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# Juries

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# JURIES

## I. VOIR DIRE

*State v. Meadows*, 304 S.E.2d 831 (W. Va. 1983).
*State v. Simmons*, 301 S.E.2d 812 (W. Va. 1983).
*State v. White*, 301 S.E.2d 615 (W. Va. 1983).
*State v. Toney*, 301 S.E.2d 815 (W. Va. 1983).

In upholding defendants' rights to a trial by an impartial, unbiased jury through effective *voir dire*, the West Virginia Supreme Court of Appeals extended its line of cases granting liberal *voir dire* privileges to include a right to examine a prospective juror out of the presence of other jurors in at least some instances. The court also examined the potential prejudice to the defendant that may exist when the prospective juror admits to having a personal relationship with a law enforcement or prosecutorial agent.

The West Virginia Supreme Court of Appeals has, in a trio of decisions, examined the common-law rule requiring the disqualification of potential jurors for cause based upon their prejudicial relationships with prosecutorial or law enforcement agencies. The court held that it was reversible error for the trial court to deny a defendant's motion to strike a juror for cause when *voir dire* revealed that this juror was the sister of a member of an agency investigating the case.[1] The court also held, however, that the trial court did not err in denying a defendant's motion to strike for cause potential jurors with more distant relationships with prosecutorial or law enforcement agencies. These relationships include a "most casual" social relationship with a testifying officer,[2] and two instances of employment in criminal justice agencies terminating ten years before trial.[3]

The right to an impartial, objective jury in a criminal trial is a fundamental right guaranteed both by the sixth and fourteenth amendments of the United States Constitution and article III, section 14 of the West Virginia Constitution.[4] In order to assure impartiality and objectivity, common-law rules relating to challenges for cause have been developed, and such rules prevail in the state of West Virginia.[5] These rules include prima facie dis-

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[1] State v. Simmons, 301 S.E.2d 812 (W. Va. 1983).

[2] State v. White, 301 S.E.2d 615 (W. Va. 1983).

[3] *Id. See* State v. Meadows, 304 S.E.2d 831 (W. Va. 1983).

[4] State v. Peacher, 280 S.E.2d 559 (W. Va. 1981). The United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." (U.S. CONST. amend. V.) and "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV. The West Virginia Constitution provides: "Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay. . . ." W. VA. CONST. art. III, § 14.

[5] It is well-settled in West Virginia that the statutory provisions of W. VA. CODE § 52-1-2 (1981) listing statutory exemptions and disqualifications do not remove the principal challenges of

qualification based on kinship with either party, an interest in the case, and membership in the same society or corporation with either party.[6]

In 1973 the court expanded these common-law doctrines to include employment by the state as a potential reason for disqualification.[7] This effectively overruled the common law, which had held that public officers are not incompetent to serve on juries solely because of their office.[8] While refusing to hold that all employees of state government are prima facie disqualified to sit on a jury in a criminal case,[9] the court found:

> When the defendant can demonstrate even a tenuous relationship between a prospective juror and any prosecutorial arm of state government, defendant's challenge for cause should be sustained by the court. A defendant is entitled to a panel of twenty jurors who are free from exception, and if proper objection is raised at the time of impaneling the jury, it is reversible error for the court to fail to discharge a juror who is obviously objectionable. In any case where the trial court is in doubt, the doubt must be resolved in favor of the defendant's challenge, as jurors who have no relation whatsoever to the state are readily available.[10]

The broad holding in *West* was followed by the subsequent decision of *State v. Pratt*,[11] holding that friends and relatives of employees are also questionable.[12]

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jurors under common law. *See* Watkins v. Baltimore & O. R.R., 130 W. Va. 268, 43 S.E.2d 219 (1947).

[6] State v. Riley, 151 W. Va. 364, 151 S.E.2d 308 (1966). The full list of causes includes:

> (1) Kinship to either party within the ninth degree; (2) was an arbitrator on either side; (3) that he has an interest in the cause; (4) that there is an action pending between him and the party; (5) that he has taken money for his verdict; (6) that he was formerly a juror in the same case; (7) that he is the party's master, servant, counsellor, steward, or attorney, or of the same cause or society or corporation with him; and causes of the same class or founded upon the same reason should be included.

*Id.*

[7] State v. West, 157 W. Va. 209, 200 S.E.2d 859 (1973).

[8] *See, e.g.*, Parsons v. State, 25 So.2d 44 (Ala. Ct. App. 1946) (deputy sheriff); Lugo v. State, 136 Tex. Crim. 226, 124 S.W.2d 344 (1946) (peace officer); State v. Lewis, 50 Nev. 212, 255 P. 1002 (1927) (special, privately paid deputy); Corley v. State, 162 Ark. 178, 257 S.W. 750 (1924) (mayor). The West Virginia rule was based upon the theory that any employee of the state is a "servant of one of the parties" and therefore disqualified to sit on the jury. State v. West, 157 W. Va. 209, 218-19, 200 S.E.2d 859, 865 (1973).

[9] It appears to this Court that there would be no reason to disqualify an elevator operator in the State Capitol Building from sitting on a criminal jury in Kanawha County, or to disqualify a State Road employee merely because he is an hourly employee of the State.

State v. West, 157 W. Va. at 219-20, 200 S.E.2d at 866.

[10] *Id.*

[11] 244 S.E.2d 227 (W. Va. 1978).

[12] In *Pratt*, four jurors disclosed that they were related by blood or marriage to, or a close friend of, a law enforcement officer. The trial court refused to submit individual questions to these jurors to probe these relationships and refused to excuse the jurors. On appeal, the West Virginia

Building upon this foundation, the court in *State v. Simmons*[13] held that it is reversible error for the trial court to deny defendant's motion to strike a juror for cause when the juror is the sister of a member of the agency investigating the case.[14] William M. Simmons was on trial for possession of marijuana with intent to sell.[15] During *voir dire* of the panel, prospective juror Debra Johnson disclosed that her brother was a member of the K-9 Corps at Huttonville Correctional Center.[16] At the bench, defense counsel informed the court that the officers who searched Simmons' residence had been assisted by members of the canine corps, although Johnson's brother had not been personally involved.[17] Defense counsel moved to strike Johnson for cause, but the court denied the motion.[18] Simmons was convicted for possession of marijuana with intent to deliver, and appealed on the grounds that the court's failure to strike Johnson for cause had prejudiced him, as he was required to utilize one of his six peremptory strikes to eliminate her from the jury panel.[19]

The supreme court of appeals agreed, holding that the trial court committed reversible error by overruling the challenge for cause to juror Debra Johnson. This error prejudiced the defendant's right to a fair and impartial jury. The court noted that even though Johnson's brother was not involved in this case, the canine corps took an active role in the investigation. One member of the corps was a key witness at trial.[20]

The court, however, found no reversible error in two other cases involving *voir dire*. In *State v. Meadows*,[21] the court found no "tenuous relationship"[22] between the prosecutor and a juror who was found to have been a prison guard ten years before the trial.[23]

David Meadows was accused of first degree murder.[24] During *voir dire*, it was discovered that a juror had been employed as a Virginia prison guard ten years prior to his jury duty. After questioning by the defense counsel, the trial court ascertained that the juror's former employment was not pre-

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Supreme Court of Appeals held it was reversible error for the trial court to refuse to present the questions to the jurors, or, alternatively, to refuse to excuse them. *Id.* at 232.

[13] 301 S.E.2d 812 (W. Va. 1983).

[14] *Id.* at 813.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] 304 S.E.2d 831 (W. Va. 1983).

[22] *See supra* note 10 and accompanying text.

[23] 304 S.E.2d at 840.

[24] *Id.*

judicial to the defendent.[25] Meadows was subsequently convicted of first degree murder and appealed, relying on *West*, and claiming injury as a result of the trial court's failure to excuse the juror for cause.[26] On appeal, the West Virginia Supreme Court of Appeals affirmed the trial court's ruling, and found that:

> the fact that the juror had been employed as a guard in an out-of-state prison ten years prior to his jury duty did not constitute such a tenuous relationship that requires reversal for failure to discharge him for cause. Thus, . . . it was not reversible error to permit him to be a juror where no prejudice was shown.[27]

Similarly, in *State v. White*,[28] the court found no reversible error where two veniremen had not been excused for cause. Janie B. White was accused of first-degree murder.[29] During *voir dire*, it was discovered that venireman Redith Blankenship socially knew Trooper Marty Allen, who had taken part in the investigation and would be a witness for the prosecution at trial.[30] It was also discovered on *voir dire* that venireman Robert Marcum had been a deputy sheriff ten years earlier, and knew both Trooper Allen and Sergeant C. R. Clinger (also an investigator in the case) from his previous employment.[31] Both venireman Marcum and venireman Blankenship testified that their relationships with the officers were not such that they would be prejudiced.[32] White was convicted of first degree murder, and appealed, stating the two jurors should have been excused for cause.[33]

In finding that the trial court did not commit reversible error, the court did not rely on the *West* line of decisions. Instead, it followed the reasoning of *State v. Kilpatrick*[34] and *State v. Neider*[35] regarding the relationship of a prospective juror to any witness. In these cases, the court had held that "[t]he true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court."[36]

Finding that Blankenship's relationship to Trooper Allen was "only the

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[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] 301 S.E.2d 615 (W. Va. 1983).
[29] *Id.* at 616.
[30] *Id.* at 618.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] 210 S.E.2d 480 (W. Va. 1974).
[35] 295 S.E.2d 902 (W. Va. 1982).
[36] State v. Kilpatrick, 210 S.E.2d at 483 (quoting State v. Wilson, 157 W. Va. 1036, 1043, 200 S.E.2d 859, 865-66 (1974)).

most casual acquaintance,"[37] and that employment in the sheriff's office ten years earlier was insufficient to support a finding of prejudice,[38] the court held that it could not "conclude from the record that the veniremen to whom defense counsel objected and who were permitted to remain on the panel were unable to render a verdict solely on the evidence adduced during the trial."[39]

Taken together, this line of cases seems to form a continuum along which the prejudicial nature of the relationship between a prospective juror and a member of a prosecutorial or law enforcement agency might be measured. On one end are relationships so close that the relationship meets the "obviously prejudicial" standard of *West*. These relationships include employment as a law enforcement officer,[40] relationship by blood or marriage to a state official,[41] and close friendship with a law enforcement officer.[42] At this end of the continuum, it is reversible error to overrule defendant's challenge for cause.[43]

At the other end of the continuum, relationships exist which are insufficient to support the "tenuous relationship" standard of *West*, unless prejudice is shown. Such relationships include employment in an out-of-state prison ten years prior to jury service,[44] employment as sheriff ten years prior to jury service,[45] and a casual acquaintance with a testifying law enforcement officer.[46] It will not be reversible error to fail to disqualify these jurors on the basis of relationship alone; however, prospective jurors at this end of the continuum may be disqualified if prejudice is shown.[47]

To the extent that factual situations fall between these two end points, the supreme court has indicated that it will require the trial court to permit counsel for the defense to question the prospective juror in order to determine whether such prejudice, in fact, exists. It may be reversible error for the trial judge to forbid the opportunity for such questioning.[48] If, after questioning, any doubt remains as to whether the juror is prejudiced, the juror should be excused.[49]

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[37] 301 S.E.2d at 618.

[38] *Id.*

[39] *Id.*

[40] State v. Dye, 280 S.E.2d 323 (W. Va. 1981).

[41] State v. Simmons, 301 S.E.2d 812 (juror was the sister of a correctional officer); State v. Payne, 280 S.E.2d 72 (W. Va. 1981) (juror was the wife of the Democratic nominee for sheriff).

[42] State v. Payne, 280 S.E.2d 72 (W. Va. 1981).

[43] State v. West, 157 W. Va. at 219, 200 S.E.2d at 866.

[44] State v. Meadows, 304 S.E.2d 831 (W. Va. 1983).

[45] State v. White, 301 S.E.2d 615 (W. Va. 1983).

[46] *Id.*

[47] State v. White, 301 S.E.2d at 841. It is conceivable that there is a relationship so slight that no question of prejudice would be raised at all.

[48] State v. Pratt, 244 S.E.2d at 859.

[49] State v. West, 157 W. Va. at 270, 200 S.E.2d at 866.

In *State v. Toney*[50] the court held that a juror is not disqualified solely by reason of having served on a prior jury which had tried another defendant on a similar charge with similar evidence and the same witnesses.[51] However, the trial court cannot limit the questioning of the jurors so as to prohibit the determination of whether any prejudice or bias had been formed from the prior trial.[52] The court further indicated that individual questioning out of the presence of the other prospective jurors may be necessary in some instances.[53]

Alberta Toney was charged with delivery of a controlled substance, a charge based in large part on testimony by Trooper D.E. Difalco that he had purchased Methaqualone from Toney, who was working undercover.[54] Approximately one month before appellant Toney's trial, Difalco testified in the trial of Marvin Toppings, who was charged with delivering L.S.D. to Difalco the evening of the Toney transaction.[55] During the Toppings trial, Difalco testified about his purchase from appellant Toney, as well as about his purchases from Toppings and others.[56] Toppings was subsequently convicted.[57]

Of the 29 prospective jurors who were called for appellant Toney's trial, ten had served on the Toppings jury.[58] After 20 prospective jurors were seated in the jury box, defense counsel moved to strike for cause any members of the panel who had served on the Toppings jury, noting that Difalco had testified during the previous trial concerning the same purchases for which the appellant was now being tried.[59] Defense counsel believed nine of the twenty had served on the Toppings jury. The judge replied that if he struck all nine, the Clerk would have to call for additional jurors to be brought to the court.[60] The judge reserved his ruling until the conclusion of *voir dire*.[61] Defense counsel then requested that the judge poll the jurors individually about possibility of influence from the prior trial.[62] The judge again reserved his ruling.[63]

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[50] 301 S.E.2d 815 (W. Va. 1983).
[51] *Id.* at 818.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 816.
[55] *Id.*
[56] *Id.* The testimony was as follows:
"Q You say you went to the Brotherhood club?
"A Yes, sir.
"Q Who did you purchase from there?
"A I bought four qualudes off Alberta Toney. I believe it was four. Two or four . . . ."
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*

Upon questioning by the court, nine of the prospective jurors said they had served on the Toppings jury.[64] The judge told those nine to retire to the jury room and discuss whether or not their prior service would influence their decision in this case.[65] When they returned to the courtroom the judge questioned each juror.[66] All replied that they were not influenced.[67] At this time, the judge questioned the remaining jurors and discovered that one of them had also been a member of the Toppings jury.[68]

In chambers, defense counsel said that he would have preferred that the court poll the jurors individually in chambers, and renewed his motion to strike them for cause.[69] The judge denied the motion, stating that he believed the jurors' statements under oath that they would not be influenced.[70] Two of the nine challenged jurors were excused on peremptory strikes, and seven served at appellant's trial.[71]

The West Virginia Supreme Court of Appeals found that the judge abused his discretion by refusing to permit counsel to question the challenged jurors individually out of the presence of the other jurors. This questioning should have been allowed to determine to what extent (if any) their previous exposure to Difalco's testimony might have prejudiced them.[72] The court distinguished the holding of *State v. Carduff*,[73] in which it had upheld the seating of eight jurors in similar circumstances.[74] The *Carduff* record showed

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[64] *Id.*

[65] *Id.* In sending the jurors to discuss the case, the judge said in part:

I'm concerned that this case might influence you in some degree in this case and it shouldn't, but I don't know whether you can completely separate that case from this case or not. I'm going to ask you to do some real honest soul searching. In fact, I'm going to take a recess for a couple of minutes and ask you to go back to the jury room and discuss it among the nine, if you would let that influence you in the slightest degree and I mean the very slightest degree, because if it would in all honesty ladies and gentlemen you should not sit on this case.

*Id.* at 816 n.3.

[66] *Id.* at 817. The questioning was conducted as follows:

"Court: Sir, would that possibly, in any degree whatsoever, influence you or might it possibly influence you in this case?

"Juror: Absolutely not, sir.

"Court: You are absolutely positive?

"Juror: Yes, absolutely, sir. The record states that 'the remaining eight were all asked the same question and all gave the same answer.' "

*Id.*

[67] *Id.* at 816.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 816-17.

[72] *Id.* at 818.

[73] 142 W. Va. 18, 93 S.E.2d 502 (1956).

[74] The facts in *Carduff* show that the defendant was charged with selling liquor without a

the trial court's decision was based on a thorough and careful examination of the jurors on *voir dire*.[75] Contrasting that careful questioning to the perfunctory, unreasonably restricted *voir dire* in this case, the court awarded Toney a new trial.[76]

The court in *Toney* relied upon earlier similar cases which had held that:

> [a juror] is not disqualified to serve as [a juror in a criminal case] merely by reason of his service as a juror or his presence as a spectator at a prior trial of a different defendant charged with a different or similar offense, although the evidence is similar and the witnesses in behalf of the prosecution are the same in each case.[77]

The test in such cases is whether the juror can "fairly and impartially act and render a just verdict upon the evidence adduced at trial."[78] However, the court has indicated that this "fair and impartial" standard may be violated by showing even possible prejudice on the part of a juror.

In *State v. Pratt*[79] the court required that jurors who "indicate possible prejudice should be excused, or should be questioned individually either by the court or counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse."[80] Thus, while under *Carduff* the juror's service in a prior trial does not automatically disqualify him from sitting on a jury in a similar case, the prior service does, under *Pratt*, indicate that possible prejudice exists.[81] Individual questioning of the potential jurors is therefore required.[82] The court went even further, however, and noted that the questioning should be done out of the presence of the other jurors.[83]

The *Toney* decision comes seven years after the court's decision in *State v. Pendry*,[84] in which the court clarified that the trial judge had the right to examine a prospective juror out of the presence of other jurors, if he believed

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license to two undercover state policemen during an evening in which the officers also purchased illegal liquor at other establishments. Eight of the twenty prospective jurors called in Carduff's trial had also served as jurors in two earlier trials in the same term of court, in which two other defendants were convicted of illegal liquor sales during the same investigation. The sale by Carduff was testified to by officers in each of those previous trials.

[75] *Carduff*, 142 W. Va. at 25, 93 S.E.2d at 516.

[76] 301 S.E.2d at 818.

[77] State v. Riley, 151 W. Va. 364, 385, 151 S.E.2d 308, 321 (1966) (quoting State v. Carduff, 142 W. Va. 18, 93 S.E.2d 502 (1956)).

[78] *Carduff*, 142 W. Va. 18, 93 S.E.2d 502 (1956) (syllabus point 3 by the court).

[79] 244 S.E.2d 227 (W. Va. 1978).

[80] *Id.* at 228.

[81] 301 S.E.2d at 818.

[82] *Id.*

[83] *Id.*

[84] 227 S.E.2d 210 (W. Va. 1976).

that the impartiality of the juror could be examined better in private.[85] However, the court in *Pendry* did not find the refusal to permit such questioning sufficient grounds for reversal.[86]

Because the court did not mention *Pendry* in its opinion, it is unclear whether the court has entirely abandoned that decision. The line of cases extending from *Pendry* (1976) to *Pratt* (1978) to *Peacher* (1981) indicates the court's increased willingness to find reversible error in limiting the scope of *voir dire*. It is clear that failure to permit individual questioning of a prospective juror apart from other jurors when some reason for suspecting prejudice exists may now be another impermissible restriction in at least some instances.

## II. JURY INSTRUCTIONS

*State v. Dameron*, 304 S.E.2d 339 (W. Va. 1983).
*State v. Clark*, 297 S.E.2d 849 (W. Va. 1982).
*State v. Thayer*, 305 S.E.2d 313 (W. Va. 1983).
*State v. Mullins*, 301 S.E.2d 173 (W. Va. 1983).

In its examination of jury instructions during the survey period, the West Virginia Supreme Court of Appeals suggested that the standard for judging prejudicial language in instructions may be the same as that used in judging prejudicial language in closing arguments. In other cases, the court removed all doubt as to the applicability of the 1978 rule shifting the burden of proof in self-defense cases.

In *State v. Dameron*,[87] the supreme court of appeals examined the use of indirectly prejudicial language in jury instructions against the standards for the use of such language in closing arguments. Appellant Dameron was found not to have been prejudiced by a jury instruction mentioning the recognized practice of "police infiltration of drug operations" in his case concerning a single drug transaction.[88]

Darrell Dameron was charged with being an accessory before the fact to the delivery of marijuana, a charge based on police officer testimony about

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[85] The court in *Pendry* gave some indication of when it felt this examination might be appropriate: "[S]ome inquiries may call for a juror to disclose information which might prove embarrassing if required to be given in open court. Also, information which may be revealed may serve to taint an entire panel if given in the presence of the entire panel." *Id.* at 217.

[86] In *Pendry*, four members of the jury admitted to knowing various members of the decedant's family. The trial judge refused to permit the defense counsel the opportunity to question each member in chambers or away from the other members of the jury, and instead directed a general question to the panel as a whole. The court found this "unobjectionable," although not so desirable as a more thorough method. *Id.* at 215.

[87] 304 S.E.2d 339 (W. Va. 1983).

[88] *Id.* at 342.

his participation in a sale of the drug to an undercover agent for the West Virginia Department of Public Safety.[89] At the close of the trial, the State's Instruction No. B was presented:

> The court further instructs the jury that in drug related offenses the infiltration of drug operations and limited participation in their unlawful practices is a recognized and permissible means of detection and apprehension.[90]

Dameron was convicted, and appealed objecting that the quoted instruction was both (1) irrelevant to the issues adduced at trial, and (2) prejudicial because it portrayed him as a part of a large scale drug ring instead of a participant in a single drug transaction.[91]

The supreme court found no merit in either objection. The instruction was relevant to the issues because the State was entitled to an instruction explaining a police officer's role in a drug transaction.[92] The court further concluded that although the language of the instruction would tend to support the trooper's credibility as a witness, it did not give undue weight to the officer's testimony, which would be erroneous under the standards of *State v. Hamrick*.[93]

In looking to the issue of prejudice due to the inflammatory language of the instruction, the court relied on two cases dealing with inflammatory language in closing argument. The first, *Peck v. Bez*,[94] had found language clearly inflamatory when it was of the nature of a personal attack based on the party's alleged intoxication and religious beliefs.[95] The second, *State v. Dunn*,[96] had found language similar to that used in this case not to be pre-

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[89] *Id.* at 340.

[90] *Id.* at 341-42.

[91] *Id.* at 342.

[92] *Id.*

[93] *Id.* State v. Hamrick, 236 S.E.2d 247 (W. Va. 1977). In *Hamrick*, the court instructed the jury "[T]he duties of [the State Police] require them to arrest persons charged with the violation of any Law of this State and to investigate such charges by interviewing witnesses as well as the persons charged with the commission of said crime and *that such acts on their part should not be attacked in Court unless it appears by the evidence that they have improperly performed said duties*." (emphasis by the court) The court found this to be obviously erroneous because it directed the jury to give extra weight to the officer's testimony. *Id.* at 248. *See also* Farrell, *Communication in the Courtroom: Jury Instructions*, 85 W. VA. L. REV. 5, 55 (1982) (discussion of undue emphasis) (hereinafter cited as Farrell).

[94] 129 W. Va. 247, 40 S.E.2d 1 (1946).

[95] "[D]efendant's counsel were persistent in their efforts to besmirch plaintiff's character. Such counsel sought to show, without any justification, that plaintiff was accustomed to the use of intoxicating liquors to excess . . . . Again in this closing argument, as in the examination of witnesses, counsel compared plaintiff's nativity with that of the defendant and by innuendo, if not direct expression, stressed and emphasized defendant's religion [Mohammedan]." *Id.* at 262, 40 S.E.2d at 10.

[96] 246 S.E.2d 245 (W. Va. 1978).

judicial.[97] In Dunn's trial for possession of a controlled substance, the prosecutor referred to the State's chief witness as follows: "He went undercover at the behest of the Bureau of Police to attempt to make some penetration of the drug culture existing in Ohio County, West Virginia."[98] Dunn appealed, stating that the language was calculated to inflame the jury by identifying him with the drug culture.[99] The West Virginia Supreme Court of Appeals held that it was not a personal attack and did not mandate reversal.[100]

The court concluded that appellant Dameron was not prejudiced by following the same reasoning as in *Dunn*. "The instruction did not say that the appellant was a member of a 'drug operation' nor is the instruction a personal attack against the appellant's character.... We therefore conclude that there was no prejudice to the appellant from the giving of this instruction...."[101] The court, however, indicated no precise standard by which potentially prejudicial language in jury instructions is to be measured. By using *Dunn* as an example, the court suggests that the appropriate standard is that used in *Dunn* for closing arguments: "[R]eversible error can occur in closing arguments when a prosecutor directs personal attacks toward the defendant in a manner calculated to prejudice and inflame the passions of the jurors."[102]

The instruction in *Dameron* is more benign that that in *Dunn*. The comment in *Dunn* mentions a specific officer going into a specific area to investigate a drug culture. The instruction in *Dameron*, however, merely advises jurors that officers (generally) in investigating drug operations (generally) have been known to use this technique. In an era where widespread questioning of police officers' methods exists, such an instruction may be necessary to overcome the jurors' distrust of the officer's techniques. The court's result in this case seems appropriate. The court should, however, beware of adopting a rule appropriate for the expansive, partisan language of closing argument for the more circumspect, neutral language of jury instructions.

Questions relating to the burden of proof in self-defense cases have been answered in several cases during the survey period. The court has clarified that once there is evidence to raise the question of self-defense, a self-defense instruction must be given.[103] It also reiterated that once the defendant has met the threshold standard of "sufficient evidence," the burden shifts to the state to show that the killing was not done in self-defense.[104] In a second case,

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[97] *Id.* at 249.
[98] *Id.* at 248.
[99] *Id.* at 249.
[100] *Id.*
[101] 304 S.E.2d at 342.
[102] 246 S.E.2d at 249 (quoting State v. Lewis, 133 W. Va. 584, 57 S.E.2d 513 (1949)).
[103] State v. Clark, 297 S.E.2d 849 (W. Va. 1983).
[104] *Id.*

giving instructions both correctly and incorrectly stating the rule on this point were found to be confusing and therefore reversible error.[105] Failing to distinctly object to a self-defense instruction was found not to preserve the grounds for appeal,[106] and failing to offer correct instructions on the burden of proof for self-defense was found not to constitute ineffective assistance of counsel.[107]

In *State v. Clark*,[108] the court examined the evidentiary predicate[109] for the self-defense instruction. Appellant Clark was charged with the shooting death of John Wood. Wood went to appellant's trailer early in the morning after having visited one of his painting crews at a construction site.[110] The State alleged that Clark had lured Wood to her trailer, argued with him over her suspicions that he was seeing another woman, and shot him as he sat in a chair.[111] Clark contended that Wood answered the phone at her trailer, was angered when no one responded, accused her of seeing another man, struck her, and bruised her face. Clark then said she walked into the bedroom, returned with the pistol, and shot Wood after a subsequent confrontation.[112] No one was present at the shooting other than the appellant and the victim.[113]

The State contended that the appellant did not introduce sufficient evidence to justify the giving of a self-defense instruction.[114] On appeal, the supreme court found that there was a question of fact to be decided concerning the time when appellant suffered her injury.[115] Therefore, the question of self-defense was a question to be decided by the jury, and a self-defense instruction was proper.[116]

Clark also claimed that an incorrect instruction was given. The defense offered verbatim a self-defense instruction approved by the West Virginia court in *State v. Kirtley*,[117] holding that once there is "sufficient evidence in

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[105] State v. Thayer, 305 S.E.2d 313 (W. Va. 1983).

[106] State v. Mullins, 301 S.E.2d 106 (W. Va. 1983).

[107] *Id.*

[108] 297 S.E.2d 849 (W. Va. 1983).

[109] "Evidentiary predicate is a coined phrase which describes the quantum of evidence necessary to authorize a jury instruction." Farrell, *supra* n.93 at 82.

[110] 297 S.E.2d at 850.

[111] *Id.* at 851.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] 252 S.E.2d 374 (W. Va. 1978). While the supreme court did not set forth its own instruction, it cited with favor the following federal practice rule in its entirety:

> If the defendant was not the aggressor and had reasonable grounds to believe and actually did believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant, he had

the case to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense."[118] The trial court believed the instruction to be an incorrect statement of the law, and instead gave an instruction which paralleled the instruction found in *Kirtley* to be incorrect.[119] The incorrect instruction placed the burden of proof on the defendant under a preponderance of the evidence standard, and did not mention the State's burden of proof once the defendant had met the "sufficient evidence" threshold.[120] The incorrect instruction was held to be reversible error, and the case was remanded for a new trial.[121]

*State v. Thayer*[122] posed a slightly different question. Thayer had been convicted of the voluntary manslaughter of David Young during an argument growing out of Thayer's speeding past the establishment where Young was employed as bouncer.[123] Young had apparently tried to enter Thayer's car, which frightened Thayer and caused him to shoot Young.[124]

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the right to employ deadly force in order to defend himself. By "deadly force" is meant force which is likely to cause death or serious bodily harm.

In order for the defendant to have been justified in the use of deadly force in self-defense, he must not have provoked the assault on him or have been the aggressor. Mere words, without more, do not constitute provocation or aggression.

The circumstances under which he acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the reasonable belief that the other person was then about to kill him or to do him serious bodily harm. In addition, the defendant must have actually believed that he was in imminent danger of death or serious bodily harm and that deadly force must be used to repel it.

If evidence of self-defense is present, the Government must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the government has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty. In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.

*Id.* at 831 (quoting E. DEVITT AND C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTION MANUAL § 41.19 (3d ed. 1977)).

[118] 297 S.E.2d at 851 (quoting State v. Kirtley, 252 S.E.2d at 375).

[119] 297 S.E.2d at 852. The instruction given in *Kirtley* was as follows:

The Court instructs the jury that if they believe from the evidence in the case that the defendant stabbed and killed David Lee Hill, and that he, the said defendant, relies upon self-defense to excuse him from such an act, the burden of showing such excuse is on the defendant, and to avail himself of such defense he must prove to the satisfaction of the jury by preponderance of the evidence . . . .

*Id.* at 852 (quoting State v. Kirtley, 252 S.E.2d at 378, n.8.). The instructions in *Clark* were identical, with the exception of the substitution of "John Wood" for "David Lee Hill", and of "shot and killed" for "killed."

[120] 297 S.E.2d at 852.

[121] *Id.*

[122] 305 S.E.2d 313 (W. Va. 1983).

[123] *Id.* at 314-15.

[124] *Id.*

Once again the State proposed jury instructions[125] which were accepted by the trial court, but which incorrectly stated the burden of proof under the standard of *Kirtley*.[126] The court refused to give two instructions submitted by the defense which correctly stated the law.[127] The defendant appealed on the basis that the erroneous jury instructions were prejudicial.

The State admitted on appeal that its instructions were improper, but contended that the giving of the instruction was harmless error, because the court also gave one instruction offered by the defense on the issue of self-defense.[128] The West Virginia Supreme Court of Appeals, however, stated that the correct instruction, when considered by the jury along with the incorrect State instruction, could only have created confusion in the minds of the jurors.[129] The conviction was reversed and a new trial awarded.[130]

In *State v. Mullins*,[131] a third case arising from the self-defense question in *Kirtley*, still two more issues were raised. Unlike *Clark* and *Thayer*, where the defense counsel offered correct instructions based on *Kirtley* which were subsequently refused by the court and replaced by incorrect instructions submitted by the State, *Mullins* had the additional problem of the defense counsel also being unaware of the change in the burden of proof.

Bonnie Gale Mullins was convicted of the voluntary manslaughter of Jerry Hamilton, the father of two of her children.[132] Evidence was introduced that on the day of the shooting, the victim had visited the defendant, quarreled with her, and removed the couple's two children from her home.[133] He returned later in the evening.[134] The defendant testified that they quarrelled again, and he threatened to shoot her.[135] When he aimed a pistol at her, she

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[125] State's Instruction 13 was:

> The Court instructs the jury that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, JOSEPH A. THAYER, shot and killed David Duane Young, and that he, the said JOSEPH A. THAYER, relies upon self-defense to excuse him for such act, the burden of showing such excuse is on the defendant, and to avail him of such defense he must prove to the satisfaction of the jury by a preponderance of the evidence . . . .

*Id.* at 315.

[126] *Id.*

[127] One of these was based on the burden of proof: "The Court instructs the jury that once there is sufficient evidence to create a reasonable doubt that the killing in this case resulted from the defendant acting in self-defense, then the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense." *Id.* at 316.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] 301 S.E.2d 173 (W. Va. 1983).

[132] *Id.* at 175.

[133] *Id.*

[134] *Id.* at 176.

[135] *Id.*

contended they struggled for it, it went off, and she killed him without meaning to.[136]

The trial court gave an instruction which stated that if the jury believed that the defendant shot the victim, "and that she, Bonnie Gale Mullins, relies upon self-defense to excuse her from such act, the burden of showing such excuse is on the defendant."[137] Mullins appealed on the grounds that this was an instruction similar to the one found to be in error in *Kirtley*.[138] In this case, however, the defense counsel had not objected to the instruction on the ground that it required the defense to establish self-defense by a preponderance of the evidence, nor on the grounds that it failed to require the State to disprove self-defense beyond a reasonable doubt.[139] Instead, the defense counsel had objected to the instruction on the basis that it implied intent, while the defense contended the killing had been accidental.[140]

In *State v. Gangwer*,[141] which followed *Kirtley*, the court noted that the rule announced in *Kirtley* was of a nonconstitutional nature, and that for a defendant to be entitled to relief under the principles of *Kirtley*, the instruction must have been objected to at trial.[142] It was further noted that for an objection at trial to be valid, "it must state distinctly the matters to which he objects and the grounds for objections."[143] Following *Gangwer*, the supreme court held that because the defendant had objected on grounds other than those mentioned in *Kirtley*, the objection did not support a reversal of Mullins' conviction.[144]

Finally, Mullins claimed that she had ineffective assistance of counsel. She based this claim primarily on defense counsel's failure to object to the *Kirtley* instructions.[145] The court refused to reverse on these grounds, measuring defense counsel's performance by the standard of *State v. Thomas*:[146]

> [C]ourts should measure and compare the questioned counsel's performances by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, ex-

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[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] 283 S.E.2d 339 (W. Va. 1981).
[142] *Id.* at 943.
[143] 301 S.E.2d at 176 (quoting State v. Gangwer, 286 S.E.2d 389 (W. Va. 1982)).
[144] 301 S.E.2d at 176.
[145] *Id.* at 177.
[146] 157 W. Va. 640, 203 S.E.2d 445 (1974).

> cept that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error.[147]

Applying this rule, the supreme court of appeals said that the *Kirtley* decision was not a "radical change" in the law of self-defense, but only a moderation of the instructional law on the ultimate burden of proof.[148] Thus, the claim of ineffective assistance of counsel did not meet the *Thomas* standard.[149]

When *State v. Kirtley* was decided in 1978, the West Virginia Supreme Court of Appeals noted that the rationale of the rule was simple.[150] "Since self-defense is an absolute justification for a killing, once sufficient evidence is in the case to create a reasonable doubt on this issue the state, in order to obtain a guilty conviction, must prove beyond a reasonable doubt that the killing was not justified."[151] In adopting this rule, the state joined a majority of jurisdictions in allocating the burden of proof in this manner.[152] While nothing in this year's decisions is surprising given *Kirtley* and its progeny, this array of cases should erase any doubt surrounding the use and acceptance of the rule in this state.

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[147] *Id.* at 665, 203 S.E.2d at 461.

[148] 301 S.E.2d at 178.

[149] *Id. Accord*, Commonwealth v. Domaingue, 8 Mass. App. 228, 392 N.E.2d 1207 (1979); State v. McNulty, 60 Hawaii 259, 588 P.2d 438 (1978).

[150] 252 S.E.2d at 380.

[151] *Id.*

[152] Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975); Payne v. State, 52 Ala. App. 453, 293 So. 2d 877 (1974); State v. Millett, 273 A.2d 504 (Me. 1971). *See generally*, 9 J. WIGMORE ON EVIDENCE § 2512, 540 and note 6 (Chadbourn rev. ed. 1981).