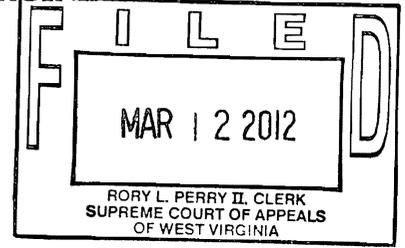

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1336



STATE OF WEST VIRGINIA,

Respondent,

v.

RICHARD A. WHITE,

Petitioner.

BRIEF OF THE STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

SCOTT E. JOHNSON
SENIOR ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 6335
E-mail: sej@wvago.gov

Counsel for Respondent

TABLE OF CONTENTS

	Page
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF THE CASE	1
III. SUMMARY OF ARGUMENT	4
IV. STATEMENT REGARDING ORAL ARGUMENT	5
V. ARGUMENT	5
A. THERE WAS NO PLAIN ERROR IN THE INSTRUCTIONS TO THE JURY	5
B. THERE WAS MORE THAN SUFFICIENT EVIDENCE STANDARD TO JUSTIFY A CONVICTION AND THE JURY WAS NOT MISLED OR CONFUSED BY THE INSTRUCTIONS	7
1. Self-Defense	12
2. Premeditation and Deliberation	14
3. Malice	15
C. THE PETITIONER FAILED TO SHOW THAT THE CIRCUIT COURT ABUSED ITS DISCRETION IN REFUSING TO AWARD THE PETITIONER A NEW TRIAL BASED UPON THE ALLEGATION OF JUROR MISCONDUCT OR PREJUDICE	16
D. THERE IS NO PLAIN ERROR IN THIS CASE IN REFERENCE TO ROBERT WHITE’S TESTIMONY OR STATEMENT	17
E. ANY CLAIM ABOUT PROSECUTORIAL MISCONDUCT IS WAIVED AND THE PETITIONER CANNOT MAKE OUT PLAIN ERROR	19
VI. CONCLUSION	26

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Anderson v. City of Bessemer City</i> , 470 U.S. 564 (1985)	17
<i>Ballenger v. State</i> , 667 So. 2d 1242 (Miss. 1995)	9
<i>Blankenship v. Mingo County Economic Opportunity Commission</i> , 187 W. Va. 157, 416 S.E.2d 471 (1992)	16
<i>Bourgeois v. McDonald</i> , 622 So. 2d 684 (La. Ct. 1993)	11
<i>Brady v. Maryland</i> , 373 U.S. 87 (1963)	21
<i>Brown v. Gobble</i> , 196 W. Va. 559, 474 S.E.2d 489 (1996)	16, 17
<i>Brown v. State</i> , 294 S.E.2d 510 (Ga. 1982)	14
<i>Commonwealth v. Johnson</i> , 754 N.E.2d 685 (Mass. 2001)	14
<i>Evans v. State</i> , 202 S.W.3d 158 (Tex. Crim. App. Ct. 2006)	11
<i>Graham v. Wallace</i> , 208 W. Va. 139, 538 S.E.2d 730 (2000) (<i>per curiam</i>)	5, 8
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993)	10
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	7, 10
<i>Jones v. United States</i> , 527 U.S. 373 (1999)	19, 20
<i>Knight v. State</i> , 392 So. 2d 337 (Fla. Dist. Ct. App. 1981)	13, 14
<i>Lewis v. State</i> , 709 P.2d 1278 (Wyo. 1985)	10
<i>McDougal v. McCammon</i> , 193 W. Va. 229, 455 S.E.2d 788 (1995)	24
<i>Patterson v. State</i> , 815 S.W.2d 377 (Ark.1991)	10
<i>People v. Garcia</i> , 942 N.E.2d 700 (Ill. Ct. App. 2011)	20
<i>People v. Mooney</i> , No. 236424, 2003 WL 22112325 (Mich. Ct. App. Sept. 11, 2003)	24, 25

<i>People v. Overlee</i> , 666 N.Y.S.2d 572 (App. Div. 1997)	24
<i>People v. Weaver</i> , No. 286265, 2009 WL 3365756 (Mich. Ct. App. Oct. 20, 2009)	20
<i>People v. Williams</i> , 599 N.E.2d 1033 (Ill. Ct. App. 1992)	13
<i>Pinkney v. State</i> , 827 A.2d 124, 141 (Md. Ct. App. 2003)	15
<i>Porcher v. Thaler</i> , No. H-10-4160, 2012 WL 267135 (S.D. Tex. Jan. 30, 2012)	9
<i>Secretary v. Tony and Susan Alamo Foundation</i> , 783 F. Supp. 405 (W.D. Ark. 1991)	11
<i>Smith v. Andreini</i> , 223 W. Va. 605, 678 S.E.2d 858 (2009)	25
<i>State v. Bailey</i> , 151 W. Va. 796, 155 S.E.2d 850 (1967)	8
<i>State v. Black</i> , 227 W. Va. 297, 708 S.E.2d 491 (2010)	22
<i>State v. Clark</i> , 175 W. Va. 58, 331 S.E.2d 496 (1985)	12
<i>State v. Collins</i> , 186 W. Va. 1, 409 S.E.2d 181 (1990)	5, 17, 18
<i>State v. Denman</i> , 193 S.W.3d 129 (Tx. Ct. App. 2006)	12
<i>State v. Evans</i> , 172 W. Va. 810, 310 S.E.2d 877 (1983)	15, 16
<i>State v. Gilman</i> , 226 W. Va. 453, 702 S.E.2d 276 (2010)	22
<i>State v. Ginyard</i> , 431 S.E.2d 11, 13 (N.C.1993)	15
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	8, 12, 14
<i>State v. Hamrick</i> , 112 W. Va. 157, 163 S.E. 868 (1932)	15
<i>State v. Hutchinson</i> , 215 W. Va. 313, 599 S.E.2d 736 (2004)	14
<i>State v. Johnson</i> , 10th Dist. No. 06AP-67, 2007-Ohio-2385	9
<i>State v. Johnson</i> , 111 W. Va. 653, 164 S.E. 31 (1932)	16

<i>State v. Kendell</i> , 723 N.W.2d 597 (Minn. 2006)	15
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996)	7, 19
<i>State v. Lyons</i> , 459 S.E.2d 770 (N.C. 1995)	10
<i>State v. Maley</i> , 151 W. Va. 593, 153 S.E.2d 827 (1967)	12
<i>State v. McCoy</i> , 179 W. Va. 223, 366 S.E.2d 731 (1988)	13
<i>State v. Milam</i> , 142 W. Va. 98, 94 S.E.2d 442 (1956)	12
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	6, 7, 18, 19
<i>State v. Miller</i> , 197 W. Va. 588, 476 S.E.2d 535 (1996)	20
<i>State v. Myers</i> , 159 W. Va. 353, 222 S.E.2d 300 (1976), overruled on other grounds by <i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	20
<i>State v. Niederstadt</i> , 66 S.W.3d 12 (Mo. 2002) (en banc)	9
<i>State v. O'Neill</i> , 250 P.3d 844 (Kan. Ct. App. Apr. 22, 2011) (<i>per curiam</i>)	9
<i>State v. Rodoussakis</i> , 204 W. Va. 58, 511 S.E.2d 469 (1998)	24
<i>State v. Stowers</i> , 66 W. Va. 198, 66 S.E. 323 (1909)	8, 11
<i>State v. Treadway</i> , 130 P.3d 746, 748 (N.M. 2006)	9
<i>State v. Vance</i> , 207 W. Va. 640, 535 S.E.2d 484 (2000)	16
<i>Tennant v. Marion Health Care Foundation, Inc.</i> , 194 W. Va. 97, 459 S.E.2d 374 (1995)	16
<i>United States v. Curran</i> , 465 F.2d 260 (7th Cir. 1972)	12
<i>United States v. Dominguez Benitez</i> , 542 U.S. 74 (2004)	19
<i>United States v. Howard</i> , 413 F.3d 861 (8th Cir. 2005)	10
<i>United States v. Lopez</i> , 431 F.3d 313 (8th Cir. 2005)	17
<i>United States v. MacPherson</i> , 424 F.3d 183 (2d Cir. 2005)	8

<i>United States v. Penniegraft</i> , 641 F.3d 566 (4th Cir. 2011)	8
<i>United States v. Ramirez-Jiminez</i> , 967 F.2d 1321 (9th Cir. 1992)	10
<i>United States v. Salerno</i> , 974 F.2d 231 (2d Cir.1992), <i>op. vacated on rehearing</i> , 8 F.3d 909 (2d Cir. 1993)	25
<i>United States v. Scheffer</i> , 523 U.S. 303 (1998)	8
<i>United States v. Thompson</i> , 195 Fed. Appx. 191, 195 (4th Cir. 2006)	20, 21
<i>Williamson v. State</i> , No. 11-05-00257-CR, 2008 WL 2381708 (Tex. Ct. App. June 12, 2008)	11
OTHER:	
Am. Jur. 2d <i>Homicide</i> § 268 (2010)	14
Bailey, F. Lee & Kenneth J. Fishman, <i>Criminal Trial Techniques</i> , vol. II § 43:1	10
IET Soldier’s Handbook, TRADOC PAM 600-4, Glossary 1 (1 Oct. 1999)	3
W. Va. R. Evid. 801(d)(2)(A)	10
W. Va. R. Evid. 403	18
W. Va. Rev. R. App. P. 10	5

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BRIEF OF THE STATE OF WEST VIRGINIA

I.

ASSIGNMENTS OF ERROR

The assignments of error are set forth in the Petitioner's brief and will not be restated here.

II.

STATEMENT OF THE CASE

The Petitioner went to the decedent's (Harvey Hersman's) house, Trial Tr., vol. II, 105, Mar. 29, 2011, claiming in a subsequent statement to the police that it was to obtain certain of his personal property located at Mr. Hersman's house. App. 14 at 7. The Petitioner (who the Petitioner's counsel described in closing as a "big guy, okay, -- he was bigger than Harvey by forty or fifty pounds at that time"), Trial Tr., vol. II, 157, Mar. 30, 2011, gave a statement to the police (read at trial), Trial Tr., vol. II, 155, Mar. 29, 2011, that he went to Mr. Hersman's house to get some personal property back. App. 14 at 7. The Petitioner admitted to believing his wife (Kathy, who

lived next door to Hersman), *id.* at 8, was having an affair with Mr. Hersman, and that the affair did not make the Petitioner “feel very good[.]” *Id.* at 8. The Petitioner did not care much for Hersman, characterizing Hersman as “ain’t nothing you want in your neighborhood anyway,” *id.* at 9, a man the Petitioner “never did care a whole lot for[.]” *id.* at 17, as someone who “ain’t safe to be on the street[.]” *id.* at 19, a man who is “corrupting . . . a bad influence [on an unnamed person]” *id.*, a man who was “pulling some crime we all got to pay for[.]” *id.*, a man who was “dirty” and “low” and “sorry[.]” *id.* at 17, someone who “cause[s] chaos and this and that[.]” *id.* at 15, and a man who did more “besides just screw my [the Petitioner’s] old lady[.]” *id.* at 17, a man the Petitioner “just don’t . . . [c]are for[.]” *id.* at 16, and a man the Petitioner “just don’t like . . . at all.” *Id.* at 17.

According to Robert White, the Petitioner’s son and Kathy’s stepson, Trial Tr., vol. II, 105, Mar. 29, 2011, he and the Petitioner went to get some of his father’s things and to see his daughter. *Id.* The Petitioner was disturbed because Kathy was not at home providing supervision to his daughter. App. 14 at 9. Kathy and the Petitioner had clashed over their daughter previously. *Id.* at 3. Since Kathy was not at home, the two went next door to Hersman’s. Trial Tr., vol. II, 105, Mar. 29, 2011.

The Petitioner told the police that although he handed his son his knife, he then said “I did have a knife. I did have a weapon and when Harvey, I asked Harvey, I said, Harvey, you know we got a problem[.]” and it was only then that Hersman responded that the two did and obtained a gun to shoot at the Petitioner and his son. App. 14 at 1. The police located a folding lock blade knife under Hersman’s body with the blade in the unlocked position. Trial Tr., vol. II, 29, Mar. 29, 2011.

The Petitioner’s son Robert, who testified that he was outside when the Petitioner first entered the Hersman residence and for about 10 or 15 seconds before entering Hersman’s residence,

Robert heard a skirmish, like things being banged around. *Id.* at 107. Kathy, who was at the Hersman house, came out and saw the Petitioner on top of Hersman with Hersman asking for her to “get him off of me” or words to that effect. Trial Tr., vol. III, 100, Mar. 30, 2011.¹

When Robert entered Hersman’s house, he also saw the Petitioner holding Hersman down. Trial Tr., vol. III. 136, Mar. 30, 2011. Robert then tried to get his father to leave because—even though he did not anticipate anything bad happening—he did not believe his father should be fighting. *Id.* at 109. Robert got in between the Petitioner and Hersman telling his father, “you know, let’s go.” *Id.* at 111. According to Robert, Hersman only then went into the kitchen for a gun, and the Petitioner chose to go in after him. *Id.* Even though he is a member of the National Guard, and had just returned from EIT² where he had some type of situation defusement training, *id.* at 118, he did not attempt to assist his father and ultimately fled the house after failing to get his father to leave at least three times. *Id.* at 131, 134. The Petitioner had two guns that he had taken away from Hersman, one of which he took from Hersman and then threw away. App. 14 at 25. The Petitioner testified that when Hersman was trying to locate the second pistol that he [the Petitioner] had thrown away, he [the Petitioner] “walked right up to him and shot him. . . right in his head.” *Id.* at 26. The Petitioner left the Hersman home and got into his car stating to his son and another car mate that he [the Petitioner] “done something wrong in there[.]” *id.* at 20, apparently alluding to the fact he had just shot Mr. Hersman “3 times in the head.” *Id.* at 1.

¹The Petitioner described Kathy as running out of Hersman’s bedroom, App. 14 at 9, “half-naked[.]” *Id.* at 11.

²This most probably should read either IET, Initial Entry Training, or AIT, Advanced Individual Training. IET Soldier’s Handbook, TRADOC PAM 600-4, Glossary 1 (1 Oct. 1999).

Once the Petitioner left Hersman's house, he took the gun that he used to shoot Hersman in the head and drove to his premises where he wrapped the gun in a plastic trash bag and buried it out by a split rail fence. App. 14 at 24. Even after having been engaged in a gunfight, the Petitioner had his wits about him when he spoke with the police, *id.* at 27, and was "[s]ober as a judge[.]" *Id.*

III.

SUMMARY OF ARGUMENT

The Petitioner agreed with the charge given to the jury after having reviewed it and having had an opportunity to consider it. Therefore, the Petitioner cannot win on a claim of plain error as these circumstances negate plain error.

The Petitioner's sufficiency of the evidence argument hinges on a misconception of the law, the jury was not required to believe his version of events—even if this version was uncontradicted or uncontested. It is still within the exclusive province of the jury to believe all, some, or none of the testimony. And the evidence here, including the size differential between victim and victimized, the dislike the Petitioner exhibited for the victim, the Petitioner's calmness after the killing, and the fact that the Petitioner took steps to hide evidence of his shooting the victim all establish that a rational jury could have found him guilty.

The Petitioner has failed to show that the circuit court was in clear error when it ruled, after hearing testimony on the issue, that the juror who was alleged to have discussed this case and made her mind up before the close of the evidence did no such thing and did not violate any of the duties or responsibilities incumbent upon her as a jury.

State v. Collins, 186 W. Va. 1, 409 S.E.2d 181 (1990), does not apply here as the Petitioner made use of the statement asserted to fall within *Collins*. As such, the Petitioner has specifically waived any error—not simply forfeited it—so that plain error cannot exist.

The numerous and varied attacks upon the judge and the prosecutor are not justified, many being refuted by the findings of fact made by the circuit court and reviewed only under the highly deferential clearly erroneous and/or abuse of discretion standards of review. The only issue that is cause for pause is the prosecutor’s statement about the blue pill splitter not being found at the Hersman house—which, although true since it was found with the murder weapon behind the Petitioner’s residence,—does not rise to the level of plain error in this case.

IV.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. The Petitioner’s brief sets forth the law and the facts in this case. Oral argument will add nothing to the legal matters at issue. This case is appropriate for a summary disposition.

V.

ARGUMENT

A. THERE WAS NO PLAIN ERROR IN THE INSTRUCTIONS TO THE JURY.

The State is aware that normally a response brief should track the initial brief’s assignments of error. W. Va. Rev. R. App. P. 10, clerk’s cmt. The Petitioner, though, raises a sufficiency of the evidence assignment of error before he raises his instructional error. A sufficiency of the evidence argument is premised on whether the jury was properly instructed. *See, e.g., Graham v. Wallace*, 208 W. Va. 139, 141, 538 S.E.2d 730, 732 (2000) (*per curiam*) (citing Syl. Pt. 3, *State v. Guthrie*,

194 W. Va. 657, 461 S.E.2d 163 (1995)) (“On appeal of a plaintiff’s verdict, we are required to assume that a (properly instructed) jury credited the evidence that was favorable to the plaintiff’s case and discredited the evidence that was unfavorable to that case.”). Logically, then, a jury instruction issue should precede a sufficiency argument.

The Petitioner asserts that there was instructional error in this case relating to self-defense. Pet’r’s brief at 27-29. He did not object to the instruction and, thus, raises these issues under plain error. *Id.* at 28. *State v. Miller*, 194 W. Va. 3, 17 n.23, 459 S.E.2d 114, 128 n.23 (1995) (“in West Virginia criminal cases the sole bases for attacking an unobjected to jury charge are plain error and/or ineffective assistance of counsel.”). The Petitioner may not avail himself of plain error.

“As a general proposition, this Court has discretionary authority to consider the legality and sufficiency of the trial court’s charge under the plain error doctrine.” *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129. Before plain error is applied, the court must determine whether here was a “waiver” or a “forfeiture:”

Under the ‘plain error’ doctrine, ‘waiver’ of error must be distinguished from ‘forfeiture’ of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.

Syl. Pt. 8, in part, *Miller*, 194 W. Va. at 3, 459 S.E.2d at 114 (1995).

At trial, the following exchange occurred:

THE COURT: Okay. I have changed the charge, and I think she’s highlighted in red those changes for you, Jesse, has she not?

MR. J. FORBES: Your Honor, we've reviewed it and we're perfectly fine with it. No objections.

Trial Tr. vol. III, 105, Mar. 30, 2011.³

Where a court offers the parties the opportunity to review and consider a jury charge, and upon the court eliciting responses by counsel, 194 W. Va. at 19, 459 S.E.2d at 130, and counsel states "he [i]s satisfied with the instructions as proposed by the court and that he had no objection to any portion of the jury charge[,]" *id.* at 17, 459 S.E.2d at 128, there is a waiver and plain error cannot apply. *Id.* at 19, 459 S.E.2d at 130.

B. THERE WAS MORE THAN SUFFICIENT EVIDENCE STANDARD TO JUSTIFY A CONVICTION AND THE JURY WAS NOT MISLED OR CONFUSED BY THE INSTRUCTIONS.⁴

West Virginia follows the *Jackson v. Virginia*, 443 U.S. 307 (1979), standard in reviewing sufficiency of the evidence claims. *State v. LaRock*, 196 W. Va. 294, 303, 470 S.E.2d 613, 622 (1996) ("In *State v. Guthrie*, 194 W. Va. 657, 667-70, 461 S.E.2d 163, 173-76 (1995), we recently revised our standard of review when a criminal defendant challenges the sufficiency of the evidence in support of a jury verdict. We adopted, both generally and in cases with circumstantial evidence, the standard set forth by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)."). *Jackson* does not simply supplant the jury with the reviewing court. A sufficiency of the evidence review does not allow a petitioner to reargue his case

³The only objection came from the State over an instruction that the Petitioner argued for; the court gave the instruction over the State's objection. Trial Tr., vol. III, 104-05, Mar. 30, 2011.

⁴The Petitioner separates his sufficiency argument and jury passion or prejudice argument into two sections. These two arguments, though, are both based on the same assertion, that there was insufficient evidence for the jury to have convicted. The other gist of the misunderstanding argument relates to alleged prosecutorial misconduct which is addressed Assignment of Error 5 in his brief and will be addressed by the State separately.

to a reviewing court sitting in the guise of a second jury. *See State v. Stowers*, 66 W. Va. 198, 66 S.E. 323, 326 (1909) (“We are not jurors, though people often seem to think so.”).

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. 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. 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. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

“Under this stern standard, a court, whether at the trial or appellate level, may not ‘usurp[] the role of the jury,’ by ‘substitut[ing] its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury[.]’” *United States v. MacPherson*, 424 F.3d 183, 187 (2d Cir. 2005) (citations omitted). “[T]his court ‘cannot make [its] own credibility determinations but must assume that the jury resolved all contradictions in testimony in favor of the Government.’” *United States v. Penniegraft*, 641 F.3d 566, 572 (4th Cir. 2011) (quoting *United States v. United Med. & Surgical Supply Corp.*, 989 F.2d 1390, 1402 (4th Cir. 1993)). Indeed, “[t]he jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses.” Syl. Pt. 2, *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967). The core purpose of the jury is to make credibility determinations. *United States v. Scheffer*, 523 U.S. 303, 312-13 (1998) (plurality opinion). A jury is free to credit, all, some, or none of a witness’s testimony, *Graham v. Wallace*, 208 W. Va. at 141, 538 S.E.2d at 732 (quoting 81 Am. Jur. 2d *Witnesses* § 1032 at 844 (1992) (footnotes omitted) (“When a witness, during the course of his testimony, makes two contradictory statements, it is within the province of the jury to

accept and rely on either version and to disregard the other, in part or in toto.”)), which includes any statement the witness gives to the police. *State v. Johnson*, 10th Dist. No. 06AP-67, 2007-Ohio-2385, ¶ 69.⁵ Thus, any evidence that does not support the verdict is not weighed by the reviewing court but is ignored or disregarded. *See, e.g., Porcher v. Thaler*, No. H-10-4160, 2012 WL 267135, at *12 (S.D. Tex. Jan. 30, 2012) (“Any contradictory testimony does not affect the validity of the guilty verdict.”); *State v. Niederstadt*, 66 S.W.3d 12, 14 (Mo. 2002) (en banc) (“The Court examines the evidence and inferences in the light most favorable to the verdict, ignoring all contrary evidence and inferences.”); *State v. Treadway*, 130 P.3d 746, 748 (N.M. 2006) (“This Court evaluates the sufficiency of the evidence in a criminal case by viewing the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences to uphold the conviction, and disregarding all evidence and inferences to the contrary.”); *State v. O’Neill*, 250 P.3d 844 (Kan. Ct. App. Apr. 22, 2011) (*per curiam*) (text available at 2011 WL 1814927, at *2) (“We disregard evidence that conflicts with the judgment of conviction and make no credibility determinations. Thus, we do not weigh the evidence or sift the record for facts or inferences contrary to the judgment. . . . In short, we ask simply whether evidence had been admitted at trial that in its un rebutted and uncontradicted form would have allowed a reasonable factfinder come to a determination of guilt. . . . [W]e look only at the evidence supporting the trial court’s finding of guilt[.]”); *Ballenger v. State*, 667 So. 2d 1242, 1252 (Miss. 1995) (“All evidence and inferences derived therefrom, tending to support the verdict, must be accepted as true, while all evidence

⁵The statement the Petitioner gave to the police is not hearsay since it is the statement of a party-opponent. W. Va. R. Evid. 801(d)(2)(A). Since it was actually played to the jury, the jury had the benefit of hearing and seeing the Petitioner in the police interview. *See* Trial Tr., vol. II, 154, Mar. 29, 2011 (noting by Lieutenant Mankins who interviewed the Petitioner that the interview was video recorded).

favoring the defendant must be disregarded”). Indeed, the only time the defendant’s evidence is considered in the equation is “in those instances in which it is favorable to the State[.]” *State v. Lyons*, 459 S.E.2d 770, 776 (N.C. 1995). See also *Lewis v. State*, 709 P.2d 1278, 1282 (Wyo. 1985) (“On appeal, we assume the evidence in favor of the successful party to be true, disregarding entirely the evidence of the unsuccessful party in conflict therewith, and give to the evidence of the successful party every favorable inference which may be reasonably and fairly drawn from it.”). *Jackson* does not ask if the jury made a correct decision, it only asks if the jury made a rational one. *Herrera v. Collins*, 506 U.S. 390, 402 (1993).

Implicit in the Petitioner’s sufficiency argument is that because he was the only witness to everything that happened that night, then the jury was bound to believe him. Such an argument has been rejected by other courts. “[The defendant] erroneously claims that because no evidence contradicted his testimony, the jury improperly discredited his story. A jury is not required to accept exculpatory testimony, even if unrebutted.” *United States v. Howard*, 413 F.3d 861, 864 (8th Cir. 2005). See also *United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1328 (9th Cir. 1992) (“[T]he jury was not required to accept his exculpatory testimony, even if it was not directly rebutted by the government.”); 2 F. Lee Bailey & Kenneth J. Fishman, *Criminal Trial Techniques* § 43:1 (footnote omitted) (“a jury is not required to accept all or any part of a witness’ testimony, although it is uncontradicted. The jury may give such testimony the weight it deems proper or wholly disregard it.”). This rule is consistent with *Jackson/Guthrie*, in that a court does not “view the evidence most favorably to the defendant. The opposite is true. The jury is not required to believe all of the defendant’s statements about what happened at the time of the homicide. It may accept or reject any part of the testimony of a witness.” *Patterson v. State*, 815 S.W.2d 377, 381 (Ark. 1991). An

unimpeached or uncontradicted witness may be disbelieved based on, for example, “the witnesses [sic] bearing and demeanor[.]” *Secretary v. Tony and Susan Alamo Found.*, 783 F. Supp. 405, 411 (W.D. Ark. 1991) (quoting I Edward Devitt and Charles Blackmar, *Federal Jury Practice and Instructions* § 17.21).

As this Court has observed:

We are not jurors, though people often seem to think so. We do not see these witnesses face to face to judge of their demeanor and credit. We cannot see them in cold print. It gives us not their eyes, their countenances, their voices, their frankness or its opposite, their personal appearance importing their characters, their demeanor on the stand, their movements and actions, so essential in passing on the credit of witnesses.

State v. Stowers, 66 W. Va. 198, 66 S.E. 323, 326 (1909).

Moreover, a party or an interested witness has a built in possibility of bias in their testimony. Thus, the uncontradicted evidence of interested witnesses—and a defendant and his son are indisputably interested witnesses⁶—creates a question of fact for the jury. “It is the function of the trier of fact to determine to what extent self-interest has colored a witness’ testimony[.]” *Bourgeois v. McDonald*, 622 So. 2d 684, 690 (La. Ct. 1993); a point on which the jury was instructed. Trial Tr., vol. III, 114, Mar. 30, 2011.

⁶“For example, a defendant’s mother may testify that the defendant was with her in [a different city from the murder] on the night of the murder. Even though the State does not cross-examine the defendant’s mother, the jury is not required to believe her uncontradicted testimony. She is, after all, the defendant’s mother.” *Evans v. State*, 202 S.W.3d 158, 163 (Tex. Crim. App. Ct. 2006). Compare Trial Tr., vol. III, 114, Mar. 30, 2011 (jury instructed that in judging credibility, it may consider, inter alia, the witness’s “relationship to any of the parties”). The jury could discount the defendant’s uncontroverted testimony because of “the possible bias of wanting to avoid imprisonment.” *Williamson v. State*, No. 11-05-00257-CR, 2008 WL 2381708, at *4 (Tex. Ct. App. June 12, 2008).

Further, because “there is no qualitative difference between direct and circumstantial evidence[,]” *State v. Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175, it is untenable to argue that “direct testimony should overcome the convicting testimony which was basically circumstantial.” *United States v. Curran*, 465 F.2d 260, 265 (7th Cir. 1972). A jury may choose to believe circumstantial evidence over direct. “A well connected train of circumstances is as cogent of the existence of a fact as any array of direct evidence, and may outweigh opposing direct testimony; and the concurrence of well authenticated circumstances has been said to be stronger evidence than positive testimony unconfirmed by circumstances.” *State v. Maley*, 151 W. Va. 593, 617, 153 S.E.2d 827, 839 (1967) (Calhoun, J., joined by Berry, J., dissenting) (quoting 32A C.J.S. *Evidence* § 1039 at 751-53)).

1. Self-Defense.

There is no dispute in this case that the Petitioner shot Hersman in the head three times. The Petitioner raised self-defense, which the jury rejected. “It is the province of the jury to weigh the evidence upon the question of self-defense and an adverse verdict will not be set aside unless it is clearly against the evidence.” *State v. Milam*, 142 W. Va. 98, 103, 94 S.E.2d 442, 445 (1956). “We have historically been reluctant to interfere with a jury verdict rejecting a claim of self-defense.” *State v. Clark*, 175 W. Va. 58, 62, 331 S.E.2d 496, 500 (1985).

Simply raising self-defense is not proof of self-defense. A defendant’s self-interested “testimony does not ‘prove,’ by itself, a claim of self-defense[,]” *State v. Denman*, 193 S.W.3d 129, 133 (Tx. Ct. App. 2006), and “[t]his same line of reasoning applies equally well to appellant’s witnesses who testified to past incidents between appellant and complainant—just as appellant’s bald statements do not, by themselves, ‘prove’ self-defense, neither did appellant’s witnesses

testimony, standing alone, ‘prove’ self-defense.” *Id.* See also *People v. Williams*, 599 N.E.2d 1033, 1042 (Ill. Ct. App. 1992) (“The jury rejected the self-defense claim. While defendant testified that the deceased had been the aggressor, the jury was not required to accept his testimony.”). “Because the jury, by finding appellant guilty, implicitly rejected his self-defense theory, it necessarily chose not to believe the testimony concerning such[.]” *Denman*, 193 S.W.3d at 132, which is, of course, the jury’s role—to make decisions about what testimony to believe and what testimony to reject. *Knight v. State*, 392 So. 2d 337, 339 (Fla. Dist. Ct. App. 1981) (citations omitted) (“the jury is not required to accept the testimony of a defendant even when he is the sole eyewitness to the shooting, rather, the jury’s function is to determine the credibility of the witnesses and weigh the evidence. Appellant’s testimony is subject to the same standard as that of any other witness: the jury is free to believe or disbelieve it in whole or in part.”). See, e.g., *State v. McCoy*, 179 W. Va. 223, 229, 366 S.E.2d 731, 737 (1988) (“It is well settled in this State, however, that the jury is the sole judge as to the credibility of witnesses.”).

The jury heard testimony from both Robert White and Kathy White that the Petitioner—who apparently substantially outweighed Hersman—was on top of Hersman and Hersman was asking Kathy’s help in getting the Petitioner off him. The jury also heard the Petitioner’s own words admitting that he carried a knife into Hersman’s abode, and the jury heard testimony from the police that an open knife was found underneath Hersman’s dead body. The jury also heard the Petitioner’s statement to the police that he “walked right up to [Hersman] and shot him[.]” App. 14 at 26, in the head while Hersman was unarmed. (The Petitioner did not simply fire blindly at Hersman, but specifically targeted one of the most vulnerable points on the body). The Petitioner also left the scene of the crime without contacting the police, and took the pistol he used to kill Herman with

him, burying it. *Knight v. State*, 392 So. 2d at 338 (“Evidence of appellant’s flight from the scene following the shooting was also introduced by the state to rebut the appellant's claim of self-defense.”).

2. Premeditation and Deliberation.

“[T]here must be some evidence that the defendant considered and weighed his decision to kill in order for the State to establish premeditation and deliberation under our first degree murder statute.” *Guthrie*, 194 W. Va. at 675, 461 S.E.2d at 181. “[T]he presence of premeditation is a question of fact reserved for the jury[.]” *State v. Hutchinson*, 215 W. Va. 313, 322, 599 S.E.2d 736, 745 (2004).

In the absence of statements by the accused which indicate the killing was by prior calculation and design, a jury must consider the circumstances in which the killing occurred to determine whether it fits into the first degree category. Relevant factors include the relationship of the accused and the victim and its condition at the time of the homicide; whether plan or preparation existed either in terms of the type of weapon utilized or the place where the killing occurred; and the presence of a reason or motive to deliberately take life. No one factor is controlling. Any one or all taken together may indicate actual reflection on the decision to kill. This is what our statute means by “willful, deliberate and premeditated killing.”

Guthrie, 194 W. Va. at 676 n.23, 461 S.E.2d at 182 n.23.

Additional factors that support premeditation include “[o]btaining and using a weapon at close range, particularly a gun,” *Commonwealth v. Johnson*, 754 N.E.2d 685, 691 (Mass. 2001), and the actions after a murder, 40 Am. Jur. 2d *Homicide* § 268 (2010), such as the defendant attempting “to conceal his perpetration of the crime[.]” *Brown v. State*, 294 S.E.2d 510, 510 (Ga. 1982).

Here, the relationship between the Petitioner and Hersman was very rocky. The Petitioner stated that Hersman “ain’t nothing you want in your neighborhood anyway,” App 14 at 9, a man the Petitioner “never did care a whole lot for[.]” *id.* at 17, as someone who “ain’t safe to be on the

street[,]” *id.* at 19, a man who is “corrupting . . . a bad influence [on an unnamed person]” *id.*, a man who was “pulling some crime we all got to pay for[,]” *id.*, a man who was “dirty” and “low” and “sorry[,]” *id.* at 17, someone who “cause[s] chaos and this and that[,]” *id.* at 15, and a man who the Petitioner “just don’t like . . . at all.” *Id.* The Petitioner brought a lock-bladed knife to Hersman’s that evening, a knife that the police found opened and laying underneath Hersman’s body. “[T]he fact that the defendant was carrying a knife was evidence tending to support an inference that he had anticipated a possible confrontation with the victim and that he had given some forethought to how he would resolve that confrontation.” *State v. Ginyard*, 431 S.E.2d 11, 13 (N.C.1993). Further, the Petitioner shot Hersman in the head three times while Hersman was unarmed. Trial Tr., vol. II, 26, Mar. 29, 2011. The Petitioner did not simply “spray and pray,” but targeted a vital part of Hersman’s body—his head. “[P]remeditation may be inferred from evidence showing “that ‘wounds were deliberately placed at vital areas of the body.’”” *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006) (citations omitted). *See Pinkney v. State*, 827 A.2d 124, 141 (Md. Ct. App. 2003) (where three out of the four shots were fired into the victim’s head, “a vital part of the body . . . the jury could easily infer premeditation and deliberation”).

3. Malice.

“Generally, existence of malice in homicide case is question for jury.” Syl. Pt. 7, *State v. Hamrick*, 112 W. Va. 157, 163 S.E. 868 (1932). “The customary manner of proving malice in a murder case is the presentation of evidence of circumstances surrounding the killing.” *State v. Evans*, 172 W. Va. 810, 813, 310 S.E.2d 877, 879 (1983). “Such circumstances may include, *inter alia*, the intentional use of a deadly weapon, words and conduct of the accused, and, evidence of ill will or a source of antagonism between the defendant and the decedent[.]” 172 W. Va. at 813, 310

S.E.2d at 879 (citations omitted). As noted above, the Petitioner clearly felt ill-will toward Hersman. The Petitioner thought Hersman as “ain’t nothing you want in your neighborhood anyway,” App. 14 at 9, a man the Petitioner “never did care a whole lot for[,]” *id.* at 17, as someone who “ain’t safe to be on the street[,]” *id.* at 19, a man who is “corrupting . . . a bad influence [on an unnamed person]” *id.*, a man who was “pulling some crime we all got to pay for[,]” *id.*, a man who was “dirty” and “low” and “sorry[,]” *id.* at 17, someone who “cause[s] chaos and this and that[,]” *id.* at 15, and a man who the Petitioner “just don’t like . . . at all.” *Id.*

C. THE PETITIONER FAILED TO SHOW THAT THE CIRCUIT COURT ABUSED ITS DISCRETION IN REFUSING TO AWARD THE PETITIONER A NEW TRIAL BASED UPON THE ALLEGATION OF JUROR MISCONDUCT OR PREJUDICE.

The Petitioner alleges juror misconduct or bias, but does not set forth a standard of review. Pet’r’s brief at 29. In any event, this standard is not appellant friendly. “[O]n a motion for a new trial, the burden is on the complaining party to show that he or she has been prejudiced by the presence of the juror on the jury.” *Blankenship v. Mingo County Economic Opportunity Comm’n*, 187 W. Va. 157, 163, 416 S.E.2d 471, 477 (1992). A circuit court’s findings of fact in such regard are subject only to clearly erroneous review, Syl. Pt. 3, in part, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000), and its ultimate decision is subject only to abuse of discretion review. Syl. Pt. 7, in part, *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932). Abuse of discretion and clearly erroneous rare “highly deferential modes of review[.]” *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995). “In fact, it is clear that the burden on an appellant attempting to show clear error is especially strong when the findings are primarily based upon oral testimony and the circuit court has viewed the demeanor and judged the credibility of the witnesses.” *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). Indeed, “[c]redibility is a

determination for the trier-of-fact, and its assessment is virtually unassailable on appeal.” *United States v. Lopez*, 431 F.3d 313, 316 (8th Cir. 2005). “We will disturb only those factual findings that strike us wrong with the ‘force of a five-week-old, unrefrigerated dead fish.’” *Brown*, 196 W. Va. at 563, 474 S.E.2d at 493 (citation omitted). “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson v. City of Bessemer City*, 470 U.S. 564, 574(1985).

The Petitioner accuses juror Denis A. Paschke of misconduct; to-wit, making statements to the Petitioner’s family that (1) she was completely biased against the Petitioner’s right to act in self-defense having decided; (2) made statements indicating that the jury had improperly been discussing the case prior to closing arguments. Pet’r’s brief at 31.⁷ Juror Paschke denied ever having talked to other jurors on the first day or trial, App. 7 at 26, denied she had made up her mind on the first day of trial, *id.*, and refuted the contention that if you shot somebody it had to be murder. *Id.* Ms. Paschke specifically denied ever having had outside contact with anybody during the course of the trial. *Id.* at 29. The circuit court found that “the juror violations alleged by the defendant in his Motion for New Trial were not shown to have occurred.” App. 11 at 1. The circuit court’s decision is not clearly erroneous nor an abuse of discretion.

D. THERE IS NO PLAIN ERROR IN THIS CASE IN REFERENCE TO ROBERT WHITE’S TESTIMONY OR STATEMENT.

Robert White was the Petitioner’s son. The Petitioner contends on the authority of *State v. Collins*, 186 W. Va. 1, 409 S.E.2d 181 (1990), that he is entitled to a new trial. Pet’r’s brief at

⁷Although perhaps somewhat pedantic, since the transcript of testimony taken on May 5 and May 27, 2011, are in the Appendix, it should be noted that the Petitioner’s brief does not cite to the Appendix as to where and when the statements were made.

31. In *State v. Collins*, this Court held that before the State impeaches its own witness the court must conduct a Rule 403 balancing test to justify the impeachment and then must give an instruction to the jury that such impeachment evidence can only be used for impeachment and not as substantive evidence. These obligations are *sua sponte* and are subject to plain error. However, subsequent to *Collins*, this Court in Syl. Pt. 8 of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), held that:

Under the “plain error” doctrine, “waiver” of error must be distinguished from “forfeiture” of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right—the failure to make timely assertion of the right—does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is “plain.” To be “plain,” the error must be “clear” or “obvious.”

During his cross-examination of Corporal Ron Thomas (an examination occurring before Robert White testified), the Petitioner’s counsel specifically told Corporal Thomas that he could look at Robert’s statement. Trial Tr., vol. II, 62, Mar. 29, 2011 (“A. I believe that’s what Robert stated. Q. You got his statement with you? If you have any questions about it, feel free to look at it. We’re going to get into that in a little while anyway.”). *See also id.* at 67: (“Q Robert told you he was at the foot of the steps, and the guy said “come in” and then a fight started; and he didn’t see what happened. A That’s correct, sir.”). The Petitioner also relied on Robert’s statement in his closing. Trial Tr., vol. III, 161, Mar. 30, 2011 (“Read Richard’s statement—Robert’s statement. Robert says Harvey Hersman started punching his dad again, and the fight starts back up and then he goes to get a gun.”). The Robert statement could be read both to oppose the State’s case and support the defendant’s. “Where the effect of an alleged error is so

uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights.” *Jones v. United States*, 527 U.S. 373, 395 (1999).

E. ANY CLAIM ABOUT PROSECUTORIAL MISCONDUCT IS WAIVED AND THE PETITIONER CANNOT MAKE OUT PLAIN ERROR.

The Petitioner makes a number of assertions in his brief about alleged improper prosecutorial conduct. The Petitioner did not contemporaneously object to any of these alleged instances of prosecutorial misconduct. Absent such an objection, the Petitioner must fall back upon the plain error rule.

“As a general proposition, this Court has discretionary authority to consider the legality and sufficiency of the trial court’s charge under the plain error doctrine.” *State v. Miller*, 194 W. Va. at 18, 459 S.E.2d at 129. “Plain error warrants reversal ‘solely in those circumstances in which a miscarriage of justice would otherwise result.’” *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)). “The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, in part, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it[.]” *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004).

The circuit court specifically instructed the jury, “Nothing said or done by the lawyers who have tried the case is to be considered by you as evidence of any fact.” Trial Tr., vol. III, 112, Mar. 30, 2011. The court went on “final arguments, which you will hear in a few moments, are intended to help you understand the evidence and apply the law thereto, but they are not evidence.” *Id.* The jury was also instructed “The Defendant is not required to testify or to prove

his innocence in anyway. The fact that he did not go upon the witness stand to testify in his own behalf is not evidence and cannot be used as the basis for any inference of guilt. You must entirely disregard and not discuss the fact that the Defendant did not testify in his own behalf.” *Id.* at 116-17. “[J]uries are presumed to follow their instructions.” *State v. Miller*, 197 W. Va. 588, 606, 476 S.E.2d 535, 553 (1996) (quoting *Zafiro v. United States*, 506 U.S. 534, 540 (1993)). These instructions undercut any plain error claim. *See, e.g., Jones v. United States*, 527 U.S. 373, 394 (1999) (“Even assuming, *arguendo*, that an error occurred (and that it was plain), petitioner cannot show that it affected his substantial rights. Any confusion among the jurors over the effect of a lesser sentence recommendation was allayed by the District Court’s admonition that the jury should not concern itself with the effect of such a recommendation.”). *See also People v. Weaver*, No. 286265, 2009 WL 3365756, at *5 (Mich. Ct. App. Oct. 20, 2009) (footnote omitted) (“Regardless, even if the prosecutor committed prosecutorial misconduct in his closing argument and rebuttal, this error was cured when the trial court instructed the jury that the statements of lawyers are not evidence. Therefore, there is no plain error affecting Weaver’s substantial rights.”); *People v. Garcia*, 942 N.E.2d 700, 711 (Ill. Ct. App. 2011); *United States v. Thompson*, 195 Fed. Appx. 191, 195 (4th Cir. 2006) (“Moreover, the district court instructed the jury that Thompson had a right to remain silent and that no inferences were to be drawn from his failure to testify.”).

Further, many of the prosecutor’s statements condemned by the Petitioner were a fair comment on the evidence. “This Court recognizes that wide latitude must be given to all counsel in connection with final argument.” *State v. Myers*, 159 W. Va. 353, 361, 222 S.E.2d 300, 306 (1976), *overruled on other grounds by State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

The Petitioner condemns the fact that the Prosecutor told the jury “There’s some things I want to point out. Now, this is a guy here today, through his attorney, says this was in self-defense. Now, this is what he told the police that nigh[. . .]” Trial Tr., vol. III, 178-79, Mar. 30, 2011. In fact, self-defense was what the Petitioner counsel’s closing was geared toward. And the circuit court had ruled the Petitioner’s statement to the police admissible, Admissibility Hr’g Tr., 17, Jan. 21, 2001, and the Petitioner did not contest that the statement met with constitutional requirements. *Id.* at 5-6. The Petitioner does not cite any authority for what must be characterized as the astounding proposition that it is unfair to use a defendant’s knowing, voluntary, and intelligently made statement against him! “[A] fair reading of his statements could not be said to constitute a comment on Thompson's failure to testify.” *United States v. Thompson*, 195 Fed. Appx. 191, 195 (4th Cir. 2006).

Additionally, in his statement to the police, the Petitioner stated, “My knife was lost on that scene, because I handed my boy my knife, when I walked in Harvey Hersman’s house, I did have a knife. I did have a weapon” App. 14 at 1. Mr. Hersman’s statement was internally inconsistent as to whether he had a knife or not, and it was fair argument for the State to assert he did have a knife—especially since a knife was found underneath Harvey Hersman’s dead body. And, of course, the Petitioner was not happy when he went over to Hersman’s house that Kathy had left the daughter alone at Kathy’s home.

Moreover, the assertions of a *Brady v. Maryland*, 373 U.S. 87 (1963), violation are not supported by the record. The Petitioner asserts that “the prosecution failed to disclose to the Petitioner, prior to the close of evidence, favorable exculpatory and favorable impeachment evidence with respect to one of the State’s witnesses, who had ‘moved’ the body of the victim, prior to the

arrival of law enforcement, and which evidence would have further supported Petitioner's claims of self-defense, and his claims that the crime scene was contaminated." Pet'r's brief at 44. The Petitioner does not further argue this but states, "[t]his issue was discussed at length in the Petitioner's motion for a new trial (A.R. 5), and further addressed by the trial court in post-trial hearings and orders included in the appendix record (A.R. 7, 8, 10, 11, 12)." *Id.* This argument is insufficient to preserve this issue for review. ""[A] skeletal "argument," really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs."" *State v. Gilman*, 226 W. Va. 453, 461 n.11, 702 S.E.2d 276, 284 n.11 (2010) (*per curiam*) (citations omitted).

In any event, this Court has held that "A claim of a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), presents mixed questions of law and fact. Consequently, the circuit court's factual findings should be reviewed under a clearly erroneous standard, and questions of law are subject to a *de novo* review." Syl. Pt. 7, *State v. Black*, 227 W. Va. 297, 708 S.E.2d 491 (2010). The circuit court specifically found in its decision on the *Brady* issue that Judy Stewart gave a statement to the State police describing how she had found Hersman's body and reached down trying to make him respond. App. 12 at 2. On November 19, 2010, the State provided Ms. Stewart's statement to the Petitioner. *Id.* The circuit court specifically found that Ms. Stewart did not move the body. In an affidavit executed by Ms. Stewart, Ms. Stewart avered that in her police statement she stated that she had found Hersman's body laying on the fan with blood on his head and that she reached down and touched him trying to get him to respond. *Id.* The circuit court further quoted from the affidavit (which defense counsel did not object to and which counsel believed was reflective of what her testimony would be), that she did not move Hersman's body in

anyway and did not touch any firearms or knives while at the crime scene. *Id.* The circuit court specifically found that “Judy Stewart did not move the victim’s body and never informed the prosecution that she did. Judy Stewart’s only statement regarding the victim’s body was that she touched the body; and that fact was fully disclosed in Ms. Stewart’s statement, which was provided to defense counsel on November 19, 2010.” *Id.* As the circuit court concluded, “Accordingly, the State possessed no exculpatory evidence to be disclosed and there was no misconduct on the part of the Prosecution in this case.” *Id.* (footnote omitted).

To the extent that the Petitioner implies some nefarious intent on the prosecutor’s behalf in questioning Corporal Thomas, Pet’r’s Br. at 45, it should be noted that the Petitioner did not object to the question, nor did he seek to have the answer be stricken as non-responsive. Trial Tr., vol. II, 92, Mar. 29, 2011. At best, the State asked Corporal Thomas why he could not collect evidence from the Hersman household, which was because it had apparently burned down. It was Corporal Thomas who injected the word mysteriously—which was very likely how the fire had kindled, mysteriously. Had counsel objected or asked for the answer to be struck, this Court would not have to be dealing with the issue. Further, if this issue was so vital, counsel should have been all the more attune to it if it arose again. But, again, the Petitioner’s counsel failed to object to what he now condemns. i.e., questions about the Hersman residence burning. Pet’r’s brief at 48. At some point one would think that Petitioner’s counsel should be expected to object to something.

Further, counsel again failed to object to the prosecutor asking about hollow point ammunition. However, this exchange occurred in discussing the spent .45 and .357 bullets that the police obtained at the Hersman house. Trial Tr., vol. II, 94-95, Mar. 29, 2011. The State was free

to delve into what bullets were what and how they would react. As Corporal Thomas explained, he based his investigation on the evidence at the scene. *Id.* at 95.

Finally, as to the question about whether Corporal Thomas took a statement from Hersman, the Petitioner's counsel actually did object on the ground that "He's trying to play the jury with the fact that Hersman died in this fight." *Id.* It is unclear under what Rule of Evidence a "playing the jury" objection falls. The circuit court, however, noted that it was the Petitioner who originally asked upon what the Corporal had based his opinion. *Id.* at 95. In any event, the objection appears to fall within Rule 403, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Here, there was no unfair prejudice since it was obvious to all that Hersman was dead before Corporal Thomas started his investigation. The Petitioner has failed to show that the circuit court abused its broad discretion in determining the admissibility of evidence. "A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998). *See also* Syl. Pt.1, in part, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995) ("The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings.").

The Petitioner also asserts that the prosecutor used sarcasm in his examination of a witness. However, he "has cited no authority indicating that a prosecutor may not use sarcasm in cross-examining a witness." *People v. Mooney*, No. 236424, 2003 WL 22112325, at *6 (Mich. Ct. App. Sept. 11, 2003). A "prosecutor is not required to make her points using the blandest possible terms[.]" *id.*, and "[t]he use of sarcasm is, of course, a well-recognized device to illustrate the inherent implausibility of a witness's testimony." *People v. Overlee*, 666 N.Y.S.2d 572, 578 (App.

Div. 1997). *See also United States v. Salerno*, 974 F.2d 231, 241 (2d Cir.1992) (stating that “ridicule and sarcasm” are “both legitimate devices of cross-examination”), *op. vacated on rehearing*, 8 F.3d 909 (2d Cir. 1993). Likewise, closing argument that consisted of “several sarcastic remarks and hyperbole” were not error. *Smith v. Andreini*, 223 W. Va. 605, 616-17, 678 S.E.2d 858, 869- 70 (2009). There is no plain error. *Mooney*, 2003 WL 22112325, at *6.

The only issue of some moment is admittedly the blue pill splitter. And, what the prosecution told the jury is true, the State Police did not secure a pill splitter from the Hersman residence, Trial Tr., vol. III, 177, Mar. 30, 2011. The pill splitter was found with the gun that the Petitioner had buried. Trial Tr., vol. III, 93, Mar. 30, 2011. The pill splitter issue was probably something that could have been handled better, and would have been had counsel objected. But, in light of the other evidence in the case—including the Petitioner’s statement which the jury saw and heard, the size differentials between victim and victimized, and the testimony from Kathy White and Robert White that they both saw the Petitioner on top of Hersman, Hersman’s asking Kathy for help, the fact that the Petitioner was calm after the killing, and took the gun he used to kill Hersman with him and buried it without alerting the police, the Petitioner has not carried his burden to show plain error.

VI.

CONCLUSION

For the above reasons, the circuit court should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



SCOTT E. JOHNSON
SENIOR ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
State Bar No: 6335
Telephone: 304-558-5830
E-mail: sej@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, SCOTTE E. JOHNSON, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "*Brief of the State of West Virginia*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 12th day of March, 2012, addressed as follows:

To: William C. Forbes, Esq.
1118 Kanawha Boulevard, E.
Charleston, West Virginia 25301



SCOTT E. JOHNSON