

---

Volume 100

Issue 5 Issue 5, A Tribute to Franklin D. Cleckley:  
*A Compendium of Essential Legal Principles  
From His Opinions as a Justice on the West  
Virginia Supreme Court of Appeals*

Article 6

---

June 1998

## Evidence

Robin Jean Davis  
*West Virginia Supreme Court of Appeals*

Louis J. Palmer Jr.

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Evidence Commons](#)

---

### Recommended Citation

Robin J. Davis & Louis J. Palmer Jr., *Evidence*, 100 W. Va. L. Rev. (1998).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol100/iss5/6>

This A Tribute to Franklin D. Cleckley: A Compendium of Essential Legal Principles From His Opinions as a Justice on the West Virginia Supreme Court of Appeals is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## II. EVIDENCE

### A. *General Admissibility*

The case of *State v. Derr*<sup>6</sup> presented Justice Cleckley with an opportunity to clarify the admissibility of evidence under Rules 401-403 of the *West Virginia Rules of Evidence*. The decision in *Derr* made emphatically clear that “[t]he West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts. These rules constitute more than a mere refinement of common law evidentiary rules, they are a comprehensive reformulation of them.”<sup>7</sup> Justice Cleckley set out a bright line in *Derr* for understanding the relationship between Rules 401-403. The opinion held,

[a]lthough Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.<sup>8</sup>

With a clear line of responsibility assigned to Rules 401-403, Justice Cleckley pressed forward to overrule prior precedent inconsistent with *Derr*'s interpretation of the responsibility assigned to Rule 403:

Whatever the wisdom and utility of *State v. Rowe*, and its progeny, it is clear that the *Rowe* balancing test did not survive the adoption of the West Virginia Rules of Evidence. Therefore, *State v. Rowe*, *supra*, is expressly overruled because it is manifestly incompatible with Rule 403 of the West Virginia Rules of Evidence.<sup>9</sup>

---

<sup>6</sup> 451 S.E.2d 731 (W. Va. 1994).

<sup>7</sup> *Id.* at Syl. Pt. 7.

<sup>8</sup> *Id.* at Syl. Pt. 9.

<sup>9</sup> *Id.* at Syl. Pt. 6 (citation omitted).

The case of *Michael ex rel. Estate of Michael v. Sabado*<sup>10</sup> provided an opportunity for further comment on Rule 403. The opinion held that

Rule 403 of the West Virginia Rules of Evidence is explicit in the discretion granted a trial judge to admit or exclude contradictions found to be “relevant” under Rule 401. Many of the evils that Rule 403 is designed to avoid are similar to those sought to be avoided by the exclusion of extrinsic evidence on a collateral matter to impeach credibility. These evils include confusion of the issues, misleading the jury, undue delay, and waste of time.<sup>11</sup>

The case of *State v. LaRock*<sup>12</sup> provided the following guidelines on the issue of prejudice to a criminal defendant from the admission of evidence:

It is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction.<sup>13</sup>

#### B. *Admission of Photographs*

The decision in *State v. Derr*<sup>14</sup> confronted the admissibility of gruesome photographs. *Derr* held that “[t]he admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence.”<sup>15</sup> The opinion then laid out the steps trial courts must follow when assessing the admissibility of photographs over an

---

<sup>10</sup> 453 S.E.2d 419 (W. Va. 1994).

<sup>11</sup> *Id.* at Syl. Pt. 5.

<sup>12</sup> 470 S.E.2d 613 (W. Va. 1996).

<sup>13</sup> *Id.* at Syl. Pt. 3.

<sup>14</sup> 451 S.E.2d 731 (W. Va. 1994).

<sup>15</sup> *Id.* at Syl. Pt. 8.

asserted gruesome objection:

Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.<sup>16</sup>

C. *Admissibility Under Rule 404(b)*

In *State v. McGinnis*<sup>17</sup> Justice Cleckley expounded upon the admissibility of evidence under Rule 404(b) of the *West Virginia Rules of Evidence*. The opinion addressed the issue generally and then established a specific standard for evaluating a proffer of evidence under Rule 404(b). As to the opinion's general statement on the issue, Justice Cleckley wrote,

[w]hen offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.<sup>18</sup>

The opinion then turned to specific guidelines to which trial courts must adhere when ruling upon a Rule 404(b) proffer of evidence. In astute fashion, Justice Cleckley held,

---

<sup>16</sup> *Id.* at Syl. Pt. 10.

<sup>17</sup> 455 S.E.2d 516 (W. Va. 1994).

<sup>18</sup> *Id.* at Syl. Pt. 1.

[w]here an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in *State v. Dolin*. After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.<sup>19</sup>

#### D. *Expert Testimony*

In *Mildred L.M. v. John O.F.*,<sup>20</sup> Justice Cleckley clarified a jury's role in rejecting uncontradicted expert testimony. The opinion held that

[a]lthough a jury is not bound to accept expert testimony and should evaluate an expert witness as it would any other witness, the jury is not free to reject uncontradicted scientific testimony and to substitute its own speculation in its place. In cases where expert testimony is uncontradicted and the jury rejects it, there must be ample other testimony reasonably supporting the jury's verdict.<sup>21</sup>

---

<sup>19</sup> *Id.* at Syl. Pt. 2 (citation omitted).

<sup>20</sup> 452 S.E.2d 436 (W. Va. 1994).

<sup>21</sup> *Id.* at Syl. Pt. 3.

In *Gentry v. Mangum*,<sup>22</sup> Justice Cleckley set out guidelines for trial courts when determining whether a witness is an expert. The opinion held,

[i]n determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.<sup>23</sup>

#### E. *Admissibility of Illegal Recording*

Justice Cleckley succinctly held in *West Virginia Department of Health and Human Resources ex rel. Wright v. David L.*<sup>24</sup> that “[a]ny recordings of conversations made in violation of W. Va. Code, 62-1D-3(a)(1) (1987), and 18 U.S.C. 2511(1)(a) (1988) are inadmissible under W. Va. Code, 62-1D-6 (1987), and 18 U.S.C. 2515 (1968).”<sup>25</sup>

#### F. *Rebuttal Evidence*

Justice Cleckley addressed the admission of rebuttal evidence in the case of *Michael ex rel. Estate of Michael v. Sabado*.<sup>26</sup> The opinion held that “[a]llowance of a party to present additional evidence on rebuttal depends upon the circumstances of the case and rests within the discretion of the individual most able to weigh the competing interests and circumstances — the trial judge.”<sup>27</sup>

---

<sup>22</sup> 466 S.E.2d 171 (W. Va. 1995).

<sup>23</sup> *Id.* at Syl. Pt. 5.

<sup>24</sup> 453 S.E.2d 646 (W. Va. 1994).

<sup>25</sup> *Id.* at Syl. Pt. 3.

<sup>26</sup> 453 S.E.2d 419 (W. Va. 1994).

<sup>27</sup> *Id.* at Syl. Pt. 4.

### G. *Impeachment*

In *McDougal v. McCammon*,<sup>28</sup> Justice Cleckley wrote that “[s]ubject to well established exceptions, impeachment by contradiction may properly attack all kinds of testimony, whether given on direct or on cross, and indeed all evidence, as well as inferences suggested by evidence or arguments of counsel interpreting the evidence.”<sup>29</sup>

The issue of impeachment, specifically under Rule 608(a), was addressed in *State v. Roy*.<sup>30</sup> Writing in *Roy*, Justice Cleckley stated,

[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to certain limitations. The evidence may refer only to character for truthfulness or untruthfulness. A fair reading of Rule 608(a) of the West Virginia Rules of Evidence provides that a witness may be impeached by proof that the witness is untruthful. Under this rule, no distinction is made between nonparty witnesses and party witnesses. The rule applies with equal force to the defendant in a criminal case. The form of proof may be either “reputation” or “opinion” evidence.<sup>31</sup>

The decision in *Roy* also looked at the use of Rule 608 to impeach a defendant who testifies. Justice Cleckley ruled on this issue by holding,

[u]nlike Rule 404(a)(1) of the West Virginia Rules of Evidence, under Rule 608, a witness’s character for truthfulness is placed in issue once the witness testifies. No more is required. The accused, by testifying, becomes subject to an attack on his credibility. In this regard, he is treated like any other witness; therefore, his credibility is placed in issue even though he should offer no direct testimony concerning his good reputation for truthfulness or concerning a character trait otherwise at issue.<sup>32</sup>

---

<sup>28</sup> 455 S.E.2d 788 (W. Va. 1995).

<sup>29</sup> *Id.* at Syl. Pt. 2.

<sup>30</sup> 460 S.E.2d 277 (1995).

<sup>31</sup> *Id.* at Syl. Pt. 4.

<sup>32</sup> *Id.* at Syl. Pt. 5.

In *State v. Blake*,<sup>33</sup> the court held that “[g]enerally, a witness who testifies to certain matters cannot be impeached by showing his or her failure on a prior occasion to disclose a material fact unless the disclosure was omitted under circumstances rendering it incumbent or natural for the witness to state it.”<sup>34</sup> *Blake* continued by holding,

[w]hen a prior inconsistent statement is offered to impeach a witness and the claimed inconsistency rests on an omission to state previously a fact now asserted, the prior statement is admissible if it also can be shown that prior circumstances were such that the witness could have been expected to state the omitted fact, either because he or she was asked specifically about it or because the witness was then purporting to render a full and complete account of the accident, transaction, or occurrence and the omitted fact was an important and material one, so that it would have been natural to state it.<sup>35</sup>

Finally, *Blake* said,

[t]hree requirements must be satisfied before admission at trial of a prior inconsistent statement allegedly made by a witness: (1) The statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed; (2) if the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of impeachment must pertain to a matter of sufficient relevancy and the explicit requirements of Rule 613(b) of the West Virginia Rules of Evidence — notice and an opportunity to explain or deny — must be met; and, finally, (3) the jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact.<sup>36</sup>

---

<sup>33</sup> 478 S.E.2d 550 (W. Va. 1996).

<sup>34</sup> *Id.* at Syl. Pt. 2.

<sup>35</sup> *Id.* at Syl. Pt. 3.

<sup>36</sup> *Id.* at Syl. Pt. 1.

Justice Cleckley ruled in *State v. Crabtree*<sup>37</sup> that “[a] statement or conduct by a declarant that is inconsistent with his or her hearsay statement that is admitted pursuant to Rule 806 of the West Virginia Rules of Evidence is not subject to the traditional requirement of affording the declarant an opportunity to explain or deny the inconsistency.”<sup>38</sup>

#### H. *Extrajudicial Inculpatory Statements*

In *State v. Bradshaw*,<sup>39</sup> Justice Cleckley confronted the admission into evidence of extrajudicial inculpatory statements by a defendant. The opinion held that “[t]he burden is on the State to prove by a preponderance of the evidence that extrajudicial inculpatory statements were made voluntarily before the statements can be admitted into evidence against one charged with or suspected of the commission of a crime.”<sup>40</sup> The decision also stated “[w]hether an extrajudicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the totality of the circumstances.”<sup>41</sup>

#### I. *Communication Privileges*

Justice Cleckley thoroughly addressed spousal communication privileges in *State v. Bradshaw*.<sup>42</sup> The opinion noted at the outset that

West Virginia recognizes two marital privileges: the spousal testimony privilege and the marital confidence privilege. The two are distinct and must be analyzed separately. The spousal testimony privilege is much broader than the marital confidence privilege in that it bars all adverse testimony; whereas, the marital confidence privilege applies only to confidential communications and can be asserted even after the dissolution of the marriage. On the other hand, the spousal testimony privilege is narrower than the

---

<sup>37</sup> 482 S.E.2d 605 (W. Va. 1996).

<sup>38</sup> *Id.* at Syl. Pt. 2.

<sup>39</sup> 457 S.E.2d 456 (W. Va. 1995).

<sup>40</sup> *Id.* at Syl. Pt. 1.

<sup>41</sup> *Id.* at Syl. Pt. 2.

<sup>42</sup> *Id.*

marital confidence privilege in that it applies only to criminal proceedings and can be asserted only during the marriage.<sup>43</sup>

The decision illustrated that “[t]he marital confidence privilege applies only to communications that are confidential. Communications made in the presence of known third parties or intended to be disclosed to others are outside the privilege.”<sup>44</sup> Finally, Justice Cleckley held that

W. Va. Code, 57-3-3 (1923), absolutely prohibits the spouse of a criminal defendant from testifying against the defendant, except where the defendant is charged with a crime against the person or property of the other spouse or certain other relatives. Where properly invoked, this statute precludes all adverse testimony by a spouse, not merely disclosure of confidential communications. This spousal protection applies only to legally recognized marriages and lasts only as long as the legal marriage exists.<sup>45</sup>

The case of *State ex rel. Doe v. Troisi*<sup>46</sup> permitted Justice Cleckley to comment on the attorney-client communication privilege. The opinion held that

[a]s a general rule, the attorney-client privilege is adequate protection of client confidences even in the context of a grand jury proceeding. There is no need to quash a grand jury subpoena simply because it is issued to an attorney of an individual under investigation. Once properly invoked, the circuit court has discretion to decide on a question-by-question basis whether the privilege was properly asserted during the grand jury proceedings.<sup>47</sup>

The attorney-client privilege was again addressed in *State ex rel. U.S.*

---

<sup>43</sup> *Id.* at Syl. Pt. 9.

<sup>44</sup> *Id.* at Syl. Pt. 10.

<sup>45</sup> *Bradshaw*, 457 S.E.2d at 461 Syl. Pt. 11.

<sup>46</sup> 459 S.E.2d 139 (W. Va. 1995).

<sup>47</sup> *Id.* at Syl. Pt. 3.

*Fidelity & Guaranty Co. v. Canady*.<sup>48</sup> In that case the court held: “[a] party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney’s advice in issue.”<sup>49</sup> Justice Cleckley wrote that “[t]he burden of establishing the attorney-client privilege or the work product exception, in all their elements, always rests upon the person asserting it.”<sup>50</sup>

The decision in *U.S. Fidelity* held that “[u]nless obviously correct or unreviewably discretionary, rulings requiring attorneys to turn over documents that are presumably prepared for their clients’ information and future action are presumptively erroneous.”<sup>51</sup> The opinion also ruled that “[w]hen a circuit court’s discovery ruling with respect to privileged materials will result in the compelled disclosure of those materials, a hard and more stringent examination will be given on appeal to determine if the circuit court abused its discretion.”<sup>52</sup>

The attorney work product privilege was also addressed in *U.S. Fidelity*. Justice Cleckley took the opportunity in that opinion to clarify what person holds the privilege under the attorney work product privilege. Justice Cleckley opined that “[w]here the work product exception is asserted, a circuit court must consider that the protection stemming from this privilege belongs to the professional, rather than the client, and that efforts to obtain disclosure of opinion work product should be evaluated with particular care.”<sup>53</sup>

The priest-penitent privilege was outlined in *State v. Potter*.<sup>54</sup> Justice Cleckley wrote:

A communication will be privileged, in accordance with W. Va. Code, 57-3-9 (1992), if four tests are met: (1) the communication must be made to a clergyman; (2) the communication may be in the form of a confidential confession or a communication; (3) the confession or communication must be made to the clergyman in his professional capacity; and (4) the communication must have been

---

<sup>48</sup> 460 S.E.2d 677 (W. Va. 1995).

<sup>49</sup> *Id.* at Syl. Pt. 8.

<sup>50</sup> *Id.* at Syl. Pt. 4.

<sup>51</sup> *Id.* at Syl. Pt. 6.

<sup>52</sup> *Id.* at Syl. Pt. 5.

<sup>53</sup> *Id.* at Syl. Pt. 9.

<sup>54</sup> 478 S.E.2d 742 (W. Va. 1996).

made in the course of discipline enjoined by the rules of practice of the clergyman's denomination.<sup>55</sup>

*J. Demonstrative Evidence*

Admission of demonstrative evidence was commented upon in *State v. Bradshaw*.<sup>56</sup> In *Bradshaw*, the court ruled "[t]he admission of demonstrative evidence rests largely within the trial court's discretion, and an appellate court will not interfere unless the trial court has abused that discretion. More specifically, demonstrative evidence in the nature of witness reenactment is admissible if it affords a reasonable inference on a point in issue."<sup>57</sup>

*K. Admissibility Under Rule 804(b)(3)*

The case of *State v. Mason*<sup>58</sup> provided Justice Cleckley with an opportunity to delineate guidelines for admitting hearsay evidence under Rule 804(b)(3). The opinion held,

[t]o satisfy the admissibility requirements under Rule 804(b)(3) of the West Virginia Rules of Evidence, a trial court must determine: (a) The existence of each separate statement in the narrative; (b) whether each statement was against the penal interest of the declarant; (c) whether corroborating circumstances exist indicating the trustworthiness of the statement; and (d) whether the declarant is unavailable.<sup>59</sup>

*Mason* went further by holding,

[w]hen ruling upon the admission of a narrative under Rule 804(b)(3) of the West Virginia Rules of Evidence, a trial court must break the narrative down and determine the separate admissibility of each single declaration or remark. This exercise

---

<sup>55</sup> *Id.* at Syl. Pt. 3.

<sup>56</sup> 457 S.E.2d 456 (W. Va. 1995).

<sup>57</sup> *Id.* at Syl. Pt. 14.

<sup>58</sup> 460 S.E.2d 36 (W. Va. 1995).

<sup>59</sup> *Id.* at Syl. Pt. 8.

is a fact-intensive inquiry that requires careful examination of all the circumstances surrounding the criminal activity involved.<sup>60</sup>

*L. Admissibility under Rule 803*

The case of *State v. Phillips*<sup>61</sup> addressed several issues involving the hearsay exceptions contained in Rule 803. Regarding the present sense impression exception to Rule 803, Justice Cleckley wrote,

[i]t is within a trial court's discretion to admit an out-of-court statement under Rule 803(1), the present sense impression exception, of the West Virginia Rules of Evidence if: (1) The statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event giving rise to the statement was within a declarant's personal knowledge.<sup>62</sup>

The opinion illustrated that "[a]lthough a trial court may consider corroborating evidence in determining whether a statement meets the prerequisites of Rule 803(1) of the West Virginia Rules of Evidence, a separate showing of trustworthiness is not required for a statement to qualify under this hearsay exception."<sup>63</sup>

The decision in *Phillips* also discussed the state-of-mind exception under Rule 803. Justice Cleckley indicated that

[a]n extrajudicial statement offered for admission under the state-of-mind exception of Rule 803(3) of the West Virginia Rules of Evidence must also be tested under the relevancy requirements of Rule 401 and Rule 402 of the Rules of Evidence. If the declarant's state of mind is irrelevant to the resolution of the case, the statement must be excluded.<sup>64</sup>

---

<sup>60</sup> *Id.* at Syl. Pt. 7.

<sup>61</sup> 461 S.E.2d 75 (W. Va. 1995).

<sup>62</sup> *Id.* at Syl. Pt. 4.

<sup>63</sup> *Id.* at Syl. Pt. 5.

<sup>64</sup> *Id.* at Syl. Pt. 6.

*M. Curative Admissibility Rule*

Justice Cleckley addressed the curative admissibility rule in *State v. Guthrie*.<sup>65</sup> The opinion ruled that

[t]he 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.<sup>66</sup>

*N. Admitting Evidence of Insurance*

In *Reed v. Wimmer*,<sup>67</sup> Justice Cleckley created a narrow presumption of lack of undue prejudice in admitting evidence of insurance in a case. The opinion held,

[a]n insured is presumed to be protected from undue prejudice from the admission of evidence of insurance at trial if the following requirements are met: (1) the evidence of insurance was offered for a specific purpose other than to prove negligence or wrongful conduct; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice; and (4) the trial court delivered a limiting instruction advising the jury of the specific purpose(s) for which the evidence may be used.<sup>68</sup>

*Reed* also identified the issue of wrongful injection of insurance evidence

---

<sup>65</sup> 461 S.E.2d 163 (W. Va. 1995).

<sup>66</sup> *Id.* at Syl. Pt. 10.

<sup>67</sup> 465 S.E.2d 199 (W. Va. 1995).

<sup>68</sup> *Id.* at Syl. Pt. 2.

at a trial. The opinion ruled that

[w]here evidence of insurance is wrongfully injected at a trial, its prejudicial effect will be determined by applying the standard set out in Rule 103(a) of the West Virginia Rules of Evidence. In addition to the possibility that the jurors are already aware of the existence of insurance, the trial court should consider the relative strength of each of the parties case or the lack of it, whether the jury was urged by counsel or the witness to consider insurance in deciding the issue of negligence or damages, whether the injection of insurance was designed to prejudice the jury, whether the mention of insurance was in disregard of a previous order, and whether a curative instruction can effectively dissipate any resulting prejudice.<sup>69</sup>

O. *Scientific Evidence*

Admissibility of scientific evidence was addressed by Justice Cleckley in *Gentry v. Mangum*.<sup>70</sup> The following initial holding was made in the case:

The first and universal requirement for the admissibility of scientific evidence is that the evidence must be both “reliable” and “relevant.” Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Wilt v. Buracker*, the reliability requirement is met only by a finding by the trial court under Rule 104(a) of the West Virginia Rules of Evidence that the scientific or technical theory which is the basis for the test results is indeed “scientific, technical, or specialized knowledge.” The trial court’s determination regarding whether the *scientific* evidence is properly the subject of scientific, technical, or other specialized knowledge is a question of law that we review *de novo*. On the other hand, the relevancy requirement compels the trial judge to determine, under Rule 104(a), that the scientific evidence “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Appellate review of the trial court’s rulings under the relevancy requirement is under an

---

<sup>69</sup> *Id.* at Syl. Pt. 3.

<sup>70</sup> 466 S.E.2d 171 (W. Va. 1995).

abuse of discretion standard. *State v. Beard*.<sup>71</sup>

*Gentry* further ruled,

[w]hen scientific evidence is proffered, a circuit court in its “gatekeeper” role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Wilt v. Buracker* must engage in a two-part analysis in regard to the expert testimony. First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand.<sup>72</sup>

Justice Cleckley concluded in *Gentry* that

[t]he question of admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Wilt v. Buracker* only arises if it is first established that the testimony deals with “scientific knowledge.” “Scientific” implies a grounding in the methods and procedures of science while “knowledge” connotes more than subjective belief or unsupported speculation. In order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. It is the circuit court’s responsibility initially to determine whether the expert’s proposed testimony amounts to “scientific knowledge” and, in doing so, to analyze not what the experts say, but what basis they have for saying it.<sup>73</sup>

*P. Excluding Witnesses Under Rule 615*

The case of *State v. Omechinski*<sup>74</sup> gave Justice Cleckley room to expound upon the witness exclusion provision in Rule 615. It was said that “Rule 615 of the West Virginia Rules of Evidence makes the exclusion of witnesses a matter of right,

---

<sup>71</sup> *Id.* at Syl. Pt. 3 (citations omitted).

<sup>72</sup> *Id.* at Syl. Pt. 4 (citations omitted).

<sup>73</sup> *Id.* at Syl. Pt. 6 (citations omitted).

<sup>74</sup> 468 S.E.2d 173 (W. Va. 1996).

and the decision is no longer committed to the trial court's discretion.<sup>75</sup> Moreover, the opinion held that

[t]he purpose of Rule 615 of the West Virginia Rules of Evidence is to prevent the shaping of testimony by one witness to match that of another and to discourage fabrication and collusion. The rule applies to rebuttal witnesses as well. It is not significant that the rebuttal witness has or has not testified earlier in the case-in-chief.<sup>76</sup>

Justice Cleckley held in *Omechinski* that “[a] circumvention of Rule 615 of the West Virginia Rules of Evidence occurs where witnesses indirectly defeat its purpose by discussing with other witnesses who are subject to recall testimony they have given and events occurring in the courtroom.”<sup>77</sup> The opinion highlights the consequences of a trial court's failure to properly instruct excluded witnesses:

A failure to instruct the witnesses fully after Rule 615 of the West Virginia Rules of Evidence is invoked may cause reversal. When the Rule is invoked, the witnesses should be directed clearly that they must all leave the courtroom, with the exceptions the rule permits, and that they are not to discuss the case or what their testimony has been or will be or what occurs in the courtroom with anyone other than counsel for either side.<sup>78</sup>

It was also added that “[i]n criminal cases, when a trial court fails to comply with Rule 615 of the West Virginia Rules of Evidence, prejudice is presumed and reversal is required unless the prosecution proves by a preponderance of the evidence that the error was harmless.”<sup>79</sup>

Justice Cleckley added a caveat to a trial court's responsibility to instruct excluded witnesses:

The rights granted under Rule 615 of the West Virginia Rules of

---

<sup>75</sup> *Id.* at Syl. Pt. 1.

<sup>76</sup> *Id.* at Syl. Pt. 2.

<sup>77</sup> *Id.* at Syl. Pt. 3.

<sup>78</sup> *Id.* at Syl. Pt. 4.

<sup>79</sup> *Id.* at Syl. Pt. 6.

Evidence are not self-executing. In the absence of a specific request by the complaining party, a defendant may not claim error as a result of the failure of the trial court to instruct witnesses as to the impact of a sequestration order.<sup>80</sup>

The court ultimately held that

[i]n making a ruling whether to exclude a rebuttal witness's testimony under Rule 615 of the West Virginia Rules of Evidence, a trial court should consider several factors including: (1) how critical the testimony in question is--that is, whether it involved controverted and material facts; (2) whether the information ordinarily is subject to tailoring such that cross-examination or other evidence could bring to light any deficiencies; (3) to what extent the testimony of the witness is likely to encompass the same issues as other witnesses; (4) in what order the witness would testify; and (5) if any potential for bias exists which may motivate the witness to tailor his or her testimony.<sup>81</sup>

*Q. Witness Competency and the Dead Man's Statute*

In *Meadows v. Meadows*,<sup>82</sup> Justice Cleckley took the opportunity to limit the scope of the state's Dead Man's Statute on the testimony of an interested party. The opinion held that

[w]here the competence of the maker of a testamentary document is put in issue, the West Virginia Dead Man's Statute does not bar a party or interested witness from testifying as to the deceased's appearance and demeanor and the witness may give an opinion as to the deceased's competency if the other prerequisites of the West Virginia Rules of Evidence are met. Thus, this Court's prior decisions of *Kuhn v. Shreeve* and *Freeman v. Freeman* are overruled to the extent they are inconsistent with this opinion.<sup>83</sup>

---

<sup>80</sup> *Id.* at Syl. Pt. 5.

<sup>81</sup> *Id.* at Syl. Pt. 7.

<sup>82</sup> 468 S.E.2d 309 (W. Va. 1996).

<sup>83</sup> *Id.* at Syl. Pt. 1 (citations omitted).

*Meadows* further held, “[w]hen communications between a deceased and a party or interested witness are not offered for the truth of the matter asserted but are merely the basis for an opinion regarding the mental competency of the deceased, the party or interested witness may use these communications to help explain the opinion.”<sup>84</sup>

#### R. *Evidence of a Witness’ Religion*

In *State v. Potter*,<sup>85</sup> the court noted that “[i]f evidence of religion is offered for purposes other than impairing or enhancing a witness’s credibility, Rule 610 of the West Virginia Rules of Evidence does not require its exclusion.”<sup>86</sup> Justice Cleckley, in *Potter*, fashioned a test for determining whether evidence of a witness’ religious belief should be admitted:

For religious belief or affiliation evidence to be admissible, the trial court must make the following findings: (1) the evidence of religion is offered for a specific purpose other than to show generally that the witness’s credibility is impaired or enhanced; (2) the evidence is relevant for that specific purpose; (3) the trial court makes an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice; and (4) the trial court, if requested, delivers an effective limiting instruction advising the jury of the specific purpose(s) for which the evidence may be used. If these elements are met, it may be presumed that the complaining party was protected from undue prejudice.<sup>87</sup>

#### S. *Nonresponsive Answer*

In *State v. Crabtree*,<sup>88</sup> Justice Cleckley provided guidelines for addressing nonresponsive answers by a witness:

---

<sup>84</sup> *Id.* at Syl. Pt. 2.

<sup>85</sup> 478 S.E.2d 742 (W. Va. 1996).

<sup>86</sup> *Id.* at Syl. Pt. 4.

<sup>87</sup> *Id.* at Syl. Pt. 5.

<sup>88</sup> 482 S.E.2d 605 (W. Va. 1996).

A witness should give responsive answers to questions of counsel, and answers that are not responsive may be stricken on motion of the examining party especially if the unresponsive answer contains inadmissible evidence. Unresponsive answers, or those that are responsive but broader than the question, should not be viewed as the responsibility of the questioner. On the other hand, a responsive answer, one that is reasonably within the scope of the question, even though prejudicial, should not be stricken as unresponsive.<sup>89</sup>

### III. CRIMINAL PROCEDURE

#### A. *Interrogating a Suspect*

The decision in *State v. Farley*<sup>90</sup> confronted the issue of effectively invoking *Miranda* rights. Justice Cleckley held that “[t]o assert the *Miranda* right to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question.”<sup>91</sup> *Farley* creates a new test for trial courts to use in determining whether a confession is valid. In overruling precedent, Justice Cleckley wrote in *Farley* that

[r]epresentations or promises made to a defendant by one in authority do not necessarily invalidate a subsequent confession. In determining the voluntariness of a confession, the trial court must assess the totality of all the surrounding circumstances. No one factor is determinative. To the extent that *State v. Parsons* is inconsistent with this standard, it is overruled.<sup>92</sup>

In *State v. Bradshaw*,<sup>93</sup> Justice Cleckley further refined the focus trial courts must have in evaluating a confession. *Bradshaw* held that “[w]hen evaluating the voluntariness of a confession, a determination must be made as to whether the

---

<sup>89</sup> *Id.* at Syl. Pt. 4.

<sup>90</sup> 452 S.E.2d 50 (W. Va. 1994).

<sup>91</sup> *Id.* at Syl. Pt. 5.

<sup>92</sup> *Id.* at Syl. Pt. 7 (citation omitted).

<sup>93</sup> 457 S.E.2d 456 (W. Va. 1995).