
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0321

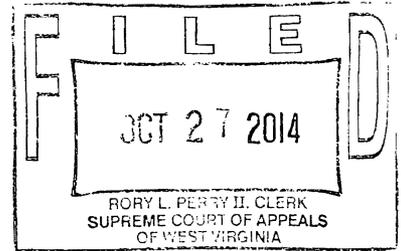
STATE OF WEST VIRGINIA,

*Plaintiff below,
Respondent,*

v.

WILLIAM B. MURRAY,

*Defendant below,
Petitioner.*



RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On the night of December 28, 2011, Petitioner William “Bub” Murray murdered his lifelong friend Thomas “T.J.” Blankenship by striking him in the head with a large wrench while Blankenship sat slumped on a couch. Murray murdered Blankenship because Blankenship had stolen two computers and a television from Murray’s father. After the brutal attack, Murray and his friend Clayton Collins callously disposed of the body: they rolled it up in a carpet, dumped it in the back of a pickup truck, and drove it to a remote riverbank (stopping for beer and cigarettes along the way) where they buried Blankenship in a shallow grave.

Following a six-day jury trial, Murray was convicted of first-degree murder and concealment of a deceased human body. He was sentenced to life in prison without mercy. He now appeals his conviction, claiming that the Circuit Court erred in several regards. The material facts from his trial are presented below, viewed in the light most favorable to the State.

I. Murray Murdered Blankenship by Crushing His Skull with a Wrench.

“Bub” Murray, Clayton Collins, and “T.J.” Blankenship had known each other since the three men were children. (Collins Tr. 6-7.)¹ At the time of Blankenship’s death, all three men were living together, along with their girlfriends, in Collins’s home near Clarksburg, West Virginia. (Collins Tr. 8.) They were so close that Murray and Collins called Blankenship, who

¹ Petitioner’s Appendix is informally separated into several volumes. Respondent’s Brief cites to four of these volumes. One volume contains various consecutively numbered documents and orders from the trial court record; a second volume is the transcript of the pretrial motions hearing regarding Murray’s motion to disqualify the Prosecuting Attorney; another volume is the trial transcript; and the fourth volume consists of the trial testimony of Clayton Collins. According to the transcript, the transcript of Collins’s testimony had been prepared before the entire trial transcript, so it is separate from the remainder of the trial. Citations herein to the various documents consecutively numbered in the first volume are to “App. ___”; citations to the pretrial motions hearing transcript are to “Hr’g Tr. ___”; citations to the trial transcript are to “Trial Tr. ___”; and citations to Clayton Collins’s trial testimony are to “Collins Tr. ___.”

was the youngest of the three, their “little brother.” (Collins Tr. 11; Trial Tr. 186-87.)² But their relationship soured in December 2011, when Murray and Collins suspected that Blankenship had stolen two computers and a television from Murray’s father, “Bee” Murray. (Collins Tr. 27-46.)

Although they believed Blankenship had stolen the items, Murray and Collins did not want to go to the police because they worried Blankenship would turn them in for their own criminal activities. (Collins Tr. 47.) So Murray and Collins decided to retaliate against Blankenship themselves by “possibly breaking his fingers, or his knees, or something.” (Collins Tr. 53; Trial Tr. 195-97.) Over the course of several conversations, Murray’s father offered Murray and Collins drugs and debt forgiveness in exchange for attacking Blankenship. (Collins Tr. 55-57.) Although they had planned to wait until after the first of the year to conduct their attack, (Collins Tr. 58), a confrontation with Blankenship led them to attack him earlier, on December 28, 2011. (Collins Tr. 59.)

In the early morning of the 28th, Blankenship came home around “three or four in the morning,” and he woke Collins up. (Collins Tr. 63-64.)³ Collins and Murray grew agitated with Blankenship and eager to confront him, but their girlfriends, Crystal Kirkland and Melissa Arbogast, were asleep in the house, as was Murray’s eight-year-old son. (Collins Tr. 65-68; Trial Tr. 197.) In anticipation of confronting Blankenship, Collins woke up the women and told them to leave and to take Murray’s son with them because “[t]here’s probably going to be a fight.” (Trial Tr. 200.) Kirkland and Arbogast left with Murray’s son in Collins’s 1976 GMC truck. (Trial Tr. 207-08.) As they left and apparently aware of what was going to happen to Blankenship, Kirkland said to Murray, “[Y]ou’re going to burn in hell.” (Trial Tr. 202, 250.)

² Blankenship was 20 years old at the time of his death. (Trial Tr. 610.) Murray and Collins were “eight or nine years” older. (Collins Tr. 6.)

³ Collins testified that they typically smoked marijuana when Blankenship got home. (Collins Tr. 64.)

After Kirkland and Arbogast left in Collins's truck, Collins confronted Blankenship about stealing from Murray's father, and an argument ensued. (Collins Tr. 78.) At some point, Blankenship charged at Collins, pushing him against a wall and choking him. (Collins Tr. 81.) Collins then grabbed an 18-inch, open box-end wrench that was lying on a nearby table and hit Blankenship repeatedly in the head, intending to kill him. (Collins Tr. 83-84, 204.)⁴ Dazed from the blows, the 238-pound⁵ Blankenship turned and walked away from Collins and "sat down on the couch and slumped over." (Collins Tr. 86.) When Blankenship "slumped over on the couch, [Collins] dropped the wrench on the floor" and "started to walk towards the door to go outside." (Collins Tr. 87-88; 176.) Murray, however, picked up the wrench off the floor and hit Blankenship in the head multiple times, with each hit making a "dull thunk" noise. (Collins Tr. 88-89; 177.) Collins went outside, took "two or three breaths," and then came back inside. (Collins Tr. 90.) "Shortly after" Collins came back in the room, he saw that Blankenship "peed himself." (*Id.*) Collins testified that "when he peed, [Murray] said he was dead, and started moving things out of the living room." (Collins Tr. 91.) At trial, the medical examiner testified that Blankenship was struck in the head four or five times, resulting in "complex" fractures and depression of Blankenship's skull. (Trial Tr. 627-30.) Any of the blows, the medical examiner concluded, could have caused Blankenship's death. (Trial Tr. 641.)

II. Murray and Collins Attempt to Conceal Blankenship's Body by Burying It in a Riverbank.

After realizing that Blankenship was dead, Murray ordered, "[W]e got to get rid of him." (Collins Tr. 91.) Murray immediately began cutting up the carpet that Blankenship had urinated

⁴ Collins described the wrench to the jury: "[I]t was a typical boxed-end wrench. It's kind of round on one side, and then the other side's open like a—maybe a fork with no middle prong." (Collins Tr. 146.) Murray had been using the wrench earlier in the day to work on the axle of his car.

⁵ (Trial Tr. 603.)

on. (Collins Tr. 92-93.) The two men then dumped Blankenship on the carpet, rolled him up, and called Kirkland and told her to return with Collins's truck. (Collins Tr. 93-94; Trial Tr. 209-10.) While Murray and Collins waited on the truck, they brought out the couch that Blankenship had been murdered on and set it on fire. (Collins Tr. 94; Trial Tr. 211.)

Once the truck was returned, Murray told Arbogast and Kirkland to leave again and fill up some canisters with gasoline, and the women complied. (Collins Tr. 98-99; Trial Tr. 212.) When the women returned for the second time, Murray and Collins loaded Blankenship's body in the back of the truck, along with cut up carpet and gasoline canisters. (Collins Tr. 100; Trial Tr. 213.) Murray wanted to dump the body in a river. (Collins Tr. 100.) They started driving toward Lost Creek, where they hoped to meet up with a friend and buy marijuana from him. (Collins Tr. 104-05.) They stopped twice: first to get shovels, and second to buy cigarettes and beer. (Collins Tr. 105, 108.)

Ultimately, Murray and Collins drove Blankenship's carpet-wrapped body to a riverbank in Arden, near Phillipi in Barbour County, West Virginia. (Collins Tr. 111.) Murray and Collins got out of the truck, grabbed the shovels, and "dug down until [they] hit rocks." (Collins Tr. 112.) They then "got [Blankenship] out of the back of the truck, and unrolled him and put him in the hole." (*Id.*) After dumping Blankenship's body in the damp soil of the riverbank, they "covered him up, and loaded all the carpet back in the truck, and took it somewhere else and burned it." (Collins Tr. 112.) They then got back in the truck and drove home. (Collins Tr. 113.)

III. Arrest, Indictment, Trial, and Conviction

Approximately two weeks later, Blankenship's body was discovered, and Arbogast contacted police and identified Murray and Collins as having been involved in the killing. (Trial Tr. 236-41.) Collins was arrested on January 16, 2012. (Collins Tr. 123.) He was initially

indicted in the Circuit Court of Harrison County on three charges: Murder, Conspiracy to Commit Murder, and Concealment of a Deceased Human Body. (App. 8-9.)⁶ Murray went to trial on July 9, 2013, and before jury selection, the State voluntarily dismissed the conspiracy charge. (Trial Tr. 9.) On July 16, 2013, the jury found Murray guilty on the murder and concealment charges. (Trial Tr. 880-81.)⁷ The jury did not recommend mercy. (Trial Tr. 881.) As a result, on February 10, 2014, Murray was sentenced to a term of life in prison on the murder charge, and to a concurrent term of 1 to 5 years for the concealment offense. (App. 22.) This appeal followed.

SUMMARY OF ARGUMENT

Murray's claims are without merit. *First*, sufficient evidence supports the jury's findings of premeditation and malice. Collins testified that while Blankenship sat slumped over on a couch, Murray picked up a wrench off the floor and struck Blankenship repeatedly in the head. It is irrelevant that Collins had previously told police that he alone had struck Blankenship. Defense counsel cross-examined Collins and challenged his veracity in front of the jury. The jury was entitled to credit Collins's testimony and determine that Murray had delivered fatal blows to Blankenship's skull with the heavy wrench.

Second, the Circuit Court did not err when it denied Murray's motion to disqualify the assistant prosecuting attorney. Simply put, Murray has identified no reason why the prosecutor was disqualified by virtue of her pretrial conversation with Crystal Kirkland. Although Kirkland may have changed her story during this conversation, the prosecutor handled the matter appropriately. Moreover, the charge that Kirkland was going to testify on—the conspiracy

⁶ "Murder" is defined at West Virginia Code § 61-2-1; "Conspiracy" is defined at West Virginia Code § 61-10-31; and "Concealment of a Deceased Human Body" is defined at West Virginia Code § 61-2-5a.

⁷ Murray did not testify at trial. (Trial Tr. 776.)

charge—was dropped prior to trial. Kirkland did not ultimately testify, and Murray can identify no harm from the prosecutor’s actions. Furthermore, from a policy standpoint, granting relief on Murray’s claim would create bad law. Essentially, such a rule would require that a prosecuting attorney’s office be disqualified any time a trial witness changed an aspect of her story during a pretrial interview.

Third, the Circuit Court did not commit plain error by not conducting *voir dire* of the entire jury when a juror realized during deliberations that she had worked with Murray’s ex-wife. Once the juror recognized the relationship, she notified the court immediately. Defense counsel then moved, “out of an abundance of caution,” to replace the juror, and the court granted this request. Defense counsel never asked for the court to interview the remaining jurors to determine whether any of them had been prejudiced by any possible remarks by the excused juror, nor is there any evidence that such an action was needed. Murray’s claim is speculative. There was no evidence of animosity or bias from the excused juror, nor was there evidence that she made any remarks to the other jurors about Murray that would prejudice him.

Fourth, the Circuit Court did not err when it admitted an inculpatory video recording of Murray arguing with Crystal Kirkland at the Harrison County Sherriff’s Department after she had given a statement to police. The Circuit Court correctly ruled that any generalized prejudice from playing the video for the jury—which showed a visibly angry Murray confronting Kirkland immediately after she was interviewed by police—did not substantially outweigh its probativity under Rule of Evidence 403.

Finally, the Circuit Court did not commit plain error when it allowed Collins to testify that his plea agreement required him to testify truthfully. The court instructed the jury—twice—on the limited uses of the evidence, including that it should be used to determine Collins’s

credibility only. This was a permissible use of the plea agreement, and Murray has identified no error.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case involves no substantial questions of law, and Petitioner has failed to identify any prejudicial error. Consequently, oral argument is not necessary, and a memorandum decision affirming the ruling below is appropriate. *See* Rev. R.A.P. 21.

STANDARD OF REVIEW

Claims preserved with a timely objection in the circuit court are reviewed under a bipartite standard: legal issues are reviewed de novo, while factual issues are considered for clear error. Syl. Pt. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000). Issues not objected to below, however, are reviewed for plain error. Syl. Pt. 2, *State v. Hatala*, 176 W. Va. 435, 345 S.E.2d 310 (1986). To prevail on a claim of plain error, the petitioner must show that there was error that was plain and that his substantial rights have been affected. Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). “By its very nature, the plain error doctrine is reserved for only the most egregious errors.” *State v. Adkins*, 209 W. Va. 212, 215 n.3, 544 S.E.2d 914, 917 n.3 (2001).

ARGUMENT

I. Sufficient Evidence Supports Murray’s First-Degree Murder Conviction.

Murray first claims that there was insufficient evidence introduced to support a verdict for first-degree murder because, he contends, “no evidence was offered by the State of West Virginia to prove” premeditation or deliberation by Murray. (Pet’r’s Br. 10.) Murray preserved this claim for appeal by moving for a judgment of acquittal at the close of the State’s evidence,

and again in a post-trial motion. (Trial Tr. 771; App. 29.) Given the evidence presented at trial, however, Murray cannot prevail on this claim.

To prevail on his challenge to the sufficiency of the evidence, Murray must show that, viewing the evidence in the light most favorable to the State, there is “no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.” Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Premeditation requires proof only that “the killing is done after a period of time for prior consideration.” *State v. Hatfield*, 169 W. Va. 191, 202 n.7, 286 S.E.2d 402, 410 n.7 (1982). And “[m]alice may be inferred from the intentional use of a deadly weapon[.]” Syl. Pt. 2, in part, *State v. Brant*, 162 W. Va. 762, 252 S.E.2d 762 (1979); *State v. Toler*, 129 W. Va. 575, 41 S.E.2d 850 (1946).

Murray’s claim requires that Collins’s testimony be ignored and that it be viewed merely as “a footnote added by co-defendant Clayton S. Collins after he was granted a plea agreement to testify against the Petitioner.” (Pet’r’s Br. 15.) But this belies the law and the record. Collins’s trial testimony provided direct evidence that Murray killed Blankenship with premeditation and malice. By his actions, it was evident that Murray did not swing the wrench at Blankenship—who sat slumped over on a couch—in the heat of passion or with sudden provocation. To the contrary, Collins’s testimony shows that this was a calculated act. The jury heard how Murray’s relationship with Blankenship had soured and how he and Collins had planned to attack Blankenship and break his fingers, knees, and legs. And the jury heard how after Murray watched Collins brutally strike Blankenship in the head several times with a wrench, Murray reached down, picked up the wrench, and repeatedly hit Blankenship in the head while Blankenship sat on a couch. They also heard how Murray then led the gruesome effort to roll Blankenship’s body in a carpet, callously dump him in the back of a truck, and bury

Blankenship's body in a riverbank and to destroy any evidence that Blankenship was ever at the house.

Murray also argues that “[e]ven if . . . the Court assumes the Petitioner did pick up the wrench and hit T.J. Blankenship,” there would be insufficient evidence that those blows killed Blankenship. There is no merit to this argument. When two people act in concert in committing a crime, each are equally liable for the results. *See* Syl. Pt. 11, *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1989) (“Under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator.”). Here, both Collins and Murray struck Blankenship in the head with a wrench, and the medical examiner testified that any one of the multiple blows could have been fatal. Collins and Murray were thus both criminally liable for Blankenship's death.

Having heard this evidence, a rational juror could certainly decide that Murray premeditated before striking Blankenship, and that he did so with malice. Collins was a fellow perpetrator in the killing and the only other living eyewitness to Blankenship's death. While Collins's trial testimony may have contradicted his earlier statements to police, he was subject to cross-examination and the defense was able to challenge his credibility before the jury. The jury was entitled to believe Collins, and his testimony cannot be so readily disregarded.

II. The Circuit Court Did Not Err in Denying Murray's Motion to Disqualify the Prosecutor Simply Because a Witness Changed Her Testimony.

Likewise, Murray's contention that the Circuit Court erred in denying a defense motion to disqualify the assistant prosecuting attorney must be rejected. Prior to trial on March 27, 2013, Assistant Prosecuting Attorney Traci Cook interviewed Murray's girlfriend, Crystal Kirkland, in preparation for trial. During that interview, contrary to what she had earlier told police, Kirkland

told the assistant prosecutor that Murray and Collins had, in fact, planned to kill Blankenship. Notably, Crystal Kirkland was not called as a trial witness by either party. On appeal, Murray claims that because Kirkland changed her story, Murray was somehow “placed in a position where he was unable to call her as a witness.” (Pet’r’s Br. 17.) This claim fails for several reasons.

In his motion to the Circuit Court, Murray stressed that “Crystal Kirkland is the only witness the State has that provides direct evidence of a conspiracy to murder the victim” and that the assistant prosecutor’s involvement in her change of story disqualified the prosecutor from trying the case. (App. 49.) He argued that her “new story [was] motivated by her desire to avoid prosecution by cooperating with the State,” and the assistant prosecutor was “an essential witness as to the circumstances of the witness’ change in story.” (App. 50.) But Murray has shown no harm from the assistant prosecuting attorney remaining in the case. The conspiracy charge was dismissed by the State prior to trial and neither party called Kirkland to testify. Murray contends that he was “unable” to call Kirkland as a witness because her “statement change caused [her] to be given Court appointed counsel as she was a co-defendant in this matter.” (Pet’r’s Br. 17.) But he fails to show how this “inability” is attributable to the assistant prosecuting attorney’s presence as counsel for the State.

Notwithstanding the lack of harm, Murray’s motion to disqualify the prosecuting attorney was misplaced at trial, as is his claim of error on appeal. Certainly, the mere fact that a witness changes her story during a meeting with a prosecutor does not then disqualify the prosecutor from the case. In Syllabus Point 1 of *State v. Smith*, this Court recognized,

When an attorney is sought to be disqualified from representing his client because an opposing party desires to call the attorney as a witness, the motion for disqualification should not be granted unless the following factors can be met: First, it must be shown that the attorney will give evidence material to the

determination of the issues being litigated; second, the evidence cannot be obtained elsewhere; and, third, the testimony is prejudicial or may be potentially prejudicial to the testifying attorney's client.

226 W. Va. 487, 702 S.E.2d 619 (2010) (*per curiam*) (quoting Syl. Pt. 3, *Smithson v. U.S. Fidelity & Guaranty Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991)).

Ostensibly, Murray would have wanted to call the assistant prosecuting attorney as a witness regarding Kirkland's statements and then use the prosecutor's testimony to impeach Kirkland at trial. But Murray's argument fails on several fronts: he fails to show that the assistant prosecutor would have had material evidence to testify to; that the evidence regarding inconsistencies in Kirkland's statements could not have been obtained elsewhere; or that her testimony would have prejudiced the prosecution.

During the pretrial motions hearing on the issue, the assistant prosecutor explained the circumstances surrounding her conversation with Crystal Kirkland. She described that "during just our general conversation of what happened, going back over her statement, she began crying hysterically and advised me at that point that Mr. Murray and Mr. Collins advised her before she left and told her to leave the house the day of the murder with Mr. Murray's son, that they told her they were going to kill T.J." (Hr'g Tr. 7-8.)

Based on what was presented, the Circuit Court properly denied the motion to disqualify the assistant prosecutor. The court rightfully recognized that "credibility issues are not material to the issue being litigated; whether the evidence cannot be found elsewhere is only speculative; and the State acted appropriately in disclosing the information and the Court cannot find that the reason the witness changed her statement is prejudicial to the State." (App. 75.) The court further stated that "if the issue arises where the assistant prosecuting attorney must be called as a witness, the Court will entertain the appropriate motion for a mistrial and revisit the defendant's

motion to disqualify.” (*Id.*) Notably, the defense never sought to call the assistant prosecutor as a witness.

Granting relief on this claim would be truly extraordinary. Murray argues that the entire Harrison County Prosecuting Attorney’s Office was disqualified from prosecuting this case because Crystal Kirkland recanted earlier statements to police. Thus, ruling in Murray’s favor would create a dramatic new rule in criminal cases: a prosecuting attorney is disqualified any time a witness gives inconsistent statements during a pretrial interview. Such a rule would run contrary to public policy and would prove unworkable in practice.

III. The Circuit Court Did Not Commit Plain Error by Replacing a Juror without Conducting *Voir Dire* of the Remaining Jurors.

Murray also argues that the Circuit Court committed plain error when it did not *voir dire* the entire jury panel after replacing a juror who realized during deliberations that she once worked with Murray’s ex-wife. Murray recognizes that he never requested *voir dire* and that his claim is subject to plain error review. (Pet’r’s Br. 19.)

In claiming error below, Murray relies on this Court’s decision in *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010) (*per curiam*), as an example of how a juror’s lack of candor during pretrial *voir dire* can upset a guilty verdict. (Pet’r’s Br. 20.) But Murray’s reliance on *Dellinger* is misplaced. In *Dellinger*, a juror had previously lived in the same apartment complex as the defendant and had befriended the defendant over social media during the trial, despite having denied any prior knowledge of, or relationship with, the defendant during *voir dire*. Furthermore, the juror failed to disclose that her brother-in-law worked for one of the trial witnesses. On appeal, this Court ruled that the juror’s lack of candor during *voir dire* deprived him “of the ability to determine whether she harbored any prejudices or biases against him or in favor of the State.” This Court thus presumed bias and ordered a new trial. This Court also

cautioned, however, that “the process of identifying bias or prejudice, except in clear cases, can be a delicate one where the conclusion is finally drawn from the totality of the responses.” *Id.* at 741, 43 (internal quotations and alterations omitted).

Murray’s case is markedly different from *Dellinger*. *First*, unlike *Dellinger*, there is no need to presume bias because the juror here was removed before the jury rendered its verdict.

Second, there is no evidence of lack of candor by the juror involved here. The juror did not conceal her prior relationship with Murray’s ex-wife during *voir dire*; rather, she simply failed to make the connection until deliberations, and it appears that she notified the court of the issue as soon as she made the realization. (Trial Tr. 868.) The note from the jury foreman stated that the juror “*just realized* that she knows and worked with the defendant’s ex-wife, Ruby King. She believes her name used to be Ruby Murray. She advised her place of employment was Clarksburg Nursing Rehab, Clarksburg Continuous Care.” (Trial Tr. 868 (emphasis added).)

Third, the trial court did everything that the defense requested. The trial court presented the note to counsel, and defense counsel told the court, “I wouldn’t have any opposition *just out of an abundance of caution* to excuse--,” before the court interrupted and instructed defense counsel to confer with Murray. (Trial Tr. 868.) Following the recess, defense counsel stated, “Your Honor, it would be our opinion that it would be safest to excuse her and have the first alternate to serve.” (Trial Tr. 869.) There being no objection, the court granted the defense motion, excused the juror, and replaced her with the first alternate. (*Id.*)

Finally, Murray’s claim that the discharged juror might have prejudiced the other jurors against him is purely speculative. Since defense counsel never requested that the trial court conduct a *voir dire* of the remaining jurors, the “delicate” process of identifying prejudice must be considered through the lens of plain error. No evidence supports Murray’s claim that the juror

would have had any animosity toward him. (Pet'r's Br. 20.) Based on the timing of the note, she notified the court of the potential issue as soon as she realized the situation.

IV. The Circuit Court Did Not Violate Rule 403 in Allowing the State to Play a Video of a Conversation between Murray and His Girlfriend.

Additionally, Murray contends that the trial court erred by allowing the State to play a video of Murray and his girlfriend at the Sherriff's Department. After she was questioned by Harrison County Sherriff's deputies, Crystal Kirkland sat with Murray, and their conversation was recorded by a closed-circuit video camera. (Trial Tr. 452.) The video showed that Murray was "very aggravated, very upset with Crystal." (Trial Tr. 454.) And it showed that "[a]t one point, he had actually made a hand motion . . . acting as though he was going to strike her." (Trial Tr. 454.) Although the volume of the video was "very low," deputies who had listened to the video testified that "at one point, he said something like, I told you to keep your mouth shut. And he does a hand motion, like he's going to backhand her." (Trial Tr. 454.)

Murray's lawyer objected to the State's motion to play the video for the jury. His motion at trial relied on the balancing test of Rule of Evidence 403, just as his appellate claim does. Under Rule 403, relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." W. Va. R. Evid. 403. The video recording was clearly relevant: it showed an aggravated Murray physically and verbally angry with his girlfriend for talking with police about his involvement in T.J. Blankenship's death. The only prejudice was that the video was in fact inculpatory against Murray. After watching the video, the trial court properly ruled that "the probative value outweighs any unfair prejudice," and the court properly instructed the jury that it was to watch and hear the video and make its own determination of how much weight to give it. (Trial Tr. 458-59.)

V. The Circuit Court Did Not Commit Plain Error in Allowing the State to Elicit Testimony that Collins's Plea Agreement Required Him to Testify Truthfully.

Finally, Murray complains that the State was allowed to tell the jury that Collins's plea agreement obligated him to testify truthfully. Two weeks prior to trial, Collins entered into a plea agreement with the State to second-degree murder and concealment of a deceased human body, and he also agreed that a recidivist information would be filed against him. (Collins Tr. 147.)⁸ During his trial testimony, the State asked Collins to confirm that "part of that plea agreement is you offer truthful testimony," and he did confirm that. (Collins Tr. 148.) Collins also conceded that his trial testimony conflicted with statements he gave to police after he was arrested that he was the only person that struck Blankenship with the wrench. (Collins Tr. 150.) Directly following the description of the plea agreement at the close of Collins's direct examination, the Circuit Court gave the jury a lengthy instruction regarding the plea agreement. Among other things, the court explained to the jury, "You may consider this witness's guilty plea or intended guilty plea only for the purpose of determining how much, if at all, to rely upon his testimony." (Collins Tr. 152.) And the court gave the same instruction at the conclusion of cross-examination. (Collins Tr. 209.) Defense counsel never objected to the description of the plea agreement or the court's instruction. Indeed, on cross-examination, defense counsel asked Collins about the terms of the plea agreement, emphasizing that he had entered into the agreement two weeks before trial. (Collins Tr. 169.)

In making his claim on appeal, Murray misstates this Court's holding in *State v. Swims*, 212 W. Va. 263, 569 S.E.2d 784 (2002), as standing for the rule that it is reversible error for a

⁸ Collins had prior convictions for wanton endangerment and malicious killing of an animal. (Collins Tr. 168.)

trial court to “fail[] to redact vouching language from a plea agreement.” (Pet’r’s Br. 23.) To the contrary, *Swims* held the following:

During the direct examination of a co-defendant, a prosecutor may elicit testimony regarding the co-defendant’s plea agreement, and may actually introduce the plea agreement into evidence for purposes which include, but are not necessarily limited to: (1) allowing the jury to accurately assess the credibility of the witness; (2) eliminating any concern by the jury that the government has selectively prosecuted the defendant; and (3) explaining how the witness has first-hand knowledge of the events about which he/she is testifying.

Id. at Syl. Pt. 4. Furthermore, the decision to allow the introduction of a plea agreement is reviewed for an abuse of discretion. *Id.* at Syl. Pt. 6.

Here, the State’s introduction of the terms of Collins’s plea agreement was simply intended to allow the jury to accurately assess Collins’s credibility, which *Swims* expressly allows. Indeed, soon after the plea agreement was described and Collins’s direct examination ended, the trial court *twice* gave a lengthy cautionary instruction to the jury on the proper uses of the plea agreement: once following direct examination and again after cross-examination. Within the cautionary instruction, the court instructed the jury, among other things, “You may consider this witness’s guilty plea or intended guilty plea only for the purpose of determining how much, if at all, to rely upon his testimony.” (Collins Tr. 152, 209.) Tellingly, Murray’s trial counsel never objected to the State’s use of the plea agreement and, in fact, attempted to impeach Collins and insinuate that he changed his story to curry favor with the State and get a better plea deal. (Collins Tr. 208.)

CONCLUSION

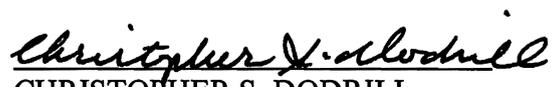
The convictions must be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

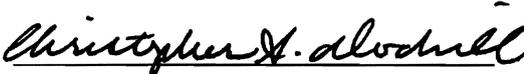
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CERTIFICATE OF SERVICE

I, Christopher S. Dodrill, Assistant Attorney General and counsel for the Respondent, verify that I served a true copy of *Respondent's Brief* upon Petitioner's counsel by depositing it in the United States mail, with first-class postage prepaid, on October 27, 2014, addressed as follows:

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