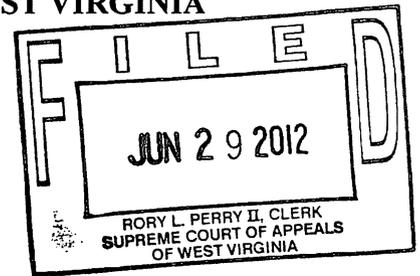


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0621



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

CLAYTON EUGENE ROGERS,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

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v.

CLAYTON EUGENE ROGERS,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On August 29, 2010 (Sunday), Clayton Eugene Rogers, a.k.a. Geno Rogers (“Petitioner”), intentionally, deliberately and premeditatedly murdered his girlfriend Laura Amos by stabbing her in the neck. The facts and circumstances giving rise to this murder are as follows:

The night before her murder, August 28, 2010 (Saturday), Laura Amos was partying/drinking with Petitioner and Keith Hubbard (“Hubbard”) under a bridge in St. Albans, West Virginia. App. R. 534-35. While there, Petitioner and Laura got into an argument with one another due to another man, Greg Lacy (“Lacy”),¹ supposedly proposing marriage to Laura.² App. R. 535. Angered by this

¹ This was not the first time that Petitioner and Laura got into an altercation about Laura’s relationships with other men; these altercations were both verbal and physical. *See generally* App. R. 865, 896, 904-09.

² At the time, Laura and Lacy were just friends and had known one another for a couple of weeks. App. R. 537, 584. “As it turns out,” Lacy never actually proposed to Laura, as he was still in love with his ex-wife. Knowing this and liking Lacy, Laura would sometimes go to Lacy’s
(continued...)

supposed proposal, Petitioner told Laura that he would kill her. App. R. 535-36. Following this argument, Laura and Hubbard left the bridge area to go to Lacy's house in St. Albans; Petitioner, for a short distance, followed Laura and Hubbard. App. R. 536-37. Laura and Hubbard did indeed go to Lacy's house where they watched movies and spent the night. App. R. 537-38, 584-85.

The next day, at approximately 11:30 a.m.–12:00 p.m. on August 29, 2010 (Sunday), Hubbard left Lacy's house and “happened upon” Petitioner, during which time Petitioner and Hubbard drank a beer together and waited for the 1:00 p.m. hour to arrive in order that they could buy some more beer. App. R. 538. During this period, Larry Means (“Means”) was also present with Petitioner and Hubbard. App. 538, 567-68. Shortly thereafter, Petitioner, Hubbard and Means went to a nearby Go Mart, waited in the parking lot for the store to open at 1:00 p.m., at which time Petitioner went in the store and bought a 12 pack of beer. From there, Petitioner, Hubbard and Means walked across the street to an abandoned house on West Main Street in St. Albans, where they were joined by Laura Amos.³ App. R. 539, 566-68, 579-80, 664. There, everyone, including Petitioner, Laura, Hubbard and Means, sat on the front porch steps of the house talking and drinking beer and vodka.⁴ App. R. 539, 541-43, 566-68, 587.

On this same day, at approximately 3:00-3:30 p.m., Lacy “happened by” the abandoned

²(...continued)
workplace and make his ex-wife jealous by announcing that Lacy had proposed to her. App. 588. Prior to her friendship with Lacy, Laura had been seeing Petitioner for approximately 2 years. App. R. 552.

³ This house is actually located at 217 West Main Street in St. Albans. App. R. 466, 498.

⁴ Although Petitioner, as did the others, consumed a “good deal” of alcohol, he was not stumbling, nor was his speech unintelligible and/or slurred. App. R. 543-44.

house while Petitioner, Laura, Hubbard and Means were still there drinking and “hanging out.”⁵ App. R. 541, 586. When he arrived, Lacy walked up on the porch, where he and Petitioner got into an argument about his supposed proposal to Laura. App. R. 541-42. Angered by the situation, Petitioner began punching the sidewalk next to Laura. App. R. 541-42, 587. Following his argument with Petitioner, Lacy drank some vodka and left to go home. App. R. 544-45, 590-91.

About five minutes after Lacy left, Petitioner and Laura got up, walked around the corner of the house, and entered the house through its side/back door; Hubbard and Means stayed on the porch area.⁶ App. R. 545, 597. Within 10 to 15 minutes, Laura began screaming, at which point Hubbard ran around the side of the house to see what was happening. App. R. 545. Not seeing anybody and not knowing whether Petitioner and Laura had gone into the house, Hubbard went back to the porch area and sat down with Means.⁷ App. R. 545.

Thereafter, Rusty Martin (“Martin”) “showed up” at the house⁸ and informed Hubbard that he was looking for a house to rent. Hubbard, in turn, indicated to Martin that he should “checkout” the house at which they were sitting. App. R. 546. Hubbard and Martin then walked up on the porch, opened the front door, and found Laura Amos lying dead on the floor in a pool of blood–

⁵ Prior to this time, Lacy was at work at Wendy’s in St. Albans. App. R. 581-82, 585.

⁶ Prior to going in the house, Petitioner slapped Laura in the face, and “followed up” this slap up with a kiss. App. R. 597-98.

⁷ In this same time period, Means saw Petitioner flee the scene into a wooded area behind the house, headed towards Robert Wilcox’s (“Wilcox”) house. App. R. 578. Petitioner did indeed go to Wilcox’s house. App. R. 601.

⁸ Please note that Martin had his wife Bonnie, as well as his child, with him at the time, both of whom stayed across the street. App. R. 546.

Laura had been stabbed twice in the neck.⁹ App. R. 467-69, 480, 498, 546, 555, 624.

Following Laura's murder, on August 29, 2010 (Sunday), the police were called and dispatched to the house. The officers responding to the scene included, among others, Detectives Donald Scurlock, Sean Snuffer and Samantha Ferrell.¹⁰ App. R. 466, 468, 498, 547, 607-08. After finding Laura dead, "working" the crime scene and talking to several witnesses,¹¹ Detectives Scurlock and Snuffer, as well as other officers from other police agencies,¹² began searching for Petitioner—Petitioner was not found on August 29, 2010. App. R. 467-69, 480-81, 498-99.

The next day, August 30, 2010 (Monday), pursuant to an arrest warrant,¹³ Detectives Scurlock and Snuffer went to the home of Timothy Ward ("Ward") in St. Albans to arrest Petitioner. App. R. 84, 108, 482, 500-02, 609, 834. Thereafter, at approximately 3:15 p.m., in the area of Ward's house, Detectives Scurlock and Snuffer arrested Petitioner and began transporting him to the Kanawha County Sheriff's Department. App. R. 85, 101, 104-05, 108-09, 482. At approximately 3:18 p.m., while he was being transported, Petitioner was advised of his *Miranda*

⁹ Following her death, an autopsy was performed on Laura, which revealed that she bled to death due to being stabbed twice in the neck. App. R. 624-25.

¹⁰ Detective Scurlock is a Captain with the Nitro, West Virginia, Police Department. App. R. 466. At the time of Laura's murder, Detective Scurlock was assigned to the Kanawha County Bureau of Investigations, which is a multi-jurisdictional police unit responsible for investigating crimes in Kanawha County. App. R. 466. Detective Snuffer is with the Kanawha County Sheriff's Department, assigned to the Criminal Investigation Section. App. R. 497. Detective Ferrell is likewise with the Kanawha County Sheriff's Department. App. R. 607.

¹¹ These witnesses included, among others, Means, Martin and Hubbard. App. R. 493, 608.

¹² These other police agencies included the St. Albans Police Department and the West Virginia State Police. App. R. 499.

¹³ This arrest warrant was actually obtained by Detective Ferrell. App. R. 101, 609.

rights.¹⁴ App. R. 85-86, 102, 109, 482, 502, 834-36.

After arriving at the Sheriff's Department, at approximately 3:55 p.m., Petitioner was again advised of his *Miranda* rights, which he waived and agreed to make a statement. App. R. 88-91, 102, 104-05, 109-10, 116, 482, 504-05, 857-59. At this point, Detectives Scurlock and Snuffer began interviewing Petitioner. During this interview, Petitioner admitted that, on August 29, 2010, he and Laura Amos went into the abandoned house alone through the side door. Petitioner further admitted that, while inside the house and with Laura in a sitting position, he took two knives out of his pocket, which he then used to kill Laura with by slicing/cutting her throat. Petitioner also admitted that, after killing Laura, he fled back out the side door and into a wooded area behind the house. *See generally* App. R. 860-915. Petitioner also explained where he discarded the knives and agreed to take Detectives Scurlock and Snuffer to that location before being presented to a magistrate.¹⁵ *See generally* App. R. 93, 530, 871-73, 912-13. The interview ended at approximately 4:50 p.m. App. R. 92, 96.

Following the interview, Detectives Scurlock and Snuffer began processing Petitioner—i.e., fingerprinting, photographing and paperwork. App. R. 93, 102-03, 110. During this same time period, at his request, Petitioner was allowed to speak to his daughter. App. R. 93-94. After speaking to his daughter, Petitioner was transported to the area where he discarded the knives. There, the knives were located and secured within 15 to 30 minutes. App. R. 94, 103. From there,

¹⁴ During this trip, at his own request, Petitioner was allowed to pick up some food from Wendy's, which he ate when he and the Detectives arrived at the Sheriff's Department. App. R. 87, 92.

¹⁵ Petitioner actually discarded the knives in the wooded area behind the house where he stabbed Laura. App. R. 531.

Detectives Scurlock and Snuffer transported Petitioner back to the Sheriff's Department, arriving there between 7:00-8:00 p.m. where, pursuant to his request, Petitioner was allowed to eat again; during this time period, the magistrate was not available.¹⁶ App. R. 94-95, 103, 112. Thereafter, at 8:00 p.m. when the magistrate became available, Petitioner was presented to the magistrate. App. R. 95, 103.

On September 17, 2010, the Kanawha County Grand Jury indicted Petitioner for first-degree murder. App. R. 59-60.

Petitioner's trial began on February 22, 2011 and ended on February 25, 2011, with the jury convicting him of first-degree murder without a recommendation of mercy.¹⁷ App. R. 71, 802-03, 815-16.

On March 15, 2011, a sentencing hearing was held in this case, during which the court sentenced Petitioner to life in the penitentiary without the possibility of parole.¹⁸ App. R. 71, 816.

¹⁶ On this particular day, August 30, 2010, the magistrate court was closed between the hours of 6:00 p.m. and 8:00 p.m. App. R. 95, 112.

¹⁷ As discussed more fully below, prior to his trial, on January 6, 2011, Petitioner moved the court to suppress his statement to the police. Petitioner's Motion to Suppress was based on his assertion that his right to be promptly presented to a magistrate had been violated. *See generally* App. R. 61-63. On January 24 and 26, 2011, hearings were held on Petitioner's Motion to Suppress. *See generally* App. R. 73-230. During the January 26, 2011 hearing, the court denied Petitioner's Motion. App. R. 204-05. Also, as discussed more fully below, prior to his trial, on February 7, 2011, Petitioner's counsel moved the court to withdraw as counsel for Petitioner. This Motion was based on counsel's assertion that he had a conflict of interest, as the Public Defender's Office had represented some of the prosecution's potential witnesses in prior cases. App. R. 233. On February 9, 2011, a hearing was held on Petitioner's counsel's Motion to Withdraw. *See generally* App. R. 231-77. During this hearing, the court denied Petitioner's counsel's Motion. App. R. 270-71.

¹⁸ During the sentencing hearing, Petitioner moved the court for a new trial based on his earlier assertion that his right to be promptly presented to a magistrate had been violated and, therefore, the court should have suppressed his statement to the police. Petitioner's Motion was also based on his assertion that the prosecution committed prosecutorial misconduct during its
(continued...)

Thereafter, Petitioner brought the current appeal.

II.

SUMMARY OF ARGUMENT

Detectives Scurlock and Snuffer did not first take Petitioner to the Sheriff's Department, bypassing the magistrate's office, for the primary purpose of taking his statement. Rather, these Detectives first took Petitioner to the station because it was consistent with their protocol to do so and to allow Petitioner an opportunity to tell his side of the story, which he voluntarily chose to do. Thus, the court committed no error in refusing to suppress Petitioner's statement to Detectives Scurlock and Snuffer.

No actual conflict of interest involving Petitioner's counsel exist in this case. Petitioner's counsel did not represent Hubbard in any prior matters—other members of the Public Defender's Office represented Hubbard in these matters. Prior to representing Petitioner, Petitioner's counsel was not privy to any confidential information arising out of the Public Defender's Office's previous representation of Hubbard. Nor was any of this confidential information passed to Petitioner's counsel after he began representing Petitioner. Any information that Petitioner's counsel had on Hubbard was generally known, as it was a matter of public record. Thus, the court committed no error in denying Petitioner's counsel's Motion to withdraw as Petitioner's counsel.

The extent of the evidence presented against Petitioner at trial was great—"to say the least." As such, the prosecutor's comments during closing argument, which were fairly isolated, did not

¹⁸(...continued)

closing argument. *See generally* App. R. 817-21. The court, in turn, denied Petitioner's Motion on these two points. *See generally* App. R. 825-29. As noted above, all of these matters will be fully discussed below.

affect the outcome of Petitioner’s trial. Thus, the court committed no error in denying Petitioner a new trial on the basis of prosecutorial misconduct due to the prosecutor’s comments during his closing argument.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

On appeal, Petitioner asserts that oral argument is necessary in this case and has requested the same under Rule 20 of the Revised Rules of Appellate Procedure. The State is inclined to agree. This is a first-degree murder case resulting in Petitioner receiving a life sentence without the possibility of parole. The issues in this case are in-depth, one of which the Court has never directly addressed—whether the “imputed disqualification rule” applies to the Public Defender’s Office. The State also believes that the Court should issue a “full-blown” opinion, rather than a memorandum decision, addressing and deciding the issues presented by this case. Finally, the State will, of course, defer to the discretion and wisdom of the Court on all these points.

IV.

ARGUMENT

A. THE CIRCUIT COURT COMMITTED NO ERROR IN RULING THAT PETITIONER’S STATEMENT TO THE POLICE WAS NOT IN VIOLATION OF THE PROMPT PRESENTMENT RULE AND, THEREFORE, WAS ADMISSIBLE.

1. Standard of Review

On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

State v. Mullens, 221 W. Va. 70, 73, 650 S.E.2d 169, 172 (2007) (quoting Syl. Pt. 3, *State v. Stuart*,

192 W. Va. 428, 452 S.E.2d 886 (1994)).

“When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court’s factual findings are reviewed for clear error.”

Syl. Pt. 13, *State v. White*, 228 W. Va. 530, 722 S.E.2d 566 (2011) (quoting Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996)). “[A] circuit court’s denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of law, or, based on the entire record, it is clear that a mistake has been made.” *State v. Milburn*, 204 W. Va. 203, 210, 511 S.E.2d 828, 835 (1998).

2. Applicable Rules

On appeal, Petitioner asserts that the court erred in allowing the prosecution to introduce his statement to the police at his trial, as this statement was taken in violation of his right to be promptly presented to a magistrate following his arrest. In support of this assertion, Petitioner argues that Detectives Scurlock and Snuffer bypassed the magistrate’s office, during a period when the magistrate was on duty, and instead took him to the Sheriff’s Department for the purpose of taking his statement. The State disagrees.

The prompt presentment statute, W. Va. Code § 62-1-5(a)(1), provides that

[a]n officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.

Furthermore, as this Court has held, “[w]hen a statement is obtained from an accused in violation of the prompt presentment rule, neither the statement nor matters learned directly from the statement

may be introduced against the accused at trial.” Syl. Pt. 1, *State v. DeWeese*, 213 W. Va. 339, 582 S.E.2d 786 (2003).

In interpreting and applying the prompt presentment statute, W. Va. Code § 62-1-5(a)(1), as well as its counterpart under the Rules of Criminal Procedure, W. Va. R. Crim. P. 5(a),¹⁹ the Court has “laid down” the following rules concerning the triggering of and acceptable delays under these two provisions:

Our prompt presentment rule contained in W. Va. Code, 62-1-5, and Rule 5(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest. Furthermore, once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered.

Syl. Pt. 2, *State v. Humphrey*, 177 W. Va. 264, 351 S.E.2d 613 (1986).

Certain delays such as delays in the transportation of a defendant to the police station, completion of booking and administrative procedures, recordation and transcription of a statement, and the transportation of a defendant to the magistrate do not offend the prompt presentment requirement.

State v. Sugg, 193 W. Va. 388, 395-96, 456 S.E.2d 469, 476-77 (1995) (footnote omitted) (citing *State v. Ellsworth J.R.*, 175 W. Va. 64, 70, 331 S.E.2d 503, 508 (1985)).

“Examples of necessary delay might include those required: 1) to carry out reasonable routine administrative procedures such as recording, fingerprinting and photographing; 2) to determine whether a charging document should be issued accusing the arrestee of a crime; 3) to verify the commission of the crimes specified in the charging document; 4) to obtain information likely to be a significant aid in averting harm to persons or loss to property of substantial value; 5) to obtain relevant nontestimonial information likely to be significant in discovering the identity or location of other persons who may have been associated with the arrestee

¹⁹ West Virginia Rule of Criminal Procedure 5(a) essentially mirrors W. Va. Code § 62-1-5(a)(1). Specifically, W. Va. R. Crim. P. 5(a) provides that “[a]n officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made.”

in the commission of the offense for which he was apprehended, or in preventing the loss, alteration or destruction of evidence relating to such crime.”

State v. Persinger, 169 W. Va. 121, 135-36, 286 S.E.2d 261, 270 (1982) (quoting *Johnson v. State*, 384 A.2d 709, 717 (Md. 1978)). See also Syl. Pt. 3, *Humphrey*, *supra* (“The delay occasioned by reducing an oral confession to writing ordinarily does not count on the unreasonableness of the delay where a prompt presentment issue is involved.”); Syl. Pt. 4, *Humphrey*, *supra* (“Ordinarily the delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule.”); *Sugg*, 193 W. Va. at 396 n.7, 456 S.E.2d at 477 n.7 (citing *Weekley v. State*, 222 A.2d 781, 787 (Del.1966)) (“In determining the reasonableness of the delay, the significant period of detention is that which occurs before the confession and not thereafter.”).

Essentially, the Court looks at the totality of the circumstances of the delay, including the primary purpose of the delay.

The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.

Syl. Pt. 6, *State v. Johnson*, 219 W. Va. 697, 639 S.E.2d 789 (2006) (internal quotation marks omitted).

We have recognized that delay in presenting an accused to a magistrate after arrest may render a confession obtained in the interim inadmissible at trial. We have consistently held, however, that such a delay is merely one factor to be considered in evaluating the voluntariness of the confession in light of the totality of the circumstances.

State v. Fortner, 182 W. Va. 345, 351, 387 S.E.2d 812, 818 (1989) (citations omitted).

Importantly, as it pertains to Petitioner’s case, this Court has found that the police may delay

taking a defendant before a magistrate where the defendant wishes to make a statement, as long as the police do not purposefully delay the defendant's presentment to the magistrate in order to encourage him to make a statement.

We wish to make clear that our prior cases do permit delay in bringing a suspect before a magistrate when the suspect wishes to make a statement. . . . However, our cases have never held that the police may purposefully delay taking a suspect before a magistrate in order to encourage the suspect to make a statement.

State v. Deweese, 213 W. Va. 339, 345 n.10, 582 S.E.2d 786, 792 n.10 (2003) (citation omitted).

3. Detectives Scurlock and Snuffer did not First Take Petitioner to the Station for the Purpose of Taking his Statement. Rather, These Detectives First Took Petitioner to the Station as a Matter of Protocol and to Allow him an Opportunity to Give his Side of the Story.

In asserting that the rights accorded to him under the prompt presentment rule were violated in this case, Petitioner argues that Detectives Scurlock and Snuffer's primary reason for taking him to the magistrate in the first instance, at a time when the magistrate was on duty, was to obtain his statement and/or confession. Not at all. Detectives Scurlock and Snuffer first took Petitioner to the station as a matter of protocol and to give Petitioner an opportunity to tell his side of the story, as it pertained to Laura Amos' murder. Nowhere is this more evident than the testimony of Detectives Scurlock and Snuffer during Petitioner's suppression hearing on January 24, 2011. During this hearing, Detectives Snuffer and Scurlock were asked, "point blank," whether the primary purpose of taking Petitioner to the station first, rather than to the magistrate, was to obtain his confession. Both of these Detectives answered this question in the negative.

[PETITIONER'S COUNSEL:] Q So the primary reason that Mr. Rogers was not taken to the Magistrate after he was apprehended was to get the confession from him, right?

[DETECTIVE SNUFFER:] A It's our normal procedure to interview people

when we arrest them.

Q Before you've been to the Magistrate?

A Yes, sir.

Q And that's what you did in this case?

A Yes, sir.

Q So the purpose of the delay was to obtain the statement, correct?

A I wouldn't necessarily call it the purpose, but as part of our booking procedure I always attempt to interview suspects.

Q And primarily that's the most important thing you do before you take them to the Magistrate is to get their side of the story, right.

A Yes, sir.

....

[PROSECUTOR:] Q So the time period spent transporting him to the station was not for the purpose of trying to gain a confession from him, was it?

....

THE WITNESS: No, ma'am, it was not.

App. R. 103-05.

[PETITIONER'S COUNSEL:] Q So how come you didn't bring him to the Magistrate right after you got to Charleston, instead of questioning him first?

[DETECTIVE SCURLOCK:] A In speaking with him, Mr. Rogers also indicated that he wished to speak with us and we conducted an interview and that's what we normally do.

Q So you normally don't take people to the Magistrate if they want to talk to you, even though there's already been a warrant issued for their arrest?

A If they wish to speak with us, no.

....

Q And you didn't take him to the Magistrate because you wanted to take a statement, right?

A No, we did want to speak with him.

Q Well, you didn't take him to the Magistrate because you wanted to take a statement; isn't that true?

A No, we wanted to speak with him; however, we give him that option. Yes.

App. R. 112-14.

Taken together, this testimony makes clear that Detectives Scurlock and Snuffer did not, contrary to his position on appeal, delay taking Petitioner to the magistrate for the primary purpose of obtaining his statement, "let alone" his confession to murdering Laura Amos. Rather, again as made clear by their testimony, Detectives Scurlock and Snuffer took Petitioner to the station first to process him and allow him an opportunity to give a statement, should he choose to do so—which, in fact, he did. *See* Syl. Pt. 6, *Johnson, supra*; *Deweese*, 213 W. Va. at 345 n.10, 582 S.E.2d at 792 n.10. Had Petitioner not agreed to speak with Detectives Scurlock and Snuffer, they would have terminated the interview, completed their "booking" procedures, and taken Petitioner in front of the magistrate. Again, this is clearly reflected by the testimony of Detectives Scurlock and Snuffer.

[PROSECUTOR:] Q [I]f when Mr. Rogers was read his Miranda rights, if he had circled "I am not willing to speak with you," what would you have done?

[DETECTIVE SNUFFER:] A We would have stopped the interview and we would have took his fingerprints, photograph, completed all our necessary paperwork and brought him before the Magistrate.

....

Q Detective Snuffer, I think that I've already asked you this, but, again, he was given an opportunity to circle either "I am" or "I am not," willing to give you a statement.

A That's correct.

Q And if he had circled, "I am not," what would you have done?

A I would have completed our normal booking procedures and brought him before the Magistrate.

Q But because he circled, "I am," what occurred?

A We interviewed Mr. Rogers.

App. R. 104, 106-07.

[PROSECUTOR:] Q I'm sorry. If you recall where we were at, was he given an opportunity to either give you—speak with you or not speak with you, if he chose to do so?

[DETECTIVE SCURLOCK:] A Yes.

Q And in what manner was he given that opportunity?

A The opportunity, or the written waiver, giving the advice of rights. He was advised that he could stop answering questions at any time until he spoke with an attorney. In addition, on the written waiver, Mr. Rogers signed himself, or marked the block on the waiver form indicating that he wished to speak with us at that time.

Q If he had signed the block that he did not wish to speak with you, or was not willing to speak with you, what would you have done?

A We would have completed the booking and presented him to the Magistrate.

App. R. 116.

As a related matter, and as pointed out by Petitioner on appeal, the State is well aware of this Court's finding that simply reading a defendant his *Miranda* rights does not nullify the prompt presentment rule. *See DeWeese*, 213 W. Va. at 345, 582 S.E.2d at 792 ("The prompt presentment rule is not nullified merely because the police read *Miranda* warnings to a suspect who is under arrest."). Here, however, Detectives Scurlock and Snuffer did much more. "To be sure," these two Detectives only read Petitioner his *Miranda* rights when he was being transported to the station. At

the station, however, Detectives Scurlock and Snuffer utilized a *Miranda* rights form. This form not only advised Petitioner of his *Miranda* rights, it provided for his acknowledgment and waiver of these rights, which he knowingly, intelligently and voluntarily waived. As their testimony makes clear, it was only after Petitioner waived his *Miranda* rights that Detectives Scurlock and Snuffer gave Petitioner the opportunity to give his side of the story concerning the murder of Laura Amos.²⁰

As a final matter on this issue, the amount of, if you will, “countable delay” of Detectives Scurlock and Snuffer’s presentment of Petitioner to the magistrate was *de minimus*. On August 30, 2010, at 3:15 p.m., Detectives Scurlock and Snuffer arrested Petitioner, at which point the prompt presentment rule was triggered. *See* Syl. Pt. 2, *Humphrey, supra*. Immediately after arresting him, Detectives Scurlock and Snuffer placed Petitioner in their cruiser and began transporting him to the station, during which time these Detectives, at his request, stopped and got Petitioner something to eat. Thereafter, at 3:55 p.m., Detectives Scurlock and Snuffer arrived at the station with Petitioner. This transportation time, of course, is not factored into determining whether Petitioner was unnecessarily delayed in being taken before the magistrate. *See Sugg*, 193 W. Va. at 395-96, 456 S.E.2d at 476-77.

Shortly after arriving at the station at 3:55 p.m., Detectives Scurlock and Snuffer advised Petitioner of his *Miranda* rights, which he waived and agreed to give a statement. At this point, these Detectives began interviewing Petitioner, during which time Petitioner admitted that he killed Laura Amos. This interview, which was recorded, lasted until 4:50 p.m. Again, this time period from 3:55 p.m. to 4:50 p.m., during which Petitioner’s statement was taken and recorded, is not

²⁰ Please note that Petitioner, in this appeal, is not contesting the voluntariness of his statement to the police.

counted for purposes of the prompt presentment rule. *See Sugg*, 193 W. Va. at 395-96, 456 S.E.2d at 476-77; Syl. Pt. 3, *Humphrey*, *supra*.

Immediately after he confessed to killing Laura Amos, Detectives Scurlock and Snuffer began “booking” Petitioner, during which time Petitioner was fingerprinted, photographed, and Detectives Scurlock and Snuffer completed their paperwork. Also, during this same time period, at his request, Petitioner was allowed to speak to his daughter. Again, for purposes of the prompt presentment rule, none of this time counted. *See Sugg*, 193 W. Va. at 395-96, 456 S.E.2d at 476-77; *Persinger*, 169 W. Va. at 135-36, 286 S.E.2d at 270.

After speaking to his daughter, and upon his agreement, Detectives Scurlock and Snuffer transported Petitioner to the area where he discarded the knives. After arriving at this location, the knives were located and secured within 15 to 30 minutes. Again, the time spent transporting, locating and securing these knives is factored out for purposes of the prompt presentment rule. *See Persinger*, 169 W. Va. at 135-36, 286 S.E.2d at 270.

After giving his confession, being transported to the location where he discarded the knives, as well as the locating and securing of these knives, Detectives Scurlock and Snuffer transported Petitioner back to the station. The Detectives and Petitioner arrived back at the station between 7:00-8:00 p.m. where, pursuant to his request, Petitioner was allowed to eat again. During this time period, the magistrate was not available, as the magistrate’s office was closed between the hours of 6:00 p.m. and 8:00 p.m. Thereafter, at 8:00 p.m. when the magistrate became available, Petitioner was presented to the magistrate. Obviously, the period between 6:00 p.m. to 8:00 p.m. is not counted for determining whether Petitioner was promptly presented to the magistrate, as no magistrate was available during this time. Furthermore, as this Court has made clear, none of the

time following his confession is taken into account for purposes of the prompt presentment rule. *See* Syl. Pt. 4, *Humphrey, supra; Sugg*, 193 W. Va. at 396 n.7, 456 S.E.2d at 477 n.7.

In short, Petitioner was not unnecessarily delayed in being presented to a magistrate. In fact, the entire delay lasted four hours and 45 minutes, from 3:15 p.m. to 8:00 p.m. The vast majority of this time, as discussed above, is not countable for purposes of the prompt presentment rule. Subtracting out this non-countable time leaves a *de minimus* time period, around 40 minutes, for purposes of determining whether Petitioner was promptly presented to the magistrate. Given this *de minimus* amount of time, as well as his giving of a voluntary statement to Detectives Scurlock and Snuffer, the court, and correctly so, found that Petitioner's prompt presentment rights were not violated in this case. *See generally* App. R. 207-15.²¹

B. THE CIRCUIT COURT COMMITTED NO ERROR IN DENYING PETITIONER'S COUNSEL'S MOTION TO WITHDRAW AS PETITIONER'S COUNSEL DUE TO A CONFLICT OF INTEREST.

1. Standard of Review

[T]he United States Supreme Court found the trial court should be afforded considerable latitude in making its determination to disqualify a criminal defense attorney due to a conflict of interest. Recognizing the trial court's need for latitude, several courts have applied an abuse of discretion standard when reviewing decisions on disqualification motions. We agree that this is the appropriate standard of review.

State ex rel. Blake v. Hatcher, 218 W. Va. 407, 417-18, 624 S.E.2d 844, 854-55 (2005) (citations omitted).

²¹ Please note that the court did find that Detectives Scurlock and Snuffer took Petitioner to the station for the purpose of obtaining a statement from him. *See generally* App. R. 208. Although the State, obviously, agrees with the court's finding that the prompt presentment rule was not violated in this case, it does disagree, for all of the reasons discussed above, with the court's finding on this point.

2. Applicable Rules

On appeal, Petitioner asserts that the court committed error in denying his counsel's, Jason Parmer's ("Counsel Parmer"), Motion to withdraw as his counsel during his trial. In support of this assertion, Petitioner argues that Counsel Parmer had an actual conflict of interest in representing him, as Counsel Parmer was a public defender and the Public Defender's Office had represented several of the prosecution's potential witnesses in previous matters. This conflict of interest, argues Petitioner, prejudiced him at trial, thus violating his right to conflict free counsel under the Sixth Amendment to the United States Constitution.²² The State disagrees.

The main provision of the Rules of Professional Conduct that governs this situation, W. Va. R. Prof. Conduct 1.9, provides that

[a] lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

In interpreting and applying this Rule, as well as conflict-of-interest issues in general, this Court, in its various decisions, focuses on (1) whether the conflicted attorney was involved in the same or a substantially related matter involving the former client and current client in which the current client's interests are materially adverse to the interests of the former client; (2) whether the former client, as well as the current client, consents to the conflicted attorney's continued

²² See *Blake*, 218 W. Va. at 413-14, 624 S.E.2d at 850-51 ("Where representation is affected by an actual conflict of interest, the defendant can not be said to have received effective assistance of counsel as required by the Sixth Amendment.").

representation; (3) whether the information relating to the representation of the former client, as well as the current client, will be used to the disadvantage of the former client or current client; and (4) whether the information concerning the former client is generally known.²³

“Rule 1.9(a) of the Rules of Professional Conduct, precludes an attorney who has formerly represented a client in a matter from representing another person in the same or a substantially related matter that is materially adverse to the interest of the former client unless the former client consents after consultation.”

Syl. Pt. 4, *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 697 S.E.2d 740 (2010) (quoting Syl. Pt. 2, *State ex rel. McClanahan v. Hamilton*, 189 W. Va. 290, 430 S.E.2d 569 (1993)). “Under Rule 1.9(a) of the Rules of Professional Conduct, determining whether an attorney’s current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations.” Syl. Pt. 5, *West Virginia Canine College, Inc. v. Rexroad*, 191 W. Va. 209, 444 S.E.2d 566 (1994) (quoting Syl. Pt. 3, *McClanahan, supra*).

“Under West Virginia Rule of Professional [Conduct] 1.9(a), a current matter is deemed to be substantially related to an earlier matter in which a lawyer acted as counsel if (1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.”

Syl. Pt. 8, *Bluestone Coal Corp., supra* (quoting Syl. Pt. 1, *State ex rel. Keenan v. Hatcher*, 210 W. Va. 307, 557 S.E.2d 361 (2001)).

When the information that is the subject of a disqualification motion predicated on prospective representation was “generally known” or otherwise disclosed to individuals other than prospective counsel, the information cannot serve

²³ This inquiry, or so it appears, amounts to nothing more than determining whether the attorney’s representation of the current client, given his representation of the former client, presents an actual conflict of interest.

as a basis for disqualification under Rule 1.9 of the Rules of Professional Conduct.

Syl. Pt. 4, *State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 575 S.E.2d 864 (2002).

Before disqualification of counsel can be ordered on grounds of conflict arising from confidences presumably disclosed in the course of discussions regarding a prospective attorney-client relationship, the court must satisfy itself from a review of the available evidence, including affidavits and testimony of affected individuals, that confidential information was in fact discussed.

Id. at Syl. Pt. 3.

When presented with a disqualification motion involving communications between an individual and prospective counsel, trial courts must carefully examine all relevant evidence that bears on the pivotal issue of whether confidential information has been disclosed which would impinge upon the attorney's right to zealously represent the current client or his duty to protect the confidences of the prospective client.

Id. at Syl. Pt. 6.

An adverse interest, also termed a conflict of interest, can occur in a variety of situations. It is impossible to devise a single statement that will reveal whether an interest is adverse. The resolution of the issue rests on first determining whether a substantial relationship existed between the two clients' interests. Next, consideration should be given by the court as to whether the attorney's exercise of individual loyalty to one client might harm the other client or whether his zealous representation will induce him to use confidential information that could adversely affect the former client.

State ex rel. McClanahan v. Hamilton, 189 W. Va. 290, 294, 430 S.E.2d 569, 573 (1993) (citations omitted).

The effective performance of counsel requires meaningful compliance with the duty of loyalty and the duty to avoid conflicts of interest, and a breach of these basic duties can lead to ineffective representation. More than a *mere possibility* of a conflict, however, must be shown. The Sixth Amendment is implicated only when the representation of counsel is adversely affected by an actual conflict of interest. When counsel for a defendant in a criminal case has an actual conflict of interest when representing the defendant and the conflict adversely affects counsel's performance in the defense of the defendant, prejudice to the defense is presumed and a new trial must be ordered.

Blake, 218 W. Va. at 414 n.4, 624 S.E.2d at 851 n.4 (quoting *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir.1991)).

Under state and federal constitutional law, “a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.” “To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised.”

State ex rel. Dunlap v. McBride, 225 W. Va. 192, 203, 691 S.E.2d 183, 194 (2010)(citations omitted).

It has been recognized that “[t]he mere possibility of a conflict of interest is insufficient to impugn a criminal conviction.” A defendant seeking to overturn a conviction based upon a potential conflict “will be entitled to a new trial only if he can establish ‘material prejudice’ to his defense resulting from the alleged conflict.”

Id. (citation omitted).

3. **No Actual Conflict of Interest Exist in This Case. Petitioner’s Counsel did not Represent Hubbard in any Previous Matters–Such Representation was Carried out by Another Member of the Public Defender’s Office. Prior to his Representation of Petitioner, Petitioner’s Counsel was not Privy to any Confidential Information Arising out of the Public Defender’s Office’s Previous Representation of Hubbard; nor was any of This Information Passed to Petitioner’s Counsel After he Undertook the Representation of Petitioner. Any Information on Hubbard That Petitioner’s Counsel Possessed was Generally Known, as it was a Matter of Public Record.**

As noted above, in asserting that his right to conflict free counsel was violated in this case, Petitioner argues that his trial counsel, Counsel Parmer, had an actual conflict of interest in representing him, as Counsel Parmer was a public defender and the Public Defender’s Office had represented Keith Hubbard in previous matters.²⁴ This conflict of interest, argues Petitioner,

²⁴ Petitioner also points out on appeal that Counsel Parmer, prior to trial, realized that, in
(continued...)

prejudiced him at trial, thus violating his right to conflict free counsel under the Sixth Amendment to the United States Constitution. Not at all.

First of all, Counsel Parmer did not represent Hubbard in any previous matters handled by the Public Defender's Office. App. R. 236, 264. These other matters were actually handled by other lawyers at the Public Defender's Office.²⁵ App. R. 238-39. Furthermore, Counsel Parmer did not have any confidential information, from reading files or otherwise, concerning the Public Defender's Office's representation of Hubbard in these previous matters. App. R. 236, 264. Additionally, as a means of impeaching him at Petitioner's trial, Counsel Parmer intended to rely solely on the complaints and criminal records of Hubbard's previous convictions, which were generally known, as they were a matter of public record.²⁶ App. R. 236, 248, 265. Based on this, and more, the court denied Counsel Parmer's Motion to withdraw as Petitioner's trial counsel. App. R. 269-71.

²⁴(...continued)

addition to Hubbard, three other potential witnesses for the prosecution had been previously represented by other attorneys in the Public Defender's Office. These other witnesses included David Edwards, Daniel Ward and Timothy Ward. App. R. 235. However, the prosecution never actually called these potential witnesses to testify at Petitioner's trial. Thus, any conflict of interest, actual or otherwise, regarding these other witnesses was mooted by the prosecution's decision not to put these other witnesses on the stand.

²⁵ These previous cases included two convictions in 2004 of credit card forgery and entering without breaking, for which Hubbard received two 1 to 10 year sentences. App. R. 238. Hubbard was represented by Steve Kinney of the Public Defender's Office on these two cases; Mr. Kinney was no longer with the Public Defender's Office at the time of Petitioner's trial. App. R. 239. A third case involved Hubbard's conviction of possession of a stolen vehicle in 2010, for which he received a 1 to 5 year sentence. App. R. 239. On this third case, Hubbard was represented by Rick Holicker; at the time of Petitioner's trial, Mr. Holicker was still with the Public Defender's Office and indicated that, although not certain, he may file a Rule 35(b) Motion for a reduction of Hubbard's sentence. App. R. 239.

²⁶ It should also be noted that the Public Defender's Office has a screening policy in place for these types of situations, whereby the attorneys are separated from one another and not allowed to have any communication. App. R. 252.

In his quest to convince this Court of an actual conflict of interest that prejudiced him during his trial, Petitioner asserts that Hubbard's public defender for his previous conviction of possession of a stolen vehicle indicated that, possibly, a Rule 35(b) Motion to reduce Hubbard's sentence could be filed. This, argues Petitioner, gave Hubbard more incentive to testify for the prosecution against Petitioner, who, of course, was a current client of the Public Defender's Office. Along with this, Petitioner further argues that, in order to zealously represent him, Counsel Parmer would have had to impeach Hubbard by cross-examining him on his previous convictions and did not do so. This argument has little, if any, merit. To begin with, there is absolutely nothing in the record indicating that Hubbard was promised anything for his testimony, such as a recommendation from the prosecution that his 35(b) Motion, should he in fact file one, be granted by the court overseeing his previous conviction and sentencing for possession of a stolen vehicle. Furthermore, there was no need for Counsel Parmer to cross-examine Hubbard about his prior criminal convictions—the prosecutor took care of this for him during his direct examination of Hubbard:

Q. Could you just state your name for the record?

A. Keith Hubbard.

Q. And you are also currently incarcerated?

A. Yes, sir.

Q. What were you convicted of?

A. Possession of a stolen vehicle.

Q. And that's a felony?

A. Yes.

Q. Have you ever been convicted of any other felonies?

A. Yes.

Q. What were they?

A. Credit card fraud, possession of stolen vehicle, burglary.

App. R. 533-34.²⁷

Furthermore, Petitioner consented to Counsel Parmer's continued representation of himself, which, as the Court is well aware, permitted the circuit court to allow Counsel Parmer to remain as Petitioner's counsel.

We have . . . observed that “[a]n indigent criminal defendant may demand different counsel for good cause, such as the existence of a conflict of interest or, if the potential conflict is disclosed in a timely fashion, he may elect to waive his rights and keep the court appointed counsel.”

State v. Reed, 223 W. Va. 312, 317, 674 S.E.2d 18, 23 (2009) (quoting *State v. Reedy*, 177 W. Va. 406, 411, 352 S.E.2d 158, 163 (1986)). “Once satisfied that [a] defendant has made a voluntary and knowing waiver of a conflict of interest, the trial court may permit counsel's continued representation[.]” *Reed*, 223 W. Va. at 318, 674 S.E.2d at 24 (internal quotation marks omitted).

On appeal, Petitioner essentially denies that he gave a valid consent to Counsel Parmer's continuing representation by arguing that the court did not discuss the conflict, as well as its ramifications, with Petitioner on the record. Nothing could be further from the truth. During the February 9, 2011 hearing on Petitioner's counsel's Motion to withdraw as Petitioner's counsel, the following discussion took place between the court, Counsel Parmer and Petitioner:

THE COURT: Mr. Parmer, do you—I note that Mr. Rogers is here and has

²⁷ It should be noted that Counsel Parmer discredited Hubbard by cross-examining him on other matters, such as his alcohol addiction and drug usage in general, his resultant diminished memory, and by eliciting testimony from him concerning the amount of alcohol he consumed the day before and day of Laura Amos' murder, August 28 and 29, 2010. App. R. 548-49, 550-56.

observed this colloquy, but have you conferred with him about this? Is there anything that the Court would need to place on the record regarding his position on this?

MR. PARMER: Well, I have spoken to him about the matter and, of course, you know, I can't speak for him, and I don't know whether I should, but I think that he seems to be satisfied with what we've done so far in his representation. You know, I don't know whether that directly addresses the issue of how to remedy the conflict, but I have spoken with Mr. Rogers about the situation. I think he understands, you know, the problem that we have, or the problem that's presented itself. I just said that the Court will rule how the Court rules and we'll proceed accordingly.

THE COURT: So Mr. Rogers, you feel that based on any conversation you had prior to this with your attorney and what you've heard today, you understand the nature of the motion that was filed here today?

MR. ROGERS: (Defendant nods his head up and down, affirmatively.)

THE COURT: And you understand that the Court's options here would be to either grant the motion to withdraw, and I think under the Rule I could absolutely do that. That would require appointment of new counsel, and I think I've put everything else in the record that would likely occur.

The other option—and I think I'm leaning in this direction because of what the record today here has shown or not shown—is to, based on the proffers and information the Court's discerned today, allow Mr. Parmer to remain as your counsel, given the fact that he has represented you from its inception. And you understand those are the Court's options; correct?

MR. ROGERS: Yes, ma'am.

THE COURT: You indicated, or I think the Court has stated that there's obviously been some pretrial matters the Court's resolved. Have you been satisfied with the representation you've received thus far?

MR. ROGERS: Yes, Ma'am.

App. R. 267-68.

It is clear from this discussion alone that Petitioner was present during the entire hearing on Counsel Parmer's Motion to withdraw as his counsel, during which the conflict issue was discussed

at length between the court, the prosecution and Counsel Parmer. It is also clear from this discussion that Counsel Parmer discussed this conflict issue with Petitioner and that he understood the situation. Finally, it is clear from this discussion that Petitioner was satisfied with the representation he had received thus far from Counsel Parmer, as well as Counsel Parmer's continuing representation of himself. In other words, contrary to his contention on appeal, Petitioner, after being made fully aware of any possible conflict problems in this case, consented that Counsel Parmer continue to represent him.

As a final note on this issue, the State and Petitioner do agree on one thing—this Court has never directly addressed whether the “imputed disqualification rule,” W. Va. R. Prof. Conduct 1.10, applies to the Public Defender's Office. Notably, however, at least one court has taken a look at the same or similar issue posed by this case—whether a public defender is “conflicted out” of a case because the prosecution's witnesses had previously been represented by other attorneys at the public defender's office. In that case, the court found that the “imputed disqualification rule” did not apply. *See generally People v. Shari*, 204 P.3d 453, 459-460 (Colo. 2009) (Direct conflicts of interest which existed among other attorneys at public defender's office could not be imputed to two public defenders appointed to represent defendant; the two public defenders were not involved in the office's prior representation of three prosecution witnesses, and the public defender's office had an extensive screening policy.).

C. THE CIRCUIT COURT COMMITTED NO ERROR IN DENYING PETITIONER A NEW TRIAL ON THE BASIS OF PROSECUTORIAL MISCONDUCT DUE TO THE PROSECUTOR'S COMMENTS DURING HIS CLOSING ARGUMENT.

1. Standard of Review

“A judgment of conviction will not be set aside because of improper remarks made by a

prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.” Syl. Pt. 5, *Sugg, supra*.

“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 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. 10, *State v. Black*, 227 W. Va. 297, 708 S.E.2d 491 (2010) (quoting Syl. Pt. 6, *Sugg, supra*).

2. Given the Extent of the Evidence Against him, the Prosecutor’s Comments During Closing Argument, Which Were Fairly Isolated, did not Affect the Outcome of Petitioner’s Trial.

In his rebuttal closing argument, the prosecutor made the following comments:

The gist of his argument that he just made was that it’s not first degree murder because he was so intoxicated he couldn’t plan ahead or he couldn’t premeditate what he did. Well, it only takes a moment to plan ahead, it only takes a moment to premeditate. And I will submit to you the evidence shows that when he opens those knives and approaches her, he’s thinking about killing her. What else would he be doing with the knives? And then you know how I know he intended to kill her? You intend the natural consequences of your actions. He premeditated it—it only takes a moment—and then he intended to kill her, ladies and gentlemen.

App. R. 783.

I’ll submit to you after he plunged the knives in her neck, he stood there and the blood from that knife dripped on that floor.

App. R. 789.

He pulls the knives out—again, plenty of time to plan ahead—pulls the knives out, walks across the room, unfolds them—

App. R. 790.

He hit right where he was aiming . . . he severed both carotid arteries.

App. R. 791.

But I'll submit to you that after he stabbed her, he reached out and cleaned his knife off on her shirt.

App. R. 792.

I humbly and respectfully request that you all find him guilty of first degree murder without mercy.

Ladies and gentlemen, he'll get to enjoy three meals a day. Laura Amos won't get to enjoy that.

App. R. 794.²⁸

On appeal, Petitioner asserts that these remarks prejudiced him to the point that he did not receive a fair trial. In support of this assertion, Petitioner specifically argues that the prosecutor's comments were a misrepresentation of the evidence, not supported by the evidence, and intended to inflame the jury. Regarding the prosecutor's comments that premeditation, an element of first degree murder, only takes a moment, Petitioner asserts this was a gross misstatement of the law, which prejudiced his defense at trial that he was not guilty of first-degree murder, as he was too intoxicated to form the requisite deliberation and premeditation to be convicted of first-degree murder. The State disagrees.

Admittedly, the prosecutor's comments were not in absolute keeping with the evidence and law. However, these remarks were fairly isolated and, more importantly, did not affect the outcome of Petitioner's case given the strength of the evidence against him. So too was the finding of the court: "In this instance any remarks [made by the prosecutor] . . . would not have changed the outcome of the trial. And so, to the extent they were made and you alleged they were improper, the

²⁸ Please note that Petitioner's counsel, Counsel Parmer, objected to some, but not all, of these remarks. Of those that he did object, the court sustained Counsel Parmer's objections. *See generally* App. R. 783, 789, 790, 792-94.

Court would find they did not constitute reversible error[.]” App. R. 828-29.²⁹

The evidence adduced at Petitioner’s trial was that he was extremely jealous and angered by his girlfriend, Laura Amos, being supposedly proposed to by another man. His jealousy and anger was such that Petitioner threatened to kill Laura the night before he actually did so. This jealousy and anger carried over to the next day when he smacked Laura across the face. Following this smack, Petitioner and Laura went into the abandoned house where, minutes later, witnesses at the scene heard Laura screaming. Thereafter, Laura was found lying dead in the floor in a pool of blood due to being stabbed twice in the neck. Shortly before or after Laura was discovered, Petitioner was seen fleeing the scene. This evidence alone was enough for the jury to convict Petitioner in the absence of the prosecutor’s remarks—but there is more. The jury also heard Petitioner’s statement to the police, wherein he admitted that he killed Laura by cutting her throat.

Outside of the presence of the jury, Counsel Parmer summed up Petitioner’s intoxication, as it related to his ability to premeditate murdering Laura Amos, as follows: “I think there’s certainly evidence of intoxication”—“whether the jury buys it is a different question.” App. R. 675. Well, the jury did not “buy it”—and with good reason. Petitioner knew exactly what he was doing before, during and after taking Laura into the house, taking two knives out of his pocket, and then stabbing and killing her. At the risk of sounding too blunt, Petitioner’s actions were cold, calculated and cowardly. Finally, it was Petitioner’s actions in this case, and not the prosecutor’s comments, that convinced the jury that Petitioner intentionally, deliberately and premeditatedly murdered Laura.

²⁹ It should be noted that, well before the prosecutor’s rebuttal closing argument, the court instructed the jury that the parties closing arguments were just that—arguments—and not evidence. App. R. 739. The court also fully instructed the jury on premeditation, as it pertains to the duration of time to form the same. App. R. 756. The court also fully instructed the jury on how and when voluntary intoxication reduces first-degree murder to second degree murder. *Id.*

V.

CONCLUSION

Petitioner's conviction should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By counsel

**DARRELL V. McGRAW, JR.
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0621

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

CLAYTON EUGENE ROGERS,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent hereby certifies that a true and correct copy of the foregoing **BRIEF OF RESPONDENT STATE OF WEST VIRGINIA** was mailed to counsel for the Petitioner by depositing it in the United States mail, first-class postage prepaid, on this 29th day of June, 2012, addressed as follows:

Crystal L. Walden
Deputy Public Defender
Kanawha County Public Defender Office
Post Office Box 2827
Charleston, West Virginia 25330



BENJAMIN F. YANCEY, III