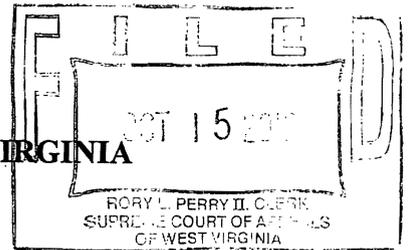


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0439



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

JEREL ADDISON GARNER,

*Petitioner Below,
Petitioner.*

RESPONSE BRIEF

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RESPONSE BRIEF

I.

INTRODUCTION

On July 8, 2008, Jerel Addison Garner (“Garner”) shot and killed Donte Newsome (Newsome”), a Marshall University football player who was about to graduate from college and to be married to the mother of his then unborn son. (App. vol. VI, Sec. 6 at 31-32.)¹

¹Garner also shot and slightly wounded Curtis Keyes, another young man with no criminal record. All of the trial testimony was that Keyes was unarmed. As Garner was shooting at Newsome, Ivan Clark, a bystander and friend of Newsome, retrieved his legally owned handgun from his car trunk and shot at Garner, slightly wounding Garner three times. The police did not charge Clark for the shooting. No witness testified that Clark fired before Garner shot Newsome. *See* Statement of Facts *infra*.

All of the eyewitnesses who testified at Garner's trial said that Newsome was unarmed. Newsome had no criminal record. Multiple witnesses testified, without contradiction, that Newsome was a peaceful and patient person. (*See, e.g.*, App. vol. II at 493; App. vol. VI Sec. 6 at 25-26.)²

Garner, on the other hand, had prior charges and convictions for drug and weapons offenses. (App. vol. VI, Sec. 6, 6/22/10 Sentencing Hr'g at 20.) There was testimony at Garner's sentencing that Garner had been charged in Georgia for trafficking in cocaine, marijuana, and methamphetamine. (*Id.* at 28-29.) The circuit court, in sentencing Garner, noted that killing Newsome was Garner's *third* involvement with an illegal firearm. (*Id.* at 15, 19-20.)

After a six-day trial, on March 30, 2010, a Cabell County jury convicted Garner of Voluntary Manslaughter, a violation of W. Va. Code. 61-2-4 [1994]; Wanton Endangerment, a violation of W. Va. Code 61-7-12 [1994]; and Carrying a Concealed Weapon Without a Permit, a violation of W. Va. Code 61-7-3 [189]. (App. vol. VI at 1387-89.) The circuit court sentenced Garner to 15 years for Voluntary Manslaughter (the maximum term); 5 years for Wanton Endangerment; and 1-5 years for (Second Offense) Carrying a Concealed Weapon Without a Permit. (App. vol. VI, Sec. 6, at 40.) Garner will be eligible for parole after he serves six years on his sentences. (*Id.* at 17-18.)

Garner was granted post-conviction bail release on home confinement on March 23, 2011, following his motion to the West Virginia Supreme Court of Appeals. (App. vol. VI at Sec. 7.) After

²Garner's trial counsel suggested at trial, and Garner has repeated the suggestion in his appellate Brief that Donte Newsome and his friends, who were at the bar and were eyewitnesses to Newsome's killing, constituted in essence a violent gang. The evidence at trial, however, did not support this false suggestion. Newsome and his friends who were at the bar called themselves "the Fabulous Five." All had successful high school and college football careers, and their "Fabulous Five" name came from their player numbers. They had no criminal records. For example, the witness Curtis Keyes, a "Fabulous Five" member who was also shot by Garner, was an Administrator at Arnett & Foster Accounting firm. (App. vol. III at 538.)

Garner thereafter *twice* knowingly violated his home confinement terms (App. vol. VI Sec. 8), the Circuit Court of Cabell County revoked Garner's post-conviction bail release on home confinement. (App. vol. VI at Sec. 9; Sec. 16 at 11.) The Home Confinement Office said that they "did not want [Garner] back." (*Id.*)³

Garner is currently incarcerated.

II.

RESPONDENT'S STATEMENT OF FACTS AND STATEMENT OF THE CASE

(For the convenience of the reader, and due to the numerous witnesses who testified, the Appendix Record cites for the statements in several of the following paragraphs are given at the end of each paragraph, instead of after each sentence in the paragraph.)

The evidence at trial⁴ showed that on the night of the killing, Garner had a verbal confrontation with several people in a Huntington bar-- after Garner took offense when another patron made a pass at Garner's girlfriend, Robyn Christie. Garner and Christie left the bar and drove away -- then, around the time that the bar was closing and a number of people were leaving, Garner drove back and parked outside the bar, with Robyn Christie in the car. (App. vol. II at 328; 369-72; 427-28.)

³The sentencing judge had previously denied any credit on Garner's sentences for Garner's time spent on pre-trial home confinement bail release. (App. vol. VI, Sec. 6 at 41.)

⁴An appellate court ordinarily views the facts of a case on review as being the facts and reasonable inferences from the admissible evidence that are consistent with the jury's verdict. *See, e.g., State v. Bull*, 204 W. Va. 255, 258 n.1, 512 S.E. 2d 177, 180 n.1 (1998) ("in light of the jury's guilty verdict, we view factual conflicts in the evidence as having been resolved by the jury in a fashion consistent with the jury's verdict."). *See also State v. Atkins*, 163 W. Va. 502, 515, 261 S.E.2d 55, 62 (1980) ("the jury's verdict of guilty is taken to have resolved factual conflicts in favor of the State . . ."); *State v. Kirk N.*, 214 W. Va. 730, 735, 591 S.E.2d 288, 293 (2003) ("We set forth in a footnote a summary statement of facts taken from the evidence at trial, assuming that the jury believed those pieces of evidence consistent with their verdict.")

Garner had a loaded, .44 caliber pistol -- known as a "hand cannon" -- with him in the car. Garner later told the police that he had just "found" the pistol in his car; he claimed not to know who had put the gun in the car. Garner briefly got out of his car, opened a rear door, and "fooled around" in the back seat of the car for a few seconds; then he got back in the car. (*Id.* at 330-31; 437; App. vol. V at 105.)

Curtis Keyes, a friend of Donte Newsome and an acquaintance of some of the people with whom Garner had the confrontation in the bar, walked over to Garner's car, pounded on the side of the car, and shouted at Garner. Keyes opened the car's door and found a gun pointing at him. Keyes slammed the door and dropped to the ground. Garner opened his car door and emerged from the car with his pistol and began firing. Garner fired at Donte Newsome, who was a friend of Keyes and who was also near Garner's car. Garner's first shot grazed Newsome, who moved several steps away and stumbled; Garner's second shot killed Newsome. (App. vol. II at 274-311, 286.) Garner then fired his pistol again several times, wounding the now-fleeing Curtis Keyes in the foot. (*Id.* at 332-34; App. vol. III at 735-36; App. vol. II at 441-53; 375-77; 439-443; App. vol. III at 571-90, 597, 653-55, 659-61; 701.)

Ivan Clark, also a friend of Newsome's, was sitting in his car nearby. When Clark saw Garner shooting at Newsome, Clark retrieved his (registered) pistol from his car trunk, fired shots in the air and then at Garner, wounding Garner three times, although not seriously. The police did not charge Clark with an offense, concluding that he had acted in self-defense and/or the defense of others. Garner returned fire at Clark, missing; then Garner got in his car and drove away. (App. vol. II at 377-78, 408; 446-47; App. vol. III at 656, 703-05.)

Shortly thereafter, when the police located Garner, who had thrown his gun into a puddle some distance from the shooting scene, the police questioned Garner about the incident. Garner told the police, in a recorded statement that was played for the jury, that Newsome and Keyes had approached Garner's car with guns, had opened the door, and had shot Garner in his car.⁵ Garner said:

[T]hey were trying to kill me flat out and I was in the car. It's not like I was in the street . . . he was reaching and he pulled out his gun, I'm not lying, and shot me . . . so I shot back . . . I know they both came on me with guns . . . you'll find the bullets in the car.

(App. vol. V at 1050, 1055-56, 1060.)

POLICE: You claim you got shot before you ever got out of the vehicle?

GARNER: Oh yeah, I was shot, you could see all the blood. Probably the bullet that went through me is probably in the car.

POLICE: You never got out of the car to shoot?

GARNER: No.

(*Id.* at 1057-59.)

The police told Garner that his story did not match the stories of eyewitnesses; then the police advised Garner, as a potential criminal suspect, of his *Miranda* rights. Garner's taped statement ended at that point. He did not give police another statement about the killing.

Garner's entire defense at trial -- self-defense -- was based on his contention that the story he told to police on the night of the killing was the truth. (Garner did not take the stand in his own defense).

⁵Garner's taped statement as originally played to the jury was inaudible in parts. (App. vol. IV at 815-23.) The tape was transcribed and played later for the jury. (*Id.*, App. V at 1047-61.)

Garner's trial counsel stated at trial that "[Garner's statement to the police] is critical for the Defendant's case." (*Id.* at 1046.) Garner's trial counsel told the jury in counsel's opening statement that the jury would have to decide whether Garner was "telling the truth" when he told the police that he was in his car when Curtis Keyes shot him. (App. vol. I at 205.)

Garner's trial counsel told the jury: "*If my client is telling the truth* and Curtis Keyes pulls a gun on him and attacks him and Donte Newsome goes to the driver's side door and punches him in the face, who are the criminals? They are." (*Id.*, emphasis added.)

Garner's trial counsel told the jury in closing argument, that the jury should listen to Garner's statement, in which Garner tells the jury that he was shot in his car and that he never left the car. (App. vol. VI at 1356-57).

Garner's trial counsel also told the jury in his opening statement that Garner's girlfriend Robyn Christie "*will be here to testify.*" Counsel told the jury that Christie "sees the gun [in Curtis Keyes' hand]" when "Keyes goes to the driver's side of the car, has a gun, bangs on the [car] window [with] a gun." (App. vol. I at 200.) (emphasis added).

However, Garner did not call Christie to testify at his trial. Nor, as noted, did Garner take the stand in his own defense, or call any witnesses.

The version of events that Garner told to the police, and that Garner asked the jury to accept as the basis of his claim of self-defense, was contrary to the eyewitness and forensic evidence presented at trial.

Countering Garner's story, forensic reconstruction expert Stephen Compton presented extensive DNA bloodstain and ballistics evidence showing that Garner was outside of his car when

he shot Donte Newsome and Curtis Keyes; and when Garner was shot by Ivan Clark. (App. vol. I at 211-32; App. vol. IV at 829-85, 872.)⁶

Compton testified that Garner “was not telling the truth” because “there was no projectile found in that car. There was no bullet holes found in that car.” (App. vol. IV at 964, 973.)

As previously noted, all of the eyewitnesses who testified said they did not see either Curtis Keyes or Donte Newsome with a weapon, as Garner claimed. (App. vol. II at 336, 344; 377-78; 437, 441; 473-74; App. vol. III at 655, 663.)

III.

RESPONDENT’S SUMMARY OF ARGUMENT

Jerel Garner shot and killed Donte Newsome. Garner’s claim of self-defense was based on a false version of the killing that was not supported by any evidence, and that was contradicted by overwhelming forensic and eyewitness evidence that showed an absence of self-defense beyond a reasonable doubt.

Garner had a fair trial; his Assignments of Error claiming that he received an unfair trial, upon examination against the record, are readily shown to be without merit. The jury had the right to convict Garner, and did so. This Court should not disturb the jury’s verdict.

IV.

RESPONDENT’S STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

The Respondent does not believe the instant case requires oral argument for decision.

⁶Garner did not employ any experts or present any expert testimony. (App. vol. I at 16.)

V.

RESPONDENT'S ARGUMENT

A. Response to Assignment of Error No. 1.

In Assignment of Error No. 1(a), Garner argues that the trial judge committed reversible error by requiring Garner's counsel to assure the court, during cross-examination of Ivan Clark, that a later witness would authenticate and testify to the contents of a written Ohio police report about Ivan Clark's conduct. (App. at 670-78.)

Absent such authentication and testimony, the Ohio report was unauthenticated hearsay. Nevertheless, Garner's counsel was able to question Clark based on the report. (*Id.*) Garner's Brief does not point to or assert any questions about the report that his counsel was prohibited from asking. The report's author, Ohio policeman Anthony Werry, was later called as a witness, and he authenticated and testified about the contents of the report. (App. vol. IV at 876-85.)

The trial judge was entirely correct and within his discretion in requiring a commitment from Garner's counsel that a foundation for questioning about the report would be put into evidence. The trial judge in fact exercised his discretion *in Garner's behalf* in allowing Garner's counsel to cross-examine based on the report, before the report was properly identified, authenticated, and testified to. There was no error in this action by the judge.

Garner's argument misleadingly links the issue of the authentication of the police report with a subsequent trial colloquy between the trial judge and Garner's trial counsel, that began when the judge became frustrated by Garner's counsel's somewhat rambling cross-examination of Clark.

This colloquy had nothing to do with the Ohio police report. (App. vol. III at 684.) The trial judge instructed Garner's trial counsel to take a recess, "sharpen it up," and figure out what areas of

questioning counsel was going to get into on cross-examination. (App. vol. III at 684-86.) This occurred, and the cross-examination continued without incident. (*Id.*)

In *State v. Foster*, 171 W. Va. 479, 300 S.E.2d 291 (1983), this Court recognized that as a general rule the scope of cross-examination is within the discretion of the trial court. However, a trial court may not control the scope of cross-examination so far as to prejudice the defendant. *State v. Jenkins*, 176 W. Va. 652, 656, 346 S.E.2d 802, 807 (1986). The standard of review for alleged errors dealing with cross-examination is set out in the Syllabus of *State v. Wood*, 167 W. Va. 700, 280 S.E.2d 309 (1981):

The extent of the cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in case of manifest abuse or injustice.

Garner does not point to a single question that his counsel was prevented from asking of Clark, nor to any evidence or close questioning that the jury was prevented from hearing. The trial judge's "sharpen it up" admonition to Garner's counsel was not repeated, and was within the range of the judge's discretion. There was no prejudice to Garner's defense.

Garner argues that his counsel was improperly prevented from asking a prosecution witness, Krystal Lee, if the victim Donte Newsome had previously owned a gun. (Pet'r's Br. at 12.)

The record shows that Lee had said in a statement that Newsome had previously owned a shotgun, but that Newsome had gotten rid of it a month before he was killed. Notably, the circuit court had earlier granted a prosecution motion *in limine* excluding any evidence relating to this shotgun. (App. vol. II at 345-46.) The basis for this ruling was that Garner had no knowledge of the previously owned shotgun. (*Id.*)

In the instant appeal, Garner does not assign the granting of the prosecution's motion in *limine* as error. Nor, apparently, does Garner include the transcript of the motion hearing, or otherwise challenge the correctness of the ruling granting the motion. Absent a challenge to the court's earlier ruling on the motion, there certainly was no error in the trial judge limiting Garner's cross-examination of witness Lee in accord with the court's previous and unchallenged ruling. Moreover, the record shows that Garner's counsel never asked Lee about Newsome's *past* ownership of a gun, and the trial court did not in fact prevent counsel from asking any such questions. (*Id.*)

In sum, the arguments in Garner's Assignment of Error No. 1(a) strain to create a "tempest in a teapot;" upon analysis, they are without merit.

In Assignment of Error No. 1(b), Garner claims that his convictions should be reversed because he was apparently not personally present for a short portion of his trial. (Pet'r's Br. at 13-14.) The record shows that during witness Justin Ross' testimony, the trial court declared a recess for a bathroom break, and to look at the record of prior testimony regarding an objection. (App. vol. III at 749-51.) Following the recess, Garner's counsel noted that Garner was not present for a short portion of this recess. (*Id.*)

When Garner's counsel brought Garner's absence to the Court's attention, counsel did not make any motion for a mistrial or for any other corrective action. Nor did (or does) Garner's counsel claim any prejudice to Garner as a result of the absence. (*Id.*)

The record thus reflects that (1) Garner's counsel was aware that his client was not present for a short portion of the testimony review; and (2) that his counsel made a deliberate decision not to assert any error in the fact of Garner's absence.

“In a criminal proceeding, the defendant's absence at a critical stage of such proceeding is not reversible error where no possibility of prejudice to the defendant occurs.” Syllabus Point 3, *State ex rel. Redman v. Hedrick*, 185 W. Va. 709, 408 S.E.2d 659 (1991). Assuming *arguendo* that the review of testimony during the recess was a critical stage of Garner’s trial, in the absence of any showing of even possible prejudice, reversible error did not occur. For the foregoing reasons, Garner’s Assignment of Error No. 1 (b) is without error.

In Assignment of Error No. 1(c), Garner asserts reversible error in the trial judge’s questioning of prosecution witness Ivan Clark about how Clark drove to Ohio to dispose of the gun that Clark used to shoot at Garner, after Garner shot Newsome and Keyes. Clark’s testimony on this point was confusing, and the trial judge was seeking clarification. (App. IV at 930-34.)

Where a defendant on appeal in a criminal case asserts that a trial court's questioning of witnesses and comments prejudiced the defendant's right to present evidence and jeopardized the impartiality of the jury, this Court upon review will evaluate the entire record to determine whether the conduct of the trial has been such that jurors have been impressed with the trial judge's partiality to one side to the point that the judge's partiality became a factor in the determination of the jury so that the defendant did not receive a fair trial.

Syl. Pt. 3, *State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007).

None of the trial judge’s clarifying questions to Clark demonstrated or effectuated any prejudice against Garner, or showed any lack of impartiality. (*Id.*) This argument has no merit.

Garner also argues that the trial judge did not “sufficiently” instruct the jury about improper conduct before each recess, in-chambers proceeding, lunch break, and other breaks. (Pet’r’s Br. at 15-16.) However, the Petitioner does not point to any juror misconduct that occurred, or even might have occurred, or a result of the trial judge’s conduct. Nor, during the trial, did Garner’s trial counsel

ever object to the trial court's instructions to the jury or a lack thereof. This argument is also without merit.

The arguments in Garner's Assignment of Error No. 1 are -- separately and together -- without merit.

B. Response to Assignment of Error No. 2.

The Respondent does not entirely follow Garner's arguments in Assignment of Error No. 2.

To the extent that Garner is complaining that the circuit court erred in not giving Garner credit for pre-trial jail confinement, Garner does not seem to point to his request to the circuit court for such credit, or to a denial of the request by the circuit court. The Respondent agrees that Garner is entitled to such credit; but such a request would be properly made first to the circuit court.

To the extent that Garner is complaining that he has been denied credit for his time released on post-conviction bail, with home confinement as a condition of said bail release, the rule is that such credit is available only when the "order imposing home incarceration contains all of the mandated statutory requirements" set forth in the Home Incarceration Act, W. Va. Code 62-11B-5 [2001]. Syl. Pt. 3, *State v. McGuire*, 207 W. Va. 459, 464-65, 533 S.E.2d 685, 690-91 (2000).

In the instant case, as in *McGuire*, the circuit court's order granting post-conviction bail with home confinement as a condition of bail did not fully set forth in the order all of the statutory requirements of the Home Incarceration Act. (App. vol. VI Sec. 7.) Thus, Garner, like the defendant in *McGuire*, is not entitled to credit for post-conviction time spent on bail release. Garner's Assignment of Error No. 2 is without merit.

C. Response to assignment of Error No. 3.

Garner argues that Juror Paula Jenkins should have been stricken for cause because Jenkins, a school teacher, was acquainted with a potential prosecution witness, Officer Coffey. (App. vol. I at 140-41.)

Jenkins told the circuit judge during *voir dire*, unequivocally, that she could disregard her acquaintance with Coffey and evaluate his possible testimony fairly. (*Id.* at 141.) On questioning by Garner's counsel, however, Jenkins acknowledged that her personal knowledge of Coffey might lead her to give Coffey's testimony more credibility, if it was directly contradicted by another witness's testimony. Garner's counsel did not pursue this line of questioning any further; nor did Garner's counsel seek any information about any possible bias by Jenkins against Garner. (*Id.* 141-42.) The trial judge denied Garner's motion to strike Jenkins for cause. (*Id.* at 164.)

Garner's Brief argues that Jenkins' *voir dire* response to Garner's counsel indicated a bias toward the prosecution. (Pet'r's Br. at 21.) But this is not an accurate statement. Jenkins had unequivocally indicated that she could be fair to both sides. Only as to one possible witness, Officer Coffey, whom she knew, did Jenkins say she might view his testimony as more credible. Importantly, *Officer Coffey did not testify at Garner's trial*. Thus, in the sole area where Jenkins might have let her personal knowledge of a witness affect her judgment on the witness' credibility -- the witness in question was not a factor in the case.

There was no showing that Juror Jenkins, either through friendship or otherwise, was aligned with law enforcement.⁷ Nor was she a social friend of Officer Coffey. And Jenkins expressed no belief that Garner was even possibly more likely to be guilty of any offense.

In *State v. Mills*, 221 W. Va. 283, 288, 654 S.E.2d 605 (2007), this Court held that the connection of a potential witness with a juror is disqualifying only if one “must reasonably conclude that it would influence the juror in arriving at a verdict.” *See also State v. Newcomb*, 223 W. Va. 843, 861, 679 S.E.2d 675, 698 (2009).

Consistent with *Mills* and *Newcomb*, numerous cases have held that where a juror knows a potential witness, and that witness does not testify and is not otherwise involved in the case against a Defendant, the juror’s knowledge of the witness did not contribute to any unfairness in the jury.

Thus, in *State v. Hughes*, 225 W. Va. 218, 230 n.13, 691 S.E.2d 2 813, 825 n.13 (2010), a potential juror knew a potential witness -- but was otherwise not shown to have any disqualifying bias. This Court’s opinion noted the fact that the State did not call the witness whom the juror knew -- and this Court upheld the trial court’s decision not to disqualify the juror.

See also U.S. v. O’Brien, 972 F.2d, 12, 14 (1st Cir. 1992) (juror contact with potential witness who did not testify did not result in reversible error); *People v. Molano*, 70 A.D.3d 1172-74, 894 N.Y.S.2d 589, 591 (2010) (juror’s knowledge of a potential prosecution witness who did not ultimately testify was not disqualifying); *Jordan v. Holland*, 174, W. Va. 230, 255, 324 S.E.2d 372, 378 (1984) (potential juror’s acquaintance with potential witnesses did not result in disqualification);

⁷The circuit judge had already ascertained in general questioning of the potential jury panel that Juror Jenkins would not give any special credit to the testimony of law enforcement. (App. vol. I at 88-89.) Juror Jenkins affirmed that she would not preferentially credit a police officer’s testimony, when questioned by Garner’s trial counsel. (*Id.* at 160.)

U.S. v. Cornell, 162 Fed. Appx. 404, 418 (6th Cir. 2006) (juror who knew potential witness not biased and disqualified, where witness did not testify against defendant); *State v. Grooms*, 353 N.C. 50, ____, 540 S.E.2d 713, 726 (2000) (juror who knew potential witness not disqualified where potential witness did not testify); *State v. Guthman*, 331 Wis. 730, ____, 795 N.W.2d 492, ____ (2011) (no error regarding juror's acquaintance with potential where witness did not testify); *In re Bolden*, 46 Cal. 4th, 216, ____, 92 Cal. Rptr. 3d 850, 860 (2009) (juror's acquaintance with person who did not testify at trial did not constitute bias against defendant); *State v. Rexrode*, 536 So.2d 671, 674 (1988) (juror who knew potential law enforcement witness who did not testify was not disqualified).

For the foregoing reasons, this Assignment of Error is without merit.

D. Response to Assignment of Error No. 4.

Garner argues that there was insufficient evidence that supported his convictions for Voluntary Manslaughter in killing Donte Newsome, or for Wanton Endangerment and Carrying a Concealed Weapon. With all due respect, this argument is patently unsound.

A comprehensive forensic analysis of the crime scene, using ballistics and bloodstain evidence, and the eyewitness testimony of numerous witnesses, established that Garner got out of his car with a weapon that he had in the car, and shot and killed one unarmed man and wounded another. The jury was properly instructed on self-defense; they simply disbelieved Garner's story to police about being shot in his car. On this point, the jury had photos of Garner's car, and police officers unequivocally testified that there was no sign in the car of any shooting of a person in the car. Garner chose not to call his companion in the car as a witness. Although Garner had no obligation to produce any particular evidence that was persuasive on his claim to have been shot in his car Garner's self-

serving and demonstrably false version of events did not and could not stand up to the truth. Garner's Assignment of Error No. 4 is without merit.

E. Response to Assignment of Error No. 5.

Garner argues that he was wrongfully denied pre-trial access to three hundred potential juror questionnaires. (App. vol. I at 8-10.) The prosecution did not have such access. (*Id.*) The trial judge ruled that Garner's counsel would have a full opportunity to examine all potential jurors. (*Id.*) And in fact, the pre-trial *voir dire* was extensive, and occupies 170 pages of the record. (*Id.* at 7-176.) Garner has not made any of the juror questionnaires a part of the record, nor pointed to any actual prejudice suffered by Garner in jury selection in their absence. Garner's Assignment of Error Number 5 is without merit.

F. Response to Garner's Assignment of Error No. 6.

Garner argues that the trial judge erred in giving an instruction on involuntary manslaughter -- that apparently he used the word "intentionally" instead of the word "unintentionally."

There was no objection made to this instruction when it was given in court, prior to or during the jury charge; and the use of the word "intentionally" in the transcript instead of "unintentionally" may reflect a slip of the tongue by the judge -- or possibly a transcription error by the court reporter.

The instructional language in which the "un" syllable was omitted from "intentionally" in the transcript, in defining involuntary manslaughter, is taken directly from State's Instruction No. 1, which was presented and accepted at the instruction conference, and which had the correct word. (App. vol. V at 1128-32.) The trial court had already previously explicitly told the jury that

Involuntary Manslaughter was the “accidental causing of death of another person, although *unintended*.” (App. vol. VI at 1267, emphasis added.)⁸

Garner does not assert any prejudice to him from the judge’s apparently at worst inadvertent use of the word “intentionally” in one part of the charge defining involuntary manslaughter -- and there was none. Garner’s counsel never argued that Garner’s shooting of Newsome was “unintentional” -- only that it was justified. And as noted, there was no objection by counsel to this portion of the charge. Therefore, a plain error standard is applicable to this claim of error.

Read in its entirety, the charge correctly told the jury all the elements of the charged offenses. What possible prejudice to Garner could arise from the inadvertent inclusion of a *greater burden for the prosecution* in one portion of the charge? The answer is -- none. Garner suffered no prejudice from the circuit court’s apparent possible misspeaking when reading part of involuntary manslaughter portion of the charge. There was no “miscarriage of justice,” the test for plain error. *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995).

Garner also argues that the trial judge refused to give some of Garner’s proposed instructions relating to self-defense -- citing to four proposed defense instructions.

The first, Defense Instruction No. 6, was conceded by Garner’s counsel to be “similar” to the State’s instruction that the judge gave and that has been approved by this Court. (App. vol. V at 1150.) The second instruction, Defense Instruction No. 7, dealt with a situation where a defendant, acting in self-defense, unintentionally killed or injured a third person who was not threatening the defendant. The trial court correctly held that the instruction did not match the evidence in case --

⁸The circuit court overruled the prosecution’s objection and included an Involuntary Manslaughter instruction, at Garner’s request. (App. vol. V at 1135-37.)

Garner shot two men whom he claimed were attacking him, not a third party bystander. (App. vol. V at 1169-72, 1203-04.)

Garner also asserts as error the trial court's refusal to give Defense Instruction No. 15, a brandishing instruction, as a lesser included offense of wanton endangerment. The prosecution objected to this instruction on the grounds that the evidence did not support the instruction. (App. vol. V at 1149-50, 1189-90.)

In *State v. Bell*, 211 W. Va. 308, 313, 565 S.E.2d 480, 435 (2002) this Court held that a brandishing instruction was required because under the facts of that case, "it would have been impossible for the [defendant] to have committed wanton endangerment without first committing brandishing." *State v. Bell* expressly states that "the facts of [the] particular case" will determine whether a "lesser included" brandishing instruction should be given, where a wanton endangerment charge is made. (*Id.*) In the instant case, all of the evidence -- including Garner's statement to authorities -- was that Garner did not "display" his gun in a fashion that threatened a breach of the peace -- which is the crime of brandishing. Rather, all of the evidence was that Garner came out of his car shooting and fired his weapon multiple times, killing one man and wounding another. Under "the facts of the [instant] particular case," the trial judge did not err in refusing to give a brandishing instruction.⁹

Garner also argues that the trial court erroneously refused Defense Instruction No. 20. (App. vol. V at 1196.) Defense Instruction No. 20 was specifically targeted to the credibility of a single witness, prosecution witness Ivan Clark, as a result of Clark's being granted use immunity for his

⁹Moreover, even if a brandishing instruction should have been given, the only consequence of the court's failure to give it would be to possibly invalidate Garner's conviction for wanton endangerment.

testimony. (*Id.*) Instructions singling out individual witnesses and/or their testimony are not favored; issues of witness credibility, including motive to fabricate, should be addressed generically in the Court charge. *See, e.g., State v. Angel*, 154 W. Va. 615, 633, 177 S.E.2d 562, 572-73 (1970):

This instruction was properly refused because it attempted to single out this witness' testimony in an undue attempt to discredit him. *See State v. Moubray*, 139 W. Va. 535, 81 S.E.2d 117. Then, too, a general instruction dealing with credibility of a witness, instruction number 17 offered by the defendant, was given by the court, which is a proper instruction for such matters.

This Court has also held:

It is error for the judge in his instruction to the jury, to single out a particular witness and to direct such cautionary instructions against his testimony, as such a course would tend to convey to the jury the impression that that particular witness is disbelieved by the judge.

Syllabus Point 2, *Storrs v. Feick*, 24 W. Va. 606 (1884). Additionally,

It is not proper to single out the evidence of any witness and caution the jury as to whether or not his evidence should be more closely scanned than that of any other witness. The instructions come from the court, and such an instruction might impress the jury that the court itself regarded the evidence of that particular witness with suspicion.

State v. Vest, 98 W. Va. 138, 126 S.E. 587, 588 (1925). Defense Instruction No. 20 is not only witness-specific, it is argumentative and draws undue attention to one aspect of the jury's credibility determination. For these reasons, Garner's Assignment of Error No. 6 is without merit.

G. Response to Assignment of Error No. 7.

Garner argues that prior to trial the prosecution "withheld" information that was presented in the testimony of prosecution witness Wilbur Hargrove. (Pet'r's Br. at 34.)

However, the supposedly "withheld" information had nothing to do with Garner, and amounted to nothing but Donte Newsome's saying "don't let me die, man," and referencing his

family. (App. vol. II at 448.) Newsome said nothing about Garner -- nothing testimonial, exculpatory, or inculpatory. For these reasons, Garner's Assignment of Error No. 7 is without merit.

H. Response to Garner's Assignment of Error No. 8.

Garner argues that the prosecutor, in closing argument, tried to shift the burden of proof to Garner -- by pointing out that Garner could have called Lead Investigator John Williams as a witness.

In making this remark, the prosecutor was responding to an argument made by Garner's counsel, attacking the prosecution's case by saying that the prosecution had failed to call Williams a witness. (App. vol. VI at 1347-48.) The prosecutor was not suggesting that Garner had any burden to present Williams' testimony; the prosecutor explicitly disavowed any such implication. The prosecutor was simply pointing out that the prosecution side had found Williams' testimony as unnecessary as Garner's counsel did, because Garner could have also obtained the evidence that his counsel suggested Williams had.

In fact, it was Garner's counsel who was "out of line" in his argument. "If a witness is equally available to both parties or unavailable to either party, the trial court should not permit [defense] counsel to argue to the jury . . . that an adverse inference arises from the state's failure to call the witness." *State v. McGarrett*, 535 N.W.2d 765, 770 (S.D.1995)." *Pullin v. State*, 216 W. Va. 231, 236, 605 S.E.2d 803, 808 (2004). Additionally,

In reviewing allegedly improper comments made by a prosecutor during closing argument, we are mindful that "[c]ounsel necessarily have great latitude in the argument of a case," *State v. Clifford*, 58 W. Va. 681, 687, 52 S.E. 864, 866 (1906) (citation omitted), and that "[u]ndue restriction should not be placed on a prosecuting attorney in his argument to the jury." *State v. Davis*, 139 W. Va. 645, 653, 81 S.E.2d 95, 101 (1954), overruled, in part, on other grounds, *State v. Bragg*, 140 W. Va. 585, 87 S.E.2d 689 (1955). Accordingly, "[t]he discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom." Syllabus Point 3, *State v. Boggs*, 103 W. Va. 641, 138 S.E. 321 (1927).

State v. Graham, 208 W. Va. 463, 468, 541 S.E.2d 341, 346 (2000)

The trial judge did not abuse his discretion in refusing to give a curative instruction to the jury regarding the prosecution's argument in reply to Garner's counsel's improper argument.

The prosecutor was also well within the bounds of zealous advocacy in the interests of justice when he replied to defense counsel's attacks on the victim and the prosecution's witnesses as a violent gang and when he otherwise pointed to the absurdity of some of Garner's counsel's arguments. Because there was no contemporaneous objection to the prosecutor's arguments, they may be reviewed only for plain error. They do not meet that test, and Garner's Assignment of Error No. 8 is without merit.

I. Response to Garner's Assignment of Error No. 9.

Garner repeats his argument in Assignment of Error No. 1a (Pet'r's Br. at 12) that his counsel's cross-examination of prosecution witness Krystal Lee was improperly limited. (*Id.* at 37.) As demonstrated *supra* at p. 9-10, this argument is without merit.

J. Response to Garner's Assignment of Error No. 10.

Garner argues that on redirect examination, police Detective Chris Sperry's notes about a conversation with Robyn Christie, the woman who was with Garner in his car, were improperly placed before the jury as impermissible hearsay.

Garner's counsel had suggested, in cross-examination of Detective Perry, that Robyn Christie told Sperry that "a large black male was beating on the side of their car with a gun." (App. vol. V at 1068.) Sperry denied that Christie had said that to him. On re-direct examination of Sperry, the prosecution asked Sperry about his interview notes with Robyn Christie -- notes that did not show any such statement. Thus, Sperry's notes were not offered to prove the *truth* of what Christie had said --

but to show the fact of what she said, in order to refute Garner's counsel's suggestion that Perry was lying. Garner's Assignment of Error No. 10 is without merit.

K. Response to Garner's Assignment of Error No. 11.

There was no cumulative error that deprived Jerel Garner of a fair trial. The above-enumerated Assignments of Error are without merit.

VI.

CONCLUSION.

As the prosecutor well illustrated in his closing argument, (App. vol. V at 1296-1323), all of the witnesses' testimony, and the substantial forensic evidence, showed that Jerel Garner, a troubled young man who had illegally armed himself with a powerful and deadly weapon, grossly overreacted to a provocation and intentionally shot and killed an unarmed young man, Donte Newsome, cutting off Newsome's young life, full of promise. *See* Victim Impact Statements of Donte Newsome's parents. (App. vol. VI Sec. 6 at 23-36.) Jerel Garner was lucky to have been convicted only of Voluntary Manslaughter, Wanton Endangerment, and Carrying a Concealed Weapon. His convictions should not be disturbed by this Court.

Respectfully submitted,

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent,

By counsel

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CERTIFICATE OF SERVICE

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent do hereby verify that I have served a true copy of the attached *RESPONSE BRIEF* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 15 day of October, 2012, addressed as follows:

To: William C. Forbes, Esq.
Forbes Law Offices, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301



THOMAS W. RODD