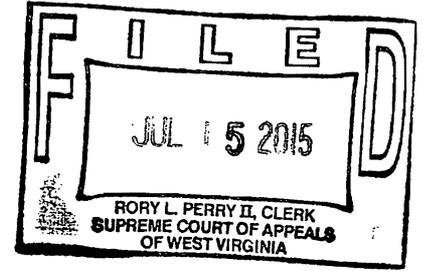


IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA



STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, RESPONDENT

VS.

Supreme Court No. 14-1037
(Raleigh County Case No. 13-F-225-H)

DONALD DUNN,
DEFENDANT BELOW, PETITIONER

BRIEF OF THE RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. **(A).** The trial court did not abuse its discretion in denying the defense continuance motion and the petitioner fails to show how he was prejudiced by the denial.

(B). There was no evidence that the petitioner was “under the influence of high-powered pain killers” or that his competency was impaired during trial.

II. **(A).** The trial court did not abuse its discretion in ruling that the admittedly speculative testimony of a defense psychologist was inadmissible under W.Va. Rules of Evidence 401, 403, 702 and pertinent case law.

(B). The trial court did not abuse its discretion in prohibiting defense counsel in opening statements from claiming that the petitioner used synthetic marijuana, since the only source of such claim was the petitioner, and whether or not he would elect to testify was unknown at the time of opening statements.

III. **(A).** The petitioner failed to preserve his claim that the disclosure and limited introduction of the petitioner’s recorded jail calls “violat(ed) a host of fundamental constitutional rights.”

(B). The trial court did not abuse its discretion in finding that the disclosure of such calls complied with W.Va. Code §31-20-5e.

- IV. (A). The trial record does not support the petitioner's claim that jurors "engaged in a heated discussion in the jury box."
- (B). The petitioner made no effort to vouch the record to support this claim and made no motion for the trial court to inquire of the jurors.
- (C). The trial court's *sua sponte* inquiry of the jury negated any claim of juror misconduct.
- (D). The petitioner fails to show prejudice.
- V. The petitioner has abandoned his claim that the trial court abused its discretion in refusing an impermissible defense instruction suggesting factors for the jury to consider on the issue of mercy.

STATEMENT OF THE CASE

On the morning of May 25, 2013, Johanna McDermott placed a 911 call from her residence in Stanaford, Raleigh County, West Virginia. She reported that she had shot her husband, Mark McDermott, and that he was not breathing. Mrs. McDermott's son, the petitioner, Donald Dunn (hereinafter Dunn) - - Mr. McDermott's step-son - - was present with Mrs. McDermott and also spoke with the 911 operator. Dunn feigned surprise that Mr. McDermott had been shot and declined to administer C.P.R. The recorded call was played for the jury at trial and a transcript was introduced for the appellate record as State's Exh. 2. App. V. II, 413-418, 424, Supp. App. 1-13.

Responding deputies found Mr. McDermott dead on the living room sofa, with massive blood loss from a gunshot wound to his head. App. V. II, 474-475. The forensic pathologist from the W.Va. Office of the Chief Medical Examiner testified that Mr. McDermott, 47 years old, died as a result of a

gunshot wound from a bullet fired into his temple and a second wound from a bullet fired into the back of his shoulder, lodging in his jaw. The pathologist confirmed that although the gunshot wound to Mr. McDermott's temple was necessarily fatal, it would not have caused instantaneous death and that the longer Mr. McDermott had survived, the more blood loss he had suffered. Mr. McDermott died as a result of a "(f)atal firearm assault in the setting of domestic conflict" and the manner of death was homicide. App. V. II, 639, 644-650.

When deputies arrived at the residence approximately ten minutes after the 11:09 a.m. 911 call, Mrs. McDermott and Dunn were the only live people there, and deputies separated the two. Mrs. McDermott was "upset and crying" and until she was separated from Dunn, she continued to claim that she had shot Mr. McDermott. Once Mrs. McDermott was removed from Dunn and placed in a cruiser with a deputy "it was a totally different story." App. V. II, 474-477.

Mrs. McDermott executed a consent to search and deputies also obtained a search warrant. App. V. II, 483. Among items recovered from the residence were camouflage gloves and a hooded sweatshirt from a closet and, on the kitchen table, a Kel-Tec handgun with a bullet stuck inside. After deputies pried the bullet from the gun, they observed there was a "dimple on the primer" from the firing pin striking the bullet but resulting in a misfire. App. V. II, 496-500. Mrs. McDermott's purse, also on the kitchen table, contained a Kel-Tec handgun case and a box of bullets from which a few bullets were missing. App. V. II, 500-501.

The W.Va. State Police laboratory firearm and toolmark examiner explained that the cartridge cases found near Mr. McDermott's body and the one bullet found at the scene and the other bullet recovered during autopsy were fired from the Kel-Tec handgun located on the kitchen table. The firearm and toolmark examiner also explained that in order to create the "dimple on the primer," the trigger had to have been pulled. Once the misfire occurred, the gun would not have fired unless the bullet had been removed and the gun had been reloaded. He testified that the misfire was caused by

the gun being a mere three millimeters “out of battery,” which would not be discernible to the shooter when he pulled the trigger. App. V. II, 620-634.¹

W.Va. State Trooper Grose observed Dunn at the residence within ten minutes after the 911 call. Dunn was “(c)alm and normal” and gave no hint of being under the influence of alcohol or drugs or confused or in any distress. App. V. II, 520-521. Deputies who conversed with Dunn throughout the day confirmed that Dunn remained “very calm, cool and collected,” and gave no indication of being under the influence of any substance. App. V. II, 536-538, 676-677.

Dunn and Mrs. McDermott were driven separately to the Raleigh County Sheriff’s Office and questioned separately. Dunn was given Miranda warnings and gave a lengthy statement blaming Mrs. McDermott for the murder of Mr. McDermott. App. V. II, 524-525, 527-528. Meanwhile, Mrs. McDermott was reporting that Dunn had murdered Mr. McDermott and also had attempted to murder her. App. V. II, 538-539. A recording of Dunn’s initial interview was played for the jury and a transcript was introduced for the appellate record as State’s Exh. 67. App. V. II, 541-542, Supp. App. 14-41.

Raleigh County Sheriff’s Office Captain Bare conducted a second interview with Dunn, after again giving him Miranda warnings. App. V. II, 675-677. Dunn continued, for nearly an hour, to claim that he was in the shower when Mrs. McDermott shot and killed Mr. McDermott. App. V. II, 677-678. After Captain Bare confronted Dunn with the information being provided by Mrs. McDermott, Dunn “changed his story” and confessed. App. V. II, 678. A recording of the confession was played to the jury and a transcript introduced for the appellate record as State’s Exh. 81. App. V. II, 679-680, Supp. App. 42-55.

¹ The W.Va. State Police laboratory also tested the camouflage gloves found in the pocket of the hooded sweatshirt in the closet of the McDermott/Dunn home. Gunshot residue was on the gloves. As discussed below, Dunn eventually confessed that he wore the gloves and sweatshirt when he murdered Mr. McDermott and attempted to murder Mrs. McDermott. No gunshot residue was on the samples in the gunshot residue kit performed on Mrs. McDermott. App. V. II, 604-605.

Dunn confessed that he shot Mr. McDermott while Mrs. McDermott was briefly out of the house. When she returned home he “tried to kill her as well” by attempting to shoot her in the head, but the gun misfired. Supp. App. 42-44.² He explained that for years he had deceived his mother and step-father into believing that he was attending Marshall University and that his graduation was to be held on May 25, 2013. Dunn also explained to Captain Bare his motivation to murder his mother and step-father on the morning of that supposed graduation.

DUNN: Uh, I thought it would be easier to stage the murder/suicide than it was for me to tell ‘em.

BARE: Okay Is that about what time you started formulating this plan?

DUNN: Yes, sir.

BARE: During spring break?

DUNN: Yes, sir.

BARE: So you’ve been thinking about doing all of this and planning this. What was the catalysis (sic) this morning to make you do it today?

DUNN: Well today we would have been going to the graduation, which I made up as well. Supp. App. 45.

Dunn stated that while Mr. McDermott was sitting on the living room sofa reading a book, Dunn shot him twice with the gun that Mr. and Mrs. McDermott kept in their bedroom dresser. He confirmed that he used their weapon to “facilitate the murder/suicide angle.” Dunn explained that Mrs. McDermott had briefly gone to visit her ailing mother and arrived home moments after he shot Mr. McDermott. Supp. App. 46-47.

DUNN: You know I thanked her for the care and everything she’s given me and then I asked her to go set down and told her I was going to give her something

² Deputies photographed the Dunn residence, which had two front doors. One door led to a room with a pool table and another led into the living room. The living room - - where Mr. McDermott was murdered - - was not visible from the so-called “pool room” where Mrs. McDermott entered the residence shortly after the murder. App. V. II, 485, 501.

just so she'd be setting down and I could actually make it look like it was a suicide.

BARE: Uh-huh (yes).

DUNN: That's when I pulled the gun and tried to shoot her.

BARE: Where did you have the gun at?

DUNN: Uh, in my coat pocket.

BARE: So you were wearing a coat?

DUNN: Yes.

Bare: Uh, were you wearing gloves?

DUNN: Yes, sir.

BARE: And that was all in the attempt I guess - -

DUNN: Yeah, keep the powder off of me and everything. Supp. App. 48.

Dunn confirmed that he purposefully had loaded only three bullets into the murder weapon.

DUNN: No. I just only put three bullets in the gun so that it would be easier, after I had killed her, you know make it look she put the thumb prints on it to make it look like she loaded it herself.

BARE: So if there would have been another round in there you would have fired it?

DUNN: Uh, probably - - well probably.

BARE: If you could have cleared that round out?

DUNN: Yeah, it was a cheap gun and without the bullet actually leaving the thing it wouldn't come out.

BARE: Oh, so it was kind of stuck in there?

DUNN: Yeah.

BARE: So it was just useless to you at that point?

DUNN: Yes sir. Supp. App. 50-51.

Dunn confirmed that Mrs. McDermott agreed to claim that she was the killer because she was scared that Dunn would hurt her. He added that he felt no remorse and that if he “got (himself) into a corner again it could happen” again. He agreed that murdering Mr. and Mrs. McDermott was “a necessity.”

DUNN: I don't know I just couldn't - - you know after keeping a lie for that long, I just couldn't imagine what would have - - like it wasn't really the thought of like upsetting them I guess it was the thought of you know losing a vehicle, losing a place to live, losing you know, fancy custom shoes and junk like that. Supp. App. 52-53.

Dunn also confirmed that he had deceived his live-in girlfriend into believing that he was graduating from Marshall University and that he had planned to gain her sympathy by deceiving her into believing that he was orphaned by the murder/suicide supposedly committed by his mother.

DUNN: Again, I guess I was planning on just acting the rest of my life, you know. And the screwed up part about it is, you know to make up for me not becoming a, you know all of a sudden I'm supposed to have this degree and I was going to use the fact that what should be a tragic event to most people my plan was to like, you know go and lose weight and actually try to become a police officer. I mean . . . that's the plan I came up with and it's like I just don't - - I mean I just don't think the guilt would have ever gotten to me, because like I said even after I did it I just didn't feel - -

BARE: Feel anything?

DUNN: Yeah. My eyes are red because I saw my girlfriend and her mom pull up so I wanted to set in there, and when I was setting at that chair, you know I put my fingers in to rub 'em to make it look like I had been upset. Supp. App. 54-55.

At no time did Dunn make any mention of synthetic marijuana.

On the evening of May 25, 2013, relatives of Mrs. McDermott discovered a typed murder/suicide note on the coffee table in Dunn's suite of rooms in the residence. App. V. II, 665-666. The note was turned over to the Raleigh County Sheriff's Office. App. V. II, 579-580.

During Dunn's testimony at trial, he admitted that he had created "the fake murder/suicide note" at approximately 8:00 a.m. on May 25, 2013. App. V. III, 940-941. On cross-examination, Dunn read the note to the jury:

Donald, I wish it didn't have to be like this, but I can't do this anymore. I've felt trapped in a loveless marriage for too long, and trying to work and take care of mom is too hard. I can't keep my head above water, and mom - - or anymore. I can't keep up with work and take care of mom and support Mark and deal with this damn cancer; it's just too much. I can't put you through this. I'm trapped and it's just too much. I can't put you through this. I'm trapped and it's just too much. Don't get trapped like I did. I love you, son, and I'm sorry I won't be around to see the man you'll become. APP. V. III, 942-943.³

During his trial testimony Dunn also admitted, as he had during his final interview with deputies, that from 2010, while he lived in Huntington, West Virginia, pretending to attend Marshall University, Mr. and Mrs. McDermott provided him with rent money and a Subaru and insurance and hundreds of dollars each month for expenses. App. V. III, 947-948, 1005.⁴ Dunn also agreed that his motivation to murder Mr. and Mrs. McDermott and to stage a murder/suicide was that, once his parents discovered that he was a fraud and was not graduating, his girlfriend, with whom he had been cohabiting in Huntington, would leave him. App. V. III, 946, 968-969.

Dunn also testified that he began planning the murders of his mother and step-father in April, 2013. Instead of using one of his own several firearms, he used the Kel-Tec handgun belonging to Mr. and Mrs. McDermott to "facilitate the murder/suicide angle." He secretly removed the gun from their bedroom one and a half weeks before the crimes. He bought the ammunition a month before he used the gun to murder Mr. McDermott and to attempt to murder Mrs. McDermott. App. V. III, 963-966.

³ Mrs. McDermott confirmed that she had cancer and that she was the caretaker of her mother. She also confirmed that she was not the author of the murder/suicide note. App. V. III, 791,842-843.

⁴ The prosecution called Marshall University's registrar, who confirmed that Dunn had enrolled in the fall of 2010 and failed all four of his courses and that he never re-enrolled after that semester. App. V. II, 435-437.

He testified that he slipped the Kel-Tec handgun case and the box of bullets into his mother's purse on the morning of May 25, 2013, shortly before he prepared the murder/suicide note, because he knew that police would be looking inside her purse. After his mother went out that morning he called her to request that she bring him Imodium. He then went into the living room and fired two bullets into Mr. McDermott. He wore camouflage gloves and a hooded sweatshirt to ensure that he would test negative for gunshot residue. He planned that after he murdered his mother, he would press her fingers or thumb upon the gun, ensuring her prints would be identified on the supposed murder/suicide weapon. He planned to then go to the store, be caught on the store surveillance video to establish an alibi and then return home to pretend to "discover the tragedy." App. V. III, 977-981.

Dunn confirmed that when Mrs. McDermott arrived home on the morning of May 25, 2013 he was "laughing and joking" with her and told her to sit down and shut her eyes because he "had a surprise." The Kel-Tec handgun was in his pocket and he placed the muzzle of the gun against her temple and pulled the trigger, but the gun misfired. He testified that, as he was attempting to murder his mother, he didn't recall if he heard his step-father's agonal breaths but he believed that it took Mr. McDermott ten minutes to die. App. V. III, 985-989.

Contrary to the claim in the Brief of Appellant (hereinafter the Brief) (at 4), that it was the prosecution's "theory" that Dunn found it easier to commit double murder than to face the consequences of being exposed as a fraud, Dunn testified that this was his motivation.

Q: And you told Detective Bare that, in fact, it was easier, it was just easier. It was easier to fake the murder/suicide than to go through the difficulty of being found out; right?

A: Yes. In my mental state, I believe so. App. V. III, 973.

He also confirmed that he was not acting out of anger, but that murder "was just a necessity" because Mr. and Mrs. McDermott had become obstacles to him. App. V. III, 967. He agreed that during the

month that he had planned the murders, he did so with the knowledge that he had no excuse or justification for killing the victims and that he did not act in the heat of passion but was calm, cool and collected as he carried out his plan. App. V. III, 965. Accordingly, Dunn testified as follows:

Q: Okay. So you will agree, you are guilty of the first degree murder of Mr. McDermott?

A: Yes, ma'am.

Q: And you will agree you are guilty of the attempted first degree murder of your mother, Johanna McDermott?

A: Yes, ma'am. App. V. III, 966-967.

The defense called Mrs. McDermott as a witness. She testified that she married Mr. McDermott when Dunn was five years old and that Mr. McDermott "treated (Dunn) as if he was his own son." App. V. III, 793, 824-825. Mr. McDermott, who owned a coal tippie repair company, lavished vacations on Dunn and his friends: there were trips to Bermuda, Guatemala, Cancun, Disney World, Las Vegas (to celebrate Dunn's 21st birthday), Beijing, England, the Grand Canyon and, on several occasions, Australia. App. V. III, 832-840.

Mrs. McDermott testified that both she and Mr. McDermott were "very proud and very excited" on the morning of May 25, 2013 because they believed it was Dunn's graduation day. Mr. McDermott already was dressed for the supposed ceremony when he was murdered. App. V. III, 841.

When Mrs. McDermott arrived home that morning, Dunn - - who had just murdered Mr. McDermott - - was "happy and normal." App. V. III, 846, 850-851. Dunn came out to her car to lead her into the house through the "pool room" entrance, where Mr. McDermott, dying on the living room sofa, was not visible to her. Dunn was wearing camouflage gloves and a hooded sweatshirt, and told Mrs. McDermott that he was cold. App. V. III, 852.

Dunn told his mother to sit down and shut her eyes. He also told her that he had been "a good boy" but occasionally smoked "a little pot." Mrs. McDermott and Dunn were laughing together until,

after she closed her eyes, she felt the muzzle of the gun against her temple. Dunn said, “Okay, mama, just let me shoot you.” Mrs. McDermott screamed for her husband and Dunn responded, “Mark’s dead, mom; I shot him.” App. V. III, 853-860.

Mrs. McDermott testified that, believing Dunn intended to kill her, she suggested alternatives by which he might avoid responsibility for the murder. Among her suggestions was that she would sell the house, hire “the best lawyer money can buy, and . . . put on a mental defense.” After Dunn rejected this suggestion Mrs. McDermott convinced him that she would take the blame for Dunn’s murder of Mr. McDermott. App. V. III, 865-868. She did so until law enforcement arrived and separated her from Dunn, after which she warned a deputy, “If this kid gets out, he will kill me.” App. V. III, 847, 872-873.

On August 14, 2014, the jury found Dunn guilty of the first degree murder of Mr. McDermott by use of a firearm without a recommendation of mercy and of the attempted first degree murder of Mrs. McDermott by use of a firearm. App. V. III, 1157-1158.⁵ On September 5, 2014 the trial court denied Dunn’s motion for a new trial. Supp. App. 239. Before pronouncing sentence, the trial judge noted that he had “tried a lot of murder cases in 20 years and never has one been so cold.” He added that, even if he could change the jury’s refusal to recommend mercy, he would not do so, and ordered that the sentence for the “attempted cold-blooded murder” of Mrs. McDermott would run consecutively with the sentence for the “cold-blooded murder” of Mr. McDermott. Accordingly, Dunn was sentenced to life imprisonment without parole and to a consecutive sentence of three to eighteen years in the penitentiary. Supp. App. 237-239.

⁵ The table of contents to Volume III of the appendix prepared by Dunn’s counsel erroneously indicates that Volume III ends at page 1142 of the trial transcript. Volume III actually ends at page 1172.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by oral argument. This case is appropriate for a memorandum decision affirming the conviction and sentence because there are no substantial questions of law; there are no errors in the trial court's decisions as to any questions of law and, upon consideration of the applicable standard of review and the record presented, there is no prejudicial error.

ARGUMENT

- I. **The trial court did not abuse its discretion in denying the defense continuance motion and there was no evidence that Dunn's competency was impaired.**

Dunn's motion to continue the August 5, 2014 trial was filed on July 23, 2014, but the grounds in support of the motion were not the grounds upon which Dunn relies in the Brief. In his written motion, Dunn's counsel gave two reasons for a continuance: (1) he had "suspended his trial preparation" while the trial court considered whether counsel was disqualified and (2) a continuance "would allow the impact of media coverage of the matter to subside. . . ." Supp. App. 56.

During the July 28, 2014 hearing to consider the motion to continue and other pre-trial issues, defense counsel stated that Dunn had been prescribed Lortabs and that counsel had "some concern that that will interfere with or impair his ability to be cogent for the trial." Supp. App. 60. Defense counsel expressed no concern that the medication impaired Dunn's competency to proceed with the hearing and there was no defense motion to continue the hearing, which included arguments on other motions and also a hearing on the voluntariness of Dunn's statements to deputies. At the conclusion of the July 28, 2014 hearing, the prosecutor asked if the defense waived any claim that Dunn was incompetent during the hearing, and Dunn, by counsel, refused to do so. Supp. App. 124-125.

The Brief (at 10-11) misleads the reader by claiming that the trial court summarily dismissed the issue of the defendant's purported medication. The trial court's observations of Dunn's condition addressed only the refusal of defense counsel to waive any claim that Dunn was incompetent during the July 28, 2014 hearing.

The trial court stated:

I understand your position. The Court will make a finding that, based upon the Court's observations of the defendant today, that the Court did not observe the defendant to be, in any way, sleepy, non-responsive, and/or he did not appear to the Court, through my own observations, to be impaired today. So I'll make that finding on the record and we can go forward as it were. Supp. App. 125.

There was no defense objection to the finding of the trial court and the defense offered no evidence nor any proffer, by Dunn's treating physician or otherwise, to rebut the trial court's finding.

The prosecutor moved the trial court for an order to have Dunn's jail records, including his medical records, disclosed to the parties in order to address any issue with his medication. The defense did not object and the trial court granted the motion. Supp. App. 63-64, 125-126. The defense never brought to the trial court's attention any information contained in Dunn's jail medical records. Moreover, Dunn now offers nothing to support his entirely conjectural claim that medication may have affected Dunn during trial. He never moved the trial court for a supplemental psychiatric or psychological evaluation or presented any evidence that he had been re-evaluated by the defense psychologist, Dr. Hudson, to determine whether or not his competency had come into question. The defense did call Dr. Hudson during a pre-trial hearing on August 4, 2014 - - the day before trial - - to offer Dr. Hudson's speculation about Dunn's supposed synthetic marijuana use at the time of the crimes. On direct examination by defense counsel, Dr. Hudson confirmed Dunn's competency to stand trial.

Q: And . . . your opinion was that he did not suffer from a diminished capacity at the time of the offense; is that correct?

A: That is correct, yes.

Q: Did you also render an opinion as to his competency to stand trial?

A: I did, yes.

Q: And it was your finding that he was competent to stand trial?

A: That is correct, yes.

Q: Is there anything (that) happened that has caused you to change either of those opinions?

A: No.

Supp. App. 142.

Once the defense continuance motion was denied, there never was another mention of Dunn's purported medication or any contention that Dunn's competency was in question until he filed his post-conviction motion for a new trial.

The Brief (at 11) then contends that the trial court's denial of the continuance motion was an abuse of discretion because of the disclosure of a large number of recorded jail calls, but - - as discussed above - - Dunn's written continuance motion was based on entirely different grounds, including that defense counsel had discontinued his preparation in the weeks before trial.

The Brief (at 11) sets forth the four factors to be considered in determining whether a trial court's refusal to grant a continuance is an abuse of discretion, citing *In re Tiffany Marie S.*, 196 W.Va. 223, 235, 470 S.E. 2d 177, 189 (1996). The Brief includes no application of those factors to the circumstances surrounding Dunn's continuance motion. Instead, Dunn "simply posits that the Court abused that discretion by reason of the facts and circumstances here."

Application of the four factors set forth in *Tiffany Marie S.* reveals:

- (1) In his written continuance motion, Dunn's counsel conceded that his need for a continuance was based primarily upon his decision to discontinue trial preparation while awaiting a pre-trial ruling.

- (2) The need for a continuance based upon the volume of recorded jail calls would not likely have been met if the continuance had been granted, because the calls continued throughout the trial, simply adding to the volume.
- (3) The extent to which a continuance would have been contrary to other interests, including the court's and the public's interest in prompt disposition of first degree murder cases, was significant - - the next available trial date would have been December, 2014 or January, 2015 and, as Dunn never had moved for bail, he had remained in pre-trial detention since May 25, 2013. Supp. App. 123.⁶
- (4) Dunn fails to specify how he suffered harm as a result of the denial of the motion: his retained trial counsel was substituted for Dunn's public defender on October 21, 2013 and the trial court offered to suspend proceedings if necessary for counsel to review the recorded jail calls, but counsel never took up the court's offer. App. V. I, Certified Docket Sheet entry # 23, Supp. App. 123-124.

II. (A). The trial court did not abuse its discretion in excluding the speculative testimony of a defense psychologist concerning possible effects of Dunn's purported use of synthetic marijuana.

The Brief (at 12), reciting Dunn's argument that the trial court abused its discretion in excluding the testimony of the defense psychologist, contains a citation to only one page of the psychologist's pre-trial testimony. The Brief omits references to the significant portions of the record containing arguments of the issue and the trial court's findings and ultimate ruling. The Brief (at 5-6) concedes that forensic evaluations conducted by Dr. David Clayman and by the defense psychologist, Dr. Hudson,

⁶ Additionally, Mr. McDermott's survivors were travelling from Australia for the trial. Supp. App. 62.

“determined that Mr. Dunn was competent to stand trial and that he did not suffer from a mental defect at the time of the commission of the offenses.”

The prosecutor’s discovery motion filed pursuant to W.Va. Rules of Criminal Procedure 12.2(b) and 16(b)(1) (C), concerning expert testimony of a defense of mental condition, was filed on July 11, 2013. Supp. App. 78-79. Because the defense never provided such discovery, the prosecution demanded pre-trial disclosure of any anticipated expert testimony. During the July 28, 2014 pre-trial hearing, with trial commencing on August 5, 2014, Dunn’s counsel stated that the defense would respond “at the appropriate time.” The trial court ruled that Dunn’s response would be due by July 30, 2014. Supp. App. 76-77. On August 4, 2014, the day before trial, defense counsel first advised the trial court of the purpose of Dr. Hudson’s anticipated testimony:

It’s somewhat unusual, Your Honor. It’s not a situation where this witness can testify that the defendant suffered from diminished capacity at the time of the offense. However, his testimony will be that his use of synthetic marijuana impacted his decision-making ability and, to that extent, it would constitute a diminished capacity defense, and it would be relevant to the issues of mercy, recidivism, that sort of thing. Supp. App. 134.

Defense counsel confirmed that there was no motion for bifurcation of the guilt and mercy phases of the trial. Supp. App. 135.

During the August 4, 2014 pre-trial hearing, Dr. Hudson testified that he was not an expert in psychopharmacology and that his “research” into synthetic marijuana began a few days before August 4, 2014 and was completed on August 3, 2014. Supp. App. 137-139. He also confirmed that in neither his original 2013 report nor in his August 3, 2014 supplemental report did he make the finding that Dunn, due to a mental disease or defect, lacked the capacity to premeditate or to form the intent to kill when he murdered his step-father and attempted to murder his mother. Supp. App. 140-141, 145.

Defense counsel summarized Dr. Hudson’s opinion:

Q: You are able to say, to a reasonable degree of medical *probability*, that the use of that substance did, in fact, contribute to his ability to reason and

think things through, and his conduct relative to the crimes charged; is that correct?

A: I am a psychologist, rather than a medical professional, but yes, I do believe that it is reasonable to state that the consumption of synthetic marijuana affected his capacity for rational thought at the time of the offense.
Supp. App. 145 (Italics added).

However, Dr. Hudson also testified that Dunn “demonstrated the intent to kill his (step) father” and “demonstrated the unsuccessful attempt to kill his mother” and also “demonstrated planning activity or premeditation.” He conceded that reports of the effects of synthetic marijuana have not been subjected to scientific study but were “anecdotal.” He also conceded that, “certainly,” his opinion to “a reasonable degree of probability” fell short of a “reasonable degree of scientific certainty” and “(t)here certainly could be people who do not experience adverse effects” from using synthetic marijuana. He agreed that in his statements on the day of the crimes, Dunn never claimed to have consumed synthetic marijuana. Supp. App. 148-152.

Dr. Hudson confirmed that he could only opine that “(i)t is possible that the offense would not have occurred if Mr. Dunn had not been using synthetic marijuana, though no such opinion can be offered with a substantial degree of certainty.” Supp. App. 157. He also confirmed that Dunn “chose to proceed with acts that he knew were wrong,” and that he was not “psychotic or delusional or experiencing hallucinations” at the time of the crimes. Supp. App. 159. He agreed that “there were rational elements to the plan” to murder Mr. and Mrs. McDermott and to stage the scene so that it would appear to be a murder/suicide. Supp. App. 160. Dr. Hudson also agreed that his testimony was pure speculation. Supp. App. 162-163.

The prosecutor argued, *inter alia*, that Dr. Hudson’s testimony was inadmissible pursuant to W.Va. Rules of Evidence 403 and 702 and applicable case law. Supp. App. 164-170, 173-179. Defense counsel’s response was that the testimony “goes to the issue of mercy, Your Honor,” and the trial court

noted that the claim that synthetic marijuana may have influenced Dunn's thinking "would be better received if this were a bifurcated (trial)." Supp. App. 170-172.

The next morning the trial court, citing W.Va. Rules of Evidence 401 and 403 and pertinent case law, ruled that Dr. Hudson's testimony would not be admissible in a unitary trial for reasons including that the testimony was not relevant and was "far more prejudicial to the case than it is helpful" and in fact was "not probative of anything." Supp. App. 186-190. Later, the trial court reiterated that the purpose articulated for the synthetic marijuana testimony was on the issue of mercy, and that the defense had made the tactical decision to proceed with a unitary trial. The trial court also gave the defense an opportunity to offer a limiting instruction by which the jury in the unitary trial would be instructed in the limited purpose of evidence of Dunn's purported synthetic marijuana use. The defense never offered such limiting instruction. Supp. App. 202-204. This Court has held that "(i)n the absence of such a(n) . . . offer, we deem that argument on limited admissibility forfeited." *State v. La Rock*, 196 W.Va. 294, 306 n. 15, 470 S.E. 2d 613, 625 n. 15 (1996).

Even after the trial court repeatedly held that Dr. Hudson's testimony would be inadmissible in a unitary trial, Dunn made no motion for bifurcation. In *State v. Berry*, 227 W.Va. 221, 707 S.E. 2d 831 (2011), the trial court excluded evidence of Berry's social anxiety disorder after the defense withdrew its bifurcation motion. Berry argued that he had a right to introduce such evidence in a unitary trial on the issue of mercy. This Court, citing *LaRock*, held that Berry had waived his right to present the social anxiety evidence because he had declined to move for bifurcation. Likewise, by making the tactical decision to proceed with a unitary trial, Dunn waived any opportunity he might have had to present Dr. Hudson's testimony during the mercy phase of a bifurcated trial.

Also in *LaRock*, 196 W.Va. at 305-307, 470 S.E. 2d at 624-626, this Court held that the trial court did not abuse its discretion in striking the testimony of a defense psychologist who opined about the "possibility" that the defendant's mental illness was a factor causing him to murder his infant son. In

affirming the trial court, this Court quoted West Virginia and Fourth Circuit precedents: “(N)othing in the Rules appears to have been intended to permit experts to speculate in fashions unsupported by, and in this case indeed in contradiction of, the uncontroverted evidence.” (Citations omitted). This Court confirmed that “evidence which is no more than speculation” - - such as Dr. Hudson’s testimony - - “is not admissible under Rule 702” and also could be excluded under Rule 403.

In Syllabus Points 2-5 of *State v. Lockhart*, 208 W.Va. 622, 542 S.E. 2d 443 (2000), this Court applied the tests set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E. 2d 196 (1993) to the issue of the trial court’s exclusion of the defendant’s evidence that he suffered from dissociative identity disorder. This Court, affirming the trial court, found that the defense expert’s testimony was speculative and unreliable and “would not have assisted the trier of fact as mandated by Rule 702.”

In *Lockhart* the diagnosis of a mental disease or defect - - necessary to support either an insanity defense or a diminished capacity defense - - was not at issue. The problem was that the diagnosis did not help the jury to determine the defendant’s mental state when he committed multiple violent felonies. In the instant case, Dr. Hudson affirmatively found that Dunn suffered from no mental disease or defect. Dr. Hudson was only able to speculate, based solely on Dunn’s claim of synthetic marijuana use and Dr. Hudson’s last-minute “anecdotal” research, that perhaps Dunn’s sound reasoning abilities were impacted. He also confirmed that Dunn did, in fact, have the requisite intent to kill his step-father and mother and did, in fact, premeditate the crimes. Thus, Dr. Hudson’s testimony was even more speculative and unreliable than the psychiatric evidence held inadmissible in *Lockhart*.

In *State v. McKinley*, 234 W.Va. 143, 764 S.E. 2d 303 (2014) the defense sought to introduce psychiatric evidence of “extreme emotional disturbance” to “address why the incident happened, and to help the finder of fact to assess culpability.” The trial court excluded the evidence, and this Court

confirmed that such evidence was not admissible to support a diminished capacity defense because “extreme emotional disturbance does not require a showing of a mental disease or defect.”

Accordingly, Dunn’s reliance in the Brief (at 13) upon a footnote in *State v. Joseph*, 214 W.Va. 525, 590 S.E. 2d 718 (2003) is misplaced.⁷ In Syllabus Point 3 of *Joseph*, this Court reiterated the standard for admissibility of evidence of diminished capacity: the defendant may “introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged.” In *Joseph*, this Court held that the defense expert did opine that the defendant, at the time he killed the victim, suffered from a mental defect that “precluded(ed) him from being able to formulate intent or malice or to premeditate under (the) circumstances.” This Court held that the trial court misinterpreted the diminished capacity doctrine to mean that a defendant must suffer a perpetual incapacity to form the requisite mental elements of murder, rather than an incapacity at the time of the criminal act. Because this Court found that the expert testimony met the standard for admissibility of evidence of diminished capacity, the testimony of Drs. Beard and Hughes was deemed “relevant in establishing that Mr. Joseph suffered from a mental impairment.” This Court, in the same footnote quoted in the Brief, noted that the testimony of Drs. Beard and Hughes would have been inadequate to support a diminished capacity defense in the absence of the other expert’s testimony.

This Court in *Joseph* cited with approval *State v. Simmons*, 172 W.Va. 590, 309 S.E. 2d 89 (1983). In *Simmons* this Court affirmed the trial court’s exclusion of defense psychiatric testimony because the psychiatrist did not offer evidence that the defendant suffered from a mental disease or defect that caused her to be incapable of forming the specific intent required for murder.

⁷ The Brief cites footnote 9 but quotes footnote 7: “We likewise find that the testimony of Drs. Beard and Hughes should have been admitted insofar as it established that Mr. Joseph suffered from a mental impairment. . . .”

As discussed above, in the instance case there was more than an absence of such evidence of diminished capacity. Rather, Dunn's expert negated any finding of mental disease or defect and confirmed that Dunn not only had the capacity to form the intent to kill and premeditation, but did in fact do so when he murdered his step-father and attempted to murder his mother.

(B). Dunn has abandoned his claim that the trial court abused its discretion in ruling that Dunn's purported use of synthetic marijuana could not be raised in opening statements.

Next, the Brief (at 13-14) includes Dunn's claim that the trial court abused its discretion in ruling that Dunn's purported synthetic marijuana use would not be discussed in opening statements. The Brief includes no citations to the trial record, no citations to pertinent authorities and no indication as to how Dunn was prejudiced by the trial court's ruling that, since it could not be known whether or not Dunn would testify, comments about Dunn's possible testimony concerning synthetic marijuana would not be allowed during opening statements. The Brief contains the mere assertion that the trial court "tied counsel's hands. . . and pushed him out in front of a jury of twelve fine men and women who had no idea they didn't get to hear the whole story."⁸ Dunn's undeveloped argument of this claim of error constitutes waiver of the alleged error. *State v. McKinley, supra*, 234 W.Va. at _____, 764 S.E. 2d at 319.

Even if Dunn had not waived this claim, pursuant to W.Va. Rules of Evidence 103 (d), "the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." Thus, the trial court did not abuse its discretion in preventing defense counsel from referring to Dunn's

⁸ The defense declined to take advantage of the option of deferring the defense opening statement until it was time for the defense to commence presentation of evidence pursuant to W.Va. Trial Court Rules 42.04 (a).

purported use of synthetic marijuana because the admissibility of such evidence depended upon whether Dunn would decide to testify after the close of the state's case.⁹

As the Brief (at 12) confirms, Dunn did elect to testify and claimed that synthetic marijuana gave him a "zombified feeling." The conclusion that the trial court's ruling concerning opening remarks did not unfairly prejudice Dunn is established by the fact that, in closing argument, defense counsel made utterly no mention of synthetic marijuana. App. V. III, 1100-1106.

III. The claim that the trial court abused its discretion in permitting disclosure of Dunn's recorded jail calls was not preserved at trial and has been abandoned on appeal: moreover, there was no error in this regard.

The Brief (at 9) mentions Dunn's recorded jail calls and, while referring to the July 28, 2014 pre-trial hearing, cites App. Vol. II, pp. 8-11; 30-35. However, despite its table of contents, Volume II of the appendix prepared by Dunn's counsel contains only pages 363-699 of the transcript of trial held on August 7, 8 and 11, 2014. As the Brief (at 14-16) never cites the portion of the record relating to the alleged error, the error is deemed nonexistent. *State v. Honaker*, 193 W.Va. 51, 56 n. 4, 454 S.E. 2d 96, 101, n. 4 (1994).

The Brief (at 9-10) then addresses three questions asked of Dunn concerning the recorded jail conversations he had with his mother. There were no defense objections to these questions. App. V. III 936-939. The Brief (at 14-16), with no citations to the record, contains Dunn's claim that the trial court permitted the disclosure of the recorded jail calls "over strenuous objection." Dunn now asserts that

⁹ In *Harvey v. State*, 296 Ga. 823, 833-834, 770 S.E. 2d 840, 848-849 (2015) the appellant claimed double jeopardy after the trial court granted the prosecutor's motion for a mistrial because defense counsel violated the court's pre-trial ruling prohibiting the defense in opening statements from referring to the appellant's police interview. Affirming the trial court, the Supreme Court of Georgia observed:

And at the hearing on the State's (pre-trial) motion, the prosecutor made it clear that the State did not intend to introduce the police interview and sought to prevent any reference to the interview unless and until the Appellant took the witness stand. That obviously would not occur before opening statements and might not happen even if defense counsel promised that his client would testify, since the decision whether to testify is ultimately for the defendant to make, not her lawyer.

the disclosure was “(o)bviously prejudicial” but fails to specify any unfair prejudice. Dunn now complains that the disclosure “implicates a variety of constitutional concerns” and that the prosecution “failed to lay a proper evidentiary foundation” and that the manner in which attorney-client jail calls are screened is “sketchy.” The Brief contains no citations to any portions of the trial record where these objections were preserved. In fact, the defense made no motion to suppress the recordings and instead stated:

I object unless and until the State can show compliance with that statute on the recordation of the phone calls . . . If they can show that, then obviously they’re entitled to obtain that information. . . . Supp. App. 65.

As Dunn made a specific objection, “the objection is then limited to that precise ground” and “specifying a certain objection is considered a waiver of other grounds not specified.” *State v. DeGraw*, 196 W.Va. 261, 272, 470 S.E. 2d 215, 226 (1996). The trial court heard testimony of the Chief Correctional Officer of the Southern Regional Jail, confirming compliance with W.Va. Code § 31-20-5e. The defense offered no rebuttal. The trial court found that “the testimony of this witness has shown that the statute has been complied with, with regard to the monitoring of phone calls. . . .” There was no objection to this ruling. Supp. App. 92-93. Dunn never contended at trial, and does not now contend, that attorney-client communications were not screened out of the recordings.

Thus, Dunn’s claim of error concerning his recorded jail calls was waived during trial, has been abandoned on appeal and is contrary to W.Va. Code §31-20-5e and *State v. Blevins*, 231 W.Va. 135, 149-150, 744 S.E. 2d 245, 259-260 (2013).

- IV. The claim of juror misconduct lacks merit because:**
- (A). it is unsupported by the trial record;**
 - (B). it was not preserved below; and**
 - (C). it is a skeletal argument insufficient to preserve the claim.**

The Brief (at 7) misstates the record in contending that there “appeared to be two jurors arguing between themselves about the case in the jury box in open court during the course of jury

deliberations.” The Brief (at 16-17) contains the additional misstatement, that “the jury reported that it was hung on the issue of mercy” and then contains mere guesswork: “the jury (sic) who *apparently* was the lone ‘mercy’ dissenter and the juror seated in front of her engaged in a heated, animated conversation, *presumably* about their dispute on the verdict and the issue of a recommendation of mercy.” (Italics added).

The jurors never announced that they were unable to reach a verdict on the issue of mercy. Before the foreperson announced the verdict, the trial court confirmed that the verdict was reached “while all 12 jurors were present at the same time” and that the verdict was unanimous. One juror then indicated that she was confused over whether a “no mercy” verdict needed to be unanimous. App. V. III, 1122-1127.

The jury returned its verdict finding the defendant guilty of all counts in the indictment. App. V. III, 1127-1128. The trial court polled the jurors on the question of mercy and all but the one confused juror confirmed that they did not recommend mercy. The trial court sent the jury back for further deliberations. App. V. III, 1128-1131. Only after the jury retired for further deliberations did Dunn’s counsel moved for a mistrial, claiming that “two of the jurors were continuing to deliberate” because they “were engaged in a heated argument.” The prosecutor noted that she, who sat closest to the jury box, observed no such event and that if jurors were talking, “we have no idea what they were talking about.” Dunn’s counsel made no attempt to vouch the record or to have the jurors questioned. App. V. III, 1131-1132.

The trial court, with approval of Dunn’s counsel, instructed the jury that the verdict on the issue of mercy had to be unanimous. App. V. III, 1135-1138. The jury then took a break for the evening and the next morning returned a unanimous verdict finding Dunn guilty on all counts with no recommendation of mercy on the first degree murder conviction. App. V. III, 1140-1141, V. III, 1154-1158. The foreperson again confirmed that all jurors were present together during deliberations, and

the jurors were polled to confirm the unanimous verdict. The trial court twice asked Dunn's counsel if he had "anything" further before the jurors were excused, and counsel twice answered "no." App. V. III, 1158- 1160. Dunn's counsel also was given an opportunity to develop his claim of juror misconduct during the hearing upon Dunn's motion for a new trial, but counsel declined to do. Supp. App. 208. Counsel had no response to the prosecutor's argument that there was no evidence that any deliberations occurred outside of the jury room and that defense counsel waived the opportunity to have the jurors questioned about what, if anything, they may have been discussing in the jury box. Supp. App. 212-213.

Accordingly, there is nothing in the trial record to support Dunn's claim of juror misconduct. The Brief (at 17) includes Dunn's complaint that the trial court "simply brushed off the matter and made no inquiry," but he voiced no such complaint until filing his post-conviction motion for a new trial. In addition to failing to request the trial court to make inquiry, he declined to take any further steps to develop the issue or to receive permission to interview jurors. See *State v. Gray*, 217 W.Va. 591, 598-599, 619 S.E. 2d 104, 111-112 (2005). Moreover, Dunn failed to comply with W.Va. Rules of Criminal Procedure 51 because he failed to "make () known to the court the action which that party desires the court to take or his or her objection to the action of the court and the grounds therefor. . . ."

In addition to failing to preserve the claim below, Dunn presents only a "skeleton 'argument,' really nothing more than an assertion, (which) does not preserve a claim." *State v. McKinley, supra*, quoting *State, Dep't. of Health & Human Res., Child Advocate Office v. Robert Norris N.*, 195 W.Va. 759, 765, 466 S.E. 2d 827, 833 (1995), *State v. LaRock, supra*, 196 W.Va. at 302, 470 S.E. 2d at 621, *State v. Lilly*, 194 W.Va. 595, 605 n. 16, 461 S.E. 2d 101, 111, n. 16 (1995).

Dunn asserts that "our jurisprudence is devoid of decisional law on this precise issue" and ignores case law requiring a showing of prejudice before a criminal conviction will be reversed, even when there is trial error involving jury deliberations. *State v. Lightner*, 205 W.Va. 657, 661-664, 520 S.E.

2d 654, 658-661 (1999). Dunn has the burden of demonstrating that whatever discussion he claims two jurors had in the jury box affected the outcome of the proceedings: he has made no attempt to do so.

V. The claim that the trial court abused its discretion in refusing an impermissible jury instruction has been abandoned.

As discussed above, issues mentioned only in passing and not supported by citation to pertinent authorities are not considered on appeal and are deemed abandoned. In the Brief (at 7, 17-18), Dunn concedes that the defense instruction at issue was impermissible because it set forth factors for the jury to consider in determining whether or not to recommend mercy. *Billotti v. Dodrill* 183 W.Va. 48, 56-57, 394 S.E. 2d 32, 40-41 (1990), Syl. Pt. 1, *State v. Miller*, 178 W.Va. 618, 363 S.E. 2d 504 (1987). Accordingly, Dunn's assertion that "the court below erred in refusing (the) defense instruction" is belied by his concession that the trial court's refusal of the instruction was required. The trial court gave the approved instruction concerning a recommendation of mercy pursuant to Syl. Pt. 3, *State v. Lindsey*, 160 W.Va. 284, 233 S.E. 2d 734 (1977), and Dunn makes no claim that such instruction was erroneous. App. V. III, 1075.

Dunn did not include a copy of the proposed defense instruction in the appendix. The Brief includes no citation to the trial record and no reference to any pertinent authority to support Dunn's assertion that the trial court abused its discretion in refusing the admittedly impermissible proposed instruction.

CONCLUSION

Dunn's conviction of first degree murder by use of a firearm without a recommendation of mercy and of attempted first degree murder by use of a firearm resulted from the overwhelming proof of his guilt, and not from any trial court error. Such proof included his trial testimony that for a month he methodically planned the murders of his step-father and mother, and that only a malfunction in the murder weapon prevented him from getting away with double murder. Accordingly, his conviction and sentence should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Brief of the Respondent* has been served upon the defendant herein by **MAILING** a copy thereof to **DAVID WHITE**, Attorney at Law, 179 Summers Street, Suite 314, Charleston, WV 25301, by United States Mail, postage pre-paid, this the 13th day of July, 2015.



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