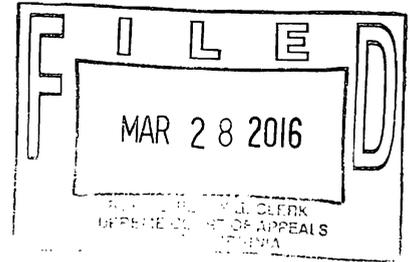


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,  
Plaintiff Below, Respondent,

v.

CHRISTOPHER R. WYCHE,  
Defendant Below, Petitioner.



DOCKET NO.: 15-0894  
(Berkeley County Case No.: 14-F-48)

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**RESPONDENT STATE OF WEST VIRGINIA'S BRIEF**

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### **PETITIONER'S ASSIGNMENT OF ERROR**

- I. WHETHER THE CIRCUIT COURT ERRED BY DENYING THE PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL?
- II. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY DENYING THE PETITIONER'S MOTION TO SEVER HIS TRIAL FROM THAT OF HIS CO-DEFENDANT?
- III. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO EXERCISE ITS PREEMPTORY STRIKES IN THE MANNER IN WHICH IT DID?
- IV. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY DENYING THE PETITIONER'S MOTION TO SUPPRESS THE RESULTS OF A GUN SHOT RESIDUE TEST?
- V. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY DENYING THE PETITIONER'S MOTION FOR NEW TRIAL BASED ON AN ALLEGED VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHTS?
- VI. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY ALLOWING THE INVESTIGATING OFFICER TO REMAIN AT COUNSEL TABLE THROUGHOUT THE COURSE OF THE TRIAL?
- VII. WHETHER THE CIRCUIT COURT ABUSE ITS DISCRETION BY LIMITING DEFENSE COUNSEL'S CROSS EXAMINATION OF CHIEF DEPUTY HARMISON WITH REGARD TO A FORMER OFFICER WHO DID NOT TESTIFY?
- VIII. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING THE ADMISSION OF DASHCAM VIDEO FOOTAGE AS EVIDENCE OF THE PETITIONER'S FLIGHT?
- IX. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING THE PETITIONER'S MOTION FOR NEW TRIAL BASED UPON ALLEGEDLY PREJUDICIAL REMARKS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENTS?
- X. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING THE ADMISSION OF RECORDS FROM NORTH CAROLINA DURING THE PETITIONER'S RECIDIVIST TRIAL?

### **STATEMENT OF THE CASE**

The Petitioner was indicted by a Berkeley County grand jury jointly with his co-defendant on one (1) felony count of Murder, one (1) felony count of Attempted Murder, one (1) felony count of Conspiracy to Commit Murder, one (1) felony count of Wanton Endangerment, and one (1) felony count of being a Prohibited Person in Possession of a Firearm on or about

February 19, 2014. [Appendix Record, hereinafter referred to as AR, Vol. 1, pg. 1-4.] The charges were based upon allegations that the Petitioner and his co-defendant began a physical altercation with two males in the parking lot of a local bar at closing time. During the altercation, the Petitioner and his co-defendant produced firearms. The Petitioner and his co-defendant then began to discharge those weapons in the parking lot, hitting and killing one man.

Following a trial by jury on January 13 - January 22, 2015, the Petitioner was found guilty of one (1) felony count of Voluntary Manslaughter, one (1) felony count of Wanton Endangerment, and one (1) felony count of being a Prohibited Person in Possession of a Firearm. [AR, Vol. 1, pg. 13-14.] The Petitioner was acquitted on the other charges. [Id.] The parties appeared before the court on March 23, 2015, to argue post-trial motions. [AR, Vol. 1, pg. 16-22.] Upon review of the written filings of the parties and presentation of arguments, the court denied the Petitioner's motions. [AR, Vol. 1, pg. 16-22, Joint Supplemental Appendix, hereinafter referred to as JSA, 592-603.]

On or about February 5, 2015, the State filed a timely recidivist information alleging that the Petitioner had twice previously been convicted of felony offenses such that the Petitioner would be subject to an enhanced life sentence pursuant to W.Va. Code §61-11-18. A recidivist trial was conducted on June 12, 2015, whereupon the jury found that the Petitioner was the same individual that had been previously convicted of the offenses listed in the recidivist information. [AR, Vol. 1, pg. 23-25.] The circuit court later declined to recidivise the Petitioner pursuant to the charge listed in count 3 of the recidivist information after making a legal determination that West Virginia classifies that offense as a misdemeanor. [JSA, 604-612.] Therefore, the

Petitioner was ultimately determined to have only once been previously convicted of a qualifying offense for recidivism purposes.

On August 3, 2015, the Court sentenced the Petitioner to serve a determinate term of fifteen (15) years in the penitentiary pursuant to his conviction for Voluntary Manslaughter, a determinate term of ten (10) years in the penitentiary pursuant to his conviction for Wanton Endangerment and the recidivist enhancement, and a determinate term of five (5) years in the penitentiary pursuant to his conviction for being a Prohibited Person in Possession of a Firearm. [AR, Vol. 1, pg. 26-29.] The court ordered said sentences to run consecutively to one another. [Id.] It is from that final order that the Petitioner appeals.

### **SUMMARY OF ARGUMENT**

There was sufficient evidence introduced at trial in support of the jury's verdict of guilt regarding the offenses of conviction. The court did not abuse its discretion in denying the Petitioner's motions for judgment of acquittal at the close of the State's case and again at the close of all the evidence.

The court did not abuse its discretion in denying the Petitioner's motion to sever his trial from that of his jointly indicted co-defendant. The court analyzed the Petitioner's motion pursuant to applicable law and found that the evidence against both the Petitioner and his co-defendant was inextricably intertwined, arose from the same act or transaction, and required the presentation of identical evidence by the State. The court further correctly found that no prejudice resulted from the joint trial.

The State exercised its use of preemptory strikes in an appropriate manner. The court did not abuse its discretion in finding the State's use of a preemptory strike to remove potential juror

M.W. was based upon a clear, articulable, non-discriminatory rationale, which the trial court found reasonable and wholly sufficient to overcome the Petitioner's Batson challenge.

The court did not abuse its discretion in denying the Petitioner's motion to suppress the results of the Petitioner's gunshot residue testing. The State established chain of custody between the lifting and testing of the sample. The lifting of the sample did not violate the Petitioner's constitutional rights. Lastly, the probative value of the evidence was not substantially outweighed by any risk of unfair prejudice to the Petitioner.

The court did not abuse its discretion in denying the Petitioner's motion for new trial based upon allegations of due process violations. There was no evidence that the pool of vomit outside the bar or the depositor thereof was in any way involved in the crime. Further, the results of the testing of the vomit were disclosed to the Petitioner in the course of discovery. The evidence was not exculpatory in nature nor was it material to the issue of the Petitioner's guilt or innocence. Further, the Petitioner was able to vigorously cross examine the officers concerning their lack of follow-up in that area and argued to the jury in closing that the officers' handling of the case was sufficient reasonable doubt to acquit. As such, there was no prejudice to the Petitioner.

The court did not abuse its discretion by allowing Deputy Christian to remain at counsel table throughout the trial, as Deputy Christian was designated as the State's representative to remain at counsel table with the prosecuting attorney pursuant to Rule 615 of the West Virginia Rules of Evidence. Furthermore, there is no evidence that Deputy Christian's presence in the courtroom prejudiced the Petitioner in any way.

The court properly limited the cross examination of Chief Deputy Harmison with regard

to questions concerning Dennis Streets. Former Capt. Streets was one of many officers who responded to the scene of the shooting, but there was no evidence that Streets had any involvement in the actual investigation of the case nor was Streets called as a witness by any party. At the time of the trial, Streets had been accused of taking firearms belonging to the Sheriff's Department and other firearms that had been ordered to be destroyed in closed cases and selling those firearms for personal gain. He had not been convicted. The court carefully considered the Petitioner's arguments before deciding to limit the Petitioner's cross of Chief Deputy Harmison on that issue. The court found that had Streets been the witness, more latitude may have been afforded, but it was improper to inquire of Harmison about Streets. As such, there was no abuse of discretion.

The court did not abuse its discretion by allowing the introduction of the dash camera video footage of the ensuing chase of the getaway car as flight evidence. The State laid a proper foundation for the admission of the footage under the Rules of Evidence and applicable case law. Although the officer whose dash camera recording was admitted into evidence did not testify, another officer who was present during and involved in the stop and chase testified that the footage accurately and fairly depicted the events as they occurred.

The court did not err in denying the Petitioner's motion for new trial based upon alleged improper statements made by the prosecutor in closing arguments. The Petitioner never objected to any of the State's closing and effectively waived the issue on appeal. Furthermore, analyzing the complained of statements under State v. Sugg, *infra.*, there is no basis for awarding the Petitioner a new trial.

The court did not err in allowing the introduction of the records of the Petitioner's North Carolina charges at the recidivist trial of the Petitioner. The court properly reviewed the law and examined the records before determining that the records were self-authenticating under Rule 902 of the West Virginia Rules of Evidence and, therefore, did not require the presentation of extrinsic evidence as a condition precedent to their admissibility.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The State avers that the facts and legal arguments are adequately presented in the briefs and record on appeal and that the decisional process would not be significantly aided by oral argument. As such, oral argument would be unnecessary in this matter pursuant to Rule 18. If, however, this Court were to find oral argument necessary, the State believes argument pursuant to Rule 19 would be appropriate.

### **ARGUMENT**

#### **I. THE CIRCUIT COURT DID NOT ERR IN DENYING THE PETITIONER'S MOTIONS FOR JUDGEMENT OF ACQUITTAL AS THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT OF GUILT.**

##### **A. Standard of Review**

“A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.”  
Syllabus Point 3, State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163

(1995).

Syl. Pt. 1, State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998); Syl. Pt. 3, State v. Williams, 198 W. Va. 274, 480 S.E.2d 162 (1996); Syl. Pt. 2, State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

## **B. Discussion**

The evidence adduced at trial was sufficient to support the jury's verdicts of guilt with regard to one (1) felony count of Voluntary Manslaughter pursuant to **W.Va. Code §61-2-4**,<sup>1</sup> one (1) felony count of Wanton Endangerment pursuant to **W.Va. Code §61-7-12**,<sup>2</sup> and one (1) felony count of being a Prohibited Person in Possession of a Firearm pursuant to **W.Va. Code §61-7-7(b)(2)**.<sup>3</sup>

The surviving victim, Antoine Stokes, identified the Petitioner and his co-defendant in open court as the attackers. Mr. Stokes testified that he and Mr. Edmond, the deceased victim, left the bar and walked a friend, Ms. Parker, to her car. Ms. Parker corroborates that testimony. All of the witnesses who were at the bar described that it was a busy night, the shooting occurred shortly before last call, and people were beginning to leave the bar.

On the way from Ms. Parker's vehicle to their vehicle, Mr. Stokes and Mr. Edmond

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<sup>1</sup> If, on sudden affray, fight is begun without deadly weapons, and one person uses deadly weapon in heat of blood and kills another, crime is "manslaughter." State v. Cassim, 112 W. Va. 92, 92 163 S.E. 769, 769 (1932). The offense of voluntary manslaughter involves an intent to kill, Syl. Pt., 1, in part, State v. Blizzard, 152 W. Va. 810, 166 S.E.2d 560 (1969). **W.Va. Code §61-2-4**, states that Voluntary manslaughter shall be punished by a definite term of imprisonment in the penitentiary which is not less than three nor more than fifteen years.

<sup>2</sup> "Any person who wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another shall be guilty of a felony, and, upon conviction thereof, shall be confined in the penitentiary for a definite term of years of not less than one year nor more than five years..." **W.Va. Code §61-7-12**.

<sup>3</sup> **W.Va. Code §61-7-7(b)(2)** makes it a felony offense punishable by confinement of not more than five (5) years in the penitentiary for a person who has been convicted of a felony offense in this state or any other jurisdiction involving a schedule I controlled substance other than marijuana or a schedule II or schedule III controlled substance to be in possession of a firearm.

passed two young ladies walking toward another car. The young lady in the back had a number of visible tattoos. Mr. Edmond commented that he liked one of her tattoos. The young lady smiled and continued to walk toward the car. However, at that car were two males: one wearing a light blue polo shirt and one wearing a dark blue t-shirt. The man in the light blue polo shirt approached Mr. Edmond angrily asking him if he thought it was ok to talk to another man's girl. Both Mr. Edmond and Mr. Stokes put their hands up, backing away, saying they didn't want any trouble. The man in the light blue polo shirt began to punch Mr. Edmond. Mr. Stokes approached and intervened in the fight between the guy in the light blue polo and Mr. Edmond. As he did this, Mr. Stokes testified that he caught a glimpse of the man in the dark blue t-shirt in his peripheral vision. It was then, Mr. Stokes stated, the first shots rang out.

Mr. Stokes testified that he and Mr. Edmond began to run. Mr. Stokes recounted hearing several shots. The first two sounded distinctly different from the second two shots. He stated from his experience in the military that it sounded like the first two shots came from a smaller caliber weapon than the second two shots. Ms. Mellott, who was a bartender inside the bar that night, also testified to hearing four shots. Officers recovered casings in the parking lot from both a .25 and a .40 caliber weapon. After they had first began to run, Mr. Stokes testified that Mr. Edmond cried out that he had been hit. Mr. Stokes looked back and saw the two men in blue shirts pursuing them and he saw Mr. Edmond fall to the ground. Mr. Stokes went back to try to drag Mr. Edmond along with him. At some point, Mr. Stokes abandoned that course of action and hid for a matter of seconds until he believed the men were leaving. Mr. Stokes testified that the men left the parking lot of the bar in a newer model Cadillac that was black or dark green in color. Mr. Stokes called 911. A "be on the lookout" or BOLO was also issued for the suspect

vehicle as described by Mr. Stokes.

Ms. Burnett testified that she and her friend, who had many distinctive tattoos, were at the bar that night and had misplaced their car keys. Some men that her friend knew, which Ms. Burnett identified as Mr. Boyd, Mr. Wyche, and Mr. Vick, were leaving the bar at the same time and indicated that Ms. Burnett and her friend could come with them if Ms. Burnett agreed to drive. Ms. Burnett testified that she and her friend then walked to the vehicle, which was a newer model black Cadillac, where she was handed the keys and got into the driver's seat. Ms. Burnett stated that her friend with the tattoos was walking behind her on the way to the Cadillac. Ms. Burnett stated that her friend got into the front passenger's seat of the car. Ms. Burnett further testified that when she and her friend got into the vehicle that Mr. Vick was already passed out in the back seat. She stated the Mr. Boyd, who was wearing a light blue shirt, and Mr. Wyche, who was wearing a dark blue shirt, were outside the vehicle. She further testified that when she got into the vehicle, she began to text with her boyfriend and was not paying attention to anything happening around her. Ms. Burnett stated that when she heard gunshots, she put the car in gear and started to drive. She said that the car had moved a bit before Mr. Boyd and Mr. Wyche jumped into the back passenger side of the car. She stated that they just kept telling each other to shut up and not say anything. Ms. Burnett further testified that she took I-81N into Maryland and after taking exit 4 toward I-70, Maryland State Police got behind her and activated lights and siren. She stated that she pulled over and stopped, but Mr. Boyd kept telling her to keep driving. She stated that there was argument in the car, but she complied with the officers' instructions and began to exit the vehicle. Ms. Burnett said the driver's door was barely open when Mr. Boyd jumped into her seat, pushed her out of the car and sped away.

Officers from the Maryland State Police testified that they performed a felony stop on a black Cadillac that matched the description of a BOLO issued by West Virginia authorities in connection with a shooting. Trooper Miller stated that the vehicle stopped and there was a commotion inside in car. Trooper Miller then indicated that the female driver began to exit the vehicle and a male jumped into the driver's seat and sped away. Trooper Miller indicated that they pursued the vehicle until the use of stop sticks caused the vehicle to wreck off of the side of the road. Trooper Miller stated that they then took custody of the occupants of the vehicle. A video of the dash camera footage from the stop and ensuing chase was introduced into evidence.

Officers from the Berkeley County Sheriff's Department testified as to their parts of the investigation of the case. Cpl. Christian and Sgt. Hall testified that they had taken GSR lifts from Mr. Boyd and Mr. Wyche while they were in the custody of Maryland authorities following the chase. A forensic analyst testified that there was gunshot residue found on the hands of both Mr. Boyd and Mr. Wyche.<sup>4</sup> Cpl. Christian and Sgt. Hall further took photographs of Mr. Boyd and Mr. Wyche. Mr. Boyd was wearing a light blue polo shirt, and Mr. Wyche was wearing a dark blue shirt. Officers further testified that they obtained the video surveillance footage from outside of the bar, which shows all of the subjects leaving the bar. The video also captures Mr. Stokes and Mr. Edmond running around the side of the bar away from the shots. The video also captures Mr. Boyd following Mr. Stokes and Mr. Edmond with his arm outstretched in front of him.

Following the shooting, Mr. Edmond was taken to the hospital where he was pronounced dead. The medical examiner determined the cause of death was a gunshot wound, which entered through the left side of his neck and exited through his right shoulder, severing two major

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<sup>4</sup> The analyst further concluded there was no gunshot residue on the hands of Mr. Vick.

arteries. The manner of death was determined to be homicide.

The Petitioner entered into a stipulation that he had been convicted of a felony offense prior to the date of the shooting which was a qualifying offense under **W.Va. Code 61-7-7(b)(2)**.

Based upon the evidence presented, the jury had sufficient evidence, both direct and circumstantial, taken in light most favorable to the State, to convict the Petitioner of voluntary manslaughter, wanton endangerment, and being a prohibited person in possession of a firearm.

State v. Guthrie, supra.; State v. Miller, supra., State v. Williams, supra., State v. Hughes, supra.

**II. THE CIRCUIT COURT PROPERLY DENIED THE PETITIONER'S MOTION TO SEVER HIS TRIAL FROM THAT OF HIS CO-DEFENDANT.**

**A. Standard of Review**

This Court reviews a trial court's ruling on a **W.Va.R.Crim.P. 14** severance motion under an abuse of discretion standard. Syl. Pt. 1, State v. Rash, 226 W.Va. 35, 697 S.E.2d 71 (2010).

**B. Discussion**

The trial court did not abuse its discretion by denying the Petitioner's motion to sever his trial from that of his co-defendant Boyd. Petitioner and his co-defendant were jointly indicted, pursuant to **W.Va.R.Crim.P. 8(b)**, for the shooting Murder of Mr. Edmonds, the attempted murder of Mr. Stokes, conspiracy to commit murder, a count each of Wanton Endangerment for discharging their firearms in the parking lot of the bar, and a count each of being a prohibited person in possession of a firearm. **W.Va.R.Crim.P. 8(b)** reads as follows:

**"(b) Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each

count.”

The Petitioner does not contend that the State improperly joined he and his co-defendant in the same indictment pursuant to **W.Va.R.Crim.P. 8(b)**. However, the Petitioner did file a motion for severance pursuant to **W.Va.R.Crim.P. 14(b)** at between the pretrial hearing and trial date.

**W.Va.R.Crim.P. 14(b)** reads in relevant part:

“If the joinder of defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the State, the Court may sever the defendants' trials, or provide whatever other relief that justice requires. ”

As such, a defendant must make an affirmative showing of prejudice in order to justify separate trials in light of the underlying policy and procedural advantages of the joinder rule. This version of **W.Va.R.Crim.P. 14(b)**, adopted by this Court through a 2006 amendment, expresses a preference for unitary trials.

The amendment represented a marked change from the prior version adopted in 1981 which mandated severance merely upon the filing of a motion. Prior to this Court's 2006 amendment, the 1981 version of **W.Va.R.Crim.P. 14(b)** read: “Upon a joint indictment or information in a felony case against several persons, the court shall upon motion of any defendant or the state order separate trials.”

The migration to the 2006 amendment was a long-time coming, evidenced by this Court's 1996 opinion in State ex rel. Cavender v. McCarty, 198 W.Va. 226, 479 S.E.2d 887 (1996), citing to the United States Supreme Court for the proposition that:

“American courts have always expressed a preference for unitary trials in both criminal and civil cases. As the United States Supreme Court suggested in Zafiro v. United States, 506 U.S. 534,

537, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993) (citing Richardson v. Marsh, 481 U.S. 200, 209, 107 S.Ct. 1702, 1708, 95 L.Ed.2d 176 (1987)), unitary trials promote efficiency and serve the interest of justice by avoiding the scandal and inequity of inconsistency.”

Id., 479 S.E.2d 887, 895.Id., 479 S.E.2d 887, 895.

Ten years after the Cavender decision, this Court adopted this preference for unitary trials and amended Rule 14(b) to allow the trial court discretion to determine a severance motion in a joint criminal trial. This decision is consistent with Zafiro (v. United States, 506 U.S. 534, 539, 113 S.Ct. 933 (1993)). The 2006 amendment to Rule 14(b) effectively overruled this Court’s earlier holding in State ex rel. Whitman v. Fox, 160 W.Va. 633, 646, 236 S.E.2d 565, 573 (1977), that a trial court does not have jurisdiction to jointly try criminal defendants who choose to be tried separately.

In Zafiro, the United States Supreme Court holds that severance is warranted “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” Zafiro v. U.S., *supra*, 506 U.S. 534, 539. Zafiro holds this to be true even when the co-defendants present conflicting or antagonistic defenses. Id., 538.

The trial court was clearly correct in finding, based upon the facts of this case, that the evidence against both the Petitioner and his co-defendant was inextricably intertwined, arose from the same act or transaction, and required the presentation of identical evidence by the State.<sup>5</sup> While the Petitioner’s assertions is that his co-defendant was the actual driver of the getaway car that the Petitioner also rode in and that his co-defendant visibly appears in the

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<sup>5</sup> The State notes that pursuant to this Court’s precedent in State v. Herbert, 234 W.Va. 576, 767 S.E. 741 (2014), the Petitioner stipulated that he had a prior conviction which made him a person prohibited from possessing a firearm. The Petitioner’s co-defendant also so stipulated. [JSA, 614.]

recorded interview to have wiped his hands off on his jeans before submitting to a gunshot residue test both prejudiced the Petitioner's case by making him appear guilty only by association with his co-defendant, the Petitioner completely fails to demonstrate this, especially in light of the jury's return of verdicts for a lesser included offense on the murder charge and of acquittals on others (for which the jury chose to instead convict his co-defendant). Furthermore, the Petitioner argues that he did not have an opportunity to confront or cross examine his co-defendant about the above actions in a unitary trial because his co-defendant had a right to maintain his silence. However, the Petitioner's argument fails in that even if the trials of the Petitioner and his co-defendant were severed, his co-defendant would still maintain his right to remain silent, and the Petitioner would still be left to have his very capable counsel delineate the differences between the behavior of the Petitioner and the behavior of his co-defendant in closing argument, just as the Petitioner's counsel did during the unitary trial.

Following the court's initial denial of the Petitioner's motion for severance, the court again revisited the issue during post-trial motions and declined to find error with its previous ruling or with the trial with regard to the issue of severance. [JSA, 48-50.]

Based upon the above, the Petitioner fails to show that the trial court abused its discretion in denying the Rule 14 severance motion. State v. Rash, *supra*.

**III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO STRIKE THE JUROR IN QUESTION, AS THE STATE HAD A PROPER ARTICULABLE BASIS FOR DOING SO.**

**A. Standard of Review**

The trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.... Hernandez v. New York, 500 U.S. 352, 364, 111 S.Ct. 1859, 1868-1869, 114 L.Ed.2d 395, 408-409

(1991)(quoting *Batson*, in part, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21).

State v. Kirkland, 191 W. Va. 586, 596, 447 S.E.2d 278, 288 (1994).

## **B. Discussion**

The State's use of a preemptory strike to remove potential juror M.W. was based upon a clear, articulable, non-discriminatory reason, which the trial court found reasonable and wholly sufficient to overcome any allegations of racial discrimination.

6. "It is a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution for a member of a cognizable racial group to be tried on criminal charges by a jury from which members of his race have been purposely excluded." Syl. Pt. 1, State v. Marrs, 180 W.Va. 693, 379 S.E.2d 497 (1989).

7. "To establish a prima facie case for a violation of equal protection due to racial discrimination in the use of preemptory jury challenges by the State, 'the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised preemptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that preemptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.' [Citations omitted.] Batson v. Kentucky, 476 U.S. 79 at 96, 106 S.Ct. 1712 at 1722, 90 L.Ed.2d 69 (1986)." Syl. Pt. 2, State v. Marrs, 180 W.Va. 693, 379 S.E.2d 497 (1989).

8. "The State may defeat a defendant's prima facie case of a violation of equal protection due to racial discrimination in selection of a jury by providing non-racial, credible reasons for using its preemptory challenges to strike members of the defendant's race from the jury." Syl. Pt. 3, State v. Marrs, 180 W.Va. 693, 379 S.E.2d 497 (1989).

9. A trial court should conduct an evidentiary hearing if, after considering the prosecutor's representations regarding the reasons for using a peremptory strike to exclude the only remaining black juror, the court deems that the circumstances surrounding the prosecutor's representations warrant such a hearing to determine whether the explanations offered by the prosecutor in exercising said strike were racially neutral or discriminatory in nature. The determination on whether to conduct an evidentiary hearing is within the sound discretion of the trial court.

Syl. Pts. 6-9, State v. Kirkland, 191 W. Va. 586, 447 S.E.2d 278 (1994).

During the jury selection process, individual voir dire was conducted with a number of potential jurors regarding more personal matters, such as prior experiences being the victim of crime, interaction with law enforcement, and criminal convictions. Potential juror M.W. disclosed that he had been charged with Driving Under the Influence by the Berkeley County Sheriff's Department, that his prosecution by the Berkeley County Prosecutor's office was currently pending, and that he had a hearing in his case the following day in Berkeley County Magistrate Court. [JSA, pg. 154-156, 158-163.] Following his individual voir dire, the State moved to strike the juror for cause considering his active prosecution by their office. [Id.] The court ultimately did not strike M.W. for cause. [Id.] At some point after initial voir dire with the panel, questions arose concerning the ethnicity of juror M.W. The Petitioner and his co-defendant are African-American, and there was an apparent lack of people of color called as a part of the jury pool. Potential juror M.W. had identified himself as Caucasian on the juror questionnaires and on his personal identification information. However, Petitioner's counsel believed based upon his appearance that potential juror M.W. was not Caucasian but was of another ethnicity. Following additional individual voir dire, potential juror M.W. disclosed that he had fairly recently discovered that his biological mother had been Cuban. He had previously always identified as Caucasian. [JSA, pg. 164-165.]

When the parties made preemptory strikes, the State exercised one of their strikes to remove potential juror M.W. The Petitioner made a Batson challenge to this strike. [JSA, pg. 166.] The State reasoned that because potential juror M.W.'s charges were still pending, it did not want to put M.W. in a position to feel pressured to return guilty verdicts against the defendants for fear of what would happen in his own case nor did the State want to be in a position that, if guilty verdicts were returned against the defendants, the defendants would allege error because juror M.W. perhaps felt pressured to return said verdicts because of an active prosecution against him. [JSA, pg. 166-167.] The trial court considered the State's reasoning and found it to be valid and non-pretextual. [JSA, pg. 168-170.] The trial court did not abuse its discretion considering the logical issue presented to the State by M.W.'s active criminal case. State v. Marrs, supra.; State v. Kirkland, supra.

The Petitioner attempts to make an argument that the State's strike was pretextual by including that M.W. was called and actually empanelled as a juror in a felony criminal case in Berkeley County some number of weeks following the Petitioner's trial. The Petitioner fails to consider a number of fallacies with this argument, including the fact that M.W. had a hearing the day after jury selection in the Petitioner's trial at which his pending charge may have been resolved, eliminating the concern of potential pressure and influence regarding M.W. that the State had been concerned with. Furthermore, the jury panel would have been different for the later trial and the assistant prosecutor at that trial (who was not the prosecutor handling Petitioner's trial) may have been concerned with additional factors affecting how he exercised his preemptory strikes. Furthermore, the trial court considered this argument of counsel at a hearing on post-trial motions. [JSA, pg. 598-600.] The trial court again determined that the State's strike of potential juror M.W. had not been racially motivated and that there existed

credible, logical reasons for the strike demonstrating that the strike was not merely pretextual.  
[Id.]

The trial court carefully considered the issues surrounding the strike of potential juror M.W. and found that the State's strike was non-racial and that credible reasons were given therefor based upon the unique circumstance of M.W.'s active prosecution. State v. Marrs, *supra.*; State v. Kirkland, *supra.* There was no abuse of discretion by the trial court. Id.

#### **IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE INTRODUCTION OF GUN SHOT RESIDUE TESTING EVIDENCE.**

##### **A. Standard of Review**

The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.

Syl. Pt. 1, State v. Harris, 216 W.Va. 237, 605 S.E.2d 809 (2004)(per curiam); Syl. Pt. 1, State v. Calloway, 207 W.Va. 43, 528 S.E.2d 490 (1999).

##### **B. Discussion**

The trial court properly admitted evidence of the gunshot residue tests.

The Petitioner alleges four separate issues with the gunshot residue (hereinafter referred to as GSR) tests that he states should have precluded their admission.

##### **1. The State established chain of custody between the taking and testing of the GSR sample.**

The preliminary issue of whether a sufficient chain of custody has been shown to permit the admission of physical evidence is for the trial court to resolve. Absent abuse of discretion, that decision will not be disturbed on appeal.

Syl. Pt. 2, State v. Davis, 164 W. Va. 783, 266 S.E.2d 909 (1980).

The testimony of Cpl. Christian at the suppression hearing clearly demonstrated that he did the GSR testing of the Petitioner in the holding cell at the Washington County Detention Center/Sheriff's Office. [JSA, pg. 66.] Cpl. Christian testified that he explained to the Petitioner what he was doing and the process for taking the GSR samples. [JSA, pg. 69.] Cpl. Christian further testified that the Petitioner did not refuse or resist him taking the sample. [JSA, pg. 69-70.] Cpl. Christian described that put on gloves and opened the GSR test kit. Thereafter he took samples from the left palm, left back, right palm, and right back of the Petitioner's hands and enclosed each of those samples in their indicated vials. [JSA, pg. 68-69.] While Cpl. Christian states that he did discover that he failed to indicate on the form the time of his taking of the sample from the Petitioner, he did indicate on the exterior form on the envelope both the date and time of the taking of the sample, which was September 16, 2012, at 8:16am. [JSA, pg. 66-67.] Cpl. Christian further testified that once he took the GSR sample from the Petitioner, he sealed that kit and stored it securely in evidence until such time as he forwarded that kit to the West Virginia State Police Laboratory. [JSA, pg. 74-75.] At trial, Koren Powers, Supervisor of the Trace Evidence Section of the West Virginia State Police Laboratory, testified that she received the sample for the Petitioner in a properly sealed test kit envelope, which indicated that the sample was taken by Cpl. Christian.

Based upon this evidence, the trial court did not err in allowing the admission of the GSR test results as the State satisfactorily established a clear chain of custody. State v. Davis, supra., State v. Harris, supra., State v. Calloway, supra.

**2. Due to the evanescent nature of GSR evidence and the non-intrusiveness of the sample taking, neither consent nor a warrant was required.**

As previously discussed, the Petitioner and his co-defendant were involved in the shooting death of an individual in West Virginia before fleeing into Maryland where a chase

ensured with Maryland State Police. The Petitioner was taken into custody by the Maryland State Police for processing before being transferred to the Washington County Detention Center/Sheriff's Department. Officers from West Virginia came to Maryland to assess whether these individuals were in fact the same individuals described as having been involved in the shooting in West Virginia. Upon arriving at the scene, West Virginia officers observed a black Cadillac as had been described as the vehicle leaving the scene of the shooting. Officers also noted that there were five occupants in that vehicle, three males and two females. This was also consistent with the witness accounts. The Officers further observed that the Petitioner and his co-defendant matched the physical description of the two individuals given by the surviving victim exactly. Because the Petitioner was taken to the Maryland State Police Barracks for processing before being transferred to the Detention Center, West Virginia officers did not have access to the suspects until they were granted said access by Maryland authorities.

This Honorable Court has previously discussed the issue of the admissibility of gunshot residue testing without a warrant or consent of the subject being swabbed. Gunshot residue is extremely evanescent in nature and can be easily destroyed by a wiping or washing of the hands or by simple passage of time. It is imperative that such tests be conducted as close in time to the alleged firing of a weapon as possible. Additionally, the GSR test involves a mere dabbing of the skin with an adhesive pad, which can later be tested for the presence of gunshot residue. The testing itself is non-invasive. This Court has found that "superficial examination of a lawfully arrested individual for evidence of gunpowder residue is not violative of the Fourth Amendment prohibition against unreasonable searches and seizures." State v. Riley, 201 W. Va. 708, 717, 500 S.E.2d 524, 533 (1997). In so finding, this Court considered the precedent of the United States Supreme Court in Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973).

In that case, there was a minimally invasive examination of a non-consenting suspect for evanescent evidence that was found to have been properly admitted over the defendant's objection. Both of those cases, the trial court noted, turned on the existence of exigent circumstances (notably easily destructible evidence) and whether there was probable cause for the arrest of the suspects.

Upon review of the evidence presented, the trial court herein found exigent circumstances due to the extremely evanescent nature of gunshot residue. The trial court also found that probable cause existed both for the Petitioner's arrest on charges related to the shooting incident in West Virginia as well as any number of offenses in Maryland related to fleeing from Maryland State Troopers. [AR, Vol. 1, pg. 7-12; JSA, pg. 147-149.] At the time of the testing itself, the Petitioner was in fact in the lawful custody of authorities in Maryland. As such, the trial court found that under the circumstances presented and under the precedent established in State v. Riley supra., and Cupp v. Murphy supra., that neither a warrant nor a knowing and voluntary consent or waiver was required for the testing.

Based upon the above and the trial court's careful consideration of the issue, there was no abuse of discretion in the admission of the GSR tests, as there was no violation of the Petitioner's Fourth Amendment rights under these circumstances. State v. Riley, supra., State v. Harris, supra., State v. Calloway, supra.

**3. The taking of a sample for GSR testing is not testimonial and did not require the reading of the Petitioner's Miranda rights.**

The Petitioner next argues that the GSR testing violated his Fifth and Sixth Amendment rights because the Petitioner was not given any Miranda warnings prior to the GSR sample being taken.

The Petitioner correctly cites that the Fifth Amendment privilege against self-

incrimination has been interpreted to provide protection only where incriminating evidence of a testimonial or communicative nature is sought from a witness through the vehicle of state compulsion. Syl. Pt. 1, State v. Bush, 191 W.Va. 8, 442 S.E.2d 437 (1994). The Petitioner, however, cites no logic or case law in support of his proposal that the lifting of a GSR sample is testimonial or communicative in nature.

It is well settled that “the protections of the Fifth Amendment prohibiting the admission of compelled statements or physical communications that are self-incriminatory do not apply to physical characteristics such as the giving of a blood sample, voice sample, or handwriting exemplar.” Pennsylvania v. Muniz, 496 U.S. 582, 595–98, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990); United States v. Dionisio, 410 U.S. 1, 7, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); Gilbert v. California, 388 U.S. 263, 266–67, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967).

Jones v. State, 213 Md. App. 483, 494, 74 A.3d 802, 808 (2013).

In fact, in 2003, the United States District Court in Maryland was asked to consider the issue in United State v. Pettiford, 295 F.Supp.2d 552 (D. MD 2003), and simply declined finding specifically that:

a GSR test does not invoke the protections of the Fifth Amendment because it does not provide evidence of a testimonial or communicative nature. See United States v. Bridges, 499 F.2d 179, 184 (7th Cir.1974) (swabbing hands does not provide evidence of a testimonial or communicative nature); see also Kyger v. Carlton, 146 F.3d 374, 381 n. 2 (6th Cir.1998).

United States v. Pettiford, 295 F. Supp. 2d 552, 560 fn. 10 (D. Md. 2003). Ten years later in

Jones v. State, *supra.*, the Maryland Court of Special Appeals agreed finding that

“[a GSR] test is a nontestimonial identification procedure ‘comparable to handwriting exemplars, voice samples, photographs, and lineups.’ ” State v. Page, 169 N.C.App. 127, 609 S.E.2d 432, 436 (2005) (quoting State v. Coplen, 138 N.C.App. 48, 530 S.E.2d 313, 318 (2000)).

Jones v. State, 213 Md. App. 483, 494, 74 A.3d 802, 808 (2013).

Likewise, the Petitioner cites nothing in support of the proposition that he had the right to the presence of counsel for the test. Courts that have considered this issue in light of the Petitioner's right to counsel under the umbrella of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) have held it inapplicable in cases of simple GSR testing. See Jones v. State, supra.; State v. Odom, 303 N.C. 163, 277 S.E.2d 352, 355 (1981)(concluding that arrestee was not entitled to counsel during GSR test, relying on Supreme Court cases indicating that the collection of physical evidence, such as fingerprints, blood, clothing, and hair, does not constitute a critical stage of trial); United States v. Love, 482 F.2d 213, 217 (5th Cir.1973) (holding that collection of physical evidence was not a critical stage during which arrestee was entitled to counsel because such tests "involve[ ] none of the probing into an individuals' private life and thoughts that marks an interrogation or search.")

After a careful consideration of the surrounding circumstances and applicable law, the trial court did not abuse its discretion in finding that the taking of the GSR sample did not violate the Petitioner's Fifth or Sixth Amendment rights. Jones v. State, supra.; State v. Harris, supra., State v. Calloway, supra.

4. **The GSR test results were both relevant and highly probative evidence, and the court properly found the evidence legally admissible, subject to foundational requirements, following a balancing test under Rule 403 of the West Virginia Rules of Evidence.**

The Petitioner lastly argues that the Petitioner's GSR test results should have been suppressed under Rules 401 and 403 of the West Virginia Rules of Evidence.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

W.V.R.E. 401. This case involved the shooting death of Mr. Edmond, charges of wanton endangerment involving a firearm, and allegations that the Petitioner was a prohibited person in

possession of a firearm. Whether or not the Petitioner had gunshot residue on his hands was clearly relevant for showing that he had possessed and fired a weapon. The presence of gunshot residue on the Petitioner's hands certainly makes it more probable that he fired a weapon. Whether or not the Petitioner possessed and/or fired a weapon is a fact of huge consequence with regard to all of the charges.

Rules 403 of the West Virginia Rules of Evidence provides as follows:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

**W.V.R.E. 403.**

The Petitioner argues that because there was no recording of the lifting of his GSR samples and because the bench notes from the West Virginia State Police Laboratory with regard to the testing of the GSR samples was not received from the State Police Laboratory until shortly before trial, the Petitioner did not have sufficient time to prepare. However, this argument of the Petitioner holds no weight. Following the receipt of the bench notes, the Petitioner filed a lengthy motion to suppress the GSR testing results. The State filed a response. The trial court held a suppression hearing on the Petitioner's motion at which the officer who took the sample testified concerning the location and circumstances of the lifting of the sample. The Petitioner advances no authority that states the lifting of a GSR sample must be video recorded.<sup>6</sup> Furthermore, the court found a sufficient chain of custody had been established through the testimony of the officer at the suppression hearing.

The Petitioner's whereabouts leading up to the lifting of the sample as well as the

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<sup>6</sup> It just so happened that the Petitioner's co-defendant's GSR samples were taken while he was in the interview room giving a recorded voluntary statement to another officer.

circumstances of the testing, including whether or not the Petitioner had been in police cruisers, handcuffed, or in contact with other incarcerated individuals was fully explored by the Petitioner in cross examining both the officer who took the sample and the forensic analyst who conducted the testing. The Petitioner even retained and presented testimony from his own expert witness, a forensic chemist with an emphasis in gunshot residue, concerning possible contamination of GSR samples and testing. In sum, the Petitioner has demonstrated no prejudice by the introduction of the GSR test results let alone any danger of unfair prejudice sufficient to substantially outweigh the very high probative value of said evidence. **W.V.R.E. 403.**<sup>7</sup>

Based upon the above, the trial court did not abuse its discretion in allowing the admission of the GSR test results. State v. Harris, supra., State v. Calloway, supra.

**V. THE CIRCUIT COURT DID NOT ALLOW THE ADMISSION OF EVIDENCE IN VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHTS UNDER BRADY AND DID NOT ERR IN DENYING THE PETITIONER'S MOTION FOR NEW TRIAL BASED THEREON.**

**A. Standard of Review**

“The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.” **W.Va.R.Crim.P. 33.**

“The question of whether a new trial should be granted depends on the circumstances of the case and is a matter largely in the discretion of the trial court. State v. Nicholson, 170 W.Va. 701, 296 S.E.2d 342, 344 (1982).”

State v. King, 173 W. Va. 164, 165, 313 S.E.2d 440, 442 (1984). “The question of whether a new trial should be granted is within the discretion of the trial court and is reviewable only in the case of abuse.” State v. Crouch, 191 W. Va. 272, 275, 445 S.E.2d 213, 216 (1994).

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<sup>7</sup> To the extent that the Petitioner argues that the prejudice was the result of a late disclosure of the bench notes from the WVSP Laboratory, the State would also note that the Petitioner did not request a continuance from the court for additional time to go over those notes.

## B. Discussion

The trial court did not err in denying the Petitioner's motion for new trial based upon alleged Brady violations.

There are three components of a constitutional due process violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982):(1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

Syl. Pt. 2, State v. Youngblood, 221 W. Va. 20, 650 S.E.2d 119 (2007).

The Petitioner again raises allegations of error with regard to the issue of the GSR testing. The State believes it has sufficiently addressed those allegations in the preceding subsection and incorporates those arguments herein by reference.

The Petitioner's other allegation of error involves a pool of vomit located outside of the bar. The surviving victim describes a physical altercation between himself and the deceased victim with two men whom they did not know but whom he identified at trial as the Petitioner and his co-defendant. During the altercation, the Petitioner and his-codefendant produced firearms and began to shoot. The surviving victim describes the deceased victim as being shot and continuing to run, leaving blood droplets in a trail. The surviving victim also states that after the deceased victim fell to the ground, he attempted to drag his dying friend away from the gunfire, also leaving a blood trail. A sample of a pool of vomit outside the bar was also collected in the course of processing the scene.

Although a droplet of the victim's blood was located in proximity to the vomit, there is no evidence as to when the vomit was deposited or that it was in any way connected to the shooting that took place. When the sample of vomit was tested, a CODIS hit showed that it

belonged to an individual named Roy Winston.<sup>8</sup> Cpl. Christian testified at trial that when he had received the information from the lab concerning the CODIS hit on Mr. Winston, Cpl. Christian conducted searches in the hopes of finding a driver's license or identification card in the four-state area for Mr. Winston, but said searches returned no information. [JSA, 316-318.] Cpl. Christian also stated that he then ran a criminal background check on Mr. Winston at which time he was able to get a physical description of him. [Id.] Cpl. Christian admitted on the stand that he did not conduct any further follow-up with regard to Mr. Winston based upon the evidence in the case.<sup>9</sup> Cpl. Christian then indicated on cross examination that he would classify the status of the investigation into Mr. Winston as still pending.

There was no evidence linking Mr. Winston to the crime. There was only evidence to show that Mr. Winston had thrown up outside of the bar at some point in time. Such evidence—that someone threw up outside of a bar—was certainly not exculpatory in nature and not material to the Petitioner's guilt or innocence of this crime. Additionally, this information was disclosed to the Petitioner prior to trial. [JSA, pg. 132.] The only thing the Petitioner states he did not know prior to trial was that Cpl. Christian considered the loose end of Mr. Winston to still be “under investigation.” Furthermore, the Petitioner and his co-defendant used Cpl. Christian's lack of further follow-up on the vomit to the fullest extent at the trial, arguing that it was sufficient reasonable doubt to acquit. In sum, there was no prejudice to the Petitioner. As such, the court did not abuse its discretion in denying the Petitioner's motion for new trial, as there was no violation under Brady. State v. Youngblood, *supra.*, State v. King, *supra.*, State v. Crouch,

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<sup>8</sup> The Petitioner and his co-defendant received notice of the test results well prior to trial and entered into a stipulation with the State concerning a basic explanation of what CODIS is to the jury. [JSA, pg. 132, 613.]

<sup>9</sup> The State once again notes that said evidence included the surviving victim identifying the Petitioner and his co-defendant, the testimony from the female in the getaway vehicle, the dash camera footage showing the flight of the Petitioner and his co-defendant, the video footage from surveillance cameras outside the bar, and the positive results of the GSR testing.

*supra.*

**VI. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE INVESTGATING OFFICER TO REMAIN AT COUNSEL TABLE FOR THE DURATION OF THE TRIAL.**

**A. Standard of Review**

“The question as to which witnesses may be exempt from a sequestration of witnesses ordered by the court lies within the discretion of the trial court, and unless the trial court acts arbitrarily to the prejudice of the rights of the defendant the exercise of such discretion will not be disturbed on appeal.”  
Syllabus point 4 of State v. Wilson, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

Syl. Pt. 7, State v. McKenzie, 197 W. Va. 429, 475 S.E.2d 521 (1996).

**B. Discussion**

As the Petitioner correctly cites in his brief, Rule 615 of the West Virginia Rules of Evidence provides that upon a party’s request, the trial court must order witnesses excluded from the courtroom as to not hear the testimony of other witnesses; however, the court may allow an investigating officer identified as the State’s representative to remain at counsel table with the prosecuting attorney.<sup>10</sup>

In this case, the State identified Deputy Christian as its representative to remain at counsel table with the prosecuting attorney. Although the Petitioner states that Deputy Christian

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<sup>10</sup> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d) a person the court believes should be permitted to be present.

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remaining at counsel table “gave him every reason to alter or shape his testimony to bolster and give credibility to the investigation,” the Petitioner goes on to highlight that defense counsel effectively attacked the credibility of the investigation in this case and fully cross examined Deputy Christian with regard to his “unfinished” investigation of two other individuals. [JSA, pg. 321-479.] Deputy Christian acknowledged that he had intended to do more follow-up with regard to two other individuals, but that he had not completed that follow-up. Deputy Christian was forthcoming about what he had not done with regard to the investigation. There is no evidence that Deputy Christian was dishonest about his actions with regard to the investigation based upon his presence in the courtroom during the testimony of other officers with regard to their actions. The fact that Deputy Christian provided photographs of the other individuals upon whom he had not followed up for use during his testimony in no way prejudiced the Petitioner’s case or precluded Petitioner’s counsel from vigorously cross-examining Deputy Christian about his lack of follow-up. In fact, Petitioner’s counsel relied heavily upon the testimony of Deputy Christian in closing argument to bolster the argument that the investigation was sloppy and unfinished. [JSA, 517-580.] Had Deputy Christian gone out after hearing the questioning of other witnesses and completed all of the follow-up he had not previously finished and testified that he had finished the investigation, perhaps the Petitioner’s argument would carry more weight; however, there is no evidence Deputy Christian’s presence in the courtroom during the testimony of other witnesses was prejudicial to the Petitioner. The trial court did not abuse its discretion in allowing him to remain at counsel table. State v. McKenzie, *supra*.

**VII. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY LIMITING THE PETITIONER'S CROSS EXAMINATION OF ONE INVESTIGATING OFFICER REGARDING ANOTHER OFFICER.**

**A. Standard of Review**

“The extent of cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in case of manifest abuse or injustice.” Syl. pt. 4, State v. Carduff, 142 W.Va. 18, 93 S.E.2d 502 (1956).

Syl. Pts. 8, State v. Davis, 176 W. Va. 454, 345 S.E.2d 549 (1986).

**B. Discussion**

During cross examination of Deputy Chief Harmison, the Petitioner attempted to ask questions with regard to the status of former Captain Dennis Streets. [JSA, 258-261.] Testimony at trial was that there were several officers who responded to the scene following the shooting in the parking lot, including Streets. There was no evidence that Streets played any role in the actual investigation of the case.

Streets had been indicted under suspicion that he had taken firearms belonging to the Sheriff's Department and other firearms that had been ordered to be destroyed in closed cases and sold those firearms for personal gain. When Petitioner's counsel began questioning Chief Harmison concerning the status of Streets, the State objected, and counsel convened a sidebar with the trial court. [Id.] The court inquired of defense counsel the relevancy of Streets' criminal charges especially considering that Streets was not testifying. [Id.] The court ruled that if and when Streets was called to testify, the matter may be relevant; however, the matter had no relevancy to the testimony of Chief Deputy Harmison. [Id.] Based upon the careful consideration of the trial court during the trial, the court did not abuse its discretion in limiting the cross examination of Chief Harmison with regard to Streets. State v. Davis, *supra*.

Furthermore, the trial court revisited the issue again during a hearing on post-trial motions where the court again considered the issue. [JSA, 48.] There was no abuse of discretion by the trial court. State v. Davis, *supra*.

## **VIII. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE INTRODUCTION OF THE DASHCAM VIDEO FOOTAGE.**

### **A. Standard of Review**

“A trial court is afforded wide discretion in determining the admissibility of videotapes and motion pictures.” Syl. pt. 1, Roberts v. Stevens Clinic Hospital, Inc., 176 W.Va. 492, 345 S.E.2d 791 (1986).

Syl. Pt. 1, State v. King, 183 W. Va. 440, 396 S.E.2d 402 (1990).

The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.

Syl. Pt. 1, State v. Harris, 216 W.Va. 237, 605 S.E.2d 809 (2004)(per curiam); Syl. Pt. 1, State v. Calloway, 207 W.Va. 43, 528 S.E.2d 490 (1999).

### **B. Discussion**

The trial court did not abuse its discretion in allowing the admission of the dash camera video footage of the initial stop and ensuing chase of the getaway car in which the Petitioner was a passenger by the Maryland State Police.

W.V.R.E. 901(a) states that “to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Subsection (b)(1) of that rule states as an example that to authenticate an item, it is sufficient to produce testimony of a witness with knowledge that the item is what it is claimed to be. W.V.R.E. 901(b)(1).

In this case, the State sought to introduce police dash camera footage from the initial stop

of the suspect vehicle by the Maryland State Police, which also shows the ensuing chase of the same vehicle. As discussed above, the Petitioner and his co-defendant had been in a physical altercation outside of a bar in Berkeley County, West Virginia, when they produced firearms and began to shoot, wounding and killing one man. The Petitioner and his co-defendant then got into a vehicle with other individuals and left the scene. A BOLO was issued for the suspect vehicle, and Maryland State Police encountered it off of I-70 in Washington County, Maryland.

Maryland State Police conducted what they called a “felony stop” on the vehicle based upon the BOLO issued by authorities in West Virginia. The driver of the vehicle pulled over in response to Maryland authorities. As the driver was exiting the vehicle, the Petitioner’s co-defendant shoved the driver, entered the driver’s seat of the vehicle, and sped off, leading the Maryland State Police on a chase, which ended only when Maryland authorities used spike strips to stop the suspect vehicle.

The dash camera footage sought to be introduced by the State was the footage from the lead car, which was being operated by Trooper Conner. However, at the time of trial, Trooper Conner was no longer employed with the Maryland State Police and his whereabouts were unknown. In support of the admission of the dash camera video footage, the State produced three (3) witnesses. The first witness was Cpl. Shaffer of the Maryland State Police who bears the responsibility of maintaining the digital dash camera footage from the cruisers of the officers in the Washington County barracks. He testified that he pulled the footage of the events in question from the cruiser of Trooper Conner and that a copy of that footage was turned over to West Virginia authorities. [JSA, pg. 181-184.] The next witness was Master Trooper Miller of the Maryland State Police. Trooper Miller indicated that he came upon the scene when Trooper Conner, who was in the lead car, had just performed the felony stop of the suspect vehicle based

upon the BOLO issued by West Virginia authorities. Trooper Miller indicated that when he arrived, he observed a male attempt or start to get out of the passenger side of the vehicle, look back at the police, and then get back into the vehicle. [JSA, pg. 196.] He testified that there was a bit of a commotion in the vehicle and then he observed the driver exit the vehicle. [Id.] At that point, Trooper Miller states he saw the driver's door close abruptly behind her and the vehicle sped away at which point the pursuit started. [Id.] Trooper Miller further testified that he continued on that pursuit behind Trooper Conner's vehicle, and he could clearly see the suspect vehicle driving all over the road in both the appropriate and opposing lanes of travel "whipping" back and forth. [JSA, pg. 196-197.] Trooper Miller further described the area of the pursuit, that the vehicle was disabled and ran off of the left side of the road, and that the occupants were then taken into custody. [Id.] Trooper Miller testified that he had watched the dash camera video footage that was removed from Trooper Conner's vehicle and in the possession of the State and that it accurately depicts the events of the evening as he observed them. [JSA, pg. 192-197.] Trooper Miller also indicated that he knew the recording was the official recording of the footage from Trooper Conner's dash camera on the date in question because of its appearance, including the appearance and location of the date/time stamp and other indicators on the video including the presence of Trooper Conner's car and ID number. [JSA, pg. 195-196.] Lastly, the footage was formally introduced into evidence during the testimony of Cpl. William Christian of the Berkeley County Sheriff's Department who received that recording from the Maryland State Police. [JSA, pg. 265-266.]

The State argued, and the trial court agreed, that a proper foundation had been laid for the authentication and admission of the dash camera video footage pursuant to the Rules of Evidence. As this Court found in State v. Adkins, 191 W.Va. 480, 484, 446 S.E.2d 702, 705

(1994), relevant photographs of a scene are admissible if identified either through the photographer who took them or by some other person familiar with the scene who is competent to identify that the photographs accurately depict the scene as it existed. Here, although the dash camera footage was shot by Trooper Conner, Trooper Miller is a competent witness to identify that the footage accurately and fairly depicts the events as they occurred.

Based upon the trial court's reasoned ruling with regard to the admission of this footage, the trial court did not abuse its discretion by finding a sufficient basis was shown for the admission of the dash camera footage. State v. King, supra., State v. Harris, supra., State v. Calloway, supra.

**IX. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE PETITIONER'S MOTION FOR NEW TRIAL BASED UPON THE PROSECUTOR'S CLOSING ARGUMENT.**

**A. Standard of Review**

"The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." **W.Va.R.Crim.P. 33.**

"The question of whether a new trial should be granted depends on the circumstances of the case and is a matter largely in the discretion of the trial court. State v. Nicholson, 170 W.Va. 701, 296 S.E.2d 342, 344 (1982)."

State v. King, 173 W. Va. 164, 165, 313 S.E.2d 440, 442 (1984). "The question of whether a new trial should be granted is within the discretion of the trial court and is reviewable only in the case of abuse." State v. Crouch, 191 W. Va. 272, 275, 445 S.E.2d 213, 216 (1994).

**B. Discussion**

The Petitioner argues that comments in the prosecutor's closing arguments were inflammatory to the extent that they violated the Petitioner's right to a fair trial. However, the Petitioner fails to note that no counsel ever objected to the State's closing. [JSA, 496-517, 580-

590.] It is well settled law that the failure to object constitutes waiver of a right to raise the matter on appeal. State v. Asbury, 187 W.Va. 87, 91, 415 S.E.2d 891, 895 (1992). Specifically with regard to the case at hand, this Court has found that

The rule in West Virginia has long been that “[i]f either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks.” Syl. pt. 5, in part, State v. Grubbs, 178 W.Va. 811, 364 S.E.2d 824 (1987). This Court has also long held that “[f]ailure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court.” Syl. pt. 6, Yuncke v. Welker, 128 W.Va. 299, 36 S.E.2d 410 (1945).

State v. Adkins, 209 W. Va. 212, 215, 544 S.E.2d 914, 917 (2001). Since the Petitioner did not object to the prosecutor’s closing argument, the Petitioner waived this allegation.<sup>11</sup>

The Petitioner does not argue that the Court consider his allegations concerning the State’s closing argument under the doctrine of plain error because plain error does not apply in this instance. “When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.” Syl. Pt. 8, in part, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995); Syl. Pt. 1, State v. White, 223 W.Va. 527, 678 S.E.2d 33 (2009)(per curiam); Syl. Pt. 1, State v. Day, 225 W.Va. 794, 696 S.E.2d 310 (2010)(per curiam).

Furthermore, even if this Court were to give full consideration of the issue, there was no error by the trial court in denying the Petitioner’s motion for new trial on this basis.

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a

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<sup>11</sup> The trial court noted that there was no contemporaneous objection and also no objection immediately following argument that could have been heard outside the presence of the jury that would have allowed the court to formulate and/or give a cautionary instruction to the jury. [JSA, 596-597.]

tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 6, State v. Sugg, 193 W. Va. 388, 456 S.E.2d 469 (1995).

The trial court heard argument on this issue during post-trial motions and specifically found that the prosecutor's arguments in context and in real time were "certainly" not a personal attack on opposing counsel. [JSA, 597.] The trial court further found that the argument concerning the "don't have the social graces God gave geese in this instance" was not an expression one would hear as it related to a religious matter but was simply used for "literative effect" as a comment on the sad way disputes are resolved in a culture full of guns and angry people and alcohol. [JSA, 598.] Applying the facts and findings of the trial court to the law in Sugg, it is clear that the Petitioner is not entitled to reversal of his conviction based upon these comments of the prosecutor. The trial court found in essence that the remarks of the prosecutor were isolated and did not prejudice the Petitioner. This is supported by the record. The entirety of State's closing argument spanned a total of 31 pages, and the complained of remarks amounted to a miniscule fraction of that. The State focused on the evidence presented during the trial and clearly did not place any comments before the jury to divert attention to extraneous matters. Furthermore, as discussed above and found by the trial court, the State produced sufficient evidence at trial to support the convictions of the Petitioner. Looking at these factors, the Petitioner is not entitled to reversal of his convictions based upon the State's closing argument. State v. Sugg, *supra*.

Based upon the above, the trial court did not abuse its discretion in deciding to deny the Petitioner's motion for new trial. State v. King, *supra*.; State v. Crouch, *supra*.

**X. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE ADMISSION OF THE RECORDS FROM NORTH CAROLINA DURING THE PETITIONER'S RECIDIVST TRIAL.**

**A. Standard of Review**

The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.

Syl. Pt. 1, State v. Harris, 216 W.Va. 237, 605 S.E.2d 809 (2004)(per curiam); Syl. Pt. 1, State v. Calloway, 207 W.Va. 43, 528 S.E.2d 490 (1999).

**B. Discussion**

The trial court did not abuse its discretion in admitting the records from North Carolina as the same were self authenticating under the Rules of Evidence.

**W.V.R.E. 901(a)** states that “to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Subsection (b)(7) of that rule states as an example that to authenticate public record evidence it is sufficient to show that a document was recorded or filed in a public office as authorized by law or that a purported public record or statement is from the office where items of this kind are kept. **W.V.R.E. 901(b)(7)**.

Additionally, Rule 902 of the West Virginia Rules of Evidence, states as follows:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

**(1) Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the United State or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

.....

**(4) Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of the United States or this state.

**W.V.R.E. 902.**

At the recidivist trial of the Petitioner, the State presented certified copies of the Petitioner's prior conviction and sentencing orders from North Carolina, along with attached fingerprint cards. Petitioner's counsel made no objection to the admission of the orders but took issue with the attached fingerprint cards. The trial court considered the argument of Petitioner's counsel and found that the fingerprint cards, just as the orders to which they were attached, were bearing raised seals indicating that they are certified to be an exact copy of, in the case of that document, fingerprints appearing in the files of the office of and endorsed by the custodian of records of the department of public safety combined public records section. [AR., Vol. 6, pg. 93-96.] As such the trial court found the documents to be self-authenticating under the Rules of Evidence. **W.V.R.E. 902.** The State cited and the trial court also considered the precedent established in the case of U.S. v. Ibarra, 499 Fed.Appx. 335, 2012 WL 5985099 (2012), wherein the Fifth Circuit Court of Appeals found that properly certified fingerprint cards attached to a defendant's certified conviction and sentencing orders obtained from the records custodian where said documents are kept are self-authenticating and admissible under the rules of evidence. Id. at 356.<sup>12</sup> Additionally, the State presented testimony from Cpl. William Christian who requested the certified copies of the Petitioner's prior conviction and sentencing orders from

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<sup>12</sup> The Petitioner incorrectly cites the case relied upon by the State in his brief.

the records custodian in North Carolina and who received said documents, including the attached fingerprint cards, directly from that official source in North Carolina. [AR, Vol. 6, pg. 93-94.] As such, he was a competent witness to testify that the records were from the office where the items of that kind are regularly kept. **W.V.R.E. 901(b)(7).**<sup>1314</sup>

Based upon a review of the law and a careful analysis of the records before the court, the trial court did not abuse its discretion in allowing the admission of the fingerprint cards. State v. Harris, supra.; State v. Calloway, supra.

### CONCLUSION

For the foregoing reasons, this Court is respectfully requested to affirm the conviction and sentence of the Petitioner and deny the Petition for Appeal.

Respectfully submitted,  
State of West Virginia,

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<sup>13</sup> The trial court further noted that although its ruling was that the records met the legal requirements for authentication in that proceeding that the Petitioner was free to make any factual argument available to him before the jury. [AR, Vol. 6, pg. 95.]

<sup>14</sup> The State also presented evidence from an expert in fingerprint analysis who determined that the fingerprints from the fingerprint cards at issue and the fingerprint card from the underlying felony conviction herein were made by the same individual.

**CERTIFICATE OF SERVICE**

I, Cheryl K. Saville, Assistant Prosecuting Attorney, hereby certify that I have served a true and accurate copy of the foregoing Respondent State of West Virginia's Brief by mailing of the same, United States Mail, postage paid to the following on this 24<sup>th</sup> day of March, 2016:

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