

**FILED**

**July 2, 2002**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

**July 3, 2002**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Starcher, Justice, dissenting:

First, the photos of the victim that were offered into evidence by the prosecution in the instant case were gruesome and revolting and unnecessary in the prosecution of the case. They show a close-up of the disfigured face of the victim, and also show her nude body on a morgue slab, front and back. The photos had no independent evidentiary purpose, because there was no dispute whatsoever as to the location, number, and nature of the wounds on the victim's body. Of course, as psychological weaponry, the photographs were powerful. In such circumstances, nude photos of the dead victim's disfigured body can be counted on to inflame the jury's anger. Because the gruesome photographs could have tilted the jury on the mercy/no mercy issue, their admission was error and not harmless beyond a reasonable doubt.

Second, the State's expert witness used a laser pointer to point out wound locations on a chart of the victim's wounds. The defendant's counsel argued to the circuit court that the laser pointer was calculated to remind the jury of the fact that the defendant's gun had a "laser sight." The circuit judge said he thought it unlikely that the prosecution's use of laser pointers would send subliminal messages to the jury. To me, and I think to the average person, this possibility seems more than reasonable. More importantly, *there was no reason not to use a physical pointer*, as defense counsel suggested.

If the homicide in the instant case had been committed with a sword, would it have been proper to let the State's expert point out wound locations with a sword? I think not. The circuit judge's refusal to direct the prosecution to set their lasers aside in the instant case was error, and was not clearly harmless.

The prosecution's use of the gruesome photos, and insistence on using the laser pointer, were examples of prosecutorial overkill -- which too often leads to tainted verdicts. In *State v. Guthrie*, 194 W.Va. 657, 685, 461 S.E.2d 163, 191 (1995), this Court stated that "only when there is a high probability that an error did not contribute to a criminal conviction" will we affirm a criminal conviction." *Id.* The evidence was overwhelming in support of a first-degree murder conviction in this case; and whether the defendant, a young man, should ever be eligible for parole, was the key issue at trial. There is no doubt in my mind that the gruesome photographs alone may have tipped the balance in the mercy/no mercy determination.

I would therefore reverse the conviction and remand for a new trial.

I am authorized to state that Justice Albright joins in this separate opinion.