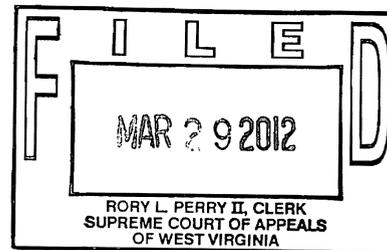

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1617



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

DAVIS WOLVERTON,

*Defendant Below,
Petitioner.*

STATE'S BRIEF

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STATE OF WEST VIRGINIA,

*Plaintiff below,
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v.

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*Defendant below,
Petitioner.*

STATE'S BRIEF

I.

ASSIGNMENTS OF ERROR

Mr. Wolverton contends that the State knowingly used perjured testimony against him and that he has satisfied the requirements for relief under *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97 (2009). He also claims that his rights were violated when a married couple were permitted to sit on his petit jury. As he has neither in fact nor law demonstrated a right to relief, the circuit court should be affirmed.

II.

STATEMENT OF THE CASE

Phillip "P.J." Payne volunteered to assist the State Police in order to minimize the impact of his prior drug offenses. App. 187. On January 27, 2010, Mr. Payne had a face to face meeting with Mr. Wolverton who told Payne that he could purchase some pills from him. *Id.* Payne made

arrangements to buy the pills, and then contacted State Police Sergeant Andrew Shingler to tell Shingler that he [Payne] could purchase some controlled substances from Mr. Wolverton. *Id.* 188-89, 303.

Sergeant Shingler met with Payne and searched him to ensure that Payne had no pills or money with him. *Id.* 189, 303-04, 305. Payne denied having any controlled substances on him, *id.* 189, which Sergeant Shingler confirmed. *Id.* 305. Sergeant Shingler also confirmed the Payne had no money. *Id.* 305. Sargent Shingler then gave Payne money and he and Sergeant Shingler, *id.*, 190, along with State Police Sergeant Michael Anderson who was driving the trio, *id.* 254, went to Mr. Wolverton's house. *Id.* 173. Payne got out of the unmarked police vehicle, *id.* 254, and went to Mr. Wolverton's door, *id.* 176, which was answered by two children who called Mr. Wolverton "dad." *Id.* 194. After entering the house, *id.* at 193, Mr. Wolverton told Payne, "'You finally made it over.'" *Id.* 195. Co-defendant Kathryn Wolverton walked into a room, got two pills, handed them to Mr. Wolverton, Payne then gave the money to Mr. Wolverton who then gave the pills to Payne. *Id.* 195-96, 197, 199. Payne left the house, *id.* 199, and went back to the police vehicle. *Id.* 199. Payne went no where other than into the Petitioner's residence after the police dropped him off, nor did he go anywhere after leaving the Petitioner's residence other than back to the police. *Id.*

The two pills that Payne bought were marked "Kadian 60 milligrams," and, after performing three tests, State Police Chemist Farrah Machado, who the circuit court recognized as an expert, opined that the pills were tablets that contained morphine a Schedule II controlled substance, a narcotic. *Id.* 285-86.

Consistent with the charges in the indictment, *id.* 1-4, the jury found Mr. Wolverton guilty of one count of delivery of a controlled substance, *id.* 484, one count of conspiracy to deliver a

controlled substance, *id.*, and one count of gross child neglect creating risk of seriously bodily injury or death. *Id.* 485.

In post-trial motions Mr. Wolverton first asserted that he was entitled to have Payne's testimony struck since Payne admitted to having perjured himself. *Id.* 500.¹ Specifically, it appears that the argument was that Payne had testified in a civil abuse and neglect proceeding testifying that he had been in the Petitioner's house many times, *id.* 503, but that at trial he testified he had only been there just twice. *Id.* 213. Additionally, it appears that Payne violated a pre-trial order not to discuss that he and Mr. Wolverton had gone to a methadone clinic together. *Id.* 230. *Compare id.* at 228:

Q You [Payne] didn't ride with him [Mr. Wolverton] anywhere?

A No, sir.

Q Never.

MR. VANDEVENDER: Your Honor, may we approach just briefly?

THE COURT: No. Objection's overruled.

BY MR. GRINDO:

Q You're absolutely sure about that?

A Yes, sir.

Q You didn't ride to Beckley on a daily basis?

A No, sir.

Q And you realize you're under oath; right?

¹The actual written motion is not in the Appendix; the statements and arguments of counsel are drawn from the post-trial motions hearing.

A Yes, sir.

At a bench conference, the prosecuting attorney asserted to the Court that “apparently Mr. Payne misunderstood --” *id.* 230, to which the circuit court responded, “I don’t think so-- . . . I’m not going to listen to an argument he misunderstood.” *Id.* 230. The circuit court then told counsel for the co-defendant in reference to the methodone clinic, “Well, I said the State wasn’t, because I think it’s [sic] prejudicial effect outweighs the probative value. If you want to open it up, that’s up to you. I think you can ask the question without mentioning about the methadone clinic Whatever you want to open you, you can open up.” *Id.* 238. Counsel then brought up what was apparently the civil abuse and neglect proceeding.² *Id.* 222. Mr. Wolverton’s counsel then questioned Payne:

BY MR. MAUSER:

Q (Referred to documents.) Mr. Payne, do you remember being in the courtroom on or about the 8th day of March, 2010, and testifying in a hearing? You may not remember that date, but do you remember testifying here in a hearing involving Mr. Wolverton?

A Did I?

THE COURT: I’m sorry.

THE WITNESS: Yeah.

BY MR. MASUER:

Q (Referred to document.) You remember -- You remember coming in this courtroom and testifying, and do you remember being asked if you had been riding with Mr. Wolverton for about the last five or six months?

A No, sir.

²A copy of the transcript of the prior civil neglect proceeding brought up by defense counsel is not in the Appendix.

Q (Referred to document.) You don't remember that? You don't remember answering as to having been riding with him for five to six months and you answering, "Yeah. Yes, ma'am"? You don't remember answering --

A I rode with Angel one time, and that's how I found out about the pills.

Q You rode with Angel -- You rode with Angel only one time and never road with --

A Yeah. Davis wasn't there, no.

Q And you don't remember testifying to that? You didn't testify that way in this courtroom?

A No, sir.

App. 239-40.

Counsel on recross-examination then engaged in the following exchange with Payne:

Q And after listening to me and Mr. Mauser go through your prior testimony -- sworn testimony, prior statements to police, and the difference between your testimony and what you have previously signed in a statement and previously testified under oath, do you wish to take back any of those statements you've made today?

A No, sir.

Q So you've either lied under oath here today, or you've lied under oath before. Which is it?

A I -- I didn't mean to lie. It just must have been a misunderstanding last time.

Q Riding with someone everyday for a five to six month period to Beckley is a misunderstanding --

A No, not everyday. No, I never --

Q Okay.

A I wouldn't say everyday.

Q So you did ride with him. Yes or no?

A He got take-home, so on the --

Q Yes or no.

THE COURT: Answer the question, did you ride with him to Beckley or did you not?

THE WITNESS: No, sir.

THE COURT: You did not.

Id. 247.

During post-trial hearing, counsel admitted the opportunity to cross-examine Payne about the inconsistent statements. *Id.* 495. In denying the motion, the circuit court specifically ruled:

The most troubling issue before the Court is the issue and testimony of Mr. Payne. I believe that it is a question of credibility for the jury in regards to this case. I mean, Mr. Payne did testify inconsistently between proceedings. Counsel had those transcripts available. They brought those issues up before the jury. The jury considered these. The jury was instructed by the Court to consider those in arriving at a decision in this case, and I believe that the evidence—that the testimony of Mr. Payne and his inconsistencies do not warrant the setting aside of this verdict and awarding the defendants a new trial in this case and, accordingly, the motion for a new trial will be denied.

Id. at 511-12.

III.

SUMMARY OF ARGUMENT

Mr. Wolverton has failed to prove that there was a violation of his due process rights as he has failed to show that Payne's testimony was actually false, or indisputably false, or conclusively false. All Mr. Wolverton has done is to show that Payne testified inconsistently in two different proceedings. But, Mr. Wolverton leaps to the conclusion that Payne's first testimony must be true

and his criminal testimony false. Yet, the exact opposite could be true, the civil testimony could be false and the criminal trial testimony true. The decision of whether Payne was “lying then, or lying now” (or lying at all-he did say it may have been a misunderstanding, App. 247), is vested solely and exclusively in the jury.

Additionally, since counsel was aware of the inconsistent statements, due process is not offended, because due process is only offended when the defendant is unaware at trial of the allegedly perjured or false testimony. Where the defendant is aware of such inconsistencies, it is counsel’s duty to bring them up before the jury so the jury can knowingly and intelligently exercise its duties. Counsel here was aware of the inconsistencies and, frankly, did a very good job of using them to attack Payne’s credibility.

Finally, the Petitioner’s claim that allowing spouses to sit on the same jury is not properly before this court under Revised Rule of Appellate Procedure 10(c)(7). In any event there is no automatic impediment to allowing a husband and wife to serve on the same jury simply because they are husband and wife. Finally, Mr. Wolverton has failed to demonstrate that his rights in this particular case were violated since he failed to show that the married couple’s voir dire answers were not truthful and did not show that the couple ignored the circuit court’s instructions.

IV.

ARGUMENT

“In order to obtain a new trial on a claim that the prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict.” *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97 (2009).

“We review the denial of a motion for a new trial based on the prosecution’s alleged use of perjured testimony under an abuse of discretion standard. We will not disturb the trial court’s ruling on the motion ‘unless there has been an error as a matter of law or a clear and manifest abuse of judicial discretion.’” *United States v. Kaufmann*, 803 F.2d 289, 291 (7th Cir.1986) (quoting *United States v. Nero*, 733 F.2d 1197, 1202 (7th Cir.1984)).

A. Mr. Wolverton has failed to show that Payne’s prior testimony was indisputably false.

The very first issue under *Franklin* is whether the prosecutor presented false testimony, thus, at the outset, Mr. Wolverton must prove the testimony was in fact false. There must be “proof that . . . the State’s evidence was actually false[.]” *State v. Brown*, 210 W. Va. 14, 27, 552 S.E.2d 390, 403 (2001) (per curiam), or “‘indisputably false[.]’” *Hicks v. Ballard*, No. 2:08-CV-01365, 2010 WL 6230434, at *10 (S.D. W. Va. Nov. 15, 2010) (quoting *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir.2000) (citations omitted)) (Magistrate Judge’s Proposed Finding and Recommendation), *adopted by District Court*, 2011 WL 1043459, at *1 (S.D. W. Va. Mar. 18, 2011), or the statements must be “conclusively show[n] . . . [to be] actually false.” *Maharaj v. Sec’y for Dep’t of Corr.*, 432 F.3d 1292, 1313 (11th Cir. 2005).

Mr. Wolverton has not shown Payne testified falsely *in this case*. While Payne may have testified in the civil case under oath opposite to what he testified to under oath in the criminal trial, this does not establish that the prior testimony was true and the latter a lie. Due process prohibits a witness from knowingly testifying falsely in a criminal case, due process does not bar a witness from testifying in a criminal because he is a liar. “[E]ven the most dastardly scoundrels, cheats, and liars are generally competent to testify[.]” *United States v. Zizzo*, 120 F.3d 1338, 1347 (7th Cir.

1997), because “[a]fter all, ‘even a liar tells the truth once in a while.’” *United States v. Robinson*, 437 Fed. Appx. 733, 735 (10th Cir. 2011) (citation omitted).

Accepting the claim at face value, all the evidence in the criminal case did was to show that Payne was a liar, but counsel for Mr. Wolverton has to concede, that does not prove that Payne was lying in this case—Payne could have been lying at the civil case and, thus, telling the truth in the criminal case. App. 247; 495. Mr. Wolverton has failed to show that Payne’s testimony in the *criminal* trial was indisputably false, actually false, or conclusively false, because Payne’s testimony in the *civil* case may be the lie. *See United States v. Hemmer*, 729 F.2d 10, 17 (1st Cir. 1984) (“Defendants’ characterization of Lovasco’s grand jury testimony as perjurious necessarily invites the converse conclusion—that her trial testimony was truthful. But this does not follow any more than that Lovasco’s testimony at trial was untrue merely because it was at variance with her grand jury testimony. . . .”). “Presentation of a witness who recants or contradicts his prior testimony is not to be confused with eliciting perjury.” *United States v. Holladay*, 566 F.2d 1018, 1019 (5th Cir. 1978). “Mere inconsistencies in testimony by government witnesses do not establish the government’s knowing use of false testimony.” *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987). It was quintessentially the duty of “[t]he jury . . . to weigh [Payne’s] testimony and determine whether he was lying then or lying now[.]” *Drumgold v. Callahan*, 806 F. Supp.2d 405, 409 n.3 (D. Mass. 2011). The circuit court should be affirmed.

B. Because Mr. Wolverton was aware if the allegedly false testimony and was allowed to meet it at trial, Mr. Wolverton has shown no due process violation.

The gravamen of a false evidence claim is premised on the fact that the defendant is unaware of the false testimony *at trial* and cannot take steps to protect the truth finding function of the

judicial system. In *United States v. Agurs*, 427 U.S. 97, 103 (1976), the Supreme Court explained that false or perjured testimony cases, as exemplified by *Mooney v. Holohan*, 294 U.S. 103 (1935), are a subset of the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), and “involves the discovery, *after trial* of information which had been known to the prosecution but unknown to the defense.” “[T]he usual scenario where the government is aware of the perjured testimony and allows the defense to remain in ignorance[.]” *United States v. Boyd*, 833 F. Supp. 1277, 1345 (N.D. Ill. 1993). Because false evidence claims³ are not meant to punish the prosecution for a witness’s misdeeds, “but to ensure [the] jury is not misled by falsehoods[.]” *Woodall v. United States*, 842 A.2d 690, 697 (D.C. 2004) (citing *United States v. Meinster*, 619 F.2d 1041, 1044 (4th Cir.1980)), ignorance by the defendant and, by extension the jury, the is an essential elements of a false evidence claim, *Sanassarian v. California*, 439 F.2d 703, 703-04 (9th Cir. 1971) (per curiam), because ignorance denies the jury the opportunity to fully evaluate the testimony before it. *Runnels v. State*, 562 P.2d 932, 936 (Okla. Ct. Cr. App. 1977) (“From our review of the above cases, it seems to this Court that a three-pronged test is used by the United States Supreme Court to determine if a defendant has been

³In false or perjured testimony cases, due process means fundamental fairness. “[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103 (citations omitted). “[W]hen dealing with due process violations in the context of the fundamental fairness of the trial, the Supreme Court has been more concerned with protecting the integrity of trial and the defendant’s right to mount a defense, irrespective of any government intent to interfere with these rights. The Due Process Clause addresses the defendant’s right to a fair trial, not just whether the government intended to deny the defendant his rights.” *United States v. Straub*, 538 F.3d 1147, 1160 (9th Cir. 2008). See, e.g., *State v. Cooper*, 217 W. Va. 613, 617, 619 S.E.2d 126, 130 (2005) (per curiam) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”)[.]”

denied due process of law: (1) The status of a key part (witness or evidence) of the State's case was presented at trial with an element affecting its credibility intentionally concealed. (2) The prosecutor knew or had reason to know of the concealment and failed to bring the concealment to the attention of the trial court. (3) The trier of fact was unable properly to evaluate the case against the defendant as a result of the concealment.”), *Bruce v. United States*, 617 A.2d 986, 993 (D.C. 1992) (“noting that when the prosecutor [knows] that the evidence [is] false, but the judge and defense counsel [do] not . . . it was his obligation, and only his, to disclose it.”) Where a defendant is *aware* of perjured testimony, the burden is on the defendant to bring such information forward to the fact finder using the traditional tools of impeachment and cross-examination. *State v. Brown*, No. 79AP-960, 1980 WL 353622, at * 3 (Ohio Ct. App. Aug. 14, 1980) (“Although there is similarity, there is also a distinguishing factor which we believe is controlling in this case. Napue’s defense counsel was unaware that the witness was in fact receiving consideration for her testimony. In the present case, both attorneys and the judge were aware of the misrepresentations. All had some responsibility to inform the jury of the misrepresentation.”).

An oft-cited Seventh Circuit case states:

“the fact that the alleged statement was known to petitioner and his counsel during the trial compelled petitioner to raise this issue then or not at all. When a criminal defendant, during his trial, has reason to believe that perjured testimony was employed by the prosecution, he must impeach the testimony at the trial, and ‘cannot have it both ways. He cannot withhold the evidence, gambling on an acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding.’ ” *Evans v. United States*, 408 F.2d 369, 370 (7th Cir. 1969) (quoting *Green v. United States*, 256 F.2d 483, 484 (1st Cir.1958)).

Beltran v. Cockrell, 294 F.3d 730, 736 (5th Cir. 2002). *See also Ross v. State*, 377 N.E.2d 634, 636 (Ind. 1978) (“One who has been convicted of a crime may not later contend that he has been denied

a fair trial because of false testimony of a government witness, if it appears that he knew at trial that the testimony was false but, nonetheless, made no attempt to demonstrate its falsity by cross-examination, by his own testimony, or by offering rebuttal witnesses who were readily available.”). Thus, “[w]here evidence refuting a false statement is revealed in cross-examination, the government cannot be said to have relied on the false direct-examination testimony to obtain a guilty verdict.” *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir.2006). See also *People v. Nash*, 222 N.E.2d 473, 478 (Ill. 1966). (holding that because the defendant knew of the false testimony concerning the lack of any leniency and evidence was presented to show that promises of leniency had in fact been made there was no denial of due process of law); *United States v. Zichettello*, 208 F.3d 72, 102 (2d Cir. 2000) (citations omitted) (“Appellants knew of the purported discrepancy in Montoro’s testimony and the evidence offered in support of that testimony. They argued to the jury that their version of when the bribes actually occurred was correct. The jury was thus aware of the dispute and obviously believed Montoro. Appellants having had ‘ample opportunity to rebut [Montoro’s] testimony and undermine his credibility,’ we will not supplant the jury as the ‘appropriate arbiter of the truth’ and ‘sift [] falsehoods from facts[.]’”). Indeed, it is upon this very point that the New York Court of General Sessions distinguished *People v. Savvides*, 136 N.E.2d 853 (N.Y. 1956), (the only case upon which Mr. Wolverton relies, Pet’r’s Br. at 4-5), concluding that “so long as the facts become known to the jury, the source of divulgence, thereupon, becomes, . . . immaterial.” *People v. Pettigrew*, 226 N.Y.S.2d 500, 502 (Gen. Sess. 1962). Here, the jury was made aware of Payne’s previous testimony, and this renders the false testimony cases inapposite. *Everitt v. United States*, 353 F.2d 532, 533 (5th Cir. 1965) (“here the basic facts were testified to on trial. The court had before it the knowledge that the witness Domaingue had been immune from

prosecution. This same distinguishing characteristic differentiates this case from *Napue v. People of State of Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed.2d 1217 (1959).”).

In fact, Mr. Wolverton argued to the circuit court that “given the extremely incredible nature of his testimony, the fact that he had testified differently on multiple occasions; that I don’t believe there is anyway a reasonable jury -- could make a determination that the State proved its case beyond a reasonable doubt based solely on his testimony, which is what the case was based on.” App. 496. This is an astounding argument for the very purpose of a jury is to make credibility determinations. “Impeachment of a witness does not compel exclusion of his testimony.” *United States v. Gutman*, 725 F.2d 417, 421 (7th Cir. 1984). “It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony is conflicting[,]” Syl. Pt. 3, *Long v. Weirton*, 158 W. Va. 741, 214 S.E.2d 832 (1975), and such a duty extends to deciding exactly when a single witness is telling the truth even when the witness has given contradictory testimony in the same case:

“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. If a witness’s testimony on direct examination conflicts with that given by him on cross-examination, it is for the jury to decide when, if at all, he testified truthfully.” It is the province of the jury to weigh evidence and resolve inconsistencies in testimony.

Graham v. Wallace, 208 W. Va. 139, 141, 538 S.E.2d 730, 732 (2000) (per curiam) (quoting 81 Am. Jur.2d *Witnesses* § 1032 at 844 (1992) (footnotes omitted)). Indeed, a “fundamental premise of our criminal trial system is that ‘the jury is the lie detector.’” *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (plurality opinion) (quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)) (emphasis deleted) A witness’s “character for truth and veracity may be impeached beyond the

possibility of doubt, yet his testimony goes to the jury, and they are to judge of its credibility and weight.” *People v. Jones*, 31 Cal. 565, 573 (1867). “[I]t is black letter law that testimony of a single eyewitness suffices for conviction even if 20 bishops testify that the eyewitness is a liar.” *Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005). “No matter how impaired [a witness’s] evidence, the jury had the right to believe all or so much of it as they thought proper.” *United States v. Luciano*, 343 F.2d 172, 173 (4th Cir. 1965).

“The jury system has served us well. We would not serve it well by holding that jurors are incapable of making credibility determinations.” *United States v. Bedonie*, 913 F.2d 782, 801 (10th Cir. 1990). In an opinion that bears repeating here, since it so resembles the issue at hand, the Fourth Circuit Court of Appeals said:

Roberson argues that the district court abused its discretion when it denied his motion to strike a witness’s testimony on the ground that the witness was inherently incredible in light of her prior false statements to the grand jury. Because it is not the function of the district court to sit as a gatekeeper and to shield the jury from evidence of questionable veracity, the district court properly submitted the issue of the witness’s credibility to the jury.

United States v. Roberson, 446 Fed. Appx. 622, 622 (4th Cir. 2011) (per curiam).

The circuit court should be affirmed.

C. The claim that spouses should automatically not be allowed to serve on the same jury is either waived or is, in any event, wrong.

Mr. Wolverton argues that spouses should automatically be disqualified from sitting together on a jury. Pet’r’s Br. at 5. Mr. Wolverton does not cite to the record where he made this an objection. Revised West Virginia Rule of Appellate Procedure 10(c)(7) provides that “The argument must contain appropriate and specific citations to the record on appeal, including citations that

pinpoint when and how the issues in the assignments of error were presented to the lower tribunal.”

This is a basis for the Court to disregard this assignment of error.

In any event, Mr. Wolverton did object during voir dire, App. 138, and re-raised the objection in a post-trial hearing. *Id.* 497. The Petitioner, however, presented no authority that spouses are automatically precluded from serving together on the same jury.

Disqualifications of jurors may be statutory or common law. *Watkins v. Baltimore & O. R. Co.*, 130 W. Va. 268, 274, 43 S.E.2d 219, 223 (1947) *overruled on other grounds by Proudfoot v. Dan's Marine Service, Inc.*, 210 W. Va. 498, 558 S.E.2d 298 (2001). There is not statutory⁴ or

⁴Statutory disqualifications from jury service are found in West Virginia Code § 52-1-8(b):

A prospective juror is disqualified to serve on a jury if the prospective juror:

- (1) Is not a citizen of the United States, at least eighteen years old and a resident of the county;
- (2) Is unable to read, speak and understand the English language. For the purposes of this section, the requirement of speaking and understanding the English language is met by the ability to communicate in American sign language or signed English;
- (3) Is incapable, by reason of substantial physical or mental disability, of rendering satisfactory jury service . . . ;
- (4) Has, within the preceding two years, been summoned to serve as a petit juror, grand juror or magistrate court juror, and has actually attended sessions of the magistrate or circuit court and been reimbursed for his or her expenses as a juror pursuant to the provisions of section twenty-one of this article, section thirteen, article two of this chapter, or pursuant to an applicable rule or regulation of the Supreme Court of Appeals promulgated pursuant to the provisions of section eight, article five, chapter fifty of this code;
- (5) Has lost the right to vote because of a criminal conviction; or
- (6) Has been convicted of perjury, false swearing or other infamous offense.

common law disqualifications⁵ from spouses serving on the same jury. “[T]he true test to be applied with regard to the qualifications of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the court’s instructions and disregard any prior opinions he may have had.” *State v. Charlot*, 157 W. Va. 994, 1000, 206 S.E.2d 908, 912 (1974). “The determination of whether a prospective juror should be excused to avoid bias or prejudice in the jury panel is a matter within the sound discretion of the trial judge.” *O’Dell v. Miller*, 211 W. Va. 285, 288, 565 S.E.2d 407, 410 (2002).

In reviewing the qualifications of a jury to serve in a criminal case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court.

State v. Miller, 197 W. Va. 588, 600-01, 476 S.E.2d 535, 547-48 (1996). Clear error and abuse of discretion are “highly deferential modes of review[.]” *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 106, 459 S.E.2d 374, 383 (1995).

“The defendant . . . maintains that a husband and wife should never be allowed to sit on the same jury; however, it cites no authority for this contention.” *Savoie v. McCall’s Boat Rentals, Inc.*, 491 So.2d 94, 102 (La. Ct. App.1986). “[N]o case is cited to us holding that family members may

⁵ The common law disqualifications of jurors are:

- (1) Kinship to either party within the ninth degree;
- (2) was arbitrator on either side;
- (3) that he has an interest in the cause;
- (4) that there is an action pending between him and the party;
- (5) that he has taken money for his verdict;
- (6) that he was formerly a juror in the same case;
- (7) that he is the party’s master, servant, counsellor, steward, or attorney, or of the same society or corporation with him; and causes of the same class or founded upon the same reason should be included.

State v. Dushman, 79 W. Va. 747, 91 S.E. 809, 810 (1917).

not serve on the same jury in the absence of any indication of bias on the part of at least one of them.” *Moss v. State*, 655 S.W.2d 375, 376 (Ark. 1983). See also *Manning v. Nix*, 901 F.2d 671, 672 (8th Cir. 1990) (“Manning would like us to announce a per se prohibition against having married couples serve on the same jury, but he has cited and we have found no case to support that rule.”). In fact, the vast weight of authority is to the contrary. “It has been held that a prospective juror generally is not automatically incompetent or subject to challenge merely because the juror is related to . . . another person on the same jury.” 50A C.J.S. *Jury* § 382 (footnotes omitted).

In *Helmick v. Potomac Edison Co.* 185 W. Va. 269, 278, 406 S.E.2d 700, 709 (1991), this Court said, “Potomac Edison alleges that because two of the jurors were married, the jury was prejudiced against Potomac Edison. We find no merit in this claim.” This Court is not alone in finding that spousal relationships between jurors are not automatically disqualifying. See also *Childs v. State*, 357 S.E.2d 48, 57 (Ga. 1987) (“As for the presence on the jury of a husband and wife, Childs cites no authority for his assertion that a juror is not impartial simply because the juror’s spouse also is on the jury. We find no error here.”).⁶

As observed by the Kentucky Supreme Court in *Harris v. Commonwealth*, 313 S.W.3d 40, 49-50 (Ky. 2010):

Bias . . . presumptive or otherwise, refers generally to a juror’s favoring or disfavoring one side of the case or the other, a risk not posed by relationships between jurors. For that reason, the few courts to have addressed in published opinions the issue of married jurors have held that such jurors are not presumptively disqualified and that their independence may be adequately assured through voir dire.

⁶While no decision has so held, some judges have taken this position—albeit in separate opinions. *Moss v. State*, 655 S.W.2d 375, 378 (Ark. 1983) (Purtle, J., dissenting); *State v. Miracle*, No. 85-11-081, 1986 WL 13268, at *3 (Ohio Ct. App. 1986) (per curiam) (Hendrickson & Jones, JJ., concurring).

Neither a claim that spouses will “‘track’ each other’s thoughts[,]” *Russell v. State*, 560 P.2d 1003, 1004 (Okla. Ct. Cr. App. 1977) (per curiam), or that “influence that might arise therefrom and that for that reason the respondent might not be able to obtain a fair and impartial trial[,]” *State v. Wilkins*, 56 A.2d 473, 473 (Vt.1948), or that married jurors “would find it difficult not to discuss the case as it was proceeding,” *Harris*, 313 S.W.3d at 49, have been seen as a grounds for automatic disqualification. In this day and age, “in which marriage is regarded as an equal partnership, the danger of one spouse dictating a decision in a jury trial to the other spouse should be regarded as minimal.” *State v. Richie*, 960 P.2d 1227, 1244 (Hawaii 1998). *Cf. Courtney v. State*, 115 S.W.3d 640, 642 (Tex. Ct. App. 2003) (wife could serve as petit juror on criminal case where husband had served on grand jury indicting the defendant). Indeed, during voir dire the circuit court specifically asked if either spouse would give greater or lesser weight to anything the other spouse might say in comparison to the other jurors, App. 123, to which the husband shook his head in the negative. *Id.* The circuit court then asked, “Would -- Would the fact he’s -- he is your husband cause you to feel that you need to agree with him in -- in your deliberations?” *Id.* 123, to which the wife answered, “No.” *Id.* 124.

Moreover, as to the speculation⁷ that a married couple would disregard the judge’s admonition not to speak to anyone about the case, “even if there were some risk of prejudice, here it is of the type that [conceivably could have been] cured with proper instructions [as to the jurors’ duty], and juries are presumed to follow their instructions.” *State v. Miller*, 197 W. Va. 588, 605-06, 476 S.E.2d 535, 552-53 (1996) (quoting *Zafiro v. United States*, 506 U.S. 534, 540 (1993) (citation and internal quotation marks omitted)). “[We] presum[e] that jurors, conscious of the

⁷Mr. Wolverton’s counsel admitted that his claim was “speculation.” App. 498.

gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324, n.9 (1985). And the circuit court specifically instructed the entire panel, "[y]ou should not discuss the case among yourselves during the trial, either here in the courtroom or beyond the courthouse." App. 158. The court continued, "[w]ait until the trial is concluded and you have retired to your jury room to consider your verdict when all 12 of you are present at the same time, acting as a body, as a jury." *Id.* "[W]e must not permit the integrity of the jury to be assailed by mere suspicion and surmise[.]" *Baker v. Hudspeth*, 129 F.2d 779, 782 (10th Cir. 1942). Since "it is presumed that the jury will be true to their oath and conscientiously observe the instructions and admonitions of the court[.]" *id.*, and since Mr. Wolverton "has produced no evidence that the married couple actually discussed the case in violation of their oaths[.]" *Manning v. Nix*, 901 F.2d 671, 672 (8th Cir. 1990), Mr. Wolverton has failed to carry his burden.

The circuit court should be affirmed.

V.

CONCLUSION

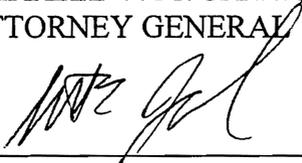
The circuit court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, SCOTTE. JOHNSON, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "*STATE'S BRIEF*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 29 day of March, 2012, addressed as follows:

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