendant to display his tattoos in the case of *State v. Meade*.\(^\text{31}\) The court held as follows:

Ordinarily, it is not an abuse of discretion for a trial court in a criminal case to direct the accused to reveal or display the accused's tattoos to a witness and to the jury at trial, where the accused's tattoos are relevant to the question of the identification of the perpetrator of the offense and where the trial court has weighed the probative value of such evidence against the danger of unfair prejudice, etc., pursuant to Rules 401, 402 and 403 of the West Virginia Rules of Evidence.\(^\text{32}\)

N. **Evidence of Other Crimes**

The decision in *State v. Caudill*\(^\text{33}\) held that "[e]vidence relating to a crime that a defendant is accused of committing, other than that charged in the indictment for which he is on trial, is not generally admissible to prove the offense for which the accused is on trial."\(^\text{34}\)

O. **Confession**

Justice McHugh relied upon *State v. Starr*\(^\text{35}\) in holding in *State v. Mitter*\(^\text{36}\) that "[t]he State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all

\(^{29}\) 369 S.E.2d 870 (W. Va. 1988).

\(^{30}\) Id. at Syl. Pt. 2.

\(^{31}\) 474 S.E.2d 481 (W. Va. 1996).

\(^{32}\) Id. at Syl. Pt. 2.

\(^{33}\) 289 S.E.2d 748 (W. Va. 1982).

\(^{34}\) Id. at Syl. Pt. 1.

\(^{35}\) 216 S.E.2d 242 (W. Va. 1975).

\(^{36}\) 289 S.E.2d 457 (W. Va. 1982).
of an offense were voluntary before such may be admitted into the evidence of a criminal case.”

Justice McHugh said in *State v. Adkins* that “[a] witness at a criminal trial may testify that he, the witness, and not the defendant was responsible for the crime for which the defendant is on trial.”

P. Noninculpatory Statements by Defendant

Justice McHugh stated in *State v. McFarland* that “[a] noninculpatory statement made spontaneously by a criminal defendant in response to the greeting or salutation of a law enforcement officer does not result from an ‘interrogation’ under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and such a spontaneous statement is admissible without an in camera hearing on its voluntariness.”

Q. Evidence Precluded by the Dead Man’s Statute

In *Papenhaus v. Combs*, Justice McHugh held that “[a] witness who is not a party to an action or has no interest in that action, is not precluded by *W.Va. Code, 57-3-1* [1937], commonly referred to as the ‘Dead Man’s Statute,’ from testifying with regard to a personal transaction or communication between such witness and a decedent.”

Justice McHugh addressed several issues involving the Dead Man’s Statute in *Cross v. State Farm Mutual Automobile Insurance Co.* He held:

> [t]he testimony of a witness which is adverse to the interests of insurance beneficiaries in a declaratory judgment action brought on their behalf by the personal representative of the deceased insured against the insurer is testimony which is “against the executor [or] administrator,” within the meaning of the Dead Man’s Statute, *W.Va. Code, 57-3-1* [1937].

Justice McHugh held that “[a] witness’ status as an agent of a party,
without more, does not make him or her a ‘person interested,’ within the meaning of W.Va. Code, 57-3-1 [1937], and his or her testimony is not on that basis precluded by that statute."

The court concluded by stating that

[the Dead Man’s Statute, W.Va. Code, 57-3-1 [1937], does not bar the testimony of an insurer’s agents that they orally informed the decedent of the costs of various levels of uninsured motorist coverage, where the only assertion is that the insurer’s agents are incompetent witnesses by virtue of their interests as agents.]

In Voelker v. Frederick Business Properties Co., Justice McHugh held:

Evidence of a beneficiary’s relationship with the decedent may be admitted into evidence for purposes of determining damages in a wrongful death action pursuant to W.Va. Code, 55-7-6(c)(1) [1989] which provides for the recovery of damages for “[s]orrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent[.]” Whether evidence is relevant pursuant to W.Va.R.Evid. 401 and 402 when determining damages in a wrongful death action and whether the probative value of such evidence is substantially outweighed by the danger of unfair prejudice pursuant to W.Va.R.Evid. 403 must be determined on a case-by-case basis. Moreover, on appeal this Court will not disturb a trial court’s ruling on the admissibility of such evidence unless there has been an abuse of discretion.

R. Out-of-Court Identification of Defendant

In State v. Gravely, Justice McHugh confronted the issue of admitting out-of-court identification evidence. The court held:

An adversary judicial criminal proceeding is instituted against a defendant where the defendant after his arrest is taken before a magistrate pursuant to W.Va. Code, 62-1-5 [1965], and is, inter alia, informed pursuant to W.Va. Code, 62-1-6 [1965], of the complaint against him and of his right to counsel. Furthermore,

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46 Id. at Syl. Pt. 2.
47 Id. at Syl. Pt. 3.
49 Id. at Syl. Pt. 2.
50 299 S.E.2d 375 (W. Va. 1982).
where the defendant at that magistrate proceeding expresses a desire to be represented by counsel, a subsequent pretrial identification of the defendant at a police initiated line-up or one-on-one police initiated confrontation between the defendant and a witness or crime victim, without notice to and in the absence of defense counsel, constitutes a violation of the defendant's right to counsel under the Sixth Amendment to the Constitution of the United States and under art. III, Sec. 14, of the Constitution of West Virginia, so as to preclude any trial testimony in regard to the identification procedure. 51

S. In-Court Identification of Defendant

Justice McHugh relied upon State v. Pratt52 to hold in State v. Baker53 that "[a] defendant must be allowed an in camera hearing on the admissibility of a pending in-court identification when he challenges it because the witness was a party to pre-trial identification procedures that were allegedly constitutionally infirm."54

T. Out-of-Court Experiment

Justice McHugh ruled in State v. Kopa55 that

[the results of an out-of-court experiment will not be admitted into evidence unless the party seeking to introduce such evidence demonstrates that the conditions under which the experiment was conducted were substantially similar to the original conditions sought to be recreated and the question of whether to admit such evidence for consideration by the jury is within the sound discretion of the trial court.56

U. Gruesome Photographs

The admission of gruesome photographs was addressed by Justice McHugh in State v. Clark57. The court held:

51 Id. at Syl. Pt. 1.
52 244 S.E.2d 227 (W. Va. 1978).
53 287 S.E.2d 497 (W. Va. 1982).
54 Id. at Syl. Pt. 2.
56 Id. at Syl. Pt. 5.
57 292 S.E.2d 643 (W. Va. 1982).
Where several gruesome photographs are admitted in evidence with an objection being made only to the least gruesome of such photographs, and where defense counsel during closing argument specifically calls the jury’s attention to the other gruesome photographs, which photographs were not objected to when admitted in evidence, this Court will not find the admission of the least gruesome photograph reversible error on the ground of prejudice.  

V. Victim Character Evidence

Justice McHugh stated in *State v. Dietz*:  

It is proper for a trial court to exclude testimony relating to the reputation for aggressiveness and character for violence of the victim in a homicide case where the defendant claims reasonable apprehension of danger, but where the defendant had no prior knowledge of such reputation at the time of the homicide.

Justice McHugh indicated in *Dietz v. Legursky* that  

[in a homicide case, malicious wounding, or assault where the defendant relies on self-defense or provocation, under Rule 404(a)(2) and Rule 405(a) of the West Virginia Rules of Evidence, character evidence in the form of opinion testimony may be admitted to show that the victim was the aggressor if the probative value of such evidence is not outweighed by the concerns set forth in the balancing test of Rule 403.]

W. Witness Character Evidence

Justice McHugh addressed conditions under which a witness’s character for truthfulness or untruthfulness may be presented in the case of *State v. Wood*. In that opinion he held as follows:

West Virginia Rules of Evidence 608(a) permits the admission of evidence in the form of an opinion or reputation regarding a

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58 Id. at Syl. Pt. 3.
60 Id. at Syl. Pt. 6.
62 Id. at Syl. Pt. 3.
63 460 S.E.2d 771 (W. Va. 1995).
witness's character for truthfulness or untruthfulness, subject to two limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. The admission of testimony pursuant to W.Va.R.Evid. 608(a) is within the sound discretion of the trial judge and is subject to W.Va.R.Evid. 402, which requires the evidence to be relevant; W.Va.R.Evid. 403, which requires the exclusion of evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[;]" and W.Va.R.Evid. 611, which requires the court to protect witnesses from harassment and undue embarrassment.64

X. Victim Testimony

Justice McHugh held in State v. Hall65 that "[n]ormally the owner of stolen property may testify as to its value because he is deemed qualified to give an opinion concerning the value of the things which he owns."66

Y. Testimony in Narrative Form

Justice McHugh opined in State v. Armstrong67 that "[t]he trial court is vested with sound discretion to permit a witness to testify in narrative form, rather than by question and answer."68

Z. Hearsay

Justice McHugh indicated in Hess v. Arbogast69 that "[i]n order for hearsay to be admissible evidence, it must first be either excepted or exempted from the general bar from admissibility contained in Rule 802. Second, it must meet the general requirements for admissibility, authenticity, relevancy, and competency."70 Hess also noted that "[u]nder W.Va.R.Evid. 803(8)(C), the contents of a public report, record or document are an exception to the hearsay rule and are assumed to be trustworthy, unless the opponent of the report establishes

64 Id. at Syl. Pt. 2.
65 298 S.E.2d 246 (W. Va. 1982).
66 Id. at Syl. Pt. 5.
67 369 S.E.2d 870 (W. Va. 1988).
68 Id. at Syl. Pt. 3.
70 Id. at Syl. Pt. 3.
that the report is sufficiently untrustworthy."\textsuperscript{71}

In *Heydinger v. Adkins*,\textsuperscript{72} Justice McHugh held that "[a] statement is not hearsay if the statement is offered against a party and is his [or her] own statement, in either his [or her] individual or a representative capacity."\textsuperscript{73} The opinion also indicated that "[w]here a party, after having submitted to a polygraph examination, makes any statement constituting an admission against interest, such testimony is admissible at trial pursuant to W.Va.R.Evid. 801(d)(2)(A), provided that the admission was not procured by coercive conduct or a denial of the party’s constitutional rights."\textsuperscript{74}

Justice McHugh held in *Transamerica Occidental Life Insurance Co. v. Burke*\textsuperscript{75} that

[where] the formal designation of the beneficiary(ies) of a life insurance policy or of other death benefits is ambiguous in light of the circumstances at the time of such designation, a declaration of the insured as to whom he or she intended to be the beneficiary(ies) is admissible as evidence of such intent under the exception to the hearsay rule for declarations of intent, W.Va.R.Evid. 803(3).\textsuperscript{76}

Justice McHugh held in *Rine By & Through Rine v. Irisari*\textsuperscript{77} that "[a]s a condition precedent to the admissibility of former testimony under W.Va.R.Evid. 804(b)(1), the proponent of such testimony must show the unavailability of the witness. If the witness is available, the in-court testimony of that witness is preferred."\textsuperscript{78}

The case of *State v. Satterfield*\textsuperscript{79} presented Justice McHugh with an opportunity to discuss the dying declaration exception to hearsay. The court held initially that

[a] suicide note may be admissible pursuant to W.Va.R.Evid. 804(b)(2) as a dying declaration exception to the hearsay rule. In order for a statement found in a suicide note to be admissible as a

\textsuperscript{71} Id. at Syl. Pt. 4.

\textsuperscript{72} 360 S.E.2d 240 (W. Va. 1987).

\textsuperscript{73} Id. at Syl. Pt. 1 (alterations in original).

\textsuperscript{74} Id. at Syl. Pt. 2.

\textsuperscript{75} 368 S.E.2d 301 (W. Va. 1988).

\textsuperscript{76} Id. at Syl. Pt. 6.

\textsuperscript{77} 420 S.E.2d 541 (W. Va. 1992).

\textsuperscript{78} Id. at Syl. Pt. 3.

\textsuperscript{79} 457 S.E.2d 440 (W. Va. 1995).
dying declaration the following must occur: the statement must have been made when the declarant was under the belief that his death was imminent, and the dying declaration must concern the cause or circumstances of what the declarant believes to be his impending death.\textsuperscript{80}

\textit{Satterfield} next held:

Once a trial judge determines that a statement falls within the dying declaration exception to the hearsay rule found in W.Va.R.Evid. 804(b)(2), then it must be determined whether the evidence is relevant pursuant to W.Va.R.Evid. 401 and 402 and, if so, whether its probative value is substantially outweighed by unfair prejudice pursuant to W.Va.R.Evid. 403. The statement is admissible only after the trial judge determines that its probative value is not substantially outweighed by unfair prejudice.\textsuperscript{81}

\textbf{AA. Demonstrative Evidence}

In \textit{State v. Hardway},\textsuperscript{82} Justice McHugh considered the propriety of the prosecutor recreating a crime scene. The court held:

It is not error for a trial court, in a homicide case, to allow the State to conduct a demonstration in the presence of the jury which re-creates the scene of the homicide by arranging articles in substantially the same position as they were at the time of the homicide, if the demonstration allows the jury to more intelligently consider the State’s theory of the case or to rebut the defendant’s theory of the case and if the probative value of such demonstration is not substantially outweighed by the danger of unfair prejudice.\textsuperscript{83}

Justice McHugh noted in \textit{State v. Kerns}\textsuperscript{84} that “[g]enerally, the admissibility of demonstrative evidence is a matter within the discretion of the trial court.”\textsuperscript{85}

\textsuperscript{80} \textit{Id.} at Syl. Pt. 2.

\textsuperscript{81} \textit{Id.} at Syl. Pt. 3.

\textsuperscript{82} 385 S.E.2d 62 (W. Va. 1989).

\textsuperscript{83} \textit{Id.} at Syl. Pt. 8.

\textsuperscript{84} 420 S.E.2d 891 (W. Va. 1992).

\textsuperscript{85} \textit{Id.} at Syl. Pt. 5.
BB. Expert Testimony

Justice McHugh stated in *State v. Dietz*\(^8\) that

[i]n a homicide case a medical examiner may be qualified to state an opinion as to whether the homicide was of a psychosexual type. Such qualification should be based upon the medical examiner's: post-mortem examination or a review of the report thereof; knowledge of psychosexual types of homicide; and experience in post-mortem examinations upon similarly situated victims. Whether a medical examiner is qualified in this regard is a determination to be made by the trial court, and, unless the trial court has abused its discretion, this Court will not disturb the trial court's ruling.\(^7\)

Justice McHugh held in *Gilman v. Choim*\(^8\) that "*W.Va. Code, 55-7B-7 [1986], being concerned primarily with the competency of expert testimony in a medical malpractice action, is valid under Rule 601 of the West Virginia Rules of Evidence.*"\(^8\)

In *Teter v. Old Colony Co.*,\(^9\) Justice McHugh's opinion stated "*W.Va. Code, 37-14-1, et seq., is not designed to prevent an expert otherwise qualified under Rule 702 of the West Virginia Rules of Evidence from testifying with regard to the value of real property or the damages that may have resulted to it.*"\(^9\)

In *Mayhorn v. Logan Medical Foundation*,\(^9\) Justice McHugh wrote:

Rule 703 of the West Virginia Rules of Evidence allows an expert to base his opinion on (1) personal observations; (2) facts or data, admissible in evidence, and presented to the expert at or before trial; and (3) information otherwise inadmissible in evidence, if this type of information is reasonably relied upon by experts in the witness' field.\(^5\)

The court in *Mayhorn* next held:

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\(^7\) *Id. at Syl. Pt. 4.*
\(^8\) 406 S.E.2d 200 (W. Va. 1990).
\(^9\) *Id. at Syl.*
\(^9\) 441 S.E.2d 728 (W. Va. 1994).
\(^87\) *Id. at Syl. Pt. 8.*
\(^92\) 454 S.E.2d 87 (W. Va. 1994).
\(^93\) *Id. at Syl. Pt. 2.*
Pursuant to West Virginia Rules of Evidence 702 an expert's opinion is admissible if the basic methodology employed by the expert in arriving at his opinion is scientifically or technically valid and properly applied. The jury, and not the trial judge, determines the weight to be given to the expert's opinion.\textsuperscript{94}

The court concluded:

Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion. Therefore, to the extent that Gilman v. Choi, 185 W. Va. 177, 406 S.E.2d 200 (1990) indicates that the legislature may by statute determine when an expert is qualified to state an opinion, it is overruled.\textsuperscript{95}

\textit{CC. Rebuttal}

In \textit{Belcher v. Charleston Area Medical Center},\textsuperscript{96} Justice McHugh stated:

Under Rule 611(a) of the West Virginia Rules of Evidence, a trial court has broad discretion in permitting or excluding the admission of rebuttal testimony, and this Court will not disturb the ruling of a trial court on the admissibility of rebuttal evidence unless there has been an abuse of discretion.\textsuperscript{97}

In \textit{State v. Dietz},\textsuperscript{98} Justice McHugh stated that "[w]here a criminal defendant's witness on direct examination raises a material matter, and on cross-examination testifies adversely to the prosecution, it is proper for the trial court to allow the prosecution to present rebuttal evidence as to such matter."\textsuperscript{99}

\textit{DD. Leading Questions}

In the case of \textit{Rine By & Through Rine v. Irisari},\textsuperscript{100} Justice McHugh stated that "[w]here the adverse party or a witness favorable to the adverse party is called as a witness by the opponent, leading questions by the adverse party's own counsel

\textsuperscript{94} Id. at Syl. Pt. 4.
\textsuperscript{95} Id. at Syl. Pt. 6.
\textsuperscript{96} 422 S.E.2d 827 (W. Va. 1992).
\textsuperscript{97} Id. at Syl. Pt. 2.
\textsuperscript{98} 390 S.E.2d 15 (W. Va. 1990).
\textsuperscript{99} Id. at Syl. Pt. 2.
\textsuperscript{100} 420 S.E.2d 541 (W. Va. 1992).
on cross-examination will usually not be allowed."\(^{101}\)

**EE. Meaning of Materiality**

In *State v. Kerns*,\(^{102}\) Justice McHugh ruled that "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."\(^{103}\)

**III. CRIMINAL PROCEDURE**

**A. Defendant's Presence at All Critical Stages**

Justice McHugh ruled in *State ex rel. Redman v. Hedrick*\(^{104}\) that "[i]n a criminal proceeding, the defendant's absence at a critical stage of such proceeding is not reversible error where no possibility of prejudice to the defendant occurs."\(^{105}\)

**B. Continuance**

The case of *State ex rel. Shorter v. Hey*\(^{106}\) called upon the West Virginia Supreme Court of Appeals to revisit its precedent concerning continuances in criminal cases. Justice McHugh noted that the court's precedent was inconsistent with fairness, and in doing so, he held that "[syllabus points] 1 and 2 in *State ex rel. Holstein v. Casey*, 164 W. Va. 460, 265 S.E.2d 530 (1980) are hereby overruled to the extent the same are in conflict with this opinion."\(^{107}\)

The court in *Hey* then went on to establish new law in the area of continuances in criminal cases. Justice McHugh held as an initial matter that

> [t]he determination of what is good cause, pursuant to *W.Va. Code, 62-3-1*, for a continuance of a trial beyond the term of indictment is in the sound discretion of the trial court, and when good cause is determined a trial court may, pursuant to *W.Va. Code, 62-3-1*, grant a continuance of a trial beyond the term of indictment at the request of either the prosecutor or defense, or

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\(^{101}\) *Id.* at Syl. Pt. 4.


\(^{103}\) *Id.* at Syl. Pt. 6.

\(^{104}\) 408 S.E.2d 659 (W. Va. 1991).

\(^{105}\) *Id.* at Syl. Pt. 3.


\(^{107}\) *Id.* at Syl. Pt. 5.