
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0538

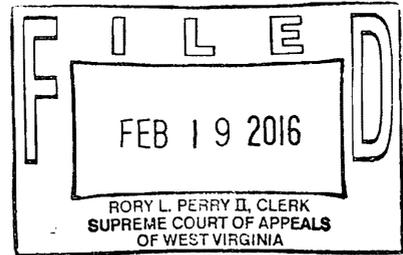
STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

ROBERT HERNANDEZ, JR.,

Defendant Below, Petitioner.



RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

Petitioner claims the following three (3) assignments of error, all related to Petitioner's allegation of insufficient evidence, which the State specifically and generally denies:

1. The jury's verdict was against the manifest weight and sufficiency of the evidence adduced at trial;
2. The trial court erred when it denied Petitioner's Motion for Judgment of Acquittal or, in the Alternative, for a New Trial, on grounds that the State failed to sufficiently establish the elements of premeditation and deliberation for a first-degree murder conviction; and
3. Petitioner's due process rights were violated when the trial court denied his Motion for Judgment of Acquittal or, in the Alternative, for a New Trial.

STATEMENT OF THE CASE

The State of West Virginia (hereinafter, “State”), disputes the facts as represented by Robert Hernandez, Jr. (hereinafter, “Petitioner”), as the facts within Petitioner’s brief are both minimal and piecemeal in an attempt to evade the insurmountable evidence of Petitioner’s guilt offered by the State at trial. As such, the State offers the following and apologetically lengthy factual review of Petitioner’s trial, as Petitioner’s claims relate purely to the finding of sufficient evidence made by the Circuit Court of Monongalia County, West Virginia (hereinafter, “circuit court”), when denying Petitioner’s post-trial motions.

A. Statement of the Facts

On or about August 14, 2014, Petitioner was party to a physical altercation inside of Bent Willey’s, a nightclub located in Morgantown, West Virginia. (Appendix Volume [hereinafter, “App. Vol.”], I at 8; App. Vol. IV at 46.) Petitioner, though not actually physically involved in the altercation, intervened and stabbed Devante Waites in the chest. (App. Vol. IV at 49.) In a video of the altercation taken from Bent Willey’s security cameras, Petitioner was captured visibly “lurking” around the fight before intervening and eventually pursuing the victim to commit the fatal stabbing. (*Id.* at 49-50.) Petitioner was then captured “[g]rabbing Devante’s shift in his left hand, holding on, pulling Devante for several seconds, and then coming in closer behind Devante Waites where his hand had complete access and close proximity to Devante Waites’s chest.” (*Id.* at 59.) While the victim died of the stab wound inflicted by Petitioner, no other party was seriously injured in the skirmish (*Id.* at 50.) Following the subsequent police investigation, wherein the security video footage was obtained by police, Petitioner was indicted on September 5, 2014, for one count of “Murder in the First Degree” in violation of W. Va. Code § 61-2-1, for the stabbing and premeditated killing of Davante Waites. (Appendix Vol. I at 8.)

B. Statement of the Case

1. Petitioner's Trial, Day One, January 26, 2015

As Petitioner does not allege any pretrial defect or error, the State will only address the evidence proffered at trial as it relates to Petitioner's insufficiency claim. Petitioner's four-day trial commenced on January 26, 2015. (*Id.* at 21.) Following voir dire, the circuit court allowed the jury to travel to the actual location of the crime. (*Id.* at 126.) The circuit court instructed the jury to view the layout of the street and adjacent parking lots, taking special notice of the parking lot exits onto the street. (*Id.*) The State also requested that the jury note how vehicles may park on the street itself. (*Id.* at 127.)

The circuit court then identified security cameras located on an adjacent nightclub. (*Id.*) Next, the circuit court identified the entrances to Bent Willey's. (*Id.* at 128.) The jurors then proceeded to enter Bent Willey's. (*Id.*) The circuit court then identified the layout inside of Bent Willey's, including the windows, the entrances into the kitchen, the location of the terrace, the location of the bar, exits onto different streets, and the area in which the crime was committed. (*Id.* at 129-135.)

Following the on-location visit, proceedings resumed inside the courtroom and the parties gave their opening statements following an introductory admonishment to the jury. (*Id.* at 136-171.) The State then called Nick Kelley, owner of Bent Willey's, as its first witness. (*Id.* at 171; Full Testimony, App. Vol. I at 171-75.) Mr. Kelley testified that he was present within the establishment on the night of the stabbing, and identified that he provided police with a copy of security video footage. (*Id.* at 172-74.) Upon cross-examination, however, Mr. Kelley identified that he did not personally see Petitioner stab the victim. (*Id.* at 175.)

The State next called Dixie Bucklew, an affiliate of Buck's Corner Pub, an adjacent business. (*Id.* at 175-77; Full Testimony, App. Vol. I at 175-80.) Ms. Bucklew identified that she allowed police to view and copy security video footage from Buck's Corner Pub. (*Id.* at 177-78.) Upon cross-examination, Ms. Bucklew identified that she did not personally see Petitioner stab the victim. (*Id.* at 179-80.)

The State then called Seon An, the general manager of Chic-n-Bones, another adjacent nightclub. (*Id.* at 180-81; Full Testimony, App Vol. I at 180-88.) Ms. An testified that Chic-n-Bones had one exterior camera facing the road and sidewalk outside of Bent Willey's, and identified that she turned security video footage over to police during the course of the police investigation. (*Id.* at 181-85.) Upon cross-examination, Ms. An testified that the video did not capture Petitioner stabbing the victim. (*Id.* at 187.) On redirect, the State clarified that Petitioner did not stab the victim in or around Chic-n-Bones. (*Id.* at 188.) Following Ms. An's testimony, the jury was excused for the remainder of the day. (*Id.* at 189.)

2. Petitioner's Trial, Day Two, January 27, 2015

On January 27, 2015, the State resumed its case-in-chief by calling Detective Darren Crouse of the Morgantown Police Department. (App. Vol. II at 11-12; Full Testimony, App. Vol. II at 12-48.) Det. Crouse recalled reporting to a call on August 14, 2014, involving a stabbing at Bent Willey's. (*Id.* at 13.) Det. Crouse identified that he met with Mr. Kelly, who provided security video of the altercation. (*Id.* at 14-15.) Det. Crouse then identified that he was informed that the victim had died, necessitating his departure from the crime scene to photograph the victim's body at Ruby Memorial Hospital. (*Id.* at 16.)

While en route to the hospital, Det. Crouse turned over the security video footage to Detective Ryan Stalling, based upon an urgency to review the video as a means of capturing the

suspect. (*Id.* at 16-17.) Det. Crouse noted a stab wound “on the left front below the nipple of the victim.” (*Id.* at 17.) Upon returning to the scene, Det. Crouse collected a sterile swab of blood found on the floor and photographed the interior and exterior of Bent Willey’s. (*Id.* at 17-19.) He further noted that no weapon was located at the scene. (*Id.* at 20.)

Det. Crouse then identified that a suspect involved in the altercation was taken into custody by the police after being removed by the bouncers following the altercation. (*Id.*) Det. Crouse acknowledged, however, that the suspect in custody was not the individual who performed the stabbing, and indicated that police were subsequently given the address of Petitioner for further investigation. (*Id.* at 21-22.) Petitioner was subsequently arrested following a traffic stop. (*Id.* at 23.)

Following Petitioner’s arrest, police searched Petitioner’s residence and recovered a peach-colored polo shirt, and a plastic bag in Petitioner’s trash containing a white t-shirt, a wash cloth, and a paper towel. (*Id.* at 24.) Det. Crouse also identified that he assisted in the collection of security video footage from Buck’s Corner Pub and packaged additional evidence to be sent to the State Police crime lab. (*Id.* at 25-26.)

Upon cross-examination, Det. Crouse identified that he briefly reviewed the security video taken from Bent Willey’s prior to taking it into evidence, but acknowledged that he did not see Petitioner stab the victim during the brief review. (*Id.* at 28.) Counsel for Petitioner also challenged Det. Crouse’s failure to send to the crime lab pants obtained from Jovaun Howard, a friend of the victim who was with the victim on the night of the altercation, that contained a small amount of blood. (*Id.* at 37.) Det. Crouse acknowledged that he did not know why the item was not delivered to the crime lab, but then stated, given the time between the crime and transfer of the pants to police, there was a high potential for contamination. (*Id.* at 38.) Mr.

Howard did, however, note that he was a friend of the victim rather than an aggressor involved in the altercation. (*Id.* at 40.)

On redirect, the State noted that the video obtained from Buck's Corner Pub showed Petitioner inside the establishment both prior to and subsequent to the events at Bent Willey's. (*Id.* at 41-42.) Further, the video showed Petitioner wearing different clothing following the incident at Bent Willey's. (*Id.* at 42.) Specifically, Petitioner was seen wearing a white t-shirt prior to the stabbing and a dark-colored t-shirt following the stabbing. (*Id.*) Det. Crouse also identified that, upon again reviewing the video taken from Bent Willey's, he could identify Petitioner complete "what could be inferred as a stabbing" upon the victim. (*Id.* at 43.) Upon re-cross, Det. Crouse acknowledged that no knife could be seen in the video. (*Id.* at 45.)

Next, the State called Detective Ryan Stalling of the Morgantown Police Department. (*Id.* at 48-49; Full Testimony, App. Vol. II at 48-78.) Det. Stalling noted that he was tasked with conducting interviews of witnesses to the fatal stabbing. (*Id.* at 50-54.) Based upon a conversation with Jared Ford, a bystander to the altercation, Det. Stalling learned that the person police originally had in custody, Tashaon Davis-Jones, was not the person responsible for the stabbing. (*Id.* at 56.) Det. Stalling also recalled speaking with Asya Drake, another witness, who indicated that Petitioner went to a vehicle and changed his shirt following the altercation within Bent Willey's. (*Id.* at 59.)

Upon cross-examination, Det. Stalling identified that Mr. Ford admitted to being intoxicated at the time of the incident. (*Id.* at 64.) Det. Stalling also identified that Jeremy Waites, the victim's brother, opined that the victim was stabbed by Mr. Davis-Jones, although Jeremy Waites did not actually see the stabbing. (*Id.* at 66.) Det. Stalling also identified that Mr.

Ford stated that he had witnessed a stabbing, later identified to be Petitioner's attempted stabbing of another individual, which was corroborated by the security video footage. (*Id.* at 67-68.)

Det. Stalling also identified that Mr. Ford was seen in the security video footage attempting to break up the altercation in Bent Willey's. (*Id.* at 72.) While Det. Stalling acknowledged that none of the witnesses actually saw a knife, he noted that Mr. Ford had witnessed a "250 pound[], 6-foot black male holding his hand in a way that . . . 'made him think that he had a sharpened tooth brush or something' in the initial attempted stabbing." (*Id.* at 74.) Det. Stalling again identified that Mr. Ford's statement appeared to be corroborated by the security video footage. (*Id.* at 78.)

The State then called Detective Lawrence Hasley of the Morgantown Police Department. (*Id.* at 78-79; Full Testimony, App. Vol. II at 79-87.) Det. Hasley identified that he had interviewed Mr. Davis-Jones, as the initial suspect of the crime. (*Id.* at 81.) After Petitioner was taken in as a suspect, Det. Hasley further identified that he collected Petitioner's shoes and jean pants. (*Id.* at 83-84.) Det. Hasley also indicated that he was one of the officers responsible for obtaining the security video footage from Chic-n-Bones. (*Id.* at 86.)

Following a lunch recess, the State resumed its case-in-chief by calling Detective Daniel Trejo of the Morgantown Police Department. (*Id.* at 88-89; Full Testimony App. Vol. II at 89-177, App. Vol. IV at 12-14.) Det. Trejo responded to the crime scene shortly after the stabbing had occurred, and was present while the EMS crew was attempting to treat the victim. (*Id.* at 90.) Det. Trejo was advised by bouncers at Bent Willey's that Mr. Davis-Jones, the individual with the most blood on him, had been detained and turned over to police custody. (*Id.* at 91.) Det. Trejo further identified that neither of the bouncers witnessed or obtained a knife. (*Id.* at 92.)

Det. Trejo returned to the station, where he was informed of Petitioner's status as a suspect in the investigation. (*Id.* at 93-94.) Based upon information obtained from Det. Stalling, Det. Trejo reviewed the security video footage obtained from Bent Willey's. (*Id.* at 95-96.) Therein, he found an individual, later identified as Petitioner, attempt to stab Tre Hines, another individual, before following the altercation and actually stabbing the victim. (*Id.* at 97.) Based upon the video footage, police could remove the possibility of Mr. Davis-Jones as the perpetrator of the crime. (*Id.* at 98.)

Det. Trejo further identified that, upon speaking with Mr. Davis-Jones, Petitioner had met with Mr. Davis-Jones at Bent Willey's prior to the stabbing. (*Id.* at 98-99.) Police were then able to obtain Petitioner's address and execute a search warrant. (*Id.* at 100.) Police performed further surveillance on the residence, and upon Petitioner's brief return and departure from the same, were able to perform a traffic stop as a means of taking Petitioner into custody. (*Id.* at 102.)

Det. Trejo identified that he reviewed the video taken from Bent Willey's numerous times, slowing the video down and printing still images. (*Id.* at 103.) He further stated that, through the use of a program called "Star Witness," he could clean the video up, zoom in, and adjust brightness and contrast. (*Id.* at 103-04.) The State then published the video to the jury, identifying specific areas called to the jury's attention during the on-location visit. (*Id.* at 106.) The State resumed the video, pausing once again after Petitioner appears. (*Id.* at 107.) The State then noted many of Petitioner's identifying factors, including his clothing and "distinctive tattoos," again noting Petitioner's location within Bent Willey's. (*Id.* at 109.)

The State played the video again, and Det. Trejo identified both Petitioner and the victim. (*Id.* at 109-10.) Det. Trejo then identified in the video where Petitioner attempts to stab Mr.

Hines. (*Id.* at 113.) Finally, Det. Trejo identified the moment during the video where it appeared that Petitioner fatally stabbed the victim. (*Id.* at 114.) Det. Trejo then identified that Petitioner appeared to have put something into his pocket. (*Id.* at 119.)

Det. Trejo then reviewed still photographs captured from the Bent Willey's security video system, which showed Petitioner leaving Bent Willey's wearing the same pants he was wearing when he was later taken into custody. (*Id.* at 122.) The State further admitted several more photographs showing identifying features of Petitioner. (*Id.* at 123-25.)

Det. Trejo then reviewed the jean pants taken from Petitioner on the night of the fatal stabbing before the jury, matching them to the jean pants seen on the video. (*Id.* at 128-29.) The State also requested that Petitioner show his right arm to the jury, a request to which Petitioner complied, which showed the same tattoo depicted in the security video. (*Id.* at 129-30.)

The State then turned its focus to the video taken from Chic-n-Bones. (*Id.* at 131.) Det. Trejo identified that the video was important based off of a witness statement made by Asya Drake, who told police that she witnessed Petitioner walk to a car in a parking lot adjacent to Chic-n-Bones and change shirts following the fatal stabbing. (*Id.* at 132.) The videos taken from Chic-n-Bones and Buck's Corner Pub corroborated Ms. Drake's statement. (*Id.* at 132-35.) Specifically, the videos and still photographs showed Petitioner wearing a white t-shirt before the stabbing and a dark t-shirt following the stabbing. (*Id.* at 132-38.) Based upon the cumulative and overwhelming evidence reviewed by police, Det. Trejo identified that Petitioner was the sole suspect. (*Id.* at 139-147.) Det. Trejo also identified a statement made by Petitioner at the police station, wherein Petitioner surmised he would "be spending the rest of his life in jail for some dumb-assed shit." (*Id.* at 148.)

Upon cross-examination, Det. Trejo admitted that no blood was found in the pocket of the jean pants where Petitioner appeared to have stowed something following the stabbing. (*Id.* at 152.) Det. Trejo also acknowledged that no one admitted to seeing -- or further admitted to -- the actual stabbing of the victim. (*Id.* at 153-56.) Counsel for Petitioner also challenged Det. Trejo's assertion that Petitioner was making a stabbing motion at Mr. Hines, highlighting that Mr. Hines was never stabbed. (*Id.* at 167-69.) Upon redirect, Det. Trejo identified that blood was found on Petitioner's shirt, approximately mid-thigh, where a weapon could have come into contact with the shirt as Petitioner was placing the item in his pants pocket. (*Id.* at 175.) Further, Det. Trejo surmised that Petitioner was preparing the knife used in the stabbing earlier in the video, while he was doing something with his hands prior to the attempted stabbing of Mr. Hines. (*Id.* at 177.)

The State then called Asya Drake, who witnessed Petitioner change his shirt in an adjacent parking lot following the fatal stabbing. (*Id.* at 178; Full Testimony, App. Vol. II at 178-95.) Ms. Drake recalled seeing Petitioner walk in front of her car and hearing her friend mention seeing blood on Petitioner's shirt. (*Id.* at 182.) She then stated that Petitioner got into his car as police drove by, presumably responding to the call at Bent Willey's, before exiting the car and changing his shirt. (*Id.* at 183-84.) Ms. Drake then identified Petitioner sitting in the courtroom. (*Id.* at 188.) Ms. Drake, however, recalled seeing Petitioner wearing khaki pants, rather than the jean pants admitted as evidence in the matter. (*Id.* at 194.)

The State next called Tre Hines, who was involved in the altercation at Bent Willey's. (*Id.* at 195-96; Full Testimony, App. Vol. II at 196-226.) Tre Hines identified himself as a friend of the victim, and identified that he had gone with the victim to Bent Willey's on the night of the fatal stabbing. (*Id.* at 197-203.) After entering into Bent Willey's, Mr. Hines recalled that

another friend had bumped into Mr. Jones-Davis while they were going to the dance floor, and that the victim had stepped in between the two as a means of defusing the situation. (*Id.* at 204.) Regardless, the incident devolved into a skirmish. (*Id.* at 206-09.) After Mr. Hines was escorted out of Bent Willey's by bouncers to calm down, Mr. Hines was allowed to return inside to find his friends. (*Id.* at 211.) He then found the victim laying on the floor in a pool of blood. (*Id.* at 212.) The State then reviewed the security video footage taken from Bent Willey's with Mr. Hines, who corroborated much of the evidence and testimony previously addressed. (*Id.* at 215-222.)

The State then called Timothy Dixon, another individual in the victim's and Mr. Hines' group. (*Id.* at 226; Full Testimony, App. Vol. II at 226-39.) Mr. Dixon corroborated the testimony of Mr. Hines, although he admitted that he did not get involved in the fight once it had started. (*Id.* at 228-35.) Upon cross-examination, Mr. Dixon admitted that he never recalled seeing Petitioner inside Bent Willey's. (*Id.* at 238-39.)

3. Petitioner's Trial, Day Three, January 28, 2015

Petitioner's trial resumed the following day, with the State calling Jeremy Waites, the victim's brother. (App. Vol. III at 4; Full Testimony, App. Vol. III at 4-38.) Mr. Waites corroborated much of the earlier testimony put forth by the State. (*Id.* at 5-14.) Eventually, bouncers for Bent Willey's broke up the fight and put Mr. Waites and his brother in the kitchen area to calm down. (*Id.* at 13-14.) At that point, Mr. Waites noticed that the victim was bleeding profusely, and the victim collapsed to the floor. (*Id.* at 14.) Mr. Waites identified that the aggressor of the fight, Mr. Jones-Davis, would not have had the time to stab the victim, largely because he was restrained by bouncers shortly after the fight had started. (*Id.* at 17.) The State

then reviewed the video with Mr. Waites, who again provided details surrounding the skirmish and identified the bouncers at Bent Willey's. (*Id.* at 19-21.)

The State then called Jovaun Howard, another of the victim's friends at Bent Willey's on the night of the fatal stabbing. (*Id.* at 38; Full Testimony, App. Vol. III at 38-66.) Mr. Howard corroborated the testimony of Mr. Hines, Mr. Dixon and Mr. Waites. (*Id.* at 40-47.) Mr. Howard admitted that he did not see the victim get stabbed. (*Id.* at 47.) Upon watching the video, however, Mr. Howard agreed that Petitioner was actually the person responsible for stabbing the victim. (*Id.* at 60.) Despite Petitioner's continued allegation that Mr. Jones-Davis was responsible for the stabbing, Mr. Howard affirmed that he never saw Mr. Jones-Davis with a knife, and that he only initially thought Mr. Jones-Davis was responsible because he was the individual involved in the fight. (*Id.* at 63.)

The State then called Jared Ford, a witness present at Bent Willey's on the night of the fatal stabbing who was not associated with any of the individuals involved in the skirmish. (*Id.* at 67; Full Testimony, App. Vol. III at 67-110.) Mr. Ford acknowledged that he did not know anyone involved in the fight, but recalled seeing one individual "shank" another during the melee. (*Id.* at 68-70.) After being informed by a police officer that a stabbing had occurred, Mr. Ford identified that he had seen the stabbing take place. (*Id.* at 71.) When police identified Mr. Jones-Davis as the individual arrested, however, Mr. Ford indicated that Mr. Jones-Davis was not the person whom he had seen stab another individual. (*Id.* at 72.)

After watching the security video Mr. Ford identified that what he thought was Petitioner stabbing the victim was actually Petitioner attempting to stab Mr. Hines. (*Id.* at 75.) Mr. Ford then identified the same during playback of the security video footage before the jury. (*Id.* at 76-81.) When asked of his somewhat incorrect description of Petitioner to police, Mr. Ford

acknowledged that he was “just trying [his] best to pull what [he] could from . . . memory. . . .” (*Id.* at 81.)

Upon cross-examination, trial counsel again had Mr. Ford review the security video footage. (*Id.* at 83.) Trial counsel challenged Mr. Ford’s characterization of Petitioner’s stabbing motion. (*Id.* at 86-87.) Trial counsel also challenged Mr. Ford’s identification of the Petitioner to police. (*Id.* at 92-94.) Mr. Ford, however, did affirmatively inform police that Mr. Jones-Davis was not responsible for the stabbing. (*Id.* at 95.) Mr. Ford also stated that he did not see a weapon, but that the darkened dance floor of Bent Willey’s had multiple flashing lights. (*Id.* at 97.) Overall, through the remaining cross-examination and following redirect, Mr. Ford identified that certain, incorrect aspects of his original statement to police became clearer upon watching the video, allowing him to give a more complete statement. (*Id.* at 98-110.)

After a lunch recess, the State resumed its case-in-chief by calling Noah Devore, a bouncer at Bent Willey’s on the night of the fatal stabbing. (*Id.* at 118-22; Full Testimony, App. Vol. III at 119-54.) Mr. Devore recalled grabbing Mr. Jones-Davis after the fight began and taking Mr. Jones-Davis to the floor before getting up and restraining the victim. (*Id.* at 124-29.) After breaking up the fight, Mr. Devore noticed the victim holding his side and the blood on the victim’s shirt. (*Id.* at 131.) Upon finding that the victim had been stabbed, Mr. Devore called 9-1-1. (*Id.*)

Mr. Devore testified that Mr. Jones-Davis did not have a knife during the skirmish. (*Id.* at 132.) Further, he agreed with the State that, to his knowledge, no knife had been “dropped or thrown or kicked aside” during the fight. (*Id.* at 135.) Mr. Devore further stated that he did not think Petitioner was involved in the fight until he later watched the security video footage. (*Id.*)

at 138.) Upon review, Mr. Devore characterized Petitioner as someone who was lurking around the fight and waiting until an opening appeared to attack. (*Id.* at 138-39.)

The State then called Dakota Toler, another bouncer employed by Bent Willey's on the night of the fatal stabbing. (*Id.* at 155-56; Full Testimony, App. Vol. III at 155-70.) Mr. Toler proceeded to corroborate the testimony of Mr. Devore, and continued to identify individuals seen in the security video footage. (*Id.* at 155-67.) Mr. Toler also admitted that none of the bouncers could find a weapon once the floor was cleared. (*Id.* at 169.) Upon cross-examination, Mr. Toler testified that he did not see Petitioner actually stab the victim. (*Id.* at 170.)

The State next called Kristen Thompson, Petitioner's girlfriend at the time of the fatal stabbing. (*Id.* at 171-73; Full Testimony, App. Vol. III at 171-87, 195-96.) Ms. Thompson identified that she started out the evening of August 13, 2014, with Petitioner at Buck's Corner Pub, before Petitioner left with friends to go downtown. (*Id.* at 177-80.) At the time Petitioner left, Ms. Thompson identified that he was wearing a white t-shirt and jean pants. (*Id.* at 181.) Upon return, Petitioner was wearing a black shirt and jean pants. (*Id.*) Ms. Thompson noted that she sensed something was wrong with Petitioner upon his return, stating that "[h]e just seemed like he was quiet." (*Id.* at 184.) Upon cross-examination, counsel for Petitioner elicited testimony from Ms. Thompson that an individual known simply as "D." told her Mr. Jones-Davis stabbed someone at Bent Willey's. (*Id.* at 196.)

The State then called Joel Harvey, a forensic analyst at the West Virginia State Police Forensic Lab. (*Id.* at 198-99; Full Testimony, App. Vol. III at 198-208.) Mr. Harvey was simply called as a means of establishing the chain of custody for evidence collected and sent to the state crime lab. (*Id.*)

Next, the State called Meredith Ann Chambers, a DNA analyst with the West Virginia State Police Forensic Lab. (*Id.* at 209; Full Testimony, App. Vol. III at 209-27.) Petitioner stipulated to her qualifications as an expert. (*Id.* at 210.) Ms. Chambers identified that a swab of the blood found on Mr. Jones-Davis' sweatshirt was consistent only with Mr. Jones-Davis' DNA. (*Id.* at 220.) A swab of the blood found on Petitioner's jeans, however, was consistent with the DNA profile of the victim. (*Id.* at 222.)

The State then called Dr. James Craner, a toxicologist at the State Medical Examiner's Office. (*Id.* at 227-28; Full Testimony, App. Vol. III at 228-36.) Dr. Craner identified that a post-mortem test of the victim's blood revealed an alcohol concentration of .03 percent, as well as findings of marijuana and marijuana metabolites. (*Id.* at 232.) Dr. Craner further identified that the victim's blood-alcohol level was below the legal limit, although the level of marijuana metabolites suggested that the victim had used marijuana at some point close to his death. (*Id.* at 233-35.)

As its last witness of the day, the State called Jeffrey Haught, a registered nurse and the County Medical Examiner for Monongalia County, West Virginia. (*Id.* at 236-37; Full Testimony, App. Vol. III at 236-49.) Mr. Haught identified that the victim died at the hospital following his emergency transportation from Bent Willey's. (*Id.* at 239.) Mr. Haught stated that the victim had died of a stab wound between the fifth and sixth rib near the apex of the heart. (*Id.* at 242.) He further described that the victim "basically [bled] into his chest cavity from a stab wound that penetrated the chest wall and penetrated the ventricle of his heart." (*Id.* at 243.) Finally, Mr. Haught affirmed that the victim was stabbed "to the left chest wall." (*Id.* at 248.)

4. Petitioner's Trial, Day Four, January 29, 2015

The State resumed its case-in-chief on the fourth day of Petitioner's trial by calling Officer Zachary Trump of the Morgantown Police Department.¹ (App. Vol. IV at 5; Full Testimony, App. Vol. IV at 5-12.) Ofc. Trump identified that he was the officer whom primarily arrested Mr. Jones-Davis, and that he had also processed Petitioner after taking him into custody. (*Id.* at 8-10.) Further, Ofc. Trump identified himself as the officer responsible for taking Petitioner's clothes into evidence. (*Id.* at 10-11.)

The State finally recalled Det. Trejo as a witness to clarify the testimony of Ms. Chambers. (*Id.* at 12.) The State addressed a knife sent by Det. Trejo to the State crime lab which was found to contain no DNA evidence. (*Id.* at 13.) Det. Trejo identified that the knife was found "well over a month after the incident" on September 26, 2014, outside of Bent Willey's. (*Id.* at 13.) Det. Trejo testified that he did not believe that the knife found outside of Bent Willey's was related to the fatal stabbing. (*Id.* at 14.)

The State then closed its case-in-chief, and Petitioner chose to stand silent. (*Id.* at 15.) Petitioner, without calling any witnesses, rested his case. (*Id.* at 16.) The circuit court then provided its charge to the jury, and closing arguments were held. (*Id.* at 16-87.) Following a lunch recess, the jury entered deliberations and returned with a verdict finding Petitioner guilty of "Murder in the First Degree" for the willful and premeditated killing of Devante Waites. (*Id.* at 94-95.)

The circuit court then proceeded to the mercy phase of Petitioner's trial, after which the jury returned a supplemental verdict of no mercy. (*Id.* at 102-25.) The circuit court held a sentencing hearing on March 16, 2015, and Petitioner was formally sentenced to a term of life

¹ To clarify, the transcribed testimony of both Ofc. Trump and the following witness, Det. Trejo, appears to mistakenly reference both officers as "Mr. Hernandez." (*See* App. Vol. IV at 5-14.)

imprisonment without the possibility of parole. (*Id.* at 10-11.) On April 10, 2015, Petitioner, by counsel, filed a Motion for Judgment of Acquittal and/or New Trial, contending that the State put forth insufficient evidence upon which to support a verdict of first degree murder. (*Id.* at 12-13.) On May 4, 2015, the circuit court held a post-trial motions hearing, and at the conclusion of which, found that “the State’s evidence, both direct and circumstantial, was fully sufficient to convince reasonable jurors beyond a reasonable doubt of [Petitioner’s] guilt on the charge of first degree murder.” (*Id.* at 19.) Petitioner now appeals. Respondent asserts that, based upon a complete review of the underlying record, as thoroughly cited above, Petitioner’s claims are wholly without merit.

SUMMARY OF THE ARGUMENT

Based upon the foregoing review of the facts and evidence of Petitioner’s case, Petitioner’s claim that he was convicted upon insufficient evidence is objectively without merit.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent disputes Petitioner’s request for oral argument under Rule 19 of the West Virginia Revised Rules of Appellate Procedure. Not only is this matter well within the purview of well-settled and longstanding West Virginia law on the topic of the sufficiency of evidence at trial, but this matter is completely and factually settled by a review of the underlying criminal record. Petitioner has submitted a full transcript of his criminal trial as an appendix to this matter, which this Honorable Court may use to effusively and completely review Petitioner’s assignments of error on appeal. Ergo, this matter may be properly disposed by Memorandum Decision under Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

ARGUMENT

The State contends that insurmountable evidence of Petitioner's guilt was proffered at trial. "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden." Syl. Pt. 2, *State v. Juntilla*, 227 W. Va. 492, 711 S.E.2d 562 (2011) (citing Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995)). "An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution." *Id.* "The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt." *Id.*

Put succinctly:

In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

State v. Cummings, 220 W. Va. 433, 438, 647 S.E.2d 869, 875 (2007) (citing Syl. Pt. 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978), *overruled on other grounds by Guthrie*, 194 W. Va. 657, 461 S.E.2d 163). This Honorable Court "applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." *Juntilla*, 227 W. Va. at 497, 711 S.E.2d at 567 (citing *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996)).

Here, Petitioner is simply without argument that his conviction was improperly based upon insufficient evidence. The State put forth twenty-one (21) witnesses in an effort to paint a clear and thorough picture of Petitioner's guilt. As a result, the evidence in support of

Petitioner's conviction is insurmountable, and is perhaps as complete a picture a prosecutor can hope to paint throughout the course of a criminal trial.

As thoroughly reviewed above, the State evidence, taken in a light most favorable to the State, shows that Petitioner began his evening by meeting Ms. Thompson at Buck's Corner Pub on August 14, 2014. At the time, Petitioner was wearing a white t-shirt and jean pants. He arrived at Buck's Corner Pub in the company of Mr. Jones-Davis. Later that evening, Petitioner left Buck's Corner Pub with Mr. Jones-Davis and traveled downtown, eventually entering Bent Willey's. Pursuant to the testimony of numerous witnesses, Mr. Jones-Davis engaged in a skirmish with the victim, Devante Waites, and several of Mr. Waites' friends, after being bumped into on the dance floor. Video of the skirmish, recorded on the Bent Willey's security system, was later obtained by police. In the video, Petitioner is seen making a stabbing motion, presumably attempting to stab Mr. Hines, before seeking out and actually stabbing Mr. Waites in the chest. Mr. Ford, a witness at Bent Willey's, recalled seeing Petitioner's attempted stabbing of Mr. Hines.

Immediately after the skirmish, Petitioner was seen outside of Bent Willey's in an adjacent parking lot by Ms. Drake. Ms. Drake noticed that Petitioner appeared to be evading or hiding from any attention, particularly by police and emergency personnel that had arrived at Bent Willey's. Ms. Drake further watched Petitioner as he changed from a white t-shirt into a black t-shirt. Ms. Drake further noticed what appeared to be blood on Petitioner's white t-shirt. Ms. Thompson identified that Petitioner returned to Buck's Corner Pub at a time after the Bent Willey's incident, and confirmed that he had changed from a white t-shirt into a black t-shirt.

After police obtained the video from Bent Willey's, they were able to identify Petitioner as the suspect of the crime. Police subsequently arrested Petitioner and obtained evidence from

his person, including the same jeans he was wearing in the video taken from Bent Willey's. The jeans were sent to the State Police Forensic Lab, where swabs of the blood lifted from the jeans were consistent with DNA taken from the victim.

While no one saw Petitioner stab the victim during the skirmish in the darkened nightclub, the video evidence, attached as a part of the Appendix in the present matter, clearly depicts Petitioner's actions as stated by numerous witnesses on the night in question. Further investigation by police objectively removed Mr. Jones-Davis as a suspect in the matter, as the blood on his clothing was revealed to be his own and no weapon was found on his person, which is particularly important as he was restrained from the point bouncers broke up the fight until he was turned over to police custody.

Based upon the foregoing, the State put forth incontrovertible evidence of Petitioner's guilt, and emphatically proved Petitioner guilty of "Murder in the First Degree" beyond a reasonable doubt. After the State presented its case-in-chief over the span of four (4) days, meeting its burden in the process, Petitioner offered no evidence or testimony to refute the State's case. Petitioner's defense was conducted solely through cross-examination, and largely consisted of pointing out that no one actually saw Petitioner fatally stab the victim.

Based upon the foregoing, Petitioner's case is simply without merit. Petitioner has no basis upon which to challenge either the State's evidence or the circuit court's discretion in denying Petitioner's post-trial motions upon a similar basis. This Honorable Court should therefore deny Petitioner's assignments of error on appeal, affirming his conviction in the circuit court below.

V.

CONCLUSION

WHEREFORE, the State of West Virginia directs this Honorable Court to deny in its entirety the direct criminal appeal of Robert Hernandez, Jr., thereby affirming his criminal conviction for “Murder in the First Degree” in the Circuit Court of Monongalia County, West Virginia.

Respectfully Submitted,

STATE OF WEST VIRGINIA,

Respondent, By Counsel,

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CERTIFICATE OF SERVICE

I, Shannon Frederick Kiser, Assistant Attorney General and counsel for the Respondent hereby verify that I have served a true copy of "***SUMMARY RESPONSE***" upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 19th day of February, 2016, addressed as follows:

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