
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0919

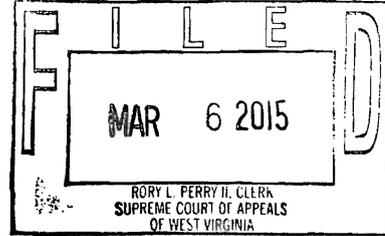
STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

DENNY FRANKLIN ERVIN,

Defendant Below, Petitioner.



RESPONDENT'S BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

SHANNON FREDERICK KISER
ASSISTANT ATTORNEY GENERAL
W. Va. Bar Number 12286
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
Email: Shannon.F.Kiser@wvago.gov
Counsel for Respondent

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ASSIGNMENTS OF ERROR

Petitioner claims five (5) Assignments of Error, which Respondent specifically and generally denies:

- A. The Preston County Circuit Court erred by not permitting the jury to visit the site of the incident.
- B. The Preston County Circuit Court erred by not permitting the testimony of Lisa McCartney.
- C. [Petitioner] argues that the jury did not consider all of the relevant evidence presented at the trial, and considered evidence which was not presented at trial when coming to a verdict.
- D. The prosecutor misrepresented evidence during the closing argument.
- E. The prosecutor prejudiced [Petitioner] by not providing a court ordered Bill of Particulars as related to the use of a firearm.

STATEMENT OF THE CASE

On October 16, 2012, Denny Franklin Ervin (hereinafter, "Petitioner"), was indicted by a grand jury sitting in the Circuit Court of Preston County, West Virginia (hereinafter, "Circuit Court"), for "First Degree Murder" in violation of W. Va. Code § 61-2-1, charged as Count One, further aggravated through the use of a firearm in violation of W. Va. Code §§ 62-12-2 and 62-12-13, which was charged as Count Two. (Appendix [hereinafter, "App.,"] at 1.) Petitioner was also indicted for one count of "Stalking" in violation of W. Va. Code § 61-2-9a(b), charged as Count Three, one count of "Wanton Endangerment Involving a Firearm" in violation of W. Va. Code § 61-7-12, charged as Count Four, and one count of "Domestic Assault" in violation of W. Va. Code § 61-2-28(b), which was charged as Count Five in the Indictment. (App. at 2.) Following trial on April 17, 2014, the jury found Petitioner guilty of first degree murder with the use of a firearm and wanton endangerment, Counts One, Two, and Four, respectively. (App. at 3.)

On June 5, 2014, the Circuit Court conducted a hearing on Petitioner's April 23, 2014, "Motion for Judgment of Acquittal, or in the Alternative, a New Trial," and his *pro se* "Motion for Extension of Time to File a Motion for a New Trial Based on Newly Discovered Evidence" and "Motion for Appointment of New Appella[te] Counsel" filed on May 1, 2014. (App. at 6-7.) Thereafter, on June 17, 2014, the Circuit Court issued an "Opinion Order Following June 5, 2014 Hearing on Defendant's Post-Trial Motions." (Full Order, App. at 6-33.)

With respect to Petitioner's "Motion for Judgment of Acquittal, or in the Alternative, a New Trial," the Circuit Court found that the State of West Virginia (hereinafter, "State"), put forth sufficient evidence to sustain a conviction. First, the State produced the testimony of Alberta Curry, Leslie Dawn Layman's (hereinafter, "Victim"), neighbor. (App. at 11.) Ms.

Curry testified that a suspicious white Subaru travelled past the Victim's home at approximately 7:30 PM on the evening of the incident, before parking further up the road, out of sight of the Victim's residence. (*Id.*) A short while later, Ms. Curry heard gunfire, and her husband, Roger Curry, then observed Petitioner walking by their home and back towards the Subaru. (*Id.*)

Cecillia Layman and Sara Layman, the Victim's daughters, testified that they heard gunfire after returning home on the evening of the incident. (*Id.*) Cecillia Layman further testified as to hearing her mother say, "Help. I Love you guys, call the cops." (*Id.*) Then, she heard Petitioner say, "You're gonna die, motherfucker." (*Id.*)

Next, Don Spiker testified that Petitioner called him after the shooting before dropping off the white Subaru at Mr. Spiker's home. (*Id.*) Petitioner then told Mr. Spiker that he could keep the white Subaru, because he shot the "girl down the street" and was likely going to prison. (*Id.*) Petitioner also attempted to leave the murder weapon with Mr. Spiker, who refused. (*Id.*) The pistol was later found approximately 50 feet from the road near Mr. Spiker's garage. (*Id.*)

Petitioner's sister-in-law, Margaret Ervin, stated that Petitioner called her and admitted to shooting the Victim twice. (*Id.*) Ms. Ervin also stated that Petitioner seemed calm on the telephone, and that Petitioner had never mentioned anything about self-defense in shooting the Victim. (*Id.*) Mark Atkinson, Petitioner's friend, also stated that Petitioner had texted the Victim prior to her murder and threatened to kill her. (*Id.* at 12.) Mr. Atkinson also revealed that Petitioner had left messages on his cellular phone admitting to the shooting. (*Id.*) Again, Petitioner never mentioned anything regarding self-defense. (*Id.*)

Linda Soccorsi, Petitioner's sister, stated that she received a telephone call from Petitioner on the night of the incident. (*Id.*) During the call, Petitioner admitted to shooting the Victim and opined that he would go to jail for the rest of his life. (*Id.*) Similarly, Petitioner

never mentioned anything about self-defense or provide motivation as to why he shot the Victim. (*Id.*) Tammy Belldina, relation unknown, testified that Petitioner called her and admitted to shooting the Victim twice, stating that Petitioner was “tired of people messing with him.” (*Id.*)

The State also played to the jury answering machine messages left by Petitioner on the Victim’s answering machine, during which Petitioner called the Victim a “whore” and referenced her relationship with a “new man.” (*Id.* at 13.) In the messages, Petitioner also accused the Victim of cheating throughout their relationship. (*Id.*) The Circuit Court found such messages to offer evidence of Petitioner’s motive in committing the murder. (*Id.*)

Petitioner called David McMasters as his first witness. (*Id.*) Mr. McMasters disputed the prior testimony, stating that he had heard eight (8) to ten (10) .22 caliber shots and then heard a large-caliber shotgun. (*Id.*) He then stated that he witnessed Sara Layman drive down to her grandmother’s residence. (*Id.*)

Petitioner then called Robert White, an expert in the field of gunshot residue analysis. (*Id.*) Mr. White called into doubt the decision by the West Virginia State Police to forgo gunshot residue analysis on the Victim. (*Id.*) He further stated that he believed a gunshot residue analysis on the Victim would be probative for purposes of Petitioner’s defense. (*Id.* at 14.) The Circuit Court also noted that the crime scene was exposed to heavy rain on the evening of the murder, and a decision had to be made by the State Police to move the body out of the rain or wait until morning to collect whatever evidence remained after the rain had stopped. (*Id.* at 14 n.3.) The State Police decided to move the body, but only after the body had been exposed to heavy rain for at least some period of time. (*Id.*)

Petitioner next called Chad Miller, who was married to Petitioner’s niece at the time of trial. (*Id.* at 14.) Mr. Miller testified that he had picked up Petitioner earlier on the day of the

murder, and that Petitioner proceeded to argue with Mr. Miller's wife and son. (*Id.*) Mr. Miller further stated that Petitioner seemed volatile, and that anything would "piss off" Petitioner. (*Id.*)

Petitioner also called Koren Powers, section supervisor of the trace evidence section at the West Virginia State Police lab and an expert in the field of forensic science. (*Id.* at 15.) Ms. Powers stated that no gunshot residue analysis of the Victim was requested by the State Police. (*Id.* at 15.) Next, Dr. James L. Frost testified as an expert in the field of forensic pathology. (*Id.*) Dr. Frost testified that clothing can show the presence or absence of gunshot residue, but also opined that rain could wash such residue away. (*Id.*) Dr. Frost also testified to a reasonable degree of medical certainty that the shot to the Victim's arm occurred first, followed by the shot to her back. (*Id.*)

Next, the 911 call from Ms. Belldina was read in full to the jury. (*Id.* at 16.) Jana Wolfe, the 911 operator called to establish the foundation for admission of the 911 call, testified that Ms. Belldina reported that Petitioner had shot the Victim in the head and back. (*Id.*) Petitioner also called 911 operator Justin Wolfe, who took a call from the Victim during a prior domestic violence incident on February 28, 2011. (*Id.*) Mr. Wolfe testified that the Victim stated during that incidence that she would shoot Petitioner if he returned to her residence. (*Id.*) Upon cross-examination by the State, however, Mr. Wolfe read in the entirety of the report, which revealed that Petitioner had been threatening the Victim, had ripped the back door off of the Victim's trailer, had hit the Victim with a bucket, had spit in the Victim's face, and had cut the brake lines on one of the Victim's vehicles. (*Id.*) The jury was effectively able to consider such evidence. (*Id.*) Petitioner stated that, after discussing the matter at length with trial counsel, he had decided to not testify in his own defense. (*Id.*)

The Circuit Court found that the State had proven all necessary elements through sufficient evidence of Petitioner's guilt and had met its burden in all charges for which Petitioner was ultimately convicted. (*Id.* at 17-20.) Similarly, the Circuit Court found that Petitioner's alternative motion for a new trial was meritless, identifying that Petitioner had failed to proffer evidence in support of his claims. (*Id.* at 20-29.) There, Petitioner alleged that the jury considered evidence consisting of an iPhone video taken on Petitioner's cellular telephone, Petitioner's cellular telephone records, and the Victim's cellular telephone records which had not been properly admitted for consideration in Petitioner's underlying trial, based upon the jury's request at the time of deliberations for information that was not entered into evidence. (*Id.* at 20.) The Circuit Court recognized that no evidence had been introduced by Petitioner to suggest the jury considered such evidence, and further identified that it had admonished the jury that such information had not been entered into evidence and was thusly not able to be considered by the jury. (*Id.* at 23.) Lastly, the Circuit Court identified that the amount of time spent by the jury during deliberation was not a proper ground for impeachment of the verdict.

With respect to Petitioner's allegation that the Circuit Court erred by failing to allow the testimony of Lisa McCartney, the Circuit Court identified several reasons for its decision before ultimately denying Petitioner's motion. Petitioner wanted to introduce the testimony of Ms. McCartney to offer a statement made by the Victim prior to the murder in which the Victim stated that she had had fired a warning shot with a shotgun at Petitioner. (*Id.* at 26.) The Circuit Court recognized Petitioner's right to introduce evidence of threats made against him in accordance with *Dietz v. Ligursky*, 188 W. Va. 526, 425 S.E.2d 202 (1992), but ruled Ms. McCartney's testimony as inadmissible hearsay. (*Id.*) The Circuit Court concluded that Ms. McCartney's statement failed to qualify as a present sense impression, excited utterance, or then-

existing state of mind because the Victim made her statement at a later time following the incident reported by Mr. Wolfe. (*Id.* at 27.)

Petitioner contended that the statement should have been admitted as a statement against interest, declarant unavailable under West Virginia Rule of Evidence 804(b)(3), as the Victim, by virtue of her statement, would be exposing herself to criminal liability. (*Id.*) The Circuit Court recognized the exception provided by 804(b)(3) and proceeded to determine whether the Victim, as a reasonable person at the time such statement was made, would have thought the statement was against her interest. (*Id.* at 28) (citing Franklin D. Cleckley, 2 *Handbook on Evidence for West Virginia Lawyers*, 8-225 (5th ed. 2012)). The Circuit court found that the Victim likely would not have expected the statement to expose her to criminal liability:

Based upon the circumstances described by [Petitioner's] motion, the Court does not find that [the Victim] would have reasonably thought that her statement exposed her to criminal culpability. First, it was made to her best friend, who [the Victim] likely felt safe confiding in and that Ms. McCartney would not seek criminal charges. Second, it is not reasonably clear that [the Victim's] actions were criminal. During the same incident, [Petitioner] had hit [the Victim] with a bucket, spit in her face, and cut the brakes on one of her vehicles. Because the statement against interest exception is construed narrowly, this Court concluded that [the Victim's] purported statement to Ms. McCartney was not sufficiently reliable to fall under the exception contained in Rule 804(b)(3) of the West Virginia Rules of Evidence.

(*Id.* at 29) (citations omitted). The Circuit Court based its question of criminal culpability off of this Honorable Court's holding in Syl. Pt. 2, *State v. W.J.B.*, 166 W. Va. 602, 276 S.E.2d 550 (1981), wherein this Court held that an "occupant of a dwelling is not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent

physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary.” (*Id.* at 28-29 n.10.)

As such, the Circuit Court found that Ms. McCartney’s testimony was properly ruled as inadmissible hearsay under established West Virginia law. (*Id.* at 28-29.) Further, the Circuit Court opined that Petitioner would have been able to proffer evidence of the Victim’s statement as an excited utterance through his own testimony, but chose instead to invoke his right to remain silent and not testify. (*Id.* at 29.) Finally, the Circuit Court found that Petitioner was able to get similar testimony admitted under the report given by Mr. Wolfe, and that such evidence “did not preponderate heavily against the verdict.” (*Id.*)

The Circuit Court then denied Petitioner’s *pro se* “Motion for an Extension of Time to File a Motion for New Trial Based on Newly Discovered Evidence” as improper, as Petitioner had not yet been sentenced following his conviction. (*Id.* at 30-31.) The Circuit Court, however, granted Petitioner’s *pro se* “Motion for Appointment of New Appellate Counsel” on the grounds that Petitioner would likely attempt to raise a claim of ineffective assistance upon the appeal of his conviction and/or sentence. (*Id.* at 31-32.)

SUMMARY OF THE ARGUMENT

Petitioner has asserted five Assignments of Error. With respect to Petitioner’s first Assignment of Error, that the Circuit Court erred by denying a site visit of the crime scene by the jury, the State proffered and the Circuit Court accepted legitimate reasons for denial of such a request. There existed sufficient information regarding the scene, including photographs, which allowed the jury to fully realize the scene as it existed two years prior on the date of the murder.

Regarding Petitioner’s second Assignment of Error, that the Circuit Court erred by ruling the testimony of Lisa McCartney inadmissible, the Circuit Court correctly found Ms.

McCartney's testimony, which concerned a statement made by the Victim before the Victim's death, did not qualify as an exception to the rule against hearsay under Rule 804(b)(3) of the West Virginia Rules of Evidence.

Petitioner's following three Assignments of Error are wholly without merit, and Petitioner has been unable to submit proof of such allegations. First, Petitioner cannot show that the jury considered information not in evidence or failed to consider information admitted into evidence. Second, Petitioner cannot make a claim for relief based upon the prosecutor's lawful, proper and vigorous prosecution of the charges contained within the indictment, including promotion of the State's interpretation of evidence during closing remarks. Finally, Petitioner's claim that the State failed to submit a bill of particulars as to Petitioner's use of a firearm is entirely misguided, as the State had no duty or obligation to inform Petitioner of information directly contained within the State Code listed in the Indictment. Therefore, this Honorable Court should deny the entirety of Petitioner's claims, and affirm Petitioner's conviction in the Circuit Court below.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner has not requested an oral argument in this matter. Respondent asserts that this case is ripe for decision by Memorandum Opinion as the law contemplated within Petitioner's Assignment of Error is well practiced, and this Honorable Court has generally held that a new hearing is unnecessary upon a Rule 35 motion by the Circuit Court. Respondent further contends that any argument upon the matter is unnecessary.

ARGUMENT

A. The Circuit Court correctly refused to permit the jury to visit the site of the incident.

W. Va. Code § 56-6-17, in relevant part, states:

The jury may, in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision, and in such case the judge presiding at the trial may go with the jury and control the proceedings; and in a felony case the judge and the clerk shall go with the jury and the judge shall control the proceedings, and the accused shall likewise be taken with the jury or, if under recognizance, shall attend the view and his recognizance shall be construed to require such attendance.

In reviewing a trial court's denial of a site view, the original motion "lies peculiarly within the discretion of the trial court, and, unless the denial of such view works probable injury to the moving party, the ruling will not be disturbed." Syl. Pt. 1, *Collar v. McMullin*, 107 W. Va. 440, 148 S.E. 496 (1929).

As a result, a trial court's refusal to permit a jury to visit the scene where a crime took place during trial is within the trial court's discretion and ordinarily does not constitute error. See *State v. Beacraft*, 126 W. Va. 895, 30 S.E.2d 541, 545 (1944) (overruled on other grounds by *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986)). "Such a view if for the purpose of informing the jurors upon any pertinent inquiry being made in the trial of the case, and the things which they observe upon such view, so far as they are pertinent to show anything proper to be proved, are to be considered by them the same as any other evidence introduced in the case." Syl. Pt. 3, *State v. McCausland*, 82 W. Va. 525, 96 S.E. 938 (1918). This Honorable Court has honored several "legitimate reasons" to prohibit a site visit, such as damage to a crime scene which renders the site dangerous to jurors, the availability of photographs and/or videotape of the scene, the distance between the courthouse and the scene, and the difficulty in getting to the specific site of the crime upon arrival to the scene. *State v. Brown*, 210 W. Va. 14, 26, 552 S.E.2d 390, 402 (2001) (per curiam).

Here, Petitioner alleges that the Circuit Court abused its discretion in denying his motion for a site view that was, for purposes of pleadings, unopposed by the State. While the State did not respond to Petitioner's motion, it did raise its concerns in open court. Primarily, the State put forth "legitimate reasons" to deny a site visit, such as the parties' agreement that the scene is no longer as it was on the night of the incident, the removal of vehicles that may be at issue, the distance between the site and the courthouse of thirty (30) minutes, and the lack of foliage currently present at the scene due to the change in season. (App. at 46.) Further, the Court found that the "file contains hundreds of photographs, charts, and aerial photographs" that would already allow the jury to visualize the scene of the crime. (App. at 46.) Finally, Petitioner was unable to illustrate how such information was unable to serve the same purpose as a site visit. (*Id.* at 46-47.) Therefore, the Circuit Court found "that the danger of misleading or confusing the jury outweighs the probative value of a site view." (*Id.* at 46.)

Based upon the foregoing information Petitioner's argument that the Circuit Court erred by prohibiting a site view is meritless. The Circuit Court discretionarily found that a site view could only enhance the danger of prejudice considering the information already available at Petitioner's trial. Petitioner is still unable to assert any factual basis as to why a site view should be required in his underlying criminal case beyond mere speculation that the jury would better understand the crime. Petitioner already had the information available at trial to show all of the evidence suggested by his motion. As a result, this Honorable Court must deny Petitioner's first (1st) Assignment of Error and affirm Petitioner's conviction in the Circuit Court below.

B. The Circuit Court correctly ruled the testimony of Lisa McCartney inadmissible.

Next Petitioner attempts to cast the Circuit Court's ruling which prohibited Ms. McCartney from testifying as to a prior conversation between herself and the Victim in which

the Victim stated that she fired a warning shot at Petitioner as a violation of Rule 801(d)(2) of the West Virginia Rules of Evidence. In actuality, the Circuit Court discussed the proposed admission of the statement at length under Rule 804(b)(3), as a statement against interest when the declarant is unavailable to testify. Under Rule 804(b)(3) at the time of Petitioner's trial on April 17, 2014, a statement against interest is one that:

was so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

At trial, a murder victim has generally been treated as an unavailable declarant for purposes of evidentiary and constitutional analysis. See *State v. Kaufman*, 227 W. Va. 537, 711 S.E.2d 607 (2011); *State v. Mechling*, 219 W. Va. 366, 633 S.e.2d 311 (2006). Such a view is consistent with the holdings of the Supreme Court of the United States. See *Giles v. California*, 554 U.S. 353 (2008).

Here, the statement of which Petitioner now complains was made by the Victim he murdered, thereby forming the basis of his underlying criminal charges. The Victim was made unavailable by Petitioner's unlawful act, and by definition was properly considered an unavailable declarant for purpose of analysis under the West Virginia Rules of Evidence regarding hearsay testimony.

The Circuit Court applied Rule 804(b)(3) analysis, finding that it was unlikely that the Victim should have reasonably concluded she was making a statement against interest, and called into question whether her actions were technically illegal given this Honorable Court's

opinion regarding the “castle doctrine” set forth in Syl. Pt. 2, *State v. W.J.B.*, 166 W. Va. 602, 276 S.E.2d 550 (1981). In this case, the Victim was violently confronted by Petitioner in her own home, where he proceeded to hit the Victim with a bucket, spit in her face, and cut the brake lines on one of her vehicles. The Victim allegedly fired a warning shot to scare the Petitioner away and prevent further harm to herself or her property. She then discussed the situation with her best friend, Ms. McCartney, and allegedly admitted to discharging her shotgun as a “warning shot.”

As recognized by the Circuit Court, the Victim’s statement raises significant questions as to whether it qualifies as a hearsay exception under either of the dually-required subsections of Rule 804(b)(3). The State avers that the Victim’s statement does not. Further, Petitioner provides no basis on which the Circuit Court’s discussion of the Victim’s statement under Rule 804(b)(3) was improper, instead couching his entire argument on the false assumption that the Circuit Court should have only treated the statement as a party admission. Therefore, this Honorable Court should deny Petitioner’s second (2d) Assignment of Error and affirm Petitioner’s conviction in the Circuit Court below.

C. Petitioner has failed to proffer evidence which suggests that the jury failed to consider the evidence presented at trial, and considered evidence not presented at trial over the admonishment to the contrary made by the Circuit Court.

This Honorable Court has previously held:

A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of. The question as to whether or not a juror has been subjected to improper influence affecting the verdict, is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial, proof of mere opportunity to influence the jury being insufficient.

Syl. Pt. 1, *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995) (citing Syl. Pt. 7, *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932)). “A jury verdict may not ordinarily be impeached based on matters that occur during the jury’s deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict.” Syl. Pt. 1, *State v. Scotchel*, 168 W. Va. 545, 285 S.E.2d 384 (1981).

Here, the Circuit Court found as follows:

In this case, there is no evidence presented by [Petitioner] that the jury considered the content of the video on the iPhone. Instead, the jury merely requested to see it, which request was refused by the Court after consultation with counsel and [Petitioner]. Although this particular scenario does not fall squarely within the examples provided in *Scotchel*, the Court considers this a ‘matter inherent to the jury’s deliberative process.’ They jury had heard testimony that a video on the iPhone was retrieved by the Digital Forensics Unit, but were not shown the video based on a prior motion *in limine*, and then asked to see it during deliberations. No showing has been made that the jury otherwise saw it or relied on it during their deliberations. Accordingly, this ground for a new trial is without merit.

(App. at 23.) Now upon appeal, Petitioner again makes an empty assumption that he was prejudiced by the jury’s request to see the video without providing a scintilla of evidence suggesting that such information was considered during deliberation. Rather, the far more likely result is that the jury requested such information, was denied, and then moved on. As a result, there is no basis upon which to factually support that the jury either considered inadmissible or unadmitted evidence or failed to consider the evidence entered at trial, and the resulting verdict should not be overturned. Therefore, this Honorable Court should deny Petitioner’s third (3d) Assignment of Error and affirm Petitioner’s conviction in the Circuit Court below.

D. The prosecutor did not misrepresent evidence during the closing argument.

Next, Petitioner alleges that the prosecutor misrepresented evidence by questioning whether Petitioner stated “I’ll slay you” or “I’ll show you” on the Victim’s answering machine during the State’s closing argument. This Honorable Court has held:

The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.

Syl. Pt. 3, *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977). Further, “[a]n attorney for the state may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan, intent only on conviction. And, it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deducible therefrom.” Syl. Pt. 2, *State v. Critzer*, 167 W. Va. 655, 280 S.E.2d 288 (1981) (citing Syl., *State v. Moose*, 110 W. Va. 476, 158 S.E. 715 (1931)).

Finally, “[f]ailure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a ... [forfeiture] of the right to raise the question thereafter in the trial court or in the appellate court.” Syl. Pt. 1, *State v. Garrett*, 195 W. Va. 630, 466 S.E.2d 481 (1995) (citing Syl. Pt. 6, *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945); Syl. Pt. 7, *State v. Cirullo*, 142 W.Va. 56, 93 S.E.2d 526 (1956); Syl. Pt. 5, *State v. Davis*, 180 W.Va. 357, 376 S.E.2d 563 (1988); Syl. Pt. 1, *Daniel B. by Richard B. v. Ackerman*, 190 W.Va. 1, 435 S.E.2d 1 (1993); Syl. Pt. 5, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995)). By failing to timely object, a petitioner’s only avenue of relief is through application of the “plain error” doctrine. Syl. Pt. 8, *State v. Miller*, 194 W. Va.

3, 459 S.E.2d 114 (1995). “To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, *Miller*. “To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.” Syl. Pt. 9, *Miller*.

First and foremost, there is no indication that the prosecutor’s closing remarks during Petitioner’s trial were objected to by either Petitioner or his trial counsel. In his brief, Petitioner identifies the statement at issue:

During his closing argument, Assistant Prosecutor James Shay referred to a series of phone messages left by [Petitioner] on [the Victim’s] voice mail. Mr. Shay states, “He says, ‘I’ll slay you.’ Now, Mr. Tipton might argue that he’s actually said, ‘I’ll show you’ there. And that is a question a [sic] fact for you to decide. I can’t tell you what he said. But what would be the difference?”

(Pet’r’s Br. at 13.) Given the statement’s nature, it is very likely that trial counsel chose to not object to the statement, and there is no indication from either the pleadings or appendix which identifies Petitioner or his trial counsel having made an objection. Therefore, this Honorable Court must necessarily proceed forward under a plain error analysis.

Under a plain error analysis, there is simply no indication that the prosecutor’s closing remarks impinge Petitioner’s substantial rights, affect the trial’s fundamental fairness, or even amount to an error in the criminal proceedings. Rather, the prosecutor’s statements likely amount to nothing more than the prosecutor invoking his power to prosecute vigorously the State’s case. The prosecutor argues Petitioner’s voice message to the jury, but then reiterates that the message is a “is a question a [sic] fact for you to decide.” (Pet’r’s Br. at 13.)

As such, Petitioner has failed to meet the extraordinary burden associated with plain error analysis and cannot prove by any measure that the prosecutor made his closing remarks in error. Further, Petitioner, by virtue of his alleged error, fails to consider the State's ability to vigorously prosecute and promote evidence in an effort to meet the burden of proof beyond a reasonable doubt. Therefore, this Honorable Court should deny Petitioner's fourth (4th) Assignment of Error and affirm Petitioner's conviction in the Circuit Court below.

E. The prosecutor did not prejudice Petitioner even though it did not provide a court-ordered Bill of Particulars as related to the use of a firearm.

A criminal defendant is "entitled to no more information than that furnished by the indictment and the bill of particulars. . . ." *State v. Hudson*, 128 W. Va. 655, 662, 37 S.E.2d 553, 557 (1946). Further, this Honorable Court has deemed that the purpose of a bill of particulars is to inform a criminal defendant of the charges against him, and to aid the "preparation and presentation of his case. . . ." *State v. Meadows*, 172 W. Va. 247, 255, 304 S.E.2d 831, 839 (1983). "A "bill of particulars" is for the purpose of furnishing details omitted from the accusation or indictment, and, where the bill of particulars furnished by the state, read in connection with the indictment, fully informs the defendant of the nature of the offense with which he is charged, the time and place of the commission thereof, it is sufficient." Syl. Pt. 2, *State v. Koski*, 101 W. Va. 477, 133 S.E. 79 (1926).

Here, the Indictment, in relevant part, read as follows:

The Grand Jurors of Preston County, West Virginia, upon their oaths, further present that [Petitioner], on or about the 8th day of May 2012, in said County of Preston, did unlawfully, knowingly, and feloniously commit the felony charged in County 1 [the "First Degree Murder" of the Victim] by the use, presentment or brandishment of a firearm, in violation of West Virginia Code §§ 62-12-2 and 62-12-13, as amended, against the peace and dignity of the State.

(App. at 1.) Thus, Petitioner understood or should have understood the State's charges against him when preparing his case. Put simply, he was charged with murdering the Victim with a firearm. W. Va. Code §§ 62-12-2 and 62-12-13 did not impose an additional criminal penalty for purposes of Petitioner's sentencing, but rather made Petitioner ineligible for parole or probation upon conviction. The language and purpose is clearly defined by the statutes, and Petitioner was fully informed of the charges against him by the indictment.

Frankly, the State was under no duty or obligation to explain to Petitioner how the law worked in conjunction to his criminal trial. Therefore, Petitioner's exact allegation as to the facts of his fifth (5th) Assignment of Error is improper for purposes of direct review. Rather, such a question of whether Petitioner was informed by trial counsel of the charges he faced would be properly examined throughout the course of habeas proceedings. As a result, this Honorable Court should deny Petitioner's fifth (5th) Assignment of Error and affirm Petitioner's conviction in the Circuit Court below.

CONCLUSION

WHEREFORE, for the foregoing reasons, the State of West Virginia respectfully requests that this Honorable Court deny Petitioner's claims for relief and affirm Petitioner's conviction in the Circuit Court of Preston County, West Virginia.

Respectfully Submitted,

STATE OF WEST VIRGINIA,

Respondent, By Counsel,

**PATRICK MORRISEY
ATTORNEY GENERAL**



SHANNON FREDERICK KISER
W. Va. Bar Number 12286
Assistant Attorney General
West Virginia Office of the Attorney General
Appellate Division
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
Email: Shannon.F.Kiser@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Shannon Frederick Kiser, Assistant Attorney General and counsel for the Respondent State of West Virginia hereby verify that I have served a true copy of “*Respondent’s Brief*” upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 9th day of March, 2015, addressed as follows:

Michael J. Sharley
5 Dunkard Avenue
Westover, West Virginia 26501
Counsel for Petitioner

Richard M. Gutmann
235 High Street, Suite 511
Morgantown, West Virginia 26505
Counsel for Petitioner



SHANNON FREDERICK KISER